



On March 26, 2024, DPS Staff issued the Proposal proposing modifications to the Uniform Business Practices (“UBP”) to incorporate these requirements.<sup>6</sup> On April 17, 2024, the Public Service Commission (“Commission”) issued a State Administrative Procedure Act (“SAPA”) Notice of Proposed Rulemaking offering an opportunity to comment on the Proposal.<sup>7</sup> RESA now hereby submits its comments regarding the Proposal.

## COMMENTS

RESA understands that the Amendments necessitate modifications to the UBP. However, the Proposal recommends UBP changes that go well beyond those required by the Amendments. These recommended changes will essentially remove all customer choice, devastate the competitive retail energy market, and undermine New York’s nation-leading climate and clean energy goals. Thus, for the reasons set forth more fully below, RESA requests that the Commission: (a) limit the applicability of the Amendments to residential customers and customers solicited via door-to-door sales; (b) limit the definition of “material change” to those items specifically identified in the Amendments and current UBP; (c) clarify that the Amendments and corresponding changes to the UBP will not be applied retroactively (i.e., to pre-existing agreements); (d) not require additional consent for price changes to which the customer has already specifically agreed; (e) exempt community choice aggregation (“CCA”) from the requirements of the Amendments; and (f) not require monthly renewal notices.

### **I. GBL 349-d(6) AND (7) ARE ONLY APPLICABLE TO RESIDENTIAL CUSTOMERS AND CUSTOMERS SOLICITED VIA DOOR-TO-DOOR SALES**

GBL 349-d defines customer 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

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<sup>6</sup> See generally, Proposal.

<sup>7</sup> See New York State Register, Vol. XLVI, Issue 16 (Apr. 17, 2024), at 16 [SAPA No. 98-M-1343SP26].

sales.”<sup>8</sup> This definition was not changed by the Amendments.<sup>9</sup> Further, to date, consistent with the plain language of the statute, the Commission has limited the applicability of GBL 349-d(6) and (7) to residential customers and customers solicited via door-to-door sales.<sup>10</sup> Despite this, in the Proposal, without any explanation or justification, DPS Staff seeks to modify the UBP to extend the requirements of GBL 349-d(6) and (7) to all customers – no matter their size, sophistication or solicitation method.<sup>11</sup> Since GBL 349-d was first adopted in 2010, consistent with the plain language of the statute, the Commission has limited the applicability of GBL 349-d(6) and (7) to residential customers and customers solicited via door-to-door sales.<sup>12</sup> The Proposal does not include any explanation or justification for expanding the applicability of these statutory provisions to all customers.

Moreover, an expansion of the applicability of GBL 349-d(6) and (7) to all customers is unwarranted. As the Commission has consistently recognized, commercial and industrial customers, especially non-mass market customers, are typically more sophisticated about the retail competitive electric market and contracting for products and services.<sup>13</sup> Indeed, businesses

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<sup>8</sup> GBL 349-d(1)(c).

<sup>9</sup> See Chapter 482 of the Laws of 2023.

<sup>10</sup> Compare GBL 349-d(6), (7) with UBP § 5.B.5.c, d.

<sup>11</sup> See, e.g., Proposal, at 7 (“These Staff recommendations are intended to enhance consumer protections provided by the UBP by ensuring that **all** consumers have full disclosure of any material change in price or in contract terms that may be proposed by their energy provider, particularly for consumers on variable rate contracts.”) (emphasis added).

<sup>12</sup> See, e.g., Order Implementing Chapter 416 Of The Laws Of 2010 (Issued Dec. 17, 2010), at 1 (“By this Order we implement GBL §349-d through (1) adopting modifications to the Uniform Business Practices (UBP), and (2) adopting an ECCR [ESCO Consumers Bill of Rights] that will be available on our website and for ESCOs to provide **to prospective residential customers and any customers marketed to through door-to-door sales.**”) (emphasis added); see also *id.* at 9 (“SCMC states that the proposed addition to UBP Section 10.C.1 should clearly indicate that it **only applies** to residential and door-to-door solicitations. **We concur** with this clarification.”) (emphasis added).

