

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 15-M-0127 - In the Matter of Eligibility Criteria for
Energy Service Companies.

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

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

ORDER ON REHEARING, RECONSIDERATION, AND PROVIDING CLARIFICATION

Issued and Effective: September 18, 2020

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on September 17, 2020

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Diane X. Burman, dissenting
James S. Alesi
Tracey A. Edwards
John B. Howard

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(Issued and Effective September 18, 2020)

BY THE COMMISSION:

INTRODUCTION

On December 12, 2019, the Public Service Commission
(Commission) issued an Order Adopting Changes to the Retail
Access Energy Market and Establishing Further Process to
strengthen protections to residential and small non-residential
(mass-market) customers.¹ The December 2019 Order was issued
following an extensive administrative process. Among other

¹ 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) (December 2019
Order).

modifications to the retail energy market, the Order: (1) increases ESCO accountability by enhancing eligibility criteria and implementing other changes in the eligibility process; (2) empowers customers by improving transparency of ESCO product and pricing information, primarily through an on-bill comparison of ESCO to utility commodity prices and through required itemizing of ESCO charges; and (3) prohibits ESCO product offerings that lack energy-service-based value by adopting restrictions on the types of products and services ESCOs are allowed to offer mass-market customers, as more fully discussed below. The December 2019 Order also established further process requirements before putting certain other customer protections in place.

On January 13, 2020, petitions for rehearing, reconsideration and/or clarification were filed by: National Energy Marketers Association (NEM); Marathon Power LLC d/b/a Marathon Energy, Approved Energy LLC and S.J. Energy Partners, Inc., jointly (together, Marathon); Retail Energy Supply Association (RESA); Direct Energy Services, LLC (Direct Energy); American Power & Gas LLC, Censtar Energy Corp, Eligo Energy NY, LLC, Josco Energy Corp, Kiwi Energy NY LLC, Major Energy Services LLC, Major Energy Electrical Services LLC, Marathon Power LLC d/b/a Marathon Energy, Oasis Power, LLC, Residents Energy, LLC, Respond Power LLC, Spark Energy, LLC, Spark Energy Gas, LLC and Verde Energy USA New York, LLC, jointly (together, American); Starion Energy NY, Inc. (Starion); New York Retail Choice Coalition (Coalition); and Family Energy, Inc. (Family).² Responses to the petitions for rehearing were filed by: Agway Energy Services (Agway); Public Utility Law Project of New York

² Each petition also included a request to stay or extend the Order's compliance deadlines. Additional extension requests were subsequently filed a number of other ESCO entities. Extensions requests were granted by notices dated January 22, 2020, April 7, 2020, and July 14, 2020.

(PULP); Utility Intervention Unit of the New York State Department of State's Division of Consumer Protection (UIU) and the Office of the New York State Attorney General (NYAG), jointly; and AARP New York (AARP).

BACKGROUND

When the Commission authorized ESCOs to serve the mass market, it anticipated that doing so would spur innovation in the creation of value-added products and commodity price competition that would improve overall customer satisfaction and lead to just and reasonable rates for residential and small non-residential customers. The instant proceeding is the result of the Commission's concerns, which grew as the retail market matured over more than two decades, that the market was failing to deliver services to residential and small non-residential customers that improved upon, or at least equaled, the services fully regulated utilities would provide in the alternative. While the Commission necessarily relied on a presumption regarding the emergence of beneficial competition when it initially created the retail market, the instant proceeding - as well as other recent Commission reform of the market - represents an important and necessary shift toward regulation based on actual market performance. As a part of this ongoing effort, the Commission provided the ESCO industry and other interested parties an unprecedented opportunity - in terms of administrative scope and investment of time and public resources - to demonstrate whether, or in what ways, the ESCO industry had provided residential and small non-residential customers value over the past two decades.

As a part of this effort, on December 2, 2016, a Notice of Evidentiary and Collaborative Tracks and Deadline for

Initial Testimony and Exhibits was issued.³ The December 2016 Notice stated that "the Commission has determined that the retail markets serving mass-market customers are not providing sufficient competition or innovation to properly serve consumers."⁴ This track of the proceeding was established to consider: (a) whether ESCOs should be completely prohibited from serving their current products to mass-market customers; and (b) whether the regulatory regime, rules, and Uniform Business Practices (UBP) should be modified to implement such a prohibition, to provide sufficient additional guidance as to acceptable rates and practices of ESCOs, or to create enforcement mechanisms to deter customer abuses and overcharging. The administrative process for this track included the filing of testimony, exhibits, and briefs from

³ Case 15-M-0127, et al., Notice of Evidentiary and Collaborative Tracks and Deadline for Initial testimony and Exhibits (issued December 2, 2016) (December 2016 Notice).

⁴ Id., p. 3.

numerous parties⁵ as well as a hearing with opportunity for cross-examination and acceptance of public comments, culminating with the December 2019 Order at issue here.

THE PETITIONS

Considered together, the petitioners for rehearing seek three distinct forms of relief: rehearing, reconsideration, and/or clarification. While petitioners often fail to specifically tie their objections to any of the three aforementioned forms of relief, the Commission will consider the arguments raised as requests for any of those forms of relief.

In certain areas, there is substantial overlap in the arguments raised by the petitioners, particularly in regard to the contention that the Commission cannot adopt the rules established in the December 2019 order. Many petitioners argue that the December 2019 Order exceeds Commission authority, is violative of the State Administrative Procedure Act (SAPA), and

⁵ The parties actively participating in this track of the proceeding were: AARP New York; Agway Energy Services, LLC; the Joint Utilities (Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; KeySpan Gas East Corp. d/b/a National Grid; National Fuel Gas Distribution Corporation; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Orange and Rockland Utilities, Inc.; Rochester Gas and Electric Corporation; and The Brooklyn Union Gas Company d/b/a National Grid NY); the City of New York; Constellation Energy Gas Choice, LLC; Direct Energy Services LLC; Drift Marketplace, Inc.; ENGIE Resources LLC and ENGIE Retail, LLC d/b/a Think Energy; Great Eastern Energy; the Impacted ESCO Coalition; Infinite Energy, Inc. d/b/a Intelligent Energy; National Energy Marketers Association (or NEM); The OE Group; the Office of the New York State Attorney General and the Utility Intervention Unit, Division of Consumer Protection, of the New York State Department of State; the Public Utility Law Project of New York, Inc.; Retail Energy Supply Association (or RESA); Robison Energy, LLC; and Staff of the New York State Department of Public Service (Staff).

was rendered prematurely since parties were not afforded an opportunity to respond to a recommended decision. The arguments that have less overlap between the petitions are discussed below.

Starion

Starion contends that the Order's definitions for determining if a customer is a mass-market customer are arbitrary and capricious. The December 2019 Order defines small non-residential electric customers as "non-demand metered customers" and small non-residential gas customers as "those using less than or equal to 750 dekatherms (dth) per year." Starion argues that both definitions are improper - the former because it is based on meter type rather than usage and the latter because the 750 dth threshold lacks foundational support in the record, as it is purportedly based on an allegedly erroneous claim made by one ESCO that was later retracted. Starion adds that the definitions are irrational because a single commercial customer may be deemed "small" for one commodity but not the other.⁶ Starion also maintains that rehearing and/or reconsideration is justified regarding this issue because the retail energy market has evolved during the two years since the hearing and, thus, new circumstances exist.

Marathon

Marathon similarly requests that the Commission "rehear, reconsider, and clarify that portion of the . . . Order that defines the term small non-residential customers." Marathon argues that the Commission cannot have a definition of the mass market because ESCOs were not provided with adequate notice that a definition was under consideration. Next, like

⁶ For instance, the customer's natural gas consumption may exceed 750 dth but it may not have a demand meter for electric (or vice versa).

Starion, Marathon claims the 750 dth threshold was erroneously adopted because that figure was subsequently revised downward by the ESCO that originally suggested it. Finally, according to Marathon, the definition is flawed in any event because the record lacks evidence suggesting that small non-residential customers are unsophisticated or require special protection with respect to their energy purchases.

Direct Energy

As relevant here, the Order authorizes ESCOs to sell, among other products, (1) fixed-rate commodity products at a capped price, which can be no higher than 5% above the trailing 12-month utility supply rate and (2) renewably sourced electric commodity products that have a renewable mix at least 50% greater than the ESCO's Renewable Energy Standard (RES) obligation. Direct Energy takes issue with both provisions and requests rehearing, maintaining that, contrary to the Commission's finding, existing ESCO prices are not excessive; rather, Direct Energy contends one example cited in the record reflects that customers in the Central Hudson market that opted for Direct Energy's fixed-rate service during the three-year period between 2014 and 2016 could have achieved a net savings of \$11 million. Next, Direct Energy asserts that correlating the price cap to a utility's average rate over the prior 12 months is unreasonable, particularly if the ESCO is seeking to provide fixed-rate service for the ensuing two or three years. Direct Energy also maintains that the Order's price cap provisions should not be applicable to small non-residential customers.

Direct Energy raises several additional arguments, including that the Order impermissibly impedes interstate commerce, violates the contract and takings clauses of the United States Constitution, and is preempted by the Sherman Act.

Finally, Direct Energy emphasizes that it fully participated in the underlying proceeding, while several ESCOs did not. It speculates that non-party ESCOs may have provided "secret information" to Department of Public Service Staff (Staff) and that the Commission may have thereafter relied on such information in reaching its conclusions.

In comments filed on April 13, 2020,⁷ Direct Energy supports the petitions for rehearing and urges the Commission to establish an expedited framework for approval of "renewable" gas products that can be sold at a premium in any order on rehearing, asserting that ESCOs selling gas products are unfairly restricted in their offerings compared to ESCOs selling electricity. It notes that it submitted a separate petition in these proceedings seeking authorization for two new gas products,⁸ but proposes that, rather than engaging in a separate rulemaking process, the Commission could decide the matter on rehearing based on parties raising the issue in their petitions for rehearing. Direct Energy contends that the Commission must address technical issues raised by ESCO parties in response to the December 2019 Order, clarify certain compliance issues, and establish further processes to address such issues.

Family

Family seeks rehearing on the basis of various alleged errors of law or fact, including that the December 2019 Order was promulgated in violation of SAPA and the State Environmental Quality Review Act (SEQRA). Family also contends that the Commission violated its regulations by issuing the December 2019 Order prior to the ALJs submitting a report to the Commission or

⁷ Direct Energy filed comments together with Gateway Energy Services Corporation.

⁸ Petition for an Expedited Declaratory Ruling and/or waiver or Rehearing Authorizing Green Gas Programs (February 28, 2020).

issuing a recommended decision. Moreover, according to Family, several motions - made by other parties that had participated in the hearings - were outstanding when the Order was issued, and that they remain unresolved.

Family maintains that the December 2019 Order improperly prohibits ESCOs from selling energy-related value added (or ERVA) products such as smart thermostats, home energy management systems, and Light-Emitting Diodes (LEDs), claiming that the prohibition is arbitrary, capricious, and inconsistent with New York State's policy goals vis-à-vis clean energy and climate change. Family similarly asserts that allowing ESCOs to offer a renewably sourced electric product but prohibiting them from selling renewably sourced gas products is arbitrary and capricious. Additionally, Family contends that the December 2019 Order "makes an error of fact by mischaracterizing the ESCO licensing regime as merely a system of 'eligibility.'" Family further asserts that, while the December 2019 Order requires that ESCOs currently authorized to operate in New York submit new eligibility applications, no currently authorized ESCO should be deemed ineligible without due process.

Finally, like Direct Energy, Family raises constitutional arguments, claiming that the December 2019 Order violates the dormant commerce clause and the equal protection clause. Here, akin to Direct Energy's assertion regarding interstate commerce, Family argues that ESCOs should be permitted to offer "environmental attributes" from outside New York. The equal protection argument, meanwhile, involves the prohibition on an ESCO's sale of value-added products, while, in comparison, distributed energy resource providers can continue to offer such products.

American

Preliminarily, many of American's contentions involve purported impracticalities associated with the December 2019 Order's timing provisions, most of which are obviated by the extensions referenced above. Turning to those that are not, American requests rehearing, reconsideration, and clarification based on various concerns similar to those set forth above.

Indeed, American also takes issue with the proposed re-application process for currently authorized ESCOs, asserting that it lacks clear standards and is accordingly arbitrary and capricious; so too is the prohibition on nationally sourced renewable attributes. Like Direct Energy, American asserts that the use of a trailing 12-month average utility rate as a benchmark for fixed-rate ESCO pricing is both unreasonable and impractical. Next, according to American, ESCOs should be permitted to offer value-added products, particularly if such products are comparable to Agway's approved EnergyGuard services.

Finally, American points to an inconsistency between the December 2019 Order and the revised UBP; whereas language in the Order suggests that affirmative customer consent would not be required in connection with automatic contract renewals involving variable rate contracts, language in the UBP would require affirmative customer consent under like circumstances.

Coalition

Coalition requests rehearing, reconsideration, and clarification on several grounds, many associated with its claim that the Commission's June 7, 2017 SAPA Notice published in the State Register was overly broad. In particular, Coalition asserts that more specific notice should have been provided regarding the December 2019 Order provisions that require ESCOs currently operating in New York to renew their eligibility,

limit the types of products such ESCOs can now offer, and amend sections 2 and 5 of the UBP. Relatedly, Coalition maintains that the enhanced eligibility requirements and limitations on product offerings are arbitrary and capricious.

With respect to the December 2019 Order's imposition of price caps and guaranteed savings requirements on ESCO products, Coalition asserts that they are not supported by evidence in the record. Indeed, according to Coalition, the 5% price cap figure "is based on a non-responsive [testimonial] answer" to a general question involving the evaluation of green products. It adds, moreover, that the use of utility pricing as a benchmark for price caps and savings guarantees is contrary to prior findings by DPS Staff and impractical, particularly inasmuch as utility pricing is not transparent and utilities do not charge market rates. According to Coalition, "the only appropriate way to evaluate the reasonableness of a fixed-rate product is to establish a forward-looking benchmark price."

Like other petitioners, Coalition takes issue with the definition of small non-residential customers and argues that there is no rational basis for restricting the types of products that should be available to them. Finally, Coalition contends that the Commission erred by prohibiting ESCOs from offering promotional items to customers, claiming that such a prohibition provides a competitive advantage to utilities.

NEM

NEM requests rehearing, reconsideration, and/or clarification, claiming that the Commission exceeded its authority by, among other things, imposing price caps on variable and fixed-rate products that are arbitrary and unreasonable, and prohibiting ESCOs from providing value-added products and services. Regarding the former, it asserts that "capping the ESCO price against a utility commodity that has no

profit or risk premium and while additional commodity-related costs remain bundled in delivery service rates, is unjust and unreasonable." As to the latter, NEM asserts that the ban is unfair because, among other things, distributed energy service providers are permitted to offer such products "under far less regulatory oversight and scrutiny."

In connection with the December 2019 Order's requirement that utilities and DPS Staff collaborate on Joint Billing Plans, NEM asserts that ESCOs should be involved in that process. Relatedly, according to NEM, requiring "unbundling" on the part of ESCOs without a "concomitant requirement for utility delivery rate unbundling" is arbitrary and unreasonable. NEM further contends that the on-bill comparison methodology set forth in the December 2019 Order will only serve to confuse consumers, not educate them.

NEM also raises a number of other arguments that have been discussed above, including that subjecting ESCOs to a de novo eligibility application process is unnecessary and overly burdensome, the definition of small non-residential customers should be revisited, and attaching ESCO prices to the trailing 12-month average utility supply rate is impractical and inappropriate, particularly in connection with proposed contracts of varying durations.

Finally, NEM challenges the requirement that ESCOs only offer renewably sourced electric commodity products that have a renewable mix at least 50% greater than the ESCO's RES obligation, claiming that it is unrealistic and inconsistent with prior Commission orders. Indeed, according to NEM, the limited present availability of renewable resources makes the 50% requirement unachievable; moreover, the requirement "has immediately inflated the price [of those resources] that are available."

RESA

RESA asserts that, contrary to the Commission's findings, there is not widespread displeasure with ESCO products and services and associated ESCO prices are not excessive. Accordingly, RESA argues that rehearing and reconsideration is warranted regarding "modifications to ESCO products and pricing, bill comparison information, and the definition of mass-market customers."⁹

Beginning with ESCO products, RESA maintains that, because the Commission's definitions of "value" and "value-added" are arbitrary, the Commission ignored record evidence revealing that ESCO products in fact provide value, both quantitatively and qualitatively. RESA suggests that Nest thermostats can reduce natural gas consumption by 10% and electric consumption used for cooling by 17%. Fixed-rate customers, meanwhile, can feel confident (an example of qualitative value) that their energy costs will not fluctuate due to extreme weather. Indeed, RESA observes that, during the 2014 "polar vortex," ESCO customers "on fixed price contracts saw no increase to their per-unit commodity costs [notwithstanding] this unforeseen and severe weather event." According to RESA then, limiting the types of products that ESCOs can offer is unreasonable.¹⁰

Turning to ESCO pricing, RESA echoes the concerns expressed above regarding the use of a backward-looking utility

⁹ Various RESA arguments ostensibly support its contention that a stay of the Commission's order is necessary. In light of those extensions referenced above (see, n. 2), such arguments are not addressed here.

¹⁰ In particular, RESA references smart thermostat and green gas offerings, noting that distributed energy resource providers are permitted to offer the former and utilities market the latter.

default price as a market baseline, claiming that it is arbitrary, capricious, and lacks a rational basis. More specifically, RESA contends that a comparison between ESCO prices and the utility default price is futile because, among other things, utility commodity costs are subsidized, and utility rates are not fully unbundled. Moreover, RESA maintains that commodity markets are volatile and ESCOs assume risks that utilities do not; unlike ESCOs, utilities can defer costs and their rates may be subject to out-of-period adjustments.¹¹ Accordingly, RESA suggests that the Commission mandate that utilities "post their default prices and hedging strategies on a monthly, forward-looking basis."

Next, RESA agrees with Coalition's contention regarding the source of the 5% price cap on fixed-rate products, claiming it is the product of "throwaway" testimony pertaining to the evaluation of a green product. RESA adds, furthermore, that the 5% figure is in any event irrational in light of the energy market's volatility. With respect to the renewal of fixed-rate contracts, RESA argues that the December 2019 Order unnecessarily overrides an ESCO's existing agreement with its customers; rather than require that all fixed-rate contracts automatically transition into variable rate contracts with guaranteed savings, the UBP should be revised such that a customer is notified 30 days in advance of any rate change or that the "product converts to variable."

In connection with that part of the December 2019 Order involving renewably sourced commodities, RESA also raises arguments that have been referenced elsewhere in this Order. Among other things, those arguments assert that the 50% figure is impractical due to the existing shortfall of eligible

¹¹ It should be noted that RESA's pricing arguments relate to both variable and fixed-rate products.

renewable resources, and that New York should not be considered an isolated market. Indeed, according to RESA, the "Commission cannot pretend that renewable generation from neighboring states does not affect the system mix in New York - it is a known, quantifiable fact." Accordingly, RESA argues that the Commission should consider renewables that originate within the New England operating system and allow ESCOs to purchase Renewable Energy Certificates (RECs) from other nearby states.

Regarding billing, while noting that it supports "the laudable goal of increasing transparency," RESA maintains that the December 2019 Order's bill comparison methodology is fundamentally flawed because, unlike ESCOs (and among other things), "utilities can and do shift costs into delivery rates - making their commodity rates artificially lower than ESCO rates." RESA adds that any true comparison formula would require utility rate unbundling and that ESCOs should be involved in the Joint Billing Plan with DPS Staff and the utilities.

Finally, for reasons similar to those asserted by other petitioners, RESA requests that the Commission revisit the definition of mass-market. Again, for similar reasons, it also maintains that the December 2019 Order violates the United States Constitution and the Sherman Act.

RESPONSES TO THE PETITIONS

Agway,¹² PULP, UIU/NYAG,¹³ and AARP presented similar responses to the petitions. Citing the Commission's broad authority to regulate ESCOs as articulated by the New York State Court of Appeals in Matter of National Energy Marketers Assn. et al. v New York State Pub. Serv. Commn.,¹⁴ each entity opines that the December 2019 Order enhances consumer protections and, thus, furthers the public interest.

With respect to petitioners' arguments, the responding parties maintain that such arguments merely reflect policy disagreements that are not properly the subject of rehearing or are duplicative of those arguments already raised in the underlying proceeding. Accordingly, these responding parties assert that petitioners have not asserted any errors of law or fact or that new circumstances exist, such that rehearing is required. To the extent that certain unresolved matters are outstanding, each responding party argues that these matters are more appropriately addressed in Track II of these proceedings than through motion practice.¹⁵

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in

¹² In addition to its January 21, 2020 response to the petitions, Agway filed comments responsive to the petitions on April 9, 2020, that are nearly identical to its initial filing.

¹³ UIU/NYAG filed additional comments responsive to the petitions on April 13, 2020, reiterating its January 28, 2020 response to the petitions.

¹⁴ 33 NY3d 336 (2019).

¹⁵ It should nonetheless be noted that Agway questions whether the Order's billing itemization and reconciliation requirement is achievable.

the State Register on February 12, 2020 (SAPA No. 15-M-0127SP9). The time for submission of comments pursuant to the SAPA Notice expired on April 13, 2020. The comments received are summarized in the prior and following sections.

PUBLIC COMMENT

A small number of comments were filed in response to the issuance of the December 2019 Order.¹⁶ Public comments were filed by Gerri Wiley; EnergyMark, LLC (EnergyMark); Mirabito Power & Gas, LLC (Mirabito); and the Consumer Energy Alliance (CEA). In addition to making personal observations of excerpts of the December 2019 Order, Ms. Wiley claims that Municipal Electric and Gas Alliance, a participant in the Community Choice Aggregation program, has undesirable characteristics that are not in line with the Commission's stated goals of transparency and cost-containment. EnergyMark asserts that the December 2019 Order should be reconsidered or amended with regards to: fixed price, asserting that it should be forward looking and based on the May 4, 2016 Staff Whitepaper on Benchmark Reference Prices; the definition of residential and mass-market customers, arguing that companies classified as businesses for tax purposes should not be treated the same as residential customers; and the on-bill comparison, opining that the comparison should be based on the total bill. EnergyMark further contends that the Commission should unbundle cost-based rates and mandate utility cost studies.

Mirabito notes its general support for the Commission's efforts to address market abuses but requests changes to and clarification of the December 2019 Order including: modification of the definition of "residential

¹⁶ Those comments filed by parties are addressed above.

customer" to exclude those customers that do not have residential usage characteristics, such as religious facilities and multi-family dwellings, by adoption of the definition of "residential customer" in 16 NYCRR Part 11.2(a)(2); modification of the definition of small non-residential gas customers from a 750 dekatherm annual threshold to 400; elimination of the requirement of a financial assurance/collateral, asserting that such requirement favors larger entities, or, in the alternative, adoption of measures it contends would be reasonable to achieve the Commission's goals. CEA requests that the Commission should extend the comment period.

LEGAL AUTHORITY

A petitioner seeking rehearing bears the burden of establishing that the Commission committed an error of law or fact or that new circumstances warrant a different determination.¹⁷ This burden is not satisfied unless each alleged error or new circumstance purporting to warrant rehearing is separately identified and explained by the petitioner.¹⁸

Pursuant to the Public Service Law (PSL), the Commission has "authority to condition ESCOs' eligibility to access utility [distribution systems] on such terms and conditions that the [Commission] determines to be just and reasonable."¹⁹ The Commission's UBPs were adopted pursuant to this authority and set forth various regulatory eligibility

¹⁷ 16 NYCRR §3.7(b).

¹⁸ Id.

¹⁹ Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn., 33 NY3d 336, 350 (2019); see, Public Service Law §§5(1)(b), 65(1), 66(5), 66-d(2); see, generally GBL §349-d(11).

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 those terms and conditions by imposing the consequences enumerated at UBP §2.D.6. on ESCOs that fail to abide by them.

DISCUSSION

In order to ensure that utility service is just and reasonable "in all respects," the Commission is authorized to "determine the terms and conditions under which ESCOs are eligible to purchase delivery services - for both gas and electricity - from utilities."²⁰ Those terms and conditions were the subject of Cases 15-M-0127 (In the Matter of Eligibility Criteria for Energy Service Companies), 12-M-0476 (Proceeding on Motion to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State) and 98-M-1343 (In the Matter of Retail Access Business Rules). The December 2016 Notice informed all parties that the Commission was considering prohibiting ESCOs from serving mass-market customers or adopting significant additional consumer protection measures to ensure that it remained just and reasonable for ESCOs to access utility systems to serve mass-market customers.²¹ The December 2019 Order did not close the mass market, but instead imposed measures intended to ensure mass-market customers were not made worse off by the market's continuation.

