

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on November 13, 2025

COMMISSIONERS PRESENT:

Rory M. Christian, Chair  
James S. Alesi  
David J. Valesky  
John B. Maggiore, recusing  
Uchenna S. Bright  
Denise M. Sheehan  
Radina R. Valova

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

ORDER ADOPTING MODIFICATIONS TO THE  
UNIFORM BUSINESS PRACTICES

(Issued and Effective November 13, 2025)

BY THE COMMISSION:

INTRODUCTION

On September 20, 2023, Governor Hochul signed into law Chapter 482 of the Laws of 2023, which amended New York State General Business Law (GBL) §§349-d(6) and (7) to include additional details on what is defined as a material change to an energy services company (ESCO) contract, as well as the required disclosures that must be made within ESCO contract renewal notices. Department of Public Service staff (DPS Staff) filed a proposal on March 26, 2024, to identify appropriate revisions to the Uniform Business Practices (UBP) to reflect these stronger consumer protections.<sup>1</sup> As discussed below, DPS Staff proposes to

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<sup>1</sup> Case 98-M-1343, Staff Proposal for Implementing Stronger Price Transparency for Consumers (filed March 26, 2024) (DPS Staff Proposal).

adopt the requirements of GBL §349-d through amendments to the UBP, the mechanism by which the Public Service Commission (Commission) provides consistent business procedures for ESCOs and the State's electric and natural gas distribution utilities.<sup>2</sup> By this Order, the Commission adopts the DPS Staff Proposal, with modifications, and modifies the UBP to reflect changes to GBL §349-d related to material changes to ESCO contracts and contract renewal notices.

#### BACKGROUND

The amended provisions of GBL §§349-d(6) and (7) require ESCOs to provide new and more detailed notice regarding changes to, and renewals of, ESCO contracts with customers. The legislative sponsor's memo in support of these amendments indicates that:

[r]ecent reports state that New York's energy serviced companies charge some of the highest residential energy costs in the United States. With that in mind it is essential that consumers have the ability to make informed choices when it comes to signing a contract for energy services. This legislation is intended to [e]nsure that New Yorkers have full disclosure [of] any material change in price or in contract terms that may be proposed by their energy provider. In this manner it can be ensured that the consumer consents to the changes.<sup>3</sup>

The amended provisions of GBL §349-d(6) include additional details on what is defined as a "material change." The preexisting provisions of GBL §349-d(6) required "express

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<sup>2</sup> The UBP are posted on the Commission's website and updated as changes are made by the Commission. The current UBP can be found at: <https://dps.ny.gov/uniform-business-practices>.

<sup>3</sup> Sponsor's Mem, Bill Jacket, L. 2023, ch. 482.

consent of the customer" for any "material change ... made in the terms or duration of any contract for the provision of energy services by an ESCO." The law, as amended, additionally provides that "[a] change in price or a change to or from fixed or variable pricing shall be deemed to be material."<sup>4</sup> While the law does not "restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and of his or her option not to accept the renewal offer,"<sup>5</sup> the amendments place limits on ESCOs charging termination fees where express consent to certain changes has not been obtained. In particular, ESCOs are prohibited from charging fees for the termination or early cancellation of a contract, as authorized in GBL §349-d(5), where the customers' "express consent has not been obtained to any change in material terms and conditions."<sup>6</sup>

The amended provisions of GBL §349-d(7) list the new disclosures that ESCOs must include in customer contract renewal notices. These required disclosures include: (i) the price charged for energy services; (ii) the price the ESCO proposes to charge upon renewal; (iii) the price that is charged by the customer's distribution utility; and (iv) information notifying the customer how they may compare past bills with what they would have been charged had they received energy services from the respective distribution utility, including the internet address of any bill calculator offered by such customer's distribution utility's website. These new provisions of the

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<sup>4</sup> GBL §349-d(6).

<sup>5</sup> Id.

<sup>6</sup> Id.

amended GBL §349-d took effect on March 18, 2024, 180 days after becoming law on September 20, 2023.

DPS STAFF PROPOSAL

The DPS Staff Proposal reflects the new requirements of GBL §349-d and sets forth an implementation plan to amend the UBP to which all ESCOs would be subject. In UBP §1, DPS Staff proposes to include two new definitions in conformity with the amendments to subdivisions 6 and 7 of GBL §349-d:

- Express Customer Consent: Consent given directly and knowingly by the customer, either verbally, electronically, or in writing, that shall be maintained by the ESCO in a verifiable format.
- Material Change: Any change that affects the rates, terms, and conditions of service contained in the customer agreement. For example, this could include, but not be limited to, the commodity rate, product term, or product type.

DPS Staff recommends that a definition of what constitutes a material change, which includes a change in price as a material change, be added to the UBP. The new requirements of GBL §349-d(6) would require an ESCO to obtain a customer's express consent for any change in price, including a price change pursuant to a variable rate agreement, or any changes in the terms used to determine such price. Absent the customer's express consent to the price change, the ESCO would not be permitted to change the price that customers pay pursuant to their agreement with the ESCO. DPS Staff also recommends that a definition of express customer consent be added to the UBP in order to make sure that this term is understood by all ESCOs.

To implement the amendments to subdivisions 6 and 7 of GBL §349-d, DPS Staff proposes amending UBP §2.B.1.c to include sample renewal notices as part of the retail access application requirements. New ESCOs would provide these sample notices as part of their initial eligibility application, and existing ESCOs would provide these samples at the time of their next annual or triennial compliance filing, whichever comes first, and on an ongoing basis as part of triennial compliance filings thereafter. The ESCOs' submission would require a sample of the updated Standard Renewal Notice for all product offerings, including variable rate products and guaranteed savings products. ESCOs would then have to use that notice in communications with their customers.

Additionally, DPS Staff proposes to modify UBP §5.b.5.d to include the specific notice disclosures regarding the transparency of pricing that GBL §349-d(7) directs be included in customer contract renewal notices. Specifically, these amendments would require that the renewal notices include: (i) the current price charged for energy services; (ii) the price the ESCO proposes to charge upon renewal; (iii) the price that is charged by the customer's distribution utility; and (iv) information notifying the customer how they may compare past bills with what they would have been charged had they received energy services from the respective distribution utility, including the internet address of any bill calculator offered by such customer's distribution utility's website. The DPS Staff Proposal includes a proposed modified Standard Renewal Notice.

With respect to the amended GBL §349-d(6), which indicates that a change in price, or a change to or from fixed or variable pricing, shall be deemed to be material changes, DPS Staff proposes amending UBP §5.B.5.d to include this more precise language and to remove language that specifically

excludes guaranteed savings products from requiring express customer consent. The new language would provide that any material changes, including a change to a guaranteed savings product, requires express customer consent. DPS Staff also proposes to add a provision requiring the ESCO to maintain records of express customer consent for a minimum of two years or the length of the sales/renewal agreement, whichever is longer.

To structurally make these changes to the UBP, DPS Staff proposes to make the material change and renewal provisions currently found at UBP §5.B.5.d through 5.B.5.F their own section found at UBP §5.B.5. The remaining provisions of the existing UPB §5.B.5 would then be found at UBP §5.B.6.

In addition to the proposed UBP modifications, DPS Staff makes the following proposals regarding implementation of the amended language of GBL §349-d. First, regarding the requirement of GBL §349-d(6) to obtain express customer consent for any material change made to the terms and conditions of an ESCO contract, DPS Staff proposes that such consent must be obtained, recorded, and maintained in a verifiable format and that verifiable proof of customer consent be furnished to DPS Staff upon request.

