15-M-0127/12-M-0476/98-M-1343 12-01-2017

NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE

15-M-0127 IN THE MATTER OF ELIGIBILITY CRITERIA FOR ENERGY SERVICE COMPANIES

12-M-0476 PROCEEDING ON MOTION OF THE COMMISSION TO ASSESS CERTAIN ASPECTS OF THE RESIDENTIAL AND SMALL NON-RESIDENTIAL RETAIL ENERGY MARKETS IN NEW YORK STATE

98-M-1343 IN THE MATTER OF RETAIL ACCESS BUSINESS RULES

EVIDENTIARY HEARING

December 1, 2017
Three Empire State Plaza
19th Floor Board Room
Albany, New York 12223

ADMINISTRATIVE LAW JUDGE
ERIKA BERGEN

ADMINISTRATIVE LAW JUDGE
ASHLEY MORENO

15-M-0127/12-M-0476/98-M-1343 12-01-2017

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I N D E X O F P R O C E E D I N G S

FRANK LACEY, previously sworn:

UIU/NYAG
PANEL: (Michael Tiger, Suzanne Desrocher, Marie Phillips)

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THE COURT REPORTER: We're on the record.

A.L.J. MORENO: Okay. I call cases 15-M-0127, 12-M-0476, and 98-M-1343. We're here this morning for a continuation of the evidentiary hearing that began on Wednesday. The first order of business this morning, we'll just quickly take appearances. If we want to start here at the staff table.

MR. DWYER: Tom Dwyer. Staff counsel.

MR. KRAMER: Steven Kramer. Staff counsel.

MR. BERKLEY: Richard Berkley. Counsel for PULP.

MR. YATES: William Yates. PULP.

MS. MIRANDA: Good morning. Joey Lee Miranda from Robinson and Cole on behalf of Constellation Energy Gas Choice and with me is Holly Smith and Chris Wentlent from Constellation.

MS. TRINSEY: Good morning. Amanda Trinsey from Couch White on behalf of the City of New York.

MR. LANG: Kevin Lang. Also from Couch White for the City of New York.

MS. O'HARE: Good morning. Kathleen O'Hare from UIU.

MS. SCRUFARI: Good morning. Carrie Scrufari. UIU.

MS. MATUSCHAK: Good morning. Kate Matuschak from the New York Attorney General's office and with me is Peter Malaspina.

MR. POND: For Direct Energy Services, L.L.C. and its affiliates doing business as ESCOs in the State of New York, George Pond and Gabe Bouvet-Boisclair of the law firm of Barclay Damon. With us today is Chris Kallaher and Angela Schorr of Direct Energy.

MR. BURCH: Good morning, Your Honor. David Burch and Ekin Senlet of the law firm of Barclay Damon on behalf of Retail Energy Supply Association, RESA.

MS. MONROE: Teresa Monroe from Boies, Schiller, and Flexner on behalf of National Energy Marketers Association, NEMA.

A.L.J. MORENO: Ms. Figueroa, if you want to get onto a microphone.

MS. FIGUEROA: Gabrielle Figueroa from the law firm of Bevan, Mosca, and Giuditta on behalf of Agway Energy Services.

A.L.J. MORENO: Okay. Before we get to our first witness, we just have a couple of procedural matters to attend to.

One of the issues that we raised, I believe, that was raised to us yesterday was with regards to the protective agreements and the folks that are authorized to be in the room during confidential cross. And we do have two additions -- two additional protective agreements that were executed and filed in the DMM system. One was filed by Ms. Feller on behalf of Great Eastern Energy. She’s acting as outside counsel.

And, in addition, counsel for Agway, Murray Bevan and Ms. Figueroa, who, you just made an appearance, and both of those protective agreements that were filed check off the third box indicating that as outside counsel, they will not share any confidential information with their client, who is a competitor of some of the ESCOs in the room.

So, first and foremost, I wanted to hear from any of the parties to see if they have -- would like to be heard with regards to those protective agreements that have been filed. None? Okay. So, on a moving forward basis, if we do move on to a confidential record, in addition to those parties that we previously identified, Ms. Feller on behalf of Great Eastern Energy and Mr. Bevan and Ms. Figueroa, on behalf of Agway, will be permitted to stay for the confidential record.

A.L.J. BERGEN: One other thing we wanted to just clarify from yesterday. There was some discussion about objections and the timing of objections. I believe Mr. Burch raised the issue. We just want to clarify that if you have an objection, like yesterday, we had objections, please raise your objections, and we will either note them for the record to be then briefed after the hearing and we will basically reserve on -- on the objection and hear your argument at the end in writing, or with an objection such as yesterday, if it impedes the efficient flow of the hearing, obviously we will deal with that as it arises. But I -- I think we perhaps may have left you with the impression that you didn't have to even note an objection, and that's certainly not what we intended.

So please, if you have objections, raise them. We'll either note them to be resolved later or as with yesterday, we'll deal with them in due course. Is there any question about that?

MR. BURCH: I -- I was not under the impression that objections didn't need to be made. My question was about motions to strike. Those -- you're considering those to be objections to testimony going in, so they should be noted.

A.L.J. MORENO: Well, again, as we had yesterday a motion to strike that did influence the -- the flow of testimony in the hearing, it would be beneficial for you to raise it. And-such as the motion by Ms. Scrufari with relation to references to Mr. Haff’s testimony. That, as we identified previously, is something that is dependent on an -- another pending motion. However, if there are motions to strike that would influence the amount of time -- for example, witnesses on the stand, if you could raise -- we’ll make a determination as to whether it would be most efficient to -- to attend to at the moment that it is raised or at a later date. But either way, it would be appreciated if you would note your objection as we are going forward. And I do note that we have had several witnesses, certainly since the commencement of this hearing. So, to the extent that any party was under a -- a different impression and they would like to raise any concerns about that now, we could certainly hear them.

MR. KRAMER: Yes, Your Honor. This is Steven Kramer for Staff. Our impression was that the motions should generally be held until after the hearing and staff did rely on that to decide what sort of cross examination we'd be doing in these proceedings.

Certainly the -- the folks that came before Dr. Makholm, there are instances where Staff would, after the hearing, make a motion to strike certain testimony, whether it's direct or rebuttal, and -- you know -- we do plan on doing that. So, I want to -- I want to point that out. Going forward, we certainly can indicate whether -- even if it doesn't impede the progress of the hearing, whether we are going to be making a motion to strike, but, if -- if you so desire, Your Honors, but I just wanted to make that clear on the record that that was our impression and that's the way we've been operating up to this point.

A.L.J. MORENO: Okay. Thank you. And certainly as we -- as this is not clear evidently, then certainly any of the -- the witnesses that have prior -- have already been presented, a motion certainly may be made to -- to strike certain portions of testimony. But again, for -- and -- and -- certainly permissible. But on a going forward basis, then if parties have an -- an objection that may influence the amount of time, for example, a witness has been presented, it may assist us in moving forward with the flow of the hearing. It would be beneficial if you could raise them, and we'll either reserve on it or, if in the case as -- as was yesterday, then it may influence the amount of time for a particular witness, we will take that into consideration and make a judgment as to whether we'd like to rule on it. And certainly we'd provide the parties with the opportunity to be heard on that before we do so.

Yes, Ms. Miranda.

MS. MIRANDA: Thank you, Your Honors. I -- I'm slightly concerned about staff's indication that they are going to move to strike things that have already come in. It -- it impacts how we cross examine and how we present cases in this matter. And so, the fact that they have held back based on a misunderstanding pre -- presents concerns for ensuring that the case is moving forward in an orderly fashion. I would ask that they be asked to do so by Monday, to present what it is, so that we aren't spending the next two weeks spinning wheels on stuff that's ultimately going to get stricken from the -- potentially get stricken from the record.

A.L.J. MORENO: Okay. Would anyone else

like to be heard on that front? Yes, Mr. Novak.

MR. NOVAK: I'm Mike Novak from National Fuel Gas Distribution Corporation. I'm not represented today, and so I need to consult with counsel. We might have something we want to bring to your attention on Monday.

A.L.J. MORENO: Okay.

MR. NOVAK: I can't -- I know I can't do it today.

A.L.J. MORENO: Okay. Thank you, sir.

MR. BURCH: This is David Burch on behalf of RESA.

A.L.J. MORENO: Yes, Mr. Burch.

MR. BURCH: I second the comments of Ms. Miranda. If we are going to operate on that as a going-forward thing, -- you know -- I haven't had the opportunity to cross examine anyone yet. So, it's probably not as important for me, but I would like to hear what other folks are going to raise -- you know -- sooner rather than later because it will impact how we proceed.

MR. POND: Your Honor, Direct Energy agrees.

A.L.J. MORENO: Okay.

MS. MONROE: And Your Honor, National Energy Marketers agrees.

A.L.J. BERGEN: Ms. Monroe, could you please -- I need you to just -- I don't think our reporter's picking that up. Is the green light on?

MS. MONROE: It was.

A.L.J. BERGEN: Okay. Sometimes you have to get very close.

A.L.J. MORENO: Well, let me ask then as the clarifying question. We've heard from staff with regards to perhaps their interest in reviewing some of the testimony that has already been presented, and their interest in perhaps moving to strike some portion of what has been presented. Is there any other party that has been under a similar impression and, therefore, has withheld or has not moved to strike any portion of testimony that has already been presented with the exception of the -- the motion that was already made with regards to striking references to Mr. Haff's testimony? Okay.

MS. SCRUFARI: Your Honors, Carrie Scrufari for UIU. Just to clarify, the -- the motion for striking references to Haff's testimony did not apply just to Dr. Makholm but to any other witness going forward, just to clarify the record.

A.L.J. BERGEN: Yes. Thank you.

MS. SCRUFARI: Thank you.

A.L.J. MORENO: Okay. All right. Well, thank you very much. Does anybody else want to be heard. I know that Mr. Novak, you said that perhaps you were unable to respond until Monday. Okay. Well, we do want to certainly make sure that National Fuel has the opportunity to be heard as well, and Mr. Novak, perhaps we can discuss with you at a break whether or not your counsel may be able to -- to weigh in earlier than Monday.

So, for -- we have certainly heard your arguments and concerns, and we will consider them. Right now, we'll go ahead and move forward with witness testimony and after a break, we will get back with you on that and certainly if we are able to hear from National Fuel before then. So, with that, we will move, unless there are any other procedural issues, to examination of the witnesses. Okay. Hearing none. I believe it is Mr. Lacey who is on first this morning. Good morning, sir.

MR. LACEY: Good morning.

A.L.J. BERGEN: Mr. Lacey, please raise

your right hand. State your name and business address for the record.

MR. LACEY: My name is Frank Lacey, L-A-C-E-Y. My business address is 3 Traylor Drive. That’s T-R-A-Y-L-O-R Drive. Westchester, Pennsylvania.

A.L.J. BERGEN: Do you swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

MR. LACEY: I do.

FRANK LACEY; Sworn

A.L.J. BERGEN: Do you adopt your pre-filed testimony as your sworn testimony in these proceedings?

MR. LACEY: I do.

A.L.J. BERGEN: The pre-filed testimony of Mr. Lacey will be entered into the record as though given orally. Thank you. You may be seated.

THE WITNESS: Thank you, Your Honor.

A.L.J. BERGEN: Counsel, are there any corrections to Mr. Lacey’s testimony?

MR. BURCH: Yes, Your Honor. Just a few. We did distribute, as folks were kind of getting seated this morning, red lines of the three changes, and we will file them on D.M.M. this -- by close of business today. I -- If anybody didn't get a copy, let -- let us know. We certainly have more to pass out if there's anyone missing those.

A.L.J. BERGEN: Does anybody need a copy of the corrections to Mr. Lacey's testimony? Does anybody have any objections to the corrections? Just give me a minute to review them. Okay. Hearing no objections to the corrections to Mr. Lacey's testimony, we'll -- we will accept them.

MR. BURCH: Thank you, Your Honor.

TESTIMONY INSERTED NEXT PAGE

A.L.J. BERGEN: Okay. City of New York, you're the first to cross examine Mr. Lacey. You may proceed.

CROSS EXAMINATION

BY MS. TRINSEY:

Q. Good morning, Mr. Lacey.

A. Good -- good morning.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Service Companies.	)	**Case 15-M-0127**
Proceeding on the 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**

DIRECT TESTIMONY OF

FRANK LACEY

ON BEHALF OF

THE RETAIL ENERGY SUPPLY ASSOCIATION

SEPTEMBER 15, 2017

REVISED ON DECEMBER 1, 2017

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Direct Testimony of Frank Lacey on Behalf of RESA

I. INTRODUCTION

Q1. Please state your name and business address.

A1. My name is Frank Lacey. My business address is 3 Traylor Drive, West Chester, PA 19382.

Q2. By whom are you employed and on whose behalf are you testifying?

A2. I am an independent consultant testifying on behalf of the Retail Energy Supply Association ("RESA").

Q3. Please summarize your educational background and professional experience.

A3. As a consultant, I am providing policy-related consulting services to advanced energy management companies and end-use customers. I have worked in the electric power industry for approximately 24 years, beginning immediately after earning my graduate degree. I have worked on major industry restructuring issues including generation asset divestiture, with a specialization in environmental asset valuation; stranded cost valuations; transmission restructuring including the development of Independent System Operators ("ISOs") and Regional Transmission Organization ("RTOs") and other independent transmission entities; the development of retail energy markets; and the development of demand response markets. Early in my career, I was employed as a consultant to industry participants, first by Putnam, Hayes & Bartlett, Inc. and then by Arthur Andersen Business Consulting. Within the industry, I have worked for Strategic Energy, a retail electricity supplier, Direct Energy, a retail energy supplier that acquired Strategic Energy in 2008, and most recently, Comverge, Inc. and CPower, two companies that share a common owner and provide demand response services to residential and to commercial & industrial ("C&I") customers, respectively. My professional experience brings a unique and valuable perspective to the policy issues in this proceeding as I have extensive practical business experience having worked for both traditional Energy Service Companies ("ESCOs") and demand response service providers. I created Electric Advisors Consulting LLC in the fall of 2015. I hold a Bachelor of Science degree in Transportation and Logistics from the University of Maryland and a Master of Science in Industrial Administration with concentrations in finance and environmental management from the Tepper School of Business at Carnegie Mellon University. My resume is provided as **Exhibit__(FL-1**).

Q4. Would you please describe your professional affiliations?

A4. I am currently a member of the board of directors of the Smart Electric Power Alliance ("SEPA"), a trade association with more than 1,000 members including utilities, distributed resource providers and related service providers. I am the Chairman of the Advisory Council on Demand Response and Smart Grid within SEPA, which is a standing Committee dedicated to enhancing the vision of demand response and smart grid ideas within SEPA. Prior to its dissolution in

2015, I served on the board of directors of the Demand Response and Smart Grid Coalition. I am also a founding member and the current Chairman of the Advanced Energy Management Alliance. I served on the board of directors of the Electric Reliability Council of Texas ("ERCOT"), the independent electric grid operator in Texas, from 2002 to 2004.

Q5. Have you ever testified before the New York Public Service Commission or any other utility regulatory agency?

A5. I have not testified before the New York Public Service Commission ("Commission" or "PSC"). However, I have testified in numerous proceedings in other jurisdictions, before other state regulatory agencies, state legislatures, and twice as a technical conference witness at the Federal Energy Regulatory Commission ("FERC"). I have provided expert testimony in Pennsylvania, Massachusetts, Ohio, Maryland, Illinois, Utah and California. I have presented oral testimony in less formal proceedings and technical conferences before the Commissions of Maryland, Pennsylvania and Texas. I have presented legislative testimony in several states, including New York, Maryland, Pennsylvania, Delaware, Michigan, California, Texas and Virginia. I recently filed an expert report on energy matters in the Superior Court of New Jersey in Bergen County. I have also spoken at numerous trade shows, conferences and other industry and corporate events as an expert on electricity market issues. A summary of my prior testimony is attached as **Exhibit__(FL-2)**.

Q6. Could you please provide an overview of your testimony?

A6. Yes. At one time, New York was a leader in the development of competitive retail markets. Many of the tools the State and utilities implemented to facilitate retail choice nearly two decades ago were cited by retail providers around the country as the model to replicate and follow. The New York model, however, has not progressed with technology improvements and product innovations.

The Commission has recently undertaken an exercise to compare the price that ESCO customers paid for electric and gas service to what those customers presumably "would have paid" had they remained on utility default service. I will show that this analysis was flawed in several ways. Despite the flawed analysis, the results have prompted regulators to take action against the ESCOs operating in the market. The Commission has expressed its desire to have ESCOs offering innovative value-added products and services and its frustration that the offerings have not been prolific to date. The Commission is also contemplating capping the rates that ESCOs could charge customers at the default service price, an outcome that is incompatible with the desire for more advanced and innovative energy products and services.

I will discuss other policy goals enacted by the State for clean energy deployment, more efficient use of the grid and customer engagement in the markets and show that the ESCOs are the most efficient path to achieve the Commission's goals as outlined in those policies.

The products and services that the Commission wants to see in New York , are already being delivered to customers by ESCOs in other markets around the country. In my testimony, I will show that the ESCO community would be delivering its value-added products to New York if the New York market could accommodate them. I will also show that without some market improvements, such as advanced metering, no entity will be able to deliver the products and services desired by the Commission.

I will also show that there is scant evidence that customers are unhappy with ESCO products and services. A review of customer complaints from 2016, the most recent year for which data is available, shows that the customer complaint rate for ESCOs is virtually identical to the customer complaint rate for utilities in New York. It is likely that comprehensive reforms at the utility level will lead to more engaged customers and fewer complaints directed at utilities and ESCOs.

The Commission should neither mandate rates on ESCOs nor should restrict any specific products or services offered by the ESCOs in New York. Instead, the Commission should embrace these proceedings as an opportunity to develop the market tools and infrastructure to create the "Utility of the Future" that will in return empower the "ESCO of the Future" to deliver the products and services desired by the Commission. I will show that the ESCO of the Future already exists and that other states' energy markets are exhibiting the deployment of advanced energy products and services.

New York should endeavor to transform its retail model and regain its leadership that it once had in these markets. It is only with this kind of leadership that the policy goals with respect to New York's ongoing Reforming the Energy Vision ("REV") initiative, the Utility Earnings Adjustment Mechanisms ("EAMs") and the Clean Energy Standards ("CES")will be achieved.

Q7. Are you sponsoring any Exhibits?

A7. Yes. I am sponsoring seven exhibits:

Exhibit_(FL-1): Frank Lacey Resume

Exhibit_(FL -2): Frank Lacey – Detailed List of Prior Testimony

Exhibit_(FL -3): Summary of Wireless Provider Market Share Data

Exhibit_(FL -4): Examples of ESCO Investments in New Products, Services and Technologies

Exhibit_(FL -5): Examples of ESCO Product Announcements and Use of Traditional Marketing Channels

Exhibit_(FL -6): Response to Commission's Statements and Questions

Exhibit_(FL -7): Summary of Surety Requirements Imposed on Competitive Retail Suppliers (ESCOs) in Other States.

II. OVERVIEW OF THE CASE

Q8. Have you reviewed the Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits?

A8. I have read the Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits ("Notice").[1]

Q9. Could you please provide an overview of the proceeding?

A9. Yes. As described by the Commission in the Notice, the PSC adopted retail choice in the hopes of recognizing all of the benefits of competition, which it eloquently restated in the notice, including efficient allocation of resources, pricing at marginal cost, efficient production of goods and services, many buyers and sellers, and several others. The Notice states that the Commission opened the retail energy markets in hopes of spurring innovation in the creation of value-added products, particularly energy efficiency services that regulated utilities might not provide. The Commission has reached the unfortunate and inaccurate conclusion that despite efforts to realign the retail energy market, the market

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[1] Cases 15-M-0127, 12-M-0476, and 98-M-1343, *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits (Issued on December 2, 2016).

serving mass market customers for differentiated services is immature or non-existent. The Notice stated that a well-designed market could offer these consumer opportunities, but it doesn't exist today. Thus, the Commission is undertaking a review to consider several market issues including, among others, the prospect of prohibiting retail electric and natural gas service to mass-market customers, a review of market rules, rate reviews and bundled product requirements. I disagree with the conclusions set forth in the Notice.

Q10. What has prompted the Commission to take these actions now?

A10. There appears to be a concern by the Commission and some consumer advocacy groups that ESCO consumers are being harmed because they may be paying more for ESCO service than they would if they remained with the default utility supply option. For example, an affidavit was filed in these proceedings seeking to have ESCOs cease marketing their products and services to low-income customers.[2] In that affidavit ("Alch Affidavit"), Mr. Bruce Alch stated that retail choice customers had paid more than $800 million more to electricity and gas suppliers than they would have paid if the customers had stayed with their respective utilities for gas and electric commodity service. The Commission also appears to

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[2] Case 12-M-0476, *supra, Affidavit of Bruce Alch* (November 18, 2016). Mr. Alch's Affidavit was originally filed in *National Energy Marketers Ass'n v. Public Service Commission,* Index No 05680-16, Supreme Court of New York for Albany County, on or about October 26, 2016.

be concerned about certain ESCO marketing practices that they believe might be misleading, deceptive or otherwise harmful to consumers.

Q11. What is your preliminary reaction to these concerns that seem to be underlying the Commission's actions in this proceeding?

A11. First, I recognize that the Commission's goal in this proceeding—to protect consumers—is a laudable one. However, I believe it is important to separate and distinguish the two issues noted above which appear to be underlying this proceeding. To the extent that there is evidence of marketing abuses by ESCOs, the Commission is right to take action. RESA supports rigorous oversight of ESCO behavior and swift enforcement action against any ESCO engaged in unlawful or deceptive practices. However, I do not believe it is appropriate to economically regulate an entire industry as a policy substitute for enforcement and oversight.

Q12. What is your reaction to the Commission's apparent conclusion that customers are harmed if they are paying more than the utility default product?

A12. RESA's second witness, Economist Jeff Makholm from National Economic Research Associates, Inc. ("NERA"), will delve into this issue in more detail. However, my first reaction is that this comparison amounts to asking the wrong question. The apparent assumption underlying the Notice is that the market has failed because some or even many customers may be paying more than what they would have paid, had they taken service from another default utilities. The flaw in this logic is readily apparent. In any competitive marketplace, there will be some customers paying more than others. Products, services, and costs vary by vendor in every competitive market. Companies position their products differently and prices can be directly related to that positioning. This is commonly referred to as "product differentiation" and it exists in nearly every, if not every product market, including those products that could and should be highly "commoditized." Indeed, if this "test" were to be applied to almost any other industry, one would similarly conclude that the marketplace in that industry had "failed." Consumers frequently and readily choose more expensively priced products and services. For example, customers overwhelmingly prefer more expensive cell phone service providers like Verizon and AT&T despite cheaper options like T-Mobile and various pre-pay providers. Customers routinely elect premium car insurance coverage such as lower deductibles and higher coverage limits although state minimum liability coverage is cheaper. Customers will fill their gas tanks with name brand gasoline when an off-brand company is selling the same product across the street for 10-20 cents less per gallon. Customers regularly pay a premium for food products that might be raised or harvested differently. These consumer behaviors show that customers perceive value in attributes other than price.

III. COMPARING ESCO PRICES TO UTILITY DEFAULT SERVICE PRICES

Q13. Have you reviewed the Alch Affidavit?

A13. I have.

Q14. Do you find the statements in the Alch Affidavit to be credible?

A14. RESA has retained NERA to perform a comprehensive review of the data presented in the Alch Affidavit. NERA is providing testimony in this proceeding on their findings. (*See* RESA-Jeff Makholm Testimony and Exhibits.) However, without conducting my own comprehensive review of the underlying data, I have three immediate reactions to Alch Affidavit. First, ESCO energy products and the utility default service products are not one in the same and should not be compared on an apples-to-apples, penny-to-penny basis. I will discuss this further below.

Second, it appears that Mr. Alch's computations involved a very static analysis. As such, Mr. Alch did not determine what the utility default service price would have been had all of the customers been on default service instead of supplier service. This would be a major undertaking on Mr. Alch's part, but this is an extremely important point because the utilities procure much of their default electric service obligation in the short-term markets. Meaning, if demand in the short-term markets was higher than it otherwise was because the demand for all of the customers was met in the short-term market, the resulting market price would have been higher. If this were the case, then the utility electricity price to its default service customers would have been higher. Additionally, this higher price would have been borne by all default service customers, not just the ESCO customers who would have been theoretically moved back to default service (these are the customers referenced in the Alch Affidavit). Similarly, on the gas side, there would be increased costs for risk management, storage and gas procurement. Finally, Mr. Alch acknowledges the seasonal fluctuation in energy pricing when discussing Attachment A to his affidavit. He states that "[i]n viewing this data I would note that the November 2014 to May 2015 heating season was a more typical winter than the more recent November 2015 through May 2016 winter which was significantly warmer than normal. Yet, as depicted in the chart, customers served by ESCOs were subjected to significant financial impacts during both periods." In other words, Mr. Alch, observed larger spreads between default energy service prices and ESCO prices in the winter months. This observation is not unexpected and represents a valuable customer attribute. In recent years, natural gas pipeline constraints and winter deliverability issues have increased costs for hedging winter energy. Mr. Alch is simply showing that those hedges were perhaps more costly than what eventually evolved in the short-term market. This brings me back to the first point, ESCO products are not the same as default service – one is a contracted hedge and one is not. Going back to the second point, the Alch observation could have been drastically different had all of the energy been procured in the short-term market, especially if the weather had been colder than expectations. If for example, the winter periods identified by Mr. Alch had been similar to the winter of 2014 (also known as the Polar Vortex), the utility pass-through costs to default service customers would have been significantly higher than the "fixed prices" that were provided by the ESCOs.

Q15. Why do you believe this price spread represents a positive customer attribute?

A15. A fixed price is a product attribute for which customers are generally willing to pay a premium. This phenomenon exists in other markets, such as the mortgage market. In March 2017, only nine percent (9%) of mortgage applications was for adjustable rate mortgages. Nine percent was the highest percentage of adjustable-rate mortgages since October 2014.[3] According to the Mortgage Bankers Association, the average interest rate for a 30-year fixed rate mortgage for the month was 4.46%. The average interest rate for a five-year adjustable rate

[3] See: https://www.mba.org/2017-press-releases/march/mortgage-applications-decrease-in-latest-mba-weekly-survey

mortgage was 3.41%. That difference would allow a customer with a $250,000 mortgage to save $150 per month for at least five years, yet only nine percent of homebuyers took advantage of this opportunity. Homebuyers instead chose the significantly higher-priced mortgage to ensure stability in their mortgage payments.

Q16. Are cost comparisons between ESCOs and utility default such as those referenced by Mr. Alch a significant driver for this proceeding?

A16. Yes. In prior phases of this and other proceedings, Department of Public Service ("DPS") Staff has presented analyses such as the Alch Affidavit noted above, attempting to show that ESCO customers, either as a whole or certain sub groups, have paid more in aggregate with ESCO service than they would have paid had all of these customers received utility provided default service.[4] While these are extremely flawed analyses, in its February 23, 2016 Order[5] the Commission appears to have relied upon this type of information as the basis for sweeping policy changes to severely restrict the products and services that ESCOs could continue to offer in New York. In the February 23 Order, the Commission sought to prohibit ESCOs from providing service to consumers at rates above the

[4] *See* for example, the Alch Affidavit discussed above.

[5] Case 15-M-0127 *et al.,* In the Matter of Eligibility Criteria for Energy Service Companies, Order Resetting Retail Energy Markets and Establishing Further Process, February 23, 2016.

applicable utility default supply price with some limited exceptions for renewable or certain other products the Commission deemed to be value-added. In the current Evidentiary Track, the Commission has noted its intent to examine issues such as: (i) ESCO "overcharging," (ii) what, in the Commission's determination, may constitute "acceptable" ESCO rates; and (iii) how to ensure "just and reasonable" rates for any form of continued ESCO service.[6] It appears that the examination of ESCO prices, particularly how such prices compare to the utility default rate, is a central issue in this proceeding.

Q17. What conclusions do you think the Commission, DPS Staff and other parties may attempt to draw based upon such price comparisons?

A17. I am concerned that DPS Staff may again focus heavily on such ESCO-to-utility price comparisons in an attempt to reach the conclusion that the ESCO market isn't working because ESCO customers are paying more, either individually or collectively, for their selected ESCO service than they would under utility default service. While the Commission has not yet put forward any concrete policy reforms as a result of this current Evidentiary Track, from the Notice instituting this proceeding, it appears that policies similar to those contained in the February 23 Order may be under consideration. Of significance, the Notice indicated that

[6] Notice at p.4.

the Commission will consider "whether ESCOs should be completely prohibited from serving their current products to mass-market customers…"[7] Ironically, the Commission, while expressing concern about "overcharging" is also in the same proceeding, exploring why more expensive products, the "value-added energy products and services," are not being offered. Because of this contradiction, it is difficult to ascertain precisely what the goals of the Commission are.

Q18. Would it be appropriate to draw broad conclusions about the functioning of the ESCO market because some ESCO customers may be paying higher prices than the utility default service?

A18. No. For a myriad of reasons, I believe no meaningful conclusions, other than that the market is working, can be drawn from different customers paying different prices for different products. ESCO products and utility default service products are fundamentally different products. They should be priced differently. It is not even reasonable to presume that only energy commodities are being delivered with ESCO products. Dr. Makholm discusses at length the problems associated with such price comparisons and I agree with his conclusions (RESA-Jeff Makholm Testimony). While Dr. Makholm presents a quantitative and economic perspective to support his conclusion that such price comparisons to the utility's

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[7] Notice at p.3.

default service are fundamentally flawed, I would like to discuss this issue from a more practical perspective as both an expert in the energy industry and an observer of markets for other products and services. I believe it is useful to look to these other industries as a lens through which to examine consumer behavior and policies for shaping the markets in the energy industry.

Q19. How can a review of markets for other products and services help inform the issues in this proceeding?

A19. As a society, we generally accept that "consumer choice through a free market" is a good thing and it is fundamental to efficient market operations for most goods and services. In the United States, we enjoy a free-market economy for nearly all of the everyday products and services that we consume. Given that one of the underlying assumptions of the Commission in this proceeding is that the ESCO market has purportedly "failed" because some customers are paying more for ESCO services than they would have with the utility's default service, I believe it is useful to examine to what degree consumers willingly pay more for products and services in other industries.

Q20. Can you offer some examples of how customers often choose products or services that cost more relative to certain alternatives?

A20. Yes, there are dozens of examples that come to mind, but below are a few specific ones:

- I demonstrated above that only nine percent of homebuyers choose a mortgage option that could save them $150 per month for five years. More than 130,000 houses were purchased in New York in 2016, at an average price of $328,406. If each of those homebuyers financed 90% of the purchase price of their home and 91% of those opted for a fixed price mortgage, New York home buyers would have voluntarily opted in to paying an extra $254 million in mortgage payments per year. Over the course of a five-year initial interest rate period, New Yorkers will have voluntarily paid $1.3 billion more than they would have paid with the lower-cost adjustable rate mortgage.
- Many customers choose higher priced mobile and data plan providers. As shown in **Exhibit__(FL-3)** to this testimony, Verizon and AT&T are the clear market leaders, and they also have the highest revenue per customer of the four companies. Notably, Verizon Wireless receives $260 more per year per customer than Sprint. Stated another way, Verizon's revenue per customer is 49% higher than Sprint's. Despite this price differential, Verizon has almost twice as many customers and enjoys an 85% customer retention rate.

- Smartphone consumers overwhelmingly prefer expensive new models. For example, the top-selling smartphone in 2016 was Apple's iPhone 7,[8] despite a price tag of $649 and an abundance of alternatives priced at or below $300.
- When shopping for a pay TV package, many customers choose premium channels or channel bundles beyond "basic cable." For example, one recent study shows that 38.7 percent of respondents pay for premium channels like HBO, Showtime or Starz.[9]
- Consumers are increasingly willing to pay more for certain products that align with their values, such as organic and sustainably raised foods and environmentally conscious brands. For example, a Pew Research Center study found that 68% of the adults in the Unites States surveyed bought organic food within the last month prior to the study.[10]

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[8] https://www.kantarworldpanel.com/global/News/iOS-Share-Driven-Higher-by-iPhone-77-Plus-Sales

[9] http://www.gomohu.com/wp-content/uploads/2016/04/Digitalsmiths_Q4_2015_Video_Trends_Report-Consumer_Behavior_Across_Pay-TV_VOD_PPV_OTT_Connected_Devices_and_Content_Discovery.pdf

[10] *See:* http://www.pewinternet.org/2016/12/01/americans-views-about-and-consumption-of-organic-foods/

- Many consumers willingly pay more for name-brand groceries and packaged goods with national brand market share at 85.5% versus private label (e.g., generic) products at 14.5%.[11]

These examples show that customers perceive value in a lot of different ways and are often willing to pay a higher price for a range of reasons.

Q21. Is evidence of customers "paying more" necessarily an indicator of a failed market or consumer abuses?

A21. No. It is an indicator of just the opposite – a well-functioning, competitive market offering different products and service levels. Clearly no one wants to pay more than required. But the examples above indicate that consumer purchasing decisions are not one-dimensional and show that consumers readily embrace products with price premiums in other markets. A recent study conducted in Ohio and Florida showed that only 45% of the respondents chose price as their primary consideration when choosing energy products.[12] The willingness of customers to purchase premium products is based on such factors as differences in features, brand loyalty, company reputation, convenience, customer service, environmental concerns, etc. Each of these attributes is present in the energy industry. Indeed, a

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[11] *See:* https://www.iriworldwide.com/IRI/media/T_TPrivate%20Label-11-16.pdf

[12] American Coalition of Competitive Energy Suppliers, The Power of Choice: Consumer Preferences on Energy Choice in Florida and Ohio, June 2017, pp. 10-12.

hallmark of a free-market economy is price and product differentiation among many competing sellers. Most casual observers would agree that it is not unusual for customers to frequently prefer a higher priced option for goods and services. Dr. Makholm will address the economic criteria for a well-functioning competitive market and will show how the ESCO market easily meets this test despite any relative price comparisons between ESCOs and the utilities.

Q22. Are the industries from your examples above dramatically different from the energy industry?

A22. Every industry is unique and clearly the energy industry has specific distinguishing characteristics. Most notable is the fact that competitive retail choice for electricity and natural gas is a fairly new phenomenon in energy markets. However, the basic drivers of consumer preferences are just as applicable in the ESCO markets as they are for mortgages, cell phone service, groceries or other products. ESCOs are differentiating their products and brands in a variety of ways. Table FL-1 details several product differentiation attributes that are available in markets for many different products and offers examples of how these attributes avail themselves in the electric and gas markets.

Table FL-1: ESCO Product Differentiation	
Differentiation	**Examples from ESCO Industry**
Product features	• Fixed rate terms ranging from 3 months to 36 months • Variable rate • Variable rate with price limit • With or without early cancellation fees • Renewable energy content, carbon offsets
Brand loyalty	• Airline miles and other reward points • Cash back incentives • Enrollment incentives (gift cards, rebates, etc.)
Alignment with Customer Values	• Renewable energy attributes • Carbon offsets • Charitable contributions
Product Bundling	• Smart thermostats • Home automation devices • Home security • Cable TV bundles • Home services, warranty and protection plans
Customer Service and Convenience	• Online enrollment and account management • App and text customer notifications • Usage reports and benchmarking • Customer satisfaction guarantees • Priority phone service lines • Extended customer service hours • Daily consumption updates

Direct Testimony of Frank Lacey on Behalf of RESA

Q23. Would it be appropriate in the other industries noted above for a regulator to intervene and require a company to price its products at or below the price of another?

A23. No. However, it is an interesting thought exercise to apply the logic from the February 23 Order to these other industries. Imagine if the Federal Trade Commission intervened to force Verizon to lower its plan rates to at or below those of Sprint? Or, if the Food and Drug Administration ("FDA") prohibited grocery stores from selling organic products in an effort to protect consumers from paying higher prices. An even closer analogy is the mortgage example. The mortgage market bears many of the same characteristics as the energy markets, as a main feature of both business models is managing risk associated with market volatility. The primary benefit of a fixed-rate mortgage is stability and cost certainty just as a fixed ESCO rate offers similar benefits. What this Commission is contemplating is akin to having the Federal Reserve or the Treasury Department require that all fixed-rate mortgages to be priced at or below variable-rate mortgages. If any of these policies were pursued, there would likely be dramatic and serious damage to the markets for these products. Wireless carriers, might stop investing in new cell towers, technologies and mobile data infrastructure. Customers could revolt at the notion of the FDA taking away their choice for organic foods. And banks would likely not offer fixed-rate mortgages.

Such policy intervention is equally inappropriate for the ESCO market, and the result of such policy intervention will likely be similar to the results hypothesized in those other markets.

Q24. Can you provide an example from the energy industry to illustrate why policy decisions based on such simplistic price comparisons are misguided?

A24. Yes. In the February 23 Order, the Commission sought to limit ESCOs to providing service at rates equal to or less than the utility's default rate. Presumably, this was intended to protect customers from paying more. It is interesting to point out, however, that the Order did not require that customers receive service from the *lowest available option* in the marketplace. Indeed, such a policy might result in placing all customers with an ESCO. For example, today in the Westchester area of the Consolidated Edison service territory, there are both fixed and variable ESCO electric offers priced below the monthly variable Consolidated Edison rate. Even during the Polar Vortex, the highest priced energy markets in recent years, there were ESCOs continuing to enroll customers at rates less than the then-current utility default rate. If the central support for major policy changes in the ESCO market is the desire to protect customers from "overpaying" relative to some lower-priced alternative, then the Commission should consider the following policy alternatives:

- Moving all utility default service customers to the lowest priced ESCO offer;
- Requiring that the utility's default price be equal to or less than the lowest available ESCO price;
- Requiring the utilities to refund money to any default service customers who paid more for energy during the Polar Vortex (or any other month) than they would have paid to an ESCO.

Of course, such policies would present substantial challenges. I expect the utilities would object vociferously to any suggestion that their rates be capped at the lowest available ESCO rate, and for good reason. Similarly, any requirement to place all customers on the lowest available ESCO rate would meet significant practical challenges. It is just as problematic and inappropriate to place such pricing restrictions on ESCOs.

IV. CUSTOMER COMPLAINTS

Q25. Have you reviewed the summary of customer complaints posted on the Commission's website?

A25. I have.

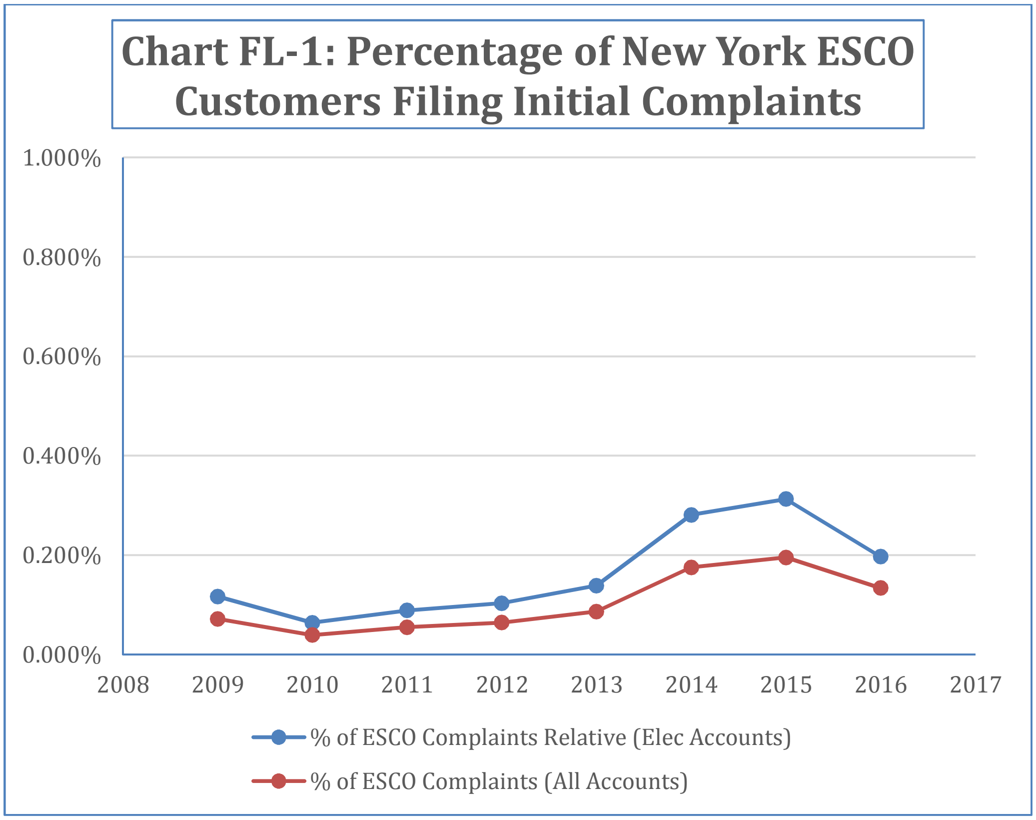
Q26. What do you conclude based on a review of that complaint data?

A26. My review of the complaint data suggests exactly what was stated above. ESCO customers are intelligent. They understand the value proposition of ESCOs and

ESCO products, and the overwhelming majority is happily engaged with their respective ESCOs. Between 2009 and 2016, approximately 20,500 "initial complaints" against electric and gas suppliers were made with the Commission. Approximately 9,700 of those were made in 2014 and 2015, many of which were likely related to the Polar Vortex, which caught the entire energy industry off guard. On its face, 20,500 complaints might sound like a large number, but over that time span, it equates to about 2,500 per year. Over that same time horizon, there were almost 2.5 million customer accounts on competitive energy service each year. That equates to about 1 customer complaint per year per 1,000 customers. If the outlier years are removed, the average was about 0.7 ESCO complaints per year per 1,000 customers. Nobody likes to hear that the market generates complaints, but some are simply unavoidable.

The raw numbers suggest that perhaps there is a bit of an over-reaction and a more measured approach to looking at the competitive retail energy markets is warranted. Chart FL-1 below, with the top bar representing 1% of ESCO customers, shows that even in the years with the highest numbers of complaints, still only small fractions of 1% of the customers lodged initial complaints with the Commission.[13]

[13] The data is presented in the chart two ways. First, the denominator used to calculate the complaint rate was the number of electricity accounts on electric supply. The second approach was to include both



Q27. Are you familiar with the Number of Complaints filed against ESCOS in other states?

A27. Yes. I researched complaints from a few states. Notably, I reviewed Texas, Pennsylvania and Illinois, as those are states with restructured energy markets that are comparable in size to New York's. For Texas and Illinois, I was only able to see complaint data for the most recent six-month reporting period. Texas electric

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electricity and gas accounts in the denominator when performing the calculation. It is shown both ways because the data is not available to determine how many customers receive both electricity and gas from ESCOs in New York.

suppliers received 1,037 complaints between January 1 and June 30, 2017.[14] In New York, 1,201 initial complaints were received in that same time frame against all ESCOs. In Illinois, 649 complaints were received between October 2016 and March 2017 against electric suppliers.[15] In New York, 1,228 initial complaints were received in that same time frame against all ESCOs. I was able to track Pennsylvania complaint data back to 2010, so have done a bit more comparative analyses with the Pennsylvania data.

Robust electric competition began in Pennsylvania in one utility in 2010 and across the remaining utility service territories in 2011. Today, more than 2 million customers in Pennsylvania are procuring electricity from competitive suppliers. The data shows that over a six-year period from 2010 to 2015, almost 15,000 complaints were filed with the Pennsylvania Public Utility Commission. The number of complaints peaked during the Polar Vortex in 2014. In fact, the percentage of ESCO-related complaints in Pennsylvania was higher than in New York during the Polar Vortex. Chart FL-2 compares the percentage of ESCO customers who filed complaints in these states.[16] The percentage of customers

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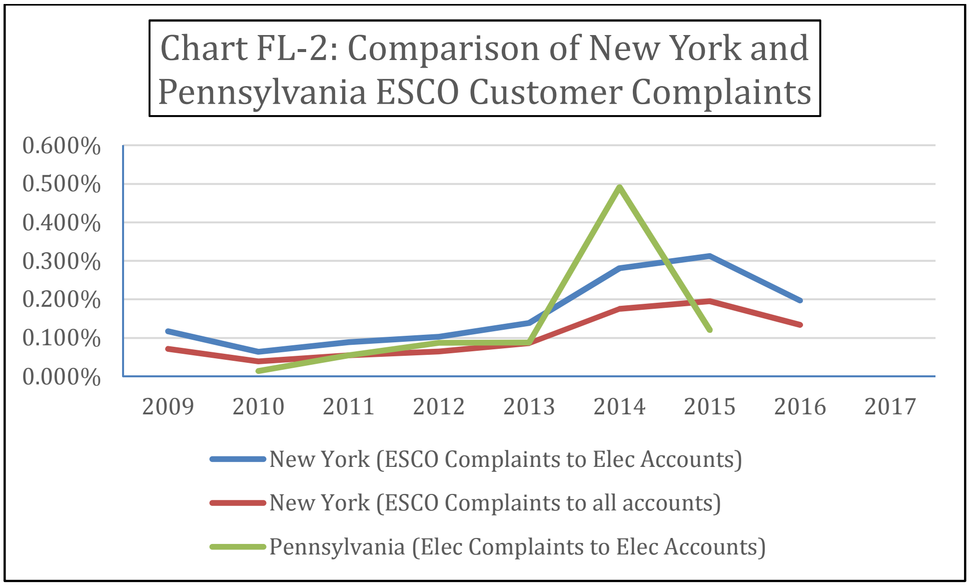
[14] See: https://www.puc.texas.gov/consumer/electricity/CustomerComplaintStats.aspx.

[15] See: https://www.pluginillinois.org/ComplaintGrid.aspx

[16] The New York data is presented the same way it is presented in Chart FL-1, with two different trend lines. The Pennsylvania data shown above excludes complaints related to ESCO gas service because the data for gas and electric complaints and customer counts come from two separate areas. Additionally, there is no data linking customers that might be receiving both energy products from ESCOs. In 2014, at the

complaining in Pennsylvania hovered near the percentage of complaints in New York prior to the Polar Vortex.



The Polar Vortex caused a spike in complaint activity in Pennsylvania, but that Commission responded vigorously, flexing its regulatory authority over the competitive supply community, opening targeted investigations of specific companies' activities and issuing fines where appropriate. The Pennsylvania regulators have not threatened to take away competitive supply options from customers. They have simply applied enforcement mechanisms over the market participants, sending a strong signal to the retail markets that the Commission will

peak of the Polar Vortex, the Pennsylvania PUC received 975 complaints related to gas ESCO service, on an ESCO customer base of approximately 358,000, yielding a complaint rate of approximately 0.27%. That would lower the peak slightly on the graph shown in Chart FL-2.

not tolerate certain behaviors. The result was an immediate drop in consumer complaints.

Q28. Have you reviewed any data relative to the amount of complaints against the utilities in New York?

A28. I have. I have reviewed the Commission's customer complaint data for 2016. This data reflects the most current annual review of the market.

Q29. How many complaints were initiated against the utilities in New York in 2016?

A29. In 2016, the utilities collectively had 12,890 initial complaints made against them in 2016.[17]

Q30. How many complaints were made against ESCOs in New York in 2016?

A30. The ESCOs in aggregate had 2,995 initial complaints against them – less than one-quarter of the number of complaints received against the utilities.

Q31. How do those numbers compare?

A31. Interestingly, I find that the ESCO complaint rate is virtually the same as the utilities' complaint rate. Table FL-2 calculates the complaint rate in 2016 using only residential customers in the denominator of the calculation. The available complaint statistics do not distinguish residential from non-residential complaints. Thus, in the absence of data from the Commission that shows

[17] Reports on ESCO and Utility Complaints in New York are available at http://www3.dps.ny.gov/W/PSCWeb.nsf/All/448C499468E952C085257687006F3A82?OpenDocument

otherwise, I assume the majority of complaints listed on the Commission's website are from residential customers. This chart also calculates the utility complaint rate two separate ways. I present two separate calculations because of a limitation in the data regarding dual fuel customers. The available data does not identify which complaints are related to gas versus electric service and similarly there is no way to know how many customers receive both commodity services from their provider. In the "Elec. and Gas Customer Rate" column below, I divided the respective complaint number, for ESCOs and utilities over the total number of residential accounts counting both gas and electric accounts in the denominator. Under this approach, the complaint rate is virtually identical for ESCOs and utilities. While this approach may double count some dual fuel customers in the denominator, this double counting occurs on both the ESCO and utility number. Another approach is to only include electric accounts in the denominator. This is the calculation shown in the "Elec Customer Rate" column below. Under this approach, the ESCO rate of complaints is actually lower than the utility rate.

Table FL-2: Comparison of ESCO Complaint Rate to Utility Complaint Rate in 2016 (Residential Customer Count)					
		Residential Customers			
Business	Complaints	Electric	Gas*	Elec Customer Rate	Elec & Gas Customer rate
ESCOs	2,995	1,210,374	720,000	0.247%	0.155%
Utilities (Less ESCO Customers)	12,890	4,702,494	3,780,000	0.274%	0.152%
Utilies (All Customers)	12,890	5,912,868	4,500,000	0.218%	0.124%
* = Exact Gas Customer Count and distribution b/t residential and non-residential not available					

Table FL-3 shows the same data, only it incorporates all customers, including C&I customers into the denominator. It shows the same result. Depending on how you calculate the complaint rates, the utility rate of complaints is either slightly higher or slightly lower than the ESCO complaint rate. This table uses the same gas numbers as above, because there is insufficient data on the PSC website to ascertain exact amounts of gas customers, there rate classification and the gas switching rates.

Table FL-3: Comparison of ESCO Complaint Rate to Utility Complaint Rate in 2016 (All Customer Count)					
		All Customers			
Business	Complaints	Electric	Gas*	Elec Customer Rate	Elect & Gas Customer rate
ESCOs	2,995	1,520,128	720,000	0.197%	0.134%
Utilities (Less ESCO Customers)	12,890	5,317,584	3,780,000	0.242%	0.142%
Utilities (All Customers)	12,890	6,845,712	4,500,000	0.188%	0.114%
* =Exact Gas Customer Count and distribution b/t residential and non-residential not available					

Direct Testimony of Frank Lacey on Behalf of RESA

Q32. What do you conclude when looking at this complaint data?

A32. First, and most importantly, I conclude that the rate of ESCO complaints is not dissimilar from that of the utilities. ESCOs may have had a higher rate of complaints during the Polar Vortex, an unusually disruptive period, but the complaint rate has subsided to relatively the same level as for the utilities. However, it must also be noted that the utilities benefited from some regulatory protections during the Polar Vortex period, such as the cost deferrals noted in Dr. Makholm's testimony (*see* RESA-JDM Testimony). Given that the ESCO complaint rate is relatively the same as for the utilities, it would be unfounded to conclude that the ESCO market is providing inferior service to consumers or is indicative of widespread misconduct or abuse. This supports my overarching conclusion discussed elsewhere that the Commission should focus on targeted enforcement in response to specific ESCO violations instead of imposing sweeping pricing and product restrictions on the entire marketplace. More fundamentally, I conclude that energy consumers everywhere are engaged. They expect certain levels of service and if they those levels are not delivered, they take matters into their own hands and take the actions necessary to get their issues resolved. This consumer engagement is a sign that the market is functioning.

V. RETAIL CHOICE IN NEW YORK

Q33. Are you familiar with the New York Retail Choice Market?

A33. I am. The two energy suppliers that I was employed by during my career both offered retail energy products in the New York market.

Q34. How long has electric retail choice been available in New York?

A34. New York was one of the early states to adopt and implement retail choice, beginning in 1997. As described in the Notice, New York recognized early that the regulated utility model was not maximizing value to the market. The State was looking for alternatives to "spur innovation in the creation of value-added products, particularly energy efficiency services that regulated rates may not provide."[18] In a rate-regulated monopoly paradigm, customers had no options and the utilities were not driving innovation.

Q35. Has deregulation spurred innovation in the creation of value-added products?

A35. Yes. Deregulation, which is more appropriately referred to as "restructuring" or "retail choice" given that ESCOs remain subject to significant oversight and regulation, has spurred the creation of many value-added energy products, including some commodity-only products that incentivize and enable efficient energy consumption and "commodity-plus" products that offer additional bundled

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[18] Notice, at page 1.

services or benefits to consumers. The New York market already has over 1,200 MW of electricity demand response participating at the New York Independent System Operation ("NYISO").[19] The deployment of Distributed Energy Resources ("DER") (exclusive of demand response) has already reduced the NYISO peak electric load by approximately 650 MW. The NYISO expects that the system peak will be reduced by almost 3,000 MW through the deployment of DER by 2026.[20] I discuss other more retail-specific value-added products below.

Q36. Could you please provide a few examples of value-added retail energy products?

A36. Yes. It is very common to see energy products today bundled with smart thermostats. The bundling effectively finances the purchase of the thermostat, which could sell for as much as $250 at retail. Deployment of the thermostat should allow the customer to realize savings on heating and cooling bills (by doing nothing but installing the thermostat). For example, Nest Thermostats can lower the amount of natural gas used for heating by approximately 10%. They can lower the amount of electricity used for cooling by approximately 17%.[21] Additionally, the remote features of the thermostat allow for control of the

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[19] NYISO, Power Trends 2016, The Changing Energy Landscape, p. 5.

[20] NYISO, Power Trends 2016, The Changing Energy Landscape, p. 11.