²⁰ Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn., 33 NY3d 336, 350 (2019); see, Public Service Law §§5(1)(b), 65(1), 66 (5), 66-d(2); see, generally GBL §49-d(11).

²¹ See generally, Matter of Retail Energy Supply Assn. v New York State Public Serv. Commn., 152 AD3d 1133, 1139 (3d Dep't 2017).

After considering the arguments raised in the petitions for rehearing and reconsideration, the Commission affirms that the reforms adopted in the December 2019 Order were proper in all respects and otherwise offers a number of clarifications in order to promote regulatory certainty. Attached to this Order as Appendix A is a redline of the UBP reflecting changes made in the December 2019 Order, as clarified by this Order.

Jurisdiction to Condition ESCO Access to Utility Infrastructure

Some petitioners assert that the Commission exceeded the jurisdiction afforded to it regarding its oversight of ESCOs. For example, NEM asserts that while the Court of Appeals decided that the Commission may condition ESCO access to utility distribution systems based on compliance with price caps,²² it did not permit the Commission to prohibit entire product offerings.

To begin, the petitions of NEM and other ESCOs appear to demonstrate a misapprehension of the fundamental rules set forth in the December 2019 Order regarding permissible product offerings. The permissible product offering rules set forth in the December 2019 Order consisted of one default, mass market-wide rule, for which the Commission then provided a small number of express exceptions. The default rule imposed by the December 2019 Order is that ESCOs must serve the mass market with guaranteed savings products - products where ESCOs must meet or beat the price of equivalent utility commodity service on an annual basis (the guaranteed savings rule). The Commission then provided express exceptions to this rule, the two most notable of which are (1) the exception that authorizes ESCOs to sell fixed-priced products to be sold for a price-capped premium above historic commodity utility prices and (2) the exception

²² Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn., 33 NY3d 336, 350 (2019).

that renewably sourced electric commodity products that meet specified quality and authenticity standards can be sold at a market price.²³

Returning to the petitions, a number of petitioners apparently presume that, if the Commission agreed with their complaints regarding the definitions of the aforementioned exceptions, ESCOs would automatically return to being able to market whatever fixed-price or clean energy products that they could conceivably design. These petitioners are mistaken. In the absence of an express exemption approved by the Commission, ESCOs can only sell products and services that satisfy the default guaranteed savings rule.

With this in mind - that the default rule for the mass market is the guaranteed savings rule - petitioners' related argument that the Commission exercised jurisdiction beyond that which was provided by the Legislature is incorrect. The December 2019 Order exercises the same authority to condition ESCO access to utility systems on a price-cap that has been repeatedly affirmed by New York courts, including the New York Court of Appeals. NEM's argument that the Commission acted "far in excess" of placing "a price cap on ESCOs as a condition of eligibility," by providing exceptions to the guaranteed price rule defies logic; under the December 2019 Order, NEM's members, and ESCOs more generally, must only comply with the default price guarantee rule; ESCOs have no obligation to avail themselves of the exceptions that apply for specified fixed-price and clean energy products unless they wish to sell such

²³ A more detailed discussion of the terms of the default guaranteed savings rule and the terms of the exceptions for fixed price products and clean energy products is provided in the December 2019 Order at pages 39-42, 64-70, and 74-83.

products.²⁴ The default guaranteed price rule that the Commission imposes uses the same price-cap regulation, based on utility commodity prices over the course of a year, that has been upheld in court as a proper exercise of the Commission's jurisdiction. Accordingly, petitioners' jurisdictional challenge lacks merit.

Thus, petitioners' arguments that the December 2019 Order exceeded the Commission's authority are all clearly contravened by New York court precedent affirming the Commission's jurisdiction to issue the December 2019 Order.²⁵

SAPA Arguments

Some petitioners assert that the December 2019 Order adopted modifications to UBP sections 2 and 5 without the proper notice under SAPA. These petitioners assert that, while the notice, published in the State Register on June 7, 2017, presents the issues and actions being considered, it did not provide specific proposed language changes to the UBP.

The December 2019 Order complied with the notice and opportunity to comment provisions of SAPA via the June 7, 2017

²⁴ Put another way, ESCOs can sell a fixed-price or clean energy product of their own design if the product satisfies the default price guarantee rule.

²⁵ See, Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn., 33 NY3d 336, 350 (2019) ("Petitioner [ESCOs] fail to adequately explain why the PSC may set conditions for eligibility to access public utility lines but may not, as one of those conditions, cap the prices charged by ESCOs, viewed cumulatively on an annual basis, to the same amount as those charged by public utilities"); Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn., 167 A.D.3d 88, 94, 98 (3d Dept 2018) ("[The PSC] lawfully exercised its rule-making power when enacting the December 2016 order" requiring "ESCOs to guarantee that their energy products offered to [utility low-income assistance program participants] would not cost more than buying energy from the local utility.").

SAPA notice, because the rules enacted via the December 2019 Order are either expressly contemplated in the 2017 notice or are a logical outgrowth of the noticed proposals. Thus, the arguments advanced by some petitioners that the December 2019 Order failed to comply with SAPA with respect to the UBP modifications adopted therein are rejected as without merit.

Similarly, some petitioners claim that the limitations on ESCO product offerings were adopted without compliance with SAPA because the SAPA notice did not present the specific product offerings that the Commission limited ESCOs to offering. This argument is without merit as the June 7, 2018 SAPA notice clearly informed the public that changes to the rules regarding ESCO oversight, including the rules regarding which products and services ESCO would be allowed to offer to mass-market customers were under consideration. Indeed, the notice informed the public that the Commission would consider discontinuing the availability of ESCO products to mass-market customers.

Finally, one petitioner asserts that the December 2019 Order violated the provisions of SAPA because the June 7, 2018 SAPA notice expired prior to the issuance of the December 2019 Order. This argument is based on the incorrect premise that the December 2019 Order was adopted pursuant to SAPA Section 102(2)(a)(i), rather than SAPA Section 102(2)(a)(ii). The provision regarding the expiration of a SAPA notice 365 days after its publication in the State Register apply only to rules adopted pursuant to SAPA Section 102(2)(a)(i), and rules enacted pursuant to SAPA Section 102(2)(a)(ii) are expressly exempted from this one-year expiration.²⁶ As the June 2017 Notice expressly noticed, the December 2019 Order was adopted pursuant to SAPA Section 102(2)(a)(ii), and thus the Commission was not

²⁶ SAPA §202(2).

obligated to issue the December 2019 Order within 365 days of the June 2017 notice of proposed rulemaking published in the State Register.

SEQRA Argument

These three proceedings concern the continuation of the Commission's priorities and commitment to consumer protection as part of its ongoing oversight of the retail access market. Family asserts that the December 2019 Order was issued in violation of SEQRA because a portion of the order "may" affect the environment and the Commission did not conduct an environmental review pursuant to SEQRA and its implementing regulations (6 NYCRR Part 617). Family's SEQRA argument is incorrect. The rule adopted in the December 2019 Order is exempted from SEQRA review as a "Type II action."

Pursuant to SEQRA, Article 8 of the Environmental Conservation Law, and its implementing regulations (6 NYCRR Part 617 and 16 NYCRR Part 7), potential agency actions are classified as "Type I," "Type II," or "Unlisted" actions. Type I actions are those that exceed certain thresholds. If an action is included on a Type I list, a rebuttable presumption exists that the action will likely cause a significant environmental impact. Actions constituting Type II actions are also identified in a separate list and require no further review under SEQRA. Unlisted actions are those that are not included in either the Type I or Type II lists. The actions taken in the December 2019 Order are Type II actions exempt from SEQRA review.

As noted, SEQRA authorizes the Department of Environmental Conservation (DEC) and other state agencies to develop a list of regulatory actions that do not require

environmental review.²⁷ DEC and DPS have both promulgated a list of Type II actions that have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under SEQRA.²⁸ As reflected by the captioned titles and regulatory history in these three cases, the December 2019 Order reflects the Commission's continuing administration and management of ESCOs' conditional access to the retail energy market that includes consumer-protection priorities and product transparency efforts dating back more than two decades. The December 2019 Order is a Type II action as identified by 6 NYCRR §617.5(c)(26), because the Commission's December 2019 Order and actions constitute "continuing agency administration and management" of a segment of the retail energy market, based on long-standing consumer-protection priorities. The Commission actions will enhance ESCO eligibility criteria, require additional transparency to consumers about products and pricing, and limit product offerings to those that the Commission has determined offer sufficient value to consumers. Those consumer protections and access conditions also incorporate the Commission's previously established Clean Energy Standard and Renewable Energy Credit program.²⁹

In addition, the December 2019 Order is also a Type II action under the Department of Public Service's (Department) regulations. The December 2019 Order addresses the conditions and instances in which ESCOs continue to participate in the

²⁷ 6 NYCRR §617.5(b).

²⁸ The DEC Type II list is set out at 6 NYCRR §617.5(c). The DPS Type II list is in 16 NYCRR §7.2.

²⁹ Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016).

retail access market,³⁰ which necessarily involves utilities' distribution, accounting, and billing systems. Thus, the December 2019 Order also falls within the Type II category of actions identified by 16 NYCRR §7.2(b)(2) and (3) as it relates to the administration and management of utility functions and customer practices given the ESCOs use of the utilities distribution and billing systems.³¹

In these cases, the Commission continues and carries forward its long-standing priorities with respect to consumer benefits and consumer protection. Thus, although Family seeks SEQRA review of certain product offering rules, the December 2019 Order's identification of permissible products - offerings that justify continuing to allow ESCOs access to utility systems - is a Type II action, and thus no SEQRA analysis was required prior to the issuance of the December 2019 Order.

In any event, the claims presented by Family are unfounded. In requesting a rehearing, Family asserts that the restrictions on eligible ESCO product offerings may have an impact on the environment. Specifically, Family argues that (1) the absence of an exception for a "green gas" product without a price cap, (2) the requirement that a renewably sourced electric product be supported with RECs that satisfy the locational and delivery requirements of Tier 1 of the Commission's CES, (3) the

³⁰ See generally, Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn., 33 NY3d at 350 ("a necessary corollary of the PSC's authority to regulate utilities' delivery of ESCOs' energy is that the PSC has the authority to determine the terms and conditions under which ESCOs are eligible to purchase delivery services—for both gas and electricity—from utilities").

³¹ See, e.g., 16 NYCRR §7.2 (b)(2)(ii)(preparation of tariff schedules), (2)(iii)(uniform system of accounts), (2)(iv) (contracts), (3)(customer relations), (3)(i)(service standards), and (3)(iv)(bills for service).

possible use of hydroelectric facilities, and (4) the prohibition on ERVA products and services that are not part of an otherwise compliant product may have adverse environmental impacts.

As an initial matter, there is no record evidence in Track 1 to support a claim that ESCOs have offered or achieved any significant sales of "green gas" products in New York. Thus, the fact that ESCOs can only permissibly sell such products if they meet the default price-guarantee rules will not have any adverse environmental impact. Moreover, while "green gas" products are discussed more fully below, the Commission notes that, unlike green electric products that can be supported by a REC, there currently is no similar mechanism for gas products. One REC is equal to one MWh of renewable generation. Thus, a renewable electric product is supported by a specified and identifiable amount of renewable generation. At this time, the same cannot be said with respect to "green gas" products, which still rely on the burning of natural gas, without any current standard for how that usage would be offset. This fact, combined with the lack of record evidence that there are currently any significant levels of "green gas" products being offered in the State, leads to the conclusion that the choice not to allow for a theoretical "green gas" product that would not be subject to a price cap will not have an adverse environmental impact.³²

Turning to the requirement that all ESCOs that elect to offer renewable electricity products to consumers be subject to the same locational and delivery requirements as Tier-1-

³² This determination does not prevent the Commission from analyzing the potential for such product offerings in future proceedings in which ESCOs submit sufficient information on such products to permit more meaningful review.

eligible REC purchases, the Commission likewise finds that this requirement will not have an adverse environmental impact. The Renewable Energy Standard (RES) locational and delivery requirements were adopted in 2016 as part of the RES program for which a SEQRA review was completed.³³ These requirements apply to all load serving entities (LSEs), including ESCOs, that have been complying with these requirements in satisfaction of their RES obligations since 2016. Contrary to Family's assertion, requiring ESCOs that elect to offer a renewable electric product to comply with these requirements will not adversely impact the environment, but instead will provide the benefit of ensuring that an ESCO product that purports to offer green electricity will be backed by certified RECs and will result in renewable energy consumption in New York. This floor for product quality will provide consumer confidence that products marketed as clean energy actually support and incent the generation of renewable energy in a manner that diversifies the energy delivered into New York. Put more plainly, compliance with these requirements will ensure that ESCO products that purport to offer green energy to customers actually deliver on those promises. Given the increased consumer confidence and product transparency that will result from rules ensuring product integrity, the Commission does not anticipate any reduction in the sales of clean energy electric products in the retail market.

Family's request for rehearing further argues that the locational and delivery requirements will create a "surge" in demand for Tier 1 RECs, which may cause the price of those RECs to increase and thus result in ESCO customers moving away from

³³ Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016); see, e.g., id. at 153-54.

renewable products. Family then postulates that this would have a negative environmental impact because such customers might later return to "dirtier, cheaper commodity." This contention is not accurate. First, the record is not clear on how many ESCOs are currently choosing to offer renewable energy products and how many consumers are electing to purchase those products.

Second, this product eligibility condition puts no obligation on ESCOs to offer such products; it is at the discretion of the ESCO to determine whether offering such product is advantageous to its business. Third, ESCOs offering renewable energy products are not limited to purchasing Tier 1 RECs to support those projects; rather, after meeting their RES requirement with Tier 1 RECs, they may purchase non-Tier 1 RECs that meet the RES technology and deliverability requirements, such as RECs from renewable generators built before 2015.

Fourth, Family's claim that increased Tier 1 REC prices would result in a negative environmental impact is inaccurate. The purpose of RECs is to incentivize the development of renewable generators and to provide compensation to those generators for their positive environmental impacts. An increase in the price of RECs would incent the development of additional renewable generation, rather than causing any additional production of "dirty" energy. Furthermore, the vast majority of renewable generators have minimal or no marginal costs to generate energy once built, and therefore would be expected to continue generating even if REC prices decline substantially, for example if, as Family suggests, increased prices lead to fewer customers purchasing renewable products from ESCOs.

In addition, Family ignores the fact that the sale of Tier 1 RECs by the New York State Energy Research and Development Authority (NYSERDA), combined with the availability

of the Alternative Compliance Payment (ACP) as a mechanism for supporting a renewable product, will significantly limit any increase in the Tier 1 REC price. NYSERDA procures RECs through long-term contracts with new renewable generators established through a series of solicitations starting in 2015 and continuing each year subsequently. NYSERDA then sells those RECs to LSEs at cost, which results in their sale at a weighted average of its solicitation results. NYSERDA does not alter this price based on demand. Furthermore, if NYSERDA does not have sufficient RECs available to an ESCO to meet that ESCO's needs for supporting its renewable product, that ESCO may choose either to purchase RECs from another source or to make ACPs. ACPs are set each year at an amount equal to the weighted average REC price for that year plus 10% and there is no limit on the number of ACPs that can be made. Thus, any increase in REC prices is limited to either the weighted average price paid by NYSERDA or, if ESCOs need more RECs than NYSERDA has available, 10% above the weighted average REC price.

Although Family's rehearing request suggests that RECs may be purchased from hydroelectric facilities that cause environmental impacts, the consumer protection measures at issue in these proceedings do not change the terms of operating licenses for existing hydroelectric facilities, nor do they authorize the construction of new hydroelectric facilities.

Family further argues that the prohibition of the sale of energy-related value-added products and services that, if offered to customers, may impact the environment. Initially, the Commission notes that here, as with the green gas products discussed above, the record developed in these proceedings demonstrates that few, if any, ESCOs are offering such products and likewise that few, if any, customers are purchasing these products from ESCOs. Moreover, most, if not all, of these

products are already readily available in markets not tied to commodity energy services, and ESCOs have not shown that they are able to offer these products at lower prices than through those other markets. Accordingly, there is no basis to conclude that the absolute sales of such products will meaningfully change. Therefore, the prohibition on ESCOs offering such products would not have an adverse environmental impact.

Additionally, these consumer protections and product eligibility criteria do not prohibit ESCOs from offering ERVA products and services outright. As discussed more fully below, ESCOs would still be permitted to offer customers these types of additional products and services so long as they are part of an otherwise compliant product. Moreover, certain promotional items like LED light bulbs and Nest thermostats that had been used to entice customers to enroll with an ESCO for energy supply service are readily available at retail and do not require the customer to enter into a contract for commodity supply. Thus, given the lack of penetration of ERVA products and services in the retail energy market, the fact that ESCOs may still offer these products as part of an otherwise compliant product, and that these products and services are readily available elsewhere, the Commission concludes that these consumer protections will not result in any significant decrease in these products being utilized by customers, and thus will not result in adverse environmental impacts.

The Commission further notes that bundling such products with ESCO commodity service and permitting ESCOs to sell that bundled service at any price increases the likelihood that customers could have their essential commodity service terminated for failure to pay charges unrelated to that commodity service. This result, particularly given that such products are readily available separate and apart from commodity

supply service, would not advance the public interest in promoting product transparency and ensuring that customers can access and maintain essential commodity service. Finally, with respect to the remaining directives,³⁴ the Commission determines that these actions will not have any impact on the environment or are otherwise Type II actions exempt from SEQRA review.

Even if the consumer protection actions at issue here were considered "Unlisted" actions, a negative declaration would be appropriate. To begin, we note that the ordering clauses concerning product offerings were extended upon request by particular ESCOs - in consideration of the outstanding rehearing petitions - and therefore the rules Family complains of as requiring SEQRA analysis have not yet gone into effect.³⁵ Prior to any implementation of the product-offering rules, the Commission evaluates the consumer protections as if they were Unlisted actions that would implicate a determination of significance.

In making a determination of significance, a lead agency causes an Environmental Assessment Form (EAF) to be prepared, considers the proposed action and reviews the EAF and any other supporting information to identify the relevant areas of environmental concern, thoroughly analyzes the identified

³⁴ These directives include, but are not limited to: utilities shall publish trailing supply rates; utilities shall file tariff amendments; utilities shall track uncollectible accounts; ESCOs shall submit applications for review; that, absent affirmative customer consent, ESCOs shall renew fixed-rate commodity product contracts as variable-rate commodity-only service product contracts that include a guaranteed savings over the utility price; and that DPS Staff work with utilities to disseminate price comparison information, including on-bill price comparisons.

³⁵ Notices Granting Extension Requests (dated January 22, 2020, April 7, 2020, and July 14, 2020).

relevant areas of environmental concern to determine whether the action may have a significant adverse impact on the environment, and sets forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.³⁶ If the lead agency determines that the proposed action will not have an adverse effect on the environment or that any adverse effect identified would not be significant, SEQRA review ends upon the adoption of a "Notice of Negative Declaration." The Commission assumes the role of Lead Agency under SEQRA and conducts an environmental review.

On August 21, 2020, Department Staff prepared an EAF. After reviewing the EAF, the petitions for rehearing, and the product-offering rules contemplated in the December 2019 Order, the Commission concludes that the actions set forth in the terms of the December 2019 Order that are affirmed, adopted and implemented in this Order will not result in significant adverse environmental impacts.

Because none of the rules adopted in the December 2019 Order, considered individually or together, will have a significant adverse environmental impact, a Notice of Negative Declaration concerning these actions will be issued along with this Order. The completed EAF will be retained in our files.

ESCO and Distribution Utility Price Comparisons

A majority of the Petitions assert that the Commission's comparison of ESCO prices against the default utility's prices is arbitrary, capricious, and without a rational basis because the Commission should have focused on ensuring that ESCOs have a fair opportunity to obtain profits. However, these arguments cite no credible error of law or fact, and further cite no changed circumstances that would warrant a

³⁶ 6 NYCRR §617.7(b).

different conclusion. The Commission's obligation is to ensure customers receive a just and reasonable rate. ESCOs choosing to participate in the New York market are not guaranteed a profit and the Commission did not err in enacting rules preferring consumer protection over ESCO profit margins. As the arguments raised by the petitions on this point simply reiterate the arguments advanced through the administrative hearing process and represent only a disagreement with the policy decision reached in the December 2019 Order, the ESCOs have failed to provide a basis for rehearing.

Fixed-Rate Products

Some petitioners assert that the requirement to cap ESCO fixed-rate products at a price that is no more than 5% greater than the trailing 12-month average utility supply rate is unreasonable and should be reconsidered. These arguments cite no credible error of law or fact, or cite to changed circumstances that would warrant a different conclusion. Instead the arguments raised by most petitions articulate only a disagreement with the policy decision reached in the December 2019 Order, not a basis for rehearing.

The Commission declines to reconsider the decision but, in response to requests for clarification, the Commission provides the following clarification to this requirement. Regarding the contracting process when utilizing the trailing twelve-month average utility supply rate, the operative date is the date of contracting with the customer. The twelve-month average utility supply rates will be posted each quarter and any customers who are enrolled on a fixed-rate product must be enrolled in a product that is no more than 5% greater than the trailing 12-month average utility supply rate currently posted at the time of enrolling the customer. That fixed-rate shall remain applicable for the term of the agreement, regardless of

subsequent changes to the trailing 12-month average utility supply rate.

Renewable Energy Products

Several petitioners argue that the December 2019 Order inappropriately limits the renewable energy products that ESCOs can offer to mass-market customers. These arguments generally focus on three aspects of the December 2019 Order: (1) the requirement that any ESCO renewable electric commodity products include a renewable mix at least 50% greater than the ESCO's RES obligation; (2) the locational and delivery terms required of the RECs purchased; and, (3) the lack of a natural gas product with either a renewable energy support component or a carbon offset component.

Regarding the requirement that ESCO renewable products include a renewable mix at least 50% greater than the ESCO's RES obligation, some petitioners predict that the renewable resources in the State are insufficient to facilitate such products offerings. Initially, there is no evidence that would support the conclusion that such insufficiency will exist, and we reject as unpersuasive various petitioners' unsupported predictions on this point. The operative point, however, is that petitioners' speculation does not merit alteration of the December 2019 Order even if such predictions are assumed to be accurate. The December 2019 Order established multiple avenues for compliance obligations. ESCOs are permitted to utilize ACPs as a means of compliance with the 50% renewable requirement. The ACP compliance avenue would not be affected by any of petitioners' market predictions. As ESCOs wishing to offer renewable electric products have multiple avenues to comply with the December 2019 Order's directives regarding such products, petitioners' contentions regarding current in-state renewable resources lack merit.

Some petitioners also argue that the Commission acted arbitrarily and capriciously in requiring ESCOs to comply with the locational and delivery requirements of the RES for Tier 1 REC purchases when buying RECs in order to offer renewable energy products. These petitioners argue that this requirement arbitrarily prohibits the use of nationally sourced RECs to satisfy renewable energy claims. As the December 2019 Order indicated, however, the locational and delivery requirements placed on the purchase of RECs will help New York meet its clean energy goals by reducing the demand for nonrenewable energy generation within the state while simultaneously promoting increased production of renewable power generation in the region, thereby protecting its citizens' health, safety, and reliable access to power.

Contrary to some petitioners' arguments, the locational and delivery restrictions placed on RECs is consistent with the Commission's existing renewable energy policies, as well as the 2019 Climate Leadership and Community Protection Act (CLCPA).³⁷ The goal of such policies is, simply put, to reduce New York's consumption of nonrenewable energy sources in order to better protect the health and welfare of our citizens and environment.

Initially setting aside concerns regarding the integrity of such products, continued reliance on nationally sourced RECs does not result in renewable energy actually being delivered into New York. Thus, the use of such RECs would not alter the ratio of renewable energy to nonrenewable energy currently available in the New York Independent System Operator (NYISO) market for consumption. Moreover, nationally sourced RECs are less likely to promote the transition away from fossil-

³⁷ Ch. 106 of the Laws of 2019.

fuel generation and toward renewable generation in and around the State, a transition that will reduce various forms of air pollutants that harm New Yorkers' health. Thus, a policy of preferring renewable energy delivered into New York promotes improved air quality throughout the State by reducing reliance on fossil-fuel powered peaker plants. This policy is particularly important in New York City's environmental justice communities that host many of these existing gas-fired generating facilities.