Second, with respect to the information that must be included in the renewal notices pursuant to GBL §349-d(7), specifically the price that is charged by the customer's distribution utility, DPS Staff proposes to allow ESCOs to utilize the most recent 12-month trailing average posted by distribution utilities on their individual websites. These values are updated quarterly and would satisfy this requirement.

Finally, the DPS Staff Proposal explains that the amended language of GBL §349-d(7) regarding contract renewals would apply to all month-to-month agreements, which expire and

are renewed each month. As a result, the ESCO would be required to provide monthly notices that include all required notice disclosures in order to continue service to a customer on a month-to-month agreement in a compliant manner. Additionally, if the renewal includes a material change, including a change in the price the customer pays, express consent would be required for that change.

#### NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rule Making (Notice) was published in the State Register on April 17, 2024 [SAPA No. 98-M-1343SP26]. The time for submission of comments pursuant to the SAPA Notice expired on June 17, 2024. Comments were received from American Power & Gas, LLC (AP&G), Family Energy, Inc. (Family), Kiwi Energy NY, LLC (Kiwi), Constellation NewEnergy, Inc. and Constellation NewEnergy Gas Division, LLC (collectively, Constellation), Joule Assets, Inc. (Joule), NRG Energy, Inc. (NRG), Public Utility Law Project of New York, Inc. (PULP), the Retail Energy Supply Association (RESA), and Sustainable Westchester. The comments received are discussed below, with a full comment summary attached as Appendix B.

#### LEGAL AUTHORITY

The Commission's authority derives from the Public Service Law (PSL), through which numerous legislative powers are delegated to the Commission. Pursuant to PSL §5(1), the "jurisdiction, supervision, powers and duties" of the Commission extend to the "manufacture, conveying, transportation, sale or distribution of ... electricity." PSL §5(2) requires the Commission to "encourage all persons and corporations subject to its jurisdiction to formulate and carryout long-range programs,

individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources." PSL §66(2) provides that the Commission shall "examine or investigate the methods employed by [] persons, corporations and municipalities in manufacturing, distributing and supplying ... electricity ... and have power to order such reasonable improvements as well as promote the public interest, preserve the public health and protect those using such gas or electricity ... ."

PSL §4(1) also expressly provides the Commission with "all powers necessary or proper to enable [the Commission] to carry out the purposes of [the PSL]" including, without limitation, a guarantee to the public of safe and adequate service at just and reasonable rates,<sup>7</sup> environmental stewardship, and the conservation of resources.<sup>8</sup> Further, PSL §65 provides the Commission with authority to ensure that "every electric corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." The Commission also has authority to prescribe the "safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public" whenever the Commission determines that the

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<sup>7</sup> See International R. Co. v Public Service Com., 264 A.D. 506, 510 (1942).

<sup>8</sup> PSL §5(2); see also Consolidated Edison Co. v. PSC, 47 N.Y.2d 94 (1979) (overturned on other grounds) (describing the broad delegation of authority to the Commission and the Legislature's unqualified recognition of the importance of environmental stewardship and resource conservation in amending the PSL to include §5).

utility's existing equipment is "unsafe, inefficient or inadequate."<sup>9</sup>

The PSL further provides the Commission with authority to limit or discontinue ESCOs' access to utility distribution systems based on whether such access is just and reasonable in all respects. PSL §5(1)(b) grants the Commission authority over, among other things, both the sale and the distribution of natural gas and electricity. In addition, PSL §§65 and 66 provide the Commission specific authority over utilities and their distribution services.

This State's highest court has recognized that these and other PSL provisions empower the Commission to regulate ESCO access to utility systems. The Court of Appeals has held that "the legislature has delegated to the [Commission] the authority to condition ESCOs' eligibility to access utility [distribution systems] on such terms and conditions that the [Commission] determines to be just and reasonable."<sup>10</sup> This broad authority encompasses, among other things, the power to "prohibit utilities from distributing overpriced [ESCO] products."<sup>11</sup> As a corollary power, the Commission is authorized to require that ESCOs prove, as a condition of accessing utility systems, that their products do not harm customers.<sup>12</sup>

The Commission's UBP was adopted pursuant to this authority and set forth various regulatory eligibility

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<sup>9</sup> PSL §66(5).

<sup>10</sup> Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 33 N.Y.3d 336, 351 (2019), reargument denied, 33 N.Y.3d 1130 (2019) (NEMA v. PSC); see also PSL §66-d(2).

<sup>11</sup> NEMA v. PSC, 33 N.Y.3d, at 351.

<sup>12</sup> Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 167 A.D.3d 88, 93, 95 (3d. Dept. 2018).

requirements for ESCOs to begin accessing, and to continue accessing, utility distribution systems for the purpose of selling energy services to customers. The Commission has authority to enforce the terms and conditions by imposing certain consequences on ESCOs that fail to abide by the terms of the UBP. Given the Commission's broad power to determine what is required for ESCO access to utility systems to ensure the provision of just and reasonable energy service to customers, the Commission has ample authority to make determinations regarding changes to the UBP.

Finally, the GBL places restrictions on ESCOs' business activities in New York. The provisions of GBL §349-d impose requirements on ESCOs in relation to, among other matters, the enrollment of new customers and renewal of existing customers. The Commission modifies the UBP to conform to State Law when pertinent changes are adopted.

#### DISCUSSION

In this Order, the Commission adopts, with modifications, the DPS Staff Proposal to amend the UBP and the Standard Renewal Notice to enforce provisions of GBL §349-d. The modifications to the GBL direct consumer protections related to price and product transparency and reflect the intention to make sure that ESCO customers (1) have all the necessary information before deciding whether or not to renew an ESCO contract, and (2) are informed of and given an opportunity to consent to or reject material changes an ESCO may make to their agreement, including changes in price. Attached to this Order as Appendix A is a redline of the UBP reflecting the modifications adopted in this Order.

UBP §1: Proposed Definitions

As noted above, DPS Staff proposes that UBP §1 be amended to include two new definitions of "express customer consent" and "material change" to add definitions of key terms used in the UBP and to conform with subdivisions 6 and 7 of GBL §349-d.

AP&G and Kiwi disagree with the proposed definition of "material change" and argue that the definition expands the scope of the statute. These companies state that variable rate contracts are constructed to account for potential changes in product pricing and customers affirmatively agree to this at the time of contracting. AP&G and Kiwi further state that the Commission has already contemplated this issue and provided an exception to the affirmative consent requirement in the context of guaranteed savings products.

Constellation also disagrees with the proposed definition of material change and argues that it will limit an ESCO's ability to provide the best price for a customer. If affirmative consent is required for a variable rate product, even when a price decreases, the company suggests that it will have an unintended consequence of holding prices steady. In addition, Constellation points out that if affirmative consent is required for a variable rate, a customer may be dropped back to the utility if they miss the notice of a price decrease and lose out on the lower price.

PULP recommends that the definition of material change should be more comprehensive to avoid ambiguity. PULP proposes to modify DPS Staff's definition to include:

Any change that effects the rates, terms, and conditions of service contained in the customer agreement. For example, this could include, but shall not be limited to: Changes in the commodity rate per unit of energy;

alterations to the length of the contract or agreement period; shifts from fixed-rate to variable-rate products or vice versa; introduction or removal of fees, such as administrative fees; introduction or removal of introductory or promotional rates; modifications to the frequency or timing of billings cycles; changes in the proportion of energy sourced from renewable resources; or modifications to customer support hours, response times, or contact methods.