[21] See: https://nest.com/downloads/press/documents/energy-savings-white-paper.pdf.

temperature while away from the thermostat. A smart thermostat can also provide a level of insurance to a homeowner who is traveling as well. For example, if a furnace breaks down while a family is on vacation, the thermostat can alert the homeowner that the house is getting too cold. The customer could then take actions while on vacation to ensure that the pipes in the house do not freeze. A smart thermostat could also be utilized to engage the customer in a demand response program, allowing for compensation to the customer as a capacity resource, energy resource, or both. I have witnessed many ESCOs deploying these and other value-added services and technologies in markets across the country. I have attached **Exhibit__(FL-4)** which is a collection of recently published articles that describe ESCO investments in alternative service providers, new products and new technologies. Even in instances where a technology provider is not a retail market participant (Nest, for example), I am aware of several instances where these providers are working with ESCOs to co-market and deploy their technologies.

Q37. Could you provide an example of commodity-only energy products that are value-added products?

A37. Yes. I am particularly fond of time-of-use pricing and pre-paid energy products. Under time-of-use products, customers will typically curtail their use of some electricity-consuming products until the electricity is less expensive. A comprehensive study recently released by ACEEE showed that time-of-use rates reduce peak-load consumption quite significantly. The study also investigated whether moving electric consumption to less expensive periods would incentivize an increase in consumption. The ACEEE study showed that on average, across 50 time-of-use programs implemented by utilities, consumers reduced total electric consumption by an average of 2.1%.[22]

Pre-paid electricity products have also been shown to induce electricity conservation. Participants in pre-paid electricity programs are shown to reduce electricity consumption by between 10% and 15%.[23]

Q38. Do you consider Fixed-Price energy products to be value-added products as well?

A38. Yes. In New York, the utility default service price is a price that varies monthly based on actual market conditions, utility forecast of market conditions and other non-market factors such as utility deferrals and prior period reconciliations.

Many customers prefer a simple, contractual fixed rate. As shown above, 91% of consumers across the country opt for a fixed-price mortgage, at a cost of hundreds of dollars monthly. For many customers, a fixed price provides peace of mind.

[22] Brandon Batz, American Council for an Energy-Efficient Economy, Report U1702, *Rate Design Matters: The Intersection of Residential Rate Design and Energy Efficiency*, March 2017.

[23] Nat Treadway, Distributed Energy Financial Group, LLC, *Prepayment, Conservation and Behavior*, Presented to the Behavior, Energy and Climate Change Conference, December 8, 2014, See also: Cobb EMC, https://www.cobbemc.com/content/how-prepaid-electricity-saves-energy.

For customers trying to manage energy expenses, a fixed-price contract for electricity and/or natural gas enables them to set a budget for a year or two or longer. The ability to lock into a budget long term, to protect against inflation and to shield from energy market swings, provides tremendous value to customers.

Q39. Do variable-rate products also offer value to consumers?

A39. Yes. I recognize that there has been concern regarding variable-rate products, particularly following the Polar Vortex. However, variable-rate products can and do offer value to certain consumers. Variable-rate products can be a useful bridge service when customers are in between fixed-rate price plans. They might also be useful when planning a sale of a home or business. Alternatively, a customer may be willing to assume price volatility for the opportunity to save money in the long run. Also, as smart meters are deployed, a number of innovative rate designs and energy management services will be dependent on some form of variable or index-based pricing to maximize value to the consumer.

Q40. Is it reasonable to conclude that the New York ESCO market is failing to provide value to customers?

A40. No. The ESCO business model is dependent on providing value to a customer. Indeed, if customers did not perceive value they would not elect service with an ESCO in the first place. It is perplexing to me that anyone could conclude that a market in which over 2 million electric and natural gas consumers have affirmatively chosen their energy supplier is failing to provide value.

Q41. Can the utilities become an adequate avenue for delivering value-added services to New York customers?

A41. No. An over-reliance on utilities to offer such services would shift risk unnecessarily back to customers. Under a regulated regime, if a utility made a bad hedge, or other type of bad investment, the customers were forced to pay for that mistake. This was one of the central reasons for moving from a regulated regime to a deregulated market construct. In a restructured market, if an energy company makes a business mistake, it is the responsibility of the energy company. Customers are no longer forced to bear the financial burden of poor business decisions made by an ESCO. Although an ESCO may attempt to recover its costs through its end-use prices, unlike the utilities, an ESCO does not have captive customers. With restructuring, the default service utilities have become expert in the delivery of electricity and gas, but their ability to manage complex portfolios of energy contracts and markets has waned. Utilities are simply pass-through entities when it comes to the energy commodities. ESCOs are now in the role of managing risk and commodity exposure for customers. ESCOs will commit to commodity positions with wholesale providers of electricity and gas. They will manage customers' retail load and their wholesale portfolios to match supply with demand. Any deviation from perfect balance is borne by the suppliers. To protect against this risk, ESCOs develop pricing programs, demand management programs, efficiency programs and more to balance, as nearly as possible, supply and demand. If a utility were to engage in this business, imbalances would be borne by ratepayers. Because of the ratepayer backstop, the incentive to manage a portfolio to a high degree of precision would diminish. It would be a tall order to reverse the restructured utility model, and such a reversal would add significant costs and risks to consumers at the same time.

Q42. What do you believe is the state's objective for energy products and services that are available to customers?

A42. In the Notice, the Commission expressed frustration that "there has been little innovation, particularly in the provision of energy efficiency and energy management services."[24] Thus it would appear that energy efficiency and energy management services and perhaps other types of energy-related value-added products are desired by the State.

Q43. How can ESCOs help the state meet these goals?

A43. In the Notice, the Commission correctly noted that "[w]hile a well-designed market could offer these consumer opportunities, it simply does not exist

[24] Notice, at page 3.

today."[25] The well-designed market the Commission is envisioning does not exist in New York today. However, the products that the Commission desires do exist today. They are being offered in other markets around the country. Some are even offered in New York currently. Most notably, the retail electric market in Texas is flush with suppliers, innovative products, energy efficiency products, time of use rates, and products bundled with services such as HVAC tune-ups and insurance policies, smart thermostats, demand response, loyalty points, airline miles, charitable contributions and more. Customers in Texas experience some of the lowest-cost electricity in the country and relatively high customer satisfaction scores. The best option for New York to achieve the goals it desires is for New York to improve the current retail market. Under the right market design, suppliers of gas and electricity could offer real-time energy efficiency and energy management products. For example, customers could be provided with real-time data about consumption and pricing to empower their own conservation decisions. They could be provided energy management products that control devices remotely, either by the customer or a supplier. With real-time metering, a customer could get daily updates by text about the amount of money spent on electricity or gas that day, or a notice about an unusual blip in consumption. The

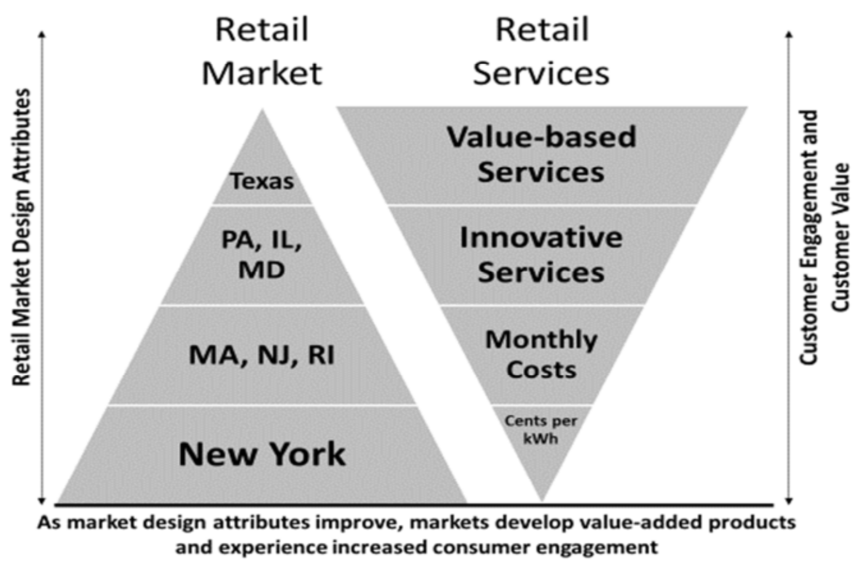
[25] Notice, at page 3.

key to enabling these products is a more robust utility infrastructure and market design.

The New York market, while it may have been innovative twenty years ago when first walking the path to restructuring, has seen little improvement since then. Metering infrastructure and data access is far from state-of-the-art. Utility protocols for data access are cumbersome. The primary billing mechanism for residential customers is still the utility invoice and it still is delivered monthly, well after the electricity is consumed.

Chart FL-3, below, is representative of how New York has stagnated in its efforts to create a robust retail electricity market. Customer engagement and the creation of customer value are directly aligned with electricity market design. New York sits at the bottom of this matrix.

Chart FL-3: Retail Market Attributes Align with the Delivery of Value-based Energy Services



The second tier of states is slightly more advanced than New York. These states have more developed efficiency programs and have a less hostile regulatory environment for retail suppliers. They also offer a fixed price default service product, protecting customers from spot market volatility and offering a slightly more valid (but still not "apples to apples") benchmark against which to compare termed supplier prices. Products improve significantly in the third tier with advanced metering which can be seen in Pennsylvania and Maryland. These states have deployed smart meters and have favorable regulatory climates for retail suppliers. In Texas, which stands alone at the top of the spectrum, with fully functioning advanced metering, real-time data availability, supplier consolidating billing, and other robust retail attributes, customers are fully engaged with their electricity providers and products, capitalizing on time-of-use products, bundled products, demand response, peak-time rebates, pre-paid energy and more. In Texas, the utilities work in concert with the retail suppliers to facilitate retail choice and supplier consolidated invoicing. Provider of Last Resort ("POLR") service, which is Texas' form of default service, is provided by market participants, not the utilities. Notably, POLR in Texas is not designed to be a competitor or comparison product to ESCO service. Rather POLR is intended only as a backstop service for when a customer's chosen supplier abruptly exits the market. In the Texas market, customers must manage their electricity in the same way they manage cell phones, insurance, leases, and other products and services -- if they want the service, they must choose to receive the service from a service provider.

If the market design is correct, the advanced products will evolve. In the Texas market, consumers actively seek out innovative products and services and they are readily available. In more advanced markets, the participants invest more heavily on what would be considered traditional sales and marketing techniques such as radio, television, and print advertising to reach customers. **Exhibit__(FL-5)** is a collection of representative marketing collateral showing the traditional marketing channels used in markets around the country.

Q44. What types of changes would be required in New York to create a more robust retail market that can deliver on the state's energy policy objectives?

A44. The utilities need to invest in upgraded infrastructure. For example, advanced metering and customer access to data will be required to achieve a robust deployment of energy efficiency and energy management services. Data sharing platforms will need to be enhanced to deliver the more granular data from smart meters to customers, ESCOs and perhaps, other third parties. Additionally, a much more robust billing framework is needed. Currently, ESCOs serving residential and small commercial customers are limited in all practicality to a utility consolidated invoice providing a rigid format and limited space for the supplier to show its charges. The utility billing systems must evolve, or preferably the Commission should allow supplier consolidated billing such that the suppliers can define the billing interface with customer. Value-added energy services and innovative energy management products will be deeply reliant on communicating with customers and presenting customers with useful and actionable information. This can-not be achieved under the constraints of the current billing paradigm.

VI. OVERARCHING STATE POLICIES

Q45. You have discussed some of the state goals for retail electricity markets. Does New York have other overarching policy issues of importance?

A45. Yes. I see three very important public policy initiatives in motion at the state level where the ESCOs will play an instrumental role in delivering success. These are: (1) the REV initiative – Reforming the Energy Vision – which lays the groundwork for efficient operations of the electric grid in New York; (2) the utility-focused earnings adjustment mechanisms (also known as EAM) that provide significant financial incentives for the utilities to deliver more efficient use of the electric grid; and (3) the "80 by '50" goal – reducing greenhouse gas emissions by 80% by 2050 -- a goal set by the Governor which will largely define the resource allocation for energy consumption over the next few decades. These State policy initiatives are inter-related. The REV goals include: (1) a 40% reduction in greenhouse gas emissions from 1990 levels; (2) an end-state where 50% of electricity consumed in New York will come from renewable sources by 2050; and (3) a 23% reduction in energy consumption of buildings from 2012 levels.[26] The primary goal of the Clean Energy Standard (also known as CES) is to have 50% of all electricity consumed in New York come from renewable

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[26] See: https://rev.ny.gov/

resources by 2030, which is a bit more aggressive than the REV goals. Finally, the EAMs, while somewhat more complicated, are an integral piece of the state-wide mix of policy goals. The EAMs include direct energy consumption reduction goals, and they also include outcome-based goals that include a reduction in energy usage per customer (energy intensity), a reduction in peak load, and a system-wide DER deployment goal.

Q46. How do you envision the retail suppliers helping the state deliver on these aggressive goals?

A46. ESCOs are the primary interface between customers who interact with the market and the market operators – currently the NYISO, but perhaps the distribution service providers in the future. Many of the ESCO business models have already developed well beyond delivering the energy commodity only. These companies are now developing and installing solar and other distributed energy resources, developing demand response programs, investing in smart thermostat technologies and other smart home products, offering home comfort systems and home energy services, aligning with energy efficiency companies and others. As discussed above, advanced products and services are being delivered in other retail energy markets around the country and around the world. In those markets, ESCOs deliver the policy goals by developing innovative products while educating customers about those products. ESCOs will not likely be selling

"REV" to an end-user. Most customers will not know or care what "REV" means. However, ESCOs can and will sell specific products and services that can act as conduit for delivering the goals of REV if they are allowed. Similarly, ESCOs won't be selling the fact that the utilities can earn hundreds of millions of dollars with deployment of energy efficiency and DERs. They will be selling energy efficiency and DERs as tools to save the customer money and improve the environment. If the market is structured correctly, all parties win –the utilities, the ESCOs and the State, and most importantly, the customers.

The important aspect for the State and the utilities to consider in this mix of policy initiatives is that ultimately, the ESCOs must develop a stronger relationship with the end-use consumer. The ESCOs already have developed sales channels, marketing pipelines and information systems to communicate with customers in the market. The ESCOs provide the most efficient channel to implement REV and achieve the EAM and CES goals. And notably, the ESCOs will be instrumental in delivering on these goals without compensation from the State or from "ratepayers" and they will not be guaranteed any cost recovery that regulated utilities would demand.

Finally, on the issue of carbon reduction, the ESCOs serve two functions. First, they ultimately are the channel to sell electricity and gas products to the end users. ESCOs can promote fuel switching, including to DERs, to support the policy initiatives. Green products are already in the mix of products offered and those options can be broadened. ESCOs marketed renewable energy products long before the State adopted mandated portfolio standards. More importantly, however, to achieve the goals set by the State, the ESCOs will need to be deploying solar resources, storage resources and other DERs that decrease the burden on traditional power plants. In addition, they will need to continue to expand their offerings in demand response, energy efficiency and other conservation products and services.

The ESCO community can provide significant assistance in achieving the goals of all three initiatives. The Commission and the utilities simply need to enable them to do so by implementing the market reforms discussed below. The Commission and the utilities need to welcome the “ESCO of the Future” to the New York market.

Today, the Commission has a choice for how it will execute on its future energy policy vision. It can attempt to over-regulate, restrict and even prohibit the products that ESCOs can offer. If it does so, it will risk driving the best partners for achieving the goals of REV, CES, the EAMs and perhaps, other policy goals out of the New York market. Or, it can set in place policies that improve transactional and operational structures for how ESCOs enroll customers initially, and engage with customers on an hourly or daily basis to create an environment that will attract ESCOs who can deploy new and innovative energy management options for customers, all of which will be required to achieve the goals of REV, CES and the EAMs.

VII. ESCO OF THE FUTURE

Q47. You mentioned the "ESCO of the Future." What does that mean?

A47. As discussed above, ESCOs can offer products and services that deliver significant value to customers and to the markets as the whole. The ESCO of the Future is one that provides innovative gas and electricity commodity products that customers want like fixed-price and other cost-stability offerings, time-of-use products or pre-paid electricity products and more. In addition, an ESCO of the Future will offer its customers incremental services such as energy efficiency solutions ranging from low to high-tech. For example, attic insulation and hot water heater blankets and wrapping of pipes fall on the low-tech end. Smart thermostats and HVAC efficiencies, in-home energy management and direct load control fall on the high-tech side. Some ESCOs will be developing relatively large scale solar and co-gen facilities at commercial and industrial sites or community-based solar projects. They will be delivering grid interaction products and services such as demand response and storage capabilities. Finally, and perhaps most importantly, they will engage with consumers through a variety of communications channels so that customers can and will be engaged in managing their electricity and gas consumption when needed. An ESCO of the Future will offer other product and service bundles that may not be directly energy related, but nonetheless can help foster customer engagement and achieve the goal of more efficient energy consumption. What today may start as an energy/non-energy product bundle, such as an electricity plan bundled with Cable TV, may tomorrow become a great way to encourage customers to conserve energy. Imagine receiving an alert while watching your favorite TV show that energy prices are expected to spike and encouraging you (or perhaps even an offer to pay you) to change the temperature on your thermostat. This is one small example of the capabilities of the ESCO of the Future for New York.

Q48. Is this a feasible business model for the ESCO community?

A48. Yes. These companies exist today and are operating in other markets around the country and world. ESCOs are keenly interested in delivering on this future energy vision because ESCOs must innovate and engage their consumers to survive in a fiercely competitive industry. The current New York market structure is not the desired end state for competitive energy markets.

As the retail markets have evolved, the agendas for industry conferences have evolved. In the early days of restructuring, the New York restructuring model was often noted as the model to replicate. Then, as the Texas market opened, it took over the stage. Once Texas deployed its smart metering infrastructure, advanced products and services became the topic of interest for attendees. Today, it is rare for someone to attend an energy conference where the discussions are limited to the commodity component of the market. This discussion is happening only in New York. The agendas for nearly every industry conference are laden with panels, keynote speakers, executive insights and other content focused on ways to deploy innovative and customer-relevant service offerings – products and services that empower the customers and encourage them to engage with the grid. A review of the public ESCO business announcements that are compiled in **Exhibit__(FL-4)** also demonstrates that ESCOs are strategically focused in this direction. These announcements include:

- ENGIE, formerly GDF Suez Energy Resources, has recently completed a restructuring that sold off its merchant generation business and the company is now strategically focused on providing new, innovative and consumer-focused energy solutions.[27]
- TerraPass has executed a partnership with Hertz car rental company to offer carbon offsets.[28]

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[27] See: http://www.retailenergyx.com/; http://www.engieresources.com/engie-resources-launches-engie-advantage-to-help-customers-finance-energy-efficiency-initiatives-press-release.

[28] See: http://www.retailenergyx.com/sy.cfm/3027/Hertz-Partners-With-Retail-Supplier-Affiliate-To-Offer-Carbon-Offsets-To-Customers

- Direct Energy's parent company, Centrica, is deploying a global connected homes strategy with its Hive home energy management products.[29]
- An LED lighting and solar development company has recently acquired an ESCO.[30]
- A smart home device company has acquired a Texas-based ESCO and intends to offer integrated home automation and green energy offerings nationwide.[31]

It is clear that the ESCO business desired by this Commission is achievable. It exists in other markets. However, the Commission cannot just wave a wand and make it happen. The Commission must be the leader and direct the utilities to build the platforms upon which the ESCOs can execute the ESCO of the Future business model. ESCOs must be fiduciaries of their investor capital and must be strategic in which markets they pursue. The energy landscape is changing globally and some markets will be more attractive than others. New York was once positioned as a retail energy market leader, and with the REV initiative, has

[29] See: http://www.energychoicematters.com/stories/20170413b.html

[30] See: http://www.energychoicematters.com/stories/20160926aa.html

[31] See: http://www.energychoicematters.com/stories/20170125z.html

the opportunity to again position itself as a leader in attracting this type of strategic investment.

Q49. Why can't the utilities fill this role?

A49. In addition to the issue of aligning risk appropriately as discussed above, significantly more important to achieving aggressive policy goals is the sheer magnitude of the market and the goals of the State of New York. No single company can provide the services outlined above to all the customers in a utility's service territory. The customer count is simply too large and the customers' interests are too varied. For example, ESCO A might thrive in selling solar in upscale neighborhoods but the willingness to curtail load through demand response initiatives in those neighborhoods might be near zero, at any price. ESCO B might offer great energy efficiency and demand response tailor-made for single-family detached homes built in the 1960s with one or two central air conditioning units. ESCO C might focus its products on high-density apartment buildings for all income brackets. It will be much more effective to have a diversified set of competitively motivated market participants actively working to reach customers with new products and services than to rely on the handful of regulated utilities to deploy programs under cost-based regulation to meet the goals that the State's policy leaders have set.

Q50. Do ESCOs offer any advantages in customer outreach?

A50. Yes. ESCOs have already invested millions of dollars in customer outreach including advertising, marketing, and information system development. Their business models are designed to reach thousands of customers annually. They already have direct access to a significant customer base and are generally aware of whom the energy decision maker is within their customer base.

Q51. What do you envision the role of the utility to be going forward as the stakeholders in the state strive to meet the goals you have mentioned?

A51. To incorporate the ESCOs of the Future and to facilitate achievement of the State's policy objectives, the utilities need to evolve to become the "Utilities of the Future." The utilities need to become the facilitator of these ESCO services, and not the provider or the "gatekeeper." Under today's policy framework, the utilities own the tools required to achieve the State's goals, including the metering infrastructure and customer data. The utilities should invest heavily in these pieces of the network with the goal of making real-time energy consumption data readily available to consumers and their third-party representatives. The utilities must also be open to a shift in the billing paradigm to allow ESCOs to directly bill their products and services to customers. This shift from a utility consolidated billing platform to ESCO consolidated billing, where the utility's charges for distribution service are included in the ESCO bill, will be essential. The challenge of operating the ESCOs of the Future is much greater if the ESCOs cannot directly engage with their customers through the bill.

Q52. Do ESCOs have any experience with Supplier Consolidated Billing platforms?

A52. Yes. In Texas, Supplier Consolidated Billing <u>is required</u> of all ESCOs. Every customer in the competitive areas of the Texas market receives a supplier bill for commodity, wires charges and supplemental products and services, if applicable. The Texan utilities send only several dozen bills every month – to the ESCOs for their wire charges. Additionally, Supplier Consolidated Billing is required in the Georgia gas market. Supplier Consolidated Billing is also required in the Alberta, Canada, gas and electric markets. Many of the suppliers operating in those markets are currently operating in New York.

Dual billing, where a customer receives two bills, one for commodity supply and one for delivery, is allowed in New York. While dual billing is utilized frequently for larger commercial and industrial customers, residential customers have consistently indicated a preference for a single bill. Because of this dynamic, most of the restructured markets, including New York, have defaulted to a utility consolidated billing platform where the utility continues to bill the customer. Unfortunately, the billing capabilities of utilities are extremely limited. This practice limits the products and services available in the market. A retail supplier cannot sell an integrated value-added, market-interfacing energy product or service if it cannot send the customer an explanatory invoice every month (or more frequently). The billing protocols implemented in New York provide relatively little flexibility and, as a result, the evolution of innovative products has been constrained. The current restriction to utility consolidated billing is a barrier to a more innovative market that offers a wealth of value-added products and services.

VIII. NYPSC NOTICE

Q53. In the Notice that gave rise to this testimony, the Commission has asked for comment on 20 statements or questions. How do you respond?

A53. Because the Commission asked for responses to those questions and statements, I am providing a response. I am including my responses to those questions as **Exhibit__(FL-6)** to this testimony.

Q54. Why are you including them as an Exhibit rather than as the direct content of your testimony?

A54. I am responding to those inquiries because, when the Commission asks specific questions, it deserves specific answers. However, I am including them as an Exhibit because I believe the questions are based on flawed premises and, as a result, are driving to unhelpful answers.

Q55. Why are the premises for the questions flawed?

A55. The questions assume that only certain supplier product offerings offer value (i.e., those that save customers money and those that offer energy efficiency and energy management services).[32] However, as discussed above, there are numerous characteristics that can add value. For instance, a customer may want budget certainty, which can only be achieved through fixed-price product offerings available from ESCOs. Or a customer may desire another pricing arrangement that better suits its needs, such as block/spot pricing, that is simply not available from the utilities. Limiting ESCO product offerings as contemplated in the Notice will significantly reduce, and potentially eliminate, these product offerings in New York.

The questions also assume that ESCOs are "overcharging" customers who pay more than the comparable default service rate.[33] However, as discussed above, this does not reflect an apples-to-apples comparison for numerous reasons. First, the comparison of a variable-rate and fixed-price product ignores the budget certainty value offered by a fixed-price product. Second, the comparison fails to recognize that there are still supply-related costs captured in the utilities' delivery charges which mask the true cost of supply and artificially deflate the default service rates. For example, National Grid "currently recovers the costs to procure

[32] *See, e.g.,* Notice, Question 1.

[33] *See, e.g.,* Notice, Question 2.

electricity to serve its supply customers in ***both*** the commodity ***and*** delivery portions of its rates . . . ."[34] In stark contrast, ESCOs can only recover these costs through their supply prices.

Q56. What are the true costs of default service?

A56. There are essentially three types of costs: (a) wholesale costs; (b) procurement and energy provision costs; and (c) administrative costs. For instance, for electricity, the wholesale supply costs are billed through the NYISO. These NYISO costs can be identified as either billed to electrical load (i.e., billed based on energy) or as billed to transmission (i.e., only billed to transmission customers). If the costs are billed to electrical load, those costs are incurred by both ESCOs and the utilities to provide supply service. However, all of these costs are not currently being billed through the utilities' default service rate; instead, some of these remain in the delivery portion of the bill. Conversely, ESCOs must collect all these costs through their supply charges.

In addition to the wholesale costs of energy, the utilities also incur other costs associated with the procurement and provision of default service, including:

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[34] Docket 17-E-0238, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Electric Service;* Docket 17-G-0239, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Gas Service* (collectively, the "National Grid Rate Case"), Testimony and Exhibits of: Electric Supply Panel (Elizabeth D. Arangio, Charles F. Willard), Book 3 (Apr. 28, 2017), at 10 (emphasis added).

- Energy procurement costs, portfolio management costs and incentives;
- Hedging costs, including costs associated with forward hedges placed at the highest point in the market; and
- Renewable Portfolio Standard ("RPS") costs.

The utilities also incur administrative costs to provide default service. For instance, earlier this year, "National Grid added a new employee in the Energy Procurement area whose responsibilities include performing analyses associated with daily and monthly set up plans and reviewing such plans based on actual weather and actual send out."[35] National Grid included the percentage of that cost allocated to Niagara Mohawk in its revenue requirements.[36] Conversely, ESCOs must collect all these costs through their supply charges.

Q57. Are there other costs the Commission should consider in comparing supplier offers with default service rates?

A57. Yes. The default service rate reflects the wholesale cost of supply without any mark-up or margin. Instead, the utilities collect a regulated rate of return in their delivery charges. In stark contrast, ESCOs must collect their margins. In addition, because customers are automatically placed on default service and must

[35] National Grid Rate Case, Direct Testimony of Elizabeth D. Arangio (Apr. 28, 2017), at 32.

[36] *Id.*

affirmatively select an ESCO, ESCOs incur acquisition costs for those customers, that the utilities simply do not.

Q58. How can the Commission account for these costs?

A58. Wholesale costs, procurement and energy provision costs, and administrative costs associated therewith are all costs related to the provision of energy that can be readily identified and easily quantified. Thus, to the extent these costs are improperly captured in delivery charges, they should be added to the default service rate before comparing those rates to ESCO prices.

Q59. Do you have other concerns with the specific questions posed?

A59. Yes. The questions posed in the Notice are focused on how ESCOs should be limited, how ESCOs should be regulated, what ESCO products and services should be mandated by the Commission and what ESCO products and companies are profitable. These questions are not going to give rise to any answers that are going to resolve any of the market issues or help meet any of the State's policy objectives.

Q60. What should the focus be?

A60. The Commission should focus on how ESCOs can help achieve the State's policy goals. To this end, the Commission should be asking two sets of questions – one to the utilities and one to the ESCOs. The utilities should be questioned about their plans to facilitate the achievement of the policy goals outlined by the State and how other market participants fit into their plans. The Commission should be asking the ESCOs the corollary questions of how the ESCOs can facilitate achievement of the policy goals outlined by the State and what the ESCOs need from the utilities and the Commission to meet those goals. The Commission must inquire of itself what is more important – is it eliminating certain electricity and natural gas products by regulation, or is it achieving the greater vision of REV, CES and the EAMs?

Q61. As you noted in the opening of this testimony, the Commission has opened this line of questioning because there are reports of ESCO charges in excess of what the utilities would have charged. How should the Commission seek to further regulate the pricing and behavior of ESCOs?

A61. As I mentioned above, it is important to separate the issue of ESCO prices from any specific alleged market misconduct by a particular ESCO. I understand and support the desire by the Commission to protect customers. However, proactive market reforms will be more effective in doing so than will sweeping price and product restrictions. The specific and targeted market reforms that I discuss below will go a long way toward correcting any perceived problems with certain ESCO marketing practices. But most importantly, the Commission should address the perpetrators, as was done in Pennsylvania after the Polar Vortex, and let the other market participants continue to improve the market. The policy of enforcement to dissuade bad behavior from a few companies should be preferred to incremental regulation that will stifle innovation. I support targeted policies to further regulate the behavior and qualifications of ESCOs, but caution against policies to economically regulate ESCO prices or restrict ESCO product offerings or that eliminate certain customers from the market.

Q62. Please explain why broad pricing and product restrictions would be counter-productive.

A62. The Commission's oversight of the market should be designed to weed out the bad players and allow the others to thrive. This will not be accomplished through regulations attempting to economically regulate the products and services of all ESCOs. In fact, such broad efforts will be counter-productive to the goal of protecting customers. It will reduce all output from ESCOs to a common, sub-optimal result. The "good players" – those who invest substantial capital and human resources in compliance and regulatory oversight – will likely flee the market due to the cost, complexity and uncertainty associated with such overly restrictive price and product regulations. By contrast, the "bad actors" will continue to ignore the rules but will likely gain market share as they face less competition.

Q63. What market reforms do you believe are needed to facilitate achievement of the state's policy goals but will also help the Commission in its quest to

correct some of the behaviors in the market that are tarnishing the ESCO reputation?

A63. I will describe several below, but one important issue for the Commission to consider is the default service design.

IX. DEFAULT SERVICE DESIGN

Q64. Can you please describe your understanding of the default service procurement model in New York?

A64. Yes. For electricity, the utility-provided default product is a monthly, variable product that reflects largely a pass-through of short-term wholesale market prices in the NYISO market. The utilities engage in some hedging activities, however, unlike in other states where utility procurements are public and transparent, in New York this hedging activity is not made public.

For gas, the utility-provided default service typically consists of the utility's average commodity cost of gas and the average demand cost of gas plus various monthly adjustments that vary by utility. The utility's average commodity cost of gas mainly includes pipeline variable transportation charges, storage costs, and gas supply costs. Depending on the particular month, gas supply costs may or may not include physical or financial hedges as well as gas withdrawn from storage. The average demand cost usually includes fixed rates and charges associated with pipeline and storage capacity charges.

Q65. Is the New York Default Service Product a good product for consumers?

A65. Good is a subjective word. In my experience, the spot market price will yield a low price over long periods of time, but may be subject to significant volatility. That product could be good for some cost-conscious customers who could withstand big potential swings in the monthly bill, but could be very bad for customers who manage a tight budget from month to month. RESA Exhibit JDM-2 shows the electricity price volatility faced by customers on New York default service. Regulators in several other restructured states have opted to reduce price volatility of default service by utilizing full requirements wholesale contracts procured on a forward basis. This procurement approach is designed to reduce volatility of default service prices, but carries a small price premium for the stability. Mr. Makholm discusses the issue of volatility of New York default service prices in detail in his testimony filed in these proceedings.

Q66. Are there other negative features of New York's default service Structure?

A66. Yes. The variable nature of the utility default price may actually encourage ESCOs to offer a variable priced product. While there is nothing inherently wrong with a variable-priced product, some have raised concerns about ESCO over-reliance on such products. With the utility default price a monthly, variable rate, an ESCO can attempt to mimic the short-term energy default service product and with some of the tax incentives in play early in the advent of retail choice, it was quite simple to offer some savings compared to the utility rate with little or no technical market expertise. This facilitated the entry of many ESCOs into the New York market.

Because of the simplicity of this market, and the ability for the ESCOs to offer superior products to consumers, this market design was praised by most in the ESCO community at the time and was frequently referenced in other states as a model market design to emulate. The assumption was that a variable-priced utility supply product would be easier to compete against because ESCOs could offer price stability as a selling point. To some extent, this assumption may still hold true, but the New York default service design never addressed other issues for this market to develop properly, such as fully unbundling additional default service related costs and actively educating consumers as to the volatility associated with the utility default model. In addition, in the gas market, the utilities rely on many regulatory support mechanisms such as post-period reconciliations and deferrals that contribute to inaccurate price signals.

Thus, the current market design that includes a non-transparent short-term utility-provided default service, reliance on a rigid utility consolidated billing system and lack of advanced meter technology, communications and other systems to support product innovation is not the right model moving forward. This antiquated market model has left the New York energy markets lagging in the provision of value-added products and services, which are technologically feasible and being delivered in other markets. However, market reforms should be managed incrementally to allow ESCOs, customers, the utilities and the Commission to adapt to the evolving market design.

X. SUGGESTED MARKET REFORMS

Q67. How should default service be structured in New York?

A67. Dr. Makholm's accompanying testimony on behalf of RESA discusses the problems of retaining the incumbent monopoly utility in the default supplier role, from both an economic and market design perspective. I agree with his opinions and conclusions; however, I am not prepared to give a concrete recommendation on the appropriate default service model for New York at this time. There are pros and cons associated with each potential model. The Commission must first identify its desired goals. At that point, the Commission should convene a collaborative to modify the current default service model (and other energy market design issues) in a manner that will best achieve the State's desired policy goals. In general, any natural gas or electric default service structure should:

1. Encourage and enable retail competition and the development of value-added products and services.
2. Send accurate and meaningful price signals to consumers.
3. Prevent cross-subsidization.

4. Operate as a plain vanilla backstop to competitively supplied service instead of actively competing against retailer provided products.

Beyond these goals, the default service design should allow the markets to achieve the Commission's desired outcomes. In New York, these goals should include, at a minimum, achieving the objectives of REV, the CES and the EAMs.

Q68. Are there changes that should be made no matter what default service model is used?

A68. Yes. No matter what procurement and pricing model the Commission employs, it should require the utilities to appropriately reflect the ***full*** cost of providing default service to end use customers. In order for customers to make informed decisions about their energy supply options, they require accurate and timely price signals. Accurate price signals provide customers with the information they need to understand the value of competitive market offerings and to encourage load shifting, conservation, and energy efficiency.

To make these decisions, customers need to understand what portion of their rates and charges are regulated and non-bypassable (i.e., unavoidable cost[37] if a customer selects an ESCO) and what portion of their rates and charges are subject

[37] The unavoidable cost is a fixed, recurring (monthly or daily) charge that all customers have to pay whether or not they take electricity or gas supply from the utility or an ESCO. This unavoidable charge is the same for all customers, independent of the supplier of electricity or gas.

to competitive market forces and can be avoided if a customer selects an ESCO. To accomplish this, utility rates must be fully unbundled with costs properly allocated between the avoidable and non-avoidable portion of rates. To this end, the Commission should require the utilities to appropriately reflect the full cost of providing supply to end-use customers by maintaining an accurate allocation of costs between generation (i.e., avoidable) and delivery (i.e., non-avoidable) rates. The underlying decision of which costs are properly included in the utilities' avoidable rates and which are properly included in the utilities' non-avoidable rates should be cost-based and determined on cost causation principles. In particular, all of the supply-related costs discussed above should be allocated to the avoidable portion of rates. Indeed, an improper allocation of supply-related costs to non-avoidable rates is patently unfair to customers who choose competitive supply because they are paying duplicate costs and subsidizing the supply costs of those customers who choose to stay with the default service option. Further, because such an improper allocation results in "hidden" costs, customers are unable to identify the true value of their energy choices. Conversely, when costs are appropriately allocated between the utilities' avoidable and non-avoidable rates, consumers can properly evaluate the cost of supply services and avoid paying costs for which they are not responsible.

Q69. Can you briefly explain some of the different default service models that have been implemented in other markets to serve residential customers?

A69. Yes. There are several different electricity default service models that have been implemented or are under consideration. The most common default service model in the electricity markets is the theme of blending fixed price, full requirements wholesale contracts over a period of time so that the customers see a bit of price movement from period to period, but monthly volatility is minimized or eliminated. Some of these models include a portion of the load being procured in the spot market. The default service price change intervals range from quarterly to twice a year to annually. I am not aware of any default service plan that implements a static price for more than one year. This is essentially a wholesale default service design. In most states, the incremental costs associated with procuring the default service and managing the portfolio are passed through to default service customers but the preponderance of the costs associated with providing the retail service aspects are still borne by the distribution company and remain in base rates. In these markets, default service is effectively subsidized due to the failure to fully allocate and reflect all costs related to the provision of default service in the avoidable default services supply rate. Some ESCOs are not particularly fond of this model as it can perpetuate a comparison to the utility's seemingly fixed default service supply rate and may also lead to "boom/bust" sales cycles, especially when the static pricing period is on the longer side. On the other hand, customers and suppliers can easily see and manage "savings" compared to the default price. This model produces a default service product that is in many ways more analogous to the types of hedged fixed-price commodity-only offers that are commonly marketed by ESCOs. However, these default service products, like the New York default service products, should not be mistaken as comparable to ESCO products.

Another default service model is the "retail" default service model. This model is used in Maine electric market and Ohio natural gas market. Default service is competitively bid as in the model above, but the service is a retail-level service. The host utility still provides the billing, but the retail provider performs the EDI transactions and billing transactions to facilitate the development of the bill and may handle some customer service functions. One advantage of this model is that, if properly implemented, it can address some of the cost-allocation and cross-subsidy concerns noted above. This is because as a retail product the supplier must account for its retail servicing costs in its bid price. The challenge with this model is that the default product still enjoys an advantage in the avoidance of customer acquisition costs. The default supplier also benefits from economies of scale when bidding for large blocks of customers, but also bears migration risk of customers moving to other suppliers. A problem with both the wholesale and retail models is that the default service supplier selection is entirely on price. While price is a very objective criterion upon which to evaluate bids, such an exclusive focus on price may not align with other energy policy goals such as carbon reduction, deployment of value-added products and services or a greater deployment of renewables.

As an example of yet another model, Texas has adopted a true Provider of Last Resort (also known as the POLR) service. The electric utilities in Texas do not offer a "default" service or a "make no choice" service. All customers in Texas[38] are now on a competitive retail supply service. If for some reason a retail supplier can no longer support its customers (for example if the supplier suddenly exits the market), those customers are transferred immediately to the POLR provider, who is also a competitive retail supplier, until the customers can find a new supplier. In ERCOT, the Public Utility Commission ("PUC") of Texas appoints POLR providers on a non-voluntary basis. According to the Texas PUC, "POLR service is relatively high-priced, due to the costs associated with planning and the risk of serving an uncertain number of customers with uncertain electricity loads. POLR service is a safety net for customers whose chosen Retail Electric Provider (REP) is unable to continue service. This service is intended to be temporary and used

[38] Certain areas of Texas do not offer competitive choice, including the geographic areas outside of the ERCOT footprint and within some of the municipal and cooperative utilities within the ERCOT footprint.

only under rare circumstances when a REP is unable to provide service, or when a customer requests POLR service."[39] This model best facilitates the end-state (assuming it is coupled with other technological needs such as advanced metering and communications of meter data) goals of REV, EAMs, 50% by 2030 and 80% by 2050. However, it required a leap of faith in the market and a fundamental change in thinking by regulators. Texas took that leap in 2002 and it has proven to provide significant benefit to consumers in Texas. Other default service models that would blend attributes of the above are also viable.

Regardless of the end-state default service design, one immediate attribute that the Commission should consider implementing is a program wherein customers are prompted to affirmatively select their supply option. If a default supply option remains in the end-state market design, customers should be required to affirmatively choose this option instead of being placed on it automatically. As a quick reference tool, Table FL-4 summarizes the default service models discussed above, shows which states have incorporated each of the models and then summarizes the pros and cons of each default service model;

Table FL-4: Summary of Utility Electricity Default Service Models Used to Serve Residential Customers

[39] See: https://www.puc.texas.gov/consumer/electricity/polr.aspx.

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Default Service Model	States	Market Attributes	Market Outcomes
Utility Procured Wholesale with fixed retail prices for multiple months	Maryland Wash, DC Pennsylvania Delaware New Jersey Massachusetts Rhode Island Connecticut Illinois Ohio	• Fixed Price to Compare • Stable price	• Effective Comparison Price (but still not apples-to-apples) • Boom/bust cycles for retail companies • Subsidization by distribution company • No margin for utilities, so pricing advantage to default service. • Delayed market signal
Retail	Maine	• Fixed Price to Compare • Stable Price • Retail Components Included	• Effective Comparison Price (but still not apples-to-apples) • Boom/bust cycles for retail companies • Less Subsidization by distribution company
POLR	Texas	• Last Resort Service • High Priced • Immediate movement on and off POLR (not meter cycle constraints)	• Nearly 100% of customers on competitive service • Product innovation • High Customer Satisfaction
Utility Regulated Price	California Michigan	• Regulated or negotiated price	• No market signal at all • Price to compare is opaque • Difficult regulatory processes
Monthly Variable	New York	• Monthly variable price	• Strong market signal (although delayed due

Table FL-4: Summary of Utility Electricity Default Service Models Used to Serve Residential Customers

Default Service Model	States	Market Attributes	Market Outcomes
Price			to lack of metering infrastructure) • Lowest default service costs possible, over time • Most volatile default service price. • No valid price comparisons • Subsidization of default service • Drives to market commoditization

Table FL-4 describes various attributes of electricity default service across different restructured markets. Gas default service is generally not hedged in advance. The price for natural gas default service is generally a pass-through of market costs. In some instances, the commodity cost may be the cost at an indexed hub and the differential to deliver the gas from the hub to the utility is competitively bid and fixed.

Q70. Do you believe that a default service is needed in the market as a benchmark to measure other products?

A70. I do not. Like any other competitive market, the products and prices available from other ESCOs create the best benchmark to compare against because they sell similar products. New York customers have ready access to over 140 offers for electricity and 120 offers for natural gas available on-line at the New York retail choice website, www.newyorkpowertochoose.com. A list that includes well over 100 valid offers in a competitive market is going to give the customers all the information they need to make a purchasing decision. I propose enhancements to the website below which will give customers even more information than what is currently available.

Customers are intelligent. Only a customer knows what is in its best interests. Customers purchase very complex products every day, including cell phones, insurance, stocks, school loans, home mortgages, etc., and associated term contracts with long-term financing, long-term leases and/or extended warranty periods. By comparison in many respects the electricity and natural gas markets and market pricing are more transparent with scores of data available from shopping websites (including the PSC's own www.newyorkpowertochoose.com site), supplier websites and even the federal government. Customers do not need their local utility to tell them what a "standard" product is worth or how it should be priced. JD Power has done a survey of customer satisfaction in the electricity markets in each of the last few years and customers in Texas have consistently rated that market higher for customer satisfaction than any other market. It is clear from this survey that customers do not need a utility benchmark to be satisfied with their energy choices.

Some will argue the energy industry is complex so customers need to be protected. The energy market is no more complex than the cell phone market. Energy customers might not fully understand the ancillary services, capacity markets, pipeline reservations or other intricacies of the electric and gas markets. Similarly, most cell phone customers don't understand bandwidth auctions, cell tower contracts and communications technologies. Similarly, most customers buying cookies at a grocery store don't understand the underlying labor contracts, sugar import regulations, manufacturing requirements, emissions laws, packaging and transportation intricacies, bar coding and the other requirements that are required to get cookies in a grocery store. But they are comfortable buying cell phones products or cookies every day.

Q71. What other changes to the market should the Commission consider?

A71. In addition to the market design changes to default service discussed above, I would recommend changes that fall into five distinct buckets;

- Bonding and registration requirements;
- Transactional reforms;
- Reforms to the current set of Uniform Business Practices ("UBP");
- Market enhancements; and

- Investments in technologies related to the utilities' retail markets infrastructure.

Q72. Could you please describe your proposed changes to the bonding and registration requirements?

A72. The eligibility standards for participation in the gas and electric markets should be strengthened to encourage reputable ESCO behaviors. New York has been a market where new suppliers could enter to learn how to become a retail energy supplier. New York is moving to a very sophisticated market model under REV and no longer needs to be the market for startups to learn the retail energy business. Specifically, I recommend that the State impose a bonding requirement for all ESCOs. The amount could be fixed or could vary based on some objective measure of customer exposure.

Q73. How should the Commission determine the bond requirement?

A73. The Commission must first determine its goals for the market and then determine the types of companies it wants to serve in the markets. Other states have imposed bonding requirements on ESCOs. Some are relatively modest, fixed amounts as low as $50,000. Others like Pennsylvania, have been tied to the suppliers' in-state revenues. The Commission should convene a collaborative proceeding to assist in the determination of the appropriate dollar amount or methodology for deriving the financial assurance required. Regardless of the amount, ESCOs should be allowed to utilize any of the commonly used assurance instruments, including surety bonds, letters of credit, cash collateral or parental guarantees from companies with a credit rating worthy of supporting a guarantee. I have included **Exhibit__(FL-7)** to this testimony, which is a summary of surety requirements imposed on ESCOs in other states.

Q74. Could this financial security requirement be utilized as an enforcement mechanism?

A74. Yes. This bond or other surety could be utilized as part of the Commission's enforcement toolbox as well. If a supplier was not acting in a manner consistent with the regulations, it could be required to forfeit some or all of that collateral. Additionally, if the Commission found through proper due process that an ESCO violated its regulations, the Commission could require a larger security obligation. These measures would incentivize compliance and reputable ESCO business practices.

Q75. Would you also recommend additional experience requirements as part of the ESCO eligibility process?

A75. Yes. The ESCO eligibility requirement should also ensure that ESCOs have demonstrated experience with wholesale energy procurement, energy risk management and hedging. For example, Illinois requires retail suppliers to demonstrate detailed managerial and technical experience by identifying at least three management personnel with at least four years of experience with enterprise financial and administration responsibilities and buying and selling power in wholesale energy markets.[40] This type of provision will not keep a startup business out of the market. Rather, it would force a startup business to show that is was relying on experienced energy market practitioners to run key aspects of its business.

Q76. Should the Commission also review an ESCO's ability to offer energy-related value-added products and services as part of the eligibility review process?

A76. Yes. As part of an ESCO eligibility process, ESCOs should also provide information on their experience developing and offering energy-related value-added products and services such as demand response, energy efficiency, energy management or other services. If the ESCO had no experience in this area, it should be required to develop and present to the Commission a plan to develop these capabilities. Rather than a mandate for ESCOs to offer such products, these criteria would be added to the PSC's overall review of the ESCO's eligibility application. The PSC could consider the level of experience in offering such products (or the level of detail shown in the plan) as part of its determination of

[40] See: Subpart D of Part 451, Certification of Alternative Retail Electric Suppliers. http://www.ilga.gov/commission/jcar/admincode/083/08300451sections.html.

whether the ESCO has sufficient managerial and technical competency to be approved as a market participant in New York.

Q77. Could you please describe your proposed transactional reforms?

A77. Yes. I have several recommendations for retail market transactional improvements. The Commission suggested in the Notice that it expected "insistence from serious participants on rules that govern against consumer fraud, maturity beyond door to door selling, and a consumer base with a much greater degree of satisfaction."[41] RESA shares in this goal. However, current regulatory and operational protocols contribute heavily to the overall customer satisfaction level and also drive ESCO business decisions around marketing. For example, the customer shopping experience with ESCOs is constrained by the utility switching protocols, which are entirely out of line with customer expectations for on-demand service. Additionally, suppliers are attracted to door-to-door marketing because utility account numbers are required for enrollments and most customers only have access to such information while at home.

The best response to improve the market should be to develop policies that enable and encourage educated and empowered consumers who can easily and

[41] Notice, at p. 3.

proactively shop around for the best ESCO products. To accomplish this objective, the Commission should allow for the following market reforms:

1) Accelerated Switching: The Commission should adopt a true accelerated switching model – not one that is dependent on the meter read date. The last electric policy adjustment -- moving to a 5-day switch lead time – did not significantly improve the shopping experience for customers because they are still limited to switches on a meter read date.[42] Under this proposed framework, a customer who perceives itself to be in an unfavorable supplier arrangement can get new service in just a few days. Under the current model, if a customer finds itself in an unfavorable contract, the customer could be stuck in that arrangement for 35 or more days. If that customer decided to get out of its contract today, it is likely that the customer would not see the first bill from its new supplier for at least 40 days. If the switch request happens to fall inside that 5-day enrollment window, the customer may not see its first invoice from the new supplier for approximately 70 days. On average, about one-sixth of all transactions will happen within that five-day window, which means about 17% of all switching customers will wait approximately 70 days for the first invoice referencing the

[42] For natural gas, the Commission most recently decreased the on-cycle gas switching timeline of 15 calendar days to 10 business days effective 3/1/16. Due to capacity release in the gas industry, the accelerated gas switching collaborative did not recommend further reductions to the timeline or off-cycle switching at that time.

new supplier. In addition, there were several problems identified when trying to accelerate the gas switching times –mostly due to constraints dealing with the timing of monthly capacity releases.

2) Enroll with your Wallet: The Commission should direct stakeholders to develop a platform that will allow a customer to enroll with a supplier using simple customer-identifying information such as name and service address. Today, the rules require customers to know their account number to switch to a new supplier. (As stated above, the requirement to know the account number is one of the primary drivers of door-to-door marketing, as the account number is on the utility invoice.) The utility account number, which is completely unrelated to anything personal about the customer, should not be required. A picture ID or social security number that links to the service or billing address should be sufficient. Immediate access to historic usage information should also be made available for this scenario so that the suppliers could tailor a product based on the customers' needs as shown with the historic usage data. For example, the data might indicate that an efficiency product could be of high value to a particular customer. While all legal forms of marketing should continue to be allowed, including door-to-door and telephone-based sales, enroll with your wallet will allow the industry to rely less on "in-home" customer interactions (where the customer may be able to access its utility account number) and move to more traditional types of retail customer engagements such as retail stores and kiosks. This model works very well in the cellular industry and is beginning to be deployed in the electric and gas industry in more evolved markets.[43]

3) Seamless Moves and Instant Connects: Allow customers to transfer their ESCO service to another service address and to establish service at utility turn-on instead of first going on default service for a month. Customers who have previously contracted with an ESCO did so with some intent. If they request to move their contract to their new residence, the utility should heed that request. The summer months, which see moving activity, coincide with what are among the highest priced and most volatile market for electricity. If a customer has protected itself from market fluctuations though a fixed-price ESCO contract, the customer should be able to keep that protection, even when the residence changes. Instant connect/seamless move will allow customers to keep the benefits and protections of ESCO products that they have already contracted for. This is the norm now in cable and even in the telecommunications industry, where a customer can now take a land-line phone number to a new address. There is simply no reason energy service should not be portable like cable, internet or telecom services.

[43] http://www.energychoicematters.com/stories/20170214a.html

4) Affirmative Choice on Enrollment: when a customer enrolls for distribution service with a New York utility, the customer should be prompted to make a choice of supplier, even if their choice is utility default service. The utility should be required to offer information about different offers from different suppliers and, if providing information about default service, the representative should be required to inform enrolling customers that the default rate is an option but is priced based on the short-term energy markets. It is not guaranteed and the price changes from month to month. This change would also incentivize marketing behavior beyond door-to-door interactions as suppliers would be able to focus marketing on move-in related activity. For example, in Texas it is common for ESCOs to market through various referral services through partnerships with real estate agents, moving companies, and other home service providers.

5) A Better Shopping Website: The current shopping comparison website (www.newyorkpowertochoose.com) was the second of its kind when first deployed many years ago. This website was recently updated (just a few days before testimony in this proceeding was filed).[44] The updates are an improvement

[44] RESA members were informed of the website update as a result of a trade publication article. See http://www.retailenergyx.com/sy.cfm/3301/New-York-Power-To-Choose-Site-Redesigned for article published on September 13, 2017 announcing the redesign. To my knowledge, neither RESA nor RESA member companies were asked to contribute to the redesign efforts. As stated elsewhere in this testimony, the RESA members (and other ESCOs) are well positioned to help the state meet its energy policy objectives. The state should be working with RESA members, calling on their collective market expertise, to help achieve the state's energy policy objectives.

over what was in place, however, for some reason, the updates to this website were made with no input from retail suppliers. Because the DPS Staff proceeded without input from suppliers, whose products the website is providing information about, the website is still insufficient.