Turning to product integrity concerns, the limitation of ESCO renewable products to RECs generated within the territories administered by NYISO or the system operators managing adjacent control areas, ISO New England and PJM Interconnection, is necessary for effective oversight of those products. DPS Staff verifies compliance with renewable energy requirements, including the RES, through review of information in the New York Generation Attribute Tracking System (NYGATS). RECs based on renewable energy generated in New York are registered in NYGATS as verifiable certificates containing details on the generator. RECs may be traded in NYGATS and may be retired in an LSE's NYGATS account, representing their use to meet a regulatory or voluntary renewable energy commitment. By reviewing an ESCO's account in NYGATS, DPS Staff is able to determine whether that ESCO met the RES requirement as well as whether that ESCO purchased and retired RECs in relation to a renewable energy product offering.

Both the ISO New England and PJM Interconnection territories have tracking systems compatible with NYGATS where RECs are registered based on renewable energy generated in those

territories, called NEPOOL-GIS and PJM-GATS, respectively.³⁸ When the owner of a REC in NEPOOL-GIS wants to sell that REC to a buyer in New York, such as an ESCO, the owner is able to execute a transaction that transfers that REC from the NEPOOL-GIS to NYGATS; the same process can be done to transfer a REC from PJM-GATS to NYGATS. RECs in NYGATS, whether generated in New York or transferred from NEPOOL-GIS or PJM-GATS, have a full set of details associated with them that allows DPS Staff to verify that those RECs comply with all relevant requirements.

By contrast, when a REC not tracked in NYGATS is sold to a New York buyer, DPS Staff cannot verify important details regarding that REC, including that the REC was created based on actual renewable generation, that the generator meets relevant technology standards, that the energy was generated within the appropriate period for compliance, and that the renewable attributes associated with the generation are not owned or claimed by any other entity.

Double-counting of renewable attributes, including as a result of confusion or misunderstanding regarding state programs and as a result of intentional fraud, has been a significant concern that tracking systems like NYGATS, NEPOOL-GIS, and PJM-GATS were designed to address. Because RECs for energy not generated in the NYISO, ISO New England, or PJM Interconnection territories are not created in a tracking system compatible with NYGATS and cannot be transferred into NYGATS

³⁸ Subject to compliance with the delivery requirement, ESCOs can purchase RECs from generators in any state that is part of ISO New England, which includes Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, and from generators in the area administered by PJM Interconnection, which covers all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia.

with the verifiability and detail necessary for DPS Staff to ensure that customers are being served in compliance with the Commission's rules, the requirement that only RECs produced in New York or in an adjacent control area be used to support renewable energy products is appropriate.

To summarize, the locational and delivery requirements directed by the December 2019 Order generally advance New York's renewable energy goals and specifically promote the reduction of pollution in the State from nonrenewable generation and ensure the integrity of electricity products marketed by ESCOs as containing a renewable energy component.

Some petitioners argue that the December 2019 Order fails to address the issue of ESCO "green gas" products in that the only permissible renewable product provided for under the December 2019 Order is a green electric product. These petitioners assert that allowing ESCOs to offer a renewable electric product while not providing for a renewable gas product is arbitrary and capricious. The Commission disagrees.

Initially, we note that the absence of discussion in the December 2019 Order regarding "green gas" products was not a mere oversight as some petitioners claim. The December 2019 Order did not provide for a "green gas" product because the record that was developed during the administrative hearing process did not include proof that any existing or proposed "green gas" products provide benefits to mass market customers that would justify an exception to the guaranteed savings requirement. While the Commission is aware of the petitions filed by ESCO requesting a waiver to offer various "green gas" products, virtually no evidence related to such products was provided by the ESCO parties during the hearings. Conversely, there is ample record basis supporting a renewable electric product.

The Commission notes that the concept of "green gas" products is relatively novel. The Commission's existing renewable energy policies, particularly those included as part of the CES, have to date been focused on the electric sector. Within the CES program, a REC is tied to a megawatt hour of electric generation, and there is no equivalent certificate for therms or any other measurement of natural gas production or consumption. Thus, while the Commission is not foreclosing the option of a product offering intended to provide a renewable generation component to offset natural gas usage, an insufficient record was developed during the administrative hearing to provide for a green gas product in the December 2019 Order, or in this Order on rehearing.³⁹ The Commission may revisit the "green gas" option in response to the ESCO petitions mentioned above, or generically as part of Track II.

Other Energy-Related Value-Added Services

Some petitioners claim that the December 2019 Order inappropriately creates disparity amongst ESCOs by approving a specific product for one company, Agway, while requiring other ESCOs to petition the Commission before they can provide similar products and services. They assert that all ESCOs should be permitted to offer any approved ERVA.

These petitioners misapprehend the nature of Commission's decision regarding the retail market. The vast majority of ESCOs that did participate in the administrative hearing argued, in essence, that the Commission should continue

³⁹ As ESCOs that sell both commodities are aware, the electricity and natural gas industries have important unique features that would require industry specific attention in regard to any carbon-offset product or renewable energy support product. Virtually none of those distinctions were explored in any depth in the underlying hearing with regard to a "green gas" product. However, such products may be explored in Track II.

to rely on the theoretical presumption that the retail market would produce value for New York consumers. However, the Commission determined that, two decades after the Commission's creation of the market, ESCOs should be able to demonstrate the actual value that they were creating for New Yorkers, if such value was being created. In contrast to the vast majority of ESCOs, Agway made use of the administrative process to demonstrate that its EnergyGuard product provided unique value. The fact that Agway provided a clear record basis regarding product value explains why the Commission was able to immediately allow it to continue offering that product.

The Commission may, should an appropriate circumstance arise, permit other ESCOs to offer a similar product, and an ESCO can submit a petition for a waiver to offer such a product. To reiterate, this is another opportunity that permits an ESCO to depart from the satisfying the default price-guarantee rule, and ESCOs can avail themselves of this prior to the completion of Track II of these proceedings. Through the Track II collaborative process, additional ERVA products and services may be developed and proposed for Commission approval.

Additionally, some petitioners argue that the December 2019 Order creates an improper disparity between ESCOs and distributed energy resource (DER) providers. The Commission has consistently treated ESCOs and DER providers differently due to important distinguishing features of those markets.⁴⁰ While ESCOs and DER providers have offered similar ERVA products, ESCO

⁴⁰ See, Case 18-M-0180, In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products, Order Establishing Oversight Framework and Uniform Business Practices for Distributed Energy Resource Suppliers (issued October 19, 2017) (establishing, among other things, separate uniform business practices for DER providers).

are also providing essential commodity service to customers, something DER providers do not do. Customers can have their essential commodity service terminated for failure to pay ESCO charges.⁴¹ Thus, when ESCOs bundle products with commodity service, the customer may have his or her commodity service terminated for failure to pay any portion of the ESCO's charges, including those costs for services unrelated to the provision of commodity. DER services are not bundled with utility services commodity or distribution services in a manner that poses this

⁴¹ For example, bundling a smart thermostat with ESCO commodity energy can add marginal costs that could be the difference between whether a customer will be able to pay his or her bills in a manner that prevents the shut off of his or her home electric or gas service.

risk from product bundling.⁴² Thus, the Commission's differing treatment of ESCOs and DER providers is proper.

Definition of Small Non-Residential Customers

Several petitioners assert that the definition of small non-residential customers is arbitrary and capricious and should be modified. The Commission notes that no change has been made to this definition since it was adopted in 2016 Order (the Reset Order).⁴³ As an initial matter, some parties incorrectly assert that the Reset Order was vacated in its entirety. The Commission's definition of mass market set forth in the Reset Order was never challenged in litigation, and the definition was not a part of the limited number of ordering clauses that were annulled on procedural grounds.⁴⁴ Petitioners cannot now retroactively broaden the scope of a previous judicial challenge or alter the scope of the resulting court decision, which did not contravene the Commission's definition of the mass market. Thus, the definition of small non-

⁴² In circumstances where consolidated billing exists in regard to DER, the Commission has required guaranteed savings as a prerequisite that prevents the type of risk that ESCOs pose when they sell bundled services for premiums. See, 19-M-0463, In the Matter of Consolidated Billing for Distributed Energy Resources, Order Regarding Consolidated Billing for Community Distributed Generation (issued December 12, 2019).

⁴³ Case 15-M-0127, et al. Order Resetting Retail Energy Markets and Establishing Further Process (issued February 23, 2016) (Reset Order).

⁴⁴ National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 53 Misc. 3d 641 (Alb. Sup. Ct. 2016) (vacating only three ordering clauses of the challenged order), aff'd, 152 A.D.3d 1122 (3d Dept 2017), aff'd as modified, 33 N.Y.3d 336 (2019), and aff'd as modified sub nom. Retail Energy Supply Ass'n v. Pub. Serv. Comm'n of State, 152 A.D.3d 1133, 59 N.Y.S.3d 590 (2017), and aff'd as modified, 33 N.Y.3d 336, 126 N.E.3d 1041 (2019).

residential customers adopted in the Reset Order was implemented and remained in effect throughout these proceedings.

While several parties propose various modifications to criteria for defining a small non-residential gas customer, this Order does not adopt a modification to this definition at this time.⁴⁵ Absent a more specific showing on this point in future proceedings, credible record evidence supported the conclusion that the Commission's current definition of small non-residential gas customer captured commercial customers that are in need of greater consumer protections because they have, like other customers that fell within the mass market's definition, generally failed to receive benefits from the existence of the retail market.⁴⁶ Given the ongoing disagreement on this point, however, including differing factual assertions, the Commission directs that Track II of these proceedings further consider whether the current definition of a small non-residential customers that would fall within the mass market and, as a result, be subject to greater consumer-protections regulation, best balances consumer interests. The definition of small non-residential customer shall be addressed in Track II of these proceedings, with a revised definition proposed to the Commission for consideration, as appropriate. During the

⁴⁵ We note that Marathon's combined argument that the Commission had no definition of mass-market prior to the December 2019 Order and was simultaneously forbidden from adopting a definition in the December 2019 Order entirely devoted to regulating the mass market does not withstand scrutiny. If Marathon held the incorrect belief that the Commission had not previously defined the mass market, the notice of proposed rulemaking's express statement that the Commission was considering reforms to the mass market would have reasonably apprised Marathon, and any other ESCO that made the same assumption, that the definition of the mass market would necessarily be at issue.

⁴⁶ Hearing Transcript (Tr.), at 2134-2137.

pendency of Track II, the Commission will continue to use the definition of small non-residential customers in the December 2019 Order.

We recognize, however, that questions raised by some petitioners regarding the current definition of a mass-market customer demonstrate the need for further clarification that will provide beneficial regulatory certainty. Thus, the Commission offers the following clarifications regarding the categorization of small non-residential customers. Whether a customer is a mass-market customer is considered on a per commodity basis; a customer may be a mass-market customer for natural gas but not for electricity, or vice versa.

The Commission further clarifies that the 750-dekatherm, or its equivalent, ceiling for natural gas small non-residential customers is intended to be considered in the aggregate as to all non-residential accounts held by that customer.⁴⁷ Accordingly, the dekatherm use of a customer holding multiple commercial gas accounts should be considered in aggregate. As to aggregation for electric customers, an electric customer is not a mass-market customer if it has one or more demand metered accounts.

⁴⁷ The annual look-back for determining where a small-nonresidential customer falls in regard to the 750-dekatherm threshold is determined at the time the parties enter the contract. The ESCO must, at that time, assess the most recent available billing data regarding customer's prior twelve-month usage to determine the customer's status in regard to the mass market. For any ESCO contract that has the duration of less than a year but which contains an automatic renewal clause, the ESCO is not required to reassess usage before each renewal; the ESCO is, however, required to assess the customer's prior 12-month usage no less than once a year.

Affirmative Consent Requirements

Several petitioners assert that the affirmative consent requirements of the December 2019 Order require clarification. The December 2019 Order directed that affirmative consent is not required for a customer transitioning to a variable rate product that guarantees savings, but went on to require such consent for "any change to a customer's rate or product or service type."⁴⁸ This language was intended to be apply to all material changes other than the change to a variable rate product that guarantees savings discussed previously in the order. The Commission hereby clarifies that renewal of a variable rate product that guarantees savings, or renewal to a product the guarantees savings, provides an exception to the affirmative consent requirement. Other changes in product and service types, including changes to price and type of compliant product (fixed-rate product to renewable product, or a change in a fixed-rate for any reason, for example) shall require affirmative customer consent.

Reapplication Process

Some petitioners claim that the reapplication process in effect prevents ESCOs from enrolling and renewing customers because the revised UBPs go into effect prior to submission of revised ESCO applications, which then need to be reviewed by Staff for consistency with the UBP and Commission Orders. While these arguments speculate as to the amount of time it will take Staff to review and approve ESCO applications, these timing concerns have been mitigated by the extension of the implementation deadlines. Nevertheless, the Secretary extensions of implementation deadlines to provide the Commission the opportunity to address the petitions now requires the

⁴⁸ December 2019 Order, p. 70.

Commission to consider, once again, the appropriate implementation deadlines for the unimplemented ordering clauses that place obligations on ESCOs. The Commission hereby establishes timelines for the re-application process that mitigates petitioners' concerns. The modified UBP adopted in the December 2019 Order and amended for clarification by this Order shall be effective 150 days from the effective date of this Order, while the deadline by which all ESCOs are to file a revised application shall be 60 days from the effective date of this Order. This timeline provides ample time to ESCOs to file their applications and have them reviewed by Staff prior to the modified UBP going into effect. ESCOs are reminded that any new contract must be reviewed by Staff prior to use.

Other petitioners assert that the reapplication requirement is arbitrary and capricious because the December 2019 Order does not provide sufficient detail regarding the showings that are required under this process, nor does it provide an opportunity to supplement a deficient application. The December 2019 Order directed Staff to file a guidance document related to Staff's review of ESCO eligibility applications.⁴⁹ That guidance document (Staff Guidance Document) was filed on February 10, 2020, thus providing greater clarity as to the information sought in the reapplication, and future application, process.⁵⁰

Additionally, some petitioners misinterpret the process for Commission review of an application that Staff has recommended for denial to preclude the ESCO from submitting additional information to Staff during its review. The

⁴⁹ December 2019 Order, pp. 29-30, 111.

⁵⁰ Case 15-M-0127, et al., Guidance document for the periodic review of ESCO eligibility (filed February 10, 2020) (Staff Guidance).

Commission hereby clarifies that, consistent with current practices, Staff will review ESCO eligibility applications and provide ESCOs a reasonable opportunity to remedy any deficiencies. Once Staff has provided such opportunity and then reviewed the full application, it may approve the application or recommend denial of the application for the reasons discussed, among other places, in the December 2019 Order and the more recent the Staff Guidance Document. In such an instance, the ESCO will be provided with an opportunity to provide argument to the Commission in support of the merit of its application to the Commission before a final determination is made. This is not an opportunity to supplement a deficient application with information that should have previously been provided to Staff.

General Business Law §349-D

Family's rehearing request mischaracterizes General Business Law (GBL) §349-D when it argues that the provision prevents the December 2019 Order from imposing heightened customer consent requirements for ESCO automatic contract renewal provisions. GBL §349-D provides a "consumer bill of rights" that expressly provides for minimum consumer-protection standards. By its plain terms, GBL §349-D(6) provides a floor, not a ceiling, for consumer protections regarding ESCO contract renewals; the provision expressly provides that the Commission "may adopt additional guidelines, practices, rules or regulations governing the renewal process." The Commission properly exercised this express authority to enact greater consumer protections in the December 2019 Order.

Constitutional Claims

We briefly address various constitutional claims raised by some petitioners, all of which are without merit. Although both Direct Energy and RESA argue that the Commission's Order constitutes a regulatory taking, RESA fails to identify a

property interest that would allow for a Takings Clause analysis. Direct Energy argues that there has been a regulatory taking in regard to its existing contracts, but that argument is based on Direct Energy's inaccurate assertion that the December 2019 Order retroactively regulates Direct Energy's existing contracts. Since the December 2019 Order only applies to prospective contracts, Direct Energy's argument lacks merit. Direct Energy's related Contract Clause claim is based on the same false premise and is, therefore, also without merit.⁵¹

Similarly, we reject the contention that the locational and delivery requirements placed on eligible RECs violate the dormant Commerce Clause. As previously explained, eligible RECs may be sourced from generation in numerous states as long as that electricity can be delivered into New York. Eligible RECs are unique products that are not comparable to products marketed as nationally sourced RECs. Eligible RECs are created pursuant to New York law to promote the health and wellness of its citizenry by ensuring product integrity in regard to renewable generation characteristics, reduce pollutants in the State resulting from fossil-fuel based generation, and diversify the energy mix in New York, including energy delivered from outside the State. Products identified as nationally sourced RECs do not provide New York residents with similar benefits. The legitimate state purposes served by the requirements for eligible RECs are not inconsistent with the dormant Commerce Clause.

⁵¹ The December 2019 Order prospectively regulates the formulation of ESCO contracts with customers in the same manner as previous ESCO regulation that has been affirmed by the Third Department, Appellate Division. Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n, 167 A.D.3d 88, 98 (2018) (rejecting ESCO argument that the Contract Clause protected ESCOs from prospective regulation).

Other Issues

Family contends that the Commission made an error of fact when the Commission noted in the December 2019 Order that, during the past two decades of state-wide regulation of the ESCO industry pursuant to the UBP, the Commission has never granted ESCO licenses. Family offers no factual support for its contention that the Commission has been granting ESCOs licenses under the UBP regime. The Commission's description in the December 2019 Order was accurate; the Commission has granted ESCOs eligibility, not licenses.⁵²

One petitioner asserts that the December 2019 Order cannot be implemented because the requirement to submit a new application occurs prior to the Commission adoption of financial assurance requirements. However, the new application package does not currently require an ESCO to provide proof of financial assurances. Any such requirements will be added to the ESCO eligibility application package once formally adopted by the Commission.

Additionally, one petitioner claims that implementation of the December 2019 Order is impractical until the Commission has developed the on-bill comparison requirements which the Commission directed be developed in the future. They assert that, even though ESCOs are not currently required to comply with these pricing transparency requirements, they need to begin working such requirements into their customer agreements and customer messaging materials now. The Commission disagrees. The December 2019 Order did not direct ESCOs to immediately implement new pricing transparency requirements, and

⁵² Although the Commission discussed the matter in the December 2019 Order as relevant regulatory background, none of the rules adopted in the December 2019 Order turn on a distinction between eligibility and a license.

instead directed Staff and the distribution utilities to develop a Joint Billing Plan for each utility to address these transparency concerns in the future.

The Commission is not persuaded that ESCOs are unable to serve customers in the meantime before those requirements are developed and adopted. Additionally, any timing issues raised in the Petitions with respect to the Staff Guidance directed by the December 2019 Order and the January 22, 2020 technical conference are now moot given that the guidance was filed on February 10, 2020, the Technical conference has taken place, and the Secretary has extended the deadlines for ESCO implementation.

One Petitioner argued that the Commission's finding that the "complaint rate for ESCOs remains unacceptably high"⁵³ is erroneous because the number of complaints against ESCOs has been decreasing in recent years. They assert that any rule changes adopted on the premise of high ESCO compliant rates is thus arbitrary and capricious. This argument is rejected as it is based on the flawed premise that the total number of complaints against ESCOs cannot decrease while complaint rates still remain unacceptably high.

⁵³ December 2019 Order, p. 12.

Certain petitioners' arguments that the December 2019 Order is preempted by the Sherman Act are also rejected.⁵⁴ The pricing provisions of the December 2019 Order advance the Commission's statutory mandate to ensure that consumers pay only just and reasonable prices for essential commodity energy services. Throughout the hearing, petitioners largely failed to demonstrate that premiums paid above the default utility rate were justified. The unsubstantiated ESCO claims that these premiums represent added value, which was neither articulated nor quantified by product, cannot be reconciled with the Commission's duty to ensure that New Yorkers can access reliable energy at just and reasonable rates. The December 2019 Order details that Staff will provide oversight of ESCO pricing through annual reporting and periodic review, which will ensure compliance with pricing requirements and impact whether an ESCO may continue to offer certain products. Further, the Commission will continue to oversee the utility rates against which the

⁵⁴ The Commission notes that this is not the first instance of ESCOs incorrectly arguing that federal anti-trust provisions prohibit the Commission from regulating, in the public interest, ESCOs' access to privately owned utility systems. The New York State Court of Appeals has already rejected federal anti-trust arguments raised by NEM in prior litigation. Compare NEM Brief for Petitioners-Appellants in APL-2018-0046, at 52-53 (dated May 29, 2018) (challenging as improper, on federal anti-trust grounds, Commission use of a price-cap for regulating ESCOs' access to utility systems); and NEM Reply Brief for Petitioners-Appellants in APL-2018-0046, at 18, 38 (repeating federal antitrust arguments) (both available at https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx); with Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 33 N.Y.3d at 351 (holding that each of NEM's challenges to the Commission's authority to regulate ESCO's access to utility systems, including those not expressly discussed in the Court's Opinion, "lack[ed] merit.").

ESCO prices will be benchmarked in the manner that it has for decades.⁵⁵ The Commission's ongoing regulation of the conditions upon which ESCOs are provided access to utility systems does not implicate the Sherman Act.

The petitioners that speculate that the December 2019 Order violated the Commission's regulations because the Commission acted before the issuance of a report or a recommended decision by the Administrative Law Judges (ALJs) are incorrect. By its plain language, 16 NYCRR §4.9(a) permits ALJs to report to the Commission rather than issue a Recommended Decision. As the ALJs submitted a report to the Commission prior to the issuance of the December 2019 Order, the Commission was expressly permitted to "decide the case without further proceedings."⁵⁶

Family's argument that the Order must be invalidated due to various motions made during the administrative hearing that Family argues deserved additional Commission review lacks merit for both procedural and substantive reasons. To begin with, Family's argument is insufficiently pled to satisfy the rehearing standard. Family does not attempt to offer any explanation for how the hearing motions it refers to could have affected the December 2019 Order. Thus, Family failed to make

⁵⁵ Both RESA and Direct Energy, the two petitioners that raise arguments regarding the Sherman Act, build their contentions on the factual assertion that the Commission does not regulate utility commodity rates. That asserted premise is, put simply, false. See, PSL §65 ("All charges made or demanded by [a] gas corporation [or] electric corporation . . . for gas [or] electricity . . . shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity . . . or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited.").

⁵⁶ 16 NYCRR §4.9(a)

an allegation that permits meaningful review, as it failed to satisfy its obligation to "specifically explain and support" how hearing-motion practice affected the December 2019 Order so as to merit rehearing.

Equally important, Family complains about the resolutions of motions in a hearing that it chose not to participate in. As Family did not make any of the motions it refers to, or participate in any way in motion practice, Family cannot be heard to complain about the hearing procedures.

Even in the absence of any particularized argument on this point, we note that the December 2019 Order was premised on the Commission's determination that none of the various ESCO motions demanding additional process or procedures had merit. The Commission finds no errors in the ALJs' denial of various ESCO motions demanding additional hearing procedures and no merit to ESCO motions asking for similar relief that were not resolved prior to the December 2019 Order.

Finally, any arguments not expressly addressed by this Order are found to be without merit for reasons already set forth in the December 2019 Order.

The Commission orders:

1. The petitions for rehearing and reconsideration are denied for the reasons discussed in the body of this Order.
2. The petitions requesting clarification are granted consistent with the discussion in the body of this Order.
3. Effective 150 calendar days from the date of this Order, energy service companies (ESCOs) shall enroll new residential or small non-residential customers (mass-market customers) or renew existing mass-market customer contracts for gas and/or electric service only if at least one of the following conditions is met:

(A) enrollment includes a guaranteed savings over the utility price, as reconciled on an annual basis;

(B) enrollment is for a fixed-rate commodity product that is priced at no more than 5% greater than the trailing 12-month average utility supply rate; or

(C) enrollment is for a renewably sourced electric commodity product that

(i) has a renewable mix that is at least 50% greater than the ESCO's current Renewable Energy Standard (RES) obligation as demonstrated by the procurement of Renewable Energy Credits (RECs) and/or the making of Alternative Compliance

Payments (ACPs) equal to the number of megawatt hours (MWH) associated with that renewable mix, (ii) the ESCO complies with the RES locational and delivery requirements when procuring RECs, and

(iii) there is transparency of information and disclosures provided to the customer with respect to pricing and commodity sourcing.

(D) enrollment is for a product or service otherwise expressly authorized by the Commission.

4. Effective 150 calendar days from the date of this Order, any mass-market customer contract for a fixed-rate commodity service that is subject to automatic renewal shall be renewed by the ESCO only as a contract for variable-rate, commodity-only service that includes a guaranteed savings over the utility price, unless the ESCO obtains affirmative customer consent to renew the contract as a fixed-rate contract that is priced at no more than 5% greater than the trailing 12-month average utility supply rate.