RESA believes the use of "any change" in the definition is superfluous. The broad definition will require notice for changes that have no substantive impact on the customer. RESA proposes the definition be changed to: "a change in the price, pricing structure, product or service type, or duration."

Regarding the new definition for "express customer consent," PULP states that it has concerns about the allowance of verbal consent as a form of express consent. PULP points out that verbal consent can be easily disputed and lacks the verifiability and reliability of written or electronic consent and therefore should not be allowed.

NRG believes a new definition for express consent is unnecessary. NRG states that "express consent" was part of GBL §349-d when the law was passed a decade ago. Also, NRG states that UBP §5.B.1 refers to existing avenues which customers can expressly consent to enter into an ESCO agreement. Adding this new definition will be confusing and will require ESCOs to cross check several sections of the UBP, according to NRG.

Finally, Sustainable Westchester urges the Commission to seek "clarity and consistency" concerning the interpretation of customer consent. They request that the Commission consider a distinct and explicit understanding in order to facilitate a competitive market that works for both customers and suppliers.

The Commission adopts both definitions of "material change" and "express customer consent" to conform with the amendments of subdivisions 6 and 7 of GBL §349-d. With respect to the definition of material change, the definition adopted will provide clarity regarding what constitutes such a change that would trigger these additional consumer protections. The Commission declines to adopt the more expansive definition suggested by PULP, but acknowledges that many of the changes included as specific examples would be considered a material change under the adopted definition. The Commission recognizes the comments provided by several ESCO parties that a change in price should not be considered a material change when it occurs as part of a variable rate agreement. However, as discussed more fully below, the GBL does not provide any such exception for variable rate agreements. Regarding reference to the Commission's prior exception to the affirmative consent rule for enrollments in a guaranteed savings product, the Commission notes that this exception is no longer available and, as discussed below, modifies the UBP to remove this option.

Regarding the definition of express customer consent, the Commission notes that, as NRG points out, express customer consent is not a new concept. However, given that this term is used in the UBP and has a specific meaning, it is reasonable to add a definition to the UBP at this time. Regarding PULP's concern with verbal authorizations, the Commission will require any authorizations, whether verbal or in writing, to be recorded and maintained so that the customer's consent can be verified at a later date.

UBP §2.B.1.c: Sample Renewal Notices Added to Retail Application Requirements

DPS Staff proposes that UBP §2.B.1.c be amended to include sample renewal notices as part of the retail access

application requirements. AP&G and Kiwi comment that if this notice has to be provided to DPS Staff with their application going forward, any changes will have to be sent to DPS Staff for review prior to using the notice. AP&G and Kiwi further request that the Commission consider permitting ESCOs to send the notice to customers via email or other forms of communication, not only via mail.

The Commission adopts DPS Staff's proposal and will require ESCOs to include sample renewal notices as part of the retail access application requirements. New ESCOs shall provide these sample notices as part of their initial eligibility application and on an ongoing basis as part of triennial compliance filings thereafter. Existing ESCOs shall provide these samples at the time of their next annual or triennial compliance filing, whichever comes first, and on an ongoing basis as part of triennial compliance filings thereafter. In addition to providing such a sample notice as part of the application or compliance filings, ESCOs must then use that notice in communications with their customers.

Regarding the request to provide notices in a format other than regular mail, the Commission declines to adopt this request because not every customer has access to a computer or the internet, but every customer has a billing address. Permitting notices to be furnished via email or other forms of communication may exclude some customers that are required to receive such notices.

UBP §5.B.5.d: Refine Language and Remove Guaranteed Savings Product Exception

DPS Staff proposes to include in UBP §5.B.5.d more precise language regarding express consent, and to remove language that specifically excludes guaranteed savings products from requiring express customer consent. As part of these

changes, DPS Staff proposes to structurally reorganize UBP §5.B.5. and its subsections. DPS Staff also proposes to add a provision requiring the ESCO to maintain records of express customer consent for a minimum of two years or for the length of the sales/renewal agreement, whichever is longer.

According to NRG, after review of the proposed amendments, the new language regarding "material change" is missing from the amended UBP. In addition, NRG notes that, if the guaranteed savings product is no longer excluded from the material change definition, it will affect the low-income customers who can purchase this product from ESCOs.

The Commission adopts the updates proposed by DPS Staff to UBP §5.B.5.d to include more precise language in order to conform with the amended GBL §349-d(6). These changes include requiring ESCOs to retain records of customer consent in a manner consistent with other record retention requirements found in UBP §5. As pointed out by NRG, the existing UBP language regarding changes in price does not precisely reflect the GBL amendments. As such, Appendix A includes an additional redline to that section to more closely track the language of GBL §349-d(6). The Commission is cognizant of the fact that these changes will prohibit customers, including low-income customers, from being automatically switched to a guaranteed saving product without their consent.

Regarding the proposed structural change to UBP §5, the Commission rejects this change and instead includes this new language as part of the existing list found within UBP §5. As proposed, the structural changes would have expanded the applicability of these consumer protections beyond those residential customers and those marketed to via door-to-door marketing, which are the customer groups to which GBL §349-d is

applicable. Including these requirements within the existing UBP §5 preserves that applicability.

UBP §5.B.5.d: Including Specific Notice Disclosures Regarding Transparency of Pricing

DPS Staff proposes to further amend UBP §5.B.5.d to include the specific notice disclosures regarding transparency of pricing that GBL §349-d(7) requires as part of customer contract renewal notices. Additionally, DPS Staff proposes modifying the standardized renewal notice required to be used by ESCOs in order to reflect these same disclosures.

RESA believes that present transparency standards regarding pricing are clear and adequate. Referring to the Power-to-Choose website, RESA states that customers enrolling through the website can view an ESCO's historic pricing. Additionally, RESA states the current requirements for an ESCO to disclose price and pricing structure at renewal provide the information DPS Staff seeks to address in their proposal. RESA contends that requiring further notices would only frustrate customer experiences.

AP&G argues that ESCOs should reserve the right to modify language in renewal notices, as long as the necessary information is provided within such notices. AP&G and Kiwi also raise concerns with the potential conflict of interest that would arise if such renewal notices were to be required. They suggest that such a mandate would work in direct opposition to Climate Leadership and Community Protection Act (CLCPA) goals. AP&G and Kiwi refer to present ESCO/customer communications and believe that email notices should be allowed if the DPS Staff Proposal is adopted.

Family requests that any requirements adopted by the Commission be applied to ESCOs and Community Choice Aggregation (CCA) programs alike, to ensure a fair and competitive market.

Referring to the Commission's 2016 CCA Framework Order,<sup>13</sup> Joule highlights the present requirements for CCA programs where municipal proxy is representative of individual consent when consumer education efforts and individual customer opt-out processes are enacted. Joule further states that customers in CCA programs are able to leave the program at any time with no fee or penalty. Sustainable Westchester refers to present CCA structures regarding consent and transparency, where consumer consent is obtained via municipal approval, with prior notice given to consumers.

NRG comments that ESCOs would only need to provide a contract renewal notice if an early termination fee would be charged under the new agreement. NRG believes that the absence of termination fees negates any requirement for renewal notices to be sent to customers.

The Commission adopts the DPS Staff proposed changes to UBP §5.B.5.d to add the data points required by GBL §349-d(7) in ESCO renewal notices. Specifically, notices to renew an agreement for energy supply service shall include: (1) the price charged for energy services; (2) the price the ESCO proposes to charge upon renewal; (3) the price that is charged by the customer's distribution utility; and (4) information notifying the customer how they may compare past bills with what they would have been charged had they received energy services from the respective distribution utility, including the internet address of any bill calculator offered by such customer's distribution utility on its website.