It should be updated similar to Pennsylvania's www.papowerswitch.com, which provides information about companies' specific offers. Additionally, the Pennsylvania website provides direct links to suppliers' websites where customers can easily and rapidly enroll with a supplier and while it shows the default service option, it also shows the volatility of the default service option. The Pennsylvania website has proven to very successful, receiving a commendation from the Governor's Office of Transformation, Innovation, Management and Efficiency ("GO-TIME") for the use of technology to promote increased citizen engagement. According to the Pennsylvania PUC, its shopping websites attract nearly one million visitors per year. The PUC also noted that a survey conducted about the energy market revealed that 90% somewhat or strongly agree that the website provides helpful information; 87% of respondents are very or extremely satisfied with the website; and 70% say that the website is very or extremely easy to navigate.[45] Massachusetts recently deployed its own shopping website,

[45] Pennsylvania Public Utility Commission, Press Release*: PUC Websites for Natural Gas and Electric Shopping Receive GO-TIME Award for Promoting Increased Citizen Engagement*, August 14, 2017.

www.energyswitchma.gov. This site offers its viewers the same type of valuable content but the offers can be sorted by price, term length or renewable energy content. Additionally, a customer can request that either energy-related products and services and/or non-energy-related products and services be shown as well. Inclusion of this type of attribute in the website redesign could facilitate more rapid deployment of rooftop solar and/or energy efficiency products. Had ESCOs been invited to assist in the redesign, this attribute might have been included in the recent redesign.

In addition to simply updating the website, the Commission should actively promote the website and encourage the utilities to do the same through bill inserts, bill messages, public service messages and other media. Again, a better shopping comparison website could encourage different marketing behavior by suppliers by encouraging more web-based enrollments. The Commission could also leverage this website to encourage reputable ESCOs. Listing offers on this Commission-sponsored website should be a privilege, not a right. ESCOs with an unsatisfactory track record should forfeit this privilege.

6) Customer Referral Program: The Commission recently eliminated the utility customer referral programs. This was due to a concern that the programs exacerbated perceived problems with the market by funneling customers into a short-term product (two-month, seven-percent discount) which would renew onto a variable rate product. The Commission should bring back the program but model it after the Pennsylvania Standard Offer Program which allows referred customers to be placed on a 12-month, fixed-price offer product that provides a discount off the current utility price to compare. I suggested above that the Commission consider moving to a different default service model. A customer referral program should be designed to complement the chosen default service model and then be re-introduced into the market.

Q78. How will these suggested transactional improvements address the Commission's concerns?

A78. A motivated and empowered customer is the best form of consumer protection. While there may be a role for regulations and oversight in the ESCO market, the best way to incentivize consumer-friendly business practices is to ensure that customers have abundant choices they can quickly and freely exercise.

Transactional improvements that empower customers to more easily switch suppliers will result in better ESCO behavior as ESCOs must provide real value and good customer service to retain their customers.

The market participants, through complicated rules, regulations and utility protocols, continue to make the energy industry complex. The industry should endeavor to streamline the process to make market transactions easier for customers. There is simply no valid reason to hold customer data captive. There is no valid reason to not allow a customer who moves to take their energy contract with them. There is no valid reason to require up to 35 days for a customer enrollment with a new supplier. These problems are all of our own making. They are all readily fixable.

Q79. Could you please describe your proposed UBP Improvements?

A79. Uniform business practices are in a state of flux currently. Staff has recently issued a set of proposed UBP changes that would materially alter the current set of rules and sought comments from the energy industry.[46] Staff has also recently proposed a set of UBPs that will be relevant to the DER market participants and sought comments.[47] The proposed sets of new regulations may not align with the goal of innovation in the delivery of value-added energy products and services. Instead of allowing a piecemeal approach to regulating the energy industry, the Commission should instead take a proverbial step back, identify the market results it would like to achieve, then convene stakeholders to develop a comprehensive

[46] Case 15-M-0127, *et. al., supra,* Notice Seeking Comments on Revisions to the Uniform Business Practices (Issued March 8, 2017).

[47] 15-M-0180, *In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products.* Notice Seeking Comments on Proposed Standards (Issued April 12, 2017).

set of rules governing the energy markets.[48] The types of rule changes that will improve the market and customer experience include:

Contract Renewal and Price Change Rules: The Commission should review and update the current UBPs to ensure that customers receive adequate notice at the time of contract renewal, when the customer experiences a significant rate change, and when products convert from one pricing structure to another (such as fixed or introductory prices converting to a variable price). The pertinent UBP provisions are:

- **Section 5.B.5.d:**

  …Regarding contract renewals, with the exception of a rate change, or an initial sales agreement that specifies that the agreement renews on a monthly basis with a variable rate methodology which was specified in the initial sales agreement, all changes will be considered material and will require that the ESCO obtain the customer's express consent for renewal.

- **Section 5.B.5.g:**

  When a fixed-price agreement is renewed as a fixed-price agreement, the ESCO shall provide the customer with an additional notice before the issuance of the first billing statement under the terms of the contract as

[48] For further discussion, please see the comments filed by RESA in response to the proposed UBP changes, Case 15-M-0127, *et. al., supra*, RESA's UBP Comments (May 12, 2017). Similar comments were filed by RESA in the DER docket, Case 15-M-0180, *supra*, RESA Comments (June 9, 2017).

> *renewed, but not more than 10 days prior to the date of the issuance of that bill. This notice shall inform the customer of the new rate and of his or her opportunity to object to the renewal, without the imposition of any early termination fees, within three days of receiving the first billing statement under the terms of the contract as renewed.*

There are a few issues with these rules. First, the requirement to obtain express consent from the customer upon renewal, except when the agreement renews to a variable rate actually encourages ESCOs to place customers on more volatile variable rate products. Second, the renewal requirements for fixed price renewals require a second notice, which further discourages fixed-price renewals. Finally, these rules do not directly address other scenarios such as introductory prices, or mid-term pricing/product conversions from one pricing structure to another, or significant price changes that occur under a month-to-month variable product. RESA supports the continued ability for ESCOs to offer month-to-month variable products and auto-renewal products. However, rather than continuing the current UBP construct of defining what constitutes and does not constitute a “material change,” the Commission should implement a more direct approach that requires 30-days advance notice to the customer of any of the following:

- Renewal of a fixed-price agreement to a new fixed-price agreement
- Renewal of a fixed-price agreement to a variable-price agreement

- Expiration of any introductory price period that is greater than one month
- Any price increase exceeding 30 percent, including for month-to-month variable products

The Commission should also clarify in the UBP that no price change notice is required if an ESCO lowers a customer's price.

Q80. Do you have any recommendations regarding variable ESCO rates?

A80. Yes. I recognize that variable rates have been a point of concern in the New York ESCO market, largely driven by the experience during the Polar Vortex that left both ESCO and utility supply customers facing significant rate increases. Before turning to any recommendations, let me first discuss why ESCOs offer variable rates and why customers may choose them.

Q81. Why do ESCOs offer variable rates?

A81. There are several reasons. First, as noted above, the regulatory requirements in New York provide a strong incentive for ESCOs to renew customers onto a variable-rate product. Second, for an ESCO to offer a fixed-rate product, prudent operations would dictate the company execute accompanying wholesale energy hedges to support the retail price to which it has committed. A variable-rate product allows the ESCO to acquire customers without undertaking expensive wholesale hedges that can become divorced from prevailing market conditions.

Finally, I believe that the monthly variable nature of the utility default product is a further incentive for ESCOs to promote variable products.

Q82. Why do customers choose variable rates?

A82. A variable rate may be appropriate for a customer for a range of reasons. First, a customer may be able to find a lower price from a variable-rate offering. Second, a customer may not want to make a long-term price commitment that could carry a significant early cancellation fee. A variable product can be a useful bridge product for a customer in between suppliers. For example, if a fixed contract ends during a high price seasonal period (peak winter or peak summer), a variable rate for 2 or 3 months may be a good way to transition until a more attractive fixed-rate offer is available. Finally, as technology improves and smart meters are deployed, I would expect more and more product offerings to leverage variable or index-based pricing. For example, a customer may be able to maximize the value of a distributed energy resource if the excess supply were sold at high-priced peak periods and off-peak consumption were billed at lower off-peak hourly rates.

Q83. What are some of the concerns around variable ESCO rates?

A83. Following the Polar Vortex, many utility default service and ESCO customers experienced unexpected and significant price increases. Customers who enrolled onto variable rates may not have fully understood the potential price volatility involved. I acknowledge that many ESCOs may have over-relied on variable-rate offerings, although this was driven in part by the regulatory requirements in place. Additionally, there are different business models for variable rates. While some suppliers may tie a variable rate to some type of published market index, many ESCO variable-rate products, particularly for mass market customers, are not directly tied to a market index. Rather the ESCO retains the contractual ability to change the rate on a monthly basis, but the factors that influence the price change are largely at the discretion of the ESCO. This can benefit the customer as it allows the ESCO to actively manage its variable book and its wholesale procurement costs to smooth out some price volatility for customers. For example, whereas a fully index-based price may jump from 8 cents per kWh in June to 18 cents per kWh in July (if there is an unusual heat wave), the ESCO may choose to only raise its variable prices to 12 cents, in order to mitigate extreme price spikes for customers. Of course, the ESCO would then need to maintain the 12 cents per kWh rate level beyond the peak price month in order to recover costs and maintain profitability. While this does have benefits for customers, some may criticize the lack of transparency into the ESCO's variable rate changes.

Q84. What regulatory reforms are needed to address these concerns?

A84. RESA supports targeted UBP revisions to address the concerns around variable ESCO rates for mass market customers. Given the complexity of the issues involved, RESA would recommend a collaborative stakeholder process to develop and iterate specific UBP revisions to address this issue. I would note that these issues have been adequately addressed in other states that have recently revised consumer protection rules in response to similar issues. These variable rate policies generally fall into the following categories:

Additional Contract and/or Marketing Disclosures at Enrollment: States such as Pennsylvania and Maryland have developed rules requiring clear and consistent up-front disclosures in contracts and marketing materials to inform consumers they are electing a variable-rate product. These states adopted contract summary documents, similar to the required New York Customer Disclosure Statement, that requires the supplier to indicate in a simple contract summary chart whether the pricing structure is fixed or variable. However, supplier contracts and contract summaries must provide additional disclosures informing customers of the potential volatility involved:

> ***Code of Maryland Regulations, 20.53.07.08.***
>
> *(d) A clear and concise price description of each service, including, but not limited to, any condition of variability or limits on price variability;*
>
> *(i) if there is a limit on price variability, such as a specific price cap, a maximum percentage increase in price between billing cycles or minimum/maximum charges per kilowatt-hour for electricity during the term of*

> *the contract, the supplier shall clearly explain applicable limits;*
>
> *(ii) if there is not a limit on price variability, the supplier shall clearly and conspicuously state that there is not a limit on how much the price may change from one billing cycle to the next.*
>
> http://www.dsd.state.md.us/comar/comarhtml/20/20.53.07.08.htm

Pennsylvania has regulations[49] nearly identical to those noted above for Maryland. Texas has similar rules, however the Texas requirements clearly differentiate between index-based products and variable rates not tied to an index.[50] The Texas rules also require specific disclosure of any limits applicable to variable rates and if there are no such limits, a standardized disclosure statement must be provided informing the customer that the rate can change at the discretion of the supplier.

> *Texas Substantive Rules* §25.475. General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers. Excerpt from (g) F (iii).

[49] http://www.pacode.com/secure/data/052/chapter54/chap54toc.html#54.5.

[50] See definitions for "index" and "variable" in Texas Substantive Rules §25.475. General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers, http://www.puc.texas.gov/agency/rulesnlaws/subrules/electric/25.475/25.475.pdf.

> *For all other variable price products, a notice in bold type no smaller than 12 point font: "Except for price changes allowed by law or regulatory action, this price is the price that will be applied during your first billing cycle; this price may change in subsequent months at the sole discretion of {insert REP name."*

<u>Notice Requirements:</u> Other states have promoted greater customer understanding and awareness of variable rates by adopting new notice requirements either at the time the product renews or converts to the variable pricing structure or when there is a substantial rate increase in the monthly rate. These notices alert customers of the upcoming change enabling them to take action, such as switching to a different supplier or returning to default service if the new variable rate is untenable. I discussed above how the UBPs could be improved with additional clarity on notice requirements in specific renewal or product conversion scenarios. Below are examples of how other states have addressed notice requirements specific to variable rates.

Maryland Rules for Price Changes[51]

13 Notice of Change in Rate.

A. When a customer's rate changes, a supplier shall make available to a customer his or her rate for the next billing period:

(1) The rate shall be made available at least 12 days prior to close of the customer's billing period;

(2) The rate shall be made available in a clear, easy to access format prescribed by the supplier;

(3) The supplier shall promptly provide the customer written directions on how to access the rate:

(a) At the time of contracting;

(b) In the Contract Summary;

(c) When sending any notice as required in this title;

(d) Upon request; or

(e) If the supplier changes the directions for accessing the rate.

B. A supplier may provide an estimated rate for the customer's next billing period, provided the estimated rate is made available at least 12 days prior to the close of the customer's billing period. If the supplier provides an estimated

[51] See: http://www.dsd.state.md.us/comar/comarhtml/20/20.53.07.13.htm.

> rate for the customer, the supplier shall not use a rate for billing purposes that is higher than the estimate.
>
> C. Written Notice Requirement.
>
> (1) If a contract with a fixed rate for three or more billing cycles changes to a variable month-to-month price and a change in the contract rate will be equal to or exceed 30 percent of the supplier's current supply rate, the supplier shall provide written notice of the new rate to the customer at least 12 days prior to the close of the customer's billing period.
>
> (2) The written notice shall be provided by mail, or with the mutual consent of the supplier and customer, by email, text, automated phone message or other manner.
>
> (3) The supplier shall maintain records that such notice was provided to the customer.

Similarly, Connecticut has adopted multiple methods of providing notice of upcoming rate changes to consumers, including requiring: (1) an end of fixed rate notice 30 to 60 days before the end of a residential fixed-price term,[52] (2) a specific variable rate notice 45 days before converting a residential customer to a

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[52] Conn. Gen. Stat. § 16-245o(g)(1).

variable rate,[53] (3) a separate rate increase notice 15 days in advance anytime a residential customer's rate will increase by 25% or more;[54] and (4) the utilities and suppliers to develop an EDI-based process for the supplier to transmit upcoming rate changes on the consolidated utility bill.[55]

<u>Price Reporting/Posting Measures:</u> Some states have also required suppliers to publicly post historical pricing information to help inform customers about the potential pricing volatility associated with variable rates. In Connecticut, suppliers are required to post their highest and lowest variable rates charged to customers on a public website.[56] In Texas, suppliers must post a one year price history for variable products.[57]

Q85. Should New York consider similar measures as those noted above to address concerns regarding variable rates?

A85. Yes. I present these examples not to necessarily suggest that New York adopt any specific set of rules that have been adopted in other states, but rather to show that

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[53] Conn. Gen. Stat. §16-245o(g)(2). This provision was passed and implemented prior to Connecticut prohibiting variable price offers to and renewals for residential customers.

[54] Conn. Gen. Stat. § 16-245o(g)(3).

[55] Conn. Gen. Stat. § 16-245d(a)(2). The EDI rate change notice requirement was very technically challenging for both the utilities and suppliers to implement and may not be replicable for the New York market.

[56] Conn. Gen. Stat. §16-245(g)(14).

[57] Public Utility Commission of Texas, Electric Substantive Rules, Chapter 25, §25.475. General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers, Section (c)2G.

other states have tackled similar issues and have arrived at regulatory reforms that preserve the opportunity for customers to receive the benefits of competitive energy supply and associated products and services from ESCOs and allow them to be protected by consumer safeguards. As stated earlier, I recommend that the Commission convene a stakeholder collaborative, perhaps as part of the Track II phase of this proceeding, to explore these solutions that have been adopted in other states and arrive at workable reforms for New York.

Q86. Have some states sought to ban variable rates for residential customers?

A86. Regretfully, yes. In 2015, The Connecticut legislature voted to ban variable rates for new and renewing residential customers.[58]

Q87. Would you support a similar ban for New York?

A87. I would advise against a ban on variable rates, or any specific pricing structure for that matter, as it would be at odds with the type of innovation that the Commission expects through its REV and other energy policy goals. In particular, consumer value will be maximized when a customer can take advantage of lower real-time rates, and then, coupled with real-time meter data, communications technologies and enabling control technologies, can modify consumption during high-priced periods. This type of active energy management and consumer

[58] Conn. Gen. Stat § 16-2450(g)(4).

engagement is what is needed to achieve the goals of REV, the CES and the EAMs.

Q88. Why do ESCOs utilize door-to-door marketing and sales practices?

A88. ESCOs utilize the door-to-door marketing channel for a few reasons. First, and as discussed elsewhere in this testimony, the utilities require the use of a customer's utility account number in order to access historic usage information or to facilitate a switch to the supplier. The most likely place where a customer will have access to the utility account number is at the home. Also, because the market is relatively young, there is still an education effort that needs to be made, informing customers of their options for gas and electricity.

Q89. How could these problems be overcome?

A89. An "enroll with your wallet" program was discussed above. This would remove a tremendous barrier to sales in the market. Suppliers could set up kiosks at malls, sporting venues, airports and other high-traffic areas in lieu of knocking on doors. Also, the utilities could engage in comprehensive market education, informing customers holistically about their options. This could be accomplished through the programs discussed above, such as the seamless moves, customer referral programs, affirmative choice on enrollment and a better shopping website. It could also be done through a comprehensive media campaign, including radio, television, internet and other communications channels. While these changes will likely reduce the level of door-to-door marketing, I am not suggesting that it will stop the practice altogether.

Q90. Given that it is possible the practice will continue, what changes can be made to protect consumers?

A90. Door-to-door marketing, unlike some of the other issues discussed above, crosses many industries, and as such there is a combination of federal, state and perhaps even local laws and regulations addressing door-to-door marketing. With that in mind, the Commission need only consider issues that are unique to the ESCO industry. For example, U.S. Federal Trade Commission ("FTC") regulations require that all contracts be written in the language in which the sale occurred. The customer must be given a three-day rescission period and must be informed orally, in addition to within the contract, of the right of rescission. The FTC also requires that if a customer signs into any type of financing arrangement or indebtedness, that the selling company not transfer or assign that note of indebtedness until the end of the fifth day after the contract is signed.[59] States have added to these provisions, requiring certain information to be made known to the customers, as well as the inclusion of precise forms of identification, including dress codes and branding on outerwear. States have also incorporated

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[59] See 16 CFR §429.1.

business training, marketing training and background checks into their door-to-door marketing regulations. In considering how to proceed, the Commission must first consider what it perceives to be problematic with regard to the particular implementation of door-to-door sales by ESCOs that might warrant incremental requirements to the federal rules already in place, then implement rules to protect against that (or those) problem(s).

Q91. Are you aware of any best practices that RESA members employ that might be useful in the New York Market?

A91. Yes. Several of RESA members require training courses for their door-to-door representatives. The training includes product and market training as well as sales and marketing training. Some also include in-field compliance personnel who will oversee the practices of the sales representatives in real time. Others even will track, with geolocation technologies, the locations of their sales agents. As I mentioned above, I am not suggesting that the Commission enlist these practices as requirements. I suggest that the Commission take full stock of the goals of the State and the shortfalls in the market today, and then lay out a road map that outlines a path forward for the markets that corrects the problems with the market and enables achievement of the goals of REV, the CES and the EAMs.

Q92. Could you please describe your proposed market enhancements?

A92. Yes. The current Purchase of Receivables ("POR") mechanism should be modified. Under the current model, it is possible for an ESCO to implement some distasteful business practices. POR provides ESCOs with full payment (less a discount rate) whether a customer pays its bill or not. Therefore, an undisciplined ESCO might have little incentive through the POR mechanism to engage in disciplined pricing behavior. ESCOs do, however, have numerous other incentives to engage in disciplined behavior. For example, an ESCO risks losing its customer if it does not offer attractive rates. Nevertheless, I recommend that the Commission remove the incentive for undisciplined pricing that may occur under the current POR mechanism, such as implementing POR controls like a claw back provision exercisable under certain conditions. In Pennsylvania, FirstEnergy has implemented a claw back rule which would impose a penalty if 1) the ESCO's actual bad debt rate exceeds 150% of the residential class average bad debt, and 2) the ESCO charges rates that are above a pre-determined pricing threshold. In Pennsylvania, the pricing threshold used is the utility default rate, which is not a valid threshold in New York. In New York, it could instead be determined by the utility and stakeholders, and be based on a metric such as the class average ESCO price over a certain period. If New York moved to a new default service model, it could be tied to the price that emerged from that new model.

This test in the FirstEnergy market reveals two behaviors – whether or not the supplier has unusually high levels of bad debt and whether or not the supplier was charging what may be perceived to be excessive or abnormally high rates. If these two measures are exceeded, the utility would impose a claw back penalty that would charge the ESCO the difference between its actual bad debt amount for its mass market customers and the class average threshold. Any funds collected from the imposition of penalties should be used to reduce the overall ESCO-related uncollectible amounts that are used to derive the POR discount rates. In other words, the actions (and payments) of the "bad actor" will result in a positive market improvement (lower POR discount rate) for the other suppliers in the market.

These POR modifications can be achieved in short order, but should also be considered only a short-term solution. The PSC should require certain changes to the billing approach in the market aimed at encouraging more direct engagement between ESCOs and their customers. The PSC should establish an end-state goal of developing supplier consolidated billing ("SCB"). SCB is the same concept as Utility Consolidated Billing, and would include a POR provision. The difference is that the ESCO would create and deliver the invoice instead of the utility. Under this market construct, suppliers would build out a billing system that would capture their own full array of value-added services and save a line on the bill to pass through the utility distribution costs. It would be a significant task for a utility to build a system that would incorporate all suppliers' value-added products and services. The utilities have implemented streamlined billing systems that are built for disseminating millions of distribution bills every month. Currently, the distribution bills have limited line items to capture what are potentially complex supplier goods and services. Moving forward, it will be more efficient for suppliers to build complex billing systems that will accommodate their respective suites of goods and services, that can be used across multiple markets, and that add a line for the more basic distribution services.

Utilities in New York offer a range of billing options. Some utilities offer bill-ready billing (where the supplier can display a total dollar amount); other utilities offer rate-ready billing that requires the pre-programming of rates in accordance with certain rate formats such as fixed customer charges and $/kWh or $/dth or MCF charges. Under either model, the current system is not conducive to billing innovative products and services. A utility could build a billing system to accommodate certain value-added products and services. However, if a utility fixes its billing system to accommodate only certain value-added products and services, only those products and services will be offered in the market. The utility billing construct is one of the primary constraints to innovative products and services today. If the market continues to move forward with a singular utility billing platform, that platform will continue to be a constraining factor on the market.

SCB solves other problems as well. It will not only enable new product and service offerings but will enhance the likelihood that suppliers have made a significant investment in the market, increasing their commitment to a long-term business model. Additionally, under SCB suppliers are taking on financial risk of customer non-payment, which creates an incentive for suppliers to charge fair rates for their services. SCB creates a framework where suppliers can functionalize the tools needed for the State to meet the REV goals. Of course, once the products are functionalized, they empower the customers with the tools to better understand their energy usage, which in turn empowers the customers to take action to lower consumption and overall bill spend, facilitating achievement of the REV and EAM goals. Finally, SCB allows suppliers to differentiate themselves in ways to become more relevant to the consumer. Today, all suppliers are represented by a few lines on the utility bill. Suppliers and their unique competencies are marginalized in the eyes of the customers by utility consolidated billing.

The implementation of SCB will present certain technical, regulatory and business issues to address. Regardless, the Commission should set this as one of the fundamental end-state market design goals, so that value-added products and services can be effectively developed, sold, managed and invoiced. SCB can be deployed first as a pilot program to gain valuable experience and can then be expanded statewide. The utilities could be incentivized to implement SCB pilot programs through the EAM process.

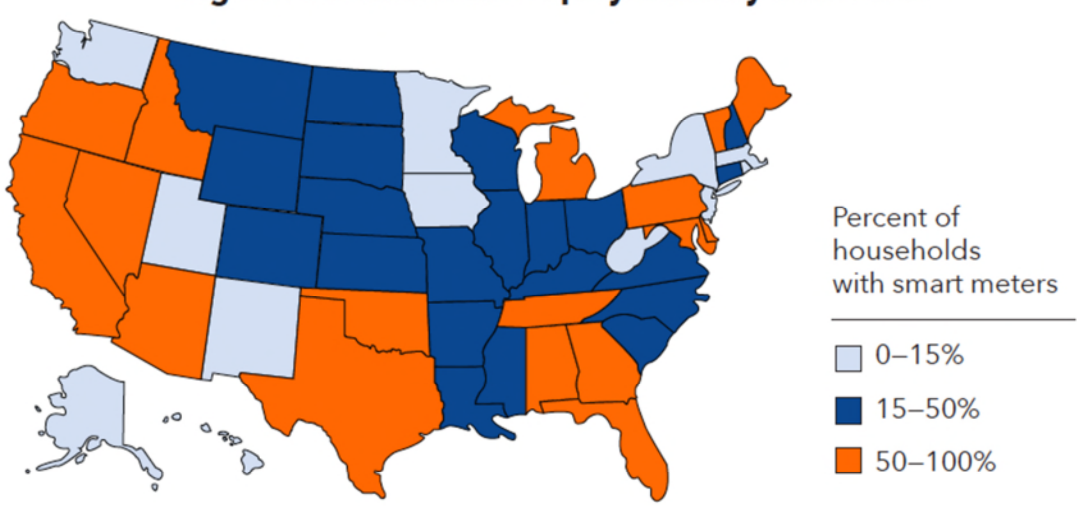
Until SCB is fully deployed, the Commission should compel the utilities to expand the current utility-consolidated billing model to allow for the placement of non-commodity charges on the bill. It is specifically the types of products that the Commission is seeking that are being choked out of the market by utility billing protocols. The current billing arrangements don't allow for these value-added products and services to be billed to the customer. Some have offered dual billing, an unattractive option to most consumers, as a compromise solution. Customers should not be compromised. It is the customers who will ultimately be engaging with the market under the REV framework. Customers should be given every incentive to participate in the market, because it is only under that end state where the State's goals are met. The dual-bill option for residential customers has virtually zero participation by residential customers in any market around the country, and it won't work in New York.

Q93. Could you please describe your proposed technology and utility infrastructure improvements?

A93. Yes. As stated before, the Commission has expressed frustration with what it views as limited product innovation from the ESCO community. The Commission is seeking market penetration of ESCO product offerings that are inclusive of energy efficiency and other value-added energy management products. The Commission can stimulate this type of product development by mandating the deployment of smart meters, advance metering infrastructure, and the requisite communications capabilities to ensure customers and their market representatives have access to real-time energy consumption data or near real-time consumption data.

According to the Edison Foundation, between zero and 15% of the homes in New York have advanced meters installed.

Figure 2: Smart Meter Deployments by State 2015 [3]



Source: Edison Foundation Institute for Electric Innovations

Direct Testimony of Frank Lacey on Behalf of RESA

As can be seen from this Edison Foundation map,[60] New York is in the small minority of states with such a low deployment of smart meters. According to the report, the New York investor-owned utilities had only installed 12,500 advanced meters by the end of 2015. The municipal and cooperative utilities in the State, by comparison, had installed almost 29,000 by that time. The report acknowledged Consolidated Edison's plans to deploy 3.6 million advanced meters by 2022, but also noted that only 4,100 had already been installed. Notably absent from the report were the advanced meter deployment plans of the other New York utilities.

There are some value-added products and services that could potentially be rolled out without the benefit of advanced meters, but they are few, and their value will not be maximized in the absence of advanced metering and data availability. The Edison Foundation report concludes by saying "Investing in smart meters is one of the first steps in building a smarter energy infrastructure."[61] The Foundation also concludes that the report shows that "smart meters are the building block for improving grid operations, integrating distributed energy resources, and offering

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[60] Adam Cooper, The Edison Foundation Institute for Electric Innovation, *Electric Company Smart Meter Deployments: Foundation for a Smart Grid*, October, 2016, p. 3.

[61] *Id.* at p. 7.

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customers more choices."[62] The report also acknowledges that "Building a solid, smart foundation for a more distributed, increasingly clean, and increasingly digital energy grid allows electric companies to deliver new services to customers." The Commission should heed this guidance and facilitate a network that will accommodate and enable the types of energy products and services it is envisioning for the New York market.

XI. CONCLUSION

Q94. Could you please summarize your testimony?

A94. Yes. At one time, New York was a leader in the development of competitive retail markets. Many of the tools the State and utilities implemented to facilitate retail choice nearly two decades ago were cited by RESA and others around the country as the model to replicate. The New York model, however, has not progressed with technology improvements and product innovations.

Recently, the Commission undertook an exercise to compare the price that ESCO customers paid for electric and gas service to what those customers presumably "would have paid" had they remained on utility default service. That analysis was flawed in several ways, most notably, by comparing the prices of dis-similar products. Despite the flawed analysis, the results prompted regulators to take

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[62] *Id.*

action against the ESCOs operating in the market, including establishing evidentiary hearings to examine the ESCO markets, in which this testimony is being submitted.

This Commission now sits at a cross road. It can pursue a path of heavy-handed economic regulation, banning products and services and restricting pricing, or it can develop a market that will deliver the products and services it desires and one that will help achieve the goals of the Clean Energy Standards, REV and the EAMs.

The key that will enable New Yorkers to experience the products and services that the Commission envisions for the market is to have the New York market evolve to one that will accommodate those same products and services. Those products and services already exist and are being delivered to varying degrees by competitive energy suppliers in other markets around the country. It simply does not make sense to believe that a supplier would not deliver its successful products to New York if the New York model could accommodate them. Without the market improvements, such as advanced metering and communications, no entity will be able to deliver the products and services desired by the Commission.

Perhaps most enlightening is the fact that customers don't appear to be any more unhappy with ESCO products and services than they are with utility products and services. A review of customer complaints from 2016, the most recent year for which data is available, shows that the customer complaint rate for ESCOs is virtually identical to the customer complaint rate for utilities in New York. It is likely that comprehensive reforms at the utilities will lead to more engaged customers and fewer complaints.

The Commission should not seek to regulate the products, services and pricing of the ESCO community. Instead, the Commission should take this opportunity to develop the market tools and infrastructure to create the Utility of the Future that will empower the ESCO of the Future to deliver the products and services desired by the Commission. The ESCO of the Future already exists and other states' energy markets are exhibiting the deployment of advanced energy products and services.

New York should endeavor to transform its retail model and regain the leadership status it once had in these markets. It is only with this kind of leadership that the policy goals with respect to REV, the utility EAMs and the 80 by '50 initiatives will be achieved.

Q95. Does this complete your testimony?

A95. Yes.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Service Companies.	)	**Case 15-M-0127**
Proceeding on the 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**

REBUTTAL TESTIMONY OF

FRANK LACEY

ON BEHALF OF

THE RETAIL ENERGY SUPPLY ASSOCIATION

OCTOBER 27, 2017

Rebuttal Testimony of Frank Lacey on Behalf of RESA

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Rebuttal Testimony of Frank Lacey on Behalf of RESA

I. INTRODUCTION

Q1. Please state your name and business address.

A1. My name is Frank Lacey. My business address is 3 Traylor Drive, West Chester, PA 19382.

Q2. By whom are you employed and on whose behalf are you testifying?

A2. I am an independent consultant testifying on behalf of the Retail Energy Supply Association ("RESA").

Q3. Did you provide Direct Testimony in this proceeding?

A3. I did.

Q4. What is the purpose of this testimony?

A4. This rebuttal testimony is filed in response to what DPS Staff and the other parties have filed.

Q5. Have you reviewed the other parties' filed testimony?

A5. I have.

II. SUMMARY AND CONCLUSIONS

Q6. Could you please provide a summary of your conclusions based on the testimony you reviewed?

A6. Yes. First, contrary to popular misconception, I conclude that the markets have a high degree of customer satisfaction. With a high complaint rate in 2015 of just 0.31% of customers lodging Commission complaints against ESCOs, and a complaint rate that has improved to what is on pace to be a 0.1% complaint rate against ESCOs in 2017, I find that more than 99.5% of all ESCO customers are satisfied with their ESCO products and services. Complaint data that is incomplete, inaccurate and misleading with respect to complaints lodged with the Commission should be rejected by the Commission. With this customer satisfaction rating, I conclude that the Commission should rule that ESCOs be allowed to continue to offer deregulated products and services to all mass market customers, however, I do not conclude that we should be complacent with respect to the current state of the markets in New York. There is consensus around the need for reform of existing market rules.

Staff Witness Joel Andruski demonstrated unequivocally that the utilities enjoy market dominance and that their dominance has expanded over the past three years. Mr. Andruski's revelation should point stakeholders and the Commission to the conclusion that it is essential that utility default service costs be unbundled in order to achieve a proper functioning competitive market. This is the first and foremost pressing market reform as it will provide customers with a transparent price signal for utility commodity service. Without proper unbundling of utility default service, any comparison between utility rates with ESCO pricing is simply inaccurate and inappropriate and additional market reforms undertaken will not correct this underlying flaw in the New York marketplace. Remaining market reforms to address ESCO licensing, billing and POR issues, supplier consolidated billing, concerns over variable rates and contract renewal, the use of certain marketing channels, the enrollment windows and potentially others should follow soon thereafter in a productive Track II proceeding.

The testimony of those seeking to return customers to default service or to reregulate the market is based on flawed analyses of costs, including most importantly, the false premise that the default service product and rates are even remotely similar to ESCO services, products and prices. Several of these witnesses have a flawed understanding of some of the most basic elements underlying the market, including which pieces of the market are regulated and which are not. The proper evaluation of restructuring the market is an analysis of savings against what would have been a regulated utility business model. The only witness offering testimony related to this issue showed that New Yorkers have benefited by an amount greater than $10 billion since restructuring began.

The Commission should conclude that the current New York energy markets are burdened with structural flaws. It should further determine that ESCOs continue to serve all mass market customers; the Track II proceeding should then commence immediately to implement solutions to the market design shortfalls. Myopic recommendations to force customers to return to a poorly designed default service model will harm customers and prevent the achievement of the

State's policy goals of REV and the CES and should be rejected by the Commission.

III. OVERVIEW

Q7. Could you please provide an overview of your rebuttal testimony?

A7. Yes. Upon reviewing the testimony provided in this case, I find that testimony falls generally into two distinct groups. First, there are those who are deeply in support of developing the New York retail energy market to a point where the Commission's vision of REV and the CES can be achieved with the active participation of ESCOs. In addition to my testimony on behalf of RESA, this group is comprised of witnesses for Direct Energy, Engie, Infinite Energy, Agway, Great Eastern Energy, the OE Group, Drift Marketplace, Robison Energy, and the National Energy Marketers Association. I include the testimony of John T. Haff, representing the New York State Office of General Services in this group. On the other hand, there is a group of parties who seem to believe that the utility default service option is the best option for energy supply for all residential customers (and some even suggest it for small commercial customers), that it should be the benchmark against which all other options are compared and some have even recommended that the utility rate be a de facto price cap for ESCOs in the market (despite utilities providing their customers with energy prices that vary across utilities and from month to month). This second group is comprised of witnesses for the DPS Staff, the New York Attorney General Utility Intervention Unit ("UIU"), the Public Utility Law Project ("PULP"), a public advocacy group that states it represents the interests of low-income customers, and AARP (which did not file sworn testimony, but rather just submitted answers to a few select questions presented by the Commission in its Notice).

The Testimony of the City of New York Policy Panel is supportive of continuing the use of ESCOs in the market, and are also supporting a more robust licensing process for ESCOs. I support both of those recommendations.

My rebuttal testimony will respond to several of the primary topics addressed by each of the witnesses. It will show where I am in agreement with some of the witnesses. It will also highlight areas where I am in disagreement with a particular witness or where I believe others have misstated, misrepresented, or misinterpreted very important facts that should be integral to fair adjudication of this proceeding.[1]

Q8. Could you please detail your findings after your review of the testimony?

A8. Yes. In general, the allegations against the ESCOs are (1) that they charge less than 15% more than the default service provided by the utilities, and (2) they

[1] Failure on my part to address certain arguments or positions made by other witnesses should not be deemed as any type of agreement with or endorsement of that position or argument.

engage in behaviors that give rise to consumer complaints. However, the analysis of pricing differentials ignores the fact that many of the utilities' costs to serve retail customers are buried in distribution rates and that the utilities have several other inherent cost advantages over ESCOs. In addition, the analysis of complaint data presented by the witnesses is factually wrong and incomplete. In fact, as I demonstrated in my Direct Testimony, the complaints against ESCOs have fallen significantly from the Polar Vortex levels and the recent rate of complaints against ESCOs is consistent with the rate of complaints against the utilities. Therefore, I conclude that the proposals advanced by certain parties in this proceeding (namely DPS Staff), which amount to the abandonment of an entire industry, are significantly out of proportion to evidence presented and the alleged market shortcomings.

My rebuttal testimony will show that the testimony of the latter group is premised on a misunderstanding of the current state of regulation and the original intent of deregulation. The proper evaluation of retail choice is whether or not customers have benefited against the world that would have been if utilities were still vertically integrated monopolies subject to cost-based regulation for fully bundled service. Retail choice should not be evaluated by whether or not an ESCO, who is purchasing energy in the same wholesale market as the default service provider, can provide lower-priced energy than the default service utility in light of the utility being required to pass through its energy costs with no mark-up and the current cross-subsidization from utility distribution rates. The regulatory model that New York has implemented for default service is simply not a fair representation of the true costs to serve a retail customer. The testimony of many of the witnesses in this proceeding supports this conclusion.

I will point out that the conclusions of the Staff Economist Andruski are fatally flawed and should be rejected by the Commission. Mr. Andruski showed that the markets are heavily dominated by the utilities and their market power has expanded over the last three years. Instead of acknowledging utility market power and suggesting changes to mitigate that, he suggests that ESCOs that hold just small fractions of a percentage of market share have the ability to maintain inappropriately above-market pricing and thus, should be price regulated.

Finally, I will show that the data submitted by several witnesses with respect to the number of complaints lodged against the ESCOs is inaccurate, misleading and incomplete. The complaints for all market participants, including the utilities, rose sharply with the Polar Vortex in 2014. Complaints against ESCOs subsided significantly in 2016 and are on pace for further decline in 2017. Completely omitted by any of the witnesses supporting a return of customers to default service is an analysis of the utility complaints, which occurred at the same rate of ESCO complaints in 2016.

IV. THE ESCO-SUPPORTIVE TESTIMONY

Q9. Have you reviewed the ESCO-sponsored testimony filed in this proceeding?

A9. I have.

Q10. Could you describe some of the important areas of agreement between you and those parties?

A10. Yes. First, there is agreement among these parties that it is a completely invalid analysis to compare a utility default service rate to an ESCO price. While I articulated this point in my direct testimony and supported it with several arguments, other parties have also added several other valid arguments showing that the comparison is completely flawed.[2] Next, several of the ESCO-supportive commenters suggested reforms to the Current POR program and a transition to ESCO consolidated billing.[3] I fully support that transition. Several of the ESCO commenters suggested a tightening of the standards for participation in the New York energy markets, including implementing enhanced licensing or other registration requirements, demonstrating technical expertise, enhanced bonding and/or financial assurance requirements, and more robust enforcement of existing

[2] In addition to the Direct Testimony of Frank Lacey, see e.g., Testimony of John Hanger, p. 18; Testimony of Guy Sharfman, pp. 3-4 and 14-15; Testimony of Michael Kagan, p. 19; Testimony of Charles Cicchetti, pp. 27-29; Testimony of Ronald Lukas, p. 15.

[3] In addition to the Direct Testimony of Frank Lacey, see e.g., Testimony of John Hanger, p. 31; Testimony of Darin Cook, p. 19; Testimony of Allen Tilley, p. 11.

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regulations to weed out some of the companies that are engaged in unseemly business practices.[4] I support those recommendations. Finally, others made some concrete recommendations for improving the market functionality, such as implementing "Enroll with your wallet" programs, enhancing the NY ESCO shopping website, affirmative choice of supplier on enrollment, retaining ESCO contracts when moving, and full deployment of smart meters.[5] I fully support all of these proposals.

Q11. Did any ESCOs make proposals you do not agree with?

A11. Yes. Ronald Lukas, testifying on behalf of Great Eastern Energy ("GEE") has suggested a few proposals that I disagree with. First, he proposed a series of what he calls benchmarks that could be used to evaluate ESCO pricing behavior. Mr. Lukas has proposed benchmarks that are, in essence, price caps. He states "consideration should be given to either (1) blocking customers from being enrolled at prices that exceed the benchmark or (2), issuing a warning to ESCOs that prices above the cap be immediately revised or they will lose their right to serve." (Lukas, p. 21.) A price cap is not a benchmark and should not be viewed

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[4] In addition to the Direct Testimony of Frank Lacey, see e.g., Testimony of John Hanger, p. 13; Testimony of Michael Kagan, p. 26; Testimony of Jeffrey Levin, p. 8; Testimony of Ronald Lukas, pp. 47-48; Testimony of Darin Cook, pp. 12-13.

[5] In addition to the Direct Testimony of Frank Lacey, see e.g., Testimony of John Hanger, pp. 22-33; Testimony of Michael Kagan, pp. 25-27; Testimony of Jeffrey Levine, pp. 5-7.

as such by the Commission. Price caps will lead to one of two results. The cap will be too low and ESCOs will not serve under the cap. Alternatively, the cap will be too high, but because that cap would become the "no harm, no foul" limit, ESCOs will be incentivized to price at that level.[6] Either result leads to market inefficiency. Mr. Lukas also suggested that in order for an ESCO to incorporate an Energy-related value added ("ERVA") product into the benchmarks, "ESCOs would disclose their prices for any ERVAS and the benchmark would apply to the commodity price as a standalone service." (Lukas, p. 20.) In other words, he is suggesting that the ESCOs "unbundle" their product pricing. For many reasons, this is unworkable. For example, in the instance where the ERVA products was a smart thermostat, the ESCO would have to effectively disclose its potentially-confidential contract terms with the thermostat vendor. Another example that shows the unreasonableness of this alternative is the home warranty ERVA product. How would that monthly insurance premium be broken out of the price? Explicitly revealing that premium could be competitively harmful to the service provider. Alternatively, the service provider could show any "price" it wanted to show for that product, rendering the commodity price comparison useless.

[6] For obvious reasons, a group of some or all competitive ESCOs would be in violation of federal anti-trust laws if they collectively agreed to prices for the market or a market segment. It is inconceivable to me that any witness would suggest such pricing behavior for an entire industry serving an entire customer segment. It is with good reason that our economy does not allow for such anti-competitive behavior.

Finally, this notion of unbundled product pricing is inconsistent with the trends and practices that customers are accustomed to in other industries. Cell phone minute allowances, text message fees and other incremental or unitized pricing structures are relics of the past in today's mobile phone market. These pricing plans have been replaced with unlimited plans and pricing based on data consumption. Amazon Prime is another great example of product bundling. Rather than paying incrementally for shipping, customers pay a one-time annual fee for the benefit of free shipping, plus access to Amazon's video on demand library. Requiring unbundled pricing for ERVA products will create a major disincentive for ESCOs to develop and market innovative product and service bundles. I do not oppose benchmarks in principle. Some benchmarks, such as those tied to utility behaviors, could be very useful in promoting price transparency in the energy markets. Mr. Lukas' proposed benchmarks, however, do not meet that standard and should be rejected.

Q12. Did Mr. Lukas make any recommendations about the APP customers?

A12. Yes. Mr. Lukas stated that as "a practical matter, GEE supports the current restrictions on serving APP customers." (Lukas, p. 48.) I disagree. This restriction makes no sense whatsoever. His recommendation (and the current policy on APP customers), leaves the most financially vulnerable customers in the market with no options to protect themselves from market fluctuations. I have done no customer analysis myself about the desires of low-income customers, but in every other state I have worked in, the low-income advocates have always sought a fixed-price default service option to protect the low-income customers from market fluctuations. I have not seen any testimony to suggest that New York low-income customers are any different from low-income customers in any other state. Therefore, I do not see any value to any customer, especially the low-income customers, in Mr. Lukas' recommendation.

NEW YORK STATE OFFICE OF GENERAL SERVICES

Specific Rebuttal to John T. Haff

Q13. Have you read the testimony in this proceeding from John T. Haff?

A13. I have.

Q14. Do you have any general responses to that testimony?

A14. I do. Mr. Haff's testimony should be afforded a great deal of deference. Mr. Haff works for the State of New York, but is in the position of participating in the electricity markets as a direct customer and as an ESCO. Mr. Haff sums up the problems with the market very succinctly when he says "[t]he electric market is dominated by the utilities. The utilities control customer data and have historically had a monopoly on the entire customer experience within their service territory." (Haff, p. 3.) He identifies other problems throughout his testimony and offers constructive feedback to the Commission, urging the Commission to fix the problems in the market and not force customers to return to default service.

Q15. Did Mr. Haff discuss the challenges that ESCOs face when operating in the energy markets?

A15. He did. He recognized that ESCOs are "subject to NYISO credit requirements and are required to make weekly payment to the NYISO within two days of the receipt of bills." And that they are "required to have collateral to back their NYISO purchases." He also identified the requirement to have "North American Energy Standards Board ("NAESB") digital certificates to participate in the NYISO markets" and that "[s]erving many smaller customers also requires electronic data interchange ("EDI") compliance…" He acknowledged that ESCOs "need to have knowledge and technical expertise to forecast, bid, schedule and reconcile all of their energy and capacity needs for all accounts," which requires "an understanding of how to convert metered data to the data that is submitted by the utility to the NYISO." (Haff, pp. 3-4.) He acknowledged that after "accounting for all of the above costs, Direct Customers and ESCOs must still compete against a utility, which is not allowed to make a profit on its commodity sales. That makes true competition impossible." (Haff, p. 4.) I concur with his assessment, but would note that while Mr. Haff also acknowledged customer acquisition costs, he omitted many of the other retail costs to serve customers at the retail level, such as customer care, sales, contract management, pricing, and others that are additive to the business functions Mr. Haff identified.

Q16. Did Mr. Haff discuss the utilities bearing some costs to provide default service?

A16. He did. And he also summarized one of the primary problems with the New York markets and the cost comparison analysis performed by Staff. He stated that because "utilities do not receive a Return on Investment ("ROI") on commodity, they are motivated to include as many costs as possible under the delivery portion of a customer's bill. In fact, utilities are incented to allocate all possible commodity and employee/technology costs to a customer's delivery bill, since that is where the utility receives an ROI. As a result, no accurate comparison is possible between utility and ESCO commodity costs." (Haff, p. 5.) I agree with this assessment wholeheartedly, and as I state below in response to Mr. Andruski, this cost-recovery mechanism creates an environment that gives the incumbent utilities immense market power, allowing them to underprice competitors in the market, ultimately preventing ESCOs from providing services to customers and/or driving them out of the market altogether.

Q17. Did Mr. Haff identify any other utility tactics that would give them a pricing advantage over ESCOs?

A17. He did. He noted that utilities can "use 'load Modifiers,' which are generators within their territory that do not participate in the NYISO markets but have contracts with the utility. The output of these generators is netted out of the load that the utility reports to the NYISO. By doing this, the utility can avoid contributing to Ancillary Service costs. When a utility avoids Ancillary Services, all other market participants must pay more for Ancillary Services because the total Ancillary Services costs remain static." (Haff, p. 5.) He also noted that the utilities "have other contracts for energy and capacity supply that are reconciled through other delivery charges. These mechanisms allow utilities to under-allocate costs to commodity, making accurate comparisons impossible." (Haff, p. 5.) While I have no independent knowledge of these utility resources, the description provided by Mr. Haff indicates to me that these resources would provide the utilities with significant cost advantages. This would further enhance their ability to exercise market power in the competitive markets and further render any cost comparison between utility commodity pricing and ESCO pricing meaningless.

Q18. What did Mr. Haff say about the allegations against ESCOs in this proceeding?

A18. He does not dispute that some malfeasance has occurred in the market, but believes "that remedying specific abuses is possible without a general prohibition on service to an entire market segment." (Haff, p. 6.) I agree with his observation and conclusion.

Q19. Do you support Mr. Haff's recommendation to re-establish the New York Office of Retail Market Development?

A19. I do. This office could be a valuable resource for the Commission to stay close to the ESCO community, develop educational materials for consumers in the state and, as Mr. Haff stated, provide "an ongoing mechanism for the Commission and market participants to identify, monitor, and correct market issues." (Haff, p. 7.)

Q20. Do you agree with Mr. Haff's recommendation that ESCOs should not be regulated under Article 4 of the Public Service Law?

A20. I do. Mr. Haff summarized his position very succinctly. "Forcing ESCOs to match or beat a zero-margin product offered by utilities is not reasonable. That is especially true in light of the fact that the utilities' commodity costs can be artificially suppressed." "Allowing other market participants to compete with utilities can have significant benefits for consumers. Competition can spur innovation and produce the value-added products and services that form the backbone of the Commission's Reforming the Energy Vision initiative." (Haff, p. 8) The Commission should heed Mr. Haff's recommendations and endeavor to unbundle the utilities' costs to serve default service load and improve the market so that consumers have access to robust commodity and value-added energy products and services.

V. THE NON-ESCO SPONSORED TESTIMONY

Q21. Have you reviewed the testimony filed in this proceeding by the non-ESCO parties?

A21. I have.

Q22. Do you agree with any of the recommendations made by these witnesses?

A22. To a limited extent, I do. However, I generally disagree with their overall conclusions and many of their recommendations.

Q23. Could you please elaborate?

A23. Yes. As a practical matter, the witnesses for the state and the consumer advocates have made some valid arguments that reforms should be made. I agree with some of those recommendations and made similar suggestions in my direct testimony. But to be clear, before describing those areas of agreement, it should be unambiguous that I do not support the forced migration of customers back to the utility, sweeping limitations on ESCOs' ability to sell energy products and services to mass market consumers, any abridgement of contracts, efforts to either force the sale of certain ESCO products, eliminate ESCOs or ESCO products from the market, or proposals for pricing regulation, including any type of price cap on ESCO products and services. I should also note that while these witnesses made several recommendations for sweeping overhauls of the market, these recommendations were made without any analysis of the impact of these changes on the consumers, the utilities, the ESCOs, the state's policy initiatives, or the markets generally.

With that stated, some of the other witnesses have identified areas for market reforms that I agree warrant some consideration. For example, Ms. Alexander recommends "a reform to the purchase of receivables programs". (Alexander, p. 9.) While Ms. Alexander and I may not agree on the specific modifications to be implemented, I also recommended changes to the POR program in my direct testimony. I note that a few of the ESCO witnesses also recommend similar reforms. Ms. Alexander, however, does not address the issue of customers receiving two bills instead of just one. As a result, her testimony leaves a very important question unanswered. Mr. Norlander also suggests reforms to the POR programs if the Commission does not eliminate the programs altogether. (Norlander, p. 32.) AARP does not make any concrete recommendations about how to reform the program, but rather only states that certain POR reforms "have recently been the subject of debate in the Illinois State Legislature." (AARP, Response to q. 8.) POR changes are needed. But these changes must consider the burden of customers paying two bills instead of one for the energy service (competitive supply and regulated delivery). The solution to that problem is

ESCO consolidated billing, where the ESCO takes ownership of the customer relationship, including the responsibility for billing and collections for energy and delivery charges. I described this solution and a transition mechanism to reach this end state in my direct testimony.[7]

Ms. Alexander also dedicates an entire section of her testimony about the ESCOs' ability to implement variable contracts by use of a negative option to renew to a variable price contract. I also raised this concern in my direct testimony. I am in agreement with her that this section of the Uniform Business Practices should be modified, but should be so modified in a manner that benefits all stakeholders, including the consumers. Given the complexity of the issue, I believe a stakeholder process should be convened to review and consider UBP changes to

[7] The Public Utilities Commission of Ohio ("PUCO") has recently ruled on two different utilities' Purchase of Receivables plans and in both has advanced the market with respect to Supplier Consolidated Billing. In Case No. 15-1507-EL-EDI, the PUCO ruled that their "desired course for competitive suppliers is to ultimately partake in supplier consolidated and dual billing. This would facilitate the innovative marketplace for the state of Ohio, and would easily resolve how suppliers can bill for non-commodity goods and services that they wish to market and then bill to their customers. A POR program is a short-term fix, and it does not represent, in this Commission's opinion, a large leap in the competitive marketplace that we hope to continue to foster in this state – a marketplace based not only upon pricing options, but one based upon the delivery of innovative products and services" (PUCO Finding and Order, *In the Matter of the Commission's Review of the Purchase of Receivables Implementation Plan for Ohio Power Company*, para 24, pp. 7-8, September 27, 2017.) More recently, in the Dayton Power and Light Electric Security Plan, the PUCO established a two-year pilot plan for Supplier Consolidated Billing. In the Dayton Order, the Commission cited the language from the Ohio Power proceeding quoted above and stated that their approval of the Supplier Consolidated Billing pilot was consistent with that goal. (PUCO Opinion and Order, *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 16-395-EL-SSO, para 68, pp. 36-37, October 20, 2017.)

address customer notice and contract disclosure issues relevant to variable rates and other instances of pricing or product conversions.

The UIU/NYAG Panel has suggested reforms to the NY Power to Choose website that are entirely consistent with my recommendations in this regard. Like I did, the panel points to the equivalent website developed for the Texas market and describes that website's ability to provide "more useful information than what is available when they research various plans on the New York Power to Choose website." (UIU/NYAG Panel, p. 39.)

Q24. Would it make sense for the Commission to adopt only these policies that you, the staff panel, PULP and the UIU/NYAG panel all agree to?

A24. I would not recommend that approach, as these alone would not generate the ideal market outcomes that could be achieved if the Commission pushed for a more comprehensive reforms. The energy markets are complex. For many years, the Commission has been attempting to cobble together minor changes to the market. It is time for a comprehensive reform that will enable the state to meet the goals of REV, CES and the utility EAMs. Modest regulatory reforms will not aid in achieving the ultimate goals. Tightening of standards, technical expertise, and financial assurance requirements, for example, will only help ensure the Commission that it has assembled the "right team" to tackle the objectives. However, if the tools such as advanced metering, price signals, market transparency, data availability, supplier billing and the others are not available to implement the plan, the goals will not be achieved. Additional oversight, regulations and standards alone will only lead to higher market costs.