<sup>13</sup> See, e.g., Order Adopting Changes To The Retail Access Energy Market And Establishing Further Process (Issued Dec. 12, 2019) (“2019 Reset Order”), at 106 (“Small nonresidential customers may have more sophistication in entering contractual arrangements than most residential customers . . . .”); *Id.* (“It is entirely reasonable to correlate the amount of a commodity used by a business to the level of attention a business owner likely dedicates to investigating ways to reduce his or her costs associated with that commodity.”).

with commercial or industrial operations, regardless of their size, regularly contract and receive bills for a variety of goods and services, from the space in which they run their operations, to the supplies that they need to conduct their operations, to professional services for assistance with preparing tax returns. Such 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. Furthermore, commercial and industrial customers are often represented by energy experts and counsel. Consequently, they do not need the added protections afforded by the Amendments – a fact the legislature appears to have recognized by expressly limiting the applicability of GBL 349-d. Thus, consistent with the plain language of the statute,<sup>14</sup> the Commission should continue to limit the applicability of GBL 349-d(6) and (7) to residential customers and customers solicited via door-to-door sales.

## **II. EXPANDING THE APPLICABILITY OF GBL 349-d WILL HARM CUSTOMERS AND THE COMPETITIVE ENERGY MARKET**

Customers in the energy market enter into agreements for competitive supply offers that best satisfy their needs and goals. For commercial and industrial customers, in particular, these arrangements frequently include complex pricing that can and, often, does vary regularly pursuant to the contractual terms to which the customer agreed.<sup>15</sup> These arrangements can include prices that vary throughout the day, including pricing that varies as frequently as hourly.<sup>16</sup> Customers that select these types of products understand how they work and do not

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<sup>14</sup> See generally, Amendments.

<sup>15</sup> See, e.g., Constellation Electricity Supply Solutions, <https://www.constellation.com/solutions/for-your-commercial-business/electricity-and-natural-gas/electricity/electricity-purchasing-strategies/electricity-supply-solutions.html#index> (last visited Jun. 15, 2024); Constellation Natural Gas Purchasing Strategies, <https://www.constellation.com/solutions/for-your-commercial-business/electricity-and-natural-gas/natural-gas/natural-gas-purchasing-strategies.html> (last visited Jun. 15, 2024).

<sup>16</sup> See, e.g., U.S. Department of Energy, Federal Energy Management Program, Demand Response and Time-Variable Pricing Programs, <https://www.energy.gov/femp/demand-response-and-time-variable-pricing-programs> (last visited Jun. 15, 2024).

expect to “approve” price changes that conform with the agreed-upon contract pricing.<sup>17</sup> Further, it would simply be untenable for customers to provide consent as frequently as every hour of every day for changes in prices to which they already agreed.<sup>18</sup> As a consequence, they will likely forgo these more complex pricing arrangements. Moreover, if ESCOs are unable to change a customer’s price pursuant to the specific terms of their agreements with customers without obtaining consent to every price change,<sup>19</sup> they will not be able to offer the more complex pricing arrangements that commercial and industrial customers have come to expect and want. Consequently, *all* customers will only have two options available - a fixed price arrangement or utility default service. Such limitations are anathema to a competitive market structure. Further, although these limited choices may be acceptable to residential customers, these arrangements do not satisfy the more complex needs of commercial and industrial customers.

In addition, limiting commercial and industrial customers to two pricing options will undermine the State’s ambitious climate and clean energy goals.<sup>20</sup> For example, adoption of the Proposal when combined with recent changes to the voluntary Tier 1 renewable energy credit (“REC”) market<sup>21</sup> will make it nearly impossible for ESCOs to offer products with additional voluntary renewable content. When an ESCO offers a fixed price product to a customer, it does

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<sup>17</sup> Cf. Proposal, at 6 (recommending that the Commission 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.”) (emphasis added).

