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October 7, 2005

**By Hand Delivery**

Hon. Jacklyn A. Brilling
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: In the Matter of Statewide Energy Referral Program
Case 05-M-0858

Dear Secretary Brilling:

Enclosed please find an original and ten (10) copies of the Reply Comments of Direct Services, LLC. submitted in response to the Commission's July 26, 2005 Notice Requesting Comments on a proposed Statewide Energy Services Company Referral Program in the above-referenced proceeding.

Copies of this filing have been served electronically on all parties on the e-mail distribution list established by the Commission for this proceeding.

Very truly yours,

George M. Pond
Attorney for Direct Energy Services, LLC

GMP:cam
Enclosure (original and 10 copies)

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**BEFORE THE**
**PUBLIC SERVICE COMMISSION**
**STATE OF NEW YORK**

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| **In the Matter of Statewide Energy Services Company Referral Program** | ) | **Case No. 05-M-0858** |

# REPLY COMMENTS
# OF DIRECT ENERGY SERVICES, LLC

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Attorney for Direct Energy Services, LLC

Dated: October 7, 2005

**BEFORE THE**
**PUBLIC SERVICE COMMISSION**
**STATE OF NEW YORK**

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| **In the Matter of Statewide Energy Services Company Referral Program** | ) | **Case No. 05-M-0858** |

# REPLY COMMENTS OF DIRECT ENERGY SERVICES, LLC

Direct Energy Services, LLC ("Direct Energy") submits these Reply Comments in response to the Commission's Notice Soliciting Comments issued in this proceeding on July 26, 2005 ("the Notice"), as extended by order of the Commission's Secretary dated September 27, 2005.[1] Direct Energy has also reviewed and fully supports the Reply Comments of the Small Customer Marketing Coalition and the Retail Energy Suppliers Association filed today in this proceeding.

## BACKGROUND

As Direct Energy noted in its Initial Comments, this proceeding stems from the landmark Statement of Policy on Further Steps toward Competition in Retail Energy Markets issued by the Commission on August 25, 2005 ("the Policy Statement").[2] In the Policy Statement, the Commission recognized that competition and market mechanisms, where feasible, can be

[1] Case 05-M-0858 – *In the Matter of Statewide Energy Service Company Referral Program*, Notice Soliciting Comments (issued July 26, 2005) ("the Notice").
[2] Case 00-M-0504 – *Proceeding in Matter of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities*, Statement of Policy on Further Steps Towards Competition in Retail Energy Markets (issued and effective Aug. 25, 2004) ("the Policy Statement").

expected to produce dramatically better results for consumers than traditional cost-based regulation:

> Competitive markets, where feasible, are the preferred means of promoting efficient energy services, and are well suited to deliver just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation.[3]

The Commission also recognized in the Policy Statement that the Switch and Save Program of Orange & Rockland Utilities, Inc. ("O&R") has proven to be an extremely effective tool for "jump starting" competition in retail energy markets in O&R's service territory.[4] In that program, O&R's call center personnel offer all customers the opportunity to receive a seven percent discount from O&R's commodity rates for two months by agreeing to take their commodity service from an Energy Service Company ("ESCO") rather than from the utility.

In the Notice, however, the Commission proposed to replace the proven Switch and Save Program with a more complex and untested uniform state-wide ESCO referral program (the "Notice Referral Program"). The principal difference between these two programs is that the Notice Referral Program would replace the uniform discount provided under the Switch and Save program with discounts that would be established separately by each participating ESCO. Responsibility for explaining these differing offers to customers interested in participating in the Notice Referral Program – and for assisting customers in selecting among the myriad of differing ESCO proposals that would likely be available to them – would fall largely on the utilities' call center operators.

No explanation was given in the Notice for this change, and there was widespread consensus in the Initial Comments submitted by ESCOs and utilities that the Notice Referral

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[3] Policy Statement at 18.

[4] O&R's Switch and Save Program was subsequently renamed "PowerSwitch." For clarity, this program will be referred to throughout these Reply Comments as Switch and Save.

Program would be much less effective than the Switch and Save Program at introducing retail customers to alternate suppliers because it would be far too complex to be administered effectively by the utilities' call centers.[5] However, several parties suggested in their Initial Comments that this change may have been the result of a concern that any program that has the effect of establishing uniform prices or discounts for ESCO sales of electricity to retail customers may constitute price fixing in violation of state or federal antitrust laws.[6] Similar concerns have been expressed by the Public Utility Law Project ("PULP") in other proceedings.[7]

Because Direct Energy can see no reason other than these antitrust concerns for the Commission's proposal to replace the proven Switch and Save Program with the Notice Referral Program, and because the antitrust analyses offered to date have been either incomplete or incorrect, Direct Energy respectfully submits the following analysis demonstrating that Commission-approved Switch and Save Programs do not violate either the Sherman Act or the Donnelly Act, even if they result in uniform prices or discounts to participating retail customers.