Q25. Some of the non-ESCO witnesses generally support market changes only as a "second-best" option to putting all of the residential customers back on default service. Do you agree with that philosophy?

A25. Of course not. The fundamental recommendations of these witnesses is to remove either all mass market customers or at least all residential customers from the energy market and place them with the utility default service. The witnesses who recommended this outcome performed no analysis of impact of this approach on any entity, nor did they assess the impact of this policy on achieving the goals of REV and CES. If implemented, this outcome would provide benefits to nobody. This approach would leave customers with fewer options for energy supply, fewer options for innovative energy management solutions and little opportunity for developing distributed energy resources. The state policy goals of REV, the CES and the utility EAMs will languish with utility control of all residential customers. This is a lose-lose-lose outcome.

Q26. Did any of the witnesses who suggested forcing mass market customers back to default service present any study or analysis of the costs or other impacts associated with that policy?

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A26. No. No witness even discussed the possible outcomes of their recommendations on any of the market participants. Therefore, it is not possible to assess with any degree of certainty what the impact will be on the customers, the retail markets, the utilities, or the wholesale market. In my review of the testimony presented in this proceeding, I conclude that the impact on customers would be negative, at a minimum, eliminating their access to any type of long-term hedges or price certainty and exposing them to greater levels of volatility. It seems obvious that the retail markets would suffer as customers would be precluded from purchasing products of choice, prices would be less transparent, and the incentive for ESCOs to invest in innovative products to facilitate the goals of REV and the CES would be eliminated. The utilities would need to implement additional hedges and/or put a larger percentage of customers into the short-term markets, either of which could be disruptive to the wholesale markets, especially in the short-term.

Q27. Why do you believe that certain parties are recommending a return of customers to utility default service?

A27. It appears that there is a lack of understanding about the original intent of the restructuring of the energy markets. PULP witness Gerald Norlander correctly noted that the Commission stated in its Opinion 96-12, that "Market forces overall are expected to produce, over time, rates that will be lower than they would be under a regulated environment. As we move toward competition, our expectation is that rates overall will be reduced." (Norlander, p. 15, citing Commission Opinion 96-12, emphasis added.)

The phrase "under a regulated environment," taken from an order written in May 1996, is clearly a reference to the then-extant fully regulated, vertically-integrated utility model. It is not a reference to today's deregulated pricing structure where the utilities procure energy on a pass-through basis from a competitive wholesale market. If price is the only metric that the Commission is concerned with, then the only fair test of whether restructuring is succeeding is to ask whether the market is now delivering prices lower than they would have been had that vertically-integrated utility model continued. It is a mistake for the Commission to change the standard now and say that the appropriate measure of success is the ability of competitive retailers to deliver prices lower than those delivered by the hybrid semi-regulated, subsidized utility default rate.

The differences in pricing between utility default rates and ESCO prices today is attributable to the cumulative effect of a number of granular decisions made by the Commission over the years about features of the market. These include, among others:

- Utility POR vs. No POR;
- Fully-hedged v. partially-hedged v. fully-unhedged default service;

- Low v. high barriers to ESCO market entry;
- Subsidized default retail services v. unbundling of default retail costs;
- Earning a return v. no return on default service;
- Starting all customers on default service v. placing them with ESCO service;
- Operational requirements under UBPs;
- Operational requirements under supplier/utility tariffs;
- Uniformity (or lack of uniformity) of utility rules across the state; and
- Utility metering and communications investments/technologies.

The pricing differences between today's default service and ESCO prices reflect these Commission decisions and do not indicate any failure of retail access for residential customers.

None of the witnesses suggesting that customers be moved back to default service have offered any shred of evidence that rates overall have not been reduced with the restructured market framework, compared to what would have occurred had New York retained regulated monopoly utility service, nor have any even attempted to account for any of the differences between the cost structures of ESCOs and ESCO products and the cost structures of default service and default service products. On the other hand, NEM witness Dr. Charles Cicchetti has testified that "U.S. Energy Department data shows that ESCO participation in the New York energy market has provided New Yorkers over $10 billion of savings as compared to utility pricing." He goes on to describe several hundred million more of savings made available by ESCOs in the New York market. (Cicchetti, p. 10.) On this basis alone, we should continue to push for market reforms and improvements.

Instead of performing an accurate comparison of ESCO prices to what regulated rates would have been, several witnesses obfuscate this record by asserting that the current utility default service rates are "regulated rates." They are not and they should not be confused with the "regulated environment" written about in Opinion 96-12. Witness Norlander, for example, says "[i]f competitive new entrants would have to provide the same or better service at prices lower than the <u>regulated rates of the default service utilities</u>…" (Norlander, p. 15.)

Mr. Norlander also incorrectly testifies when arguing for ESCO tariffs, that "Currently, the only rates set by the Commission are those of the incumbent utilities…" (Norlander, p. 30) At best, these statements are only partially true, with respect to procurement practices, not rates. At worst, they reflect an uninformed witness or are meant to intentionally mislead. Utility commodity default service rates are not "regulated" as that term is generally understood in the context of utility regulation. The procurement practices of the default service utilities are approved by the Commission. The rates, however, are set based on market conditions and partial hedging strategies that vary by utility and utility service territory. The resulting rates are the byproduct of a Commission regulated process, but the rates themselves are not the outcome of a rate case. Nor are they subject to any type of cost of service analysis and approval. The delivery charges for utility delivery service, on the other hand, are regulated and as a monopoly, the delivery services face no competition in delivery services from ESCOs or any other third party. I have to assume, however, that because his comparison is to ESCO prices, Mr. Norlander is suggesting that utility default service rates are regulated.

Q28. Do other witnesses appear to believe that default service rates are regulated?

A28. Yes. Ms. Alexander, when criticizing GEE's marketing literature, asserts that the example she is discussing is "not a proper comparison to regulated utility default service rates." (Alexander, p. 39.)

Perhaps more importantly, Staff witness Joel Andruski, who is the chief economist for Staff in this proceeding, bases his arguments almost entirely on the premise that utility default rates are regulated. He states: "the reasonably determined <u>regulated prices for the incumbent utility</u>, for the most part, have not constrained the pricing of the fringe providers." (Andruski, p. 10.) "[P]rices … are not being reasonably constrained by <u>the regulated prices of the incumbent</u>

utility." (Andruski, p. 11.) "That the incumbent utility's price is regulated does not preclude another supplier from charging rates below the utility, and is not a given that another supplier must charge rates above the utility." (Andruski, p. 13.) "This suggests that such rate regulation of the utilities' prices is not producing the intended effect of disciplining the prices charged by the ESCOs in the market." (Andruski, p. 13) "[R]egulation expanded to include the regulation of ESCO prices would be preferred to a market only with the regulation of the utilities' prices…" (Andruski, p. 13) (Emphasis in all Andruski quotes added.) It is worrisome that the chief economist for the State in this proceeding has either a fundamental misunderstanding of the markets (which would call into question all of his market analyses) or that he understands the underlying markets and is intentionally trying to suggest that default service is a price-regulated option, when it is not.

Q29. Why is it important to point out that these witnesses are stating that the utility prices are regulated?

A29. It reveals either (1) a complete lack of understanding about the underlying market design or (2) the words are being used to mislead the readers into believing that a regulated solution that includes all costs and a rate of return is available in the New York market from the default service providers. In fact, if the default service costs were subject to a cost of service analysis and all costs were properly allocated to default service, the resulting "regulated rate" would in fact be higher than they are today. The lack of understanding of the underlying market would provide a rational explanation for the simplistic and inappropriate price comparison of ESCO prices and default service revenues. Under the assumption of a regulated default service, it would be easy for the witnesses to assume that all costs are appropriately allocated to default service. They are not. But even under the assumption that the market is regulated, a comparison that shows the market dominant regulated market participant has a lower cost structure than dozens of competitors with every incentive to provide a lower cost should provoke questions about the dominant participant's pricing. It should not provoke questions about the competitors' pricing. In New York, the default service products are purchased in the same market where ESCO products are purchased (See Andruski, p. 17). The constant references to a "regulated" default service calls into question many of the analyses performed and recommendations made by these witnesses.

Q30. Are some of the parties suggesting a re-regulated market?

A30. I did not see any suggestion to reregulate the utilities, but that is perhaps because the witnesses believe that default service commodity prices are already regulated. On the other side of the coin, however, at a minimum, PULP and Staff both recommend that ESCOs be regulated by the Commission. While Staff's recommendation is explicitly about regulation of pricing, I assume PULP's recommendation is also related to pricing, as the Commission has a full set of rules, regulations and tariffs that represent regulatory oversight of ESCOs. As noted above, Staff Economist Andruski concluded that "regulation expanded to include the regulation of ESCO prices would be preferred to a market only with the regulation of the utilities' prices, or to a market with no price regulation at all." (Andruski, p. 13.) He also opined that "[g]iven the dominant position of a single provider in these markets, continued regulation in these markets is warranted." (Andruski, p. 10.) The "provider" he is referring to in this statement is the incumbent utility. PULP witness Norlander supports "the recommendations of PULP regarding other recommended changes to the current ESCO regulatory regime – such as, among other possibilities, regulation of ESCOs as utility corporations under Article 4 of the Public Service Law…" (Norlander, p. 6.) The regulation of prices from an entity operating in a market where prices are deregulated makes no sense at all. These recommendations, premised on a false assumption, should be flatly rejected by the Commission.

Q31. Is re-regulation of commodity pricing in the New York energy markets feasible?

A31. I do not believe it is. Electricity generation, and natural gas supply are deregulated at the federal level. The New York utilities have long-ago divested themselves of upstream assets that would be required to be integrated into their operations in order for the utilities to be price-regulated. The purchase and/or reconstruction of these facilities by the utilities would be prohibitively expensive if even possible.

Q32. If re-regulation of utility pricing is not feasible, does it make sense to regulate ESCO pricing?

A32. According to Staff witness Andruski, "the incumbent utilities have the majority share of these retail markets" (Andruski, p. 10.) He estimates the utilities' market shares to be between 52% and 91% of their respective markets. (Andruski, p. 12.) Elsewhere, the Staff Panel testifies that 23 electric ESCOs and 19 gas ESCOs serve approximately 80% of their respective remaining residential market shares (Staff Panel, p. 121), leaving each of the ESCOs with a market share of between less than 0.5% and perhaps as high as 2.5%. It seems a fool's errand to attempt to regulate the prices of multitudes of companies with *de minimis* market shares operating in a deregulated wholesale market, when the dominant suppliers in the market (the incumbent utilities) continue to offer a deregulated-price default service.

Q33. Could any aspect of default service be regulated?

A33. Yes, but the pricing cannot be regulated. The Commission, for example, has broad authority to direct the utilities how to procure its default service. It also has broad authority to require a proper allocation of costs to default service. It also has authority to eliminate some of the pricing gimmicks such as true-ups and deferrals. As I stated in my direct testimony, the Commission has accepted this current short-term procurement and default service pricing model which will, in most cases, lead to lower commodity prices over time than any value-added term energy product. However, as discussed below, under certain circumstances, like we saw with the Polar Vortex in 2014 (and again with less severe weather events in the winter of 2015 and summer of 2016), energy prices in certain months can be very high. This subjects all default service customers to significant levels of volatility and potentially extremely high monthly bills. Direct Energy witness Sharfman demonstrated these extremes pictorially in his direct testimony exhibit GS-8 where he showed the wholesale energy price curves for 2014-2016. Exhibit GS-10 represents this volatility numerically, where Mr. Sharfman shows that some default service customers saw monthly price swings in excess of 10% in almost two-thirds of the months from 2014-2016. In that same time period, the largest monthly swings for some customers (including some low-income customers) were greater than 100%. The New York Commission, whether conscientiously or not, has adopted a policy that favors lower-cost short-term volatile energy prices over one that favors low-volatility energy prices. New York sits alone in this regard for mass market customers. No other restructured energy market in the U.S. has an incumbent utility providing a monthly variable-priced electricity product to its residential default service customers. In New York, ESCO fixed-cost products are the only tool available that will allow customers to eliminate this volatility. Had the Commission chosen another default service model, which it is fully empowered to do, we would likely be having a different discussion today than the one of alleged “overcharging.” The commodity price tells only a piece of the pricing story, however. A comparison of ESCO prices to utility default service rates suggests that the costs to acquire, operate, manage and service the default service customers are zero. These utility costs are not adequately allocated to default service, rendering any current cost comparison meaningless.

Q34. Would an allocation of costs to serve default service customers increase costs to customers?

A34. No. It would have just the opposite effect. If costs to serve default service customers were properly allocated to default service, the corresponding costs would be removed from distribution rates. In the short run, the net cost to customers would be the same and distribution rates would go down for every customer. Over time, as customers left the utility for competitive service, the total costs to customers would be reduced.

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Q35. Several of the witnesses suggest that ESCOs have engaged in a practice of overcharging customers for energy services. Do you agree?

A35. In my belief, DPS Staff, and other parties who recommend banning ESCO's in New York, misuse the term "overcharge." First and foremost, overcharging suggests that ESCOs entered into contracts for a set price, then charged customers in excess of that agreed-upon price. DPS Staff and PULP witnesses have provided no evidence of ESCOs "overcharging" their customers. The witnesses seem to suggest that ESCOs are overcharging customers because customers could have bought a similar (but, in reality, different) product from a different supplier for a lower price over some limited period of time. If this was the criteria for overcharging, market participants in every market across the country would be guilty of overcharging every day. Consumers, for example, will frequently enter a convenience store and purchase a soda and a bag of chips for a dollar or two each. The similar products might be sold at a grocery store right across the street for 50 cents each. That doesn't mean the convenience store is overcharging. It means the convenience store is offering a good or service that is appealing to the consumer at a price that is appealing to the consumer. I provided an example in my direct testimony of consumers in New York willingly entering into mortgage contracts that will result in $1.3 billion in increased costs over the initial term of the mortgage when compared to an alternative mortgage product readily available in the market. No regulator is claiming that the mortgage company is "overcharging" its customers. Overcharging in the mortgage example would be contracting for a 4.00% interest rate, but charging a higher rate on the monthly bills.

Q36. What is the value of the ESCO value-added products?

A36. It is not possible for me, for any ESCO, for any regulator, for any DPS Staff personnel or for any other witness in this proceeding to ascribe a value to any ESCO product except the one that they themselves buy. I can tell you that the retail price of a Nest thermostat is $249.[8] The price has nothing to do with its value. The value of that product can be different for every customer. For those in a large house that consumes a large amount of electricity and gas for cooling and heating, the financial value is likely higher than to a small apartment owner in Manhattan, as Nest advertises that it saves about 15% on your heating and cooling consumption. Obviously, greater savings suggests a higher value to the customer. Alternatively, a small user of energy might also ascribe a very high value to having a Nest thermostat that is included in the monthly electric (or gas) bill because it might end up costing the customer something less than the full retail price. Additionally, while it might save that smaller customer only a modest

[8] See: https://nest.com/thermostats/

amount of money every year, it might be viewed as a status symbol by their peers. Value is subjective, and it depends on each customer's current perspective, thus it can it can only be assessed by the buyer of the product(s).

Q37. Have some of the witnesses made other incorrect or misleading statements?

A37. They have. In addition to the statements about overcharging and references to a regulated utility price, the Staff Panel also makes some serious misrepresentations about the complaints registered with the Commission.

Q38. Can you please explain?

A38. Yes. The Staff Panel testified in significant detail about the number of complaints received against ESCOs. (Staff Panel, pp. 82-83.) I have no issues with the numbers presented. They are the same numbers I used in my direct testimony.

The Staff Panel's presentation, however, suffers from several fatal flaws. First, it cherry picks years to over-emphasize the impact that the Polar Vortex had on the rate of complaints; it fails to recognize the more recent trends of significantly decreased consumer complaints; and most importantly, it ignores the similar complaints lodged against the utilities.

The Staff Panel concludes its discussion with a statement that says "[a]lthough these numbers indicate a modest improvement in initial complaints relating to ESCO marketing practices for 2016 they still <u>far exceed the number of complaints received collectively by all other regulated utilities in New York</u> including the lightly regulated telecommunications industry (refer to pages eight through twelve of the report).” (Staff Panel, p. 83, emphasis added.) The report referenced in the parenthetical is the December 2016 Office of Consumer Services Monthly Report on Consumer Complaint Activity. Pages eight through twelve of the report summarize only the complaints received in December for the regulated utilities. However, the data used by staff for ESCO complaints is annual data. Contrary to the Staff Panel assertion, as presented in my direct testimony, the number of complaints lodged against the regulated utilities in the state in 2016 is quite a bit higher (12,890) than the complaints received against the ESCOs (2,995). It is understood that the utilities have many more customers than do the ESCOs, so I presented an analysis of the <u>rate of complaints</u> in my direct testimony. This analysis shows that the complaint rate is virtually the same for both segments of the industry. It is not clear whether the Staff Panel meant to deliberately misrepresent this number or if they truly do not understand the magnitude of complaints lodged against the regulated utilities. However, I suggest that imposing draconian restrictions on ESCOs as a result of the complaints lodged against them is misguided unless the same punitive actions and restrictions are imposed on the utilities.

The Staff Panel also stated that during a portion of the period of their review, the “number of ESCO related complaints, and deceptive marketing and high bill complaints in particular, steadily increased through 2015." (Staff Panel, p. 82.) This statement, while factually correct, omits two important points. First, the panel ignored 2016 in this statement, which was in their period of review. 2,049 fewer complaints were lodged against ESCOs in 2016 (2,995) than were lodged against them in 2015 (5,044). This represents 40% fewer complaints. Additionally, the Staff Panel ignores the significant impact of the 2014 Polar Vortex on the industry and the influx of complaints it caused in New York and other markets as well, as demonstrated in my direct testimony. The amount of complaints lodged against ESCOs through August 2017 is down to 1,632.[9] This equates to an annual rate of 2,448 complaints, a reduction of more than 500 complaints from 2016 and a greater than 50% reduction in complaints since 2015.[10]

PULP Witness Yates also presents an analysis of complaint data. (See generally Yates, pp. 61-69.) Again, I take no concern with the raw data he presents on numbers of complaints. They are the same numbers used in the analysis

[9] See: New York Department of Public Service, Office of Consumer Services Monthly Report on Consumer Complaint Activity, September 29, 2017. Available at: http://www3.dps.ny.gov/W/PSCWeb.nsf/ca7cd46b41e6d01f0525685800545955/448c499468e952c085257687006f3a82/$FILE/August%202017%20MR.pdf.

[10] Based on the December 2016 migration reports for electricity and gas, there were 2.4 million choice customers at the end of 2016. If this number is still current, this would suggest a complaint rate against ESCOs in 2017 of just 0.1%. In other words, 99.9% of customers have not complained.

presented in my direct testimony. However, his conclusions are made without any regard to facts that should otherwise be very germane to his analysis. Mr. Yates presents two charts showing correlations between complaints and what he describes as "extra cost incurred by residential ESCO customers…" (Yates, p. 62.) His charts each show spikes in the winter months. A simple review of the history of the NYISO energy market would reveal, for example, that in the winter of 2014, market prices reached the highest sustained levels recorded in open markets. The chart below titled "Figure A-2" is taken from the 2014 NYISO Market Monitor State of the Market Report shows exactly how high prices were in this time frame.

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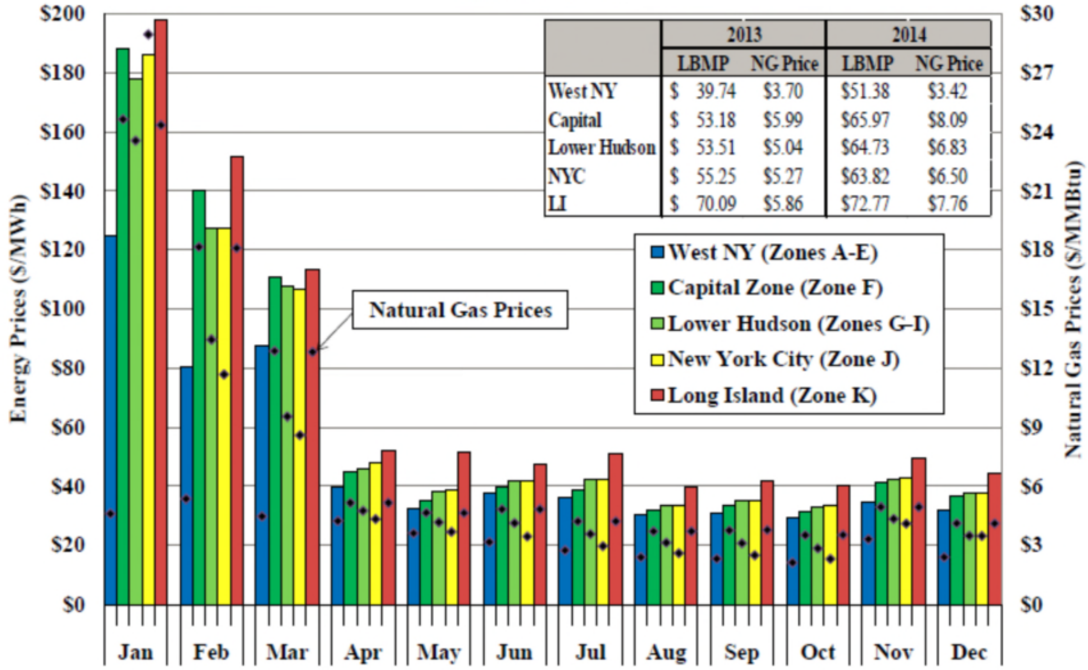
Figure A-2: Day-Ahead Electricity and Natural Gas Prices
By Month, 2014



I am not in any way suggesting that the complaints were not made. I am just suggesting that many customers, especially those on variable-priced products, would have seen invoices at levels never seen before. An analysis as provocative as the one presented by Mr. Yates has to question if the complaints were "valid" complaints, or just instances of upset and overwhelmed customers seeking assistance and answers. This was a problem that was prevalent in all of the deregulated markets affected by the Polar Vortex. I will discuss this in more detail below, but it is worth pointing out here that during this same three-month

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period, consumers lodged 4,678 complaints against the energy utilities, more than double the amount lodged against ESCOs (2,067) in this time frame.

In discussing his "correlation" findings, Mr. Yates states, "In the case of a correlation between ESCO extra cost and complaints, common sense might lead one to expect that there would be a causal relationship between the experience of <u>customers incurring costs for ESCO supply that were higher than comparable supply provided by their utility</u>, and the data suggest that this was in fact the case from 2014 -2016." (Yates, p. 64, emphasis added.) As stated by many of the other witnesses in this proceeding, the base pricing comparisons that are being used in this proceeding to reflect "overcharges" do not include any adjustments for the regulatory deferrals that the utilities made during this period of time.[11] If Mr. Yates' assumption about the causal relationship being <u>the difference</u> between the costs of ESCO supply and utility default service supply is true, the cause of at least a portion of the complaints then, is the utilities and the deferrals because the utility deferrals would have <u>increased the difference</u> in costs.

Interestingly, Mr. Yates' testimony notes "an extraordinary influx of initial complaints to DPS" in the February to April 2014 time frame. (Yates, p. 64.)

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[11] In addition to the Direct Testimony of Frank Lacey, see e.g., Testimony of John Hanger, p. 20; Testimony of Michael Kagan, p. 19; Testimony of Charles Cicchetti, p. 65.

He takes a full page of explanation to suggest that the "extraordinary influx" was caused by "new entrant ESCOs" who accounted for 41% of the complaints received in that period of time. (Yates, p. 66.) While I am not convinced by his analysis that new ESCO entrants were the root cause of the complaints, if this were the case, it would make a strong argument for more stringent ESCO licensing requirements, and not for banning ESCOs from serving residential customers. Further debunking the "new entrant" argument, however, is the influx of complaints against the utilities during this same time frame that Mr. Yates ignored. Overlooking the effect of the historic Polar Vortex in 2014 makes me question what else he ignored in his analyses.

Finally, in addition to the flawed analysis Mr. Yates presented about the ESCO complaints, he tells only half of the story. Like the Staff Panel, Mr. Yates neglected to inform in his testimony that the utilities received tens of thousands of complaints over the period that he reviewed, including 4,678 complaints against the energy utilities in the February to April 2014 period.

STAFF

Specific Rebuttal to Joel Andruski

Q39. Have you read the testimony in this proceeding from Joel Andruski?

A39. I have.

Q40. Do you have any general responses to that testimony?

A40. I do. He completely overlooks the proverbial "elephant in the room" with respect to the stronghold that the utilities have in the market. In his testimony, Mr. Andruski calculates HHIs (market concentration calculations) for the energy markets. Witness Kagan stats that "[m]arket share concentration is often measured quantitatively through application of the Herfindahl-Hirschman Index (HHI) which is calculated as the sums of the squares of the market shares for a designated number of competitors." (Kagan, p. 13.) Mr. Andruski's findings[12] that show with the utilities included in his analyses, all of the energy markets in New York are "highly concentrated" markets, with HHIs well above the threshold of 2,500 that he defined in his own testimony. (Andruski, p. 9.) The market concentration values range from a low of 3,459.76 in the gas markets and 3,582.62 in the electric markets (and these are outliers on the low side, being 3,000 points lower than the next lowest gas market and 1,600 points lower than the next lowest electric market) and a high of 8,196.54. Without the utilities included in the analysis, the market concentration scores for every New York electric and gas market fall under 1,500, which is the threshold that below which,

[12] I did not independently calculate HHIs for the New York energy markets. Therefore, I do not endorse Mr. Andruski's methodologies or his calculations. The focus of my testimony is to show that the conclusions drawn by Mr. Andruski based on his own analyses of market concentration are fatally flawed and illogical.

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Mr. Andruski defines as "unconcentrated" markets. Even in markets that at one time showed "moderate" market concentration without the utilities (NYSEG and RGE markets), competition has increased, bringing these markets to an HHI index of less than 1,500 in 2016. Yet, somehow, with this data he concludes because ESCOs are not offering prices below the utility, "[t]his suggests that such rate regulation of the utilities' prices is not producing the intended effect of disciplining the prices charged by the ESCOs in the market." (Andruski, p. 14.) Based on Mr. Andruski's HHI calculations, one could conclude that the utilities are exercising market power and are charging prices that are unreasonably low such to thwart competition.[13] For example, Mr. Andruski acknowledges that "ESCOs and utilities are subject to the same commodity markets for electricity and natural gas. Therefore, all market participants are subject to the same underlying movements in commodity pricing." (Andruski, p. 17.) Yet he is unable to explain how utilities keep their costs lower than ESCOs. Mr. Andruski then provides several speculative examples of how pricing practices could have

[13] I do not wish to suggest that utilities are in any way acting in a manner unsupported by the legal standards for operations in a competitive market. The utilities are acting in accordance and in compliance with regulatory mandates from the New York Public Service Commission. However, it is these mandates that have given rise to utility default service rates that are not reflective of the true cost to serve default service customers and because of that, are driving competition out of the market. As discussed by Mr. Haff in his testimony on behalf to the State of New York Office of General Services, the utilities also have no incentive to fix the problem, for fixing the ills in the markets will require capital investments, changes in operations policies and procedures, and will result in customers fleeing to competitive markets, which will ultimately reduce revenues and return at the utilities.

evolved within an ESCO organization, and concludes that "ESCO prices are sticky going downward…" and that "[t]his is not the outcome one would expect in a rigorously competitive market." (Andruski, p. 22.) Instead of inquiring about why the market dominant utility can maintain lower prices than dozens of other companies, all competing for market share, he focuses on ESCO costs, saying "outside of marketing cost, I do not see any significant underlying business reason which would account for the significant difference in ESCO and utility pricing." (Andruski, p. 23.) He is right that the utilities do not have to market to customers in order to maintain their stronghold on the energy market. All customers start on the utility monopoly service. The utilities bury the majority of the cost to serve retail customers, such as billing, customer care, executive time, and regulatory resources in their distribution rates. The utilities also benefit from regulatory protections such as the ability to defer costs to customers in times of market duress.[14] What is perhaps most concerning of all with Mr. Andruski's analysis however, is that it shows (and he does not mention) that over that past three years the markets, already dominated by the utilities, have become more concentrated. Exhibit JSA-2 details the market concentration calculations for each electric and

[14] In addition to the Direct Testimony of Frank Lacey, see e.g., Testimony of John Hanger, p. 19; Testimony of Michael Kagan, p. 7; Testimony of Charles Cicchetti, p. 65; Testimony of Ronald Lukas, p. 32.

gas market shows that with the utilities included, with the exception of the Con Edison electric market, every gas and electric market in the State has a higher HHI for 2016 than it did for 2014. Just the opposite phenomenon is demonstrated if the analysis focuses just on the ESCOs. The market concentration calculations without the utilities included show that the market concentration has decreased in every market except for the Con Edison electric market (400.09 vs. 420.85), the O&R electric market (574.06 vs. 602.6), the Central Hudson gas market (989.96 vs. 1,006.89), and the O&R gas (680.64 vs. 688.77), which are all still well within the bounds of "unconcentrated" markets. This clearly demonstrates that it is the utility-provided default service that is the source of market concentration and not ESCOs. Based on the fact that more competitors are entering the market, yet utility market concentration is increasing, I conclude, then, not that ESCOs should be price regulated, but rather the utilities' default service structure warrants a regulatory remedy, including a complete unbundling of distribution costs. The utilities should allocate fully all costs related to providing default service to the energy portion of the bill so the default service rates will more accurately reflect the true cost to provide default service.

Q41. Staff witness Andruski asserts that ESCOs have the ability to control pricing in the market. How do you respond?

A41. It is unreasonable to conclude that a group of fragmented ESCOs that have a collective 20% market share could control pricing in the market.

Mr. Andruski and the other staff witnesses readily admit that the data used in the staff analysis is fundamentally flawed. For example, the Staff Panel discusses at length the difficulty it had acquiring information on value-added products offered by suppliers. Instead of making educated estimates of value, staff ignored this benefit and did not make any adjustments to its calculations of alleged "overcharging." To my knowledge, no adjustments at all were made to the base utility data to account for any type of value to customers. The conclusions about the ability to control pricing in the markets were made based on this flawed data and Mr. Andruski's apparent misunderstanding of the comprehensive energy market structure. His conclusions should be dismissed by this Commission.

Q42. Do you concur with Mr. Andruski's conclusion that continued regulation of the market is warranted?

A42. Mr. Andruski concludes "[g]iven the dominant position of a single provider in these markets, continued regulation in these markets is warranted." To the extent his conclusion reflects regulation of ESCO pricing, I disagree. I agree that the Commission needs to exert more oversight over the utilities, their procurement, pricing and other practices related to the delivery of default service. The utilities should be further regulated to ensure they are not providing default service energy

Rebuttal Testimony of Frank Lacey on Behalf of RESA

at below-market costs, driving competition out of the market. I recommend implementing the market reforms outlined in my direct testimony, and also that the Commission take very seriously the recommendations to unbundle utility costs applicable to default service, and also reconsider the default service model for New York consumers.

Q43. The critics of your plan will suggest that you are only seeking higher default service costs so that ESCOs can compete against them. How do you respond?

A43. I am not suggesting any increase in costs to customers. I am only suggesting that the utilities allocate a proper amount of costs to default service so the true cost to provide default service is visible, transparent and avoidable if competitors can provide the same service more efficiently. Every penny allocated to default service rates should be removed from distribution service rates so that customers and the utilities are financially neutral to this change.

Q44. Mr. Andruski also makes the argument that a budget bill product from the utilities provides similar value to customers because it eliminates month-to-month bill volatility. How do you respond?

A44. I am pleased that Mr. Andruski acknowledges that "month-to-month bill volatility concerns many customers." (Andruski, p. 24.) For a variety of reasons, however, Mr. Andruski's claim is simply wrong. The budget bill products in New York provide no real level of price certainty and they offer no protection against price swings and market volatility. A budget bill will not protect a customer from paying the costs associated with an event such as the Polar Vortex. It will only allow the customers to avoid the costs in the short run, but they will end up paying the full cost of the market volatility. An ESCO's fixed-price product places the pricing and volatility risks and burdens with the ESCOs.

It is shown in the utilities' responses to certain RESA Information Requests, that budget bill products are not the panacea for customers that Mr. Andruski claims. For example, in some instances, a utility might require a customer to "establish a usage history and start the budget billing plan at a later date." Also, if the customer's usage changes during the period, the utility will "determine if the budget amount should be revised." If so, the accounts are "adjusted accordingly." (*See* RGE Response to RESA-RGE-021, attached hereto as Exhibit__FL-1R) In the Con Edison service territory, if "12 months' previous usage is unavailable for the current customer, the previous version of the account is utilized with the previous customer's monthly consumption." The previous customer usage profile could be completely different from the current customer's. In this instance, the budget amount would be adjusted quarterly, and at the end of the budget period, the customer will be charged or paid the difference. (*See* Con Edison Response to RESA 4-19, attached hereto as Exhibit__FL-2R) In addition, the utilities use the customers' money somewhat to their advantage under budget billing programs.

For example, according to NFGD, at the end of the budget period, if the customer has a balance "due to the Company, the balance is billed to the customer and due with their next invoice. If the remaining budget plan balance is due to the customer, it is either left as a credits (sic) on the account to cover future bills or refunded upon customer request." (*See* NFGD Response to RESA-Utilities Questions 17-19, attached hereto as Exhibit__FL-3R) In other words, in the absence of a direct request from the customer, NFGD can hold onto the customers' money and use it as it sees best. Con Edison will review the budget bill amount "every six months after a customer is enrolled in budget billing, for possible revision of the customer's level payment installment amount." Also, if the level payment amount exceeds the actual amount used, the amount due to the customers is credited against the current bill. However, debit amounts "over $50 for residential customers are spread over the next six budget billing periods." (*See* Con Ed/O&R Response to RESA-Utilities-19, attached hereto as Exhibit__FL-4R) The utility will refund to the account small amounts of over-collections, but for larger amounts, the utility is going to hold onto the customers' money for six months. For the NMPC and KEDLI territories, every three months the budget bill is "recalculated if the budget amount is 10% greater than the current amount." In these territories, customers have the option of paying any budget shortfall with the final budget amount, or the "rollover" option allows the customer to take "the debit owed at the end of the budget year divide[d] by twelve and add[] it onto the new budget amount." (*See* National Grid response to RESA-Utilities-19, attached hereto as Exhibit__FL-5R) This latter option may seem customer-friendly, but it could potentially result in ever-increasing electric bills for a budget-billed customer. The utilities' responses to RESA's Information Request demonstrate that a budget-billed default service product offers a fundamentally different value proposition to what an ESCO fixed-price product provides. Mr. Andruski's claim that they are similar is simply incorrect.

Q45. Can you address Mr. Andruski's concern that the ESCOs do not deploy comparison shopping tools?

A45. Yes. Mr. Andruski seems shocked that the ESCOs do not deploy comparison shopping websites, saying "This is counter to what one would expect from a reasonable transparent and competitive market. The prices offered by providers in such markets are often available on-line at comparison shopping websites such as Priceline.com, Kayak.com or Expedia.com." (Andruski, p. 35) This is a somewhat comical allegation. The websites he mentions are all independently run commercial websites. These websites are not run by the individual airlines or hotels whose services they sell. A customer would be hard-pressed to go to any business and find out the prices of the business' competitors for the same products. And to the extent that data was provided about a competitor's products and services, a customer would be wise to have suspicions about that data. I would add that while I am not an anti-trust lawyer, I believe that if competitors in a market all had pricing information from one another and could all post the others' prices on-line, this would run afoul of the principles underlying a competitive market, especially in a market that is alleged by Mr. Andruski to have competitors with the unreasonable ability to support prices above a competitive level. (Andruski, p. 34) Finally, I would note that on-line shopping tools analogous to the ones Mr. Andruski references (Priceline, Kayak, etc.) do indeed exist in the ESCO market. One example is www.electricrate.com/residential-rates/new-york/.

Q46. Mr. Andruski is concerned with the way ESCO costs are presented on the utilities' invoices to customers. How do you respond?

A46. The current utility billing systems are flawed. Mr. Andruski describes the fundamental problem with utility consolidated billing, but remarkably, indicates displeasure with the ESCOs for the billing problems. ESCOs have one or two options for billing, depending on the utility. An ESCO can provide the utility a unit price and the utility will calculate a bill to the customer based on the customer's usage. This is "rate-ready" billing. Rate-ready billing makes it very difficult to supply a customer with a value-added product such as a home warranty or a smart thermostat, because on its face, the unit costs might look very alarming if an extra $10 or $20 per month was to be collected for the value-added service. Additionally, the ESCO might have to calculate a different rate for every customer's value-added service. The alternative methodology, "bill-ready" billing, requires the ESCO to calculate a bill amount for the utility. The utility then applies that bill amount to the utility bill with no supporting data. Bill Ready billing is the more efficient of the two utility approaches to invoice a customer for a value-added service. However, Mr. Andruski states "[f]or bills furnished with only the total supply amount, customers would then have to follow up with their ESCO to ensure they were accurately charged." While Mr. Andruski is intent on blaming the ESCOs for this outcome, this is a direct result of the shortcomings in utilities' billing systems. The utilities' billing systems will continue to be a constraint in markets as long as they are limited in the number of products they can bill. Today, the utility billing systems are extremely limited in their capabilities to invoice for anything more than a straight commodity sale. The best option for the evolution of the markets is to allow for ESCO consolidated billing. This is discussed in more detail in my direct testimony.

<u>Specific Rebuttal to Staff Panel</u>

Q47. Have you read the testimony in this proceeding from the Staff Panel?

A47. I have.

Q48. Do you have any general responses to that testimony?

A48. Yes. First, I find that Staff has a fundamentally different view on how to improve retail energy markets than do the ESCOs. Staff claims that since the early 1990s, "as experience with the retail energy markets has been gained, the Commission has adjusted its rules and policies to both encourage and accommodate competition within the retail energy markets." (Staff Panel, p. 28.) Staff provides Exhibit SP-4 as a timeline of the major and relevant Commission actions supporting its contention. The first page of this six-page exhibit covers the time frame from 1994 through 2008. A review of the exhibit shows that through 2006, the Commission generally enacted pro-markets policies. However, a review of the last five-plus pages of the six-page exhibit details several examples of revocation of rights of certain suppliers, imposition of incremental reporting requirements on ESCOs, and the imposition of incremental operational requirements on ESCOs. As shown in Exhibit SP-4, very few market improvements have been made in New York over the last decade.

In its testimony, the Staff Panel further states that a 2012 Commission Order "directed Staff to undertake a focused review of the performance of the retail electric and natural gas markets for mass market customers and to determine if the market was functioning as intended and to identify <u>opportunities for improvement</u>." (Staff Panel, p. 38, emphasis added.) The proceeding following from the 2012 Order resulted in a February 2014 Order. The directives of the

February 2014 Order were designed to "improve market transparency and provide additional customer protections." (Staff Panel, pp. 40-41.) Staff identified eight operational requirements imposed on ESCOs (Staff Panel, p. 41) that were ultimately in response to the Commission seeking "opportunities for improvements." These changes are simply not market improvements. Improvements that will lead to consumer engagement and a better customer experience are outlined in my direct testimony, and include easier enrollments, faster switching, the availability of consumer data, and advanced meters and meter data communications.

Q49. Do you believe Staff is objectively stating the facts in this proceeding?

A49. I do not. I believe they are trying to paint, with a broad brush of allegations, a picture that all ESCOs are bad, based on what may be the actions of just a few and an erroneous comparison of revenues. In an effort to paint this picture, they are providing less than the whole picture and using maligning allegations that are generally unsupported. For example, Staff provided the incomplete analysis of complaint data discussed above. In an effort to malign ESCOs, they have completely failed to make any comparisons to the level of utility complaints. The

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Staff Panel also describes what is, at most, 891 high bill complaints in 2010[15] (out of almost 2.3 million ESCO accounts) as "many complaints." The utilities had over 1,100 complaints lodged against them in just one month (October) in 2010.[16] They then say without support that they "found <u>significantly higher</u> commodity rates than the utilities for nothing more than a pass-through of commodity costs with minimal or no value-added products." (Staff Panel, p. 37, emphasis added.) Witnesses have premised their testimony on calculations that show that the premiums were less than 15%. I am not sure this rises to "significantly" higher. As a further example, the Staff Panel states that "these proceedings show that the ESCO community itself is not committed to meaningful market reforms…" (Staff Panel, p. 67.) However, just six pages earlier, the Staff Panel testified that "several ESCOs responded" to a request for comments in response to the May 10, 2016 Notice Seeking Comments. (Staff Panel, p. 60.) The Staff Panel stated that the ESCO comments:

> "called for strengthening of ESCO eligibility requirement including sales agent background checks; documentation of sales agent training proficiency;

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[15] Staff does not mention a number of complaints. They only mention the type of complaint – high bill complaints. A review of the Commission's complaint data reveals however, that only 891 complaints were lodged against ESCOs in 2010. It is not likely that all of the ESCO complaints in 2010 were for high bills. The actual tally of high bill complaints is likely only a fraction of the 891.

[16] See: New York Public Service Commission, Monthly Report on Consumer Complaint Activity, October, 2010, November 9, 2010.

instituting a policy for initial and annual certification fees to be used in part to fund Staff enforcement activities; requiring additional notices to customer as their variable priced product terms near expiration; and, increased commodity price transparency. Some ESCOs also called for improved consumer education efforts by the ESCO community; and, tougher regulatory compliance enforcement, including zero tolerance and stiffer penalties for UBP infractions. The comments also supported the use of performance bonds or similar security as proof of financial capability as a minimum requirement for ESCOs to operate in New York."

Staff further testified that "several ESCOs… were willing and able to forgo CUBs and /or POR…" (Staff Panel, pp. 60-61.) Staff's own testimony shows that the ESCOs are committed to meaningful reforms. The reforms suggested by ESCOs include reforms to sales and marketing, licensing, training, compliance, credit, financial wherewithal, billing, accounts receivable and collections. The Staff Panel statements to the contrary are disingenuous and do not help resolve the real market concerns.

Q50. Staff does not believe the ESCO community has demonstrated a concerted effort or willingness to modify their business practices to address the Commission's concerns in the Reset Order. How do you respond?

A50. The Staff Panel only states concern over the "willingness of the ESCOs to provide the necessary product pricing detail in a transparent manner so as to enable an open and truly competitive marketplace in which mass market customers can participate knowledgably and fairly." (Staff Panel, p. 62.) The Staff Panel opines at length about the lack of product differentiation (electrons are electrons; gas is gas; ESCO products are the same as utility products, etc..), ubiquitous high pressure sales tactics and contract terms, and customer inexperience and ignorance, but offers no constructive recommendations to correct what it perceives to be problems. The Staff Panel concludes, "the primary distinguishing factor between the various ESCO commodity products is the commodity prices offered, including the offering of the local utility." (Staff Panel, p. 66.) The Staff Panel has not provided any support for this opinion. They have not queried customers. They have offered no validation at all. They have not considered that ESCOs might offer a better customer experience, be it the contract, the bill, the product, the customer care response time, the fixed price, the renewable attribute or any other quality. Staff is pre-disposed to believe that price is the only factor that matters to customers (it is not) and Staff is basing its opinions on its own flawed pricing comparison (products are not the same and the utility is shielding many costs in its distribution rates) and their other aforementioned factually inaccurate statements.

Q51. The Staff Panel is suggesting that some of the standard energy efficiency products should no longer be considered "value-added" products. How do you respond?

A51. The Staff Panel testified that they "contend that energy efficient light bulbs, thermostats or similar energy saving products are now readily available consumer products that can be found in stores at prices that are likely significantly lower than the amortized costs of these products collected by the ESCOs over the term of the contract. Therefore, we conclude that these readily available consumer products should no longer be permitted to be the primary energy related value-added product attached to ESCO commodity." (Staff Panel, p. 66.) This statement belies all logic and is not supported in any way in their testimony. RESA sought to understand what products the Staff would be willing to consider as qualified value-added products and sent the Staff an Information Request seeking that information. In response, Staff stated that other than a 100% green product, it was "otherwise unaware of any other products that provide sufficient value." (Staff Response to RESA-DPS Question 24, attached hereto as Exhibit__FL-6R) Staff continued "one criteria that we would consider is the general availability of the product to the public from sources other than an ESCO. More specifically, if the product is readily available through means other than an ESCO, then we would generally not consider that product to be a true energy related value-added product that we would endorse for customer to pay additional fees for to an ESCO." This means that staff is only willing to consider an ESCO's proprietary technology as a value-added service and once that technology was sold, or licensed, or made available at the local Ace Hardware store, it would no longer be considered a value-added product. There are many ramifications to this policy approach, but rapid deployment of that technology throughout New York would not be one of them.

The Staff Panel approach to energy related value-added products is not only inconceivable, it is also completely inconsistent with regulatory treatment of energy efficiency resources in the utilities' energy efficiency programs in New York. Energy efficient light bulbs and programmable thermostats are listed as approved residential energy efficiency measures in the most recently Commission-approved Technical Reference Manual ("TRM") with an effective date of January 1, 2018.[17] Further, the TRM is over 600 pages and details page after page of energy efficiency measures that are approved for the utility energy efficiency program. The Staff Panel recommendation is essentially saying that these devices are okay for ratepayers to fund in a socialized manner, but are not

[17] New York State Joint Utilities, *New York Standard Approach for Estimating Energy Savings from Energy Efficiency Programs – Residential, Multi-Family, and Commercial/Industrial Measures,* Version 5, Issued July 17, 2017, Effective January 1, 2018.

okay as part of an ESCO commodity product or service bundle that is voluntarily chosen and paid for by the customer. This testimony from the Staff Panel is disingenuous at best, and should be summarily rejected by the Commission.

Q52. Is Staff's overly restrictive view of value added products harmful to customers?

A52. Yes. Staff would disallow one of the primary benefits that ESCOs can offer customers, which is to bundle additional products and services in an appealing and financially attractive way. Staff believes that customers receive no value if the value-added product, such as the smart thermostat, is bundled in the commodity price, because customers can buy such products themselves at retail. First, this ignores that ESCOs may be able to leverage their purchasing power to buy smart thermostats and other products at discounts that are not available to individual customers. Second, Staff ignores that not all customers have the financial freedom to pay for such products up front. $249 for a Nest thermostat is a significant amount of money, particularly for a low-income customer. Amortizing these costs over a multiple month energy supply contract may be more desirable than paying all at once. In fact, by prohibiting such arrangements there are likely some customers who would never obtain these valuable energy-saving products and devices. This outcome proposed by the Staff Panel is harmful for the customers, and will also frustrate the efforts to achieve the state's energy policy goals of REV and CES.

Q53. How do you respond to the Staff Panel's recommendation that a green product must be a 100% renewable product?

A53. I make the same observation here as I make below with respect to Ms. Alexander's recommendation for a renewable product. The Staff Panel has proposed one of many viable renewable energy products. They defend their recommendation by stating that it is the Governor's "strategy to lead on climate change and grow New York's economy by building a cleaner, more resilient and affordable energy system for all New Yorkers. The Governor proposed to accomplish this by stimulating investment in clean technologies like solar, wind, and energy efficiency[18] and generating 50 percent of the state's electricity needs from renewable energy by 2030." (Staff Panel, p. 70.) The Staff Panel's recommendation for a "take it or leave it" 100% renewable product is not likely to maximize the amount of renewable energy sold. The Staff Panel must assume that any customer interested in renewable products would be "all-in." They do not leave room for a customer who might want to afford only a portion of its

[18] It should be noted again here that the Staff Panel has recommended eliminating two of the most prolific and promising forms of energy efficiency – lighting and thermostats – from what would be considered a value-added ESCO product. Under this recommendation, if this proceeding were held in the future, any lighting and thermostat sales made by ESCOs would cause the difference in price between an ESCO product and a utility default service product to increase, which would serve to "indict" ESCOs.

energy from renewable resources. Contrary to the Staff Panel's thesis, this recommendation will limit the achievement of the Governor's goals. I would also note that the Staff Panel testifies for several pages about incremental operational requirements on ESCOs that offer the 100% renewable energy product. (Staff Panel, pp. 74-76.) Of course, such requirements will not facilitate achievement of the Governor's goals. The requirements will only make it more burdensome, therefore more expensive, to market the products, which will in turn result in fewer renewable energy sales. Finally, the Staff approach is inconsistent with a product that NYSEG and RG&E currently are allowed to offer. Both of these utilities offer "customers the option to purchase renewable wind energy in blocks of 100 kWh per month with a 2 block per month minimum purchase." The Companies state that this product "allows customers to support the use of clean, renewable wind-generated electricity." (NYSEG response to RESA-NYSEG-020 and RGE Response to RESA-RGE-020, attached hereto as Exhibit__FL-7R and Exhibit__FL-8R, respectively). Customers do not consume electricity in 100 kWh blocks, but clearly, these utilities are demonstrating that some customers would choose something less than 100% renewable energy if given the option.

It appears that Staff is favoring some sort of in-state deliverability requirement by limiting the 100% green product to products complying with the New York environmental disclosure label program. It is unclear whether common and popular products, such as green energy sourced through national or regional renewable energy certificates or Green-E certified renewable products would qualify. These types of voluntary green products have been successfully deployed and marketed by ESCOs to help customers achieve environmental sustainability goals. I would strongly recommend that the Commission allow for a flexible and adaptable standard for voluntary green products. It should not be assumed that only green energy supply located in New York provides value to New York consumers. I discuss this issue further in response to Ms. Alexander's suggestion to allow ESCOs only one renewable energy product. As the Commission is well aware, environmental outcomes can and do cross state lines.

Q54. The Staff Panel suggests that its enforcement powers are not enough to correct the on-going ESCO behaviors. How do you respond?

A54. I believe the Commission's enforcement powers are vast. It is possible that they have not been utilized to their fullest extent historically.

The Staff Panel describes at length a process where the Commission will issue a Notice of Apparent Failure ("NOAF") in response to customer complaints. If the ESCOs do not address the complaints adequately, the Commission will issue an Order to Show Cause ("OTSC") why it should be allowed to continue to market or not be subject to penalties or sanctions. (Staff Panel, pp. 84-90.) The Staff Panel's complaint is that they have no "protections against price gouging by

ESCOs" and they "are unable to address the fundamental flaws in the retail access marketplace which allows the majority of the ESCO community to aggressively market and charge unfettered prices for commodity." (Staff Panel, p. 91.) The Staff Panel showed price differentials that are less than 15% between the ESCOs prices and default service rates. By any reasonable standard, this does not equate to "unfettered pricing" or "price gouging." However, if my contention is wrong, customers who felt victimized by such tactics are free to complain to the Commission, which would then trigger the Commission's authority to issue NOAFs and OTSCs. The Staff Panel apparently believes that customers are being victimized by ESCOs yet 99.9% of them are remaining silent about it; they are not complaining to the Commission, but at the same time are being victimized. This defies logic.

Q55. How many enforcement actions has the Commission pursued?

A55. The Staff Panel states that they have issued 79 NOAFs since January 2013. They have also issued 18 OTSCs. I am confident that the Commission and Staff have responded adequately to the complaints they have received. If not, as mentioned above, ESCOs have made formal recommendations to the Commission supporting "a policy for initial and annual certification fees to be used in part to fund Staff enforcement activities." (Staff Panel, p. 60.)

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Q56. The Staff Panel stated that the price comparison they engaged in is to the ESCOs' advantage because it reflects tax advantages that ESCOs' customers receive. How do you respond?

A56. The Staff Panel makes several mistakes in this part of their testimony. First, as has been stated numerous times in this proceeding, the products whose prices are compared are fundamentally different. More importantly, the utilities' costs to serve the default service customers are not reflected in their default service rates. Billing, customer care, legal, regulatory, executive costs, taxes and employee benefits and other costs are buried in the default service utilities' distribution rates. ESCOs must incur all of these costs. Also, utilities do not earn a profit on default service. ESCOs, in order to continue to invest in the State, must earn a fair return on their products and services. The tax benefit, which accrues to customers, not the ESCOs, is hardly enough to overcome all of those cost disadvantages. This issue is discussed further in response to Ms. Alexander's allegations that ESCOs evade taxes because of this tax benefit.

Q57. The Staff Panel claims that ESCOs should be able to "beat" the utilities' pricing because ESCOs operate in the same market as the utilities. How do you respond?

A57. Using logic that is unexplained, the Staff Panel reasons that "while ESCOs are not required to hedge, those that do would likely hedge <u>in the same declining or rising</u>

marketplace as the utility, and should therefore be able to “beat” the weighted average cost of commodity (WACOC) that the utility presents if the ESCO is indeed interested in providing competitively priced commodity.” (Staff Panel, pp. 93-94, emphasis added.) It is nonsensical for the Staff Panel to suggest that any party purchasing in the same market as another party, can “beat” the other party purchasing in the same market. This is similar to suggesting that because my neighbor and I shop at the same store for bread, I should be able to “beat” the neighbor’s price for bread. That simply makes no sense. If it was possible for an ESCO to “beat” its other competitors in the market and/or the utility, it would be foolish of the ESCO to not exercise that capability, for eventually, it would earn a monopolist-like market share. This Staff Panel claim is made without any understanding of how markets work. More importantly, as demonstrated in the markets and discussed throughout my testimony, “beating another price” is not always what customers desire. ESCOs offer many value-added products and services. Finally, the Staff Panel’s testimony conveniently ignores the fact that there is very little transparency into the utility’s specific hedging strategies or practices. An ESCO that wanted to try and mimic and beat the utility would not be able to do so because it cannot ascertain how much supply has been hedged, at what price or for what period of time.