<sup>18</sup> Cf. *id.*

<sup>19</sup> *Id.* (“Absent the customer’s express consent to the price change, the ESCO would not be permitted to change the price the customers pay *pursuant to their agreement* with the ESCO.”) (emphasis added).

<sup>20</sup> See Climate Leadership and Community Protection Act (“Climate Act”); New York State Climate Action Council. 2022. “New York State Climate Action Council Scoping Plan,” [climate.ny.gov/ScopingPlan](https://climate.ny.gov/ScopingPlan) (providing “recommendations to meet the Climate Act’s nation-leading goals and requirements, including actions to achieve a reduction in economywide greenhouse gas (GHG) emissions of 40% by 2030 and 85% by 2050 from 1990 levels . . . .”) (last visited Jun. 15, 2024).

<sup>21</sup> See Case No. 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Modifying Clean Energy Standard Tier 1 Obligations (Issued Apr. 20, 2023) (“CES Tier 1 Modification Order”).

so based on the information it has available at the time regarding the costs it will incur to serve the customer, including the cost for additional renewable content. However, pursuant to CES Tier 1 Modification Order, beginning with compliance year 2025, ESCOs will only know the cost of voluntary Tier 1 RECs a few months in advance of a particular year<sup>22</sup> and possibly not until the end of that year.<sup>23</sup> As the Commission has recognized “predicting future REC prices can be challenging . . . .”<sup>24</sup> However, if the price of RECs is unknown at the time of contracting and ESCOs cannot adjust the price unless the customer provides additional consent beyond that already contained in the customer agreement for such change,<sup>25</sup> it will make it too risky for ESCOs to offer voluntary renewable products to customers; thereby, undermining the State’s climate and clean energy goals.

While RESA recognizes that GBL 349-d already applies to some commercial and industrial customers,<sup>26</sup> the number of commercial and industrial customers that are solicited via door-to-door sales<sup>27</sup> is *de minimis*. Hence, application of GBL 349-d(6) to this small subgroup of customers will not have the devastating impact on customer choice that the Proposal’s recommended application of GBL 349-d(6) will have. To avoid undermining a customer’s ability to choose a pricing option that best suits its needs and goals, destabilizing the competitive energy market, and undercutting New York’s nation-leading climate and clean energy goals, RESA

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<sup>22</sup> CES Tier 1 Modification Order, at 7-9 (describing annual presale process, including that the presale price will be available by July 15 each year for Tier 1 RECs for the upcoming year).

<sup>23</sup> *Id.* at 9-10 (describing annual resale process “at the end of the compliance year if there is a sufficient demand for such RECs.”).

<sup>24</sup> *Id.* at 17.

<sup>25</sup> Proposal, at 6 (“Absent the customer’s express consent to the price change, the ESCO **would not be permitted to change the price** the customers pay **pursuant to their agreement** with the ESCO.”) (emphasis added).

<sup>26</sup> See GBL 349-d (defining customer to include a customer solicited via door-to-door sales).

<sup>27</sup> See UBP, § 1 (excluding “any sale which is conducted and consummated entirely by mail, telephone or other electronic means, or during a scheduled appointment at the premises of a buyer of nonresidential utility service, or through solicitations of commercial accounts at trade or business shows, conventions or expositions” from the definition of door-to-door sales).

urges the Commission, consistent with the plain language of the statute,<sup>28</sup> to limit the applicability of the Amendments to residential customers and customers solicited via door-to-door sales.