5. Revisions to Sections 1, 2, and 5 of the Uniform Business Practices are adopted in accordance with the discussion of the body of this Order, as well as the discussion in the body of the Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process, issued December 12, 2019, in these proceedings (December 2019 Order). The revisions shall be effective 150 days following the date this Order is issued.

6. ESCOs currently operating in New York that intend to continue to renew contracts with customers in New York and/or enroll new customers in New York following the effective date of Ordering Clause No. 3 (i.e., 150 calendar days following the date of this Order) are directed to file an application in accordance with the body of this Order as well as the December 2019 Order no later than 60 calendar days of the date of this Order.

7. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to file tariff amendments or addenda to incorporate or reflect in their tariffs the Uniform Business Practices revisions approved in Ordering Clause No. 5. The tariff revisions shall be filed, on not less than one day's notice, to become effective on or before February 12, 2021.

8. The requirements of Public Service Law Section 66(12)(b) as to newspaper publication of the tariff revisions filed in accordance with Ordering Clause No. 6 are waived because the process in this proceeding and this Order give adequate notice of the changes.

9. 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.

10. These proceedings are continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

APPENDIX A

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

UNIFORM BUSINESS PRACTICES
CASE 98-M-1343

~~September 2019~~

~~December 2019~~ September 2020

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SECTION 1: DEFINITIONS

As used in the Uniform Business Practices (UBP), the following terms shall have the following meanings:

Assignment – Transfer by one ESCO to another ESCO of its rights and responsibilities relating to provision of electric and/or gas supply under a sales agreement.

Bill ready – A consolidated billing practice that requires each non-billing party, after receiving customers' usage data, to calculate its charges and send via EDI charges, billing information, and bill messages to the billing party in a form that allows the transfer of the information to the bill in a format the billing party selects.

Billing cycle – The period for which a customer is billed for usage of electricity or natural gas.

Billing services agreement (BSA) – An agreement between the distribution utility and the ESCO stating the billing practices and procedures and the rights and responsibilities of billing and non-billing parties relating to issuance of consolidated bills to customers.

Budget billing – A billing plan that provides for level or uniform amounts due each billing period over a set number of periods, typically 12 months, and determined by dividing projected annual charges by the number of periods. Installment amounts may be adjusted during the period and may include reconciliations at the end of the budget period to account for differences between actual charges and installment amounts.

Business day – Monday through Friday, except for public holidays.

Consolidated billing – A billing option that provides customers with a single bill combining charges from more than one service provider and issued by a distribution utility providing delivery service (utility consolidated bill) or by a commodity supplier (ESCO consolidated bill).

Customer inquiry – A question or request for information from a customer relating to a rate, term, or condition of service provided by an ESCO, distribution utility or other service provider.

Cramming – The addition of unauthorized charges to a customer's bill.

Deferred payment agreement (DPA) – A fair and equitable payment plan agreed upon by a customer and utility and/or a customer and an ESCO that allows a customer to pay an overdue amount in installments. A DPA is based upon the customer's financial circumstances and ability to pay the overdue amount while making payment on current charges.

Demand – The amount of electricity or natural gas that is or could be immediately needed by a customer at any given point in time referred to as customer load. For consolidated billing, the term is used in the context of "billing period demand" for customer bills.

Electric – The amount of electricity, measured in kilowatts (kW), that a customer uses at a point in time, the customer's usage averaged over a period, or capacity of facilities reserved for the customer for stand-by or other service.

Natural Gas – The amount of gas measured in cubic feet or therms that a customer uses or may use over a period, or capacity of facilities reserved for the customer for stand-by or other service.

Direct customer – An entity that purchases and schedules delivery of electricity or natural gas for its own consumption and not for resale. A customer with an aggregated minimum peak connected load of 1 MW to a designated zonal service point qualifies for direct purchase and scheduling of electricity provided the customer complies with NYISO requirements. A customer with annual usage of a minimum of 3,500 dekatherms of natural gas at a single service point qualifies for direct purchase and scheduling of natural gas.

Distribution utility – A gas or electric corporation owning, operating, or managing electric or gas facilities for the purpose of distributing gas or electricity to end users.

Distribution utility customer account number – A number used by a distribution utility to identify the account of a utility customer.

Distribution utility tariff – A schedule of rates, terms and conditions of services provided by a distribution utility.

Door-to-door sales – The sale of energy services in which the ESCO or the ESCO’s representative personally solicits the sale, and the buyer’s agreement or offer to purchase is made at a place other than the places of business of the seller; provided that “door-to-door sales” shall not include 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.

Drop – A transaction that closes a customer’s account with a provider. This term is used when: (1) a customer’s enrollment is pending and the customer rescinds the enrollment; (2) a customer enrolled with an ESCO returns to distribution utility service or enrolls with another ESCO; or (3) the ESCO discontinues service to a customer.

Dual billing – A billing option that provides for separate calculation of charges and presentation of bills to the customer by the distribution utility and ESCO.

Electronic data interchange (EDI) – The computer-to-computer exchange of routine information in a standard format using established data processing protocols. EDI transactions are used in retail access programs to switch customers from one supplier to another or to exchange customers’ history, usage, or billing data between a distribution utility or MDSP and an ESCO. Transaction set standards, processing protocols and test plans are authorized in orders issued by the Public Service Commission in Case 98-M-0667, In the Matter of Electronic Data Interchange and available on the Department of Public Service website at: www.dps.ny.gov/98m0667.htm.

Energy broker – A non-utility entity that performs energy management or procurement functions on behalf of customers or ESCOs but does not make retail energy sales to customers.

Energy services company (ESCO) – An entity eligible to sell electricity and/or natural gas to end-use customers using the transmission or distribution system of a utility. ESCOs may perform other retail service functions.

ESCO marketing representative – An entity that is either the ESCO or a contractor/vendor conducting, on behalf of the ESCO, any marketing activity that is designed to enroll customers with the ESCO.

Enroll/Enrollment – The process used to switch a customer from a distribution utility to an ESCO or from one ESCO to another.

Enrollment date – The effective date for commencement of electric or natural gas service from an ESCO or distribution utility.

Guarantor – An entity that agrees to pay another’s debt or perform another’s duty, liability, or obligation.

Independent Third-Party Verification – the confirmation of a customer’s agreement to take service from an ESCO or authorization for the ESCO to request information by a Verification Agent.

Interval data – Actual energy usage for a specific time interval for a specific period recorded by a meter or other measurement device.

Load profile – Actual or estimated customer energy usage by interval over a period representing usage for a customer or average usage for a customer class.

Lockbox – A billing payment receipt method agreed upon by a distribution utility and an ESCO, involving use of a third-party financial institution to receive and disburse customer payments.

Marketing - The publication, dissemination, or distribution of informational and advertising materials regarding the ESCO’s services and products to the public by print, broadcast, electronic media, direct mail, or by telecommunication.

Meter – A device for determination of the units of electric or natural gas service supplied to consumers.

Meter Data Service Provider (MDSP) – An entity that provides meter data services, consisting of meter readings, meter data translations, and customer association, validation, editing and estimation.

Meter Service Provider (MSP) – An entity that installs, maintains, tests and removes meters, or other measurement devices and related equipment.

Multi-retailer model – A model for retail access that involves provision of electric or natural gas supply and of delivery service, provided separately to end use customers by two or more entities.

New York State Independent System Operator (NYISO) - An independent management organization, authorized by the Federal Energy Regulatory Commission, operating the bulk electric transmission system.

New delivery customer – A customer initiating delivery service by a distribution utility.

Nomination – A request for delivery of a physical quantity of natural gas or for its delivery at a specific point under a purchase, sale, or transportation agreement.

Office of Consumer Services – Office, within the Department of Public Service, which receives and makes determinations concerning customer complaints. Office of Consumer Services (OCS) identifies the exiting Office or its successor in the event the Office name is changed.

Pay-as-you-get-paid method – A payment processing method offered by a billing party presenting consolidated bills, whereby the billing party forwards payment to the non-billing party after receiving payment from the customer.

Pending enrollment – A stage in processing an enrollment that commences with validation of an enrollment transaction request and ends on the enrollment date that the new supplier is expected to deliver energy.

Pending ESCO – An ESCO is a pending ESCO from the date of receipt of an EDI notice containing the effective date for a customer's enrollment until the ESCO commences commodity service for that customer.

Plain Language – Written in clear and coherent manner using words with common and everyday meaning and avoiding legal or energy industry terms, acronyms, and abbreviations that a person of ordinary intelligence would not be expected to understand. If use of a technical term is necessary, the term is clearly defined in the portion of the text where it is used.

Purchased accounts receivable – A debt owed to an ESCO by a customer for receipt of supplies of gas or electricity and transferred to a distribution utility in exchange for consideration.

With recourse – Purchase of accounts receivable with recourse by a distribution utility means that the ESCO remains liable if its customers fail to make payments. A distribution utility that purchases accounts receivable with recourse sends payments to an ESCO at predetermined intervals for amounts billed that are not in dispute and may offset subsequent purchase payments against or obtain reimbursement from an ESCO of any unpaid amounts.

Without recourse – Purchase of accounts receivable without recourse by a distribution utility means that the ESCO is not liable if its customers fail to make payments. A distribution utility that purchases accounts receivable without recourse sends payments to an ESCO at predetermined intervals for amounts billed that are not in dispute and has no right to seek reimbursement from an ESCO of any unpaid amounts.

Rate ready – A consolidated billing practice that requires each non-billing party to furnish in advance of the billing cycle, rates, rate codes or prices (fixed and/or variable), tax rates, billing information, and bill messages to the billing party. The billing party, after receipt of usage data from the MDSP, uses the information on record to calculate the non-billing party's charges.

Residential customer – An individual or occupant of a residential premise as defined in 16 NYCRR Part 11.2(a)(2).

Sales agreement – An agreement between a customer and an ESCO that contains the terms and conditions governing the supply of electricity and/or natural gas provided by an ESCO. The agreement may be a written contract signed by the customer or a statement supporting a customer's verifiable verbal or electronic authorization to enter into an agreement with the ESCO for the services specified.

Single retailer model – A model for retail access that involves provision of electric and/or natural gas service to end users by an ESCO that purchases delivery service from the distribution utility and resells it along with electricity and/or natural gas to end users.

Slamming – Enrollment of a customer by an ESCO without authorization.

Small non-residential electric customer – a non-residential electric customer who does not have any demand metered accounts.

Small non-residential natural gas customer – a non-residential natural gas customer who, on an annual basis, does not use more than 750 dekatherms, or its equivalent, when usage is aggregated across all accounts.

Special meter reading – An actual meter reading performed, upon request, on a date that is different than the regularly scheduled meter reading date.

Special needs customer – A customer who has a certified medical emergency condition, who is elderly, blind or physically challenged, or who may suffer serious impairment to health or safety as a result of service termination during cold weather periods and, thus, is eligible for special procedures before termination of service under the Home Energy Fair Practices Act (HEFPA) (Public Service Law §32(3)).

Switch – Transfer of a customer from one ESCO to another, from a distribution utility to an ESCO, or from an ESCO to a distribution utility.

Switching cycle – For electric service, the period between the date of the last meter read and the next regularly scheduled meter read. For gas customers, the period between the date of the last meter read and the next regularly scheduled meter read or the first day of the month and the first day of the following month.

Termination Fee – An amount specified in an ESCO sales agreement where such agreement permits the ESCO to assess and collect a charge in such amount to a customer who terminates the agreement before the end of a term described in that agreement, regardless of whether the assessed amount is identified as a fee, a charge, liquidated damages or a methodology for the calculation of damages, and regardless of whether it is fixed, scaled or subject to calculation based on market factors. In the event the customer is deceased before the end of such contract term, no fee for termination or early cancellation shall be assessed.

Verification Agent - An entity that is an independent vendor/contractor conducting, on behalf of the ESCO, verification of an agreement, resulting from telephonic or door-to-door marketing with a customer to initiate service and begin enrollment or to obtain customer authorization for release of information, as required by Section 5, Attachment 1 of the UBP. In the limited circumstance where the verification is only of customer authorization for release of information, the entity does not need to be independent of the ESCO.

SECTION 2: ELIGIBILITY REQUIREMENTS

A. Applicability

This Section sets forth the process that an applicant is required to follow for a Department of Public Service (the Department) finding of eligibility to sell natural gas or electricity as an ESCO, that an ESCO is required to follow to maintain eligibility, and that a distribution utility is required to follow for discontinuance of an ESCO's or Direct Customer's participation in a distribution utility's retail access program.

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:

- a. A completed Retail Access Eligibility Application Form (Application), available on the Department website (www.dps.ny.gov), www.dps.ny.gov). The Application shall require the applicant to:
 - i. identify the methods by which it intends to market its products and services to customers;
 - ii. identify the category/categories of commodity products it intends to provide to customers (e.g. variable-rate, fixed-rate, or renewably sourced commodity);
 - iii. disclose each state in which the applicant operates as an ESCO or has operated within the 24 months preceding the date of application and provide any data in its possession regarding complaint history;
 - iv. disclose any other trade names used by the applicant and the state in which the trade name was/is used;
 - v. disclose and describe any data breaches associated with customer proprietary information that occurred in any jurisdiction within the 24 months preceding the date of application, as well as any actions taken by the applicant in response to the incident(s);
 - vi. disclose and describe specific policies and procedures established by the applicant to secure customer data; and
 - vii. disclose any history of bankruptcy, dissolution, merger, or acquisition activities in the 24 months preceding the date of application, including data for affiliates of the ESCO applicant and upstream owners and subsidiaries.

~~a.b.~~ A sample standard Sales Agreement for each customer class that meets the requirements set forth in Section 5.B.3, infra.

~~b.c.~~ Sample forms of the notices sent upon assignment of sales agreements, discontinuance of service, or transfer of customers to other providers.

~~e.d.~~ A sample ESCO bill used when dual billing is in effect and, if applicable, a sample ESCO consolidated bill, with terms stated in clear, plain language;

~~d.e.~~ Procedures used to obtain customer authorization for ESCO access to a

customers' historic usage or credit information;

e.f. Sample copies of informational and promotional materials that the ESCO uses for mass marketing purposes;

f.g. Proof of registration with the New York State Department of State;

g.h. Internal procedures for prevention of slamming and cramming;

h.i. Name, postal and e-mail addresses, and telephone and fax numbers for the applicant's main office;

i.j. Names and addresses of any entities that hold ownership interests of 10% or more in the ESCO, including a contact name for corporate entities and partnerships;

k. Detailed explanation of any criminal or regulatory sanctions imposed during the previous 36 months against any senior officers of the ESCO or any entities holding ownership interests of 10% or more in the ESCO;

j.l. An Officer Certification document sworn to by a high-level officer of the ESCO applicant, such as the Chief Executive Officer, President or the equivalent, in which the officer affirms that the ESCO is willing and able to comply with all applicable laws and regulations;

k.m. A copy of the ESCO's quality assurance program, which is designed to monitor (a) compliance with Section 10 of the UBP and (b) accuracy of the ESCO marketing materials provided to prospective customers;

l.n. A completed Service Provider Contact Form, which can be found on the Department's website <http://www.dps.ny.gov/ocs.html>, identifying the ESCO's employee(s) responsible for resolving consumer complaints received by the Department and referred to the ESCO; and

m.o. A list of the entities, including contractors and sub-contractors, that will market to customers on behalf of the ESCO. The list must include the entities' names, addresses, phone numbers and owners, managers, and/or principals. This list must be updated regularly as entities are added or removed.

2. Applicants shall submit to the Department the name of the utility that will test designated EDI transactions required for syntactical verification in the Phase I testing program. The Department shall maintain a list of ESCOs that successfully complete Phase I test requirements by transaction type.
3. An ESCO that knowingly makes false statements in its application package is subject to denial or revocation of eligibility.
4. If the application package contains information that is a trade secret or sensitive for security reasons, the applicant may request that the Department withhold disclosure of the information, pursuant to the Freedom of Information Law (Public Officers Law Article 6) and Public Service Commission regulations (16 NYCRR §6-1.3).

C. Department Review Process

1. The Department shall review the ~~a~~Application information and documentation submitted by ~~for~~ each applicant and make an initial determination as to the applicant's likelihood of compliance with the Uniform Business Practices if the ESCO were deemed eligible to operate in the State. To enable the Department to make a thorough and assessment of an application, ~~A~~an ESCO shall notify the Department of any major changes in the information submitted in the Retail

Access Eligibility Application Form and/or application package that occurs during the Department review process.

- ~~1.2.~~ Following its review of the Application information and documentation, tThe Department shall advise the applicant, in writing, if the ~~a~~Application# is approved and the applicant is eligible to operate in the State and submitted the required information and if satisfaction of Phase I EDI testing requirement has been verified by the utility designated by the applicant.
3. ESCOs deemed eligible to provide commodity service by the Department must begin serving customers within two-years from the date of the letter notifying the ESCO of their eligibility status (eligibility letter). The ESCO that does not begin serving customers within such two-year period may be required to conduct additional EDI testing before enrollments will be processed.
4. If following its review of the Application information and documentation the Department determines that the applicant is not likely to comply with the UBP if the ESCO were deemed eligible, the Department may recommend to the Commission that, for good cause shown, the Commission deny the ESCO's Application.
5. In any instance that the Department recommends to the Commission that an ESCO applicant be denied eligibility, the applicant shall be afforded an opportunity to provide to the Commission with a response in rebuttal to the Department's recommendation and in support of its application before the Commission renders a final eligibility determination.
- ~~2-6.~~ The Department shall periodically review the eligibility of each ESCO operating in New York and make a recommendation to the Commission if the Department finds that the ESCO should not be permitted to continue operating in New York.

D. Maintaining ESCO Eligibility Status

1. An ESCO shall submit by January 31 each year (January 31 Statement):
 - a. a statement that the information and attachments in its Retail Access Eligibility Form and application package are current; or
 - b. a description of revisions to the Retail Access Eligibility Form and application package and a copy of the revised portions or, at the ESCO's option, a copy of the revised portions identifying the revisions by highlighting or other means; and
 - ~~b.c.~~ An Officer Certification document, as required by Section 2.B.1.-
2. An ESCO shall update all the information it submitted in its original application package to the Department every three years, starting from the date of its eligibility letter, consistent with the requirements of UBP Section 2.B. An ESCO's status as an eligible supplier is continuous from the date of the Department eligibility letter, unless revoked or otherwise limited in accordance with UBP Section 2.D.5. If the three-~~y~~-year anniversary date falls within one month of January 31, the ESCO shall resubmit its application package in lieu of the January 31 statement.
3. An ESCO shall file with the Secretary, a separate average unit price for products with no energy-related value-added services for each of two groups of customers and by load zone: i) residential price fixed for a minimum 12-month period; ii) residential variable price. The averages should be weighted by the amount of commodity sold at each price within each customer category. ESCOs shall also file the number of customers purchasing products in those categories. ESCOs

shall file the required information quarterly, reflecting data over that period, within 30 days of the end of each calendar quarter (i.e., data must be provided no later than April 30th, July 30th, October 30th and January 30th of each year).¹

4. An ESCO shall submit at other times during the year:
 - a. A description of any major change in the Retail Access Eligibility [Application](#) Form and/or application package and a copy of the revised portions or, at the ESCO's option, a copy of the revised portions identifying the revisions by highlighting or other means. For purposes of Subdivision D of this Section, the term, "major change," means a revision in the terms and conditions applicable to the business relationship between the ESCO and its customers, including provisions governing the process for termination of sales agreements.
 - b. Changes in marketing plans, including changes to the list required in subsection B.1.n of this Section of the UBP.
 - c. Changes in the ESCO's business and customer service information displayed on the Department's Website.
 - d. At least once every thirty days, each ESCO serving residential customers must post a price for each product it offers to those customer classes (e.g., fixed-price, variable-price, renewable energy, with each type of value-added service, etc.) on the Power to Choose website. Each ESCO must guarantee to charge new customers no more than the price of the ESCOs posted offers at the time of the customer's agreement for each product.
 - e. Changes in personnel responsible for resolving consumer complaints received by the Department and referred to the ESCO.
5. An ESCO may be subject to the consequences listed in UBP Section 2.D.6.b for reasons, including, but not limited to:
 - a. false or misleading information in the application package;
 - b. failure to adhere to the policies and procedures described in its Sales Agreement;
 - c. failure to comply with required customer protections;
 - d. failure to comply with applicable NYISO requirements, reporting requirements, or Department oversight requirements;
 - e. failure to provide notice to the Department of any material changes in the information contained in the Retail Access Eligibility Form or application package;

¹ If the Power-to-Choose website is modified to allow ESCOs to file this information there, the Department may notify ESCOs that compliance with this provision may be accomplished in that manner.

- f. failure to comply with the UBP terms and conditions, including discontinuance requirements;
 - g. failure to comply with EDI transaction set standards and processing protocols and/or use properly functioning EDI systems;
 - h. repeated failures to comply with price reporting requirements, reporting misleading price information, or continuing to fail to comply with price reporting requirements after withdrawal of eligibility to enroll new customers;
 - i. failure to comply with the Commission's Environmental Disclosure Requirements or failure to comply with other Commission Orders, Rules or Regulations;
 - j. failure to reply to a complaint filed with the Department and referred to the ESCO within the timeframe established by the Department' Office of Consumer Services which is not less than five days;
 - k. any of the reasons stated in Subdivision F of this Section; or
 - l. a material pattern of consumer complaints on matters within the ESCO's control;
 - m. failure to comply with any federal, state, or local laws, rules, or regulations related to sales or marketing; or 'No Solicitation' signage on the premises; or
 - n. failure to comply with any of the Marketing Standards set forth in Section 10 of the UBP.
6. In determining the appropriate consequence for a failure or non-compliance in one or more of the categories set forth in UBP Section 2.D.5, the Commission or Department may take into account the nature, the circumstances, including the scope of harm to individual customers, and the gravity of the failure or non-compliance, as well as the ESCO's history of previous violations.
- a. The Commission or Department shall:
 1. Either (a) notify the ESCO in writing of its failure to comply and request that the ESCO take appropriate corrective action or provide remedies within the directed cure period, which will be based on a reasonable amount of time given the nature of the issue to be cured; or (b) order that the ESCO show cause why a consequence should not be imposed.
 2. The Commission may impose the consequences listed in subparagraph b of this paragraph if (a) ESCO fails to take corrective actions or provide remedies within the cure period; or (b) the Commission determines that the incident or incidents of non-compliance are substantiated and the consequence is appropriate.
 3. Consequences shall not be imposed until after the ESCO is provided notice and an opportunity to respond.
 4. The notice of consequences imposed by the Commission will be published on the Department's website.

- b. Consequences for non-compliance in one or more of the categories set forth in UBP Section 2.D.5 may include one or more of the following restrictions on an ESCO's opportunity to sell electricity and/or natural gas to retail customers:
 1. Suspension from a specific Commission approved retail program in either a specific service territory or all territories in New York;
 2. Suspension of the ability to enroll new customers in either a specific service territory or all service territories in New York;
 3. Imposition of a requirement to record all telephonic marketing presentations, which shall be made available to the Department for review;
 4. Reimbursements to customers who did not receive savings promised in the ESCO's sales agreement/Customer Disclosure Statement or substantially demonstrated to have been included in the ESCO's marketing presentation or to customers who incurred costs as a result of the ESCO's failure to comply with the marketing standards set forth in Section 10 of the UBP;
 5. Release of customers from sales agreements without imposition of early termination fees;
 6. Revocation of an ESCO's eligibility to operate in New York; and,
 7. Any other measures that the Commission may deem appropriate.
 - c. Consequences imposed pursuant to this paragraph shall continue to apply until the ESCO's failure to comply with the UBP has been cured or the Commission or Department has determined that no further cure is necessary.
7. An ESCO's eligibility to serve customers is valid unless: the ESCO abandons its eligibility status; or such status is revoked by the Commission through a final order pursuant to UBP Section 2.D.6.
 8. The Department shall notify distribution utilities upon notice to the ESCO, and the NYISO if applicable, of any determination to revoke an ESCO's eligibility to sell natural gas and/or electricity. The distribution utility shall notify the ESCO's customers, in accordance with paragraph 3 of Subdivision F of this Section, of any Department revocation of an ESCO's eligibility.
- E. Distribution Utility Requirements
1. After receipt of the Department's compliance letter, the ESCO shall notify the distribution utility, and NYISO if applicable, of its eligibility status and intent to complete the process to commence operation in the distribution utility's service area, including execution of any operating agreement that is required.
 2. Upon satisfaction of the distribution utility's and, if applicable the NYISO's requirements, and successful completion of EDI testing conducted by the distribution utility, the ESCO may enter into an operating agreement, if any is required, with the distribution utility to commence operations in its service territory.