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Q58. The Staff Panel opined that ESCO fixed-rate products are generally not providing benefits to customers commensurate with their costs. How do you respond?

A58. First, the Staff Panel has made no credible calculation of the "cost" of fixed-price service. More importantly, the Staff Panel's opinion of "benefit" is not relevant. The customers' opinions of "benefit" are what matters. Many consumers live on a fixed (meaning steady or regular) income. This includes both wage and salary employees as well as retirees. Budgeting is easiest when the monthly inflows and outflows can be easily determined. This budgeting capability is a benefit to many customers. Again, I would point to the $1.3 billion premium in mortgage payments that those who bought a house in 2016 in New York are willingly paying over five years to better manage their monthly costs.

Further, the Staff Panel's suggestion that the utilities' budget billing process is akin to offering a fixed-price product is also without merit. The Staff Panel states that the "utilities are required to offer budget billing program that provide the same sort of monthly price stability for a customer's combined monthly bill as a fixed rate ESCO supply product, but with a likely overall lower commodity cost over the course of the year, even when one considers the annual true-up, which can be either negative or positive, that occurs as part of the utility's supply cost reconciliation programs." (Staff Panel, p. 113.) The Staff Panel is suggesting that being beholden to the utility's supply cost reconciliation program, where a customer could receive either a negative or positive true-up charge, is equally beneficial to a customer as an ESCO fixed-price product. This assertion is simply a falsehood for any customer who has a low tolerance for cost swings from month to month. The Staff Panel ignores that customers will have to pay for any imperfection in utility forecasting of their consumption and they will have to pay for any market anomalies, such as Polar Vortex pricing. They will also be subject to potential waiting periods before participation in the budget product, intra-period budget adjustments, next-period price adjustments, and withholding of excess payments made under a budget bill program. (See discussion in response to Mr. Andruski for more detail, pp. 44-46, *supra*.) An ESCO fixed-price product does not carry any type of intra-period price adjustments or a true-up at the end of the year.

The Staff Panel position with respect to fixed-price products is inconsistent with what the Commission has stated in among other places, the REV docket. In the February 2015 REV order, the Commission stated that "Service providers will also be free to develop new offerings based on their assessment of customer needs and products offered by or to the DSP. Service products can include <u>value-added electricity services, such as fixed commodity pricing</u>, demand response and efficiency programs, or contracts for DER maintenance and operations."[19] The Staff Panel is taking a position that is contrary to what the Commission has already decreed as the policy of the state and the Staff Panel has offered no support for its position that fixed-price energy products are not providing benefits to the customers who purchase them. The Commission should reject the Staff Panel's arguments.

Q59. Staff has testified that the only product that ESCOs should be able to sell to mass market customers is a guaranteed savings product. How do you respond?

A59. This is an interesting change of heart in the testimony of the Staff Panel. Earlier in their testimony, they acknowledged that a 100% renewable energy product would be acceptable as well, and even suggested accounting for the "premium" that would be charged for the product. (Staff Panel, pp. 73-76.) Despite the flip on what should be allowed, I have the same comment as I made about the 100% renewable product – Staff has identified only one of many potentially viable energy products. But not all customers are the same and not all customers want the same electricity products. Some customers are price sensitive, others are

[19] New York Public Service Commission, *Order Adopting Regulatory Policy Framework and Implementation Plan*, Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, February 26, 2015 (Emphasis added).

environmental stewards. Some customers value savings, others might value airline miles. Some might value a "front-of-the-queue" service when calling customer care because their time might be of utmost importance to them. The Staff Panel has testified repeatedly with the assumption that all customers are the same and that they know what all customers want – savings from the utility. This is simply not the case, and the "one size fits all customers" model represents the monopolist business model that the market moved away from in the 1990s. The Staff Panel believes "such a product would fulfill the original intent of the Commission, reflected in the market's guiding principles in Case 94-E-0952." (Staff Panel, p. 125.) The Staff Panel does not describe exactly how it would meet those objectives, but according to Witness Cicchetti, consumers in New York have saved over $10 billion under restructuring[20] – and with savings as the key concern of the Staff Panel, restructuring seems to have met that objective.

Q60. Are you supportive of the Staff Panel's recommendation for Community Choice Aggregation and Not-For-Profit business models?

A60. The Community Choice Aggregation model presents significant opportunities for benefits to customers. Aggregators should be free to offer what is the best product for the Community. Aggregators should not be limited by the pricing and

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[20] See: Testimony of Charles Cicchetti, p. 10.

product restrictions contemplated by staff for ESCOs generally (guaranteed savings and 100% renewable energy products being the only allowable product types). These restrictions are neither appropriate for the CCA model, nor the ESCO market generally. I would caution against limiting CCAs to those facilitated through non-profit ESCOs or offered to only a fiduciary buyer. These may be viable business options for some entities interested in pursuing CCA. However, I would not in any way limit the market to these business models. The Staff Panel recognized, for example, that the "municipal not-for-profit operations that, as the name implies, have no profit motive and more than likely minimal marketing expenses…" (Staff Panel, p. 130). Generating no profit is not a universally optimal outcome, as profits can be reinvested in customer education, product development, and research efforts, all of which can lead to further consumer benefits. Municipal aggregations can serve the mass-market well. However, they lead to a "one-size-fits-all" kind of market for the community, potentially stifling innovative products in the market long-term. I would not recommend banning either of these models. On the other hand, limiting the market to these business structures will lead to sub-optimal outcomes. Traditional ESCOs are well positioned to help CCAs quickly and efficiently ramp up to provide supply options for consumers. Additionally, traditional brokers can help educate communities interested in pursuing CCA. While communities should follow public contracting rules and should be transparent in their pursuit of a CCA program, they should be afforded flexibility to select the business partners and vendors who can best assist the community in meeting its energy procurement and policy objectives.

Q61. How do you respond to the Staff Panel's recommended UBP changes?

A61. The Staff Panel has recommended a set of rules that are somewhat illogical, but nonetheless, would have the net effect of eliminating energy competition from the mass markets in New York, unless the ESCOs were organized as non-profit entities or were only selling municipal aggregations. The proposals suggest that the only product that can be offered to mass market customers is a guaranteed savings product. However, the proposal further states that ESCOs don't need to offer guaranteed savings products if the products are 100% renewable energy products. But then, the Staff Panel proposes that if the ESCO is supplying a municipal aggregation to a fiduciary buyer, or is organized as a "bona-fide" not-for-profit business, the ESCOs are not bound to either requirement. The Staff Panel UBP proposals also ban telemarketing and door-to-door sales by ESCOs. The net effect of the proposed UBPs is that a "bona-fide" not-for-profit business (which just means profits are not allocated to owners, not that earnings are not generated), can continue to sell any energy products to any customers at any price. The proposed UBPs as drafted would practically exempt ESCOs with these business models from exactly the type of oversight the Commission is seeking to impose on the ESCOs in the market. RESA has suggested to the Commission in prior proceedings that excessive regulations will drive responsible companies out of the market and only the bad actors will stay. This is exactly the scenario to which these proposed regulations will lead. Small, private, not-for-profit entities will be aggressively selling energy products in the market and they will be exempt from any pricing oversight. I strongly suggest that the Commission not accept these recommendations from the Staff Panel.

Q62. The Staff Panel has recommended that POR without recourse be modified to POR with recourse. How do you respond?

A62. I testified that changes to the POR programs should be incorporated into the New York energy market design moving forward. However, the Staff Panel recommendation to change the program from "without recourse" to "with recourse" is not based on any data. It is possible (but unknown) whether ESCOs in aggregate, certain specific ESCOs or the utilities' default service customers have higher percentages of uncollectible balances. The Staff Panel is seemingly making recommendations without considering what the possible or likely outcomes of those recommendations will be. Moving to a POR program "without recourse" will have the likely outcome of having the majority of customers with lower credit ratings remaining on default service. I am not suggesting that this is either a good or bad outcome, just one that the Staff Panel seemingly did not consider or address in its testimony. Because the Staff Panel provided no analysis on its recommendation, I am not in a position to opine on it. However, it is a policy consideration that could have consequences across the markets that should be given consideration by the Commission before any decision is made on this issue.

Q63. How do you respond to the Staff Panel's suggestion that Mass Market ESCOs should file with the Commission financial statements every year in accordance with the Uniform system of Accounts?

A63. The Staff Panel testified that "these reporting requirements are essential for the regulators to understand each ESCO's share in the marketplace and the value of services provided to customers." (Staff Panel, p. 168.) A simple sales report, which quantifies MWH and/or DTH sold to customers is all that is needed to assess market share. As stated above, no amount of financial data is going to allow the regulator to understand the "value" of services provided to the customers, as value is held only by the customers. If customers do not perceive value in the service, they will not buy the service. The justification for the requirement is flawed. The suggestion should be rejected as there are far simpler approaches to achieve the stated goal.

Q64. Did you review the Staff Panel's recommendation with respect to confidentiality and cyber security?

A64. I did. It is just another veiled attempt to turn back customers to the utility and mitigate the progress that ESCOs have made under retail restructuring. The Staff Panel proposes "adding provisions to the UBP that obligate ESCOs to maintain data access controls and security programs to ensure that customer confidentiality is maintained…" The Staff Panel makes no specific technical recommendations here, but uses this opportunity to suggest a return of customers to the utility and again malign the ESCOs without any analytical support. They state that the customers should be transitioned back to the utilities and that the "Commission should not otherwise allow itself to be distracted from implementing these recommendations by the prospect of potential value-added products that ESCOs could offer to mass market customers until the recommended transition has been implemented; the potential development of value-added products should occur later as part of a collaborative process in Track II of the ESCO proceeding after the detrimental aspects of the current products have been eliminated and customers can choose a-new whether they want ESCO products by making informed decisions that are not tainted by inappropriate marketing practices." (Staff Panel, pp. 169-170.)

Q65. Does the Staff Panel recommendation to force customers to return to default service have any correlation to customer information and cyber-security concerns?

A65. No. First, the Staff Panel showed no correlation between the requirement to send customers back to default service and customer information and cyber-security concerns. The Staff Panel offered no evidence that ESCOs are not fully compliant already with cyber-security standards. In fact, the Staff Panel never even suggested that ESCOs were not compliant with cyber-security standards. They just make the leap that because standards are not embedded in the UBP, data must be at risk. Additionally, the Staff Panel did not show that if there was a data or cyber-security concern, that it could not be resolved without the forced migration of customers to default service. It seems like the Staff Panel is seeking a solution to a problem that has not been shown to exist. Unfortunately, that solution will harm customers and the ESCO community.

Also, the Staff Panel offers no evidence that all ESCO products, or even a majority of ESCO products are "tainted by inappropriate marketing practices." Finally, forcing the customers to make the choice again assumes that the customers made an uninformed choice, and made a choice that they cannot reverse on their own. Neither of these suggestions has been supported by the Staff Panel. The Staff Panel, in making this recommendation, fails to consider that a migration of customers might very well harm customers, even if they proactively make a choice and get off of default service as soon as possible. The utility enrollment windows will require at least one month of service with the utilities and will require at least two months for the fraction of the customers whose next meter read date falls within the enrollment window. This could expose customers to extreme market volatility.

Q66. What do you conclude as you review the Staff Panel's testimony?

A66. I find the Staff Panel's testimony unconvincing. The allegations made are inaccurate and the analyses presented are incomplete. The solutions proposed do not solve problems identified. Additionally, some solutions were provided to address problems that were never shown to exist. The Staff Panel appears to be predisposed to an extreme regulatory intervention in the ESCO market, proposing rules, restrictions and other operational constraints that if accepted in aggregate by the Commission, would amount to ending retail competition for mass market consumers. I surmise that from their perspective, the extreme but convenient regulatory solution of returning all customers to utility default service is "easier" than targeted reforms that preserve the market. At every turn, it appears that Staff has preferred this extreme regulatory intervention despite evidence that the ESCOs were willing to accept significant but targeted reforms to the business practices and regulatory requirements that govern the market. It is far simpler in their mind to turn customers back to the utilities than it is to seek out and prosecute bad behaviors in the market, even though the Staff Panel has not explored the potentially adverse ramifications of having all residential customers on default service. It is easier to paint with a broad brush, allegations against an entire industry than it is to seek out individual companies that may be driving a disproportionate amount of the complaints in the market. It is easier to cast aspersions on a group of more than 100 "unregulated" companies than it is to cast aspersions on the few that are regulated, despite a commensurate number of complaints against them as well. It is easier to clamp down and further regulate education and sales efforts of ESCOs than it is to get the utilities to change the way they conduct operations in the retail markets, such that all New York consumers benefit. I conclude that the Staff Panel has made few, if any, productive recommendations that will benefit customers, the utilities, the ESCOs or help achieve any of the State's broader policy objectives.

PULP

Specific Rebuttal to Barbara Alexander

Q67. Have you read the testimony in this proceeding from Barbara Alexander?

A67. I have.

Q68. Do you have any general responses to her testimony?

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A68. Yes. I have seen Ms. Alexander testify in several proceedings. She presents herself generally as an advocate for residential and/or low-income residential customers. In those proceedings, I have seen her argue passionately for a fixed-price default service product. I cited one of her presentations in my direct testimony, where she articulated that "[t]he reliance on short-term wholesale market prices to provide vital electric service to most consumers is a dangerous and risky business." I note that because she failed to mention anything about this in her testimony in this proceeding. She may have changed her long-held opinions on this subject, but she makes no mention of her change of heart or why she believes this not to be the case in New York today. The use of the short-term wholesale market default service model in New York is what has given rise to the preponderance of customers (including all default service customers) being on variable rate contracts – one of her primary concerns (see Alexander, pp. 60-70.) In addition, Ms. Alexander has mischaracterized some of the evidence that she submitted in support of her conclusions. For instance, on numerous occasions, Ms. Alexander reaches conclusions or attributes meanings or motives to words and phrases that are simply not supported by the materials that she references. In other places, Ms. Alexander implies that suppliers did not provide certain information when that information was actually not requested during the course of discovery. As a result, Ms. Alexander's ultimate conclusions based on these mischaracterizations and false implications are unfounded and should be disregarded.

Q69. Ms. Alexander has recommended that ESCOs be prohibited from serving low-income customers in New York. Does that reconcile with what you know of her prior testimony?

A69. It does not. I am not familiar with all of her testimony and positions. I have, however, seen her in many proceedings that I have been involved in over the course of my career. I am not aware that she supported a return of low-income customers to default service in any of those proceedings. Nor did she support a change in the default service in any market to a monthly variable rate. The majority of the testimony that I have seen from her has been based on the premise that default service provides somewhat of a safe haven from market volatility for residential customers. For example, in an effort to protect against market power in a proposed merger proceeding in Maryland, I offered testimony to support fully unbundled default service from the merged utility. Ms. Alexander opposed this plan saying that the proposal "would expose residential customers to passing through a price that relies on purchasing 100% of their energy needs in the

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wholesale market…"[21] Additionally, in a paper written by Ms. Alexander at the very early stages of restructuring, she wrote:

> "at a minimum, the experiences documented by this project suggest that legislators and regulators should develop policies that protect such customers from uncertainty and short-term price volatility. Any attempt to expose such customers to short-term "real time" prices, as proposed by some observers, is likely to harm the customers who are least able to take alternative actions or to afford costly mistakes in public policy."

While this paper is clearly out of date,[22] and not reflective of current market conditions, it reflects strongly on what I believe is Ms. Alexander's long-held belief that residential customers, especially those "least able to take alternative actions" should not be exposed to volatile energy prices. I understand that her career focus has been to "protect" residential and low-income customers. This makes her recommendations in this proceeding all the more astonishing. Her positions in this docket appear to contradict recommendations she has made in

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[21] See: Rebuttal Testimony of Barbara Alexander, In the Matter of the Merger of FirstEnergy Corp and Allegheny Energy, Inc., Before the Maryland Public Service Commission, Case No. 9233, October 22, 2010.

[22] See: Barbara Alexander, *The Transition to Retail Competition in Energy Markets: How Have Residential Consumers Fared? Part 1: An Analysis of Residential Energy Markets in Georgia, Massachusetts, Ohio, New York and Texas*, Prepared for The National Energy Affordability and Accessibility Project National Center for Appropriate Technology, September 2002.

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many other proceedings over a period of many years. She has offered no rationale how restricting low-income customers to a monthly variable-priced default service product will provide them any degree of protection from the wholesale market.

Q70. Ms. Alexander suggests that ESCOs be required to communicate regularly with their customers informing them of their host utility's default service rate. How do you respond?

A70. Ms. Alexander recommends that ESCOs "be required to issue notices to all of their customers on a quarterly basis that inform the customer of the price per kWh applicable to the customer's current contract and how that price compares with the applicable default service rate in effect by the customer's distribution utility." (Alexander, pp. 11-12.) She defends this recommendation by stating that it "is only natural that consumers are influenced by what the sales agents say and explain because consumers do not really have complete and accurate knowledge of the retail energy markets and ESCOs are not required to provide consumers with a comparison of their offers with the utility's default service rates over any period of time." (Alexander, p. 23.) First, I disagree with Ms. Alexander's recommendation because it forces a price comparison between two fundamentally different products. I and others have testified at length about how the utility's default service rate is not analogous to ESCO prices. Forcing a side-by-side comparison of ESCO prices to a monthly variable product that is subsidized by distribution rates and subject to regulatory driven true-ups and reconciliations would only be misleading to the customer.

Second, the standard she expects is unreasonable. Very few consumers have "complete and accurate" knowledge of any market, be it the market for milk, or cookies, gasoline, or worse, something that requires a term contract like cell phones, cable service or insurance, or perhaps even worse, markets that require material long-term investments such as automobiles or housing. Consumers simply know that they can shop around for the products that meet their respective needs. In fact, it is robust competition that affords customers this luxury.

Similarly, consumers don't expect to go into a convenience store to buy a soda for $2.00 and see a sign that says the grocery store across the street is selling the soda for $1.00. More importantly, in regard to this proceeding, the utility default service models are essentially "black boxes", that are not replicable by market participants. Attempting to educate customers about the utilities' "black box" procurement approaches could be risky and lead to complaints of misleading customers. While I don't support this recommendation, in order to implement it, the utilities would have to make their procurement and pricing more transparent and comparable.

Q71. Is Ms. Alexander's recommendation to reform the New York tax laws going to impact the retail energy markets?

A71. First, I would note that Ms. Alexander's choice of language is highly suspect, in that she says that ESCOs have the ability to "evade" taxes. The tax benefit she is referring to is the ability of customers in some areas to avoid (not evade) sales tax on their delivery charges if taking service from an ESCO. This is a consumer-oriented tax benefit, and it provides no financial benefit to ESCOs. ESCOs that facilitate this tax savings for customers are simply complying with the current legal standards for tax collection in the state. <u>This is not tax evasion</u>. The Internal Revenue Service has a publication discussing the difference between "tax evasion" and "tax avoidance."[23] Tax evasion is defined by the IRS as "The failure to pay or a deliberate underpayment of taxes," and is illegal. Ms. Alexander's deliberately misleading word choice when discussing this issue is indicative of the biased perspective that she brings to this proceeding. Additionally, I find it extremely surprising that Ms. Alexander, who states that she is representing low-income customers in this proceeding, would support a statutory change that forces customers to pay more for utility delivery service. Ms. Alexander's proposal is nothing more than a forced delivery rate increase for

[23] https://apps.irs.gov/app/understandingTaxes/whys/thm01/les03/media/ws_ans_thm01_les03.pdf

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customer served by ESCOs, demonstrating once again, that her objectives in this proceeding are inconsistent with her stated role of low-income advocate. If this law was changed so that consumers had to pay the tax, it might alter the ESCO markets, but it is not going to result in the benefit, as she states, of "ensur[ing] a more proper comparison between ESCO and utility default supply pricing and bill impacts." (Alexander, p. 10.) Many witnesses in this proceeding have stated the ESCO products and the default service products are fundamentally different.[24] The cost structure of the two products is different and many of the utilities' costs to provide default service are buried in distribution rates.[25] More importantly, however, her suggested change would cause an increase in the customers' delivery rates, not energy supply rates. A proper unbundling of utility costs is required as a first step to be able to achieve something that is even close to an adequate comparison. Then, similar products would need to be analyzed. After that, if the tax benefit shows to provide an advantage to ESCOs, rather than

[24] In addition to the Direct Testimony of Frank Lacey, see e.g., Testimony of John Hanger, p. 18; Testimony of Guy Sharfman, pp. 12-14; Testimony of Michael Kagan, pp. 20-21; Testimony of Charles Cicchetti, pp 17-23; Testimony of Jeffrey Levine, p. 8; Testimony of Allen Tilley, p. 9; Testimony of Allen Singer; p. 4.

[25] In addition to the Direct Testimony of Frank Lacey, see e.g., Testimony of John Hanger, p. 18; Testimony of Guy Sharfman, p. 16; Testimony of Michael Kagan, p. 7; Testimony of Charles Cicchetti, pp 17-23; Testimony of Jeffrey Levine, p. 5; Testimony of Ronald Lukas, p. 15; Testimony of Darin Cook, p. 21.

customers, then the dialog about whether the tax incentive should still apply could be opened.

Q72. How do you respond to Ms. Alexander's discussion of an ESCO's ability to renew customers through a negative option to a variable price?

A72. This is an area that I have recommended that the Commission address. However, her arguments in faulting ESCOs are not persuasive here. She explicitly cites to UBPs that not only allow the practice, but as described in my testimony, they promote the practice. What I find least persuasive is her description of how contracts with renewal provisions are presented to customers. Ms. Alexander states "[t]hese renewal provisions of ESCO contracts are not negotiable and presented as a take it or leave it basis." (Alexander, p. 61.) She provides no support to back up this assertion, and in my experience, contracts are almost always negotiable. If any contract, including an ESCO contract, is not negotiable, customers are not compelled to enter into the agreement, which gives the buyer the ultimate negotiating tool, which is to take service from another provider with a more acceptable contract. Ironically, the exception to the rule that contracts are negotiable might be the utility tariffs, which, short of a tariff filing, are truly, "take it or leave it" arrangements. More importantly, under the ESCO contracts, customers are not compelled to renew under a negative renewal contract term. They can affirmatively shop and pick a new supplier at the end of the initial contract term. Witness Sharfman has testified in this proceeding that "customers who actively shop throughout the year can achieve a high level of savings by continually monitoring and taking advantage of posted ESCO variable offers. Comparably, the fixed offer savings analysis demonstrates that informed customers who actively shop can achieve long-run market savings even when opting for longer term fixed-price products." (Sharfman, p. 42.)

Ms. Alexander also concludes that ESCOs' "disclosed pricing methodologies are not 'methodologies' at all, but a vague list of factors that would neither allow any consumer (or regulator) to determine if the resulting rate matched the stated 'methodology'." Ms. Alexander criticizes the attempts of several different suppliers to meet the requirements of the UBP (Alexander, pp. 63-70) but has made no concrete proposals to improve upon something she sees as a problem. It is simply not clear what she wants the renewal pricing methodology to reveal, so it is not easy to address her concern. However, if an equation is what she seeks, that is not practical because of the changing prices, changing regulatory requirements (imposition of clean energy program costs, RMR charges or other regulatory fees and assessments) and other issues outside the control of the ESCO (and customers). Additionally, pricing information and methodologies are highly proprietary. Even if that were not the case, any type of methodology that would explicitly reveal the price would confuse a customer. One only needs to think about the pricing equation for Oreo Cookies and what it would include to understand how confusing and detrimental it would be. Imagine if you went to the grocery store, you could shop for cookies based on the lowest cost of labor, for example. I do not believe that would facilitate “transparency.” Extrapolate that to the ESCO industry and you would see pricing for energy, capacity, transmission, ancillary services, storage, clean energy programs, regulatory surcharges, cost of credit, cost of labor, etc… How detailed would the equation need to be? The more detailed it became, the more confused the customer would become. For the reasons stated above, it is inconceivable to require a pricing “equation” for contract renewals. However, if the Commission should pursue such a path, it should impose the same burden on utilities, including a detailed accounting of unbundled costs such as billing and customer care, as stated in the testimony of witness Cicchetti. (Cicchetti, pp. 24-25.) I discuss the complexity of utility rates in a bit more detail below. Ms. Alexander is seeking more transparent pricing methodologies, but fails to detail any specific level of transparency. She just lodges dissatisfaction with the current practices. As discussed below, the utility rates might be transparent to some, but the tariffs required to provide this transparency amount to more than 700 pages, and that is just for electricity in one utility service territory. I have not surveyed customers on this issue, but I would hypothesize that the majority of customers would find a one- or two-page ESCO contract more transparent than a 700+ page tariff. Some might then claim that the utilities' prices are posted publicly, so they meet the definition of transparent. This is not the case. In a recent order issued by the New York Public Service Commission, there was an explicit acknowledgment that the utilities' posted prices are not accurate. The order was issued in response to a petition to allow an ESCO to serve low-income customers. In that order, the Commission stated, "[w]ith the understanding that the <u>published utility rate is not all inclusive</u>, Just Energy will utilize modeling software for determining utility prices, for comparison purposes, at each 12-month contract anniversary or when a customer terminates ESCO service."[26] In other words, Just Energy could not use the published utility rate as the benchmark against which to assess what a customer "would have paid" had it been served by the utility. It must use special software to make that assessment.

Q73. Ms. Alexander is recommending that ESCOs not be allowed to market renewable energy based on the purchase of renewable energy certificates, or RECs. Is that a prudent recommendation?

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[26] New York Public Service Commission, Order Approving Waiver and Authorizing Just Energy Corporation to Serve Low-Income Customers, Case No. 12-M-0476, 98-M-1343, 06-M-0647 and 98-M-0667, p.4, October 19, 2017, (emphasis added).

A73. Ms. Alexander alleges that REC-based renewable energy products provide "no benefit to New York electricity customers and also raises questions about the deceptive nature of offering a renewable energy product to New York consumers." (Alexander, p. 13.) Ms. Alexander has offered no support for her contention that REC-based products provide no benefit to New York electricity consumers. If a New York consumer was concerned about a "global" warming or climate change issue, these concerns are not limited to the geographic boundaries of the state. The REC-based product offers that customer peace of mind that he or she is contributing to the reduction of emissions from power plants somewhere. That is a significant benefit to some consumers. Others might be concerned with regional air emissions and might rather purchase a renewable certificate from a market "upwind" from their New York property. Again, this could be a significant benefit to someone. Ms. Alexander further opines that any renewable energy product marketed in New York should include "a stated percentage of renewable resources that exceeds what is already reflected in the NYISO market and document that its renewable energy attributes are purchased so that the incremental renewable energy resource actually flows into the ISO-New York wholesale market." As I mentioned above with respect to the Staff Panel recommendation for a renewable product, with this statement Ms. Alexander is describing one of potentially many viable renewable energy products. It should by no means be the only allowed renewable energy product in the New York market, and she offers no rationale as to why it should be the only renewable product allowed. Based on her recommended solution, it is not clear what she is trying to accomplish, other than constraining ESCOs. Instead of proposing requirements on ESCOs, and ESCO products, Ms. Alexander should be identifying policies that would give credence to her desired objectives. Notable policy objectives might include NY renewable energy jobs (her recommendation does not accomplish that), decreased emissions in New York (her recommendation does not accomplish that), or perhaps a policy of wider distribution of renewable energy products (her recommendation does not accomplish that). Finally, I assume her recommendation on this issue is restricted to the residential consumers. Businesses have other reasons for procuring renewable energy, such as for marketing and reputational purposes, but also for more tangible purposes such as green building LEED certification. Green-e Energy-certified RECs qualify for LEED certification points,[27] and these do not need to be sourced or delivered in-state.

Q74. Has Ms. Alexander acknowledged any of the problems in the market that you identified in your direct testimony?

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[27] See: https://www.usgbc.org/node/2612837?return=/credits/new-construction/v4/energy-%26amp%3B-atmosphere.

A74. Yes, she recognized the 30- to 60-day enrollment window, but she did not specifically identify it as a problem as I did. In discussing her concerns with ESCO contracts, she states that "three days is far too short for a customer to be able to reasonably ascertain that an is or (sic) can meet its representations concerning its products and services since they will not receive a bill that reflects any ESCO price for 30-60 days after enrollment." (Alexander, p. 45.) While she makes this comment suggesting the three-day rescission period is too short, she identifies two of the real market problems which are delayed enrollments and delayed subsequent billing. Ms. Alexander makes no concrete suggestion for extending the rescission period. But even if it was doubled or tripled, which would be unreasonable, that would still leave a 30- to 60-day gap between the end of the rescission period and the customer's first bill. The Commission should strive to reduce the time to enroll a customer with a new supplier to help alleviate RESA's and Ms. Alexander's concerns.

Specific Rebuttal to Gerald Norlander

Q75. Have you read the testimony in this proceeding from Gerald Norlander?

A75. I have.

Q76. Do you have any general responses to his testimony?

Rebuttal Testimony of Frank Lacey on Behalf of RESA

A76. Yes. At some level, I believe Mr. Norlander's testimony is intentionally pejorative and misleading. For example, he introduced the term "overcharging" to this case by his own definition. He simply decreed that he will call charges that exceed those charged by the default utility as overcharging. (Norlander, p. 8.) As I have argued above, overcharging is not defined because one product costs more than another product from a different supplier. Overcharging is a serious allegation that should only be tied to a specific contract.

Q77. Mr. Norlander states that ESCO flat-rate pricing does not benefit customers. Do you agree?

A77. No. I have shown in my testimony a very specific example of consumers in New York opting to pay approximately $1.3 billion dollars to lock in mortgage rates in order to secure a flat rate. That calculation is based on the small portion of the consumers in the State who purchased homes in 2016. Mr. Norlander observes that "there is no need for ESCOs to exist to provide flat-rate products, the utilities can be ordered to do so." (Norlander, p. 13.) He is correct in that the utilities could be ordered to provide a fixed-price offering. In fact, in the majority of other restructured states, electric default service for residential customers is a fixed-price service for increments of time ranging from several months to as long as a year. Retail choice fits into those markets as it does in New York, where variable pricing is the current default service model.

Rebuttal Testimony of Frank Lacey on Behalf of RESA

Mr. Norlander also questions whether retail access is in the customers' best interest. (Norlander, p. 13.) The answer here is clearly yes. Mr. Norlander is under the impression that all consumers are homogenous. They are not. Some customers like fixed rates, some like variable rates. Some like green products and some do not wish to pay a premium for any products. Some want solar or storage or demand response. Others do not. Choice is the optimal word.

Mr. Norlander is opposed to ESCOs bundling value-added services with energy products, saying "it would just reduce the overall cost benefit or value of the other service." He also states that bundling "works against the goals of transparency, efficiency pricing, and competition." (Norlander, p. 14.) His logic is flawed. As stated above, perfect transparency will confuse customers, because they will typically not have any care about the individual components of energy products.[28] Additionally, product bundles are typically assembled because they generate incremental value for the consumer who purchases them. The concept of bundling is to lessen the burden (cost, installation, shopping, etc.) of purchasing the components separately. Finally, consumers don't typically assess the value of

[28] To be clear, the unbundling sought by Mr. Norlander should not be confused with the unbundling of distribution rates sought by many parties in this proceeding. Distribution rates are being used to subsidized default service rates for energy. This subsidization provides the incumbent utilities a cost-advantage in the energy markets as they compete against the ESCOs. Unbundling of these costs and properly allocating them to default service will have no impact on customers' costs or the utilities' revenues. Mr. Norlander is suggesting unbundling value-added energy-related products and services that when bundled, can provide greater value to a customer and an ESCO.

each component of a product bundle. Consumers, for example, would not typically purchase a bundled "value-meal" at a fast food chain and then seek to determine the value (or cost) of each of the components of the meal (and if they did, each customer might come to a different conclusion based on level of hunger, level of thirst, or even whether the assessment was made before or after the meal was consumed).

Q78. Mr. Norlander believes the ESCO Regulatory regime has not been effective. Do you agree?

A78. Not at all. Mr. Norlander has leveled many allegations against ESCOs, asserting the laws and regulations governing ESCOs "have not addressed the retail energy market's endemic problems of higher ESCO prices, slamming, complaints, misleading promises of bill saving, and high-pressure sales tactics to enroll vulnerable and/or non-English speaking customers seeking to reduce their energy bills." (Norlander, p. 17.) While I certainly do not suggest that these events have never happened, I challenge his characterization of these issues as "endemic." The rate at which complaints are received against ESCOs is on par with the rate of complaints against the utilities. Depending upon how you perform the complaint rate calculation, they occurred for both the utility and the ESCO segments at a rate of between 0.2 and 0.3 percent of customers registering complaints in 2016. This hardly rises to the level of "endemic" for either segment of the industry (99.7% to 99.8% of customers are not lodging complaints). His arguments do not support his contention that the current regulatory framework is deficient. (As discussed above, the rate of complaints for 2017 is on pace to be 0.1%, or a 99.9 customer satisfaction rate.)

Q79. Do you believe that the Commission was relying on a "regulatory forbearance" theory when it decided not to regulate ESCOs as utilities in 1997, as Mr. Norlander suggests?

A79. No. I will allow counsel to address his legal theories at the appropriate time. I will respond simply from a market perspective. In every restructured market, the "utility" stands as the incumbent monopoly provider of delivery services. The commodity services have been deregulated. This restructuring has occurred in several states. At the federal level, pricing for commodities has been deregulated. I believe that the Commission fully understood that once pricing was deregulated at the federal level, it made sense to deregulate it at the state level. In terms of non-price terms and conditions, the ESCOs are already heavily regulated by the Commission. The UBPs are voluminous. In addition, each utility has supplier tariffs approved by the Commission that govern the relationships between the ESCOs and utilities. In this regard, to the extent the Commission exercised any forbearance, it was very short term.

Mr. Norlander cites to language from Case 00-M-0504 suggesting that proposals to halt residential retail access or to regulate ESCOs as utilities are neither contrary to Commission policies nor unexpected. He cites "Developments in recent years in the energy markets demonstrate that some issue may not be recognized or will not be known in advance as the transition to competitive markets continues. Thus, flexibility is required in the oversight of the market. We should maintain the ability to change direction, adopt new policies, or abandon established ones should circumstances so require." (Norlander, p. 22, citing Statement of Policy on Further Steps Toward Competition in Retail Energy Markets, Case 00-M-0504, fn 3, Aug 25, 2004.) This statement suggests neither a re-regulation of utilities nor an abandonment of retail choice is the appropriate action. It suggests that the Commission should be adapting to new technologies and energy products, and changing the New York market over time. New York was at one time a leader in the development of retail energy markets. It has fallen behind other markets. The proper action now is to abandon or modify the policies that are not working that I identified in direct testimony and adopt new policies that are in line with today's technological advances in metering, communications and other areas.

Q80. How do you respond to Mr. Norlander's assessment that ESCOs compete from a non-level playing field?

A80. Mr. Norlander states that if "the goal of this market is to spur competition, it is equally important that such competition be fair and conducted upon a level playing field." (Norlander, p. 27.) He makes this argument in an effort to bring ESCOs under Article 4 regulation – a recommendation with which I disagree. Utility default service rates are not economically regulated. Neither should be ESCO prices. Default service should, however, be provided on the same cost basis as ESCO commodity service. All utility costs to serve default service customers should be unbundled and assessed appropriately to default service customers only and ESCOs should have the ability to invoice customers with ESCO consolidated billing. Those changes will go a long way toward creating the level playing field that Mr. Norlander desires. A thoughtful reform of the default service pricing structure in New York could also help level the playing field by creating a more accurate price to compare ESCO offers against.

Q81. Will this unbundling cause default service customers' rates to increase?

A81. No. If done properly, the unbundling will decrease distribution rates by the exact amount that default service rates are increased. This change will only enable the customers to see the true cost of utility provision of default service.

Q82. Do you believe that publicly filed ESCO rates, terms and conditions of service promote price transparency?

A82. No. Mr. Norlander suggests that imposing “burdens upon ESCOs such as publicly filed rates, terms and conditions of service might have the effect of promoting price transparency, shopper comparison, and potential development of a healthier competitive market for service to any customer classes that may still be serviced by ESCOs.” (Norlander, p. 27.) First, I would note that a publicly filed rate does not mean that the rate is regulated. Default service rates are not economically regulated. They are market-based. Further, Mr. Norlander’s mere use of the word “burdens” is indicative of his real goals. He seeks to “burden” the ESCOs. That is the only real impact of these proposed requirements -- burden. I would challenge almost any residential customer in the State of New York to look at a utility tariff to try to understand its costs for electricity and what it is essentially agreeing to when it takes default service and/or distribution service. Con Edison’s tariff for electricity service, for example, is over 700 pages long and that does not include any of its “Supply and Supply-related Adjustment” statements. Imposing this type of “burden” on ESCOs will not in any way promote any positive market attribute and it will certainly not promote transparency or a customer’s comparison shopping.

Q83. Can you address Mr. Norlander’s contention that requesting approval for ESCOs to issue or transfer stock would not cause undue burden?

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A83. Yes. Mr. Norlander's statement demonstrates that he does not understand the businesses of the market participants. The New York ESCO community includes most if not all, of: subsidiaries of multi-national business conglomerate organizations; subsidiaries of utility companies domiciled outside the US; subsidiaries of utility companies domiciled in the US; publicly traded companies domiciled outside the U.S.A.; publicly traded companies domiciled in the U.S.A.; large, privately held companies; smaller privately held companies; hedge fund and/or private equity investments. This requirement to oversee stock issuances is not needed to "give the Commission better information as to the ownership interests in ESCOs and possible concentration in the industry." (Norlander, pp. 28-29.) The Commission could acquire this information through a simple licensing process that I and other witnesses have suggested. Mr. Norlander's recommendation is simply not reflective of any market reality.

Q84. What do you think of Mr. Norlander's suggestion that ESCOs be required to file tariffs to ensure that ESCO bills be no greater than utility bills?

A84. First, I would point to Mr. Haff's testimony on behalf of the State of New York Office of General Services. He states that "[f]orcing ESCOs to match or beat a zero-margin product offered by utilities is not reasonable." That is especially true in light of the fact that the utilities' commodity costs can be artificially suppressed…" (Haff, p. 8.) Further, Mr. Norlander's suggestion, if followed to its logical conclusion based on the arguments presented in this proceeding by Staff and PULP, would lead to a situation where default service customers, by definition, would be worse off financially than ESCO customers. And following the same logic that he has applied in this proceeding, the utility rates could therefore not be just and reasonable and the only logical action would be for the Commission to move all customers to ESCOs, whose prices would by mandate, have to be lower than the utilities' prices. I do not agree with Mr. Norlander's recommendation. If it is enacted, however, this Commission should first ensure that all of the utilities' costs to serve default service are allocated to default service rates. Then, the Commission should save the market a giant procedural hurdle and host an auction that is premised on a standard product that the Commission desires and send the customers to the lowest-priced provider(s) of that product, for I am confident, that if the utilities' true costs to service default service load were allocated to default service rates, the ESCO community could compete on price quite effectively. But the real answer is neither Mr. Norlander's recommendation, nor moving all customers to the lowest bidder. The Commission should embrace the policy objectives of REV and the CES and move forward with policies that will achieve those goals. Those policies should include the development of a modernized grid and the market reforms that I outlined in my direct testimony, including a default service product that was priced in a manner that truly reflected all of the costs to deliver that product. These policy reforms will show the State's true objectives and will demonstrate to the ESCO community that the State is a prudent market within which to invest capital and resources needed to achieve the goals of REV and the CES.

Q85. Have you reviewed Mr. Norlander's ultimate recommendation to the Commission?

A85. I have. He recommends that the Commission "prohibit ESCOs from selling gas and electricity to residential customers, and preferably to all mass market customers." (Norlander, p. 34.) His entire recommendation is preposterous for the many reasons stated earlier. Additionally, his inclusion of small commercial customers is completely unsupported by his testimony. Mr. Norlander spent his entire testimony discussing residential customers. He offered no specific arguments to include commercial customers in any type of reregulation, yet expands his ultimate recommendation to include that customer segment. If anything, his arguments that suggested that the Commission overstepped its bounds by allowing retail choice for residential customers (Norlander, pp. 7-9) explicitly separated the commercial customers from the residential customers. Subsequent to that explicit separation of customer classes, he never argued that somehow, some group of small commercial customers are different and should be treated differently from other commercial customers. His recommendations should be dismissed by the Commission.

UTILITY INTERVENTION UNIT/NEW YORK ATTORNEY GENERAL

Specific Rebuttal to UIU/NYAG Panel

Q86. Have you read the testimony in this proceeding from the UIU/NYAG Panel?

A86. I have.

Q87. Do you have any general responses to that testimony?

A87. I do. The UIU/NYAG Panel has recommended some of the same reforms that I recommended. For example, as mentioned above, the UIU/NYAG Panel recommends changes to the Power to Choose website. Additionally, they recommend requiring "that an ESCO seeking eligibility to operate in New York State first disclose any investigation, complaints, or reports of poor performance in other jurisdictions outside of New York." (UIU/NYAG Panel, p. 25.) They also support "a requirement that ESCOs post performance bonds to be deemed eligible to operate in the State of New York." (UIU/NYAG Panel, p. 26.) As long as the performance bond is reasonably tied to the potential exposure that customers would be subjected to, I support such a requirement. However, I reject the suggestion that the level of bond be in any way related to the amount of a specific

ESCO's alleged "overcharges" or a group of ESCOs' alleged "overcharges". This metric is based upon a false premise that an "overcharge" is the difference between what the ESCO charges and what the utility would have charged in any particular month (for a different product). Overcharging can only be assessed by comparing what is agreed to in a contract to what was billed by the ESCO.

I also note that the UIU/NYAG Panel resorts to recommending that the Commission ban mass market participation in the competitive retail markets. This is a mistake. Customers have varying preferences. These preferences cannot be met by a singular utility product. Additionally, Ms. Alexander, PULP's expert in this proceeding, has testified in numerous other venues about the dangers of volatile monthly default service market pricing for residential customers. The Commission should look to market redesign solutions, consistent with many of the recommendations in this proceeding, before it seeks to turn customers back to the volatile utility default service.

Q88. How do you respond to the UIU/NYAG Panel recommendation to prohibit door-to-door marketing?

A88. I do not believe that prohibiting door-to-door marketing or any sales or marketing channel is appropriate. However, I would support a thorough examination of door-to-door marketing best practices in other markets and the adoption of targeted training, compliance and other oversight requirements for this marketing channel. Door-to-door marketing is utilized as a sales channel in large part due to some of the very arcane utility rules still in place in the market. For example, a customer must have access to its utility account number in order to facilitate a change in energy provider. Rules that would allow a switch with working knowledge of the account, like billing address, service address and a positive identification linking a person to the account should suffice for adequate proof of responsibility for an account. This would enable more traditional marketing channels like mall kiosks and retail store fronts.

I would also note that while the UIU/NYAG Panel asserted that the requirements to deliver an ESCO Consumer Bill of Rights and a notice explaining the right to cancel the contract "are <u>often</u> ignored by the marketers", they supported this statement with only two examples, neither of which had any relationship to neglecting to deliver required notices to customers. (UIU/NYAG Panel, p. 31, emphasis added.)

Q89. What is your response to the UIU/NYAG Panel's description of complaints lodged against ESCOs?

A89. As with the prior witnesses, this Panel also tells an inaccurate and incomplete story. This Panel uses information from other proceedings and from other witnesses to source their data. However, those sources are incomplete. To be clear, as I have shown above, the number of ESCO complaints dropped by 40%

between 2015 and 2016. The number of complaints against ESCOs through August 2017 is on pace to drop again this year from 2016 levels. Also, as stated above, this Panel completely dismisses the number of complaints lodged against the utilities, which are significantly greater in number than the ESCO complaints.

Q90. How do you respond to the UIU/NYAG Panel's recommendation that the utility should put a comparison of its prices to ESCOs prices on its bills?

A90. The Panel suggests that placing "comparable prices on a customer's bill would afford customer the ability to assess risk and make an informed decision when selecting an ESCO or remaining with their full service utility for energy supply." (UIU/NYAG Panel, p. 42.) As a first measure, I would note my disagreement with the characterization of the utilities as "full service." They offer energy and distribution, but they don't offer energy products tailored to meet the customers' needs. Beyond that, it would be most beneficial to the market if the utilities would make clear their energy prices in advance of a delivery month and also if they would make clear to customers how they purchase energy and how they calculate their monthly charges. It would also be beneficial to the customers if the utility would unbundle its costs and allocate fully its costs of serving default service customers to those customers. Once those barriers are overcome, a bill comparison might have some merit. That comparison, however, should be a product-to-product comparison. If the ESCO offered a fixed-price product, the utility comparison should show "N/A" or some other reference indicating that the utility does not offer a similar product. Anything short of that type of comparison would be an example of the dominant market participant using its market dominant position to suggest that its product is the one product against which all products should be compared. The Panel has not discussed how a value-added service would be positioned on this bill comparison. Ignoring that type of product difference only gives the Staff Panel further ammunition to allege that the ESCOs are "overcharging," and they are not. The Commission should not seek to send all customers back to default service. It should seek to make a truly competitive market where customers can secure advanced energy and value added energy products and services.

Q91. Has the UIU/NYAG Panel recognized any of the problems associated with the market that you identified?

A91. Yes. And like prior examples, it does not necessarily point them out as problems. Specifically, when discussing a company they were pursuing an enforcement action against, the Panel noted "[c]onsumers were given the impression that they could cancel their contracts at any time, when in fact it could take up to two months to process a cancellation – thus forcing customers to continue to pay" the company's higher rates for those months. (UIU/NYAG Panel, p. 46.) This example is quite informative on one of the underlying themes in this proceeding.

The ESCO industry is being criticized for a poor customer experience, when the actual driver for that customer experience is the Commission-approved switching policy of the utility. This example cited by UIU/NYAG is the result of another arcane utility rule, where switching transactions can only occur on a scheduled meter-read date and the utilities have to be given several days' notice in order to effectuate the switch on that meter read date. A consumer can switch cellular providers instantaneously. The Commission should endeavor to reduce the enrollment windows to as short a window as reasonably possible. Rather than penalizing ESCOs for a market design that they have been advocating to improve for years, the Commission should require the utilities to adopt a true accelerated switching model that empowers customers to switch electric suppliers on any day of the month with minimal notice (i.e., no more than 3 to 5 days).

CITY OF NEW YORK

Specific Rebuttal to New York City Policy Panel

Q92. Have you read the testimony in this proceeding from the New York City Policy Panel?

A92. I have.

Q93. Do you have any general responses to that testimony?

A93. Yes. The New York City Policy Panel offers generally constructive recommendations to the Commission. Most importantly, it is in favor of continuing the opportunities for residential customers to participate in the energy markets. The Panel is recommending a licensing process for ESCOs and enhanced oversight and enforcement from the Commission, both of which I agree with. Those objectives, however, do not need to be coupled with price and product restrictions. In particular, the New York City Policy Panel has suggested that ESCO products must guarantee savings, that the contract rescission period be extended to 10 days and that a customer must affirmatively consent to a contract renewal when changing from a fixed to a variable rate contract. I disagree with these recommendations.

Q94. Why do those suggestions pose problems for ESCOs?

A94. I have already testified extensively about the problems with a guaranteed savings product. Customers are not ubiquitous and they do not all value low-priced energy products as primary needs. Additionally, the utility default service costs are not reflective of the true costs to serve default service.

The 10-day rescission period adds risk to a supplier’s contract, especially fixed-price contracts. It also exacerbates some of the problems already acknowledged with respect to the utilities’ enrollment windows. ESCOs cannot in good faith submit a switch transaction to the utility during the rescission period. The incremental rescission period will effectively add a week to each of the utilities' enrollment windows, resulting in about 25% of the customers being enrolled in the subsequent month, after their next meter read.

An affirmative consent on renewal adds to the ESCO's cost structure and to the customer's burden. More problematic is that the Panel did not recommend a solution for what happens when the customer does not respond to the request for consent? Is the customer supposed to be returned to default service? That would defeat the intent of protecting customers from a variable rate if they originally contracted for a fixed rate. I have testified that the renewal process should be addressed by the Commission, with the benefit of stakeholder input. An affirmative consent provision does not resolve the current market problems.

AARP

Q95. AARP stated that it "believes that customer choice makes no sense if customers cannot save money on the energy portion of their utility bill when compared to the utility default service." How do you respond?

A95. AARP has submitted answers to some of the questions posed by the Commission in its December 2, 2016 Notice in this proceeding. It is not offering any testimony or any other form of evidence into the record. Rather, it is just stating its positions on the questions. In response to this specific concern, I would say that customer choice is exactly that – a customer choice. Nobody is compelling any AARP member to engage with an ESCO. If AARP believes that the low-cost, but volatile utility default service is the best option for its members, it should so educate its members. After many years of customer choice, over 2 million residential customers in New York have decided for themselves that the default service product does make sense for them. AARP stated that ESCOs should "compete on price and price alone". That is an interesting philosophy, for it is one in which I could start a trade association representing retired people and charge $1.00 less per year than AARP charges. Under AARP's logic, competing on "price and price alone" would dictate that AARP give up all of its members to the new trade association. But of course, AARP would argue that it offers its members some value-added services. More importantly to this proceeding, AARP's logic means that if an ESCO could underprice a utility's default service rate, all customers should be then transferred to that ESCO. Based on AARP's positions in prior energy matters, I believe they would not support that outcome (nor the outcome where a new trade association could "compete on price and price alone" with AARP).

Q96. Do you have examples of AARP marketing practices that further call into question AARP's arguments concerning the ESCO industry?

A96. Yes. AARP has consistently criticized the ESCO industry in this and other retail market proceedings. I find AARP's arguments to be hypocritical given that AARP engages in similar marketing practices to recruit members and market services and products for various vendor partners. AARP describes "well-documented issues in ESCO marketing including bait and switch offers that revert low short-term fixed rate offers to variable rates." (AARP, Executive Summary. Page numbers not included in AARP answers.) AARP itself offers a low short-term fixed rate, then a higher rate after that expires.[29] AARP also states that ESCOs should not be allowed to sell to mass-market customers unless "it can be shown that they are matching or beating the customer's incumbent utility price." (AARP, Response to question 1.) However, AARP itself markets New York Life's term life insurance products, yet they provide no guarantee that the premiums are the lowest available in the market. CBS News writes:

> "As part of our continuing analysis of AARP's financial services products (earlier stories covered AARP mutual funds and AARP life insurance and annuities), we wondered how well the huge organization was treating its 40 million members with the homeowners and auto policies it sells. So we examined the coverage and compared AARP/The Hartford prices with those

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[29] See: https://appsec.aarp.org/mem/join?campaignId=UBBORG1&intcmp=DSO-HDR-JOIN-EWHERE.

> of Allstate, State Farm, GEICO, and Progressive in three zip codes to answer the question, Should you put AARP on your policy shopping list?
>
> Our answer: <u>If you are shopping on price alone, no</u>. You can save money — in some cases a lot of money — by taking your business elsewhere. But the policies do offer a few appealing features that you might find are more than worth the extra cost. And The Hartford has an impressive customer service record."[30]

The CBS analysis shows that AARP is attempting to impose on ESCOs a standard that they do not apply to themselves or their preferred vendors. They are selling to their members something that is clearly not the lowest price. CBS also reported AARP's response to the allegation that they might be overcharging customers. Richard Hisey, president of AARP Financial, the for-profit arm of AARP was quoted in the article as saying "There is a cost to having some of the features in the program," and "We believe that if you're comparing apples-to-apples features, we will be cost-competitive." The answer is very similar to the responses in this proceeding from the ESCOs. ESCOs are cost-competitive with

[30] See: https://www.cbsnews.com/news/auto-and-homeowners-insurance-is-aarp-looking-out-for-you/ (emphasis added.) This CBS story also mentions and links to articles about investigations into the investment funds, other insurance policies and annuities sold by AARP. Those stories concluded for mutual funds that "by doing some homework, you could put together your own index-fund portfolio and pay lower expenses with fund companies such as Vanguard or Fidelity." They also identified several different and perhaps better for some people, options for annuities and for insurance products. Clearly, AARP is not delivering the lowest priced products to its members.

Rebuttal Testimony of Frank Lacey on Behalf of RESA

each other, and if an apples-to-apples comparison was made to the default service rate, ESCOs would be cost-competitive with default service, like they are in the other competitive energy markets in the country.

AARP also offers that no customer "should be subjected to unscrupulous business practices by ESCOs (or any business) …" (AARP, Response to question 6.) AARP engages in many of the practices that it or others have described as unscrupulous. For example, they offer gifts and incentives. They bundle products. They provide auto-renewal contracts that include a mailer that will indicate they are going to charge you again.[31] AARP even shares members' customer information with unaffiliated companies. AARP collects information from a member's membership application, website trafficking, third party vendors and other sources. In turn, it will share that information with service providers, social media advertising interests, licensed providers of services, corporate affiliates, approved vendors, and other non-profit organizations.[32] AARP also offers savings to customers on some products that might not be real. For example, AARP claims that customers can save $370 by switching auto

[31] See: https://appsec.aarp.org/mem/join?campaignId=UBBORG1&intcmp=DSO-HDR-JOIN-EWHERE.

[32] See: https://www.aarp.org/about-aarp/privacy-policy/.

insurance.[33] The CBS analysis mentioned above showed that a comparison of the AARP rates to four other companies in three different cities showed that the AARP policy was less expensive than only two of the twelve options reviewed. The greatest savings shown was $70 per year.