### III. “MATERIAL CHANGE” SHOULD BE DEFINED TO INCLUDE ONLY THOSE ITEMS SPECIFICALLY IDENTIFIED IN GBL 349-d AND THE CURRENT UBP

GBL 349-d provides that “[a] change in price or a change to or from fixed or variable pricing shall be deemed to be material.”<sup>29</sup> However, the Proposal suggests that the Commission define a material change as: “*Any* change that affects the rates, terms, and conditions of service contained in the customer agreement.”<sup>30</sup> First and foremost, a definition that includes “any” change would render the legislature’s use of the word “material” superfluous in direct contravention of the principles of statutory construction.<sup>31</sup>

Further, such a broad definition would require ESCOs to receive consent for changes to terms that have no substantive impact on the customer (e.g., ESCO contact information).<sup>32</sup> Moreover, if the customer is unwilling to consent to such a change, the customer would then be able to terminate the agreement without incurring an early termination fee.<sup>33</sup> As a result, an ESCO could be exposed to substantial losses simply because it made a non-material change, like changing its telephone number. Such a result is simply untenable and will result in ESCOs attempting to protect against such risk by increasing the prices they charge customers. Although

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<sup>28</sup> See generally, Amendments.

<sup>29</sup> GBL 349-d(6).

<sup>30</sup> Proposal, Attachment A, § 1 (emphasis added).

<sup>31</sup> *People v. Talluto*, 39 N.Y.3d 306, 311 (2022) (“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.”) (quoting *Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 91 (2001)) (emphasis added).

<sup>32</sup> See UBP, § 5.B.4.h (requiring that sales agreement include the ESCO’s contact information).

<sup>33</sup> GBL 349-d(6) (prohibiting an ESCO from charging an early termination fee “to a customer whose express consent has not been obtained to any change in material terms and conditions . . . .”); see also Proposal, Attachment A, § 5.B.5.a (“A customer shall not be charged a termination fee . . . if the customer’s express consent has not been obtained to any change in material terms and conditions . . . .”)

mass market customers receiving service pursuant to a guaranteed savings product or non-renewable fixed price agreement will be protected from significant increases, all other customers could be exposed to substantial price increases. Thus, RESA requests that, consistent with the plain language of the statute and the current UBP, the Commission define “material change” as a change in the price,<sup>34</sup> pricing structure,<sup>35</sup> product or service type,<sup>36</sup> or duration.<sup>37</sup>

#### **IV. PRE-EXISTING CONTRACTS SHOULD BE EXEMPT FROM THE NEW REQUIREMENTS**

There is a presumption against the retroactive application of a new law when it impacts substantive rights.<sup>38</sup> A new law affects substantive rights “if it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”<sup>39</sup> If the Amendments are applied to contracts that existed as of the effective date of the Amendments, they will impair the rights of ESCOs to impose an early termination fee if a customer fails to consent to a change to a pre-existing agreement and then terminates that agreement.<sup>40</sup> In addition, if the Amendments, as recommended in the Proposal, are applied to pre-existing contracts they will impose new duties on ESCOs to obtain further consent for pricing changes to which customers already agreed in

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<sup>34</sup> GBL 349-d(6); UBP, § 5.B.5.d.

<sup>35</sup> *Id.*

<sup>36</sup> UBP, § 5.B.5.d.

<sup>37</sup> *Id.*

<sup>38</sup> *Regina Metropolitan Co. v. New York State Div. of Housing and Community Renewal*, 35 N.Y.3d 332, 370 (2020).

<sup>39</sup> *Id.* at 365 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278-80 (1994)) (internal quotations omitted).

<sup>40</sup> Proposal, Attachment A, § 5.B.5.a (“A customer shall not be charged a termination fee . . . if the customer’s express consent has not been obtained to any change in material terms and conditions . . . .”)

those pre-existing agreements.<sup>41</sup> Thus, absent a “clear expression” from the legislature to the contrary, the Amendments cannot be applied to contracts that existed as of the effective date of the Amendments.<sup>42</sup>

Although the legislature is not required to use specific words, “the expression of intent must be sufficient to show that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result.”<sup>43</sup> The Amendments do not contain any such expression of intent.<sup>44</sup> Thus, they cannot be applied to pre-existing agreements.

Accordingly, RESA requests that the Commission clarify that the Amendments do not apply to agreements that existed prior to the effective date of the Amendments (i.e., March 18, 2024) and that any implementing changes to the UBP that go beyond the express terms of the statute<sup>45</sup> do not apply to agreements that existed prior to the effective date of such UBP changes.