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<sup>13</sup> See Case 14-M-0224, Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs, Order Authorizing Framework for Community Choice Aggregation Opt-Out Program (issued April 21, 2016) (CCA Framework Order).

Regarding comments suggesting that such notice disclosures are unnecessary, the Commission disagrees. Not only are these specific disclosures explicitly required by GBL §349-d(7), the Commission finds such disclosures appropriate to ensure the customer is apprised of how their energy service is changing and to allow the customer to make an informed choice regarding whether to continue with the ESCO. Moreover, as discussed below, these notice requirements from GBL §349-d do not conflict with the CLCPA.

Turning to NRG's argument that the Commission had previously not required express consent or renewal notices for changes in price as part of a variable rate or month-to-month agreement, the Commission highlights that such determination was, in part, based on the previous premise that a change in prices was not considered a material change. This is no longer the case as GBL §349-d(6) explicitly includes a change in price as a material change. This change in law necessitates revisiting and modifying the Commission's prior determination.

Regarding AP&G's assertion that ESCOs should be permitted to modify the sample renewal notice, the Commission confirms that ESCOs are indeed permitted to propose such modifications, so long as the notice includes all required information in a clear and easily understandable manner. Such proposed modified notices, however, must first be submitted and approved by Staff before an ESCO may employ them. Regarding the comments that suggest similar treatment for ESCOs serving customers pursuant to a CCA program as for other ESCOs serving customers via the traditional model, the Commission confirms that GBL §349-d does not include any carve out or exceptions for CCA programs and thus these consumer protections would apply to all ESCOs serving residential customers or customers marketed to

via door-to-door sales, including those that do so as part of a CCA program.

Express Customer Consent Must be Obtained and Recorded in a Verifiable Format

DPS Staff proposes that, when obtaining express customer consent for a material change, that consent must be obtained and recorded in a verifiable format and that verifiable proof of customer consent be furnished to DPS Staff upon request.

AP&G and Kiwi believe that further consent for variable or month-to-month products is unnecessary. They argue that customers who enter into these agreements do so knowingly and expecting future price changes. AP&G and Kiwi agree that ESCOs should be permitted to disclose pricing information to customers throughout the year, referring to winter and summer months, but believe additional consent should not be needed. They further argue that, as an initial price is provided at the beginning of such contracts, and customer consent is obtained at the time of signing, there should be no further requirements to obtain customer consent for future rate changes.

Family refers to the 2016 CCA Framework Order, stating that while this order suspended certain provisions in the UBP, UBP §5.B.5 was not a practice from which CCA programs were exempt. Family believes that CCA administrators should not be exempt from obtaining express customer consent.

NRG states that the DPS Staff Proposal is unnecessary and will only cause confusion for ESCOs in matters of compliance. NRG refers to UBP §5, in which ESCOs are required to obtain express customer consent and retain customer authorization for two years.

PULP states that it has concerns about the allowance of verbal consent as a form of express consent. PULP points out

that verbal consent can be easily disputed and lacks the verifiability and reliability of written or electronic consent and therefore should not be allowed.

RESA believes requiring express customer consent in response to material changes would be inefficient and limiting to customers. Regarding variable contracts, RESA claims that customers enter into such contracts understanding that changes in price are a piece of the agreement. By requiring ESCOs to contact customers who knowingly enter variable agreements, RESA believes that the DPS Staff Proposal will create undue complications for ESCOs and the customers they serve.

Sustainable Westchester refers to the current CCA framework, where customer consent is obtained through municipal approval when coupled with customer education and individual customer opt-out options.

The Commission adopts DPS Staff's proposal regarding how consent is tracked and verified. While many of the commenters assert that consent for a price change is not necessary, the explicit language of GBL §349-d dictates otherwise. Some commenters argue that customers should be notified of pricing changes, but should not have to consent to those changes, while others argue that consent for price changes is not necessary because the customer received the initial price when they signed the agreement. Not only are these arguments unpersuasive from a consumer protection standpoint, but they ignore the explicit requirements of GBL §349-d that (1) ESCOs obtain express customer consent for material changes to energy service agreements and (2) a change in price is considered a material change.

The Commission disagrees with NRG's comments that the record retention requirement will cause compliance issues. The requirement that ESCOs obtain, record, and maintain customer

consent in a verifiable format that can be produced upon request is consistent with other UBP record retention requirements and will ensure that appropriate records are available should a dispute arise regarding whether or not a customer consented to a material change.

Regarding PULP's comments about the ability to verify verbal consent, as stated above, the retention requirement adopted herein will require ESCOs to maintain a record of consent, whether verbal or in writing. For verbal consent, this would include a recording of the verbal consent given by the customer - as well as maintaining that recording and producing that recording when requested by DPS Staff.

Utilizing the 12-Month Trailing Average Posted by Utilities

DPS Staff proposes to allow ESCOs to utilize the 12-month trailing average posted by distribution utilities quarterly to satisfy the requirements regarding disclosure of utility pricing, as set forth in GBL §349-d(7).

Constellation refers to utilities posting average prices for mass market customers and argues that DPS Staff's amendments to GBL §349-d should not be applicable to commercial customers. They request confirmation from the Commission that the price to compare is current and accurate.

RESA refers to present CCA requirements, where fixed price products will be no greater than the 12-month trailing average utility supply rate plus a premium of no more than 5%, and variable-rate products must be guaranteed savings. With these current standards, RESA believes that the DPS Staff Proposal to require further customer protections is unnecessary for CCA programs.

The Commission adopts DPS Staff's recommendation to utilize the 12-month trailing average that distribution utilities already post in compliance with the Commission's Order

Adopting Changes to the Retail Access Energy Market and Establishing Further Process, for the purposes of satisfying the price comparison information required by GBL §349-d(7).<sup>14</sup> This will provide ESCOs with a readily available price to compare that can be utilized to satisfy these new notice requirements. As noted above, the GBL does not make exceptions for ESCOs serving customers under a CCA program and thus these protections apply to ESCOs that service CCA programs as well.

Variable Rate/Month-to-Month Product Offerings

Reflecting the amendments to subdivisions 6 and 7 of GBL §349-d, DPS Staff presents the practical impact these changes would have on variable rate and month-to-month agreements. GBL §349-d explicitly requires express customer consent for any material change to the terms or duration of an energy service contract, and explicitly identifies a change in price or product structure as material changes. Thus, DPS Staff asserts that ESCOs are required to obtain a customer's express consent for any change in price, including a price change pursuant to a variable rate agreement, or any changes in the terms used to determine such price. Additionally, regarding contract renewals, DPS Staff asserts that the amended language of GBL §349-d(7) regarding contract renewals would apply to all month-to-month agreements, which expire and are renewed each month.

AP&G and Kiwi believe that the DPS Staff Proposal works against the purpose of these product structures. They believe that customers enter into these types of contracts knowingly and are aware that pricing will fluctuate. Additionally, AP&G argues that month-to-month contracts are

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<sup>14</sup> Case 15-M-0127 et al., ESCO Eligibility, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (issued December 12, 2019).

continuous until either party terminates the agreement. They believe that the information transparency concerning price and consent DPS Staff seeks to introduce through its proposal is a standard presently required by the UBP. Additionally, AP&G and Kiwi raise concerns over contract termination and guaranteed savings products. AP&G and Kiwi argue that the DPS Staff Proposal would enable customers to breach the contract each month until termination. AP&G and Kiwi believe that such market volatility would potentially jeopardize guaranteed savings products, as ESCOs would seek to recoup the means of lost termination fees through increased prices and alternate avenues.