- F. Discontinuance of an ESCO's and Direct Customer's Participation in a Retail Access Program
1. In accordance with the procedures established in this Subdivision, a distribution utility may discontinue an ESCO's or Direct Customer's participation in its retail access program for the following reasons:
 - a. Failure to act that is likely to cause, or has caused, a significant risk or condition that compromises the safety, system security, or operational reliability of the distribution utility's system, and the ESCO or Direct Customer failed to eliminate immediately the risk or condition upon verified receipt of a non-EDI notice;
 - b. Failure to provide natural gas (provided zero quantity) to the distribution utility's city gate;
 - c. Failure to pay an invoice upon the due date;
 - d. Failure to provide for delivery of at least 95% of the amount of natural gas directed by a distribution utility for delivery or at least 80% of the daily metered usage of the ESCO's customers or a Direct Customer's specified load or lower percentages included in a balancing program established in a distribution utility's tariff and/or any operating agreement;
 - e. Failure to maintain a creditworthiness standard or provide required security;
 - f. Failure to comply with the terms and conditions of a distribution utility's tariff, operating agreement, or Gas Transportation Operating Procedures (GTOP) Manual to the extent that said documents are consistent with the provisions of the UBP;
 - g. Discontinuance of an ESCO's or Direct Customer's participation in a distribution utility's retail access program by the NYISO; or,
 - h. Commission determination that an ESCO is not eligible to sell natural gas or electricity to retail customers.
 2. To initiate the discontinuance process, a distribution utility shall send a non-EDI discontinuance notice by overnight mail and verified receipt, to the ESCO or Direct Customer and the Department. The notice shall contain the following information:
 - a. The reason, cure period, if any, and effective date for the discontinuance;
 - b. A statement that the distribution utility shall notify the ESCO's customers of the discontinuance if the ESCO fails to correct the deficiency described in the notice within the cure period, unless the Department directs the distribution utility to stop the discontinuance process;
 - c. The distribution utility may suspend the ESCO's right to enroll customers until correction of the deficiency; and
 - d. Correction of the deficiency within the cure period, or a Department directive, will end the discontinuance process.
 3. The distribution utility shall send notices to the ESCO's customers informing them of the discontinuance and providing the following information:

- a. The discontinuance shall or did occur on one of the following dates selected by the distribution utility: the scheduled meter read date, the first day of the month, or another date, if readings are estimated, or on the date of a special meter read;
 - b. Customers have the option to select another ESCO or return to full utility service or, if a program authorizing random assignment is in effect, to enroll with a designated ESCO through that program;
 - c. Names and telephone numbers of ESCOs offering service to retail customers in the distribution utility's service territory;
 - d. Any ESCO selected by a customer may file an enrollment request on the customer's behalf with the distribution utility, and the distribution utility shall charge no fee for changing the customer's provider to the new ESCO; and,
 - e. During any interim between discontinuance of a customer's current ESCO and enrollment with a new ESCO, the distribution utility shall provide service under its applicable tariff, unless the distribution utility notified the customer that it is terminating its delivery services to the customer on or before the discontinuance date.
4. The distribution utility shall submit a sample copy of its discontinuance notice to the Department for review and approval prior to distribution to customers.
 5. The distribution utility may request permission from the Department to expedite the discontinuance process, upon a showing that it is necessary for safe and adequate service or in the public interest. Any expeditious discontinuance process shall include the ESCO or Direct Customer, and the distribution utility.
 6. Upon any discontinuance, an ESCO or Direct Customer shall remain responsible for payment or reimbursement of any and all sums owed under the distribution utility tariffs, any tariffs on file with the FERC and service agreements relating thereto, or any agreements between the ESCO and the distribution utility.
 7. The notice requirements and time limits for a distribution utility to discontinue an ESCO's or Direct Customer's participation in a distribution utility's retail access program (discontinue participation) are:
 - a. Upon a distribution utility determination that an ESCO's or Direct Customer's action, or failure to act, is likely to cause, or has caused, a significant risk or condition that compromises the safety, system security, or operational reliability of the distribution utility's system and that the ESCO or Direct Customer failed to eliminate immediately the risk or condition upon verified receipt of a non-EDI notice, the distribution utility may discontinue participation as soon as practicable.
 - b. Upon a distribution utility determination that an ESCO or Direct Customer responsible for the delivery of natural gas failed, except under force majeure conditions, to deliver natural gas (provided zero quantity) to the distribution utility's service territory for its load, the distribution utility may discontinue participation no sooner than two business days after receipt by the ESCO or Direct Customer of a discontinuance notice.
 - c. Upon a distribution utility determination that an ESCO or Direct Customer failed to pay an invoice on the due date, as specified in the distribution

- utility's tariff, and the ESCO's or Direct Customer's required security or credit limit is insufficient to cover the unpaid amount, with interest, the distribution utility may discontinue participation no sooner than ten business days (cure period) after receipt by the ESCO or Direct Customer of a discontinuance notice. If the ESCO or Direct Customer pays the amount due
- d. on or before the expiration of the cure period, the distribution utility shall stop the process to discontinue participation.
 - e. Upon a distribution utility determination that an ESCO or Direct Customer responsible for the nomination and delivery of natural gas failed, except in force majeure conditions, to nominate and/or deliver sufficient natural gas to the distribution utility's service territory to satisfy at least 95% of the amount of natural gas directed by a distribution utility for delivery or at least 80% of the daily metered usage of the ESCO's customers or the Direct Customer's specified load or lower percentages included in a balancing program established in a distribution utility's tariffs and/or any operating agreement on any three days during any month, the distribution utility may initiate a discontinuance process no sooner than five business days (cure period) after receipt by the ESCO or Direct Customer of a discontinuance notice. If the ESCO or Direct Customer provides adequate assurances and a description of any necessary process changes that ensure adequate nominations and deliveries on or before the expiration of the cure period, the distribution utility shall stop the discontinuance process. Upon a determination to continue the discontinuance process because the assurances and proposed process changes are inadequate, the distribution utility shall notify the ESCO or Direct Customer that it will discontinue participation no later than 15 business days from the expiration of the cure period. The distribution utility shall notify the ESCO's customers that the distribution utility will discontinue participation on or before the expiration of 15 business days from the end of the cure period. If a failure to provide sufficient natural gas for any 3 days during a calendar month occurred during the past 12 months and the distribution utility sent a related discontinuance notice for each occurrence, it may discontinue participation no sooner than two business days after receipt by an ESCO or Direct Customer of a discontinuance notice.
 - f. Upon a distribution utility determination that an ESCO or Direct Customer failed to provide or maintain a creditworthiness standard or required security, the distribution utility may initiate a discontinuance process no sooner than five business days (cure period) after receipt by the ESCO or Direct Customer of a discontinuance notice. If the ESCO or Direct Customer satisfies the creditworthiness standard or provides the required security on or before the expiration of the cure period, the distribution utility shall stop the discontinuance process. Upon a determination to continue with the discontinuance process because the ESCO or Direct Customer failed to comply with the creditworthiness standard or provide adequate security, the distribution utility shall notify the ESCO or Direct Customer that it will discontinue participation no later than 15 business days from the expiration of the cure period. The distribution utility shall notify the ESCO's customers that it will discontinue participation on or before 15 days from the expiration

of the cure period. If a failure to comply with the creditworthiness standard or provide adequate security occurred twice during the past 12 months and the distribution utility sent a related discontinuance notice for each failure, it may discontinue participation no sooner than two business days after receipt by an ESCO or Direct Customer of a discontinuance notice.

- g. Upon a distribution utility determination that an ESCO or Direct Customer failed, except in force majeure conditions, to comply with any other applicable provision of the distribution utility's tariff, operating agreement, or GTOP manual, the distribution utility may initiate a discontinuance process no sooner than ten business days (cure period) after receipt by the ESCO or Direct Customer of a discontinuance notice. If the ESCO or Direct Customer provides adequate assurances and a description of any necessary process changes that ensure compliance on or before the expiration of the cure period, the distribution utility shall stop the discontinuance process. Upon a determination to continue the discontinuance process because the assurances and proposed process changes are inadequate, the distribution utility shall notify the ESCO or Direct Customer that it will discontinue participation no later than 15 business days from the expiration of the cure period. The distribution utility shall notify the ESCO's customers that it will discontinue participation on or before the expiration of 15 business days after the end of the cure period.

SECTION 3: CREDITWORTHINESS

A. Applicability

This Section establishes creditworthiness standards that apply to ESCOs and Direct Customers. An ESCO's and Direct Customer's participation in a distribution utility's retail access program is contingent upon satisfaction of creditworthiness requirements and provision of any security.

B. ESCOs

1. An ESCO shall satisfy a distribution utility's creditworthiness requirements if:
 - a. The ESCO, or a guarantor, maintains a minimum rating from one of the rating agencies and no rating below the minimum from one of the other two rating agencies. For the purposes of this Section, minimum rating shall mean "BBB" from Standard & Poor's, "Baa2" from Moody's Investor Service, or "BBB" from Fitch Ratings (minimum rating); or,
 - b. The ESCO enters into a billing arrangement with the distribution utility, whereby the distribution utility bills customers on behalf of the ESCO and retains the funds it collects to offset any balancing and billing service charges provided that the distribution utility has a priority security interest with a first right of access to the funds. The ESCO shall submit an affidavit from a senior officer attesting to such utility interest and right. Except that an ESCO serving customers outside of such billing arrangement, must satisfy the security requirements of UBP Section 3.D with respect to those customers.
2. If an ESCO, or a guarantor, is not rated by Standard & Poor's, Moody's Investor Service or Fitch Ratings, it shall satisfy a distribution utility's creditworthiness requirements if the ESCO, or a guarantor:
 - a. Maintains a minimum "1A2" rating from Dun & Bradstreet (Dun and Bradstreet minimum rating) and the ESCO maintains 24 months good payment history with the distribution utility; and,
 - b. Provides any security required by the distribution utility, calculated in accordance with Subdivision D, after deduction of the following unsecured credit allowances:

| <u>Rating</u> | <u>Unsecured Credit Allowance</u> |
|---------------|---|
| 5A1 or 5A2 | 30% of an ESCO's tangible net worth, up to 5% of the distribution utility's average monthly revenues for the applicable service |
| 4A1 or 4A2 | 30% of an ESCO's tangible net worth, up to 5% of the distribution utility's average monthly revenues for the applicable service |
| 3A1 or 3A2 | 30% of an ESCO's tangible net worth, up to 5% of the distribution utility's average monthly revenues for the applicable service |
| 2A1 or 2A2 | 50% of an ESCO's tangible net worth, up to \$500,000 |
| 1A1 or 1A2 | 50% of an ESCO's tangible net worth, up to \$375,000 |

An ESCO shall provide information, upon request of the distribution utility, to enable the distribution utility to verify the ESCO's equity. The distribution utility may request reasonable information to obtain the verification and shall safeguard it as confidential information and protect it from public disclosure. The distribution utility may deny the unsecured credit allowance to any ESCO that fails to provide the requested information.

3. A distribution utility may require an ESCO to provide and maintain security in the full amount of the distribution utility's credit risk, calculated in accordance with Subdivision D, if:
 - a. The ESCO, or a guarantor, is not rated;
 - b. The ESCO, or a guarantor, with a minimum rating is placed on credit watch with negative implications or is rated below the minimum rating;
 - c. The ESCO, or a guarantor, is rated below the Dun & Bradstreet minimum rating or the ESCO fails to maintain 24 months good payment history with the distribution utility; or,
 - d. An ESCO issuing consolidated bills fails to render timely bills to customers or to make timely payments to the distribution utility.
4. If a distribution utility's credit risk, associated with an ESCO's participation in its retail access program, exceeds 5% of the distribution utility's average monthly revenues for the applicable service, the distribution utility may require the ESCO, in addition to maintaining a minimum rating, to provide and maintain security in the amount of such excess credit risk.

C. Direct Customers

A Direct Customer shall satisfy a distribution utility's creditworthiness requirements if:

1. Its account is current and remained current for the past 12 months; and,
2. If its debt is rated, it maintains a minimum rating of its long-term unsecured debt securities from one of the rating agencies and no rating below the minimum rating from one of the other two rating agencies.

D. Calculation of Credit Risk and Security

The distribution utility shall calculate its credit risk and establish its security requirements as follows:

1. Delivery Service Risk

- a. For an ESCO that issues a consolidated bill under a multi-retailer model, a distribution utility may require security in an amount no greater than 45 days of peak usage of the ESCO's customers' projected energy requirements during the next 12 months, priced at the distribution utility's applicable delivery service rate and including relevant customer charges.
- b. For an ESCO that bills customers for delivery and commodity services under a single retailer model, a distribution utility may require security in an amount no greater than 60 days of peak usage of the ESCO's customers' projected energy requirements during the next 12 months, priced at the distribution utility's applicable delivery service rate and including relevant customer charges.
- c. Upon an ESCO request, the distribution utility shall establish separate security requirements for summer (April 1 - October 31) and winter (November 1 - March 31) and may retain winter security until the end of two months (April and May) after the end of the winter period.

2. Natural Gas Imbalance Risk

- a. The distribution utility may require an ESCO or Direct Customer to provide security in an amount no greater than the ESCO's customers' or a Direct Customer's projected maximum daily quantity times peak forecasted NYMEX price for the next 12 months and for upstream capacity to the city gate times 10 days.
- b. Upon the request of an ESCO or Direct Customer, the distribution utility shall establish separate security requirements for summer (April 1 - October 31) and winter (November 1 - March 31) and may retain winter security until the end of two months (April and May) after the end of the winter period.

3. Major Change in Risk

- a. A major change shall mean a change in credit risk of more than the greater of 10% or \$200,000.
- b. The ESCO or Direct Customer shall promptly notify the distribution utility and the Department of any major change in credit and or rating risk.
- c. The distribution utility may require an ESCO or a Direct Customer, within five days, to provide additional amounts of security if a major change occurs to increase its credit risk, as follows:
 1. If Standard & Poors, Moody's Investor Service, or Fitch Ratings downgrades an ESCO's, or its guarantor's, rating or a Direct Customer's

debt below the minimum rating or Dun & Bradstreet downgrades an ESCO's, or its guarantor's, rating or a Direct Customer's debt; or,

2. An increase occurs in customer usage or in energy prices and such increase is sustained for at least 30 days.
- d. In the event that a major change occurs to decrease a distribution utility's credit and/or rating risk, results in compliance by an ESCO or Direct Customer with creditworthiness requirements, and elimination of the basis for holding some or all of the security, the distribution utility shall return or release the excess amount of the ESCO's or Direct Customer's security with accumulated interest, if applicable. The distribution utility shall return such amount within five business days after receipt of an ESCO or Direct Customer notice informing the distribution utility of the occurrence of such major change.

E. Security Instruments

1. The following financial arrangements are acceptable methods of providing security:
 - a. Deposit or prepayment, which shall accumulate interest at the applicable rate per annum approved by the Public Service Commission for "Other Customer Capital";
 - b. Standby irrevocable letter of credit or surety bond issued by a bank, insurance company or other financial institution with at least an "A" bond rating;
 - c. Security interest in collateral; or,
 - d. Guarantee by another party or entity with a credit rating of at least "BBB" by S&P, "Baa2" by Moody's, or "BBB" by Fitch; or
 - e. Other means of providing or establishing adequate security.
2. A distribution utility may refuse to accept any of these methods for just cause provided that its policy is applied in a nondiscriminatory manner to any ESCO.
3. If the credit rating of a bank, insurance company, or other financial institution that issues a letter of credit or surety bond to an ESCO or Direct Customer falls below an "A" rating, the distribution utility shall allow a minimum of five business days for an ESCO or Direct Customer to obtain a substitute letter of credit or surety bond from an "A" rated bank, insurance company, or other financial institution.

F. Lockbox

If the distribution utility and ESCO arrange for a lockbox, security requirements are reduced by 50% provided that the arrangement includes the following:

1. Agreement on allocation of funds and the first right of the distribution utility, in the event of an ESCO's financial difficulty, to obtain funds in the lockbox deposited to the credit of the ESCO;
2. Establishment of rules for managing the lockbox;
3. Agreement on conditions for terminating the lockbox for non-compliance with the rules or for failure to receive customer payments on a timely basis; and,

4. Responsibility of an ESCO for any costs associated with implementing and administering the lockbox.

G. Calling on Security

1. If an ESCO or Direct Customer fails to pay the distribution utility, in accordance with UPB Section 7, Invoices, the distribution utility may draw from security provided that the distribution utility notifies the ESCO or Direct Customer five business days' in advance of the withdrawal and the ESCO or Direct Customer fails to make full payment before the expiration of the five business days.
2. If an ESCO receives a discontinuance notice or elects to discontinue service to customers and owes amounts to the distribution utility, the distribution utility may draw from the security provided by the ESCO without prior notice.
3. If an ESCO files a petition or an involuntary petition is filed against an ESCO under the laws pertaining to bankruptcy, the distribution utility may draw from security, to the extent permitted by applicable law.

H. Application by Distribution Utilities

1. Within ten business days after receipt of a complete ESCO application, a distribution utility shall complete its evaluation of initial creditworthiness, state the rationale for its determination, and provide the calculation supporting the credit limit and any resulting security requirement.
2. A distribution utility shall perform, at least annually, an evaluation, at no charge, of an ESCO's satisfaction of creditworthiness standards and security requirements.
3. A distribution utility shall perform evaluations of creditworthiness, security requirements, and security calculations in a non-discriminatory and reasonable manner.
4. Pending resolution of any dispute, the ESCO or Direct Customer shall provide requested security within the time required in this Section.
5. A distribution utility may reduce or eliminate any security requirement provided that it reduces or eliminates the requirement in a nondiscriminatory manner for any ESCO or Direct Customer. The distribution utility may request reasonable information to evaluate credit risk. If an ESCO or Direct Customer fails to provide the requested information, a distribution utility may deny the ESCO or Direct Customer an opportunity to provide lower or no security.

SECTION 4: CUSTOMER INFORMATION**A. Applicability**

This Section establishes practices for release of customer information by distribution utilities or MDSPs to ESCOs and Direct Customers and identifies the content of information sets. The distribution utility or MDSP and an ESCO shall use EDI standards, to the extent developed, for transmittal of customer information and may transmit data, in addition to the minimum information required, via EDI or by means of an alternative system.

B. Customer Authorization Process

The distribution utility or MDSP shall provide information about a specific customer requested by an ESCO authorized by the customer to receive the information.

1. An ESCO shall obtain customer authorization to request information, in accordance with the procedures in UBP Section 5, Changes in Service Providers, Attachments 1, 2, and 3. An ESCO shall inform its customers of the types of information to be obtained, to whom it will be given, how it will be used, and how long the authorizations will be valid. The authorization is valid for no longer than six months unless the sales agreement provides for a longer time.
2. A distribution utility and a MDSP shall assume that an ESCO obtained proper customer authorization if the ESCO is eligible to provide service and submits a valid information request.
3. An ESCO shall retain, for a minimum of two years or for the length of the sales agreement whichever is longer, verifiable proof of authorization for each customer. Verification records shall be provided by an ESCO, upon request of the Department, within five calendar days after a request is made. Locations for storage of the records shall be at the discretion of the ESCOs.
4. Upon request of a customer, a distribution utility and/or MDSP shall block access by ESCOs to information about the customer.
5. An ESCO and its agent shall comply with statutory and regulatory requirements pertaining to applicable state and federal do-not-call registries.

C. Customer Information Provided to ESCOs¹

1. Release of Information. A distribution utility and a MDSP shall use the following practices for transferring customer information to an ESCO:
 - a. A distribution utility shall provide the information in the Billing Determinant Information Set upon acceptance of an ESCO's enrollment request and the information in the Customer Contact Information Set and the Credit Information Set, upon ESCO request.

¹ Upon enrollment of a customer, an ESCO shall receive usage data and any subsequent changes, corrections and adjustments to previously supplied data or estimated consumption for a period, at the same time that the distribution utility validates them for use. An ESCO issuing consolidated bills is entitled to receive billing information, in accordance with UBP Section 9, Billing and Payment Processing.

- b. The distribution utility or MDSP shall respond within two business days to valid requests for information as established in EDI transaction standards and within five business days to requests for data and information for which an EDI transaction standard is not available. The distribution utility or MDSP shall provide the reason for rejection of any valid information request.
2. Customer Contact Information Set. The distribution utility or MDSP, to the extent it possesses the information, shall provide, upon an ESCO request, consumption history for an electric account and consumption history and/or¹ a gas profile for a gas account.
 - a. Consumption history² for an electric or gas account shall include:
 1. Customer's service address;
 2. Electric or gas account indicator;
 3. Sales tax district used by the distribution utility and whether the utility identifies the customer as tax exempt;
 4. Rate service class and subclass or rider by account and by meter, where applicable;
 5. Electric load profile reference category or code, if not based on service class, whether the customer's account is settled with the ISO utilizing an actual 'hourly' or a 'class shape' methodology, or Installed Capacity (ICAP) tag, which indicates the customer's peak electricity demand;
 6. Customer's number of meters and meter numbers;
 7. Whether the customer receives any special delivery or commodity "first through the meter" incentives, or incentives from the New York Power Authority;
 8. The customer's Standard Industrial Classification (SIC) code;
 9. Usage type (e.g., kWh or therm), reporting period, and type of consumption (actual, estimated, or billed);
 10. Whether the customer's commodity service is currently provided by the utility;
 11. 12 months, or the life of the account, whichever is less, of customer data via EDI and, upon separate request, an additional 12 months, or the life of the account, whichever is less, of customer data via EDI or an alternative system at the discretion of the distribution utility or MDSP, and, where applicable, demand information;³ if the customer has more than one meter associated with an account, the distribution utility or MDSP shall provide the applicable information, if available, for each meter; and

¹ If a distribution utility or MDSP offer a gas profile and consumption history, an ESCO may choose either option. A distribution utility or MDSP shall make available, upon request, class average load profiles for electric customers.

² A distribution utility or MDSP, in addition to EDI transmittal, may provide Web based access to customer history information.

³ A distribution utility may provide data for a standard 24 months or life of the account, whichever is less, as part of its Customer Contract Information Set.

12. Electronic interval data in summary form (billing determinants aggregated in the rating periods under a distribution utility's tariffs) via EDI, and if requested in detail, via an acceptable alternative electronic format.
- b. A gas profile for a gas account shall include:
 1. Customer's service address;
 2. Gas account indicator;
 3. Customer's number of meters and meter numbers;
 4. Sales tax district used by the distribution utility for billing and whether the utility identifies the customer as tax exempt;
 5. The customer's Standard Industrial Classification (SIC) code;
 6. Whether the customer's commodity service is currently provided by the utility;
 7. Rate service class and subclass or rider, by account and by meter, where applicable;
 8. Date of gas profile; and,
 9. Weather normalization forecast of the customer's gas consumption for the most recent 12 months or life of the account, whichever is less, and the factors used to develop the forecast.
3. Billing Determinant Information Set. Upon acceptance of an ESCO enrollment request, a distribution utility shall provide the following billing information for an electric or gas account, as applicable¹:
 - a. Customer's service address, and billing address, if different;
 - b. Electric and/or gas account indicator;
 - c. Meter reading date or cycle and reporting period;
 - d. Billing date or cycle and billing period;
 - e. Meter number, if available;
 - f. Distribution utility rate class and subclass, by meter;
 - g. Description of usage measurement type and reporting period;
 - h. Customer's load profile group, for electric accounts only;
 - i. Life support equipment indicator;
 - j. Gas pool indicator, for gas accounts only;
 - k. Gas capacity/assignment obligation code;
 - l. Customer's location based marginal pricing zone, for electric accounts only; and,
 - m. Budget billing indicator.²

¹ As specified in the EDI standard for an enrollment request and response, the distribution utility may transmit additional data elements, based upon the request, the responding distribution utility, and the commodity type.

² This indicator is limited to 12 month levelized payment plans and does not include other payment plans.

4. Credit Information Set. The distribution utility or MDSP shall provide credit information for the most recent 24 months or life of the account, whichever is less, upon receipt of an ESCO's electronic or written affirmation that the customer provided authorization for release of the information to the ESCO. Credit information shall include number of times a late payment charge was assessed and incidents of service disconnection.