## **V. FURTHER CONSENT SHOULD NOT BE REQUIRED FOR ALREADY AGREED UPON PRICE ADJUSTMENTS**

The Proposal recommends requiring “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.”<sup>46</sup> Further, pursuant to the Proposal, if the customer does not consent, “the ESCO would not be permitted to change the price the customers pay *pursuant to their agreement* with the ESCO.”<sup>47</sup> However, requiring customer consent for changes to energy prices in a contract where price changes are anticipated, to which the customer

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<sup>41</sup> Proposal, at 6 (recommending that the Commission 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”) (emphasis added).

<sup>42</sup> See *Regina Metropolitan*, 35 N.Y.3d at 370.

<sup>43</sup> *Id.* at 370-71.

<sup>44</sup> See generally, Amendments.

<sup>45</sup> See Sections I-III *supra*.

<sup>46</sup> Proposal, at 6 (emphasis added).

<sup>47</sup> *Id.* (emphasis added).

agreed and that the customer may specifically have requested would create unnecessary administrative burdens for both customers and ESCOs.

Customers regularly contract with ESCOs for different pricing structures that vary by their exact nature. These structures include monthly variable prices, indexed variable prices, tiered pricing, and real time pricing, among others. Under these structures, prices can change monthly, weekly, daily, or throughout the course of a single day. Each of these pricing variations are expected at the time the customer agrees to a contract with an ESCO. These customers should be permitted to take advantage of the pricing options that best meet their needs and goals without the added administrative burden of having to consent to every expected and already agreed to price change especially in light of the protections that already exist.

For example, each customer agreement must include a disclosure of “the price or how the price is determined.”<sup>48</sup> In addition, each customer agreement must be accompanied by a Customer Disclosure Statement that also includes this same information.<sup>49</sup> Furthermore, if the customer’s consent to enroll with the ESCO was authorized via a third-party verification, the customer is asked to confirm that it has agreed to various terms of service, including the price or pricing structure.<sup>50</sup> Also, “all variable charges must be clearly and conspicuously identified in all contracts, sales agreements and marketing materials” for residential customers and customers solicited via door-to-door sales.<sup>51</sup> Additionally, if the customer enrolls through the Power-to-Choose website, (s)he is also able to view the ESCO’s historic pricing.<sup>52</sup> Moreover, at renewal,

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<sup>48</sup> UBP, § 5.B.4.a.2; UBP, § 5, Attachment 1, ¶ B; UBP, § 5, Attachment 2, ¶ A.2; UBP, § 5, Attachment 3, ¶ A.2.

<sup>49</sup> UBP, § 5.B.4.b; UBP, § 5, Attachment 1, ¶ B; UBP, § 5, Attachment 2, ¶ A.2; UBP, § 5, Attachment 3, ¶ A.2; UBP, § 5, Attachment 4.

<sup>50</sup> UBP, § 5, Attachment 1, ¶ A.12.

<sup>51</sup> UBP, § 5.B.5.c.

<sup>52</sup> See, e.g., <https://documents.dps.ny.gov/PTC/historic-pricing/10023/1/183/864> (last visited Jun. 16, 2024).

ESCOs are required to disclose the price and pricing structure.<sup>53</sup> Plus, the renewal notice also includes a copy of the applicable terms of service,<sup>54</sup> which contains the price or pricing structure.<sup>55</sup> Finally, mass-market customers also have the added protection that a non-renewable variable price will never exceed the utility default service rate.<sup>56</sup> Notably, none of these same protections exist for customers receiving default service supply from their utility. Given the significant protections that already exist to ensure that customers understand their price and/or pricing structure, there is little (if any) added benefit from requiring customers to continue to consent over and over and over again to price changes to which they have already agreed.