Referring to the Commission's Order Modifying Community Choice Aggregation Programs and Establishing Further Processes, Family highlights ESCO and CCA mass market product offerings.<sup>15</sup> Family believes that the applicable requirements for ESCOs and CCA programs would allow customers to better understand competitive services.

Constellation believes that month-to-month products are a continuation of a single agreement. Constellation states that when a contract transitions to a month-to-month period, it is per the initial agreement. Referring to the GBL §349-d requirements for pricing changes, Constellation maintains that these standards would be applicable. However, they suggest that existing legal and contractual arrangements should not be impacted due to these changes because doing so would only negatively impact customer relations with the ESCO. Constellation further contends that the DPS Staff Proposal would include commercial and industrial customers and cause an undue burden on such customers. They highlight the sophistication of

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<sup>15</sup> See Case 14-M-0224, supra, Order Modifying Community Choice Aggregation Programs and Establishing Further Process (issued January 19, 2023).

commercial customers and refer to their use of energy experts and counsel when searching for products and entering into agreements. Additionally, Constellation proffers that DPS Staff's proposal to require consent for material changes would negatively impact pricing structures often used by commercial customers, in that the proposed requirement to obtain customer consent whenever a price changes would be unfeasible under certain pricing structures and would create situations in which customers would miss out on lower rates.

Joule argues that material changes, including rate changes, are discussed during the initial agreement and prior to any rate changes affecting customer agreements. Commenting on unknown costs for long-term contracts, Joule indicates that customers are aware of pricing changes once costs become known. Additionally, Joule believes that rate changes after contract execution ensure that customers don't overpay or underpay for compliance with the Commission's Clean Energy Standard requirements. Joule states similar parameters are set for short-term fixed-rate products. Joule further asserts that municipalities entering into these agreements are made aware of term dates, dates when rates may or may not change, how much the rate can change, and measures for which this information will be shared with customers.

NRG maintains that the DPS Staff Proposal to require renewal notices for month-to-month contracts would create customer confusion. NRG also argues that the DPS Staff Proposal would require ESCOs to mail hardcopy notices, resulting in delivery-related emissions, and thus would interfere with CLCPA greenhouse gas emission goals. NRG comments on DPS Staff's exclusion of email as a viable option for customer notice and believes the DPS Staff Proposal should be rejected because it is not consistent with the CLCPA. Additionally, NRG refers to GBL

§527-a, asserting that this section "neither explicitly provides nor implicitly suggests that each successive term of an automatically renewing contract is a new contract." NRG argues that an automatic renewal contract is a single contract and states that the DPS Staff Proposal is unnecessary and would create a "monthly bombardment" of notices and requests for ESCO customers.

RESA claims customers enter variable rate or month-to-month agreements with the expectation of price changes. RESA believes the proposed monthly renewal notices would generate customer confusion, increase customer complaints, and create unnecessary administrative burdens for both customers and ESCOs. RESA continues to dispute the modifications, stating that such a requirement would negatively impact all customer classes an ESCO serves and would require increased customer vigilance concerning price changes. RESA refers to customers using hourly pricing structures and the likely burden facing them to monitor and provide consent for pricing contracts that change over the course of a day. RESA further believes that any adopted proposal where ESCOs are required to obtain customer consent for material changes should not be applicable to any variably priced contract preceding the DPS Staff Proposal.

The Commission agrees with DPS Staff's interpretation of the requirements of GBL §349-d, which explicitly require express customer consent for any material change to the terms or duration of an energy service contract, and expressly identify either a change in price or product structure as a material change. Several commenters, such as Constellation, NRG, and RESA, argue that renewal notices and express customer consent should not be required for customers served on month-to-month and/or variable rate agreements. These commenters assert that customers are aware at the time of signing that the contract is

subject to future price changes and thus the ESCO should not be required to provide notice when those changes occur. These commenters further assert that monthly renewal notices would generate customer confusion, increase customer complaints, and create unnecessary administrative burdens for both customers and ESCOs.

While these commenters assert that it is the DPS Staff Proposal that requires these notices for renewals and material changes, these requirements were imposed by the legislature when it adopted the revisions to GBL §349-d and the DPS Staff Proposal simply seeks to incorporate those changes into the Commission's UBP for consistency. As noted above, the plain language of GBL §349-d explicitly requires express customer consent for any material change to the terms or duration of an energy service contract, and expressly identifies a change in price or product structure as material changes. Though the Commission considers month-to-month agreements to expire and renew each month, it has not historically required renewal notices to be sent each month. However, given the explicit statutory language that a change in price is considered a material change, this is no longer the case and ESCOs are now required to receive express customer consent for monthly rate changes. With that said, the Commission makes one modification to DPS Staff's interpretation of these provisions. While DPS Staff asserts that GBL §349-d(7) would require renewal notices to be sent each month to all customers on month-to-month agreements, the addition of specific notice requirements in GBL §349-d(7) does not automatically require a renewal notice. The Commission will not impose a requirement that renewal notices be sent each month to customers who are on month-to-month agreements, which expire and are renewed each month, so long as there is no material change made to the customer's agreement.

However, a customer notice and express customer consent is required if a material change occurs in any given month, including a change in price as part of a variable rate agreement.

RESA asserts that these notice requirements will negatively impact customers and require increased customer vigilance concerning price changes. The Commission does not see increased customer awareness and vigilance concerning price changes as a downside and seeks to promote ESCO pricing transparency.

AP&G and Kiwi's argument that the DPS Staff Proposal would enable customers to breach the contract each month until termination underscores the need for this consumer protection. A customer exercising their right to exit the agreement in any given month upon providing notice to the ESCO would not constitute a "breach" of a month-to-month contract. The characterization of this normal customer choice as a breach of contract highlights that some ESCOs view providing customers with product transparency as harmful to the companies' efforts to retain customers. Our perspective differs from the commenters. Customers should be empowered and encouraged to make informed energy choices and providing customers with up-to-date pricing information will not lead to a significant rise in breaches of month-to-month agreements.

NRG's reference to GBL §527-a does not change this analysis. NRG points out that this provision dealing with prohibited business practices does not suggest that each successive term of an automatically renewing contract is a new contract. While this may be true, that is not dispositive of this issue and the Commission has explicitly held that month-to-month contracts expire and renew each month and that new consumer protections shall be implemented following the first

full billing cycle after the implementation date of the new rules. NRG's argument also ignores the material change element of these notices. NRG argues that it should not have to send renewal notices each month because month-to-month agreements are continuous, but this argument assumes that either the price would not change each month, or that the ESCO should not have to provide notice to the customer of a change in price, something clearly required by GBL §349-d.

Turning to Constellation's comments concerning the applicability of these consumer protections to commercial customers, the Commission confirms that the protections will not apply to ESCO service to commercial customers. As discussed above, these consumer protections are reflected in UBP §5.B.5 which, like GBL §349-d, is limited to residential customers and customers solicited via door-to-door sales.

With respect to ESCOs serving customers as part of a CCA program, as stated above, the GBL provisions do not include an exception for such ESCOs and these rules would apply to these ESCOs' service as well. However, such material change and renewal notices will follow the CCA consent process whereby municipal consent serves as a proxy for individual customer consent.