D. Direct Customer Information

A Direct Customer shall receive usage data and any subsequent changes, corrections and adjustments to previously supplied data, and estimated consumption for a period, at the same time that the distribution utility validates them for use. The distribution utility or MDSP shall make available, upon request, to an electric Direct Customer, a class load profile for its service class.

E. Charges for Customer Information

No distribution utility or MDSP shall impose charges upon ESCOs or Direct Customers for provision of the information described in this Section. The distribution utility may impose an incremental cost-based fee, authorized in tariffs for an ESCO's request for customer data for a period in excess of 24 months or for detailed interval data per account for any length of time.

F. Unauthorized Information Release

An ESCO, its employees, agents, and designees, are prohibited from selling, disclosing or providing any customer information obtained from a distribution utility or MDSP, in accordance with this Section, to others, including their affiliates, unless such sale, disclosure or provision is required to facilitate or maintain service to the customer or is specifically authorized by the customer or required by legal authority. If such authorization is requested from the customer, the ESCO shall, prior to authorization, describe to the customer the information it intends to release and the recipient of the information.

SECTION 5: CHANGES IN SERVICE PROVIDERS**A. Applicability**

This Section establishes practices for receiving, processing, and fulfilling requests for changing a customer's electricity or natural gas provider and for obtaining a customer's authorization for the change. A change in a provider includes transfer from: (1) one ESCO to another; (2) an ESCO to a distribution utility; and (3) a distribution utility to an ESCO. This Section also establishes practices for: an ESCO's drop of a customer or a customer's drop of an ESCO, retention of an ESCO after a customer's relocation within a distribution utility's service area, assignment of a customer, and initiation or discontinuance of procurement of electricity or natural gas supplies by a Direct Customer. This Section does not establish practices for obtaining other energy-related services or changing billing options.

The process of changing a service provider is comprised of two steps. For enrollment with an ESCO, the first step is obtaining customer agreement, and any required third-party verification, to accept electric and/or natural gas service according to the terms and conditions of an offer. A sales agreement establishes the terms and conditions of the customer's business arrangement with the ESCO. The second step is enrollment and the distribution utility's modification of its records to list the customer's transfer to a provider on a specific date. The second step is primarily between the ESCO and the distribution utility.

B. Customer Agreement

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

1. The ESCO shall obtain a customer agreement to initiate service and enroll a customer and customer authorization to release information to the ESCO by means of one of the following methods.
 - a. Telephone agreement and authorization, preceded, or followed within three business days, by provision of a sales agreement, in accordance with requirements in Attachment 1 – Telephonic Agreement and Authorization/Third Party Verification Requirements;
 - b. Electronic agreement and authorization, attached to an electronic version of the sales agreement, in accordance with requirements in Attachment 2 – Electronic Agreement and Authorization Requirements; or
 - c. Written agreement bearing a customer's signature on a sales agreement (original or fax copy of a signed document), in accordance with requirements in Attachment 3 – Written Agreement and Authorization Requirements.

2. For any sale resulting from either door-to-door or telephonic marketing, each enrollment is only valid with an independent third-party verification.
3. The ESCO shall provide residential customers the right to cancel a sales agreement within three business days after its receipt (cancellation period).
4. The standard Sales Agreements for each customer class shall include the following information written in plain language:
 - a. Terms and conditions applicable to the business relationship between the ESCO and the customer which includes:
 1. provisions governing the process for rescinding or terminating an agreement by the ESCO or the customer including provisions stating that a residential customer may rescind the agreement within three business days after its receipt;
 2. the placeholder for the price or how the price is determined, the terms and conditions of the agreement, including the term and end date, if any, of the agreement, the amount of the termination fee and the method of calculating the termination fee, if any, the amount of late payment fees, if applicable, and the provisions, if any, for the renewal of the agreement; and,
 3. a clear description of the conditions, if any, that must be present in order for savings to be provided to the customer, if savings are guaranteed.
 - b. Such contract shall also include on the first page thereof a Customer Disclosure Statement (the Statement). The text within this Statement shall state in plain language the terms and conditions described above and set forth in Attachment 4 – Sample Customer Disclosure Statement. When the form contract is used by the ESCO as its agreement with the customer, the Customer Disclosure Statement shall also contain the price term of the agreement. In the event that the text in the Statement differs from or is in conflict with a term stated elsewhere in the agreement, the term described by the text in the Statement shall constitute the agreement with the customer notwithstanding a conflicting term expressed elsewhere in the agreement.
 - c. Procedures for resolving disputes between the ESCO and a customer;
 - d. Consumer protections provided by the ESCO to the customer;
 - e. Method for applying payments and consequences of non-payment;
 - f. Any charges and fees, services, options or products offered by the ESCO;
 - g. Department contact information, including the Department ESCO hotline at 1-888-697-7728;
 - h. ESCO contact information, including a local or toll-free number from the customer's service location, and procedures used for after-hours contacts and emergency contacts, including transfer of emergency calls directly to a distribution utility and/or an answering machine message that includes an emergency number for direct contact with the distribution utility.
 - i. A statement that the ESCO shall provide at least 15 calendar days' notice prior to any cancellation of service to a customer; and

- j. If a condition of service, a statement that the ESCO reserves the right to assign the contract to another ESCO.
5. Additional terms and conditions applicable to residential customers and customers solicited via door-to-door sales include:
- a. Prepayments – no agreement for the provision of energy by an ESCO shall require a prepayment. Where an ESCO is the billing party, it may offer a customer an option of prepayment. Any agreement providing for prepayment may be cancelled by the customer, without penalty within 90 calendar days from the date of such agreement. Any unused portion of the prepayment shall be returned to the customer within 30 business days following cancellation of the agreement.
 - b. Termination fees – no agreement for the provision of energy by an ESCO shall require a termination or early cancellation fee in excess of either a) \$100 for any contract with a remaining term of less than 12 months; or b) \$200 for any contract with a remaining term of more than 12 months or; c) twice the estimated bill for energy services for an average month, provided that an estimate of an average monthly bill was provided to the customer when the offer was made by the ESCO along with the amount of any early termination fee. To calculate such average monthly bill, the ESCO may use an average of the customer’s actual usage for the previous twelve months or if such data is unavailable at the time the offer is made apply the usage for a typical customer in that service classification as reported by the distribution utility or the Commission, and multiply it by the ESCO’s estimate of the average annual rate that will be charged under the agreement.
 - c. Variable charges – all variable charges must be clearly and conspicuously identified in all contracts, sales agreements and marketing materials.
 - d. Material changes and renewals – 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 objects to such renewal within three business days of receipt of the first billing statement under the agreement as renewed. Regarding contract renewals, ~~with the exception of a rate change,~~ or an initial sales agreement that specifies that the agreement automatically renews on a monthly basis with a variable rate methodology which was specified in the initial sales agreement, all changes to the terms of the contract, including changes to the 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. A renewal notice in the standardized format provided by the Department, must be used.
- f. 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."
- g. When a fixed-~~price~~rate-agreement is renewed as a fixed-~~price~~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.

C. Provision of List of ESCOs to Customers

Distribution utilities shall offer to provide a customer who requests initiation of delivery service with an up-to-date list of ESCOs and provide the list at any time, upon request of any customer.

D. Customer Enrollment Procedures

1. An ESCO shall transmit:
 - a. An electric enrollment request to a distribution utility no later than 5 business days prior to the effective date of the enrollment.
 - b. A gas enrollment request to a distribution utility no later than 10 business days prior to the effective date of the enrollment.
 - c. The enrollment request shall contain at a minimum, the information required for processing set forth in Attachment 5, Enrollment Request.
2. The distribution utility shall process enrollment requests in the order received.
3. The distribution utility shall accept only one valid enrollment request¹ for each commodity per customer during a switching cycle. If the distribution utility receives multiple enrollment requests for the same customer during a switching cycle, it shall accept the first valid enrollment request and reject subsequent requests.
4. An ESCO shall submit an enrollment request after it obtains customer authorization, and third-party verification where required, and it has provided the sales agreement to the customer. For telephonic enrollments, in which the ESCO sends the customer the sales agreement via US Mail, the ESCO shall provide for two business days for the customer to receive the sales agreement.
5. After receipt of an enrollment request, the distribution utility shall, within one business day, acknowledge its receipt, and provide a response indicating rejection and the reason, or acceptance and the effective date for the change of provider.

¹ Criteria for determining the validity of an EDI transaction are described in the EDI processing protocols adopted in Case 98-M-0667, Electronic Data Interchange.

6. Upon acceptance of an enrollment request, the distribution utility shall contemporaneously send a notice to the incumbent ESCO that the customer's service with that ESCO will be terminated on the effective date of the new enrollment. In the event that the distribution utility receives notice from the pending ESCO, the incumbent ESCO (with specific customer authorization for each cancellation), or the customer, prior to the effective date that a pending enrollment is cancelled, the distribution utility shall transmit a request to reinstate service to the incumbent ESCO, unless the incumbent ESCO previously terminated service to the customer or the customer requests a return to full utility service.
7. With the exception of a new installation use of an interim estimate of consumption or a special meter reading,¹ a change of providers is effective: for an electric customer, on the next regularly scheduled meter reading date; and, for a gas customer, on the next regularly scheduled meter reading date or the first day of the month, in accordance with provisions set forth in the distribution utility's tariff.² The distribution utility shall set the effective date, which shall be no sooner than 5 business days after receipt of an enrollment request. Service to new delivery customers is effective after the installation is complete and, if necessary, inspected.
8. An off-cycle change of an electric service provider is allowed no later than 15 calendar days before the date requested for the change if a new ESCO or a customer arranges for a special meter reading or agrees to accept an interim date for estimating consumption. The ESCO or customer is required to pay the cost for any special meter reading, in accordance with provisions set forth in the distribution utility's tariff. A change based upon an interim estimate of consumption or a special meter reading is effective on the date of the interim estimate or special meter reading. Off-cycle changes of gas service providers are allowed if the incumbent and new ESCO agree on an effective date no later than 15 calendar days following the request.

E. Customer Notification

1. The distribution utility shall send no later than one calendar day after acceptance of an enrollment request a verification letter to the customer notifying the customer of the acceptance. The notice shall inform the customer that if the enrollment is unauthorized or the customer decides to cancel it, the customer is required immediately to so notify the distribution utility and the pending ESCO.
2. Upon receipt of such cancellation, the distribution utility shall cancel the pending enrollment and reinstate the customer with the incumbent ESCO, if any, or the distribution utility, provided that the distribution utility is notified prior to the planned effective date. If the distribution utility is notified on or after the planned effective date, the change to the new provider shall occur and remain effective for

¹ If meters are read bimonthly and bills are issued monthly using estimated usage, the effective date for the interim months is the date usage is estimated for billing purposes.

² If meters are not read within two business days of the scheduled meter reading day, the distribution utility or MDSP shall estimate usage as of the scheduled meter reading day. The effective date for a change of provider is that date, except where changes of natural gas suppliers are scheduled for the first of the month.

one billing cycle. The customer shall return to full utility service at the end of the next switching cycle, unless the customer is enrolled by another ESCO in accordance with this section prior to the next switching cycle.

3. If a customer notifies the pending ESCO of such cancellation, the pending ESCO shall send a customer's drop request to the distribution utility within one business day.

F. Rejection of Enrollment Requests

The distribution utility may reject an enrollment request for any of the following reasons:

1. Inability to validate the transaction;
2. Missing or inaccurate data in the enrollment request;
3. ESCO's ineligibility to provide service in the specified territory;
4. No active or pending delivery service;
5. A pending valid prior enrollment request; or
6. The account is coded as ineligible for switching.

G. Customer Relocations Within a Service Territory

1. A customer requesting relocation of service within a distribution utility's service territory and continuation of its ESCO service, arranges for continuation at the new location of delivery service by contacting the distribution utility and of commodity service by contacting the ESCO.¹ Each provider contacted by the customer shall remind the customer of the need to contact the other provider to initiate the change in service or arrange for a conference call with the other provider and customer, and within two days, notify the other provider that a customer requested relocation of service.
2. The distribution utility's representative shall inform the customer, or the customer's agent, and the ESCO of the effective dates, contingent upon the customer's approval, for discontinuance of service at one location and commencement of service at the new location. The ESCO shall confirm to the distribution utility that it shall continue service to the customer at the new location.
3. In the event that the ESCO is unable or does not wish to continue service to the customer at the new location, the distribution utility shall provide full utility service to the customer.

H. Customers Returning to Full Utility Service

1. A customer arranges for a return to full utility service by contacting either the ESCO or the distribution utility in accordance with this paragraph. An ESCO contacted by the customer shall, within one business day, process the customer's request to return to full utility service. A utility contacted by a customer shall remind the customer to contact the ESCO about the customer's returning to full

¹ In the Single Retailer Model, the customer contacts only its ESCO. The ESCO notifies the distribution utility of the customer's new service location and mailing address, if applicable. Direct customers contact only the distribution utility.

utility service provided, however, that if the customer has already contacted the ESCO or wants to proceed without contacting the ESCO, the utility shall, within one business day, process the customer's request to return to full utility service. If a change to full utility service results in restrictions on the customer's right to choose another supplier or application of a rate that is different than the one applicable to other full-service customers, the distribution utility shall provide advance notice to the customer.

2. A Direct Customer that intends to change from procuring its own supplies to full utility service shall notify the distribution utility.
 3. No ESCO shall transfer 5,000 or more customers during a billing cycle to full utility service, unless it provides no less than 60 calendar days' notice to the distribution utility and Department. The transfers shall occur on the customers' regularly scheduled meter reading dates, unless the distribution utility and ESCO agree to a different schedule.
 4. The following process sets forth the steps for an ESCO's return of a customer to full utility service.
 - a. An ESCO may discontinue service to a customer and return the customer to full utility service provided that the ESCO notifies the customer and the distribution utility no later than 15 calendar days before the effective date of the drop. The ESCO's right to discontinue service to any customer is subject to any limitations contained in its sales agreement.
 - b. An ESCO's notice to retail customers shall provide the following information:
 1. Effective date of the discontinuance, established by the distribution utility, unless the ESCO arranged for an off-cycle date;
 2. Statement that the customer has the option to select another ESCO receive full utility service from the distribution utility, or, if available in the distribution utility's service area and the customer is eligible, accept random assignment by the distribution utility to an ESCO; and,
 3. Statement that customer shall receive full utility service until the customer selects a new ESCO and the change in providers is effective, unless the distribution utility notified the customer that it will terminate its delivery service on or before the discontinuance date.
 - c. The ESCO shall provide a sample form of the notice it plans to send to its customers when it transfers 5,000 or more customers to the Department for review no later than five calendar days before mailing the notice to customers.
- I. New Delivery Customers
1. A customer may initiate distribution utility delivery service and subsequently enter into a customer agreement with an ESCO for commodity supply or arrange for both services at the same time.
 2. A customer may authorize an ESCO to act as the customer's agent (ESCO agent) in establishing distribution utility service. The ESCO agent shall retain, and produce upon request, documentation that the customer authorized the ESCO to act as the customer's agent.
 3. An ESCO acting as a customer's agent shall establish a new delivery account on behalf of the customer and enroll the customer with the distribution utility so that

ESCO commodity service commences when distribution utility delivery service begins. The ESCO shall retain, and produce upon request, documentation that the customer authorized the ESCO to act as the customer's agent. An ESCO that is a customer's agent is authorized to submit the customer's application for new delivery service, in compliance with requirements for such applications stated in the law, rules and distribution utility tariffs. An ESCO shall provide the customer's name, service address and, if different, mailing address, telephone number, customer's requested service date for initiation of delivery service, and information about any special need customers, including any need for life support equipment. An ESCO shall refer a customer directly to a distribution utility for arrangement of distribution related matters, such as contribution-in-aid of construction and construction of facilities necessary to provide delivery service and settling of arrears and posting security.

4. Upon a customer's application for service, the distribution utility shall provide an ESCO with the effective date for initiation of delivery service and any other customer information provided to an ESCO in an acceptance of an enrollment request. The distribution utility may notify the customer of the acceptance.

J. Multiple Assignments of Sales Agreements

1. An ESCO may assign all or a portion of its sales agreements to other ESCOs provided that the assigned sales agreements clearly authorize such assignments or the ESCO provides notice to its customers prior to the assignments and an opportunity for each customer to choose another ESCO or return to full utility service. An ESCO shall provide a written notice no later than 30 calendar days prior to the assignment or transfer date to each customer and distribution utility. The notice to the distribution utility shall include a copy of the assignment document, with financial information redacted, executed by the officers of the involved ESCOs, and a copy of the notice sent to the customer, or, if a form notice, a copy of the form and a list of recipients.
2. The assignment documents shall specify the party responsible for payment or reimbursement of any and all sums owed under any distribution utility tariff or Federal Energy Regulatory Commission tariff and any service agreements relating thereto, and under any agreements between ESCOs and distribution utilities and between ESCOs and their customers.
3. An ESCO's notices to customers shall provide the following information:
 - a. Effective date of the assignment;
 - b. The name, mailing and e-mail addresses, and telephone number of the assigned ESCO; and,
 - c. Any changes in the prices, terms and conditions of service, to the extent permitted by the sales agreement.

4. The ESCO shall provide sample forms and any major modifications of such notices to the Department for review no later than five calendar days before mailing them to customers.
5. The distribution utility shall, within two business days after receipt of an assignment request, acknowledge and initiate processing of the request and send written notice of the request to the ESCO's assigned customer.

K. Unauthorized Customer Transfers

1. A change of a customer to another energy provider without the customer's authorization, commonly known as slamming, is not permitted. The distribution utility shall report slamming allegations to the Department on at least a monthly basis.
2. An ESCO that engages in slamming shall refund to a customer the difference between charges imposed by the slamming ESCO that exceed the amount the customer would have paid its incumbent provider and pay any reasonable costs incurred by the distribution utility to change the customer's provider from the ESCO that engaged in slamming to another provider.
3. ESCOs shall retain two years or for the length of the sales agreement whichever is longer, documentation of a customer's authorization to change providers. Such documentation shall comply with the requirements described in Attachments 1, 2 or 3.

L. Lists of ESCO Customers, Budget Billing, Charges and Fees

1. A distribution utility, upon an ESCO's request, shall provide at no charge, once each calendar quarter, a list of the ESCO's customers at the time of the request and, monthly, the number of accounts enrolled with an ESCO and the ESCO's sales (kWh and/or dekatherms). ESCOs may obtain such customer lists at other times for cost-based fees set forth in distribution utility tariffs.
2. A distribution utility shall adjust its bills rendered under a budget billing plan on the effective date for changing a provider and include the adjustments in the customer's next bill.
3. Upon enrollment of a distribution utility customer with an ESCO or return of an ESCO customer to full utility service, a distribution utility shall impose no restrictions on the number or frequency of changes of gas or electricity providers, except as provided in this paragraph. The distribution utility shall accept only one valid enrollment request for each commodity per customer during a switching cycle. If multiple requests are received for the same customer during a switching cycle, the distribution utility shall accept the first valid enrollment request and reject subsequent enrollment requests.
4. A distribution utility shall impose no charge for changing a customer's gas or electricity provider.
5. A distribution utility may establish a fee in its tariffs for a special meter reading.

Attachment 1**Telephonic Agreement and Authorization/Third Party Verification Requirements**

- A. A voice-recorded verification is required to enter into a telephonic agreement or a door to door agreement, with a customer to initiate service and begin enrollment. Use of either an Independent Third Party or an Integrated Voice Response system to obtain customer authorization is required for any telephone solicitation or sales resulting from door-to-door marketing. Verification by an Independent Third Party or an Integrated Voice Response system shall be recorded and conducted without the ESCO marketing representative's presence, either on the telephone or in person. A voice-recorded verification shall verify the following information to substantiate the customer's agreement or authorization:
1. Do you understand that this conversation is recorded and that oral acceptance of the [ESCO name]'s offer is an agreement to initiate service and begin enrollment?
 2. Is it [specific date] at [specific time]?
 3. Do you understand that the marketing representative represents [specific ESCO] and that [specific ESCO] is not the distribution utility?
 4. If the sale was conducted through door-to-door marketing, has the marketer left the premises?
 5. Are you [specify customer's name]/Please state your name (or is your company name [specify company name]/Please state your company's name)?
 6. Do you live at [specific address]/Please state your address (or is your company located at [specify company address]/Please state your company's address)?
 7. Is your email address [specific e-mail address] /Please provide your email address (if the customer chose to provide it)?
 8. Is your distribution utility account number [specify account number]/ Please state your distribution utility account number?
 9. Are you the primary account holder or do you have authority to make changes to this account?
 10. If the sale was conducted through door-to-door marketing: did the ESCO marketing representative provide you with the sales agreement, his/her business card or contact information and leave a copy of the ESCO Consumer Bill of Rights?
 11. If the sale was conducted through telemarketing: did the ESCO marketing representative offer to mail you a copy of the ESCO Consumer Bill of Rights or did the ESCO marketing representative tell you how to find the ESCO Consumer Bill of Rights online?

12. Did you agree to the terms of service as reviewed with you by the [ESCO name] representative on [INSERT ENROLLMENT DATE]?
 - a. The price of ___(electricity and/or natural gas) under the contract is ___for___months (years).
 - b. Or the price of ___(electricity and/or natural gas) under the contract is a variable rate and will vary month-to-month.
 - c. The early termination fee (if any) is ___(this may be a methodology instead of a dollar amount).
 13. If savings is guaranteed (compared to the utility rate), a plain description of the type of savings and the conditions that must be present in order for the customer to be eligible for savings. If savings is not guaranteed (as compared to the utility supply service) a statement indicating such;
 14. Please be advised that energy supply will be provided by the ESCO, and that energy delivery shall continue to be provided by your utility and the utility will also be available to respond to leaks or other emergencies should they occur;
 15. Do you authorize the release of the following information from your distribution utility: [specify information] and do you understand that you may rescind this authorization at any time by calling [specify toll free number] or e-mailing [specify e-mail address]?
 16. For residential enrollments only: Do you understand that you may rescind the agreement within three business days after its receipt by [describe how such rescission can be accomplished] and if you do not rescind the agreement, an enforceable agreement will be created?
- B. The ESCO, or its agent, shall provide a copy of any Customer Disclosure Statement and sales agreement to the customer by mail, e-mail or fax within three business days after the telephone agreement and independent third-party verification occurs. The sales agreement shall set forth the customer's rights and responsibilities and describe the offer in detail, including the specific prices, terms, and conditions of ESCO service. Such agreement shall be substantially the same, in form and content, as the sample contract submitted to the Department pursuant to Section 2.B.1.b.
- C. The independent third-party verification shall be conducted in the same language used in marketing or sales materials presented to the customer and communicated clearly and in plain language.
- D. An ESCO shall retain independent third-party verification records for two years from the effective date of the agreement and/or authorization or for the length of the sales agreement whichever is longer. In the event of any dispute involving agreement, authorization and/or the independent third-party verification, the ESCO shall make available the audio recording of the customer's agreement and/or authorization, including the independent third-party verification within five business days after a request from the Department.

Attachment 2**Electronic Agreement and Authorization Requirements**

- A. To enter into an electronic agreement with a customer to initiate service and begin enrollment or to obtain customer authorization for release of information, an ESCO, or its agent, shall electronically record communications with the potential customer. As required in Section 5, the Electronic Agreement and authorization may also require an independent third-party verification call, which must include the information in Attachment 1. An ESCO shall provide the following electronic information, as applicable, to substantiate the customer's agreement and/or authorization:
1. A statement that electronic acceptance of a sales agreement is an agreement to initiate service and begin enrollment;
 2. The Customer Disclosure Statement and the sales agreement containing the prices, terms and conditions applicable to the customer, which, if printed as a physical document, would be substantially the same, in form, and content, as the sample contract submitted to the Department pursuant to Section 2.B.1.b.
 3. If savings are guaranteed, or guaranteed under only certain circumstances, the ESCO must provide a written statement which includes a plain language description of the conditions that must be present in order for the savings to be provided;
 4. An identification number and date to allow the customer to verify the specific sales agreement to which the customer assents;
 5. A statement from the ESCO that energy supply will be provided by the ESCO, and that energy delivery shall continue to be provided by the customer's utility; and that said utility will also be available to respond to leaks or other emergencies should they occur;
 6. A requirement that the customer accept or not accept the sales agreement by clicking the appropriate box, displayed as part of the terms and conditions; after the customer clicks the appropriate box to accept the sales agreement, the system shall display a conspicuous notice that the ESCO accepts the customer;
 7. Use of an electronic process that prompts a customer to print or save the sales agreement and provides an option for the customer to request a hard copy of the sales agreement; an ESCO shall send the hard copy by mail within three business days after a customer's request;
 8. A description of the types of information that the ESCO needs to obtain from a distribution utility or MDSP and the purposes of its use, a request that the customer provide authorization for release of this information, and the effective duration of the authorization;
 9. A requirement that the customer agree or not agree to provide such authorization by clicking the appropriate box, displayed as part of the terms and conditions;

10. A statement that a residential customer may rescind the agreement and authorization within three business days after electronic acceptance of the sale agreement; a statement that a customer may rescind the authorization for release of information at any time; provision of a local or toll-free telephone number, and/or an e-mail address for these purposes; upon cancellation of the agreement, the ESCO shall provide a cancellation number;
 11. Verification of the date and time of the electronic agreement and authorization; and
 12. Provision by the customer of the customer's name, address, distribution utility customer account number, and any additional information to verify the customer's identify.
- 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.
 - C. The ESCO shall use an encryption standard that ensures the privacy of electronically transferred customer information, including information relating to enrollment, renewal, re-negotiation, and cancellation.
 - D. Upon request of a customer, the ESCO shall make available additional copies of the sales agreement throughout its duration. An ESCO shall provide a toll-free telephone number and e-mail address for a customer to request a copy of the sales agreement.
 - E. An ESCO shall retain documentation of a customer's agreement in a retrievable format for two years from the effective date of the customer's acceptance and/or authorization or for the length of the sales agreement whichever is longer. In the event of any dispute involving an electronic agreement or authorization, the ESCO shall provide a copy of the customer's acceptance of the sales agreement and/or authorization for release of information or provide on-line access to the acceptance and/or authorization within five calendar days after a request from the Department.