Moreover, any incremental benefit that customers may receive is far outweighed by the substantial administrative burden that will be placed on customers who will be required to continuously provide consent to something to which they have already agreed. For instance, there are some, more sophisticated customers that prefer real-time pricing options whereby prices vary frequently (e.g., hourly) over the course of the day.<sup>57</sup> If the Proposal is adopted, customers on hourly pricing structures would be required to provide consent each and every hour of every single day - 24 hours/day, 7 days/week, 365 days/year – in order to receive the benefits of the pricing structure to which they have already agreed and, perhaps, specifically requested.<sup>58</sup>

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<sup>53</sup> Standard Renewal Notice (Residential), <https://dps.ny.gov/standard-renewal-notice-residential> (last visited Jun. 16, 2024); Standard Renewal Notice (Nonresidential), <https://dps.ny.gov/standard-renewal-notice-non-residential> (last visited Jun. 16, 2024); Proposal, Attachment B (Proposed, Revised Residential Standard Renewal Notice).

<sup>54</sup> *Id.*

<sup>55</sup> UBP, § 5.B.4.a.2; UBP, § 5, Attachment 1, ¶ B; UBP, § 5, Attachment 2, ¶ A.2; UBP, § 5, Attachment 3, ¶ A.2.

<sup>56</sup> *Cf.* 2019 Reset Order, at 69 (“Considering that all future variable-price commodity-only ESCO contracts will be required to be offered at a guaranteed savings, a fixed-rate ESCO customer that is rolled over to a variable-price commodity-only contract will be protected from unreasonably high prices and/or rate shock associated with the change in contract terms.”).

<sup>57</sup> *See, e.g.*, Environmental Defense Fund, “A Primer on Time-Variant Electricity Pricing,” [https://www.edf.org/sites/default/files/a\\_primer\\_on\\_time-variant\\_pricing.pdf](https://www.edf.org/sites/default/files/a_primer_on_time-variant_pricing.pdf) (last visited Jun. 16, 2024) (“EDF Primer”), at 2.

<sup>58</sup> Proposal, at 6 (recommending that the Commission 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”).

Even if a customer were willing to undertake such a commitment (which RESA believes is extremely unlikely), the customer would likely need to hire several staff members to undertake this onerous task. Concomitantly, ESCOs offering these pricing options would need staff available 24 hours/day, 7 days/week, 365 days/year to obtain each customer's consent. Furthermore, if the customer were to fail to consent in any given hour, the ESCO would not be able to change the customer's price that hour;<sup>59</sup> thereby, depriving the customer and the State of the benefits of such a pricing structure.<sup>60</sup> To avoid placing significant burdens on customers in order for them to obtain and maintain pricing structures to which they have already consented, the Commission should clarify that price changes to which customers have already agreed, including without limitation, monthly variable prices, indexed variable prices, tiered pricing, and real time pricing, do not require further consent.

Some ESCO contracts contain a provision that allows the ESCO to modify the price charged to the customer based on a change in law, rule, regulation, tariff, or regulatory structure impacting the agreement. These change in law provisions allow ESCOs to provide customers with more competitive pricing because the ESCOs are not required to include significant risk premiums<sup>61</sup> to insure against unexpected costs that may never occur (e.g., if a change in law does not occur during the contract term). Customers consent to these potential price adjustments when they enter into their agreements with ESCOs. Thus, any further consent would be duplicative and should not be required. Accordingly, the Commission should also clarify that, if a customer has

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<sup>59</sup> Proposal, at 6 (recommending that the Commission require that, if the customer does not consent, “the ESCO would not be permitted to change the price the customers pay pursuant to their agreement with the ESCO”).

<sup>60</sup> EDF Primer, at ii-iii (describing the benefits of time-variant pricing, including pollution reduction and integration of more renewable resources).

<sup>61</sup> *Cf.* Comments of Joule Assets on Department of Public Service Staff Proposal for Implementing Stronger Price Transparency for Consumers (Jun. 14, 2024), at 5 (“Allowing the continuation of intra-contract rate changes for CCAs is essential to ensure that participants do not pay a risk premium and are able to advance their renewable electricity goals.”).

already consented in their contract to a potential price adjustment should a change of law occur, further consent will not be required in order for an ESCO to change the price in accordance with such a provision.