Finally, with respect to arguments made that requiring ESCOs to mail hard copy notices would interfere or be inconsistent with the CLCPA, the Commission finds otherwise. The Commission notes that many ESCOs already utilize significant amounts of paper in marketing to, enrolling, and serving customers, and that the UBP requires various customer notices and communications at certain points throughout their service with the ESCO. Requiring ESCOs to inform customers of material changes to their energy supply will require some ESCOs to increase the number of notices sent to customers, but that

increase will be de minimis compared to the broader impact on greenhouse gas emissions caused by ESCO activity generally. These commenters fail to provide any support for their assertions that adopting these provisions of the GBL within the UBP will increase paper mailings in a manner that would be inconsistent with the CLCPA, and instead appear to argue that any increase in paper generated would be inconsistent with the CLCPA. By this logic, any new request for ESCO eligibility should be denied as inconsistent with the CLCPA because the ESCO will likely generate significant amounts of paper in marketing to, enrolling, and serving customers.

Moreover, the alleged inconsistency with CLCPA emissions targets is speculative. These notice requirements would only adhere if the ESCO is serving a customer and makes a material change to the customer's agreement. Not all ESCOs make regular changes to their agreements that would necessitate such a notice and an ESCO that does offer such a product could choose not to do so. Thus, while the GBL requires customer notices - and express consent - for material changes, whether or not a material change occurs is entirely in the control of the ESCO and whether or not such notices will need to be mailed is speculative.

Finally, assuming for argument's sake that requiring customer notices is inconsistent with the CLCPA, which the Commission determines is not the case, the notice requirement would still be justified. Ensuring customers receive notice of material changes to their energy supply contracts, as required by the GBL, necessitates this incremental mailing requirement, and the benefit of ensuring informed customer energy decisions would outweigh any incremental increase in greenhouse gas emissions associated with the mailing of customer notices. While the Commission understands the request to provide such

notices via email, as stated above, not every customer has access to a computer or the internet and allowing these notices to be provided electronically is likely to result in a significant number of customers not receiving the required notices. For this reason, ESCOs shall continue to mail physical notices for all required ESCO notifications to customers.

#### CONCLUSION

By this Order the Commission adopts the DPS Staff Proposal, with the modifications discussed above, to modify the UBP to reflect changes to GBL §349-d. Redlines to the UBP are included with this Order as Appendix A. Additionally, distribution utility tariffs shall be updated to reflect the modifications made to the UBP. As these tariff revisions will be filed in compliance with this Order and stakeholders have been provided an opportunity to provide comment, the newspaper publication requirements of PSL §66(12)(b) and 16 NYCRR §720-8.1 are waived with respect to these tariff filings. Finally, in order to track retail access market changes, including the impact that the changes directed in this Order have on the types of products and services ESCOs offer in the State, DPS Staff is directed to collect information on the number of customers served on month-to-month contracts by each ESCO. DPS Staff should collect this information with respect to all ESCO customers in the State, not just residential customers or those marketed to via door-to-door sales. This information shall be compiled and reported to the Commission on March 1 each year. Finally, the Commission anticipates that the Long Island Power Authority's Board of Trustees will adopt similar modifications to the PSEG Long Island retail access program and approve the necessary tariff amendments to implement these changes to the GBL in a manner consistent with this Order.

The Commission orders:

1. The Department of Public Service Staff Proposal for Implementing Stronger Price Transparency for Customers, as filed on March 26, 2024, is adopted, with modifications, as discussed in the body of this Order.

2. Revisions to the Uniform Business Practices are adopted in accordance with the discussion in the body of this Order and Appendix A to this Order. These revisions shall become effective on December 31, 2025.

3. Department of Public Service staff shall, within 15 days of the effective date of this Order, file the revised Uniform Business Practices in this proceeding and update the Uniform Business Practices posted on the Public Service Commission's website to reflect the changes made in this Order.

4. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Corning Natural Gas Corporation, Liberty Utilities (St. Lawrence Gas) Corporation, National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY, Keyspan Gas East Corporation d/b/a National Grid, FirstEnergy Pennsylvania Electric Company, and Valley Energy, Inc. are directed to file tariff amendments or addenda to incorporate or reflect in their tariffs the revisions to the Uniform Business Practices directed in this Order. The tariff revisions shall be filed, on not less than one day's notice, to become effective on or before December 31, 2025.

5. The requirements of Public Service Law Section 66(12)(b) and 16 NYCRR §720-8.1, as to newspaper publication of

the tariff revisions filed in accordance with Ordering Clause No. 4, shall be waived.

6. Energy Service Companies shall include sample customer renewal notices as part of the retail access application requirements, as discussed in the body of this Order.

7. Energy Service Companies shall include in customer renewal notices: (1) the price charged for energy services; (2) the price the Energy Service Company proposes to charge upon renewal; (3) the price that is charged by the customer's distribution utility; and (4) information notifying the customer how they may compare past bills with what they would have been charged had they received energy services from the respective distribution utility, including the internet address of any bill calculator offered by such customer's distribution utility's website, as discussed in the body of this Order.

8. Energy Service Companies shall obtain express customer consent for any material change made to a contract with a customer, as discussed in the body of this Order. Express customer consent must be obtained and recorded in a verifiable format that shall be furnished to Department of Public Service staff upon request, as discussed in the body of this Order.

9. Department of Public Service staff shall, by March 1, 2026, and every March 1 thereafter, collect information regarding the number of energy service company customers served on month-to-month contracts, as discussed in the body of this Order.

10. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least three days prior to the affected deadline.

11. This proceeding is continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS  
Secretary

## **SECTION 1: DEFINITIONS**

Express Customer Consent: Consent given directly and knowingly by the customer, either verbally, electronically or in writing, that shall be maintained by the ESCO in a verifiable format.

Material Change: Any change that affects the rates, terms, and conditions of service contained in the customer agreement. For example, this could include but not be limited to, the commodity rate, product term, or product type.

## **SECTION 2: ELIGIBILITY REQUIREMENTS**

UBP Section 2.B.1.c:

### B. Application Requirements

1. Applicants seeking eligibility to sell natural gas and/or electricity as ESCOs are required to submit to the Department an application package containing the following information and attachments:
  - c. Sample forms of the notices sent upon assignment of sales agreements, discontinuance of service, renewal notices, or transfer of customers to other providers.

## **SECTION 5: CHANGES IN SERVICE PROVIDERS**

UBP Section 5.B.5:

### B. Customer Agreement

An ESCO, or its agent, may solicit and enter into a sales agreement with a customer subject to the following requirements.