To be clear, I'm not suggesting that these marketing examples are illegal or violate any consumer protection rules or regulations. However, these examples indicate that many other product and service providers, including those endorsed by ESCO market opponents like AARP, utilize marketing and sales practices that ESCOs have been criticized for in this proceeding. Practices such as marketing statements about savings, automatic renewal, providing free gifts or other incentives for new customers, and similar practices are ubiquitous in the consumer marketplace. It is hypocritical and disingenuous for AARP to hold the ESCO industry to a difference standard and one that AARP does not apply to its own business practices.

Q97. AARP opines that door-to-door and telemarketing sales activities should be prohibited. How do you respond?

[33] See: http://aarp.thehartford.com/pl/landingpages/display-integratedcampaign?N=AARPINTTST&PLCode=004355&campaignid=6502&ctkwd=AARP_Integrated_MemBenNative.

A97. AARP stated that those "practices should be prohibited when interacting with potential customers. Indeed, Illinois and Connecticut have enacted reforms and limits." (AARP, Response to q. 7.) To be clear, neither Illinois nor Connecticut have prohibited door-to-door and telemarketing activities. These states have only made "reforms." As stated in my testimony, the primary driver of the need for door-to-door sales is a requirement that a customer have access to its utility account number to switch suppliers. My direct testimony outlined several reforms that would enable additional sales channels beyond door-to-door marketing.

Q98. Do you agree with AARP's position on the utilities' POR Programs?

A98. I outlined POR reforms in my direct testimony. I do not agree with AARP's pejorative statements about POR causing unnecessary confusion about billing dispute rights, allocation of payment rights, or that POR is an "anti-competitive subsidy" for ESCOs. (AARP, Response to q. 8.) AARP provided no support for these allegations. However, even if the Commission concludes that it is a subsidy for ESCOs, several of the ESCO witnesses have testified that suppliers should take on the responsibility for billing, including the billing of wires charges for the utility and that the suppliers bear collection risk for their customers. Moving forward under this billing option would eliminate any cause for concern that the utilities were subsidizing competitive market participants.

VI. CONCLUSION

Q99. Could you please summarize your testimony?

A99. Yes. First, contrary to popular misconception, I conclude that the markets have a high degree of customer satisfaction. With a high complaint rate in 2015 of just 0.31% of customers lodging Commission complaints against ESCOs, and a complaint rate that has improved to what is on pace to be a 0.1% complaint rate against ESCOs in 2017, I find that more than 99.5% of all ESCO customers are satisfied with their ESCO products and services. Complaint data that is incomplete, inaccurate and misleading with respect to complaints lodged with the Commission should be rejected by the Commission. With this customer satisfaction rating, I conclude that the Commission should rule that ESCOs be allowed to continue to offer deregulated products and services to all mass market customers, however, I do not conclude that we should be complacent with respect to the current state of the markets in New York. There is consensus around the need for reform of existing market rules.

Staff Witness Joel Andruski demonstrated unequivocally that the utilities enjoy market dominance and that their dominance has expanded over the past three years. Mr. Andruski's revelation should point stakeholders and the Commission to the conclusion that it is essential that utility default service costs be unbundled in order to achieve a proper functioning competitive market. This is the first and foremost pressing market reform as it will provide customers with a transparent price signal for utility commodity service. Without proper unbundling of utility default service, any comparison between utility rates with ESCO pricing is simply inaccurate and inappropriate and additional market reforms undertaken will not correct this underlying flaw in the New York marketplace. Remaining market reforms to address ESCO licensing, billing and POR issues, supplier consolidated billing, concerns over variable rates and contract renewal, the use of certain marketing channels, the enrollment windows and potentially others should follow soon thereafter in a productive Track II proceeding.

The testimony of those seeking to return customers to default service or to reregulate the market is based on flawed analyses of costs, including most importantly, the false premise that the default service product and rates are even remotely similar to ESCO services, products and prices. Several of these witnesses have a flawed understanding of some of the most basic elements underlying the market, including which pieces of the market are regulated and which are not. The proper evaluation of restructuring the market is an analysis of savings against what would have been a regulated utility business model. The only witness offering testimony related to this issue showed that New Yorkers have benefited by an amount greater than $10 billion since restructuring began.

The Commission should conclude that the current New York energy markets are burdened with structural flaws. It should further determine that ESCOs continue to serve all mass market customers; the Track II proceeding should then commence immediately to implement solutions to the market design shortfalls. Myopic recommendations to force customers to return to a poorly designed default service model will harm customers and prevent the achievement of the State's policy goals of REV and the CES and should be rejected by the Commission.

Q100. Does this conclude your testimony?

A100. Yes.

Q. My name's Amanda Trinsey, and I'm here on behalf of the City of New York. If you have any questions about any of the questions I ask you, please just let me know.

A. I -- I will. Thank you.

Q. On page 10, starting on page 10 of your testimony, lines 11 through 12 --

A. Direct testimony?

Q. Your direct testimony. Yes. You state that, and I quote, consumers frequently and readily choose more expensively-priced products.

A. Yes.

Q. Do New York Energy customers frequently choose higher-priced energy products?

A. I -- I think that's the whole background of this case. Right. There are customers that are buying more expensive products than default-service products. There are customers that are buying green energy products. There are companies -- customers that are buying thermostat products and efficiency products. So, yes. I think they do.

Q. Turning now to page 22, table FL-1.

A. Yes.

Q. So, this is a -- a table detailing

ESCO products differentiation. Are all of these products that you list on page 22 offered to customers in New York?

A. I'm not sure if these specific product attributes are offered, but I've been in the ESCO industry since 2000, and I've seen these products offered, these types of differentiated products offered throughout my career. I think if the market was accommodating to offer these types of products, every one of them would be available.

Q. Are all of these products specifically linked to mass-market customers, or are some of these products C and I customer related?

A. I -- I think every one of them could be applicable and useful to a mass market customer.

Q. In preparing your testimony, did you review what products ESCOs in New York offer to mass market customers?

A. I -- I reviewed the -- the New York Power to Choose website. I didn't review it -- what I would call, scientifically. Like, I didn't tally what products were being offered or anything like that. I didn't survey the RESA members about what products are being offered. But, again, in my almost twenty years in the ESCO industry, I've seen all of these product attributes offered in one market or another.

Q. In your testimony on page 66 and in other places too, you discuss the use of AMI. Is AMI necessary for the retail market to move forward in offering products to customers? Mass market customers in New York?

A. No. AMI is not required to offer products. AMI's required to offer the ultimate products. I have a chart in here about the different retail markets, and I kind of put Texas at the top of the chart. And in that market, you can offer products that are really -- price becomes irrelevant. Unit cost becomes irrelevant because it's a total bill kind of a -- a product. So, in other words, you're selling grid-interactive services that allow a customer to control con -- or allow an ESCO to control on a customer's behalf consumption during high price periods of time. So, overall, what you're looking at is the bill at the end of the month instead of the unit cost of the bill. I also think that's a big flaw with the analysis as presented here. It doesn't take into account any kind of usage modifications from different products, but -- so, I think that AMI is required to get to that end state. It’s not required to offer a retail product.

Q. And in that same vein, you discuss the smart thermostats as a value-added product, specifically on page 35. You -- you go into a discussion about smart thermostats. When ESCOs are providing smart thermostats as a bundled product or a value-added product to customers, are they providing the thermostats for free?

A. I don’t know what the makeup of all the offers is. It’s a bundled product. If you go to McDonald’s and buy a Happy Meal for 4 dollars, are you getting a soda for free or French fries for free or a hamburger for free? It’s not really clear. If you buy an energy product for 9 cents, are you getting electrons for free or a thermostat for free? It’s not really clear. It’s a bundled product.

Q. Uh-huh.

A. So --

Q. And do you know, and if you don’t, that’s okay, but do you know if when this is offered as a bundled product, the ESCO is also installing the thermostat and providing the customer with education about the thermostat and how to use it?

A. I used to work for a demand response

company, and we contracted with -- at one point, we contracted with an ESCO to install thermostats and educate the customers. So, some do. I know that for a fact. I don't know that all do. So -- but yes.

Q. Do you know which ones in New York do?

A. I do not know which ones in New York do.

Q. Okay. In your testimony, you say it's very common to see this as a -- a bundled product. What information or what data were you relying on to provide that conclusion, and is it specific to New York or just more generalized?

A. I -- I -- I've seen the product offering in multiple states. I've seen it in New York. I've seen it in multiple other states as well. So, I believe it is a very common product offering.

Q. How many New York ESCOs offer that as a bundled product?

A. I -- I didn't do that calculation.

Q. Okay. Moving over to page 36, you discuss -- or you provide an example of a commodity-only energy product that is also a value-added product. And the example you give is -- are time-of-use products and prepaid energy products.

A. Yes.

Q. Do you know -- are either of these products offered in New York?

A. These are the types of products that you would need advance infrastructure for. Metering, communications, real-time data feedback. Things of that nature. So --

Q. So, no?

A. -- I think it's technically not possible at this point to offer them.

Q. And what is a prepaid energy product?

A. It -- it -- it's one of my favorite energy products. It's kind of like an E-ZPass. I assume -- I know there's tolls everywhere here, so I think everyone has EZ Pass. It's kind of like E-ZPass, although at the end of every day -- so, you prepay -- I might misuse credits and debits, but you prepay a dol -- a certain dollar amount to an energy company. And at the end of the day, -- so, say you prepay them 100 dollars. At the end of the day, they'll send you a text that says you used X number of kilowatt hours. That costs you 7 dollars. So you have 93 dollars left on your budget bal -- on your -- on your balance. You are X dollars ahead or behind of your budget for the month. You -- so, it -- it gives you all sorts of information. And then you can set up -- again, this is where it's like E-ZPass. If your credit -- if your balance gets down to 20 dollars, you can automatically put another 100 dollars on it through your credit card or through some other mechanism. It's a -- in my mind, it's a very consumer-friendly product. It offers a ton of value to a customer because you can get credit card points, you can get affinity points with your energy supplier. Your -- the energy costs are lower because the cost to the supplier is lower because they don't have carrying costs associated with the lag in billing collections. So, it's just a generally much more efficient, better product for customers.

Q. And then does the customer also receive a bill on top of that?

A. They -- they would -- they -- well, in this market, the way it's currently structured, they would have to get a distribution bill. But where that product is very prominent is Texas, so it's supplier-consolidated billing. So, they wouldn't get a bill on top of that.

Q. Now moving over to the value-added

product -- or excuse me, the fixed price energy product on page 37. You state that this is a -- a value-added product. Is a fixed-price product always a value to customers?

A. Could you point me to where you're talking, and -- and then --?

Q. On page 37.

A. Yes.

Q. Question 38.

A. Yes.

Q. It starts at line 10.

A. Yes.

Q. You discuss fixed-price energy products being a value.

A. Yes.

Q. And my question is simply is -- is a fixed-price product always a value to a customer?

A. I -- I hesitate to ever use always or never. Right. A customer might be moving next month and might not want a fixed-price product because he or she would face an exit fee or an early termination fee. So, no. In that case, no. If your preference is -- if you have high disposable income and your preference is just low cost over time, a variable product might be good if you can handle wild volatility, if you can handle a 300 dollar bill one month when your bill is normally 100 dollars, it’s fine. The variable is fine. If your concerned about monthly cash flows, a fixed-price product is a huge value to a customer.

Q. So, even if the fixed-price product is say four to five times above the spot-market price, that’s still a value to a customer?

A. The -- the spot-market price varies every hour. So, you could have a 2 dollar spot-market price. You could have negative spot-market prices. So, if it was four times negative, it would be very negative. So, yes. It would be very valuable. It -- it has -- so, you can’t say four times the spot-market price because what hour are you talking about?

Q. I’m just talking about the average spart -- spot-market price over the course of a month if you were to take that as an example.

A. So, you might take an average spot-market price in April, and it might be 20 dollars, 2 cents a megawatt hour. If you hedge at 8 cents a megawatt hour for all year, that’s a tremendous value because you’re eliminating your volatility in the winter months and the summer months. So, you might pay more in

April, but you're going to pay a lot less in August and January and February. So, yes. It's a value.

Q. I want to move now to the section of your testimony that discusses the market in Texas.

A. Okay. Could you --

Q. On page 41.

A. Thank you.

Q. Lines 8-10. You state that customers in Texas experience some of the lowest cost electricity in the country. Is it your position that they're experiencing that low-cost energy because of ESCOs and the retail market place?

A. It -- it's a couple of reasons. That's certainly one of them. They have hundreds of competitive suppliers, forcing prices down. If I go to an ERCOT meeting, I hear people complaining about the market being too efficient. Right. So, that's part of the reason. It's a predominantly all gas market. It has a lot of wind resources. That's -- those are other reasons. It offers an abundance of choices. So -- you know -- so, that's part of the reason. It's not entirely the reason.

BY MS. TRINSEY: (Cont'g.)

Q. On page 61, or excuse me, 60 of your

testimony, you raise the topic of earnings adjustment mechanisms in New York State.

A. Yes.

Q. And -- and it's not clear exactly what you're suggesting here in your testimony, but is it -- are you suggesting that ESCOs in the future should be able to earn an earnings adjustment mechanism?

A. No. Absolutely not. I -- I'm suggesting the ESCOs can be instrumental in helping the utilities achieve the energy efficiency goals.

Q. Following up on that question, how -- how are the ESCOs going to help utilities achieve their goals?

A. The EAM's -- I forget all of the goals, but they're energy efficiency related, they're DER penetration related. The ESCOs in this room are offering energy efficiency products. They can help meet the goals through distribution of those energy efficiency products. They can help meet the goals through developing DER resources, solar storage, residential, lots of ways. I think they're instrumental in -- in achieving those goals.

Q. What are -- what are ESCOs doing, of what you just listed, of that today in New York with mass market customers?

A. I can't speak specifically to New York, but I know ES -- well, I can speak a little bit. I know some ESCOs are using the energy eff -- the thermostat, for example, is an energy efficiency resource. They're distributing EE resources. I know in other markets, I don't know about New York specifically, but I know in other markets. They're installing rooftop solar, they're building DER's on commercial sites. They're -- you know -- again, like I said, the -- the -- the whole model in Texas is to reduce the bill. It's not to get to the lowest unit cost. It's to reduce the bill. You do that by reducing consumption and really providing true value to the customer.

Q. Mr. Lacey, are you aware that EAM's are shareholder incentives that ratepayers have to pay for?

A. I am. Yes. The -- I believe we're approved by the commission. Yes.

Q. Okay. And just one last question on this topic. Why -- why would ESCOs assist utilities in raising costs for ratepayers?

A. It -- it's -- it's not raising costs

for ratepayers. If -- if we achieve the goals that are set out under the EAM's, it will reduce cost for everybody. It will lower demand on the system. It will clean the environment. It will lower overall costs for everybody, and I'm sure the Commission took that calculus into consideration when they approved them. And -- and by the way, I'm not supporting the EAM's. I'm not testifying that they're great. I'm saying they're the law of the land, and if they want to be achieved, ESCOs are instrumental in helping the utilities achieve them.

Q. Moving forward to page 88 of your testimony, you discuss transactional impro -- improvements.

A. Yes.

Q. And specifically on line 20, you state that there is simply no valid reason to hold customer data captive.

A. That's correct.

Q. Are you suggesting here that there should be some re -- re -- reform to how customer data is provided, or how customer consent is given for data?

A. Yes. It -- so, again, in the perfect world, I should be able to go to -- I, as a customer, should be able to just go to the mall. I'm shopping. I see a kiosk like I get my cell phone at a kiosk. Why can't I get electricity at a kiosk? I can't do that because I need my customer -- my account number. The utilities hold the data. They make it very difficult to get. You know, I should be able to have a -- I, as a supplier, should be able to have a portal at the mall, download a customer's data with customer's consent. I think Mr. Hanger said it is customer data. I firmly believe that. I don't know if that's the -- the assumption in this market. I believe it is the customer's data, not the utility's data, and the customer should have ready access to it.

Q. Moving to page 91. You state on line 17 through 18 that the Commission should implement a more direct approach that requires 30 days advance notice to the customer, and then you list a variety of product details for when this notice provision should be given.

A. Yes.

Q. How should this notice be provided to customers?

A. Let me -- let me just re -- reread this for one second.

Q. Sure. Take your time.
A. Okay. Was your question, how should that notice be required?
Q. Yes. What -- how should the ESCO be providing that vital thirty-day notice to that customer?
A. I think they should be providing it by the method that the customer chooses. Right. So, do you want it by email? I'll send it to you by email. Do you want it by text? I'll send it by text. Do you want it by U.S. mail? I'll send it U.S. mail. It could -- could easily be a customer decision.
Q. And then what happens if the customer never receives that notice?
A. Well, I think we know with a fairly high degree of certainty the customer will receive the notice. So, I think the question might be better, what if the customer does not respond.
Q. Or what if -- what if the mail gets lost. I mean, in -- in New York City -- you know -- things happen with mail, and -- you know -- your neighbor gets it instead of you or --
A. I -- I -- I know. That happens, but that is seldom. It's rare. But in -- in that instance, what happens? The -- it's the exception process. I

don't know. What do you do with the exception? I think that's up for discussion amongst the stakeholders.

Q. So, taking your first bullet as an example, renewal of a fixed price agreement to a new fixed price agreement, hypothetically, if a customer never got that notice, they could be enrolled in another twelve -- twelve-month fixed product?

A. They could. Yes.

Q. Okay.

A. And I -- I would argue that for the majority of customers, that's probably a good thing, especially if they signed up to a fixed-price contract the first time. They obviously have a preference for a fixed-price contract. Right. I also know with my experience working with suppliers and for suppliers, that if mistakes happen, companies are willing to modify contracts. Mod -- they're -- they're willing to make exceptions. Are they willing to write off every customer? No. That would be very costly. If one customer says -- calls in and says hey, I got renewed to this accidentally, but I'm moving. Can I -- you know -- what can I do? I think suppliers are willing to work with those customers.

Q. What is the likelihood that -- that

that, what you just described, would actually happen, and how does a customer know that, well now I'm signed up on this product for twelve more months that they can call whatever ESCO and get out of it, so to speak, because there was a mistake?

A. So -- so, right now, this conversation assumes a relationship with a customer that is very static. Right. It's like -- it's very anonymous. It's part of the billing problem. The relationship is very anonymous. That's not the goal of the suppliers. The goal of the suppliers would be to be very interactive with their customers, to have a dialogue with their customers, and to provide customer service. That's what they do. That -- that's the goal. Right. The goal is not to anger customers. The goal is not to rip-off customers. The goal is to provide customer service, value-added products and services.

Q. So, what are ESCOs doing in the New York market today to interact with their customers and provide this relationship?

A. Well, I know they're not doing supplier consolidated billing. I -- I don't know. I -- I didn't query the members about what they're doing to interact with their customers. But again, I will point to some of the other products that are very interactive. And -- and -- and REV requires interactivity. Right. REV requires an active customer. ESCOs are that intermediary. ESCOs will be the intermediary to the customers when they're interacting with the grid.

Q. But there's nothing today preventing ESCOs from interacting with their customers. Right?

A. No. I think there are several constraints today. There -- there is no AMI. There's no supplier consolidated billing. I -- I think there's lots of constraints.

Q. But I'm talking about simply customer service, customer interactions with contracts, customer education, marketing. All those things that are happening today, there's no barriers to ESCOs improving those things and improving their customer relations. Right?

A. Customer relations can always be improved in every industry. Correct. And there's no legal impediment to having them make a phone call to every one of their customers saying hi, how are you. Right. I -- I think that's a little extreme, but there's no legal impediment to that. There are structural impediments to automating that interaction.

Q. Thank you, Mr. Lacey. No further questions.

A.L.J. MORENO: Thank you. I believe the next party that had indicated an interest in cross was Staff. If you'd like to proceed, Mr. Kramer and Mr. Dwyer.

MR. DWYER: Thank you, Your Honors. Before I get started, I just want to, pursuant to our discussion this morning, note for Your Honors that Staff may have objections to certain portions of this witness's testimony, but Staff does not believe that will impede our ability to go forward with cross examination of the witness this morning, and intend to, pursuant to Your Honors' ruling, file those motions in writing at the conclusion of the hearings.

A.L.J. MORENO: Mr. Dwyer, can you be more specific?

MR. DWYER: Well, particularly with respect to the rebuttal testimony, similar to the issues raised yesterday with respect to improper rebuttal that simply agreed with the positions of other witnesses.

A.L.J. MORENO: Okay. Mr. Dwyer, at this point, are you able to identify those sections?

MR. DWYER: With a brief recess, we -- we likely could. It wasn't our expectation that these -- it was our expectation these would be submitted in writing after the hearing. So, I -- I did not prepare -- prepare the line numbers for today.

MS. SCRUFARI: Your Honors, UIU supports that motion and is prepared with the page numbers and line references if you'd like to hear them at this time.

A.L.J. MORENO: Well, I think in the interest of expediency to ensure that we're dealing with the matter holistically, it may make sense to take a brief recess in order for Staff to ensure that your motions, to the extent that they're being made, are identical or -- so, we have everything before us that we need. So, why don't we take a brief -- why don't we come back. We'll take a brief break and -- for ten minutes, and -- so, we'll go off the record. And Mr. Lacey, if you want to get up and stretch your legs, you're welcome to do so. Just remember, you're still under oath.

MR. LACEY: Thank you.

(Off the record)

THE COURT REPORTER: We are back on the record.

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A.L.J. BERGEN: Okay. Before we -- we took a recess, we -- well, we took a recess to allow staff an opportunity to review portions of the rebuttal testimony. They indicated they wanted to, or they had plans to move to strike at a later time, and UIU also was prepared to move to strike certain testimony.

Staff, did you have an opportunity to review the testimony?

MR. KRAMER: We did.

A.L.J. BERGEN: Okay. Would you like to note for the record the portions of the testimony you intend to strike?

MR. KRAMER: Yes. First, on page 4 --.

A.L.J. BERGEN: I'm sorry. We're just talking about rebuttal only?

MR. KRAMER: Yes. That is correct. On page 4, lines 12 and 13, there's a sentence that begins with I include and ends with in this group.

A.L.J. BERGEN: Okay.

MR. KRAMER: On page 8, line 6, that entire line all the way through page 9, line 7.

A.L.J. BERGEN: Okay.

MR. KRAMER: Turning to page 12, beginning at line 8 and continuing through page 17, line

17.

A.L.J. BERGEN: I'm sorry. Repeat that.

MR. KRAMER: Yes. That was beginning page 12, line 8 through page 17, line 17.

MR. BURCH: Could I just clarify? I might have got that reference wrong. Page 17, line 17?

MR. KRAMER: That's correct.

MR. POND: When we look at that, it looks like you're cutting off in the middle of a sentence?

A.L.J. BERGEN: Line 17 on page 17 does end in the middle of a sentence.

MR. KRAMER: My apologies. I believe, it's page 17, line 2.

A.L.J. MORENO: And just for clarification, on pages 8 over to 9, you -- you're striking from lines 6 to 7 or from lines 4 beginning on page 8 to line 7 on page 9?

MR. KRAMER: On page 8, beginning at line 6.

A.L.J. MORENO: Okay. Thank you.

MR. KRAMER: Which wouldn't -- and would include the heading and -- and a question.

A.L.J. MORENO: Okay. Thank you.

A.L.J. BERGEN: You want to include the

heading? The question?

MR. KRAMER: Yes. Yes.

A.L.J. BERGEN: Okay. That -- so that would be line 4.

MR. KRAMER: I apologize. No. The heading will not be included. Just beginning on line 6 with the answer.

A.L.J. BERGEN: Okay. And then after, we left off page 17.

MR. KRAMER: Yes. Turning to page 43.

A.L.J. BERGEN: Okay.

MR. KRAMER: There -- there’s a footnote, footnote 13 on the page, and the second half of that footnote, which is -- it’s the 5th line of the note and it begins a sentence, as discussed through the end of that footnote.

A.L.J. BERGEN: Okay.

MR. KRAMER: And finally, on page 100.

A.L.J. BERGEN: Page 100.

MR. KRAMER: Lines 16 through 20. And line 20, it -- not the entire line. Just the end of the sentence that ends in a parenthetical.

A.L.J. BERGEN: Okay. Is that it?

MR. KRAMER: Yes, Your Honors.

A.L.J. BERGEN: Okay. And can you please state your basis, or your intended basis to strike this in this testimony?

MR. KRAMER: Yes. The -- the basis for this motion to strike is that this testimony is improper rebuttal. It doesn't rebut any testimony filed in these proceedings and simply agrees with the positions of other parties.

A.L.J. BERGEN: Ms. Scrufari, would you like to be heard with respect to your intended motion to strike?

MS. SCRUFARI: Yes, Your Honors. We second the motion as staff has stated with respect to the page numbers, the line numbers, and the basis. And the alternative, we also move to strike based on Mr. Haff's withdrawal of his testimony. And therefore, it's not an evidentiary record and these references should similarly be withdrawn. Thank you.

A.L.J. BERGEN: So, your motion -- your intended motion would be exactly the same lines?

MS. SCRUFARI: As Staff. But also an addition. There is the pending motion before Your Honors with respect to moving to compel Haff.

A.L.J. BERGEN: Yes.

MR. LANG: Your Honors, Kevin Lang for the City.

A.L.J. BERGEN: Yes, Mr. Lang.

MR. LANG: I -- I would just note as well that the City does support most of what Staff has just recommended with the exception of the testimony at page 8 to page 9 that Mr. Dwyer referenced. We don't offer a position on that, but for the reasons stated by Mr. Dwyer and Ms. Scrufari, we agree that because OGS has decided not to introduce testimony into the record in this proceeding, it is improper for there to be rebuttal to testimony that is not in the record.

A.L.J. BERGEN: Okay. So, let me make sure that we understand your positions. Staff and UIU's main rationale is that the testimony identified simply agrees with other testimony and therefore is improper rebuttal. But your position would be because it refers to testimony that was withdrawn, it would be improper rebuttal?

MR. LANG: Yes, Your Honor. As to whether -- with the proper scope of rebuttal, we're not taking a position on that.

A.L.J. BERGEN: Okay.

MR. LANG: But in this instance, -- and I'm not even sure it's technically correct to say that OGS has withdrawn it because it's never actually been offered. Simply filing it in accordance with a ruling isn't the same as offering it into the record and withdrawing it from the record. So, it's simply not in the record of this proceeding, and, therefore, rebutting something that isn't in the record is not appropriate.

A.L.J. BERGEN: Okay. Does anybody else want to be heard with respect to these applications? Mr. Burch?

MR. BURCH: Could I be heard briefly? I guess my -- first let's start with a question for Your Honors. Is this intend -- those are intended motions, so there will be a briefing at some point? Or would you like me to argue?

A.L.J. BERGEN: Do you intend to move to strike any portion of Mr. Lacey's testimony?

MR. BURCH: No.

A.L.J. BERGEN: Okay.

MR. BURCH: I intend to -- I don't intend to strike any. I intend to oppose the motions.

A.L.J. BERGEN: Absolutely. Do you want to be heard briefly?

MR. BURCH: I -- I would, although I would reserve the right to file a written brief on these issues.

A.L.J. BERGEN: Okay. Well, let me just tell you to -- to make sure you understand. We intend to reserve any decision on these -- these issues. We're not going to decide that right now. So, if you'd like to be heard briefly still reserving opportunity to respond, that's fine.

MR. BURCH. Okay. Yes, Your Honors. Thank you.

A.L.J. BERGEN: Okay.

MR. BURCH: Just briefly, I think I understand the grounds for these motions. The -- simply striking because it refers to Mr. Haff, that is not something that's before Your Honors yet because you've already indicated you're -- you're going to rule on the motion to compel first. So, I'll reserve completely on those issues. With respect to staff's motion to strike because it's improper rebuttal because it's merely support, I think that they're taking an incredibly and inappropriately narrow view of what rebuttal means. Your Honors issued a -- an -- a decision already in this proceeding on a motion to strike where you referenced the definition of rebuttal. I think -- you know -- we certainly can all look back at that. But the definition of rebuttal, paraphrasing, is that it's evidence introduced to counter, disprove, or contradict the opposition's evidence or a presumption or a response of legal argument.

To be properly submitted as rebuttal, testimony should do more than summarize another party's position. If you look at all of these references, it's -- it -- it is more than summarizing Mr. Haff or some other witness's position. There's some summary, but that's just to give Mr. Lacey's view of it, and then he goes on to use that and say -- and -- and like -- you know -- for example, like Mr. Haff, we're in agreement and that's counter to what some other witnesses said.

That's entirely appropriate for rebuttal. And I get -- just as I mentioned yesterday, this is a slippery slope because many witnesses in their rebuttal reports do come before Your Honors do the same thing, and we'll be sitting here making those same motions if this is the path we're going to go down. But I think it's helpful to Your Honors to hear different perspectives. I think it's incredibly helpful to Your Honors and perhaps later the Commissioners to hear a summary of where the parties are in agreement. Why -- you know -- that's -- that's something that everyone here should want because it's to the furtherance of finding common ground that aren't disputed issues. And so that's in the interest of judicial economy, the interest of getting to a final result here, and the issue -- and -- and in the interest of -- you know -- giving the parties what they all agree on. And -- and so, a lot of what Mr. Lacey's done is to try to make those points. And again, I will reserve further arguments and legal arguments and case citations to a written brief. Thank you, Your Honors.

A.L.J. BERGEN: Thank - thank you.

Ms. Miranda?

MS. MIRANDA: Thank you, Your Honors. Just -- I wanted to follow up on Mr. Burch and the process we're following today. So, yesterday the -- the argument was made that it was improper rebuttal, and we took a break, and you came back and made a decision.

Today, the arguments being made it's improper rebuttal again, and we're -- we're going to wait. And so, I -- I guess my question is should Staff be crossing on this? Because Mr. Lacey should not have to come back because we don't have a ruling, and they feel like they don’t have to cross on it. So, that -- I’m struggling with this a little.

A.L.J. BERGEN: Okay. So, I was going to address that --

MS. MIRANDA: Okay.

A.L.J. BERGEN: -- after we heard positions with respect to -- to this. So, I will -- we will address that.

MS. MIRANDA: Okay. And then my only position is that I support what Mr. Burch said. Thank you.

A.L.J. BERGEN: Okay. Thank you. Mr. Dwyer?

MR. DWYER: If -- if -- if I may? As I indicated initially, I don’t think that our -- our motion would impact the ability to go forward with this witness today here, and staff does not plan to cross on any of the testimony that we suggest be stricken.

A.L.J. BERGEN: Okay. Is there anything else? Anyone? Okay. So, we are not going to -- to make any determination with respect to striking any portion of Mr. Lacey’s testimony right now. We will move forward with cross examination of Mr. Lacey. I think we should remind you that we’re moving forward with cross examination, and this does not relieve any party of an obligation to object to any live cross examination that may take place here today. If you have an objection to it, or in the future, any objection that you do -- if you do not object -- if you have an objection and you do not raise the objection to the cross examination, -- you know -- that will be waived.

So, I know we talked about motions to strike. That's a different issue. Right. So, if you have an objection, you must raise it. A motion to strike, we need to know about your intent to move to strike something.

As with yesterday, we couldn't move forward until we resolved the motion because there was a -- a related proffer of an exhibit, and that proffer of the exhibit was dependent on the determination as to whether that testimony was going to remain or was going to be stricken. Here today, it is our position that we can move forward with this cross examination without having to rule on the pending motions to strike. So, --

MS. SCRUFARI: Your -- Your Honors, I'm sorry to interrupt. May I be briefly heard on that point?

A.L.J. BERGEN: Yes.

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MS. SCRUFARI: UIU would have cross examination questions on the proposed testimony to be stricken from the record. So, we're just in a bit of a -- a bind in terms of trying to decide whether we proceed without a ruling from Your Honors --

A.L.J. BERGEN: Yes.

MS. SCRUFARI: -- on this matter.

A.L.J. BERGEN: So, -- you know -- as was raised, we will not be recalling Mr. Lacey. So, if you have cross examinations for -- questions for Mr. Lacey, you should presu -- you know -- pre -- lost the word -- you should proceed. You should proceed with your -- your questioning of Mr. Lacey. You should not rely on the fact that there may be a motion to strike his testimony and not proceed with your cross examination.

MS. SCRUFARI: Thank you for clarifying.

A.L.J. BERGEN: Well, as Judge Moreno said, to not proceed with your cross examination would presume a result of the motion. So that -- you know -- wouldn't really be a wise --.

A.L.J. MORENO: You do so at your own risk.

A.L.J. BERGEN: You do so at your own risk. Okay. So, are there any questions about the process? Okay.

MR. KRAMER: No, Your Honor.

A.L.J. BERGEN: Are we ready to proceed with cross examination, Mr. Lacey? Okay. Where did we leave off?

A.L.J. MORENO: With Mr. Dwyer.

A.L.J. BERGEN: With Mr. Dwyer. Okay. Mr. Dwyer, please proceed.

MR. DWYER: Thank you, Your Honors.

CROSS EXAMINATION

BY MR. DWYER:

Q. Good morning, Mr. Lacey.

A. Good morning.

Q. I just have a couple clarifying questions with respect to your rebuttal testimony.

A. Okay.

Q. If I could direct your attention to pages 77 and 78 of your rebuttal testimony.

A. Okay.

Q. On 78, line -- line 3, you mention the -- the potentially adverse ramifications of having all residential customers return to default service. There, are you referring to the utility’s ability to serve these customers that may be potentially returned to default service?

A. Not specifically. It -- it would depend on the methodology that was used to return all the customers. You could cause a severe price impact. You could cause severe turmoil in the wholesale markets because ESCOs would be liquidating contracts. There are lots of things that have not been thought through, not been discussed, not been testified about. I think it's a very risky maneuver.

Q. Mr. Lacey, are you aware that the utilities have indicated in an IR response to RESA utilities 17 and 19 that they are able to handle the return of ESCO customers to default service?

A. I -- I have no doubt that the utilities mechanically can handle the return of customers, the default service provider. That's not my biggest concern. My biggest concern would be a market impact of price spike, turmoil in the wholesale market, liquidating contracts, breaching contracts, et cetera.

Q. Thank you.

MR. DWYER: Your Honors, at this time, I have a document I'd like to have marked as an exhibit.

A.L.J. BERGEN: Okay.

MR. DWYER: This document is the IR

responses that were propounded on all utilities by RESA for Con Edison, Orange and Rockland, National Fuel Gas Distribution, Central Hudson, and National Grid. It is RESA-Utility number 17, and for New York State Gas and Electric and Rochester Gas and Electric, it's RESA-Utility 19. I will note that it was -- it's the -- the same exact question that was asked on all utilities.

A.L.J. BERGEN: Okay. That will be marked Hearing Exhibit --

A.L.J. MORENO: 728.

MR. DWYER: I'm sorry --

A.L.J. BERGEN: 728.

MR. DWYER: Thank you.

A.L.J. MORENO: Mr. Lacey and Counsel, have you had the opportunity to review the document presented.

THE WITNESS: I have. Yes.

A.L.J. MORENO: Okay. Thank you. Mr. Dwyer, you may proceed.

BY MR. DWYER: (Cont'g.)

Q. Mr. Lacey, would you agree that in responding to this IR from RESA that the utilities have indicated that in addition to the mechanics, being able to mechanically handle the return of these customers, that they also indicate, for example on page 1 for Con Edison, that it would able -- be able to meet future supply requirements through additional spot market purchases through the NYISO and -- and so forth?

A. I -- I would not agree with that. What this says is Con Ed did do an analysis, and it believes it can meet the supply requirements. I have no doubt that it can meet the supply requirements. It doesn't address the impact on the market. The other responses all say no analysis has been done.

MR. DWYER: No further questions, Your Honor.

A.L.J. MORENO: Thank you. And Mr. Berkley for PULP, you had indicated an interest in crossing the witness.

MR. BERKLEY: Yes, Your Honor. I have a few questions.

CROSS EXAMINATION

BY MR. BERKLEY:

Q. Good morning, Mr. Lacey.

A. Good morning.

Q. I'll be with you in one moment.

THE COURT REPORTER: Could you scooch your mic up, Mr. Berkley? Thank you.

MR. BERKLEY: Sorry. Is that sufficient?

THE COURT REPORTER: Yes.

MR. BERKLEY: Okay.

BY MR. BERKLEY: (Cont'g.)

Q. Could you turn to page 79 in your rebuttal, lines 1 through 10?

A. Yes.

Q. So based on that portion of your testimony, can you cite to any evidence in your direct or -- or your rebuttal testimony where you identify, summarize, or otherwise analyze the amount that ESCOs bill for variable-rate service versus fixed-rate service in New York for the period of 2011 through '16? And please take your time if you'd like to refresh your memory.

A. I think this is about my history with Ms. Alexander and her testimony in prior proceedings.

Q. Yes.

A. Right. That question didn't seem to be about that.

Q. Do you opine anywhere in your -- I'm sorry. Do you address the issue of ESCO billing for variable-rate service versus fixed-rate service anywhere in your testimony?

A. I'm sorry. Could you repeat the question?

Q. Do you address anywhere in your direct or rebuttal testimony and analyze or summarize the amount that ESCOs bill for variable-rate versus fixed-rate service in New York?

MR. BURCH: Objection, Your Honor. Can we -- can we have the witness pointed to a reference? This is a lot of testimony.

A.L.J. MORENO: Sustained. Mr. Berkley, could you find a reference point?

MR. BERKLEY: I'll withdraw it for now, Your Honor, and come back to it.

A.L.J. MORENO: Thank you.

BY MR. BERKLEY: (Cont'g.)

Q. I'm turning to page 80, Mr. Lacey, lines 6 through page 82, line 4. This is a -- again, it's your rebuttal to Ms. Alexander's testimony.

A. Yes.

Q. And it relates to the question you asked, which is should -- that Ms. Alexander has recommended that ESCOs be prohibited from serving low-income customers in New York. Does that reconcile with what you know of her prior testimony? As you state on lines 13 and 14 on page 81, are you -- you state that you were astonished that Ms. Alexander recommended that ESCO should be prohibited from serving low-income customers. Is that correct?

A. That is.

Q. Yes.

A. I think specifically under the tools that are available in the New York Market. Ms. Alexander has a long history of supporting flat-rate products, flat-priced products for default service to protect residential customers from volatility. I think it's very well founded in this proceeding that the New York default service is extremely volatile. And I've never seen Ms. Alexander recommend low-income customers or any other residential-rate class customers be served by a volatile default service product.

Q. Thank you. If we could turn to page 82, line 5 through the end of page 83. And your question starting on line 5 is that Ms. Alexander suggested ESCOs be required to communicate regularly with their customers, informing them of their -- of their host utilities default service rate. So just beginning on page -- I'm sorry. On line 17 through 19 of page 82, you disagree with Ms. Alexander’s recommendation that ESCOs be -- that issue notice to their customers on a quarterly basis, and that’s, again, referring to lines 8 through 11. And your reason for disagreement is that you assert that it forces a price comparison between two fundamentally different products.

A. Correct.

Q. Is that correct?

A. That is correct.

Q. Are you aware of any industries where price comparisons are made between two fundamentally different products?

A. I’m not aware of any that are forced comparisons. I’m not aware of any industry that forces their members to say, oh -- you know -- my interest rate is 3.8 percent and you must reveal the prime rate or the bank next door’s rate or anything like that. I’m not aware that that exists in any industry whatsoever.

Q. Do you have a -- do you own auto -- I’m sorry. Do you own an automobile, Mr. Lacey?

A. I -- I do.

Q. Are you familiar with gas stations?

A. I am.

Q. Yes. Have you ever seen gas

stations advertising prices?

A. I've never seen a gas station offering -- advertising a competitor's prices.

Q. Have you ever -- thank you. Have you ever seen a gas station advertising the contents of its product to distinguish it from another gas station's product?

A. Octane.

Q. Gas additives. Have you ever heard of MTBE?

A. I've heard of it. I have no idea what it is.

Q. Have you ever heard of ethanol, Mr. Lacey?

A. I have.

Q. Are you aware of whether or not there are gas stations that advertise those different additives to their products?

MR. BURCH: Objection, Your Honor. This is, I think, beyond the scope of this expert's testimony. He's not an expert in the gasoline indus -- retail industry.

A.L.J. BERGEN: Mr. Berkley, where -- we need to get where you're going.

MR. BERKLEY: Thank you. I was really just asking the witness if he was aware, since he stated that he disagreed with a recommendation that would force a price comparison between fundamentally different products, I wanted to know if he was aware of any industry that had done that.

A.L.J. BERGEN: And he -- that question was asked and answered.

MR. BERKLEY: Okay. Thank you, Your Honor.

BY MR. BERKLEY: (Cont'g.)

Q. So, the underlying rationale for this question and your answer is that Ms. Alexander recommended that ESCOs be required to issue notices to ESCO customers, and this is in the nature of -- that as you say -- quoting her, the customers are influenced by what sales agents say and explain.

MR. BURCH: Objection, Your Honor. I'm not sure what the question is and I would object to the continuing paraphrasing of testimony that's in the record.

MR. BERKLEY: Thank you. I'll move on, Your Honor.

A.L.J. BERGEN: I'm sorry?

MR. BERKLEY: I'll move on, Your Honor.

A.L.J. BERGEN: Thank you.

BY MR. BERKLEY: (Cont'g.)

Q. On lines 15 through 17 on page 83 of your rebuttal testimony, you assert that attempting to educate customers about utility black box procurement approaches could be risky and lead to complaints of misleading customers. Could you explain that please?

A. Yes. I would venture that there are probably no more than two people in this room that could read a tariff and understand what the utility is going to charge them in any given month. Right. That black box -- I've worked for energy companies for almost twenty years, I know very brilliant people who have tried to undo that black box and try to figure out what's in that black box, and no one has ever been able to do it, to my knowledge. So, I think putting a requirement on a supplier to educate a customer about a black box that no one knows anything about is very risky, and it doesn't do the customer any good whatsoever.

Q. Thank you. So, it's still your contention that the standard of educating the customer is unreasonable? That you are responding to in Ms.

Alexander's testimony?

MR. BURCH: Ob -- objection, Your Honor. Characterizing testimony improperly.

A.L.J. BERGEN: I -- I agree. Rephrase please.

BY MR. BERKLEY: (Cont'g)

Q. On line 4, you state in your testimony, and this is still page 83 of your rebuttal, the standard she, that is Ms. Alexander, expects is unreasonable, and this relates to your entire answer, which begins on line 8 of page 82 and goes on through there, which is a discussion of informing ESCO customers. My only question is do you -- do you still believe as you assert on line 4 that the standard that she expected was unreasonable?

A. The -- her requirement is -- or her suggestion, and I think I quoted it, is be required to issue notice to all of their customers on a quarterly basis that inform the customer of the price per kilowatt hour applicable to the customer's current contract and how that price compares with the applicable default service rate in effect in the customer's distribution utility. I said earlier, I would challenge everyone in this room to look at a utility tariff and tell me what the bill is going to be, what the rate is going to be next month. Okay. That is an unreasonable standard, to put a supplier in a position to educate a customer about something that I venture hardly anyone knows anything about. So, yes. That -- that is still my contention. It is an absolute unreasonable standard.

Q. Thank you. I'm going to move on to page 94, Mr. Lacey.

A. Okay.

A.L.J. BERGEN: Direct or rebuttal, Mr. Berkley?

MR. BERKLEY: I'm sorry. Rebuttal, please. Still.

A.L.J. BERGEN: Okay.

BY MR. BERKLEY: (Cont'g.)

Q. And between lines 2 and 16, you are discussing the testimony of Mr. Norlander, which began from question 77 on the previous page.

A. Okay.

Q. You state that Mr. Norlander's logic is flawed -- this is on line 10 towards the end -- in his opposition to ESCOs bundling value-added services?

A. That is correct.

MR. BURCH: Objection, Your Honor. He's

-- he’s continuing to paraphrase and characterize testimony. If he has a question specifically about the testimony, I don’t have a problem with him asking, but this continued characterization is -- is -- is making for a messy record.

A.L.J. MORENO: In this instance, Mr. Burch, Mr. Berkley has referred to a line number and is, I believe, directly quoting "his logic is flawed."

MR. BURCH: But Mr. -- I agree that he started there, but he -- but Mr. Berkley continued to add after he finished that quote.

A.L.J. MORENO: Okay. Mr. Berkley, if you could rephrase please?

MR. BERKLEY: Yes, Your Honor.

BY MR. BERKLEY: (Cont’g.)

Q. On line 10, you state his, referring to Mr. Nor -- Norlander. His logic is flawed. Could you explain that statement?

A. Yes. He states a bundling works against the goals of transparency, efficiency pricing, and competition. I -- I think it’s just the opposite. I -- I think that bundled products add to all of those things that he says they de -- detract from. I -- I don’t think customers in the electricity market want to know about ancillary service costs or what transmission wires were used to get to the light to the electrons to their house or anything of that nature. I -- I don't know what kind of transparency they're looking for. We saw a contract the other day. It was perfectly transparent to me. It was a two-page contract. It -- it described 100 percent renewable energy, and it was 8.9 cents, or something like that. I -- I don't know how that's not transparent. I don't know how that's not way more transparent than a 700-page tariff that no one can understand whatsoever. I think his logic is completely flawed.

Q. Mr. Lacey, are you referring to the Direct Energy contract?

A. The one that was --

Q. Was proffered into evidence --

A. Yes.

Q. -- for here --

A. The whole --

Q. -- this week.

A. -- the whole suite of materials, the contract, the web documents, et cetera.

Q. And did you read those documents that were offered into evidence?

A. I -- I didn't read them verbatim. I didn't read the -- you know -- every line item in the terms and conditions. I saw the web printouts. I saw the two pages of terms and conditions that are very consistent with every ESCO contract I've seen in 20 years. There's nothing hidden there. Whereas, you get a 700-page tariff, there is nothing transparent there. I -- I -- I -- so, I think his logic is flawed. One is much more transparent than the other.

Q. So, just to continue on the transparency of the two-page contract that you brought up, and you said that it stated on its first page 100 percent green energy. Did you then also read the document that had a Public Service Commission heading that looked like a document from the PSC official website that showed that what was being offered was actually only the fuel mix of the State of New York?

MR. BURCH: Ob -- objection, Your Honor. If the -- if we're going to have the witness talk about a specific document, could we have him look at it please?

A.L.J. MORENO: Yesterday we had -- was it yesterday?

MR. BURCH: I believe it was Wednesday.

A.L.J. MORENO: Wednesday. Thank you. We had entered into the record -- the City of New York entered into the record Exhibits 1300 and 1301, I believe.

MR. BERKLEY: Mr. Burch, let me bring forward Exhibit 1300 and 1301 to refresh your witness's memory.

BY MR. BERKLEY: (Cont'g.)

Q. Mr. Lacey, do you have in front of you Exhibits 1300 and 1301 that were offered into evidence earlier in the week?

A. I believe I do. Yes.

Q. Could you turn to the second page of 1301, which has a heading at the top that says New York State Department of Public Service?

A. Yes.

Q. In your expert opinion, are the fuel sources that are offered in the upper-most box equivocal to 100 percent renewable energy?

A. This doesn't reflect a 100 percent renewable product. This represents the entire fuel mix for the Direct Energy portfolio. And this document, I believe, is required by state regulation. The 100 percent renewable attributes were on, I believe it was the first page of the product that was selected, which I believe was -- the fourth page of Exhibit 1300. In the lower, right-hand corner, it says 100 percent renewable.

Q. Yes. And do you remember, Mr. Lacey, how Exhibit 1301 came to be entered into the record earlier this week?

MR. BURCH: Objection, Your Honor. It's beyond the scope of his expert opinion.

A.L.J. BERGEN: The record speaks for itself, Mr. Berkley.

MR. BERKLEY: Thank you.

BY MR. BERKLEY: (Cont'g.)

Q. Exhibit 1301 was entered into the record because it was a click-through link from the notice of 100 percent renewable energy, which led to this page, that, in fact, instead of 100 percent renewable energy, it showed the fuel mix of the State of New York.

MR. BURCH: Objection, Your Honor. He's characterizing the record. There's no question pending either.

MR. BERKLEY: One moment, Your Honor.

MR. BURCH. I -- I move to strike that

soliloquy.

A.L.J. BERGEN: Mr. Berkley, could you repeat your statement?

MR. BERKLEY: I’m sorry, Your Honor. I didn’t hear you.

A.L.J. BERGEN: Could you repeat what you said that led to the objection please.

MR. BERKLEY: I asked the witness, who had said that he was here in the room and was aware of the introduction of this exhibit into the record, if he remembered how the exhibit had been -- had come to be entered into the record.

A.L.J. BERGEN: You can answer if you remember how it came to be admitted.

A. There was a discussion, and I forget who exactly was involved in the discussion, requesting that it be added to the record, and it was subsequently added to the record.

MR. BURCH: Your Honor, if I could just note, I think you subs -- sustained that objection and then said the record speaks for itself. He can answer, but the record does speak for itself obviously.

A.L.J. BERGEN: Well, the witness either recalls or he doesn’t. So, the record does speak for itself as to how the exhibit actually came into -- to evidence, but you can ask him --

MR. BERKLEY: Thank you, Your Honor.

A.L.J. BERGEN: -- what he remembers.

BY MR. BERKLEY: (Cont'g.)

Q. Just to return to this contract that was entered as Exhibit 1300 and 1301, would you characterize this as being transparent?

A. I believe this is totally transparent. This document that you're referring to, the second page of Exhibit 1301 is required to be delivered to all -- I believe it's all customers. It might just be all mass market customers in New York that take ESCO service. To the extent that you believe it is not transparent, that's not an ESCO issue. That's a regulation issue. The contract, the terms and conditions, the 100 percent renewable, the product name, I think it's completely transparent.

Q. Thank you. If you could hang on to this I may come back to it, Mr. Lacey. I'm staying with page 94, Mr. Lacey. In your rebuttal you state and I'm starting with the word perfect on line 11, perfect transparency will confuse consumers because they will typically not have any care about the individual components of energy products. Could you cite to any surveys or any other manner in which you came to that conclusion?

A. I've been working in the competitive retail industry for almost 20 years, and I know as soon as you start talking to even commercial and industrial customers about things like ancillary services, ZECs, RECs, transmission costs, they gloss over very quickly. I can't imagine any residential customers who are interested in those things. They want to turn their lights on -- they want to turn the light switch on, have electricity when they get to their house. They don't care about the origin of the electricity. They might like a green product but they don't care that it came from X, Y, Z wind farm instead of A, B, C wind farm. They just care that it's green.

Q. So would you argue, Mr. Lacey, that New York customers if they believe that they were buying a green product wouldn't care if it came from, as you say, New York wind farm as opposed to a Texas wind farm?

MR. BURCH: Objection, your Honor. Argumentative.

A.L.J. MORENO: No, that's overruled. He can provide his opinion regarding that matter.

A. I think every customer is different and I believe in my testimony I said there are lots of reasons why a customer might want to buy just a Green-E certified REC. It gives them LEED certification points. There are also people who would definitely want to buy a New York wind farm product. There are also people who would want to buy a -- a Canadian or something west of here wind product that would reduce emissions in another state believing that the emissions ultimately would blow this way. I think every customer has different preferences, and -- and I think that's one of the key issues that's being completely overlooked in this proceeding.

BY MR. BERKLEY: (Cont'g.)

Q. Thank you. I'm going to move backwards in your rebuttal testimony back to page 23. And this is line 14 of page 23 through line 12 of page 24. And you state on lines 14 through 17 the differences in pricing between utility default rates and ESCO prices today is attributable to the cumulative effect of a number of granular decisions made by the Commission over the years about features of the market. Could you provide a citation to any analysis or any other evidence in your rebuttal testimony or your direct that would support that conclusion?

A. These are just statements of fact. I mean, there's been a long history of regulatory proceedings that have imposed costs, obligations, restrictions on certain entities. I think Staff testified that we all buy from the same wholesale market, and I believe that is true. We all buy from the same wholesale market. We buy differently but it's the same wholesale market. So the differences can only be driven by these things.

Q. On page 24 on lines 10 through 12 you state that the pricing differences between today's default service and ESCO prices reflect these Commission decisions that presumably, and please correct me if I'm wrong, referring to the Commission's that you referred to as general knowledge in the -- the previous section I cited you to, and do not indicate any failure of retail access for residential customers.

A. To be very clear, I'm referring to the decisions around these bullet points that this Commission has made that define the rights, responsibilities, obligations of utilities, of ESCOs and they absolutely do not reflect the failure of the retail markets. The retail markets are quite robust in -- in New York. I mean, we've seen ample evidence there are 200 competitors they sell different products, they sell -- they have different pricing. That's the sign of a robust market. It's not a sign of a failed market.

Q. Thank you. Do you have any citations to any studies in your direct rebuttal or exhibits that would tend to provide support for that analysis?

A. That it's a competitive market?

Q. That the pricing differences do not indicate any failure of retail access for residential customers.

A. I think for you to believe that retail access has failed you have to believe that 200 people who are trying to gain market share are not acting in a competitive manner. I -- I think you have evidence, whether it's right or wrong or not I -- I can't say, that shows that the competitive market concentrations for the ESCO business are very low. Well below the, you know, uncompetitive standards that Mr. Andruski testified about. So I find no evidence of any market failure whatsoever.

Q. Thank you. A couple of your bullet

points when these start on line 18 on page 23 and continue through line 9 on 24, I had a question about 2 of them in particular. On line 1 on page 24 you have a bullet point that says low versus high barriers to ESCO market entry.