Attachment 3**Written Agreement and Authorization Requirements**

- A. An ESCO may enter into a written agreement (original or fax copy of a signed document) with a customer to initiate service and begin enrollment or to obtain customer authorization for release of information. As required in Section 5, the Electronic Agreement and authorization may also require an independent third-party verification call, which must include the information in Attachment 1. A sales agreement shall contain, in addition to the Customer Disclosure Statement discussed in UBP Section 2.B.1.b.2, the following information, as applicable:
1. A statement that a signature on a sales agreement is an agreement to initiate service and begin enrollment;
 2. A description of the specific prices, terms, and conditions of ESCO service applicable to the customer, which is substantially the same, in form and content, as the sample contract submitted to the Department pursuant to Section 2.B.1.b and, if savings are guaranteed, or guaranteed under only certain circumstances, the ESCO must provide a plain language description of the conditions that must be present in order for the savings to be provided;
 3. A description of the types of information that the ESCO needs to obtain from a distribution utility or MDSP, the purposes of its use, and effective duration of the authorization;
 4. A statement that acceptance of the agreement is an authorization for release of such information;
 5. A customer signature and date; the sales agreement shall be physically separate from any check, prize or other document that confers any benefit on the customer as a result of the customer's selection of the ESCO;
 6. A statement that a residential customer may rescind the agreement within three business days after signing the sales agreement; a statement that a customer may rescind the authorization for release of information at any time; provision of a local, toll-free telephone number, and/or e-mail address for these purposes; the customer may fax a copy of a signed sales agreement to the ESCO; upon cancellation of the agreement, the ESCO shall provide a cancellation number; and
 7. The customer's name, mail and any e-mail address (if the customer chooses to provide it), distribution utility account number, and any additional information to verify the customer's identify.
 8. A statement from the ESCO that energy supply will be provided by the ESCO, and that energy delivery shall continue to be provided by the customer's utility; and that said utility will also be available to respond to leaks or other emergencies should they occur;
- B. ESCOs shall retain written agreements and/or authorizations for two years from the effective date of the agreement and/or authorization or for the length of the agreement whichever is longer. In the event of any dispute involving a sales agreement or authorization, the ESCO shall provide a copy of the sales agreement and/or authorization within five business days after a request from the Department.

Attachment 4**Sample Customer Disclosure Statement**

| | |
|---|--|
| | |
| Price | |
| Fixed or Variable and, if variable, how the price is determined | |
| Length of the agreement and end date | |
| Process customer may use to rescind the agreement without penalty | |
| Amount of Early Termination Fee and method of calculation | |
| Amount of Late Payment Fee and method of calculation | |
| Provisions for renewal of the agreement | |
| Conditions under which savings to the customer are guaranteed | |

Attachment 5**Enrollment and Drop Requests Information Requirements**

- A. An ESCO shall provide the following information for enrollment requests, and an ESCO or distribution utility shall provide the following information for drop requests:
1. Utility ID (DUNS# or tax ID);
 2. ESCO ID (DUNS# or tax ID);
 3. Commodity requested (electric or gas); and,
 4. Customer's utility account number (including check digit, if applicable).
- B. The following information is required for enrollment requests:
1. Customer's bill option;
 2. For distribution utility rate ready consolidated billing:
 - a. an ESCO's fixed charge, commodity price, sales and use tax rate or rate code;
 - b. ESCO customer account number;
 - c. budget billing status indicator; and,
 - d. tax exemption percent and portion taxed as residential.
 3. For Single Retailer Model: special needs indicator;
 4. For gas service: gas capacity assignment/obligation indicator, and, if applicable, gas pool ID, gas supply service options, and human needs indicator;
 5. For electric service: indicator for a partial requirements customer, if applicable.
- C. The following information is required for drop requests:
1. Reason for the drop;
 2. For distribution utility request, service end date;
 3. For ESCO initiated request, effective date of customer move, if applicable; and
 4. For ESCO initiated request in Single Retailer Model, customer's service and mailing address.

SECTION 6: CUSTOMER INQUIRIES**A. Applicability**

This Section establishes requirements for responses by an ESCO or distribution utility to retail access customer inquiries. An ESCO or distribution utility shall respond to customer inquiries sent by means of electronic mail, telecommunication services, mail, or in meetings. The subjects raised in inquiries may result in the filing of complaints.

B. General

1. Distribution utilities and ESCOs shall provide consistent and fair treatment to customers.
2. Distribution utilities and ESCOs shall maintain processes and procedures to resolve customer inquiries without undue discrimination and in an efficient manner and provide an acknowledgement or response to a customer inquiry within 2 days and, if only an acknowledgement is provided, a response within 14 days.
3. Distribution utilities and ESCOs shall provide local or toll-free telephone access from the customer's service area to customer service representatives (CSRs) responsible for responding to customer inquiries and complaints.
4. CSRs shall obtain information from the customer to access and verify the account or premises information. Once verification is made, the CSR shall determine the nature of the inquiry, and, based on this determination, decide whether the distribution utility or the ESCO is responsible for assisting the customer.
5. The CSR shall follow normal procedures for responding to inquiries. If the inquiry is specific to another provider's service, the CSR shall take one of the following actions:
 - a. Forward/transfer the inquiry to the responsible party;
 - b. Direct the customer to contact the responsible party; or,
 - c. Contact the responsible party to resolve the matter and provide a response to the customer.
6. Each distribution utility and ESCO shall maintain a customer service group to coordinate and communicate information regarding customer inquiries and designate a representative to provide information relating to customer inquiries to the Department.
7. ESCOs may provide a teletypewriter (TTY) system or access to TTY number, consistent with distribution utility tariffs.

C. Specific Requests for Information

1. A distribution utility or ESCO shall respond directly to customer inquiries for any information that is related to commodity supply and/or delivery service, to the extent it has the necessary information to respond.
2. The entity responsible for the accuracy of meter readings shall respond to customer inquiries related to usage.

3. The distribution utility and ESCO shall respond to customer inquiries about billing and payment processing, in accordance with UBP Section 9, Billing and Payment Processing.

D. Emergency Contacts

1. An emergency call means any communication from a customer concerning an emergency situation relating to the distribution system, including, but not limited to, reports of gas odor, natural disaster, downed wires, electrical contact, or fire.
2. The ESCO CSR shall transfer emergency telephone calls directly to the distribution utility or provide the distribution utility's emergency number for direct contact to the distribution utility. If no ESCO CSR is available, the ESCO shall provide for after-hours emergency contacts, including transfer of emergency calls directly to a distribution utility or an answering machine message that includes an emergency number for direct contact to the distribution utility.
3. Each ESCO shall provide periodic notices or bill messages to its customers directing them to contact the distribution utility in emergency situations and providing the emergency number.

SECTION 7: DISTRIBUTION UTILITY INVOICES**A. Applicability**

This Section establishes procedures for invoices of charges for services provided by the distribution utility directly to an ESCO or Direct Customer. A distribution utility and ESCO or Direct Customer may agree to establish other arrangements and procedures for presentation and collection of invoices for services rendered.

B. Invoices

1. An ESCO or Direct Customer shall pay the full amount due, without deduction, set-off or counterclaim, within 20 calendar days after the date of electronic transmittal or postmarked date (due date). Subsequent to the due date, charges are overdue and subject to late payment charges at the rate of 1.5% per month. The overdue charges include the amount overdue, any other arrears, and unpaid late payment charges. The distribution utility may provide, upon request, supporting or back-up data in electronic form, if available on its computer system.
2. A distribution utility shall provide interest at the rate of 1.5% on an overpayment caused by the distribution utility's erroneous billing, provided that it may, without applying interest, credit all or a portion of the overpayment to the next bill issued within 30 days and/or refund all or a portion of the overpayment, upon request, within 30 days after its receipt. The distribution utility shall refund any credit balances, upon request.
3. An ESCO or Direct Customer shall make payments by means of an electronic funds transfer. A distribution utility shall use any partial payments first to pay any arrears and second to pay current charges.

C. Billing Inquiries and Disputes

1. An ESCO or Direct Customer shall make any claims relating to inaccuracies of invoices in writing no later than 90 calendar days after the date of electronic transmittal or postmarked date. ESCOs and/or Direct Customers are responsible for payment of disputed charges during any pending dispute.
2. A distribution utility shall designate an employee and provide a telephone number and e-mail address for receipt of inquiries from an ESCO or Direct Customer relating to invoices. The employee shall direct an ESCO or Direct Customer that presents an inquiry or complaint to the responsible and knowledgeable person able to explain charges on an invoice.
3. A distribution utility shall acknowledge in writing receipt of an inquiry within five calendar days after its receipt. A distribution utility shall investigate and respond in writing to the inquiry within 20 calendar days after its receipt.
4. A distribution utility shall refund any overpayments, including interest, within five calendar days after it makes a determination that an ESCO or Direct Customer made an overpayment. It may provide the refund by applying a credit to any overdue amounts or making direct payment of any remainder. The distribution utility shall provide refunds by means of an electronic funds transfer. Interest is calculated at the rate of 1.5 % per month from the date of the overpayment to the refund.

5. No interest is required on overpayments voluntarily made by an ESCO or Direct Customer to an account, unless an overpayment is applied to security.

**SECTION 8: DISPUTES INVOLVING DISTRIBUTION UTILITIES,
ESCOs OR DIRECT CUSTOMERS**

A. Applicability

This Section describes the dispute resolution processes available at the Department to resolve disputes relating to competitive energy markets involving utilities, ESCOs and/or Direct Customers, including disputes alleging anti-competitive practices. The processes are not available to resolve disputes between retail customers and ESCOs or distribution utilities. They are also not applicable to matters that, in the opinion of the Department Staff, should be submitted by formal petition to the Public Service Commission for its determination or are pending before a court, state or federal agency. The availability of the processes does not limit the rights of a distribution utility, ESCO or Direct Customer to submit any dispute to another body for resolution.

B. Dispute Resolution Processes

The parties shall in good faith use reasonable efforts to resolve any dispute before invoking any of these processes. Distribution utility tariffs and operating and service agreements between the parties shall identify the processes used to resolve disputes and shall refer to the dispute resolution processes described in this Section as acceptable processes to resolve disputes.

1. Standard Process

The parties shall use a method to send documents described in this paragraph that will verify the date of receipt.

Any distribution utility, ESCO or Direct Customer may initiate a formal dispute resolution process by providing written notice to the opposing party and Department Staff. Such notice shall include a statement that the UBP dispute resolution process is initiated, a description of the dispute, and a proposed resolution with supporting rationale. Department Staff may participate in the process at this or any later point to facilitate the parties' discussions and to assist the parties in reaching a mutually acceptable resolution.

- a. No later than ten calendar days following receipt of the dispute description, if no mutually acceptable resolution is reached, the opposing party shall provide a written response containing an alternative proposal for resolution with supporting rationale and send a copy to Department Staff.
- b. No later than ten days after receipt of the response, if no mutually acceptable resolution is reached, any party or Department Staff may request that the parties schedule a meeting for further discussions. The parties shall meet no later than 15 calendar days following such request, upon advance notice to Department Staff, unless the parties and Department Staff agree upon another date. The Department may assign one or more Staff members to assist the parties in resolving the dispute.
- c. If no mutually acceptable resolution is reached within 40 calendar days after receipt of the written description of the dispute, any party may request an initial decision from the Department. A party to the dispute may appeal the initial decision to the Public Service Commission.

- d. If the parties reach a mutually acceptable resolution of the dispute, they shall provide to Department Staff a description of the general terms of the resolution.
2. Expedited Process

In the event that an emergency situation arises to justify immediate resolution of a dispute, any party may file a formal dispute resolution request with the Secretary to the Public Service Commission asking for expedited resolution. An emergency situation includes, but is not limited to, a threat to public safety or system reliability or a significant financial risk to the parties or the public. The filing party shall provide a copy of the request to other involved parties and the Department Staff designated to receive information related to dispute resolution under this Section. The request shall describe in detail the emergency situation requiring expedited resolution, state in detail the facts of the dispute, and, to the extent known, set forth the positions of the parties.

SECTION 9: BILLING AND PAYMENT PROCESSING**A. Applicability**

This Section establishes requirements¹ for billing and payment processing options offered by a distribution utility and ESCO in a multi-retailer model. This Section does not establish requirements for billing and payment processing in the single retailer model. A distribution utility and ESCO shall comply with the requirements established in this Section, unless they agree upon modifications or other procedures for billing and payment processing in a Billing Services Agreement.

B. Billing and Payment Processing Options: General Requirements

1. A distribution utility shall offer to ESCOs without undue discrimination the billing and payment processing options available in its service territory.
2. A customer participating in a retail access program shall select from the billing and payment processing options offered by ESCOs.
3. A distribution utility shall allow its customers to select, through their ESCOs, one of the billing and payment options available in the distribution utility's service territory. An ESCO may offer to its customers billing and payment processing options available in the customer's service territory and shall maintain or provide for the capability of issuing a separate bill for its services under the dual billing option. An ESCO customer may direct the billing party to send its consolidated bills or dual bills to a third party for processing and payment.
4. A distribution utility or ESCO may perform the responsibilities of a billing party for a customer and the other provider (non-billing party) based upon the billing and payment processing options available to the customer and the customer's choice.
5. A distribution utility or MDSP shall make validated usage information available to the billing and non-billing parties at the time that the distribution utility or MDSP determines that the information is acceptable.²
6. Information on customer usage, billing, and credit is confidential. A distribution utility or MDSP may release such information, upon a customer's authorization, in accordance with the UBP Section 5, Changes in Service Providers.
7. A distribution utility and ESCO shall demonstrate the technical capability to exchange information electronically for their billing and payment processing options.
8. An ESCO shall provide 60 calendar days' notice by mail, e-mail or fax to a distribution utility of any plan to offer a billing option that is not currently offered to its customers. The distribution utility may agree to a shorter notice period preceding initiation of the option. The 60 calendar-day notice shall not impose any obligation on any party to proceed without a successful test of data exchange capability and the fulfillment of other obligations described in this Section. If an ESCO later changes its system, it shall provide adequate advance notice and conduct any additional testing required.

¹ The requirements are applicable when EDI is available upon issuance by the Commission of data standards applicable to a bill model and operational upon successful completion of the testing required for a bill model.

² A distribution utility or MDSP shall provide electronic interval data in summary form (billing determinants aggregated in the rating periods under a distribution utility's tariffs) via EDI and, if requested, in detail via an acceptable alternative electronic format if retrieved from meters.

9. A distribution utility and an ESCO are responsible for separately remitting their tax payments to the appropriate taxing authorities.
10. Where the ESCO is the billing party, it may offer a customer an option of prepayment. Where a distribution utility is the consolidated billing party, the distribution utility is not required to support processing of prepayments or application of customer prepayments to ESCO charges.

C. Consolidated Billing: General Requirements

1. A distribution utility and ESCO shall establish in a billing services agreement (BSA) detailed expectations for their responsibilities, including consequences for any failure to carry out such responsibilities.
2. A distribution utility may use the bill ready or rate ready method¹ for issuing consolidated bills. An ESCO that offers consolidated billing shall use a bill ready method.
3. A customer receiving delivery service from a distribution utility that is a combination natural gas and electric corporation (combination retail access customer) may receive a consolidated bill for both energy services if:
 - a. The distribution utility issues the consolidated bill;
 - b. One ESCO supplies the customer with both natural gas and electricity;
 - c. An ESCO supplying only one of the commodities agrees to bill for charges for the service provided by the other ESCO; or,
 - d. Separate distribution utility accounts are established for each service.
4. A combination retail access customer may receive separate consolidated bills for each commodity or a dual bill for one commodity and a consolidated bill for the other provided that the distribution utility's system is capable of providing separate accounts for each commodity. A distribution utility shall establish bill cycles and payment due dates. A distribution utility may charge a fee, as set forth in its tariff, to an ESCO to establish, upon the ESCO's request, a separate account for one of the commodities the distribution utility provides.

D. Consolidated Billing: Functions and Responsibilities

1. A billing party shall perform the following functions and responsibilities:
 - a. If the bill ready method is used, receive bill charges and other billing information from the non-billing party;
 - b. If the rate ready method is used, receive rates, rate codes and/or prices (fixed and/or variable) and other billing information from the non-billing party;
 - c. Receive bill messages and bill inserts from the non-billing party;
 - d. If the bill ready method is used, acknowledge receipt of the non-billing party's information and accept or reject it;
 - e. If the rate ready method is used,¹ calculate billed charges, including sales and use taxes; the non-billing party is required to provide the customer's sales and use tax rate to the billing party;
 - f. Print or make available electronically consolidated bills that state the non-billing party's charges, including taxes, arrearages, late fees, and bill messages;

¹ A distribution utility electing the rate ready method for utility consolidated billing is not obligated to calculate or bill separately for other goods and services that an ESCO may provide.

- g. Insert in bill envelopes consolidated bills and inserts required by statute, regulation or Public Service Commission order;
 - h. Stamp, sort and mail consolidated bills or, if authorized, transmit bills electronically;
 - i. Cancel and rebill charges;
 - j. Notify the non-billing party of amounts billed, by account, within two business days after rendering bills to customers;
 - k. Receive and record customer payments;
 - l. Allocate and transmit the non-billing party's share of receipts, by account, to the non-billing party;
 - m. Respond to general inquiries and complaints about the bill and its format; refer customers to the non-billing party for inquiries and complaints related to the non-billing party's rates, charges, services, or calculations; and,
 - n. Maintain records of billing information, including amounts collected, remaining and transferred, and dates.
2. If the bill ready method is used, each party shall calculate and separately state sales and use taxes applicable to its charges; if the rate ready method is used, the billing party shall calculate and separately state the state sales and use taxes applicable to its charges and the non-billing party's charges.
 3. A party that requires a customer's deposit shall administer it. If a non-billing party applies a customer deposit to an outstanding balance, it shall notify the billing party.
 4. Upon receipt of payments, a non-billing party shall notify the billing party.
 5. To initiate consolidated billing using the rate ready method, the non-billing party shall provide the billing party with the rates, rate codes, and/or prices (fixed and/or variable) and tax rates necessary to calculate the non-billing party's charges. The billing party shall specify in the BSA the number of prices for each service class per commodity accepted, deadline for transmission, effective date, and acceptable frequency of changes.²
 6. The billing party may process special handling requests from customers provided that it obtains agreement from the non-billing party for requests that affect it;
 7. The billing party is not required to calculate or provide separate statements to customers regarding gross receipts taxes applicable to a non-billing party's charges. The non-billing party may calculate and provide information on the gross receipts taxes applicable to its charges in a bill message or, if the bill ready method is used, as a line item on the bill.
 8. The non-billing party may offer special billing features, such as budget billing or average payment plans.

¹ A distribution utility is not required to calculate or bill for ESCO services that are not directly related to the commodity it delivers.

² If a billing party's billing system is capable of providing the service, a billing party shall, upon request, apply a different rate, rate code, and/or price and tax rate to usage during different portions of the billing cycle to service provided after the effective date of the change. The non-billing party shall request a change in the rate, rate code, and/or price no later than four business days prior to the effective date requested.

E. Consolidated Billing: Initiation, Changes or Discontinuance**1. Initiation**

- a. An ESCO that proposes to issue consolidated bills shall establish and provide to a distribution utility written procedures for billing and payment processing that ensure billing accuracy and timeliness, proper distribution of a distribution utility's bill messages and inserts, and proper allocation and transfer of distribution utility funds.
- b. No distribution utility may impose a fee on an ESCO to process its application to offer consolidated billing.

2. Changes

A request to change a customer's billing option shall be made on or before 15 calendar days prior to the scheduled meter reading date.

3. Suspension and Discontinuance

- a. A distribution utility may suspend or discontinue an ESCO's right to offer consolidated billing as a billing party or a non-billing party for failure to comply with a BSA. Suspension of the right to offer consolidated billing means that the ESCO is prohibited from offering consolidated billing to new customers.
- b. Upon a determination by a distribution utility to suspend or discontinue an ESCO's right to offer consolidated billing to customers, it shall provide notice on or before 15 calendar days prior to the proposed date for the suspension or discontinuance (cure period) to the ESCO and state the reason for its determination. Upon failure of the ESCO to correct the deficiency on or before the expiration of the cure period, the distribution utility may require a change to dual billing for the ESCO's customers.
- c. Upon discontinuance of consolidated billing rights, an ESCO may reapply to the distribution utility to offer consolidated billing. A distribution utility shall expedite consideration of such requests. Customers may begin receiving consolidated bills again after requirements are satisfied, including submission of transaction requests to establish consolidated billing for customers.

F. Consolidated Billing: Customer Requests

1. A customer may request an ESCO to change its billing option. The ESCO shall request the bill option change on or before 15 calendar days prior to the scheduled meter reading date. An EDI change request is used to request a change in a customer's bill option. After receipt of the change request, a distribution utility shall, within one business day, acknowledge receipt of the request and, within two days, provide a response indicating rejection and the reason or acceptance and the effective date.
2. No distribution utility may impose a charge on a customer or an ESCO for changing a billing option.
3. When more than one request to change a customer's billing option is transmitted for a billing cycle, a billing party shall accept the last timely request received.
4. A distribution utility may deny a request to initiate consolidated billing or discontinue consolidated billing for a customer with an amount past due for at least 38 calendar days, unless the past due amount is subject to a DPA and the customer is fulfilling DPA obligations.

G. Consolidated Billing: Content

1. A billing party may decide upon the format for its consolidated bill provided that it states a summary of total charges and separately states distribution utility and ESCO charges in sufficient detail to allow a customer to judge their accuracy. Such separate statements shall appear in clearly separated portions of the bill and identify their source, distribution utility or ESCO. An ESCO that provides consolidated billing shall state on its consolidated bill the unadjusted distribution utility charges for delivery services provided by a distribution utility, without change.
2. A consolidated bill shall contain the information listed in Attachment 1, General Information, preferably in a summary section. The billing party may place the information on the bill in any order or location.
3. A consolidated bill shall contain the information listed in Attachment 2, Distribution Utility Content, separately stated for each distribution utility.
4. A consolidated bill shall contain the information listed in Attachment 3, ESCO Content, separately stated for each ESCO.
5. If the rate ready method is used, the ESCO shall provide to the distribution utility information listed in Attachment 3, ESCO Section Content, to the extent necessary for the distribution utility to calculate and issue bills. To initiate utility consolidated billing using the rate ready method, an ESCO shall provide the information to the distribution utility on or before 15 calendar days prior to the scheduled meter reading date. An ESCO may request a price or rate change no later than four business days prior to its effective date.
6. If a billing party and non-billing party agree to show the non-billing party's logo on the bill, the non-billing party shall provide it in an acceptable electronic format at least thirty days before its initial use.
7. If the rate ready method is used, a non-billing party is not required to provide information after it is initially submitted, except when a change is made.
8. When an ESCO issues a consolidated bill and the distribution utility transmits bill ready data, the distribution utility shall transmit to the ESCO at the appropriate time the applicable information listed in Attachment 2, Distribution Utility Content, items d – q, and the customer's name and service address.
9. When an ESCO issues consolidated bills on behalf of other ESCOs and distribution utilities and the other ESCOs provide information, the non-billing ESCOs shall provide bill ready information listed in Attachment 3, ESCO Content to the billing ESCO.
10. No party shall engage in cramming.
11. A non-billing party may display its bill messages up to 480 characters in length on the bill provided that the billing party raises no reasonable objection to the message. There is no limit in message length for the billing party. If the bill ready method is used, the non-billing party shall transmit the text of the messages or agreed upon message codes in the same EDI transaction as the billed charges. If the rate ready method is used, a non-billing party shall submit a common bill message on or before 15 calendar days before the date used. Unless a final print date is provided, the billing party shall continue to print the message on bills until

- the non-billing party transmits a different message or requests its discontinuance. In emergencies requiring printing of messages on bills, the billing party shall accommodate the needs of the non-billing party, if practicable.
12. The billing party shall, in a timely manner, print on bills or insert into bill envelopes information that a statute, regulation, or Public Service Commission order requires a distribution utility or ESCO to send to its customers. The billing party may not assess charges for inclusion of required inserts that do not exceed one-half ounce. A distribution utility may charge for any excess weight in accordance with its tariff. The party responsible for providing the information shall submit it to the billing party. If the information is provided in a bill insert, the responsible party shall deliver the inserts in preprinted bulk form in a proper size on or before 15 calendar days before the date requested for initiation of distribution to customers to a location designated by the billing party.
 13. Due dates and other general payment terms and conditions shall be identical for distribution utility and ESCO charges, unless different terms and conditions would have no impact on them. In the event of a conflict, the distribution utility's payment terms and conditions shall govern.