5. Additional terms and conditions applicable to residential customers and customers solicited via door-to-door sales include:
  - d. Material changes to and renewals of customer agreements – No material changes shall be made in the terms or duration of any contract for the provision of energy by an ESCO without the express consent of the customer obtained under the methods authorized in the UBP. This shall not restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and the customer's option to reject the renewal terms. A customer shall not be charged a termination fee as set forth in Section 5.B.3.1.a herein, if the customer's express consent has not been obtained to any change in material terms and conditions, or if the customer objects to such renewal within three business days of receipt of the first billing statement under the agreement as renewed. ~~Regarding contract renewals or an initial sales agreement that specifies that the agreement automatically renews, a~~All changes to the terms of the contract, including changes to the price, commodity rate, product or service type, will be considered material and will require that the ESCO obtain

the customer's express consent for renewal. ~~Notwithstanding the forgoing, when an agreement renews as part of a month-to-month product which guaranteed savings compared to the distribution utility price, or renews to a new product which guaranteed savings compared to the distribution utility price, the customer's express consent for renewal is not required.~~

~~e. An ESCO shall retain, for a minimum of two years or for the length of the sales/renewal agreement whichever is longer, verifiable proof of a customer's express consent for renewal.~~

~~f. A renewal notice in the standardized format provided by the Department, must be used. In any notice regarding contract renewal, the provider shall disclose the following information as it exists at the time of such notice: (i) the price the provider currently charges for energy services; (ii) the price it proposes to charge upon renewal; (iii) the price that is charged by the customer's distribution utility; and (iv) information notifying the customer how they may compare past bills with what they would have been charged had they received energy services from their respective distribution utility, including, the internet address of any bill calculator offered on such customer's distribution utility's website.~~

~~g.e.~~ The renewal notice must be enclosed in an envelope which states in bold lettering: "IMPORTANT: YOUR [ESCO NAME] CONTRACT RENEWAL OFFER IS ENCLOSED. THIS MAY AFFECT THE PRICE YOU PAY FOR ENERGY SUPPLY."

~~h.f.~~ When a fixed-rate agreement is renewed as a fixed-rate 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 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.

COMMENTING PARTIES

American Power and Gas, LLC & Kiwi Energy NY, LLC (AP&G & Kiwi)

Constellation NewEnergy, Inc. & Constellation NewEnergy - Gas Division, LLC (Constellation)

Family Energy, Inc. (Family Energy)

Joule Assets, Inc. (Joule)

NRG Energy, Inc. (NRG)

Public Utility Law Project of New York, Inc. (PULP)

Retail Energy Supply Association (RESA)

Sustainable Westchester

American Power & Gas and Kiwi Energy NY, LLC

AP&G and Kiwi believe that DPS Staff's proposed definition of "express customer consent" exceeds the scope of the Commission's authority. They believe that DPS Staff's definition would cast a blanket applicability to all customer classes, including large commercial and industrial. AP&G and Kiwi further comment on DPS Staff's proposed definition of "material change" and argue that price changes made as part of variable price or month-to-month products should not be considered material. Furthermore, AP&G and Kiwi believe that DPS Staff's proposal to require ESCOs to send monthly renewal notices to customers is unnecessary. AP&G and Kiwi state that such contracts only expire until service is terminated, and thus a renewal notice requirement would be unwarranted. AP&G and Kiwi further state that customers knowingly consent to future price changes when enter into such agreements, therefore making such notices for renewal unnecessary. AP&G and Kiwi state that customers who enter into variable agreements, enter so with the expectation that pricing will fluctuate. Citing the functionality and structure of pricing contracts, AP&G and Kiwi

raise concerns over the possibility for increased costs of service and the potential for guaranteed savings products to be eliminated from the market.

AP&G and Kiwi refer to Commission's previous order where consent must be obtained for changes made to rates, product, or service type and believe the same concept should be applied here, recommending that customer consent should be given for the entirety of the contract for all variable products as authorized by the customer at time of signing.

AP&G and Kiwi believe that ESCOs should not be required provide monthly renewal notices for month-to-month contracts, as they consider them to be continuous contracts. AP&G and Kiwi refer to GBL §527 to support their argument, claiming that continuous service agreements are continued in perpetuity or until the customer cancels the service. They comment that the requirements set forth in this statute enable parties to enter into continuous agreements if information is provided clearly, and affirmative customer consent is obtained. AP&G and Kiwi argue that, under these terms, ESCOs should not be required to provide renewal notices to customers enrolled in continuous service contracts.

In response to DPS Staff's proposed modifications to Standard Renewal Notices, AP&G and Kiwi argue that ESCOs should reserve the right to modify language in renewal notices, if all required information is included within such notices. In response to DPS Staff's proposal to require ESCOs to submit sample renewal notices during the ESCO application process, AP&G and Kiwi state that such samples would ensure that proper language and information is approved during DPS Staff's review of ESCO initial, annual, and triennial filings.

AP&G and Kiwi also raise concern over renewal notices sent through regular mail. Concerned with the increased

hardcopy mail, the companies suggest Commission considers the permission of alternative communication methods. Stating that many ESCO customers communicate through e-mail, AP&G and Kiwi believe that electronic receipt of renewal would add additional layers of consumer protection while also maintaining verifiable proof in a verifiable format.

AP&G and Kiwi request Commission to require that no further mandate of additional renewal notices be made for customers who have previously provided consent; confirm that customers enrolled in month-to-month contracts are single, continuous contracts and do not expire unless the customer cancels service; allow ESCOs to modify language within renewal notices after such samples have been deemed appropriate under DPS Staff's review and approval; and allow for ESCOs to communicate these renewal notices via electronic mail.

Constellation NewEnergy, INC. and Constellation NewEnergy - Gas Division, LLC.

In response to DPS Staff's proposed definitions of "express customer consent" and "material changes," Constellation raises concerns over unclear service class identification, claiming that the language proposed by DPS Staff would encompass all service classes, including commercial and industrial customers. Constellation refers to the definition of "customer" as provided in Section 1 of GBL §349-d, which identifies applicable classes as "any person who is sold or offered an energy services contract by an ESCO (i) for residential utility service, or (ii) through door-to-door sales." Constellation highlight that this definition went unchanged in recent legislation.

Constellation also provides comments on DPS Staff's proposed modifications to UBP §5.B.5. Constellation believe that

language within GBL §349-d(6) clearly identifies the requirement for ESCOs to divulge price changes to customers, and believes that the proposed modifications to the UBP are unwarranted and unnecessary.

In response to DPS Staff's proposal for ESCOs to obtain express consent when a material change is made to a customer's contract, Constellation believe the proposed modifications would hinder pricing benefits for customers and propagate customer dissatisfaction. Constellation state that DPS Staff's proposal does not provide any exemption for price changes that benefit the customer (e.g., when prices decrease). Constellation believes that ESCOs should be able to provide lower prices to customers without affirmative consent. Constellation further states that, if adopted, the applicability of these standards would create an undue burden for an ESCO's commercial and large industrial customers.

Joule Assets, Inc.

Joule comments that CCA programs are exempt from UBP customer consent requirements. Joule states that CCA programs allows for customer consent to be obtained through municipal authority. Joule further comments that municipalities participating in CCA programs are exempt from Section 5 of the UBP. Joule states that any material changes are outlined and disclosed prior to contract execution. Additionally, Joule states that rate changes are communicated to CCA program participants and further explains how rate changes are determined.

Family Energy, Inc.

Family Energy filed reply comments contesting Joule's proposed recommendations and exemption from DPS Staff's

proposal. Family Energy claims that Joule's proposal creates an unfair advantage for CCA programs. Family Energy shares other commenters concern over the proposed definition to "material changes." Regardless of which language is adopted, Family Energy requests that Commission applies the same regulations to CCAs and ESCOs.

NRG Energy, Inc.

NRG believes that DPS Staff's proposal to include new definitions to the UBP is unnecessary. NRG states that the language used in GBL §349-d regarding customer consent and material change is clear and straightforward. Additionally, NRG claims that DPS Staff's proposal, as written, would provide a blanket applicability to all customer classes an ESCO serves. NRG comments further that any applicability of this proposal to an ESCOs large commercial or industrial customers enrolled in variable rate agreements would be an over-reach of Commission's authority.