A. Yes.

Q. Do you believe that there are high barriers to ESCO market entry in New York?

A. No, I think they're very low market barriers to entry in New York. That's one of the things I think should be corrected, and I mention that in my testimony. But that --

Q. For what --.

A. -- that isn't, in fact, an active, whether cognizant or not, whether conscientious decision or not, it is a decision that has been made by this Commission at some point along the road to restructuring. And -- and so that's the market we have.

Q. So and could we refer back to lines 14 through 17, you cite all these bullet points as decisions that lead to -- forgive me.

If you look at all these bullet points from line 18 on page 23 through line 9 on page 24, is it correct to suggest that you cite these as decisions that have an effect on the difference in pricing between utility default rates and ESCO rates?

A. I believe that's what I said, yes.

Q. Just checking.

A. Yes.

Q. With regard to line 1 on 24 which is low versus high barriers to ESCO market entry --

A. Yes.

Q. -- what -- what proposition are you citing that for? Is it for -- I'm sorry, let me withdraw that. Are you citing that proposition with regard to ESCOs offering at a higher price or a lower price?

A. That -- that would tend to drive prices very low. That -- we have HHIs and the low hundred levels that -- that were presented by Mr. Andruski. That's a very competitive market.

Q. On line -- I'm sorry, line 18 on the previous page, page 23, you cite utility POR versus no POR.

A. Yes.

Q. Could you explain for the record what the POR is?

A. Oh, I'm sorry. It's purchase of

receivables which is a program where ESCOs bill their -- for their charges through the -- on the utility bill.

Q. Thank you. And could you explain the effect that that would have on ESCO price offerings?

A. It is complicated so it's not a direct one to one. I think I identified in my testimony that POR can create bad incentives, and I've suggested that the POR model be changed in my testimony to a supplier consolidated billing. So for an ESCO that is ill-intended it offers the ability to raise prices. And for a well-intentioned utility it offers some billing efficiencies, and it does offer some customer service attributes that I think are outdated by now, but it offered some incentives to get ESCOs into this market that would tend to lower prices. So it has both effects. Some upward incentives and some downward incentives on pricing.

Q. Thank you. Just to return to a statement you made a few seconds ago, you said that it could create an incentive to raise prices. Could you explain why?

A. Because there's no recourse. The utilities purchase the receivable, and this is one of the things I've suggested be changed. I think you need to put this obligation on the -- on the ESCOs. Let them bill for their services and delivery charges just like in almost every other industry. For example, if I buy something from Amazon.com -- Amazon -- I don't pay Fed Ex separately. I -- I pay Amazon.com, they pay the shipping, right, so it should be the same model here.

The ESCO provides the product and pays for the shipping. I think that -- that would eliminate a lot of the -- the negative incentives that are present or created potentially by POR programs.

Q. Thank you. Let me move on. I may come back to that. Moving on to page 24 in your rebuttal testimony. Oh, my apologies. Page 37, forgive me. So beginning on line six you make the statement in your rebuttal testimony and I'll skip the first word "additionally" and begin with the -- the Staff panel ignores the significant impact of the 2014 Polar Vortex on the industry and the influx of complaints it caused in New York and other markets as well as demonstrated in my direct testimony.

Can you provide a citation to any analysis or surveys or tables in your direct or rebuttal testimony that substantiates your statement that there was an influx of complaints based on the Polar Vortex?

A. I have that in my testimony. I don't know where it is, but there was an influx. I think in response to Mr. Yates who suggested that it was caused by new entrants. He also ignored the Polar Vortex. There was definitely a spike in complaints at both the utility and at the utilities and at the ESCOs or against ESCOs and against the utilities in that three month period following the Polar Vortex. I don't know what page number, but it's in here.

Q. Thank you.

A. And -- and in -- in fact, it's the -- it's the page that was corrected this morning because I actually had the wrong number of complaints in there. There were more complaints that I had originally testified to against the utilities.

Q. Thank you, Mr. Lacey. On page 38, lines 5 through 8, you make a statement beginning on line 5 -- no, I'll withdraw that.

On lines 11 through 15 on page 40 you're still discussing -- and if you -- if I mischaracterize your -- your testimony please correct me, but you're still discussing complaints made by ESCOs, is that correct, sir?

A. Could you refer me to the lines?

Q. Lines 11 through 15. Your statement is, if Mr. Yates's assumption about the causal relationship being the difference between the cost of ESCO supply and ESCO default service is true, the cause of at least a portion of complaints then is the utilities and deferrals because the deferrals would have increased the difference in cost.

A. Yes. So let me explain that.

Q. Before you move on to explain it --

A. Okay.

Q. -- is this still referring to ESCO complaints?

A. Yes. In that sentence it is.

Q. Okay. So please continue.

A. Okay. So let me read this one more time real quickly.

Q. Please take your time.

A. Yes. Yeah, so Mr. Yates offered some suggestions, and I don't have his testimony in front of me so I can't remember exactly what was said, but offered some suggestions for rationale for complaints in that time frame. One of the things that was mentioned was an influx of new ESCO participants. I think that's debunked by the fact that utilities got an equally number -- equally high number of complaints during the same period and they're certainly not new market participants. And they also made an observation that the difference in price was causing the complaints. Not necessarily the -- the raw -- the -- the sheer level of the price, but it was the difference between the utility price and the ESCO price.

And so if the difference is driving the complaints, the fact that the ESCO or the utilities held their price artificially low that would drive more complaints, if in fact that was true. I don't believe it was -- it is true. I believe it's just caused by the sheer outrageous pricing that everyone witnessed during that period. But if Mr. Yates assessment is true then the utilities are to blame for some of the complaints that were lodged against ESCOs.

Q. Thank you. Bear with me one minute, Mr. Lacey.

A. Absolutely.

MR. BERKLEY: No further questions, your Honor.

A.L.J. MORENO: Thank you, Mr. Berkley. And I believe Ms. Scrufari you had -- or O'Hare had indicated that you had some questions for this witness.

MS. SCRUFARI: Yes, your Honor. It's just a few. Thank you.

CROSS EXAMINATION

BY MS. SCRUFARI:

Q. Good afternoon, Dr. Lacey. Mr. Lacey.

A. Thank you.

Q. Thank you.

A. I was going to correct you. I was going to check the time first.

Q. I was going to -- I was going to elevate you above. You mentioned earlier today that you used to work for a demand-response company.

A. I did, yes.

Q. And would you characterize demand-response programs as providing value in terms of improving efficiency?

A. It -- it depends about -- it depends on what you mean by efficiency.

Q. Energy efficiency.

MR. BURCH: Object, your Honor. I -- I think this goes beyond the scope of his direct and rebuttal testimonies.

A.L.J. MORENO: Mr. Lacey indicated this morning that he previously worked for such a company. If he's able to characterize the work he performed there he is welcome to answer the question.
A. So you're going to get a long answer here because there's a big debate in the industry whether demand response is energy efficiency or it's not. It is trending to become more and more of an efficiency product because a lot of demand response now, especially at the residential level, is being done by things like programmable or -- or communicating thermostats.
The communicating thermostats are also smart thermostats and they're learning thermostats, so they learn your usage behavior at home. They learn when you're away, when you're not, when you're at home. And so they create an energy efficiency effect in addition to the demand response capabilities. So it's -- it's not -- it's not a yes, no question.
BY MS. SCRUFARI: (Cont'g.)
Q. Okay. Would it be fair to say that one value of demand-response programs could be energy efficiency? That could be one outcome?
A. That's definitely a potential

outcome.

Q. Thank you. Would you characterize at least part of the value of demand-response programs as getting customers to reduce their consumption of energy at -- at times when demand for energy is at its highest in terms of the thermostats that you just mentioned?

A. I'm sorry, could you repeat the question?

Q. Certainly. Could you -- would you characterize at least part of the value of demand-response programs as getting customers to reduce their consumption of energy at times when the demand for energy is at its highest?

A. Yes. Definitely. That's -- that's one of the primary benefits of demand response. Not necessarily a benefit to that customer.

Q. But to the system.

A. But -- but to a system it's a huge benefit and to all the other customers it's a huge benefit.

Q. Thank you. When customers are paying ESCO fixed prices, do they have an incentive to reduce their consumption during the periods where demand for energy is at its highest on a hot summer day?

A. An ESCO can offer that product to a customer and it would have that incentive, yes. A -- a customer on a flat-rate product in a non-interactive system like the New York grid, that -- that incentive -- I mean, the incentive is a little more difficult to put in place. But certainly a customer, an -- an -- a customer on a flat rate price has a lot of incentive to participate in demand-response programs.

Q. What incentive would that be if their bill doesn't vary with their usage?

A. Okay. So we're going to get into product design for a minute. A demand-response product can be created by an ESCO that actually offers a lower price than a -- than a -- a normal -- all things being equal. You have a demand-response product and a flat rate price product.

Q. Just to -- just to clarify to your flat rates product, are you using that phrase synonymous with a fixed-price product? That's specifically what I'm asking about.

A. I am, yes. Yes.

Q. Okay. Thank you.

A. So you have a fixed-price product

and a demand-response product. All things being equal, an ESCO could offer a lower price on the demand-response product because it can create an incentive for the customer to reduce its load during those peak hours.

So we would offer either a financial incentive through a lower price or a financial incentive, hey I'm going to give you 20 bucks if you do this for me. Right.

Q. And how would a customer in New York know how much they were paying for the demand-response product versus the fixed-price product?

A. Well, you could look on the Power to Choose website and it would be 7.2 cents versus 6.5 cents.

Q. But in terms of what the customer is paying for each product, not necessarily what the customer is paying per kilowatt hour of usage. I'm -- I'm talking about the products that's separate from the purchase of the commodity. How would a customer discern what they are paying for the commodity for the demand-response program and for the fixed-price product service that you mention? To -- to my mind those are three different things.

MR. BURCH: Objection, your Honor.

I'm -- I'm sorry, but I'm a little bit lost.

BY MS. SCRUFARI: (Cont'g.)

Q. I'm just asking how a customer would be able to discern from their bill what they're paying for the commodity, for the demand-response product and for the fixed-price service product in your hypothetical.

A. In my hypothetical -- well, in my hypothetical it's supplier consolidated billing so the customer can understand whatever it wants to understand on the bill.

Q. But we don't have that in New York yet.

A. I understand we don't have that. So in today's world in New York, there's a couple of ways you could do that, right? The most efficient way would just be for the ESCO to either offer a lower price or to say I'm going to give you the same price and I'm going to give you 20 bucks at the end of the summer, right? The demand response company I used to work for worked with ESCOs and we offered both products.

We offered -- we assisted in product development where they could offer lower prices, and we also offered products that said, you know, we'll give you a rebate. We'll give you a dollar every time we curtail your air conditioner or five dollars or whatever. So it depends on what the product looks like.

Q. Thank you. Are you aware of any --?

A.L.J. MORENO: I'm sorry, Ms. Scrufari, I -- I did need a clarification just for myself if -- if --

MS. SCRUFARI: Oh, certainly.

THE WITNESS: I'm -- I'm sorry.

A.L.J. MORENO: -- if I could interject. My apologies.

THE WITNESS: Yes.

MS. SCRUFARI: No problem.

EXAMINATION

BY A.L.J. MORENO:

Q. In the scenario you just described are you describing a scenario where there is a fixed-price product and comparing that to a separate demand-response product. Or are there -- is it a combination product?

A. So I think in answering her question I said you could do it either way, right.

Q. I see. And it's not a --.

A. You could offer a lower fixed price

--

Q. Okay. Thank you.

A. -- because your risks are lower because you can physically manage your risks as an ESCO. Or you can offer what would be your standard fixed price and then offer a rebate if you ever kicked in the demand response tool.

Q. Okay. Thank you.

A. So you could do it either way.

A.L.J. MORENO: Yes, Ms. Scrufari, thank you.

CROSS EXAMINATION

BY MS. SCRUFARI: (Cont'g.)

Q. Sorry. I'm having trouble seeing around. So to your -- to your knowledge -- thank you -- to your knowledge are there any ESCOs in New York that are offering that combination of demand response and fixed-price products that you just mentioned?

A. I don't know.

Q. Thank you. And you're -- I'm referring now to your rebuttal testimony, you discuss cost. And costs are not the same thing as prices, right?

A. Could -- could you point me to a --?

MR. BURCH: What -- object. Yeah.

BY MS. SCRUFARI: (Cont'g.)

Q. There is -- I'm speaking generally. There's 129 references to cost throughout his rebuttal testimony discussing costs and prices. So it -- it occurs throughout the testimony.

MR. BURCH: Objection, your Honor. If we could have a reference to perhaps the first place where it's defined or something for the witness.

MS. SCRUFARI: Certainly. Costs -- discussion of costs appear on page 6 at line 4.

MR. BURCH: Direct or rebuttal?

MS. SCRUFARI: Rebuttal. This is all rebuttal. And actually it's -- it's page 6 line 2 to line 4.

A. Okay. So generally I try to be very careful using specific words, costs, prices, rates. They're all different things. Sometimes they get mixed up, but I try to be very careful because they are very specific words. So to me when I use costs, it's costs.

BY MS. SCRUFARI: (Cont'g.)

Q. Okay. So just to -- thank you. That's helpful. To clarify, a supplier such as ESCOs and utilities pay costs?

A. All businesses play -- pay costs.
Q. And consumers pay prices.
MR. BURCH: Objection.
A. Let me just clarify.
MR. BURCH: Objection, your Honor. Is this in general, in the scope of his testimony?
MS. SCRUFARI: This is in general. And the witness just testified that the terminology between costs and prices can be confusing and he tries to use those terms with specificity. So I'm just trying to clarify how he's using those terms throughout his rebuttal testimony.
A.L.J. BERGEN: You may clarify how you are using those terms in your testimony.
THE WITNESS: Okay. I will say businesses and we can narrow it down later to suppliers.
BY MS. SCRUFARI: (Cont'g.)
Q. That's fine.
A. Businesses incur costs and they charge customers prices.
Q. That's consistent with my understanding. Thank you.
A. Okay.
Q. I just wanted to make sure that that

was clear. Thank you. So in order to compare prices that are paid by customers, I don't need to know what the costs are that are paid by the businesses or the suppliers?

A. As a customer?

Q. As a customer.

A. You -- it would just confuse most customers to know what the prices were. What the costs were, sorry.

Q. What the costs were.

A. Sorry. What the costs were.

Q. That's okay. Thank -- thank you. That's okay. So that line reference that I gave you just a moment ago of your rebuttal testimony on page 6, line 4, you're discussing how utilities enjoy cost advantages over ESCOs.

A. Yes.

Q. And these -- in -- in your opinion these costs advantages allow utilities to charge lower prices than ESCOs?

MR. BURCH: Objection, your Honor.

A.L.J. BERGEN: What's the basis?

MR. BURCH: Characterizing the testimony.

MS. SCRUFARI: I'm asking for his opinion.

A.L.J. BERGEN: Overruled. You may answer.

THE WITNESS: Thank you. Could you repeat your question? I'm sorry.

BY MS. SCRUFARI: (Cont'g.)

Q. Certainly. You -- you mentioned in your testimony that utilities -- and I'm quoting here, utilities have several other inherent cost advantages over ESCOs. Is your opinion that these cost advantages allow utilities to charge lower prices than ESCOs?

A. The fact that they --.

Q. I'm sorry, who's the "they" in your sentence?

A. They, the utilities. I'm sorry.

Q. Okay. Thank you.

A. The fact that the utilities put -- recover many of their costs that result in the delivery of retail service from the distribution rates, that disconnect is one of the reasons utilities can charge a lower price.

Q. So that -- that would be a yes?

A. It -- they're -- it's -- but more

importantly it's a -- it's the wrong price. The utilities are charging an inaccurate price, okay. They're charging too much for distribution and not enough for default service, okay. So I'm not suggesting anywhere that the utilities should increase their costs. That's not a good solution.

What I'm suggesting, and -- and so it's not just a yes, no question, right. It's one of the reasons default service is price advantaged in the market.

Q. Which allows the utilities to charge lower prices than ESCOs, correct?

A. And results in them charging distribution rates that are too high.

Q. I'm sorry, can you answer the -- the question. It results in utilities charging lower prices than ESCOs, yes or no?

A. It is one of the elements that's goes in --.

MR. BURCH: Objection, your Honor.

A.L.J. BERGEN: This has been asked and answered. Let's move on please.

MS. SCRUFARI: I'm sorry, I don't have a yes or a no, your Honor. I don't know what the answer is.

A.L.J. BERGEN: I don't think it's a yes or no answer. He's indicated he does not believe that to be a yes or no answer. That's his -- that's his answer.

MS. SCRUFARI: May I rephrase?

A.L.J. BERGEN: You may.

BY MS. SCRUFARI: (Cont'g.)

Q. So the cost structure of utilities, would you say that is one cost advantage that results in utilities charging lower prices?

A. I'm going to get very specific. It's not the cost structure of the utilities. It's the allocation of that cost structure to default-service rates that gives utilities a -- one of the elements that gives utilities a cost advantage over ESCOs.

Q. Thank you. So given the lay of the land that you just described with the cost allocation, utility -- or, I'm sorry, ESCOs should be allowed to charge higher prices than utilities?

MR. BURCH: Objection, your Honor. Is there a question?

A.L.J. BERGEN: What's the basis for your objection?

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MR. BURCH: I -- I did not hear a question. I just heard a statement.

A.L.J. BERGEN: Okay. Can you rephrase please, Ms. Scrufari?

MS. SCRUFARI: Certainly.

BY MS. SCRUFARI: (Cont'g.)

Q. I asked given the witness's prior answer, should ESCOs be allowed to charge higher prices than utilities.

A. ESCOs should be allowed to charge a market price for electricity. Some months that's higher than the default service price which is a backward-looking price. Some months it's higher, some months it's lower. There should not be price regulation. There should not be a limit. There should not be, as Mr. Makholm said, a stake in the quicksand against which you should measure ESCO pricing. So it's -- they should be allowed to charge what the market will bear.

MS. SCRUFARI: Thank you. No further questions, your Honors.

A.L.J. MORENO: Thank you. I believe -- I believe that that is -- concludes all of the parties who had indicated that they had cross examination based on the questioning this morning. Is there any other party that has questions for this witness? Okay. In that case I think that we may have some questions for Mr. Lacey. If you could bear with us just a moment.

EXAMINATION

BY A.L.J. MORENO:

Q. Mr. Lacey, I would like you to turn please to your direct testimony. I just had a couple of questions --

A. Sure.

Q. -- to better understand your testimony. Looking at page 35, lines 1 to 3 --

A. Yes.

Q. -- you had indicated that the New York market already has 1,200 megawatts of electricity demand response participating in the New York Independent System Operator. Could you please, to the extent that you're aware, characterize what types of customers participate?

A. I think it's -- I think it's predominantly commercial and industrial. But I don't know with certainty the breakout.

Q. Okay. Thank you. And looking at page 41, I believe it was during Mr. Berkley's test --

questioning of you, you mentioned that in -- in some instances a -- a market may be too efficient. Could you expound a little bit for me about what you meant by that?

A. It's -- it's not a comment -- it's not a belief that I share.

Q. Okay.

A. It's comments that I've heard in stakeholder meetings in ERCOT. Everyone's always looking for more efficiency, more efficiency, more efficiency. It's a bare bones, low priced market. And when you talk about more efficiency the generators just throw up their arms and say we can't have more efficiency. We're barely making a nickel, right. So it's a -- it -- it's -- it's a truly, fiercely competitive market that has driven excess margins out of the market.

Q. Okay. Thank you. Looking at your page 54 of your direct testimony again, lines 15 through 19, under the what I -- please correct me if I'm wrong -- your suggestion or position that perhaps having -- moving to a -- a fully retail-related market, would it be -- if a -- if a customer wanted only solely commodity instead of -- of some sort of a bundled package, do you think under the -- do you think that product would be a product that is -- is currently available or would be available under sort of the -- the marketplace that you envision in your testimony?

A. I -- I think that product will always be available -- will -- excuse me, will always be available. I think it's -- it's a -- I don't know, the Toyota Camry of electricity products or what -- whatever the right car is, it's kind of the standard bearer probably. Customers or innovators they move at different speeds, so I think that kind of base core commodity-only product will be available as long as customers desire it.

Q. Okay. Thank you. And at page 84 of your testimony towards lines 13 and 14, you had discussed instant connections or seamless moves for customers presuming that customers move and are -- are interested in moving a service with them. If a -- under this scenario would that move be permitted throughout different pricing areas as well?

Presumably, we've had some testimony and -- my apologies -- if it wasn't particularly yours please so advise. But talking about pricing in different zones of the NYISO, if you were to -- in this situation that you describe where you might have a seamless move, would under -- under sort of the -- the regime that you envision, would that be available to customers if they were moving in and out of zones, for example, for the electric market?

A. I think at -- at the first step it would be within a utility, with Westchester to New York City might create some problems. But I -- I think I'm not suggesting someone that moves from Albany to New York City be able to keep their contract. It's really if you move from the east side of Albany to the west side of Albany you'd be able to keep your contract.

Q. Okay. Thank you. And looking at your rebuttal testimony on page 24, just wanted to understand, I believe, again, that when Mr. Berkley was asking you a few questions you had -- in speaking specifically to line 1 talking about the low versus high barriers to ESCO market entry, I wanted to make sure I understood your testimony correctly. Did you state that low barriers would drive prices down? Did I hear you correctly?

A. Low barriers to entry would welcome lots and lots of suppliers. Forcing competitive pressures would drive the prices down, yes.

Q. Okay. Thank you.

(A.L.J. Bergen) Judge Moreno talked about some of the technical aspects. I have some questions about the logistics of some of your ideas. Specifically when you -- you talk about throughout your testimony the ESCO of the future.

A. Yes.

Q. And a lot of your exhibits, in particular, Exhibit 4 to your direct testimony some examples of ESCO investments in new products.

A. Yes.

Q. And one of the -- the concerns that we've -- we've heard and -- and some other testimony in the proceeding, one is about the safety and security of customer information. So I don't see anything in your testimony that would speak to how do we maintain confidentiality and security of customer information and privacy concerns when you have a fully connected home so to speak?

A. I'm not a technology expert or a cyber-security expert. I have worked for ESCOs in the past. They share the same privacy concerns. They have millions and millions of customers and a data breach is like Equifax. It is very damaging to your reputation.

I -- I can't testify that they meet certain missed standards or whatever the standards are -- standards for securing customer data, but they take that very seriously.

And it's not in anyone's interest to have a data breach. So it's best practices. It's required of all modern businesses in any industry to secure customer data. And -- and I would also add it's not -- it's done every day in every industry.

Q. Okay. And on page 51 of your direct you talk about the Texas market and how Texas has apparently, as I understand it, fully deployed smart metering infrastructure. And that's one of the things that you recommend is -- is done in New York. When I -- to the extent you can speak to it, I don't see any recognition of -- of the costs involved in rolling out smart metering. Do you have any -- any data to suggest that it's economically feasible to have a large scale roll out?

A. I have participated in AMI rate proceedings -- AMI proceedings in different markets. I was -- this is several years ago now, so I'm not going to remember the exact numbers, but both the utilities in Illinois put together extremely comprehensive business plans that's -- that showed positive net present value over 10 years for the meter deployment -- the smart meter deployment and the grid deployment.

Their rate-based assets they are dynamic assets but with -- with the advent of programs like REV they become cost effective very quickly for customers, right. And so this is my point about the Texas market. The Texas market you're -- you're at a point -- it's so fiercely competitive because of the technology and the meter data and everything that's there, you're -- you're selling -- you're selling a product. You're not just selling electrons.

Is it three cents a kilowatt hour? Is it two point eight cents a kilowatt hour? It doesn't matter. It's the monthly bill. It's -- it's what's coming in. It's like the -- what is the value? How are you driving usage down not price down? The price can't get any lower so everyone is -- is fighting for technology and customer ownership in that market through product innovation, right.

And -- and when you get to that point, again, the -- the comment in the Ameren -- AMI cases they were five or six years ago at this point, heavily dependent on simply demand response to show positive net present value. This concept of DER integration and non-wires alternatives, they -- they didn't even exist when those rate cases were going on. So if you add those to the mix, smart meters and AMI deployment become very cost effective for customers very quickly.

Q. Okay. And my final question is about -- and I think we touched about -- on this a little bit in other questioning, on page 56 and 57 of your direct testimony, just talking about the -- around line 15 on page 56, customers consistently indicate a preference for a single bill.

A. Yes.

Q. And on 57 -- continuing to 57 on the bottom of 56, a retail supplier cannot sell an integrated value-added market interfacing energy product or service if it cannot send the customer an explanatory invoice every month or more frequently. Are you suggesting that in -- as the market is structured right now, an ESCO in New York is prohibited or otherwise has no ability to communicate with a customer to explain the product and service that the customer's receiving?

A. It's a practical limitation not a legal limitation. Dual billing is allowed but customers, especially mass market customers, don't want to pay two bills. You know, you could have a 100 dollar bill, you could have two 50 dollar bills, right, customers don't want the two 50 dollar bills because it's just twice as much work for them, right? So it's -- it's really a consumer preference.

I've -- even in the small commercial market the ESCOs I've worked for have had very little success in offering dual bills. It -- from a business standpoint it's better to do dual billing from a -- from an ESCO perspective because they can collect the revenue faster so their carrying costs on -- on outstanding balances are lower. But from a customer perspective it just doesn't make sense. They -- they reject it.

Q. And do you have data to support that?

A. I have 20 years working in the ESCO industry. That's all. I actually looked for studies that would support it. The -- the closest I could find was an FCC regulation that at one point mandated single billing in the telecom industry.

A.L.J. BERGEN: Okay. That's all the -- that I have.

THE WITNESS: Thank you.

A.L.J. BERGEN: Counsel, would you like redirect?

MR. BURCH: Yes, your Honors. Could I have a brief recess?

A.L.J. BERGEN: Sure. We'll go -- we'll take a 10 minute recess. We're off the record.

(Off the record)

A.L.J. MORENO: Mr. Burch, do you have any redirect?

MR. BURCH: Yes, your Honors.

REDIRECT EXAMINATION

BY MR. BURCH:

Q. Mr. Lacey, I have a few questions on redirect just to clarify a few things in the record. You talk -- you were asked a number of times about fixed-price contracts with ESCOs. Can you explain again what a fixed-price contract is and -- and what it means?

A. Yeah. So for the purposes of my testimony and everything I've said, when I refer to a fixed-price contract that is a -- a fixed price per kilowatt hour -- per kilowatt hour over the term of the contract.

Q. Okay. And so price is constant but usage is not?

A. Correct. Price is constant and the usage would vary as the customer's usage would normally vary.

Q. Okay. And price as I'm using it means price of commodity not overall price of the bill?

A. Correct.

Q. With that understanding of fixed-price product, can you explain the incentives for a customer to enter into a demand response arrangement which -- with one of those fixed-price contracts?

A. Yes. So I'm going to talk about -- very quickly a couple of separate products to identify the incentives. A fixed rate product or a fixed-price product is I think what everyone -- what I just described. It's a unit -- fixed unit-cost product. One of the products I mentioned it would be a demand-response product.

Option A or product number two on this list would be a lower fixed-price option where a supplier could curtail air conditioning load or refrigeration somewhere or a pool pump or something like that at the supplier's discretion. And the customer's compensated that in terms of a lower unit cost.

Another way to offer that product

and to give a customer an incentive to enroll in that product is to say we're going to go back to your original fixed rate, so whatever product number one on this list was, whatever that fixed rate is, we're going to give you that fixed rate but we're going to give you a -- an incentive, a financial incentive or some other incentive every time we curtail your air conditioner or your pool pump or your refrigerator. We'll give you some kind of financial incentive.

All of these can be provided by us -- an ESCO. The -- and then -- so as we migrated into the -- the difference between demand response and energy efficiency, the massive incentive for a customer to enroll in one of these programs, for example a thermostat program, is that there's an energy efficiency benefit. And what that means is you get a lower price and a lower quantity.

So over the course of your contract your overall bill is lower than what it would have been otherwise, right. So you're reducing the total bill on a monthly basis because you're -- you're more -- more efficiently optimizing the use of your air conditioner in the summer or -- and – and/or your furnace in the winter. So there are lots of efficiency benefits that are now being generated with these products.

Q. Thank you. I'd like to direct your attention to Exhibit 1301 which hopefully you still have a copy of.

A. I do.

Q. And specifically page two of that exhibit.

A. Yes.

Q. Can you explain who prepares this document?

A. Department staff prepares this document.

MS. TRINSEY: Objection, your Honor. The -- the witness just said he doesn't know anything about this -- earlier during his testimony he said he didn't know anything about this document.

MR. BURCH: I don't -- I don't think that's what he said. I think we were talking about earlier the -- the source of maybe perhaps Exhibit 1300 which is off the website of Direct Energy.

MS. TRINSEY: He -- he said, your Honor, that he -- he didn't know where it came from or anything about 1301.

A.L.J. BERGEN: I'll have her read

back.

(Reporter complied with request)

(Off the record)

A.L.J. BERGEN: Okay. Mr. Burch, can you lay a foundation for his knowledge please?

MR. BURCH: Yes, your Honors.

BY MR. BURCH: (Cont'g.)

Q. Mr. Lacey, you have in front of you what's been labeled Exhibit 1301, correct?

A. I do. Yes.

Q. Are you -- and -- and on the -- for the record it states it -- it's a two-page document. The first page is a -- apparently a printout from Direct Energy.com. And the second page has at the top of it New York State Department of Public Service. Turning to the first page, do you know who -- what -- who generated the first page?

A. Well, this is a print-off from the Direct Energy website, yes.

Q. Okay. And turning to the second page, do you understand the source of that document?

A. I do.

Q. What is it?

A. The -- the source of this document

is the New York State Department of Public Service. They're the authors of this document.

Q. And -- and why -- what's the basis of your knowledge?

A. Well, I'm familiar generally with environmental disclosure label requirements in many states. I do know that the -- the staff here puts together the environmental disclosure label for the state and other state suppliers put their own together. But here this -- in this state it's done by staff.

Q. And you -- and you testified earlier about this being a regulated requirement, correct?

A. I did.

MR. BURCH: Okay. I -- I'd offer this witness's testimony which I'd like to ask questions about this document.

A.L.J. BERGEN: Please proceed.

BY MR. BURCH: (Cont'g.)

Q. Earlier you talked about the fuel sources, and I believe you were asked, you know, does this represent renewable sources. What -- can you explain again what these fuel sources mean with respect to the -- the products or services of a particular ESCO?

A. Yes.

MS. TRINSEY: Your Honor, I'm going to object to that because I don't believe that's what he testified about earlier.

A.L.J. BERGEN: Okay. You can have recross. We'll allow it.

A. This document reflects the fuel mix or the emissions attributes of, in this particular case, Direct Energy's entire portfolio of products, settled load for this document the calendar year 2015. It is not a product-specific document. It -- it reflects their entire load settled in New York that year. It -- it doesn't reflect any voluntary RECS the customers purchase. It just reflects the New York purchases.

BY MR. BURCH: (Cont'g.)

Q. Thank you. And with -- with respect to ESCO customer contracts generally, what's your understanding of the level of review and approval of those contracts by -- by state regulators?

A. My understand -- excuse me, my understanding is that all retail contracts are reviewed and approved by staff.

Q. Thank you. Moving on I'd like to direct your attention to page 24 of your direct testimony. I'm sorry. I'm -- it's page 24 of your rebuttal testimony.

A. Yes.

Q. And actually starting over on line 18 of page 23 of your rebuttal following to line 9 of page 24 of your rebuttal. Can you explain what this list represents?

A. Yes. This list is a representative list. I -- I don't claim it to be comprehensive. A -- a representative list of material market attributes that have been established for the New York market. Some of these product attributes or some of these market attributes will have the impact of increasing utility prices. Some will have the impact of decreasing utility prices. Some will have the impact of increasing ESCOs' costs and prices, and some will have the impact of decreasing ESCOs' costs and prices.

Q. And specifically turning to page 24, line 1, you were asked earlier about low versus high barriers to ESCO market entry. Can you explain how that impacts this analysis?

A. Yes. I think I mentioned that low barriers to entry would -- has the effect of allowing many, many, many suppliers in. That's a good outcome that drives efficiencies. And I think what -- what my testimony reflects is a desire to put some regulatory mechanisms around the licensing -- best practices to develop a market that is full of responsible market participants.

Certainly we -- I would welcome competition. It's a great -- it -- it drives efficiencies into the market. But you want to establish regulatory reforms to make sure that the market is acting appropriately.

Q. Okay. If I could direct your attention to the corrected page 32 of your direct testimony which was entered into the record this morning. You -- do you recall being asked about data in your -- in your testimony regarding Polar -- your Polar Vortex analysis?

A. I do.

Q. And you were asked for a reference, correct?

A. Yes.

Q. And I -- I believe you referred to the corrected testimony page, but is this particular page 32 the corrected testimony page you were referring to?

A. Could you remind me what specific

question I was asked?

Q. So you were asked a question regarding the Polar Vortex's impact on complaints I believe.

A. Yes.

Q. And then asked to identify the data that would support your conclusions.

A. Yes.

Q. And you pointed to a -- a table but you didn't have a page reference handy.

A. That's correct.

Q. Okay. And is this among other places where you discuss the complaint data and the Polar Vortex, is this one of those places?

A. Yes. This is one of the places. But specifically the complaint -- the three-month Polar Vortex complaint data was corrected on page 40 and 41.

Q. Okay. And that's -- so also another place which I was going to get to. So turning your attention to page 40 and 41 of your rebuttal testimony, and that -- those, you know, there's some minor corrections there, but is this also a place where the data that supports your Polar Vortex complaint analysis is -- is contained within your testimony?

A. It is. Yes.

Q. Thank you. You were asked a series of questions regarding the -- I guess the cost differences between utilities and ESCOs in the -- in your analysis of the comparison of those. Can you explain that analysis?

A. Yes. So I -- I think what we were talking about was the -- the utilities ability to offer a lower price. The -- the utilities really can't offer a lower price. The utilities offer a price that is subsidized. They offer a default-service price that is subsidized by the distribution utility and -- and the costs that are embedded within the distribution utility.

The utilities costs don't disappear ever, so they're always going to collect those costs that they have on -- on the distribution side of the business even as customers migrate. So -- and over time. So they'll always collect their costs. It -- it is not reflective of a utility cost advantage. It's reflective of an inappropriate allocation of cost within the utilities to default service.

Q. And so in your opinion is a comparison possible?

A. Well, for several reasons a

comparison is not valid. It -- it's possible but it is truly comparing apples to oranges. There's this cost issue. There's also the issue that the -- the default service price is a backward looking price. It -- it reflects things that have already happened in the market and ESCOs' price on forward curves looking forward. They're -- they're completely different products and price -- and have completely different cost structures embedded in those prices.

Q. Turning back to the complaint data issue, was there a particular website where you pulled complaint data from to prepare your analysis?

A. There is -- I don't have the reference offhand. It's -- it's a Commission website and it's the website that was cited by staff in their testimony when they referenced the ESCO complaint data.

Q. Okay.

A. The -- but the complaint data comes from the exact same sources.

Q. Okay. So you're using the same website that Staff pointed to in their direct testimony to pull your data for your analysis?

A. The same website and the same documents embedded in that -- or contained in that website.

Q. Okay. Thank you. You were asked a series of questions regarding the impact of switching customers back to the utility default service should ESCOs not be permitted to serve mass market customers. Do you recall that?

A. Yes, I do.

Q. Okay. Can you talk -- describe your opinions on the impact to customers that would -- would take place if they were compelled to switch back to utilities?

A. Sure. Mr. Hanger the other day used the term slammed back and -- and it's effectively -- it would be the same thing. It's very disruptive to customers. Presumably customers have taken an affirmative choice to buy from someone other than the utility. And we don't know their reason. It would be very disruptive to the customer. It could potentially put a customer who is on a very favorable fixed price back into a very volatile market. It clearly eliminates or it completely invalidates the customer's proactive decision that it has already taken.

Q. And -- and just to be clear, that's a mass switchback that you're describing here. Not a particular customer deciding to switch back. That's not what you're describing, correct?

A. Correct. Customers should always be free -- as long as there is a utility default service -- should always be free to take that if that's the regulatory construct. But a customer should never be forced away from the contract it has proactively chosen to enter into.

Q. You were asked about deployment of AMI Do you recall that?

A. I do.

Q. Can you describe your analysis and opinions regarding the future deployment of AM -- AMI in the State of New York?

A. Yes. I understand there are plans in place for deployment of AMI in some of the New York utilities. At -- at the core of what -- what I've mentioned several times in my testimony, the policy initiatives of the state, the REV, the Clean Energy standards, AMI is going to be instrumental in achieving those objectives. It -- it allows for a more robust market. It allows for more innovative products and services -- products and services that will allow you to reduce quantity as well as price. Reduce overall emissions, reduce, you know, just generally benefit customers and the market.

Q. Okay. Thank you. You were asked also about the potential for customers to stay with their supplier if they were to move residences.

A. Yes.

Q. Can you explain that further?

A. Yes. So customers enter into contracts voluntarily. They -- they choose them for a reason. I think specifically I was asked if -- if I would suggest that a customer be allowed to carry its contract into another utility market. That's not possible, right. But a customer should be allowed to when it gets to the new utility market say, hey I'm already an ESCO customer, I want to stay an ESCO customer. It would have a new bill, a new utility account number, so it would have to go through all of the -- it would -- it would have to generate a new contract with their ESCO because there are different requirements in each of the different utility markets. But it should be allowed to do so on -- on initial move. It shouldn't have to go back to the utility for a month, for example.

Q. And -- and what causes that need

currently to go back to the utility and then switch back to an ESCO?

A. The regulatory requirements. New customers start on utility service.

Q. Or even if they were previously a New York customer somewhere else.

A. Correct.

MR. BURCH: I have nothing further at this time.

A.L.J. BERGEN: Ms. Trinsey, did you have any recross?

MS. TRINSEY: I do. I have a few questions.

RECROSS EXAMINATION

BY MS. TRINSEY:

Q. Mr. Lacey, turning back to Exhibit 1300, this is the -- if you turn to page 8, the contract --.

A. Yes.

MR. BURCH: Can I just clarify for the record. My copy anyway is doublesided. And is it the eighth page?

MS. TRINSEY: Front. So it's the contract. So I -- I just want -- page was --.

MR. BURCH: Counted eight if you want --.

MS. TRINSEY: I guess if you did one, two, three, four --.

A.L.J. MORENO: I believe this is the New York residential and small commercial terms and conditions, Ms. Trinsey?

MS. TRINSEY: Yes. The eighth piece of paper. Thank you.

BY MS. TRINSEY: (Cont'g.)

Q. And these are the terms and conditions that a -- a customer executes when they enter into an agreement with an ESCO or with Direct Energy in this case.

A. This is Direct Energy's contract that's been approved by the Commission staff or reviewed by the Commission staff.

MR. BURCH: Object. Objection -- I'd object to the entire line of questioning about this. This is outside the scope of my redirect. I didn't ask about 1300. I asked questions about 1301.

MS. TRINSEY: And, your Honors, the witness brought up the contract in his redirect.

MR. BURCH: I don't believe he did.

MS. TRINSEY: He said this contract had been approved by the PSC.

MR. BURCH: He didn't say this contract has been approved. He said contracts generally, is his understanding, are approved by the Public Service Commission staff.

A.L.J. MORENO: We'll allow this line of questioning. And Mr. Lacey did indicate that contracts are generally approved by the PSC and this is one of those such contracts.

BY MS. TRINSEY: (Cont'g.)

Q. Mr. Lacey, anywhere on this contract or anywhere in this contract does it indicate what product the customer is signing up for or that this is a renewable product?

A. This document reflects terms and conditions of ESCO service that are approved by the Commission. This -- this document -- and this is very common in all markets that I'm familiar with and all ESCOs -- does not reflect exactly what the product is. The product terms -- the product definition is -- is back in these web pages that were printed out. All right, so --.

MR. POND: Your Honor, I'm very

concerned about this because I have a different understanding of Direct Energy's contract. It's fairly technical, it's fairly legalistic. But it seems to me that this cross examination of a witness on a contract that he didn't author and that, you know, isn't his organization's contract is leading to confusion in the record. And -- and I'm not sure what the best way to -- to -- to clear the record is.

A.L.J. MORENO: To the extent, Mr. Pond, that that was an objection it's overruled. To the extent that you're able to answer Ms. Trinsey's questions, you're able to do so. If not, so state.

MS. TRINSEY: And I'll move on from this line of questioning.

BY MS. TRINSEY: (Cont'g.)

Q. Focusing on Exhibit 1301, are you aware of how that -- how a customer comes to view that document in relation to the product that they're signing up for?

A. I have no knowledge of how a customer gets -- they could get it a variety of ways. So I don't know.

Q. Are you aware that Direct Energy provides that document to customers when they're signing up from their -- for their renewable product?

A. My belief is that this is a requirement. They have to disclose this to their customers.

Q. So, Mr. Lacey, are you aware that Direct Energy provides that environmental disclosure to customers when it is signing up for their renewable product?

MR. BURCH: Objection. Asked and answered.

A.L.J. BERGEN: Sustained. Move on please, Ms. Trinsey.

MS. TRINSEY: Your Honor, the question was never answered though.

A.L.J. BERGEN: Please restate your previous answer.

THE WITNESS: I -- I believe it is a requirement that all customers get this disclosure label no matter what product they're on. So I would expect all ESCOs to comply with those requirements.

BY MS. TRINSEY: (Cont'g.)

Q. I have one other question for you. Just going back to your corrected testimony on page 32 about customer complaints --.

A. Yes. Just give me one second.

Q. Sure.

A. I have it somewhere here. Yes.

Q. Just to confirm the tables on these pages are data from 2016 and have nothing to do with the Polar Vortex, correct?

A. Yes. This is a complaint rate experienced by utilities and ESCOs for the calendar year 2016.

Q. Thank you. And the Polar Vortex was 2014, correct?

A. Correct.

MS. TRINSEY: Thanks. I have no more recross, your Honor.

MR. POND: Your Honor, since I disagree with something that the witness stated I would like to conduct a bit of recross.

A.L.J. MORENO: Go ahead.

MR. POND: Thank you very much.

RECROSS EXAMINATION

BY MR. POND:

Q. Mr. Lacey, could you look again at the document that's been marked as Exhibit 1300 and from the back move forward 3 pages to the Direct Energy New

York residential small commercial and small commercial terms and conditions?

A. Yes.

Q. And under paragraph one, terms of service, would you read the first sentence to yourself? Just read that first sentence.

A. Okay.

Q. Will you now go two pages forward and look at the document entitled Direct Energy customer disclosure statement for residential electricity or natural gas?

A. Two pages backward?

Q. Two pages forward. Towards the front of the document.

A. Oh, okay.

Q. I apologize. The document is not paginated. This is required for exhibits.

A.L.J. BERGEN: Mr. Pond, can you please identify that? Just say what it -- what does the document say at the top?

MR. POND: At the top it has the Direct Energy logo and aside from -- from the address on the right-hand side it says Direct Energy customer disclosure statement for electricity or natural gas.

A.L.J. BERGEN: Thank you.
BY MR. POND: (Cont'g.)
Q. Okay. Do you see that?
A. I do, yes.
Q. And the third box down is rate plan type, do you see that?
A. I do.
Q. And do you see where it says if this box is checked you chose a renewable energy plan?
A. I do see that.
Q. Now if you were a customer and you read the first sentence of the agreement which said that these terms and conditions together with the disclosure statement are the contract and you looked at this disclosure statement, would you or would you not think you were buying a renewable energy project -- product?
MS. TRINSEY: I'm going to object your Honor. This is beyond the scope of redirect.
MR. POND: He stated -- he stated that --.
MR. BURCH: This is not redirect.
MR. POND: This is not --.
UNIDENTIFIED SPEAKER: No, but recross is related to redirect.

MR. POND: He -- he -- he and Ms. Trinsey had a discussion about what -- what this contract provides, the result of which is clearly inconsistent with the face of the document. All I'm trying to do is get it into the record what's on the face of the document.

UNIDENTIFIED SPEAKER: And as Mr. Pond has stated previously, the documents speak for themselves --

A.L.J. BERGEN: Okay.

UNIDENTIFIED SPEAKER: -- so you don't need a witness to interpret a document. The purpose of recross is to be focused on redirect not on cross of other parties.

A.L.J. BERGEN: Objection overruled. You may answer.

BY MR. POND: (Cont'g.)

Q. Do you have the question in mind, sir?

A. No, I was going to ask if you could repeat the question.

Q. Sure. My question is if you were a customer and you signed this contract and you read in paragraph one that the -- that the terms and conditions together with the customer disclosure constituted the contract, and then you looked at the customer disclosure and saw that if the -- if this box is checked you are taking a renewable energy plan and that box is checked, would you think that your -- your plan was renewable or not renewable?

A. Excuse me. I think it would be renewable. I think if I misspoke earlier then the record should be clarified. I think this is perfectly transparent. I think I mentioned that earlier in my testimony that this is absolutely a transparent document and it reflects a renewable energy contract.

MR. POND: Thank you, Mr. Lacey. Thank you, your Honors.

MS. SCRUFARI: Your Honors, may I have a brief recross please?

A.L.J. BERGEN: Uh-huh.

A.L.J. MORENO: Sure.

MS. SCRUFARI: Thank you.

(Off the record)

RECROSS EXAMINATION

BY MS. SCRUFARI:

Q. Mr. Lacey, you were asked by Mr. Burch on redirect what incentives a customer might have to enter into a -- a combined demand response and a fixed-price product, is that right?

A. Yes.

Q. Is AMI deployment required for an ESCO to be able to offer the sort of combined products you were answering in -- on redirect in terms of demand response and fixed price?

A. AMI is required to get the true value of the demand response represented to the customer. For example, in -- in today's market you would settle a customer based on a profiled load, so you might have a -- a customer that has a stay at home family create one set of demands on the system and another family that has no one at home all day. They could both participate in demand-response products. And under today's market they would both be compensated the same way because they'd both be settled the same way. And that's a massive cross subsidization. So AMI would allow you to pay the customers for exactly the value that they contribute to the system.

Q. So an ESCO would need to have the AMI deployed in order to be able to accurately assess those values?

A. Correct.

MS. SCRUFARI: Thank you. No further questions, your Honors.

A.L.J. BERGEN: Anybody else have any recross? Mr. Burch?

MR. BURCH: No, your Honors.

A.L.J. BERGEN: Okay. Thank you, Mr. Lacey. You may be excused.

THE WITNESS: Thank you.

A.L.J. BERGEN: Okay. At this point we're going to recess for an hour for lunch. We can go off the record. Please come back at two thirty-five.

(Off the record)

A.L.J. MORENO: The next witnesses we had was the City of New York’s policy panel. If you could please stand and raise your right hands and, if you could, one by one, just state your names and your business address, please.

MR. TIGER: Michael Tiger, Deputy General Counsel of the New York City Department of Consumer Affairs, 42 Broadway, New York, New York.

MS. DESROCHES: Susanne DesRoches, Deputy Director for Infostructure and Energy in the Mayor’s office of Recovery and Resiliency, 253 Broadway.

MS. PHILIP: Marie Philip, Deputy

Commissioner, Emergency Intervention Services at Human Resources Administration, 4 World Trade Center, New York.

A.L.J. MORENO: Thank you. And do you swear and affirm that the testimony that you will give today will be the truth, the whole truth and nothing but the truth?

THE PANEL: I do.

MICHAEL TIGER; Sworn

SUSANNE DESROCHES; Sworn

MARIE PHILIP; Sworn

A.L.J. MORENO: Thank you. And do you adopt your pre-filed testimony, the New York City policy panel testimony as your own sworn testimony in these proceedings?

THE PANEL: Yes.

A.L.J. MORENO: Okay. You may be seated, thank you.

And counsel, did you have any corrections --

MR. LANG: Yes, your Honor --

A.L.J. MORENO: Wait -- excuse me, Mr. Lang, one moment. Could you please move the -- into the record the pre-filed testimony of the panel as though given orally? Thank you.

Before the
New York State Public Service Commission

In the Matter of

Case 98-M-1343	**In the Matter of Retail Access Business Rules.**
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 15-M-0127	**In the Matter of Eligibility Criteria for Energy Service Companies**.

September 15, 2017

Prepared Direct Testimony of:

New York City Policy Panel:

Michael Tiger
Susanne DesRoches
Marie Philip

On Behalf of:

The City of New York

INTRODUCTION

Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.

A: Mr. Tiger – My name is Michael Tiger. I am the Deputy General Counsel of the New York City Department of Consumer Affairs ("DCA"), the main office of which is at 42 Broadway, New York, New York.

Ms. DesRoches – My name is Susanne DesRoches. I am the Deputy Director for Policy, Infrastructure for the New York City Mayor's Office of Recovery and Resiliency and am currently overseeing energy regulatory affairs in the New York City Mayor's Office of Sustainability. My business address is 253 Broadway, 14th Floor, New York, New York.

Ms. Philip – My name is Marie Philip. I am the Deputy Commissioner for Emergency and Intervention Services of the New York City Human Resources Administration/Department of Social Services ("HRA"). My business address is 4 World Trade Center, 150 Greenwich Street, 38th floor, New York, New York.

Q. ON WHOSE BEHALF ARE YOU SUBMITTING THIS TESTIMONY?

A. We are submitting this direct testimony before the New York Public Service Commission ("PSC") on behalf of the City of New York ("City").

Q: PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL EXPERIENCE.

A. Mr. Tiger – I graduated from Columbia Law School in 2001 with a Juris Doctor degree and from Cornell University in 1998 with a Bachelor of Arts degree. Before becoming Deputy General Counsel of DCA in December 2016, I was a partner at Hughes Hubbard & Reed LLP in New York City. As Deputy General Counsel, among other things, I supervise the counsel who bring cases under the New York City Consumer Protection Law, oversee the work of our Appeals Unit, and assist with the review and drafting of legislation and rules.

Ms. DesRoches – I have a Bachelor Degree in Industrial Design from the Pratt Institute and a Master in Public Administration Degree in Environmental Science and Policy from Columbia University School of International & Public Affairs. I have been in my current position since September 2015. In this role, I oversee analysis and advocacy on a wide range of regulatory and legislative energy matters before the New York State and federal government for the Mayor's Office of Sustainability. I also lead the City's efforts to adapt infrastructure systems across the region to the risks of climate change, with a specific focus on the infrastructure resiliency recommendations in the City's strategic plan, *One New York: The Plan for a Strong and Just City* ("*OneNYC*"). I oversee a team responsible for implementing a cohesive program of resiliency initiatives across several key areas, including energy, telecommunications, water/sewer/waste, and transportation. Prior to joining the City, I served as the Chief for Resilience and Sustainability in the Engineering Department of the Port Authority of New York & New Jersey.

Ms. Philip – I am a trained social work administrator with a Master's Degree from Lincoln University. I joined HRA in 2003 and was promoted to Deputy Commissioner in December 2015. As Deputy Commissioner for Emergency

Intervention Services, I oversee the administration of a variety of comprehensive emergency social services that address the immediate and long-term needs of individuals and families. These services are administered through the following matrix of programs: the Office of Domestic Violence, the Office of Emergency Food and Nutrition Assistance Program, HEAP, and Emergency Utility Intervention Programs.

Prior to my career with HRA, I was a long-time community organizer creating, developing, and directing social service programs for individuals and families impacted by domestic violence, substance abuse, sexual assault and child abuse.

Q: PLEASE DESCRIBE DCA AND ITS MISSION.

A: Mr. Tiger – DCA's mission is to protect and enhance the daily economic lives of New Yorkers to create thriving communities. DCA serves New York City's consumers, businesses, and working families, enforcing laws and providing services that address the needs of New Yorkers, from their wallets to their workplaces. DCA licenses almost 80,000 businesses and individuals in over 55 different business categories. DCA also enforces the City's consumer protection and licensing laws and other laws that regulate the marketplace and prohibit deceptive acts and misleading marketing practices.

DCA's Office of Financial Empowerment ("OFE") is the first local government initiative in the nation with a mission to educate, empower, and protect New Yorkers with low incomes so they can build assets and make the most of their financial resources. OFE provides free, professional, one-on-one financial counseling at over 20 Financial Empowerment Centers across the city.

DCA's Office of Labor Policy and Standards ("OLPS") is a dedicated voice in city government for workers in New York City. OLPS' mandate is to enforce key workplace laws and rules; to educate workers, employers, and the public about local, state and federal workplace protections; and to conduct original research and use it to advance new policy initiatives that are responsive to a changing economy.

Q: WHAT DOES HRA DO?

A. Ms. Philip – HRA provides temporary help to individuals and families with social service and economic needs to assist them in reaching self-sufficiency. HRA serves more than three million New Yorkers through essential, diverse programs and services such as energy assistance, temporary cash assistance, public health insurance, and Supplemental Nutrition Assistance Program.

Q. WHAT TYPE OF ENERGY ASSISTANCE DOES HRA PROVIDE?

A. Ms. Philip – HRA administers benefits through HEAP to help low-income homeowners and renters pay bills for electricity, heating fuel, energy equipment, and related repairs and replacements. HEAP is a federally funded program that assists eligible households with grants to pay regular and emergency energy costs for heating and cooling.

HRA also administers a Utility Assistance Program ("UAP"), which assists individuals and families who are elderly, blind, disabled, mentally impaired, or residing in a neglected or hazardous environment and require financial assistance for their energy bills, primarily in cases where customers are faced with termination of services due to nonpayment, theft of service, or meter tampering. UAP is a state-mandated program, and HRA is the designated liaison between these individuals and families and the utility companies.