## **VI. THE AMENDMENTS SHOULD NOT APPLY TO CCAs**

As the Commission recognized when it established the CCA framework, “the requirement that elected officials approve a CCA program before one is implemented represents a reasonable proxy for customer consent, when coupled with consumer education efforts and individual customer opt-out processes.”<sup>62</sup> In addition, in 2023, the Commission adopted requirements for standard CCA supply products. Specifically, “[f]ixed-rate products should be limited to a price no greater than the trailing 12-month average utility supply rate plus a premium of no more than 5%, and variable-rate products must be a guaranteed savings.”<sup>63</sup> In addition, “the Commission adopt[ed] an additional consumer protection to ensure municipalities, and potential participants, understand the significant pricing difference before choosing to participate in a renewable product offering.”<sup>64</sup> Thus, further protections are not necessary for CCA program participants.

Moreover, as the Commission is aware, even before the Amendments, GBL 349-d(6) provided, in pertinent part: “No material change shall be made in the terms or duration of any contract for the provision of energy services by an ESCO without the express consent of the

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<sup>62</sup> Case No. 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 Apr. 21, 2016), at 20.

<sup>63</sup> Case No. 14-M-0224, *Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs*, Order Modifying Community Choice Aggregation Programs and Establishing Further Process (Jan. 19, 2023), at 51.

<sup>64</sup> *Id.*

customer.”<sup>65</sup> There was no change in this language as a result of the Amendments.<sup>66</sup> Consistent with this requirement, the UBP currently provides “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.”<sup>67</sup> To date, the Commission has not required CCA program administrators to obtain customer consent under this provision;<sup>68</sup> instead, consistent with the CCA framework, the Commission has permitted the municipality to act as “a reasonable proxy for customer consent.”<sup>69</sup> Similarly, the Commission should confirm that CCA programs are exempt from the requirements of the Amendments.

## **VII. MONTHLY RENEWAL NOTICES SHOULD NOT BE REQUIRED**

The Amendments modified GBL 349-d(7) to require that certain information be included in “any notice regarding contract renewability.”<sup>70</sup> The Amendments did not make any other changes to GBL 349-d(7). Despite this, without explanation or justification, the Proposal seeks to add a new requirement that would obligate ESCOs to send renewal notices each month to customers on “month-to-month agreements, which expire and are renewed each month.”<sup>71</sup> Such a requirement would signify a substantial departure from the current requirements.<sup>72</sup> Moreover, monthly renewal notices would create customer confusion, provide little (if any) added benefit,

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<sup>65</sup> GBL 349-d(6).

<sup>66</sup> See Chapter 482 of the Laws of 2023.

<sup>67</sup> UBP, § 5.B.5.d.

<sup>68</sup> Cf. 2019 Reset Order, at 107-08 (exempting CCAs from, among other things, the requirement to obtain affirmative consent before renewing a customer agreement to something other than a variable priced guaranteed savings product).

<sup>69</sup> Cf. CCA Framework Order, at 20.

<sup>70</sup> See generally, Amendments.

<sup>71</sup> See Proposal, at 7.

<sup>72</sup> See, e.g., Order Implementing Chapter 416 of the Laws of 2010 (Issued Dec. 17, 2010), at 7 (“In the event of a variable rate agreement, which renews on a monthly basis and without termination fees, neither express consent nor a renewal notice is necessary.”).

and increase the administrative burden on ESCOs. Thus, RESA requests that the Commission not require monthly renewal notices.