NRG argues that month-to-month contracts are individual contracts, not single term products that expire and renew at the end of each month. NRG states that DPS Staff's proposal would only cause a stream of notices that they believe are unnecessary. Referring to GBL §527-a, NRG argues that current law allows for such continuous contracts to be made. Referring to GBL §349-d(6), NRG states that if no early termination fee is charged, affirmative consent or renewal notice will not be required.

NRG also raises concerns over the implementation and practicality of DPS Staff's proposal to require notice and consent to be obtained any time a material change occurs. NRG states that DPS Staff's proposal does consider alternate mailing methods, specifically email. Referring to the Climate

Leadership and Community Protection Act (CLCPA), NRG believes that requiring ESCOs to provide renewal notices any time a material change occurs would work in direct opposition of the CLCPA's mission to mitigate greenhouse gas emissions.

NRG also believes that DPS Staff's proposal to include guaranteed savings products would disproportionately impact low-income customers, who can only apply for variable rate products with guaranteed savings. NRG believes that DPS Staff's requirement to obtain express customer consent monthly would only propagate customer confusion and frustration. Supporting their argument, NRG refers to current customer rights concerning contract termination, where customers may terminate a contract without penalty. In this matter, NRG urges Commission to reject DPS Staff's proposal to prevent harm to New York's ESCO industry and all ESCO customers.

In response to DPS Staff's proposal to require ESCOs to obtain and retain customer consent in a verifiable format as verifiable proof which can be provided to DPS Staff upon request, NRG refers to UBP §5, which provides an outline for ESCOs to obtain and retain customer authorization for two years. NRG believes that the present requirements in UBP §5 provide detailed requirements, and that DPS Staff's proposal is unnecessary.

Public Utility Law Project of New York, Inc.

PULP raises concerns over the language used in DPS Staff's proposed definitions of "material change" and "express consent." Regarding DPS Staff's definition of "material change," PULP believes more clear and concise language should be used that would alleviate any ambiguity. PULP proposes a definition of "material change" that they believe to be more comprehensive and believes that an explicit definition will

allow customers to better understand their ESCO agreements and allow for informed decisions to be made when considering products and services. Additionally, PULP raises concern that a definition that is not clearly defined would provide for greater risk for customers with consideration to more nefarious ESCOs.

PULP raises further concern with DPS Staff's proposal to obtain express consent via verbal affirmation. PULP believes that a greater risk of credibility resides in verbal consent and could additionally prove problematic regarding verifiability. To remedy this concern, PULP suggests Commission limit verifiable formats to written or electronic communications. PULP believes that these formats will allow for greater customer protections and ensure DPS Staff receives verifiable proof, in a verifiable format when the information is requested.

#### The Retail Energy Supply Association

RESA believes that DPS Staff's proposed definition of "material change" is unnecessary. RESA refers to GBL §349-d(6) and its current language regarding material changes. RESA refers to *People v. Talluto* asserting that "where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning; words are not to be rejected as superfluous."<sup>1</sup>

RESA raises concerns that DPS Staff's proposal would be applicable to all customer classes, and requests that the Commission limit these requirements to residential customers and customers enrolled via door-to-door sales. Referring to the presently protected customer classes identified in GBL §349(d), RESA finds DPS Staff's proposal unclear, and comments that applying these standards to an ESCOs large commercial and

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<sup>1</sup> *People v. Talluto*, 39 N.Y. 3d 306, 311 (2022).

industrial customers is unwarranted. RESA states that this class of customers frequently utilizes the opinions of energy experts and is often represented by legal counsel. RESA further states that large commercial and industrial customers are well aware of the need to evaluate offers for products and services and to choose products and services that are appropriate for their operations. Unlike residential customers and those solicited services via door-to-door sales, RESA believes that DPS Staff's proposed protections are unnecessary for an ESCOs business-minded customers.

RESA further comments that DPS Staff's proposal would complicate the current market. They believe DPS Staff's proposal to require express consent any time a material change is made, and that renewal notices be sent for customers enrolled in month-to-month contracts, would only generate customer confusion and frustration with ESCOs. RESA states that DPS Staff's proposal to require ESCOs to obtain express customer consent any time a material change is made to customer contract would work in opposition to the functionality of variable rate and month-to-month contracts. They believe that customers enter into these types of agreements fully aware of how they work and expect that no further approval be made to changing rates. Additionally, RESA states that agreements concerning monthly variable prices differ from customer to customer. RESA explains that some of these variable price agreements have fixed terms that are longer than a month, or continue until they are cancelled by either party. RESA states that mandating customer consent for variable rate or month-to-month products would welcome an encumbrance endured by all market participants, ESCOs and customers alike.

RESA comments that, under DPS Staff's proposal, all customers will be provided with two options: fixed rate or

utility default service. RESA states these product options may be suitable for residential customers but are concerned these options will not meet the needs of an ESCOs large commercial and industrial customers.

RESA believes that DPS Staff's proposal would counteract the clean energy goals the State has set forth under the CLCPA. With consideration to voluntary Tier 1 renewable energy certificates and the modifications made to the Clean Energy Standard in 2023,<sup>2</sup> RESA believes that DPS Staff's proposal would create a perceived risk and would deter ESCOs from offering voluntary renewable products.

RESA further comments concern over DPS Staff's proposal, in which changes deemed material, but without substantive impact on a customer's price (e.g., a change to an ESCOs contact information), would instigate contract termination if customer consent for such a change is not obtained. Referring to language in GBL §349-d(6), which prohibits ESCOs from charging early termination fees when customer consent has not been obtained, RESA believes that DPS Staff's proposal would instigate price increases in order for ESCOs to recoup costs lost in the absence of early termination fees.

Regarding DPS Staff's proposal to allow ESCOs to utilize the 12-month trailing averages posted by distribution utilities to establish further pricing transparency, RESA refers to the customer's ability to view ESCOs historic pricing through the Power to Choose website. Additionally, RESA claims that DPS Staff's proposed transparency protections are currently provided to customers during the renewal process, where ESCOs are required to disclose price and pricing structure. Additionally, RESA states that the pricing information DPS Staff seeks to

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<sup>2</sup> Case 15-E-0302, Clean Energy Standard, Order Modifying Clean Energy Standard Tier 1 Obligations (issued April 20, 2023).

include in their proposal is currently found in the applicable terms of service supplied to customers.

RESA believes that DPS Staff's proposal should not apply to CCA programs. Referring to Commission's 2016 CCA Order,<sup>3</sup> RESA believes the present framework to obtain customer consent presently meets the requirements DPS Staff proposes to mandate. RESA refers to GBL §349-d(6) and the UBP, demonstrating that ESCOs are already prohibited from making material changes to a customer agreement. Additionally, RESA states that DPS Staff's modifications to include information regarding distribution utility price in renewal notices is similarly unnecessary.

#### Sustainable Westchester

Sustainable Westchester believes that ambiguity in regulation will lead to market uncertainty in relation to real or perceived risk. Sustainable Westchester states that any ambiguity in regulatory requirements could deter new energy suppliers or ESCOs from entering the market, which would in turn limit competition in the energy market. In the matter of customer consent for material changes, Sustainable Westchester states that the proposed changes are presently governed by the CCA Framework Order.

Additionally, Sustainable Westchester believes that DPS Staff's proposed modifications would risk oversight of distinctions between traditional ESCO contracts and CCA Programs. Sustainable Westchester refers to present customer communication and authorization methods utilized by CCA programs

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<sup>3</sup> Case 14-M-0224, Community Choice Aggregation, Order Authorizing Framework for Community Choice Aggregation Opt-Out Program (issued April 21, 2016).

and claim that the present practices ensure transparency and consumer protection.