Q: WHAT DOES THE MAYOR'S OFFICE OF SUSTAINABILITY DO?

A. The New York City Mayor's Office of Sustainability oversees the City's multi-layered OneNYC climate resiliency program and works on ccitywide sustainability policy development, oversight and implementation in coordination with relevant agencies. The Mayor's Office of Sustainability also works with other agencies to coordinate relevant policy with federal, state and local stakeholders.

PURPOSE OF TESTIMONY

Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A: The purpose of this testimony is to provide input in response to the *Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits* ("Notice") that was issued on December 2, 2016 in Cases 98-M-1343, 12-M-0476 and 15-M-0127. The City's testimony (1) submits that there is place for energy service companies ("ESCOs") to operate in the New York City market so long as they are providing real and measurable value to customers at just and reasonable rates, (2) supports strengthening consumer protections and PSC oversight over ESCOs, (3) supports improving ESCO contract transparency, and (4) supports improving marketing practices.

Q. ARE YOU SPONSORING ANY EXHIBITS WITH YOUR TESTIMONY?

A. No.

Q: PLEASE SUMMARIZE YOUR TESTIMONY AND RECOMMENDATIONS.

A: We provide the following broad recommendations:

1) ESCOs should provide real and measurable value to customers at just and reasonable rates, including, where applicable, guaranteed savings for low income assistance program participants ("APP") customers over what such customers would otherwise pay to the utility.

2) Consumer protections and PSC oversight of ESCOs should be strengthened, including the implementation of a licensing process for ESCOs that utilizes strict standards and imposes financial penalties for non-compliant ESCOs.

3) Contracts should provide transparent disclosure of pricing and contract duration/terms, expand the three-day rescission/cancelation period to at least ten days, and require affirmative consent from customers upon any material change to the customer's agreement with an ESCO.

4) ESCO marketing practices should be improved to provide customers with greater protections against aggressive sales representatives or marketers representing themselves as the utility.

Q: WHAT IS THE BASIS FOR YOUR RECOMMENDATIONS?

A: The City's recommendations are based on years of participation in the development of the PSC's retail marketplace and from assisting New York City residents with energy-related issues. For example, over the last decade, the City has frequently submitted comments and been an active participant in the PSC's retail market proceedings. In 2007, with the New York State Consumer Protection Board ("CPB") and DCA petitioned the PSC to adopt and implement stringent marketing standards for ESCOs to protect consumers from predatory marketing practices. In 2008, DCA responded to proposed revisions to the Uniform Business Practices ("UBP") and advocated for the use of plain language disclosures and clear standards for communicating with customers whose primary language is not English. In 2010, DCA submitted recommendations regarding the PSC's implementation of the Consumer Bill of Rights. Thereafter, in 2013 and 2014, DCA submitted comments to the PSC regarding ESCO marketing practices, urging the PSC to take meaningful action to empower consumers through complete and accurate disclosure of current prices and to curtail deceptive ESCO marketing practices.

In 2015, the City was an active participant in a Department of Public Service ("DPS") Staff-led collaborative that examined how ESCOs can serve APPs (hereinafter "ESCO Low Income Collaborative"). Thereafter, in 2016 the City participated in DPS Staff's series of meetings to discuss resetting the retail energy markets for mass market customers. The City also offered comments to the PSC on three DPS Staff Whitepapers that were issued addressing express consent, benchmarking reference prices, and the need for performance bonds and other security interests.

Q: TO WHICH OF THE PSC'S QUESTIONS DO YOU RESPOND?

A: The recommendations herein are broad in scope. Because there is some overlap between the questions in the Notice, each topic discussed in our testimony may be applicable to one or multiple Notice questions. As such, the topics below should not be narrowly construed as only answering certain Notice questions, but should be read comprehensively as the City's full position. We have structured our testimony as follows:

- Topic One responds generally to Question 1 of the Notice.
- Topic Two responds generally to Questions 3, 5 and 6 of the Notice.
- Topic Three responds generally to Question 16 of the Notice.
- Topic Four responds generally to Questions 7 and 8 of the Notice.

TOPIC ONE: ESCOS MUST PROVIDE REAL AND MEASURABLE VALUE TO CUSTOMERS AT JUST AND REASONABLE RATES

Q: WHAT IS YOUR GENERAL POSITION ON THE RETAIL ENERGY MARKETPLACE IN NEW YORK?

A: The City has been a longtime supporter of a fair and transparent retail marketplace that empowers consumers to make better and more informed decisions regarding their energy services. However, the retail marketplace has proven time and time again to be very difficult for mass market customers – especially low income APPs.

Q: HOW HAVE RETAIL MARKET FAILURES AFFECTED RESIDENTS OF NEW YORK CITY?

A: As set forth in more detail below, DPS Staff reports that mass market customers – especially APP customers – in the city who switch to ESCO service oftentimes end up paying higher prices for electric and gas supply service than they otherwise would have paid if they purchased their commodity directly from the utility. These increased supply payments are particularly damaging to APP customers because such increased energy charges ultimately negate any rate reduction they receive on their delivery service from the utility's low income assistance program or other State or Federal assistance. Moreover, a lack of product innovation in the marketplace means that these higher costs are not accompanied by other energy-related value-added products ("ERVAS") that help customers ultimately reduce their utility bills.

Q: WHAT IS AN ERVAS?

A: In its February 25, 2014 *Order to Improve Residential and Small Nonresidential Retail Access Markets* in Case 12-M-0476 ("February 2014 Order"), the PSC put forth that a "value-added" product is one that generally "exceeds the expectations associated with provision of what is otherwise an undifferentiated commodity."

In furtherance of the February 2014 Order, DPS Staff convened the ESCO Low Income Collaborative to address, among other things, a definition for ERVAS for long income APP customers. The City participated in that collaborative and recommended a number of guidelines for ERVAS including: (1) products provided for free, or at a discount, through government entities or action should not be considered ERVAS; (2) a DPS Staff proposal to establish a representative price for ERVAS that would be amortized over a one-year period (with interest) and collected from customers on a per-kWh or per-therm basis should be rejected; (3)

advanced thermostats or other energy management equipment provided at no charge to APP customers could be considered ERVAS; and (4) more data is needed to understand the number of APP customers who might benefit from maintenance and/or repair of home energy equipment, particularly when the customer does not own or control the building furnace.

Q: DID THE ESCO LOW INCOME COLLABORATIVE REACH A CONSENSUS ON A DEFINITION FOR ERVAS?

A: No. Ultimately, the Collaborative was unable to reach a consensus on products that could be considered ERVAS within the PSC's guidelines.

Q: HAS THE COMMISSION TAKEN ACTION SINCE THE END OF THIS COLLABORATIVE?

A: Yes. On December 16, 2016, the PSC issued a prohibition on service to APP customers by ESCOs (hereinafter "December 2016 Order"). However, the PSC left open the opportunity for ESCOs to petition the PSC for a waiver of the prohibition to serve low income customers if they provide a guaranteed savings program to APP customers. The December 2016 Order noted that such waiver petitions would be reviewed on a case by case basis.

Q: DOES THE CITY SUPPORT THE PSC'S PROHIBITION?

A: We believe that the PSC was acting in the best interests of consumers in their December 2016 Order. As the City has noted in past proceedings, if ESCOs are to serve low income APP customers, such service should be limited to where the ESCO is offering guaranteed savings over what the customer would otherwise pay to the utility, or when the ESCO is providing the APP customer with an ERVAS that provides real and measurable value to the customer.

Q: HISTORICALLY, HAVE ESCOS PROVIDED CUSTOMERS WITH GREATER SAVINGS?

A: No. In its December 15, 2016 Order, the PSC reported that its ESCO Low-Income Collaborative "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 [ESCO Low Income] 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 [low-income] customers."

Q: SHOULD GUARANTEED SAVINGS BE LIMITED TO APP CUSTOMERS?

A: No. Although low income customers are particularly at risk for being exposed to ESCO customer abuses and paying higher prices for electric and gas supply, the PSC specifically found in the February 2014 Order that "the retail energy markets serving residential and small non-residential customers have failed to provide [ERVAS similar to those available to large commercial and industrial customers] to these 'mass market' customers." Such market flaws, therefore, have not been observed to rest solely with APP customers, and all mass market customers suffer from a lack of available ERVAS.

Q: WHAT ARE YOUR RECOMMENDATIONS REGARDING WHETHER ESCOS SHOULD BE PERMITTED TO SERVE MASS-MARKET CUSTOMERS, OR WHETHER ESCOS SHOULD BE REQUIRED TO OFFER ERVAS AS A CONDITION TO OFFERING COMMODITY SERVICE?

A: It continues to be the City's position that ESCOs wishing to operate in New York must provide real and measurable benefits to mass market customers, including offering ERVAS to such customers. While a specific definition of ERVAS has yet to be adopted by the PSC, the City reiterates the same concerns raised in the ESCO Low Income Collaborative discussed above. Any ERVAS provided in lieu of a price guarantee must provide real and measurable value to customers, such as assisting customers with reducing their utility bills. Moreover, an ESCO cannot simply provide a product or service that the customer would otherwise receive for free – the ERVAS offered by the ESCO must be legitimate.

Q: ARE THERE ANY ERVAS THAT ESCOS SHOULD BE PERMITTED TO PROVIDE TO MASS MARKET CUSTOMERS?

A: Yes. For example, ESCOs should have the option of providing "green" energy products to mass market customers as an ERVAS.

Q: WHAT IS A GREEN ENERGY PRODUCT?

A: While this topic has not fully been examined in the context of the retail marketplace, in the PSC's February 23, 2016 *Order Resetting Retail Energy Markets and Establishing Further Process* (hereinafter "Resetting Order") it held that a new green product will "guarantee that at least 30% of the energy provided to the customer will be generated by renewable sources, eligible under the Commission's Environmental Disclosure Labeling Program rules."

Q: DOES THE CITY SUPPORT GREEN ENERGY PRODUCTS?

A: Yes. The City has an established history of promoting the development and use of renewable energy, and reducing greenhouse gas emissions, as outlined in Mayor Bill de Blasio's *OneNYC* plan. *OneNYC* serves as a blueprint for the City to meet its sustainability goals in an integrated way. A key component of *OneNYC* focuses on reducing the City's greenhouse gas emissions 80 percent by 2050. To provide leadership to meet this overall goal, the City has set for itself the goal of reducing greenhouse gas emissions in City-owned buildings by 35 percent by 2025. To accomplish these goals, the City seeks to maximize the consumption of renewable power, and seeks to lead by example, ideally having 100% of the City's load serviced by renewable sources over the next ten years.

The opportunity for mass market customers to have the ability to make an informed choice to purchase green energy products from ESCOs will further both the State's and City's renewable and carbon reduction objectives.

Q: SHOULD THE DEFINITION OF "GREEN ENERGY PRODUCT" INCLUDE THE PURCHASE AND SALE OF RENEWABLE ENERGY CREDITS?

A: Yes. The definition of green energy product should include the buying and selling of renewable energy credits ("REC") or comparable environmental attributes of electricity. Based on a purchase of electric commodity alone, it is impossible to distinguish the sources of electricity that make up the purchased commodity. That is, it is impossible to pinpoint which electrons consumed by an end-user ultimately came from which generators. Instead, the PSC's New York Generation Attribute Tracking System "mints" RECs for set quantities of electricity generated by renewable facilities as a means of distinguishing their cleaner-sourced electricity from other fossil fuel generation sources. RECs therefore have an added value that should qualify them as ERVAS for purposes of retail energy sales by ESCOs to mass market customers.

TOPIC TWO: THE PSC'S OVERSIGHT OF ESCOS SHOULD BE STRENGTHENED

Q: HISTORICALLY, WHAT HAS THE CITY'S POSITION BEEN ON ESCO OVERSIGHT?

A: The City has generally supported amendments to the UBP that provided greater protections to consumers.

Q: WHAT IS THE CITY'S CURRENT RECOMMENDATION FOR PSC OVERSIGHT OF ESCOS?

A: The City maintains the position that there is room for the PSC to strengthen its oversight of ESCOs.

Q: DO YOU HAVE ANY SPECIFIC RECOMMENDATIONS?

A: Yes. It would be beneficial to consumers if the PSC, or the appropriate New York State agency, implemented a comprehensive licensing structure and assessed penalties for violations of the UBP or potential future licensing requirements.

Q: WHY SHOULD THE PSC LICENSE ESCOS?

A: DCA licenses over 55 different business categories. DCA has found that, where appropriate, a properly constructed licensing structure can expand consumer protections without endangering the viability of an industry.

The PSC already has the power to suspend an ESCO's ability to do business in New York State. But, a licensing scheme could provide the PSC with greater power to undertake an assessment of an ESCO's fitness to market to New Yorkers before the ESCO opens for business in the State. A licensing scheme could also benefit ESCOs by providing transparency about the requirements necessary to do business in New York and by excluding "bad actors" from the industry.

Also, as part of a licensing structure, the PSC could consider implementing other consumer protection requirements. For example, the PSC could require a security bond, to ensure that consumers can be made whole as a result of misconduct by ESCOs. DCA now requires a security bond (or similar protection) from applicants in seven of the industries it licenses.

Q: DO YOU HAVE ANY OTHER RECOMMENDATIONS?

A: Yes. Requiring an ESCO to submit an officer certification that the ESCO is in compliance with the UBP, or other relevant oversight guidelines, as part of any application for a license to do business in New York would assist in holding ESCOs accountable and eliminating bad actors.

Q: WHY IS AN OFFICER CERTIFICATION REQUIREMENT NECESSARY?

A: DCA's basic license application requires all license applicants to affirm that they understand that they "must comply with all relevant laws and rules if granted a license to operate." In certain license categories, such as process servers and home improvement contractors, DCA requires additional certifications that the applicant will comply with specific laws or rules. In the City's experience, these certifications are effective enforcement tools against non-compliant licensees.

Q: WHAT IS THE CITY'S POSITION ON THE USE OF PENALTIES AS A COMPONENT OF ESCOS COMPLIANCE MEASURES?

A: Penalties are another important tool to ensure that businesses do not take advantage of consumers. For example, in every one of the industries for which DCA issues licenses, DCA can also assess violations against non-compliant businesses. According to DCA's rules, violations can result in set penalty amounts, if upheld by the New York City Office of Administrative Trials and Hearing. The City Council has also authorized DCA to assess violations for businesses in several industries for which DCA does not issue licenses, including income tax preparers and immigration assistance service providers. These violations also can result in penalties for violations.

Penalties would have the effect of forcing ESCOs to be more diligent in responding to customer complaints. Penalties would also improve ESCO communications with DPS Staff regarding the ESCO's efforts to resolve any existing or potential compliance issues. Of course, the penalties should be fairly drawn and directed at correcting actions that the ESCO controls. But, they should also be sufficient in magnitude so as not to become mere "costs of doing business."

Q: IS THE CITY PROVIDING TESTIMONY ON WHETHER CURRENT STATE LAW PERMITS THE PSC TO LICENSE ESCOS OR ASSESS PENALTIES?

A: No. We offer no opinion on the jurisdictional framework for PSC oversight of ESCOs pursuant to the Public Service Law, or whether any changes therein are necessary for the PSC to either require licensing for, or assess penalties against, ESCOs. Our testimony on this topic is limited to whether, as a matter of policy, it would be beneficial to consumers for the PSC to have these powers.

Q: ARE THERE OTHER MEASURES THAT COULD BE IMPLEMENTED TO STRENGTHEN THE PSC'S OVERSIGHT OF ESCOS?

A: Yes. The City has previously supported the PSC's expanded definition of "ESCO marketing representative" that encompasses the ESCO and its employees, agents, contractors, or vendors conducting marketing activities on behalf of the ESCO. It is critical that ESCOs are held responsible for third-parties – whether or not they are vendors or contractors – acting on their behalf. DCA's laws and rules similarly hold businesses accountable for the actions of their agents.

The City also supports the PSC's recent change to the UBP, allowing it to suspend an ESCO's ability to market in New York based on a "material pattern of consumer complaints." The City encourages the PSC to monitor for such "material pattern" and to suspend any ESCO's with such a "material pattern" from marketing in New York.

<u>TOPIC THREE: IMPROVEMENTS TO CUSTOMER CONTRACTS</u>

Q: ARE ESCO CONTRACT IMPROVEMENTS WARRANTED?

A: Yes. As mass market customers will be entering into such arrangements with ESCOs for a duration of time, it is vital that there is a greater level of contract transparency. This includes greater transparency regarding the price of the product being received and the duration and term of the contract. There are many instances where ESCOs offer "teaser" rates wherein the customer only receives the discounted price for a few months and then the price increases to a monthly variable rate. The PSC should ensure that customers understand what they are buying - which can oftentimes be complicated products and services.

The City also recommends continuing the current practice of requiring ESCOs to receive affirmative consent from the customer upon any material change to the customer's agreement with an ESCO (*see* Uniform Business Practices Section 5(B)(1)). The City submits, however, that the PSC should expand this requirement to ensure that an ESCO obtains affirmative consent by the customer to any rate or product change at re-enrollment. This would include instances wherein a customer initially signed an agreement for a fixed price contract that automatically renews as a variable price product that changes the price of electricity/gas month-to-month unless the customer affirmatively requests to end the agreement. Given the disparity in energy supply costs charged to mass market customers by ESCOs as compared to utilities, it is the City's position that a contract price or product change at re-enrollment should be prioritized as material and require new, express consent of the customer. To be clear, the City is not advocating that affirmative consent is necessary each time a variable price changes, if the customer affirmatively consented to a variable price product. The City's primary concern is when a customer goes from a fixed price product to a variable price product due to an automatic renewal opt-out contract provision.

Q: SHOULD THE CURRENT THREE-DAY RESCISSION/CANCELATION PERIOD BE EXTENDED?

A: Yes. As a measure of increasing consumer protections, the City supports extending the ability for mass market customers to cancel an agreement with an ESCO from three days to at least ten days. Currently, the ESCO sales and switching process occurs swiftly. A three-day rescission/cancellation period is not a sufficient amount of time for customers to fully understand the energy product they have signed up for, or the impacts that such switch may have on a customer's utility bill. For example, it is probable that a low-income customer has not analyzed how switching suppliers may dilute any public assistance or utility discount they receive on their energy bill. Extending the timeframe by which a customer can rescind or cancel an ESCO agreement will provide greater consumer protections and protect vulnerable customers from potential abuses.

<u>TOPIC FOUR: ESCO MARKETING PRACTICES SHOULD BE IMPROVED</u>

Q: IS THE CURRENT STATE OF THE REGULATION OF ESCO MARKETING PRACTICES SUFFICIENT?

A: No.

Q: ARE THERE OPPORTUNITIES FOR ESCOS TO IMPROVE THEIR MARKETING PRACTICES?

A: Yes. The City supports the PSC's efforts to enact strong consumer protections with respect to ESCO marketing practices, generally. For example, door-to-door marketing has been a major source of consumer complaints, particularly from APP customers, the elderly, non-English speaking, or disabled New Yorkers.

Q: WHAT ARE SOME OF THE DOCUMENTED GENERAL POTENTIAL CUSTOMER ABUSES ASSOCIATED WITH ESCO MARKETING PRACTICES?

A: DPS Staff has reported in the past that consumers complain about " ... aggressive sales representatives, marketers representing themselves as the utility, [and] an unauthorized change of providers attributed to the account number that is obtained from the customer during door-to-door marketing." (*See* October 18, 2012 Session Meeting of the Public Service Commission, Transcript pp. 43-44).

Investigations conducted by the Office of the Attorney General have also found that ESCOs have marketed to consumers at their homes in illegal ways, including wearing clothes that imitate utility worker uniforms, using intimidation to persuade consumers to switch providers without researching available options, or making sales to minors or other family members who were not the utility customer.

Also, in its December 2016 Order, the PSC reported that "[a]ccording 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" which includes complaints related to marketing practices.

Q: HAS THE CITY RECEIVED DIRECT FEEDBACK FROM NEW YORK CITY RESIDENTS REGARDING MARKETING ABUSES?

A: Yes. Over the last decade, clients at DCA OFE's Financial Empowerment Centers have spoken with financial counselors on numerous occasions about personal experiences with predatory sales tactics employed by ESCOs. OFE Counselors have also observed that many of their clients are enrolled with ESCOs based on reviews of their utility bills and have heard about predatory practices during one-on-one counseling sessions. There have been instances where DCA clients report being enrolled in ESCO services, although they do not recall consenting to the services, signing any enrollment documents, or receiving any notification of enrollment. Moreover, at community outreach events as recently as early 2017, consumers have expressed their concerns about ESCO marketing practices directly to DCA Commissioner Salas.

Q: WHAT STEPS SHOULD THE PSC TAKE TO REFORM ESCO MARKETING PRACTICES?

A: As noted above, the City supports the PSC's inclusion of "ESCO marketing representatives" in the UBP and the PSC's ability to suspend ESCOs that exhibit a "material pattern of consumer complaints." The PSC should vigorously enforce both provisions.

The City also strongly supports the steps that the PSC has taken to require independent third-party verification of door-to-door and telephonic sales. The City supports the PSC's proposed amendments to the UBP to further strengthen the third-party verification process, such as requiring all door-to-door sales to be verified by a third-party within 30 minutes, and requiring that the ESCO retain all independent third-party verification records for as long as that customer remains with the ESCO. The City also supports the PSC's proposal to explore whether it is necessary to extend third-party verification procedures to mail solicitations.

Finally, the City supports the PSC's Resetting Order establishing a "do not knock" rule for door-to-door solicitation, and encourages the PSC to monitor and enforce violations of that rule.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

15-M-0127/12-M-0476/98-M-1343 12-01-2017

A.L.J. MORENO: Mr. Lang?

MR. LANG: Thank you, your Honor. They adopt the testimony subject, we have six very minor changes that I'll briefly walk through with them. We have submitted this morning for D.M.M. corrected and clean and red-lined versions. I do have here in the room both the red-line version and I also, for ease of the parties, prepared a one-pager that just shows specifically what the changes are, so folks can easily find them. With that, panel, do you have corrections to your testimony?

MR. TIGER: Other than the ones that are in the --

MR. LANG: Right. So yes?

MR. TIGER: Yes. Yes, Mr. Lang.

MR. LANG: Would you please tell us what the correction is on page five?

MR. TIGER: Yes. We are changing on page five, line seven, citywide to delete the redundancy.

MR. LANG: Do you have a correction on page seven?

MR. TIGER: Yes. On line two, we are deleting the word "with."

MR. LANG: On page nine do you have a correction?

MR. TIGER: Yes. On line seventeen, we are changing the word “long” to “low.”

MR. LANG: Do you have a correction on page 10?

MR. TIGER: Yes. On page nineteen, we are changing their, T-H-E-I-R, to “its.”

MR. LANG: Do you mean line nineteen?

MR. TIGER: I’m sorry, my apologies. Yes, on line nineteen of page ten, we are changing “their” to “its.”

MR. LANG: Do you have a correction on page sixteen?

MR. TIGER: Yes. On line seventeen we are deleting the words “for violations.”

MR. LANG: And finally, do you have a correction on page eighteen?

MR. TIGER: Yes. On line sixteen we are changing the citation to Section 5B1 to Section 5B5D.

MR. LANG: Do you have any other corrections to your testimony?

MR. TIGER: No.

MR. LANG: Your Honor, the panel is available for cross-examination.

A.L.J. MORENO: Thank you, Mr. Lang. And the first party that had indicated they'd like to cross this panel is Constellation. Ms. Miranda, if you'd like to begin.

MS. MIRANDA: Thank you.

CROSS-EXAMINATION

BY MS. MIRANDA:

Q. Good afternoon. Joey Lee Miranda from Robinson and Cole on behalf of Constellation Energy Gas Choice.

A. (Tiger) Good afternoon.

Q. Referring to your testimony at page five, line eighteen, on -- on that page, actually starting at sixteen, it indicates that the City's testimony, one) submits that there is a place for Energy Service Company, ESCOs, to operate in the New York City market so long as they are providing real and measurable value to consumers at just and reasonable rates. Is that correct? And --

COURT REPORTER: Is that a yes?

THE WITNESS: Yes.

COURT REPORTER: Thank you.

BY MS. MIRANDA (Cont'g.):

Q. And turning to page nine, beginning at page -- excuse me, at line six, the testimony indicates that -- it starts with the word "moreover," which is not relevant to the question but -- "Moreover a lack of product innovation in the marketplace means that these higher costs are not accompanied by other energy value added products that help customers ultimately reduce their utility bills." My understanding from your testimony is that energy -- energy related value added products mean products that have some -- offer something beyond the commodity with a value greater than zero dollars. Is that correct?

A. (DesRoches) With added value, yes.

Q. Okay. Or that help customers reduce their utility bills?

A. That one, ERVAS
that is one option, yes.

Q. So in your testimony, you also discuss the guaranteed savings products would be a value added product in your -- in your view, is that correct?

A. I think that we should just be clear where guaranteed savings -- where we've -- where we've suggested guaranteed savings -- that that is for low-income customers. It should be available to retail customers, but should be guaranteed to low-income customers. I don’t want to -- I want to make sure there’s brackets around that.

Q. Thank you, that’s -- that’s helpful. Do you believe energy efficiency has a value greater than zero or helps consumers reduce their utility bills?

A. Energy efficiency can, yes, help consumers reduce their energy bills.

Q. Do you believe that demand response has a value greater than zero dollars or helps consumers reduce their utility bills?

A. It can.

Q. Do you believe renewables have a value greater than zero or can help consumers reduce their utility bills?

A. It depends on the renewable.

Q. If there is a behind-the-meter renewable at a -- at a customer’s facility, that would help them reduce their utility bill, correct?

A. If they -- yes, if they are using it themselves, that can.

Q. Thank you. Do you believe that

fixed priced products provide a value greater than zero or help consumers reduce their utility bills?

A. So it would be helpful if you define what you mean by “fixed-price product.”

Q. A product where the price per kilowatt hour does not vary for the term of the contract.

A. So again, my answer would be that it depends on what the range of cost is for energy supply at that time.

Q. Do you believe that there’s a value in budget certainty to certain consumers?

A. To certain consumers, that can be a value, yes --

Q. Thank you.

A. -- not all necessarily.

Q. Have you surveyed any New York City customers, residential or small commercial, the mass market customers, to ask them what they -- they deem valuable in energy services?

A. No.

Q. Have you asked any customers, beyond an actual survey, what they deem value?

A. So for -- for the purposes of this

testimony, we relied on the Staff investigation -- the Staff information provided.

Q. And when you say “Staff,” you mean the Department of Public Service Staff?

A. Correct. Correct.

Q. Thank you. In your testimony there is discussion of the One New York plan, the plan for a strong and just city, are you familiar with that?

A. Yes I am.

Q. And have Energy Service Companies played a role in assisting the City in meeting some of its objectives under the One New York plan?

A. So the One New York plan is specific to New York City and to -- when -- if a resident was eligible for a performance contract, which I understand is not at this time a product offered, than that could help them with energy efficiency. So when we talk about New York City broadly and the residents that live in New York City, ESCOs can be an assistance with reducing energy consumption, if they provide a certain type of product.

Q. And the -- the products that reduce energy consumption wouldn’t be listed -- limited, excuse me, to performance contracting?

A. No.
Q. Correct?
A. Correct.
Q. They could include smart thermostats, correct?
A. They can, yes.
Q. Is one of the goals of the One New York plan to reduce energy use in buildings?
A. Yes.
Q. And one way to do that is through energy efficiency, correct?
A. Uh-huh.
Q. And are you familiar with the 2016 progress report associated with the One New York plan?
A. I am.
Q. And in that -- in that progress report, are you familiar with the discussion of the New York City Housing Authorities' performance contracting project?
A. I am not.
Q. Okay. Is anyone on the panel familiar with that?
A. (Tiger and Philip) No.
Q. Thank you. Have Energy Services

Companies already played a role in helping New York satisfy its objectives under the One New York plan?

A. (DesRoches) So I would -- I cannot distinguish what kind of company is helping New Yorkers reduce energy -- reduce energy use, right? So we don't -- we don't look at that granular level of data. We look at building efficiency in the aggregate to provide sort of a gross New York City number.

Q. Are you aware that Energy Service Companies have products available to consumers that have a renewable component to them in New York?

A. Yes, I am aware of that.

Q. Thank you. In your testimony at page seventeen, lines fifteen through seventeen, the testimony indicates that it is critical that ESCOs are held responsible for third parties, whether or not they are vendors or contractors acting on their behalf. Is that correct?

A. (Tiger) Yes.

Q. Are you aware that there are third parties that act on behalf of consumers in this -- in the electric supply space?

A. Such as?

Q. For instance, consultants who will

come to a consumer, small commercial even residential, and perform an energy efficiency audit or help them determine if they could save money on their energy supply or purchase a renewable product.

A. To be honest, I am not totally familiar with that dynamic.

Q. Is anyone on the panel familiar with the dynamic that customers actually can engage third parties directly?

A. (DesRoches) I am not familiar with that.

Q. Okay.

A. (Philip) Neither am I.

Q. Thank you. Going to the -- page eighteen of your testimony, lines sixteen through eighteen, and this is -- I'm paraphrasing, so if I paraphrase incorrectly, please correct me. I'm not -- I'm not trying to be incorrect or inaccurate. The -- the City, essentially, is saying that the PSC should expand the requirement for affirmative consent at the time of re-enrollment, is that correct?

A. (Tiger) Yes, when there's a rate or product change.

Q. When you refer to re-enrollment, are

you referring to a renewal of an existing -- so I --

A. Yes.

Q. -- of an existing contract, I'm sorry.

A. Yes.

Q. Thank you. And is this -- is this recommendation limited only to a renewal to a variable price product?

A. No. As I think -- as we articulate in the testimony, if it's fixed and then is to become variable, there needs to be an additional affirmative consent.

Q. I'm sorry, maybe my question wasn't clear. That -- that actually -- that is -- one of the question -- part of the question I was asking. Would you also -- is your recommendation also that if it's fixed currently, and it's going to renew to fixed, that you also need affirmative consent?

A. Well, no. If there hasn't -- if there's not a change, then there doesn't need to be an affirmative consent.

Q. Okay. So if I'm -- I'm just going to use an example, I'm a customer who's currently paying eight cents on a fixed price for twelve months and I am up for renewal and my supplier says, well now I’m going to charge you seven and a half cents for six months, do you believe --

A. (Philip) Consent -- affirmative consent is required.

Q. Affirmative consent is required at that time?

A. (Tiger) I’m sorry, I didn’t -- I apologize, I didn’t follow the hypothetical.

Q. Okay. Under the hypothetical, I’m a customer --

A. Uh-huh.

Q. -- who currently has an eight cent contract for twelve month with an ESCO, it is now time for renewal of my contract and I receive a notice from them that says we are going to renew you at seven and a half cents for six months.

A. So that’s a different rate.

Q. It’s a different rate, it’s a different term.

A. It’s a different -- right. So then they would need affirmative consent.

Q. Okay. And if the customer doesn’t give affirmative consent to a fixed to fixed renewal, what -- what do you imagine would happen to that customer?

A. Then they would have the ability to opt out of the arrangement with -- with the -- with the ESCO and then have a choice of defaulting back to utility.

Q. So -- but if they don't provide affirmative consent under your proposal, the ESCO couldn't actually renew, isn't that correct?

A. Correct. They have to provide consent when there is a rate or product change.

Q. And if the customer does not respond to communications asking for consent, what would happen to that customer?

A. They would no longer continue with the ESCO --

Q. So they --

A. -- because you need affirmative consent.

Q. They would return to default service?

A. Correct.

Q. And default service is a variable price product, is that correct?

A. With a utility, yes.

Q. Thank you. I have no further questions.

A.L.J. MORENO: Thank you. Up next we have Direct Energy.

MS. FELLER: Hi, your Honor.

A.L.J. MORENO: Hello, Ms. Feller.

CROSS-EXAMINATION

BY MS. FELLER:

Q. Good morning. My name is --

A.L.J. MORENO: I'm sorry. So, Ms. Feller, for the Impacted ESCO Coalition. I just wanted to make sure they understood who was asking the questions, thank you.

MS. FELLER: Oh okay, thank you.

A.L.J. MORENO: You also have to be closer to a microphone

BY MS. FELLER:

Q. Good morning -- oh, it's afternoon. Good afternoon.

A. (Tiger) Good afternoon.

Q. My name's Natara Feller, I'm counsel to the Impacted ESCO Coalition and several ESCOs that are parties to the proceeding. I'm asking these questions on behalf of the Coalition and Drift Marketplace and Robison -- Robison Energy and Robison Energy Commercial. How are you guys doing?

A. (Panel) Good.

Q. Who -- who -- who got the -- who got the good seat on the ride up to see the Hudson?

A. (Panel) None of us did, none of us.

Q. That’s too bad.

A. (Tiger) It’s a trick question.

A. (Philip) I was going to get it on the way back.

Q. Are you familiar with the -- the -- the Department of Consumer Affairs website?

A. (Tiger) I am. I didn’t design it, but I am aware of my Agency’s website.

Q. And are you familiar with the page that specifically offers an overview of the Department of Consumer Affairs?

A. Again, I know there’s an overview page.

MS. FELLER: Your Honor, is it okay if I hand the witness a copy of the overview page?

A.L.J. MORENO: Yes. Do you have copies?

MS. FELLER: Yes.

A.L.J. MORENO: Thank you. Ms. Feller, just to be clear, are you seeking to mark this as an exhibit?

MS. FELLER: Yes.

A.L.J. MORENO: Thank you. Ms. Feller, could we also get some copies please?

MS. FELLER: Oh, yes.

A.L.J. MORENO: So the exhibit will be marked as number four zero six.

MR. LANG: I'm sorry, your Honor, could you repeat that?

A.L.J. MORENO: Yes. It's four zero six, 406.

BY MS. FELLER: (Cont'g)

Q. Thank you. And could you please read the first two sentences of this exhibit 406, beneath the -- the first heading?

A. (Tiger) So beginning with, "The New York City Department?"

Q. Yes.

MR. LANG: I just object. I think we should try to lay some foundation if the witness has ever actually seen this before.

MS. FELLER: Your Honor, the -- the -- the witnesses have stated that they're generally familiar with this section of their website.

WITNESS: (Tiger) I mean I'm generally familiar, but I -- I can't remember the last time I actually looked at it.

BY MS. FELLER: (Cont'g.)

Q. Would you agree that this is a -- does this appear to you to be a -- an accurate representation of a printout from the website?

A. (Tiger) I mean --

Q. Subject to check?

A. It has a New York Consumer Affairs logo on it. It has verbiage I'm familiar with, but --.

MR. LANG: Your Honor, we will stipulate. We've checked the website that it is consistent with internal website.

A.L.J. MORENO: Thank you, Mr. Lang.

Proceed.

BY MS. FELLER: (Cont'g.)

Q. Thank you.

Could you please read the first two sentences, beginning with "The New York City Department of Consumer Affairs," that's below the first heading?

A. (Tiger) Yes. The New York City Department of Consumer Affairs, DCA, protects and enhances the daily economic lives of New Yorkers to create thriving communities. DCA licenses more than 81,000 businesses in more than 50 industries and enforces key consumer protection licensing and workplace laws that apply to countless more.

Q. And the second sentence? Oh sorry, the third sentence?

A. Okay. By supporting businesses through equitable enforcement and access to resources and by helping to resolve complaints, DCA protects the marketplace from predatory practices and strives to create a culture of compliance.

Q. Thank you. And do you -- do you agree with the third sentence that you just read, where it states that by supporting businesses through equitable enforcement and access to resources and by helping to resolve complaints, that DCA protects the marketplace from predatory practices and strives to create a culture of compliance?

MR. LANG: I’m going to object to that. I don’t know if you’re asking, does he personally? If you’re asking him in his official capacity, this is a statement from his agency.

BY MS. FELLER: (Cont'g.)

Q. Do you agree -- in your official capacity, do you agree that this is required?

A. (Tiger) I mean, that's not what this says, but, yes, I agree with the -- what has been set forth by my agency.

Q. But do you agree with the logic behind the sentence?

A. Yes.

Q. So if there are rules there, but the rules are not enforced, then would having the rules have an effect on the marketplace?

MR. LANG: I'm going to object to that. I don't know what rules and when you say "there," I don't know what "there" is. Is it at the PSC, is it at DCA, is it rules related to ESCOs or some other businesses?

BY MS. FELLER: (Cont.g)

Q. Are there -- are there any --

A.L.J. MORENO: It's sustained. So if you could rephrase, Ms. Feller.

MS. FELLER: I'll rephrase, thank you.

BY MS. FELLER: (Cont'g.)

Q. Does DCA enforce any rules?

A. (Tiger) Yes.

Q. And -- and what -- what's the -- the general scope of rules that DCA enforces?

A. Well we license as -- we license, as I noted in my testimony, fifty-five different business categories. There are provisions of the New York City Administrative Code that we enforce and rules we promulgate pursuant to authority in the administrative code.

Q. Do you --?

A. We also enforce the Consumer Protection Law of New York City which applies to all businesses in New York.

Q. So you're the agency that enforces the Consumer Protection rules and --?

A. We -- we -- we enforce the New York City Consumer Protection Law and rules related that were enforced -- that were implemented pursuant to the Consumer Protection Law.

Q. Without enforcement of those rules, if those rules lived in a book that was -- and -- and they weren't enforced on a -- on an equitable and consistent basis, how would that impact the marketplace?

A. I mean that's a little bit of a broad hypothetical. I mean we believe in equitable enforcement. I can't speculate what would the results would be if there wasn't equitable enforcement, but we believe there should be equitable enforcement against actors that we regulate.

Q. Would you agree with a statement that if the rules were not enforced, some actors might undertake activities that go against the interests of the consumers you're seeking to protect?

A. I mean we believe that vigorous enforcement of the laws and rules that we are designated to enforce is important for consumer protection.

Q. Thank you. Turning to page eleven of your testimony, could you please read the sentence starting on line 15 that starts with the word "the" and it ends -- it ends on line 19 with "mass market customers?"

A.L.J. MORENO: I'd prefer to read the entire sentence and not a section of a sentence.

MS. FELLER: Sure.

MR. LANG: Your Honor, the testimony itself is already in evidence. I'm not sure why they need to repeat it.

MS. FELLER: I'm -- I'm asking them to read it for follow-up questions so that they're in context for everyone --

A.L.J. MORENO: Well, why don't we just have the -- the witnesses review and then ask your questions, Ms. Feller.

MS. FELLER: Okay.

BY MS. FELLER: (Cont'g.)

Q. Let me know when you're ready.

A. (Tiger) We're -- we're ready.

(DesRoches) Yeah, I think we're ready.

Q. Okay. Thank you. And what order does that -- what order is referenced in response to -- what order is referenced in your answer that goes from line 14 to 21?

A. I don't, off the top of my head, remember the order.

Q. Is there a short name for the order?

A. Again, I -- I don't recall.

Q. At page -- on page 11, line 16, would you agree that it states the February, 2014 order?

A. That's what the testimony states,

yes.

Q. And would you -- would you agree that the statement following that reference is the Retail Energy Market serving residential and small residential customers have failed to provide ERVAS similar to

Those -- to those available to large commercial and industrial customers to the mass market customers?

A. That’s what the testimony says.

(Tiger) I think you actually left out a word when you were --

Q. Oh, sorry.

A. I mean, if it matters for the record.

A. (DesRoches) Which word was it?

(Tiger) I think it said small non -- it says, “the Retail Energy Market serving residential and small, non-residential customers have failed to provided ERVAS similar to those available to large commercial and industrial customers.”

Q. And for -- for clarity subject to check, would you agree that the 2014 order that’s being referred to here is an order that was issued on February

25, 2014, order taking actions to improve the residential and non-residential and small non-residential retail access markets?

MR. LANG: Your Honor, if -- if there's going to be cross-examination about the order, I would ask that the order be provided to the witnesses so they could review it.

MS. FELLER: Your Honor, I -- I'm -- I'm just looking to -- to look at the -- the original source of the information that they had used to support their position in response to their questions so the --

A.L.J. MORENO: I believe that reference is on page 9 of the witness testimony.

A.L.J. BERGEN: Page 9, line 11.

A.L.J. MORENO: Yes.

BY MS. FELLER: (Cont'g.)

Q. On page 9 of your testimony, do you refer to a February, 2014 order?

A. (DesRoches) Yes.

Q. And for clarity, is that the order to improve residential and small non-residential retail access markets that was issued by the New York Commission in 2014?

A. Yes.

Q. And do you know the timeframe that DPS staff used to collect information to support its finding that you quote in -- from the 2014 order?

A. No.

Q. Would you agree that it was before 2014?

A. The order is dated February 25th, so it is possible that there's data from 2014.

Q. Would you -- would you agree that there's likely data from 2012 and 2013 also being used?

A. I can't --

MR. LANG: I'm going to object, your Honor. I mean, we're now questioning what the PSC relied upon in a PSC order and these witnesses are not qualified to speak to what the PSC relied upon.

MS. FELLER: Your Honor, the --

A.L.J.: That objection's sustained.

BY MS. FELLER: (Cont'g.)

Q. Would it surprise you to learn that the statement in the 2014 order was based on a study that PSC staff had conducted in 2012 in terms of reviewing value-added products and services that were offered to mass market customers?

A. (DesRoches) I'm sorry, can you

repeat the question?

Q. Would you agree that the statement in the 2014 order was from -- regarding a study of available energy related value ad services, the evaluation of whether those types of services were available to large -- were available to mass market customers, would you agree that that statement within the 2014 order is based on a prior staff study?

MR. LANG: Objection, the order speaks for itself. Whether they agree with it or not, what the order says is what the order says.

A.L.J. MORENO: Sustained.

A.L.J. BERGEN: Sustained.

BY MS. FELLER: (Cont'g.)

Q. Has -- are you -- to the -- to your knowledge, have there been new technologies developed since 2014?

A. (DesRoches) In -- in -- in what area?

Q. Have there been new technologies that offer a greater access to consumer usage, greater access to social media platforms, has there generally been an improvement in technology that allows further engagement to consumers than was previously available in

2014?

A. I can't make that determination.

Q. Would you agree that most -- in your own experience, how many -- how many of your friends carry iphones or something similar? Just about everybody, only a few people -- within your -- within your -- within your circle.

A. Many people I know carry a smart phone.

Q. And do these many people who carry a smart phone use apps?

MR. LANG: Objection, your Honor. I think we're getting really far afield of what these witnesses testify to.

A.L.J. BERGEN: That's sustained. We have to relate the questioning to their testimony please.

BY MS. FELLER: (Cont'g.)

Q. Would you agree that products that companies can now offer to customers in 2017 is able to take advantage of technologies that were not available in 2014?

A. That is possible.

Q. Would you agree that ESCOS are able

to offer customers products that take advantage of these technologies that are now available in 2017 that were not available in 2014?

A. Hypothetically that is possible.

MS. FELLER: Thank you, your Honor. That's all I have.

A.L.J. MORENO: Thank you. And we had also Direct Energy and -- and NEMA left, I'm not sure if you have a preference in the order. Mr. Pond?

MR. POND: Thank you, your Honor.

A.L.J. MORENO: Please use a microphone, Mr. Pond.

MR. POND: Yes, your Honor. I turned it on, it might not be close enough.

A.L.J. MORENO: There you go, thank you.

CROSS-EXAMINATION

BY MR. POND:

Q. Good afternoon, my name is George Pond and I'll be cross-examining you briefly on behalf of Direct Energy Services. Could you turn to page 14 of your testimony and take a look at lines 3 through -- or 2 through 4? Could you explain why it's impossible to pinpoint which electrons are consumed by an end user?

A. (DesRoches) So generally the grid has many different kinds of energy generation attached to it so the electron from one generation source travels in the grid and doesn't necessarily go to any other specific place.

Q. And do you know what a bilateral contract is?

A. I am aware of what a bilateral contract is.

Q. And can you explain what a bilateral contract is in the market.

A. Again, generally, it is when an entity purchases energy directly from another entity.

Q. And would you say that your statement that you can't pinpoint the source of the electrons applies to bilateral transactions?

A. So my understanding of bilateral transactions is limited, so I am speaking of bilateral -- bilateral agreements that include direct transmission.

Q. I'm not sure I understand what you mean by include direct --?

A. So when you're purchasing the generation with transmission, then you can pinpoint where the generation comes from to the end point. If it

-- if that contra -- that bilateral agreement includes transmission.

Q. So you're saying that you can pinpoint the source of electric generation if it goes through the NYSO system in a bilateral transaction?

A. That's not what I said.

Q. Okay. Please explain.

A. Okay. So it is possible that you could have a contract -- a bilateral contract that included generation and transmission, that's what I'm referring to. One that includes both, in which case you could pinpoint where those electrons are coming from.

Q. And by that you mean a generator that's proximate to a load and has a dedicated line --

A. Correct.

Q. -- is that what you're talking about?

A. That's what I'm talking about.

Q. But if a source of renewable energy has to travel through the NYISO system, is it your testimony that you really can't tell where those electrons go?

A. So the remainder of that paragraph talks about the NYGAT System and how RECs are registered so that we understand, you know, where they originate.

Q. Right. What we do is -- would you agree that what we do is we unbundle the renewable attributes and track them separately?

A. Correct.

Q. And that's because we really can't track the electrons, is that correct?

A. That is correct.

MR. POND: I have no further questions, your Honor.

A.L.J. MORENO: Okay. Thank you.

Ms. Monroe?

MS. MONROE: NEMA has no questions.

A.L.J. MORENO: Okay. Thank you.

COURT REPORTER: Did she say something?

A.L.J. MORENO: She has no questions.

COURT REPORTER: Okay. Thanks.

A.L.J. MORENO: Bear with us a moment if we -- we may have some for you, thank you.

A.L.J. BERGEN: Does anybody else have any cross based on the questions that were asked and the answers and everything? Okay.

MS. DESROCHES: Pardon me, but my drink exploded. Just a little bit of excitement with my sparkling water.

A.L.J. BERGEN: Do you need a recess?

MS. DESROCHES: No, I'm fine. It's on the floor.

MR. TIGER: My wife once had her -- her desk catch fire in court. I'll tell that story off the record.

MS. DESROCHES: Things are exciting in New York.

MR. TIGER: That was outside the scope of my direct.

A.L.J. BERGEN: I do have one question. Referring to page twenty-one of the testimony, the question about the city receiving direct feedback regarding marketing uses.

MR. TIGER: Yes.

A.L.J. BERGEN: And that paragraph, beginning at line 10 and ending in 20, talks about financial counselors with DCAOFES financial empowerment centers speaking directly to -- to individuals who have experienced quote predatory sales

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tactics employed by ESCOs and some of the complaints include DCA clients reporting being enrolled in ESCO services although they don't recall consenting to such or signing any documents. What would be the policy at DCA in that particular financial empowerment centers? What kind of action is taken once a complaint such as that is received?

MR. TIGER: We refer the complaint to the Public Service Commission.

A.L.J. BERGEN: Okay. Do -- do DCA employees refer or are you just advising the customer, here's where you should go for that?

MR. TIGER: Yeah, so the Office of Financial Empowerment is a team of financial counselors. They're not lawyers, they're not the staff of the Department of Consumer Affairs that handles the intake of consumer complaints generally. So they will advise the consumer that if they are having an issue with problems with an ESCO or -- or -- well, the problem with an ESCO they would say you should file a complaint with the Public Service Commission.

A.L.J. BERGEN: Okay. And it -- so from the perspective of the -- the counselors at this particular center, once that advice is given to a consumer is there any follow-up that's done with that individual?

MR. TIGER: Not about the complaint per se, only if they have an ongoing counselor relationship it may come up just sort of in that sort of contact, but not in a "I'm following up for you and like, how do -- how is your complaint proceeding from a legal standpoint."

A.L.J. BERGEN: Okay. Okay. That -- we don't have any further questions.

Counsel, do you have re-direct?

MR. LANG: May we have two minutes, your Honor? I'll be very brief.

A.L.J. MORENO: Sure.

A.L.J. BERGEN: Sure, you can have five minutes in fact. We'll go off the record.

(Off the record)

THE COURT REPORTER: We're back on the record.

A.L.J. MORENO: Mr. Lang.

MR. LANG: Your Honor, we have a very brief re-direct.

A.L.J. BERGEN: Very good, thank you, proceed.

MR. LANG: Thank you.

REDIRECT EXAMINATION

BY MR. LANG:

Q. Panel, during the cross-examination you were asked about whether the smart thermostats would help achieve the One NYC goals. Could you please elaborate on how a smart thermostat could actually help the city achieve its goals?

MS. MIRANDA: Your Honor, I'm sorry, that wasn't the question that I asked.

MR. LANG: You were asked -- the question was asked, could it include smart thermostats.

MS. MIRANDA: The question asked whether smart thermostats could add value greater than zero or reduce consumer energy usage, not whether it would further the New York City plan.

BY MR. LANG: (Cont'g.)

Q. Okay. So, Panel, with that correction, could that value -- could you please elaborate on how smart thermostats would actually be able to add value?

A. (DesRoches) Sure. So the -- the thermostat would need to be installed and that customer would -- the thermostat would need to be able to regulate the heating and cooling of that unit.

Q. Would a customer also need to be educated on how to use the smart thermostat and use it?

A. Absolutely.

Q. Moving on, there was also some questioning about whether the panel was aware that ESCOs -- that certain ESCOs have renewable products. Do you recall that question?

A. Yes.

Q. Do you have anything that you'd like to add regarding the renewable products that ESCOs offered?

A. Sure. Again, you know, when we're talking about the City's goals, the City's goals were outlined in One NYC. We are talking about where renewable power can be consumed in order to reduce the City's dependency on fossil fuels. The State had similar goals in the CES, so what I wanted to clarify is that while green products are important because they are a climate mitigating strategy, it's important to the city that those -- that the information about where those RECs are coming from is transparent and what percentage of that power is, in fact, green power.

Q. And is it important to the City what

percentage should be green power to help aid the City's goals?

A. Ideally it would be a hundred percent, you know. That, in today's construct, may not be possible, but could be possible in the future. We hope is possible in the -- in sooner future.

Q. Moving on, there's been a lot of discussion over the last two-and-a-half days not only about what ESCOs are offering, but what they could offer. Now to this panel you were asked a question that if a customer does not provide the consent that they would default and the question was default to the variable-rate service. Do you recall that?

A. (Tiger) I do.

Q. To your knowledge, is it possible that the Public Service Commission or -- strike that, let me rephrase that.

Are you aware of any legal impediments as to why the Public Service Commission in the future could not direct the utilities to also offer a fixed rate product?

A. I am not aware of any such legal impediment.

MR. LANG: That is all the redirect I

have, your Honor.

MS. MIRANDA: Your Honors, may I re-cross on just one topic area?

A.L.J. MORENO: Go ahead.

MS. MIRANDA: Thank you.

RECROSS EXAMINATION

BY MS. MIRANDA:

Q. Going back to the renewable products, you indicated that the City would prefer a hundred percent renewable product, but you did not believe that that was available under the current construct. Earlier you indicated that RECs renewable energy credits indicate whether something is renewable or not, it’s -- it’s separate and distinct from the commodity. Isn’t -- is it not possible for an ESCO to offer the City a hundred percent renewable product based on renewable-energy credits that are equal to the value of the consumption by the city?

MR. LANG: Ms. Miranda, just to be clear, are you saying to City customers or to the City itself as a customer?

MS. MIRANDA: I believe your question was to the City and so I’m asking as the -- to the City, but if you were asking --

MR. LANG: I was --

MS. MIRANDA: -- about customers, then I --

MR. LANG: I was asking about customers.

MS. MIRANDA: -- want to know. Okay. To customers then.

A. (Ms. DesRoches) Right. So can you just rephrase that one more time so I make sure that I get all of the different nuances?

BY MR. LANG: (Cont'g.)

Q. Okay. So I believe you indicated that a hundred percent renewable product is not currently available?

A. So let's -- let me correct that.

Q. Okay.

A. So what I meant was that in New York City, currently, we have a very small -- the mix is a quite small amount of renewables, right? We have about a little bit less than 5 percent hydro and 1.2 percent wind and .02 percent solar that comes into the energy mix. So that's what I'm referring to when I say that the power isn't, you know, can't be a hundred percent renewable.

Q. So I guess I'm slightly confused. So in response to questions from -- from Attorney Pond, there was discussion of bringing electron from the -- from the renewable generator to the end user and, in general, absent a direct connection that is not possible, correct?

A. That is my understanding.

Q. Okay. So when you were referring to one hundred percent renewable, are you referring to the grid being one hundred percent renewable?

A. I was referring to the grid, yes.

Q. Okay that -- thank you. And have you asked any customers or surveyed any customers about what they -- what they think the percentage is?

A. No.

Q. Thank you.

MS. MIRANDA: No further questions.

A.L.J. MORENO: Mr. Lang?

MR. LANG: No. Nothing, your -- I'm sorry, nothing, your Honor.

A.L.J. MORENO: Okay, with that, the panel is excused. Thank you. Can we go off the record, please?

(Off the record)

THE COURT REPORTER: We're back on the record.

A.L.J. MORENO: Thank you very much for your time today, we're adjourned. Have a nice weekend everyone.

(Off the record)

15-M-0127/12-M-0476/98-M-1343 12-01-2017

STATE OF NEW YORK

I, JANET AXTON, do hereby certify that the foregoing was reported by me, in the cause, at the time and place, as stated in the caption hereto, at Page 1074 hereof; that the foregoing typewritten transcription consisting of pages 1074 through 1507, is a true record of all proceedings had at the hearing.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this the 7th day of December, 2017.

JANET AXTON, Reporter