H. Consolidated Billing: Bill Issuance

1. No late charge may be applied to customers' bills for distribution utility charges, if payment is received by the billing party within the grace period.
2. If the bill ready method is used, the non-billing party shall transmit its charges and other information to the billing party on or before two business days after receipt of valid usage data for a customer account. If the rate ready method is used, the non-billing party shall transmit any revisions in rate and/or price data to the billing party on or before four business days prior to the prescribed date.
3. If the bill ready method is used, a billing party that receives a non-billing party's transaction within the prescribed time and rejects the transaction for cause shall, within one business day after receipt of the transaction, send the non-billing party an EDI reject transaction and state the reason for the rejection. The non-billing party may, if time permits, submit a corrected file containing billing charges for inclusion in the current billing statement.
4. If a non-billing party's transaction is sent to the billing party outside the prescribed time frame, the billing party may reject the transaction and shall notify the non-billing party on or before two business days after its receipt that the charges were not billed. The non-billing party may resubmit its charges the following billing period in accordance with prescribed time limits and without late charges. If the bill ready method is used, the non-billing party may submit a separate bill to the customer and notify the billing party of the action. The parties may also agree that the billing party shall hold the non-billing party's charges for inclusion in the next bill.
5. If a non-billing party's transaction is accepted using the bill ready method, the billing party shall render a bill within two business days after receipt of the transaction. If a rate ready method is used, a billing party shall render a bill in accordance with the distribution utility's regular bill issuance schedule. A bill is rendered upon transfer to the custody of the U.S. Postal Service or other delivery service or, if authorized by a customer, sent electronically to a valid e-mail address or telefax number, displayed on a secure website, or presented directly to the customer or customer's representative.

6. If the billing party has not purchased a non-billing party's accounts receivable, is able to process the non-billing party's transaction, and is unable to render a bill within the prescribed time, the billing party shall notify the non-billing party immediately. A billing party shall afford customers the same grace period to pay the bill.
 7. If the rate ready method is used, the billing party shall provide to the non-billing party within two business days after bill issuance, a statement of the accounts billed, date of issuance and amount of the non-billing party's charges shown on the bill (past due, current, and late payment charges and taxes).
- I. Consolidated Billing: Cancellations and Rebills
1. If non-billing party errors occur and are not corrected before the bill is issued, a billing party is not required to cancel bills or issue new bills. The non-billing party shall provide any necessary explanations to the customer and billing party and make any necessary adjustments on the next bill.
 2. If billing party errors cause the non-billing party charges to miss the billing window, the billing party shall cancel and reissue the bills within two business days after notification, unless the billing party and non-billing party arrange an alternative bill correction process.¹ A billing party shall afford customers the same grace period to pay bills.
 3. If no party errs, the parties may agree to cancel and rebill.
 4. To cancel a bill, a billing party shall:
 - a. Cancel usage by billing period;
 - b. Send consumption in the cancel transaction that matches consumption sent in the original transaction;
 - c. Send cancelled usage at the same level of detail as the original usage;
 - d. Using the rate ready method, if a bill is to be cancelled and reissued, recalculate charges and issue revised bills to customers within two business days after receipt of the revised usage data;
 - e. Using the bill ready method, if a bill is to be cancelled and reissued, issue the revised bill to customers within two business days after receipt of the revised usage data.
 5. To restate usage for a period, the distribution utility or MDSP shall first cancel usage for that period and then send the full set of restatement transactions.
- J. Consolidated Billing: Payment Processing and Remittance
1. The parties shall set forth their responsibilities, performance parameters, financial arrangements and other details associated with payment processing and remittance in a BSA, subject to the requirements in this Section.
 - a. In the Pay-as-You-Get-Paid Method, the billing party sends payments to the non-billing party, within two business days of receipt and posting of the funds and processes the payments in accordance with the required priority for application of payments established in this Section.
 - b. A BSA shall establish procedures for processing payments made on any purchased accounts receivable.

¹ Such errors do not include usage-related adjustments necessary when an actual meter reading becomes available to replace an estimated reading required, for example, because a customer denies access to a meter.

2. Payment Processing

- a. The billing party shall notify the non-billing party that payment is received and send payments to the non-billing party, within two business days after receipt and posting, by use of Electronic Funds Transfer (EFT), Automated Clearing House (ACH), or similar means to banks or other entities as agreed upon by the parties. The notice shall include, in account detail, the payments received from customers, the date payments are posted, the date payments are transferred, and the amounts allocated to the non-billing party's charges.
- b. The billing party may impose late payment charges on unpaid amounts not in dispute for the non-billing party provided the terms of the late payment charges are stated in a tariff or a sales agreement and previously disclosed to the customers. If the bill ready method is used, each party shall calculate its late payment charges. If the rate ready method is used, the billing party shall calculate the non-billing party's late payment charges under terms agreed upon by the parties. If a customer's check is returned for any reason, the billing party may charge the customer's account for the return fee and any reasonable administrative fee.
- c. Upon failure of the billing party to pay the non-billing party its proper share of customer payments within two business days after their receipt and posting or at the time agreed upon when accounts receivable are purchased, the billing party shall pay interest on the unremitted amount. The billing party shall calculate the interest at the rate of 1.5 percent per month from the date the payment was due to be received by the non-billing party or its bank.¹ The payment of interest is in addition to, and not in lieu of, the rights and remedies otherwise available to the parties.

3. Collections

The billing party is not responsible for collection of non-billing party funds, unless agreed to in a BSA.

4. Application of payments

- a. The billing party² shall allocate customer payments to the following categories of charges on the bill or contained in a notice that are not in dispute in this order of priority of payment: (1) amounts owed to avoid termination, suspension or disconnection of commodity or delivery service; (2) amounts owed under a DPA, including installment payments and current charges; (3) arrears; and (4) current charges not associated with a DPA. The billing party shall pro-rate payments to the charges within each category in proportion to each party's charges in that category. After satisfaction of the charges in a category, assuming available funds, the remainder of the payment shall apply to the next highest category according to the priority of payments and in the same manner as described above until the payment is exhausted.

¹ Upon request, the billing party shall provide the non-billing party with a verified copy of the posting log of payments received and transferred to the non-billing party during any calendar month specified by the non-billing party.

² Distribution utilities supplying delivery service for both natural gas and electricity to customers receiving consolidated bills shall apply the receipts to the separate services in accordance with their regular procedures. Where a consolidated bill displays delivery charges for separate gas and electric distribution utilities, the customer's payments shall be first prorated between the utility accounts in accordance with the amount each is due compared with the total amount due both distribution utilities.

- b. The billing party may retain any payment amounts in excess of the amounts due as prepayments for future charges or return the excess amounts to customers. The billing party shall, in a timely manner, combine any excess payment amounts with the customer's payment on the next bill, and allocate and pro-rate the sum as set forth in Section 9.J.4.a.¹
 - c. When the billing or non-billing party enters into a multi-month payment agreement with a customer or waives any charges, that party shall notify the other party of such action.
 - d. The billing party shall hold payments received without account numbers or enough information for the billing party to identify the accounts and attempt to obtain information to identify the payer. If sufficient information is not obtained to identify the account information prior to the next bill, the billing party shall present the unpaid amount and late charge, if applicable, on the bill. If the customer contacts the billing party to inquire about the late charge and the lack of payment credit, the billing party shall resolve the matter and reverse the late charges. The billing party shall notify the non-billing party of the matter and its resolution and then allocate payments as necessary to balance the account.
5. Multiple Account Payment Processing
- Processing of a single customer payment for multiple accounts requires proactive action on the part of the billing party and the non-billing party to apply payments correctly. The parties shall set forth arrangements for multiple account payment processing in a BSA.
6. Non-billing Party's Balance
- a. Except as provided in Section 9.J.6 d., when a final bill is issued, the billing party shall maintain a current and past due balance for each account of the non-billing party until payment of the last bill issued for service provided by the non-billing party or 23 days after issuance of such bill, whichever is sooner. After such time, the account shall be considered "inactive."
 - b. Except as provided in Section 9.J.6 d., when a customer changes to a new ESCO, the billing party shall continue to receive and apply a customer's payments for the active account of the prior ESCO. If the customer does not pay the outstanding balance owed to the prior ESCO on or before 23 days after the final bill containing the prior ESCO's charges is issued, the billing party shall notify the ESCO and report the balance due.
 - c. With regard to a new distribution utility/ESCO relationship following a change of ESCOs or a change in a distribution utility, the new billing party shall, upon request of the new non-billing party, bill for the balances that may exist at the time of the change. The new billing party may include the arrears on current bills or in a separate bill if its billing system is not capable of accepting prior charges. If a change of providers occurs, a distribution utility is not required to post any arrears of the prior ESCO on consolidated bills issued after the final billing of its charges, unless the arrears become the property of the new ESCO, and it provides documentation of its property right to the distribution utility.

¹ Where the customer elects to make a charitable donation, such as funding a low-income program, satisfaction of the donation shall be made prior to allocation and pro-ration of the customer's excess payment.

- d. Upon ESCO termination of the commodity supply of a residential customer due to failure to pay charges, the billing party shall maintain a current and past due balance for the account of the terminating ESCO for one year from the date of termination by the ESCO. In the event that the terminating ESCO seeks suspension of delivery service within one year of the termination, or the residential customer has a DPA, the billing party shall maintain a current and past due balance for each account of the terminating ESCO until the arrears are paid in full.
7. Customer Disputes: Initiating a Bill Complaint
 - a. A customer or authorized representative may initiate a customer complaint regarding some or all of the charges on the customer's bill at any time.
 - b. When a complaint relates to the entire bill, to only the billing party's charges or services, or, using the rate ready method, to calculation of the billing or non-billing party's charges, the customer should contact the billing party. The billing party shall resolve the complaint and, if appropriate, place the customer's account in dispute. In the event the inquiry concerns only a non-billing party's bill, charges, services, or calculations, the billing party shall refer the customer to the non-billing party.
 8. Customer Complaints: Notification
 - a. Upon a determination that a complaint affects the entire bill, the billing party shall notify the non-billing party of the subject and amount in dispute, if known.
 - b. The non-billing party shall inform the billing party of disputes related to non-billing party charges that would affect the billing process.
 - c. Once such complaints are resolved and the billed amounts are no longer in dispute, the other party shall be notified.
- K. Consolidated Billing: Call Centers
- A billing party shall provide call centers with toll-free or local telephone access available 24 hours a day and an answering machine or voice mail service during the hours when call center staff is not available. A billing party shall maintain adequate staff to respond to customers' inquiries or refer inquiries to the non-billing party, where appropriate, within two business days.
- L. Dual Billing
1. The distribution utility and ESCO, acting as separate billing parties, shall render separate bills directly to the customer or the customer's representative. The customer or its representative shall pay the distribution utility and the ESCO separately.
 2. The distribution utility's bill shall conform to the standards set by the Public Service Commission.
 3. The distribution utility or MDSP shall transmit usage data to the ESCO at the time the information is available for rendering bills to customers, which may or may not coincide with meter reading cycle dates.
 4. The ESCO may decide upon its bill format provided that it states its charges in sufficient detail to allow customers to judge the accuracy of their bills. At a minimum, an ESCO shall provide the following information:
 - a. Customer's name and billing address and, if different, service address;
 - b. Customer's account number or ID;

- c. Period or date associated with each product or service billed;
 - d. Name of the entity rendering the bill;
 - e. Address to which payments should be sent or the location where payments may be made;
 - f. Local or toll-free number for billing inquiries; if an ESCO enrolls and communicates with customers electronically, an e-mail address and telephone number with area code;
 - g. Due date for payment and a statement that late payment charges shall apply to payments received after the due date; and
 - h. Amount and date of payments received since the last bill.
5. Whenever a distribution utility or MDSP cancels consumption for an account, it shall provide a notice of cancellation and restated billing parameters for the account to an ESCO and a distribution utility, if applicable, and shall:
- a. Cancel usage by billing period;
 - b. Send consumption in the cancel transaction that matches consumption sent in the original transaction;
 - c. Send cancelled usage at the same level of detail as the original usage; and,
 - d. To restate usage for a period, cancel usage for that period and send the full set of billing parameter restatements.

Attachment 1**General Information**

- A. Customer name
- B. Service address
- C. Billing address, if different than service address
- D. Billing party account number, if any
- E. Start of billing cycle period (prior meter reading date for metered customers)
- F. Starting period meter reading (for metered customers)
- G. End of billing cycle period (current meter reading date for metered customers)
- H. Ending period meter reading (for metered customers)
- I. Billing period metered usage, any multiplier necessary to convert usage to billing units and resulting billing units (for metered customers)
- J. Billing period demand, if applicable
- K. Indicators, if usage is estimated, actual or customer provided
- L. Total current charges (total of billing and non-billing party charges, including late charges and taxes)
- M. Total prior billed charges (total of billing and non-billing party prior bill charges, including prior late charges and taxes)
- N. Total credits since last bill (total of billing and non-billing party credits);
- O. Date through which the credits are applied
- P. Total current bill (total of billing and non-billing party charges plus prior bill charges less credits)
- Q. Billing party name (and billing party logo, if billing party wishes it shown)
- R. Billing party address
- S. Billing party toll-free or local telephone number, and for a billing party that enrolls and communicates electronically with customers, an e-mail address and telephone number with area code, in lieu of a toll-free or local telephone number
- T. Distribution utility toll free-or local telephone number and emergency telephone number
- U. Method and location for payments
- V. Date of bill
- W. Payment due date
- X. Billing party messages of any length that apply in general to the bill and services provided by billing and non-billing parties, that are not reasonably objectionable to the parties

Attachment 2**Distribution Utility Content**

- A. Distribution utility name, and logo, if the parties agree
- B. Distribution utility address, if the distribution utility is not the billing party
- C. Distribution utility toll-free or local telephone number for inquiries about the distribution utility portion of the bill, if the distribution utility is not the billing party, and distribution utility emergency number
- D. Distribution utility customer account number, if the distribution utility is not the billing party
- E. Distribution utility rate classification identifier
- F. Distribution utility rates per billing unit, if applicable
- G. Distribution utility rates not based on billing units, if applicable, and unbundled, if applicable
- H. Distribution utility charge adjustments and adders, separately stated
- I. Taxes on distribution utility charges, if separately stated
- J. Billing period total distribution utility charges
- K. Prior billing period total distribution utility charges, including any prior late charges
- L. Credits on prior distribution utility charges
- M. Net prior distribution utility balance remaining, unless included in total prior billed charges stated in the General Information Section
- N. Late charge for unpaid prior distribution utility balance, unless included in total prior billed charges stated in the General Information Section
- O. Total amount due for distribution utility services
- P. If a budget bill, applicable billing information and resulting budget bill amount due for distribution utility services
- Q. The distribution utility's bill message, if any, up to 480 characters, if the distribution utility is not the billing party

Attachment 3**ESCO Content**

- A. ESCO name and logo, if parties agree
- B. ESCO address, if the ESCO is not the billing party
- C. ESCO toll-free or local telephone number for billing inquiries if the ESCO is not the billing party; ESCOs that enroll and communicate electronically with customer may provide an e-mail address and telephone number with area code in lieu of a toll-free or local telephone number; if a rate ready method is used, the billing party shall include a notice directing ESCO customers to call the billing party first to clarify bill calculations
- D. ESCO account number, if the ESCO is not the billing party and has a unique account number
- E. ESCO rate classification, if applicable
- F. ESCO rate per billing unit, if applicable
- G. ESCO rate not based on distribution utility unit, if applicable
- H. ESCO charge adjustments and adders, if any, separately stated
- I. Taxes on ESCO charges, if required to be separately stated
- J. Billing period total ESCO charges
- K. Prior billing period total ESCO charges, including any prior late charges, unless included in total prior billed charges stated in the General Information Section
- L. Credits on prior ESCO charges
- M. Net prior ESCO balance remaining
- N. Total amount due for ESCO services
- O. If a budget bill, applicable billing information and resulting budget bill amount due
- P. The ESCO's bill message, if any, up to 480 characters, if the ESCO is the non-billing party.

SECTION 10: MARKETING STANDARDS

A. Applicability

This Section describes the standards that ESCOs and ESCO marketing representatives must follow when marketing to customers in New York.

B. Training of Marketing Representatives

1. ESCOs shall ensure that the training of their marketing representatives includes:
 - a. Knowledge of this Section and awareness of the other Sections of the New York Uniform Business Practices;
 - b. Knowledge of the ESCO's products and services;
 - c. Knowledge of ESCO rates, payment options and the customers' right to cancel, including the applicability of an early termination fee;
 - d. Knowledge of the applicable provisions of the Home Energy Fair Practices Act that pertains to residential customers; and,
 - e. The ability to provide the customer with a toll-free number from which the customer may obtain information about the ESCO's mechanisms for handling billing questions, disputes, and complaints.

C. Contact with Customers

1. In-Person Contact with Customers¹

ESCO marketing representatives who contact customers in person at a location other than the ESCO's place of business for the purpose of selling any product or service offered by the ESCO shall, before making any other statements or representations to the customer:

- a. Introduce him or herself with an opening statement that identifies the ESCO which he or she represents as an Energy Services Company, identifies him or herself as a representative of that specific ESCO; explains that he or she does not represent the distribution utility; and, explains the purpose of the solicitation.
- b. Produce identification, to be visible at all times thereafter, which:
 1. Prominently displays in reasonable size type face the first name and employee identification number of the marketing representative;
 2. Displays a photograph of the marketing representative and depicts the legitimate trade name and logo of the ESCO they are representing;
 3. Provides the ESCO telephone number for inquires, verification and complaints.
- c. During the sales presentation, the marketing representative must also state that if customer purchases natural gas and/or electricity from the ESCO, that the customer's utility will continue to deliver their energy and will respond to any leaks or emergencies. This requirement may be fulfilled either (a) by an oral statement by the ESCO marketing representative, or (b) written material left by the ESCO marketing representative. Further, ESCOs that are affiliates of distribution utilities should not describe or disclose their relationship to the distribution utility unless such information is specifically requested by the customer.

¹ Including but not limited to marketing encompassed in the definition of door to door sales.

- d. An ESCO marketing representative must provide each prospective residential customer a business card or similar tangible object with the ESCO marketing representative's first name and employee identification number; ESCO's name, address, and phone number; date and time of visit and website information for inquiries, verification and complaints.
- e. An ESCO marketing representative must provide each prospective residential customer or customer that is marketed to via door to door marketing, with a copy of the ESCO Consumers Bill of Rights, before the ESCO marketing representative makes his or her sales presentation.
- f. An ESCO marketing representative must provide the customer with written information regarding ESCO products and services immediately upon request which must include the ESCOs name and telephone number for inquiries, verification and complaints. Any written materials, including contracts, sales agreements, marketing materials and the ESCO Consumers Bill of Rights, must be provided to the customer in the same language utilized to solicit the customer.
- g. Where it is apparent that the customer's English language skills are insufficient to allow the customer to understand and respond to the information conveyed by the ESCO marketing representative or where the customer or another third party informs the ESCO marketing representative of this circumstance, the ESCO marketing representative shall either find a representative in the area who is fluent in the customer's language to continue the marketing activity in his/her stead or terminate the in-person contact with the customer. The use of translation services and language identification cards is permitted.
- h. An ESCO marketing representative must leave the premises of a customer when requested to do so by the customer or the owner/occupant of the premises.
- i. As stated in Section 5.B.2, for any sale resulting from door-to-door marketing, each enrollment is only valid with an independent third-party verification in conformance with Section 5, Attachment 1. The verification must occur after the marketing agent has left the customer's premises and must be completed before the ESCO may enroll a customer.
- j. All ESCOs who have ESCO marketing representatives conducting door-to-door marketing must maintain a daily record, by zip code, of the territories in which the ESCO's marketing representatives have conducted door-to-door marketing. The information should be in a form that can be reported to Staff upon request and should be retained by the ESCO for a minimum of six months.

2. Telephone Contact with Customers

ESCO marketing representatives who contact customers by telephone for the purpose of selling any product or service offered by the ESCO shall:

- a. Provide the ESCO marketing representative's first name and, on request, the identification number;
- b. State the name of the ESCO on whose behalf the call is being made;
- c. Never represent that the ESCO marketing representative is an employee or representative or acting on behalf of a distribution utility. In addition, the ESCO marketing representative must clearly indicate that taking service from an ESCO will not affect the customer's distribution service and such service will continue to be provided by the customer's distribution utility;

- d. State the purpose of the telephone call;
 - e. Where it is apparent that the customer's English language skills are insufficient to allow the customer to understand and respond to the information conveyed by the ESCO representative or where the customer or another third party informs the ESCO marketing representative of this circumstance, the ESCO marketing representative will immediately transfer the customer to a representative who speaks the customer's language, if such a representative is available, or terminate the call; and,
 - f. Remove Customers' names from the marketing database upon Customers' request.
 - g. When marketing to residential customers the ESCO marketing representative must also:
 1. Explain that he or she does not represent the distribution utility;
 2. Explain the purpose of the solicitation;
 3. Notify each prospective customer of the ESCO Consumer Bill of Rights, where they can find it, and also provide a copy of the ESCO Consumer Bill of Rights with any written material sent to the customer including the sales agreement; and,
 4. Provide any written materials, including contracts, sales agreements, marketing materials and the ESCO Consumers Bill of Rights, must be provided to the customer in the same language utilized to solicit the customer.
 - h. As stated in Section 5.B.2, for any sale resulting from telephonic marketing, each enrollment is only valid with an independent third-party verification in conformance with Section 5, Attachment 1. The verification must be completed before the ESCO may enroll a customer.
3. Electronic Enrollments
- a. When marketing to residential customers the ESCO Consumer Bill of Rights should be provided to prospective customers as a non-avoidable screen, which a customer must affirmatively acknowledge to verify they have seen the document, prior to effecting an enrollment.
4. Conduct
- ESCOs shall:
- a. Not engage in misleading or deceptive conduct as defined by State or federal law, or by Commission rule, regulation, or Order;
 - b. Not make false or misleading representations including misrepresenting rates or savings offered by the ESCO;
 - c. Provide the customer with written information, upon request, or with a website address at which information can be obtained, if the customer requests such information via the internet;
 - d. Use reasonable efforts to provide accurate and timely information about services and products. Such information will include information about rates, contract terms, early termination fees and right of cancellation consistent with Section 2 of the UBP and any other relevant Section;
 - e. Ensure that any product or service offerings that are made by an ESCO contain information written in plain language that is designed to be understood by the customer. This shall include providing any written information to the customer in a language in which the ESCO representative has substantive discussions with the customer or in which a contract is negotiated;

- f. Investigate customer inquiries and complaints concerning marketing practices within five days of receipt of the complaint; and,
 - g. Cooperate with the Department and PSC regarding marketing practices proscribed by the UBP and with local law enforcement in investigations concerning deceptive marketing practices.
5. Dispute Resolution
- ESCOs will maintain an internal process for handling customer complaints and resolving disputes arising from marketing activities and shall respond promptly to complaints forwarded by the Department.