A requirement that a contract renewal notice be sent every month would create customer confusion. For example, ESCOs are required to send confirmation notices when a customer enrolls.<sup>73</sup> If the Proposal is adopted, ESCOs would almost immediately also be required to send a customer on a month-to-month agreement, a renewal notice.<sup>74</sup> As a consequence, the customer would first enroll with the ESCO for an agreed-upon price or pricing structure that will be disclosed in the customer contract<sup>75</sup> and Customer Disclosure Statement,<sup>76</sup> then receive a notice confirming enrollment that may include the agreed-upon price or pricing structure,<sup>77</sup> and then receive a “renewal” notice providing the current price and the price for the next month<sup>78</sup> - all before the customer even receives service from the ESCO or a bill reflecting the initial price the ESCO is charging. This will only serve to create customer confusion and generate complaints to ESCOs, the utilities, and DPS Staff that could be avoided by maintaining the status quo.

In addition, requiring monthly renewal notices will provide little (if any) benefit. First and foremost, not all agreements for monthly variable prices have month-to-month terms; some are for a fixed term that is longer than a month and others continue until cancelled by either party. Thus, only a small subset of customers on monthly variable priced products would actually

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<sup>73</sup> See, e.g., UBP, § 5, Attachment 2, ¶ B (“The ESCO shall, within three business days of any final agreement to initiate service to a customer, send an electronic confirmation notice to the customer at the customer’s e-mail address.”).

<sup>74</sup> See UBP, § 5.B.5.d (requiring renewal notices be sent “not less than thirty days nor more than sixty days prior to the renewal date”).

<sup>75</sup> UBP, § 5.B.4.a.2; UBP, § 5, Attachment 1, ¶ B; UBP, § 5, Attachment 2, ¶ A.2; UBP, § 5, Attachment 3, ¶ A.2.

<sup>76</sup> UBP, § 5(B)(4)(b); UBP, § 5, Attachment 1, ¶ B; UBP, § 5, Attachment 2, ¶ A.2; UBP, § 5, Attachment 3, ¶ A.2; UBP, § 5, Attachment 4.

<sup>77</sup> See, e.g., UBP, § 5, Attachment 2, ¶ B.

<sup>78</sup> See UBP, § 5.B.5.d (requiring renewal notices be sent “not less than thirty days nor more than sixty days prior to the renewal date”); GBL 349-d(7) (requiring that renewal notices contain the customer’s current price and the price to be charged upon renewal); Proposal, Attachment A, § 5.B.5.c (same).

receive the notices. Second, monthly renewal notices are unnecessary because there are already adequate protections in place. In particular, mass market customers on variable priced agreements are already protected from significant price variability because ESCOs are not permitted to charge those customers more than the utility default service rate.<sup>79</sup> As noted above, non-mass market customers are more sophisticated and are often represented by energy advisors and legal counsel that assist them in contracting for retail energy supply. Third, if customers receive too many notices they will become fatigued and simply begin to ignore them; further undermining the value of monthly renewal notices. Accordingly, requiring monthly renewal notices will provide little (if any) benefit. Monthly renewal notices would, however, create an added administrative burden and additional costs for ESCOs that would far outweigh any incremental benefit. Thus, RESA requests that the Commission not require monthly renewal notices.

## **CONCLUSION**

For all the foregoing reasons, RESA requests that the Commission: (a) limit the applicability of the Amendments to residential customers and customers solicited via door-to-door sales; (b) limit the definition of “material change” to those items specifically identified in the Amendments and current UBP; (c) clarify that the Amendments and corresponding changes to the UBP will not be applied retroactively (i.e., to pre-existing agreements); (d) not require additional consent for price changes to which the customer has already specifically agreed; (e) exempt CCAs from the requirements of the Amendments; and (f) not require monthly renewal notices.

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<sup>79</sup> *Cf.* 2019 Reset Order, at 69 (“Considering that all future variable-price commodity-only ESCO contracts will be required to be offered at a guaranteed savings, a fixed-rate ESCO customer that is rolled over to a variable-price commodity-only contract will be protected from unreasonably high prices and/or rate shock associated with the change in contract terms.”).

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RETAIL ENERGY SUPPLY ASSOCIATION

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