## ANALYSIS

### I. COMMISSION-APPROVED SWITCH AND SAVE PROGRAMS DO NOT VIOLATE THE FEDERAL ANTITRUST LAWS

Section 1 of the Sherman Act prohibits all "contracts, combinations . . . and conspiracies in restraint of trade."[8] In interpreting this provision, the United States Supreme Court has held that certain types of agreements, such as price fixing among competitors, are so inherently anti-competitive and so devoid of pro-competitive benefits that they must be declared to be illegal

[5] *See, e.g.*, Comments of Niagara Mohawk Power Corporation ("Niagara Mohawk") at 2-3; Comments of the Consolidated Edison Company of New York, Inc. at 3-4; Comments of ConEdison Solutions, Inc. at 3-4; Comments of the Small Customer Marketing Coalition and the Retail Energy Supply Association ("SCMC and RESA") at 4-6; Comments of Select Energy New York, Inc. at 2; Comments of the National Energy Marketers ("NEM") at 5-6; Comments of MXenergy at 2-3.

[6] *See* Comments of Niagara Mohawk at 7-11; Comments of SCMC and RESA at 7 n.5; Comments of NEM at 7-10.

[7] Case 00-M-0504, *Orange & Rockland Utilities, Inc.*, Comments of Public Utility Law Project on Retail Access Plan at 30-31 (filed April 8, 2005).

[8] 15 U.S.C. § 1.

"per se."[9] The Supreme Court has declared horizontal price fixing agreements to be unlawful without regard to whether the price agreed to by these competitors was "reasonable."[10] Agreements that do not constitute price fixing or any other per se violation are reviewed under the more flexible rule of reason, under which the pro-competitive benefits of the challenged conduct are balanced against its possible anti-competitive effects.[11]

The fundamental antitrust concern with respect to the Switch and Save Program appears to be that because a private agreement among ESCOs fixing the prices those ESCOs would offer to their customers would constitute price fixing prohibited by section 1 of the Sherman Act, so too must any Commission action that would similarly establish a uniform price or discount for all participating ESCOs. This analysis suffers from several fatal flaws, each of which is discussed below.

### A. The Sherman Act Does Not Apply To The Commission Or Its Employees In The Exercise Of The Commission's Rate Setting And Rulemaking Powers Under the Public Service Law

The first fatal flaw of this antitrust concern is that it fundamentally mischaracterizes the facts. Direct Energy and other proponents of "Switch and Save" Type programs are not suggesting that ESCOs should meet and agree among themselves on the amount of the discount to be offered to their customers. Rather, these parties are proposing that the Commission, in the exercise of the comprehensive supervisory authority over New York's electric utilities granted

[9] *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979) (describing per se offense as a practice that "facially appears to be one that would always or almost always tend to restrict competition and decrease output"); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 8 (1958).

[10] *United States v. Joint-Traffic Association*, 171 U.S. 505, 568 (1898); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927).

[11] *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (explaining that under the rule of reason, "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

by the Public Service Law,[12] should establish tariff provisions and/or regulations designed to ensure that the ESCO referral programs operated by those utilities are properly structured to ensure that these programs promote an expeditious transition from regulation to competition. Supporters of this view, including Direct Energy, believe that regulatory action to promote this transition is required to implement the Vision Statement adopted by the Commission in the Policy Statement.

As previously noted, there is widespread consensus among ESCOs and utilities in this proceeding that existing utility call center operations cannot accommodate the complexity that would result if each ESCO were allowed to determine the amount and duration of its discount and each utility's call center personnel were required to assist each customer in selecting an ESCO. Those parties have all suggested in their Initial Comments that the Commission's goal of expediting the transition to retail competition would be best served if the Commission were to direct utilities subject to its supervision and control to adopt programs modeled on O&R's proven Switch and Save Program.

The United States Supreme Court has consistently recognized that the Sherman Act simply does not apply to state authorities engaged in this type of sovereign governmental action. In *Parker v. Brown,*[13] the Supreme Court explained that the Sherman Act was never intended to restrain a state or its officers from activities authorized or directed by the state legislature:

> We found nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's

[12] *See* N.Y. Pub. Serv. L. § 66 (1) (McKinney 2000) (providing that the Commission shall have "general supervisory authority of all . . . electric corporations . . . .").
[13] 317 U.S. 341 (1943).

> control over its officers and agents is not lightly to be attributed to Congress.[14]

In *Bates v. State Bar of Arizona,*[15] the Supreme Court held that a state supreme court adopting rules pursuant to delegated authority from its state legislature is entitled to the same immunity from the Sherman Act as the state legislature itself.[16] Similarly, in *Hoover v. Ronwin,* [17] the Supreme Court held that admission decisions made by a committee of the Arizona State Bar acting for and under the supervision of the Arizona Supreme Court were also acts of the state as sovereign which could not be challenged under the Sherman Act.[18]

The Supreme Court also noted in *Hoover v. Ronwin* that the state's immunity from the Sherman Act for such sovereign acts does not depend in any way on the two-prong test for "state action" for private conduct establsihed by the Supreme Court in other cases:[19]

> When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. When the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."[20]

The relevance of these precedents to the facts in this proceeding is clearly illustrated by the Supreme Court's decision in *Fisher v. City of Berkeley.*[21] In that case, the appellant was a landlord challenging a rent control ordinance adopted by the City of Berkeley, California, on the ground that it forced him and other landlords to charge rents "fixed" by municipal ordinance in

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[14] 317 U.S. at 350-51.
[15] 433 U.S. at 350 (1997).
[16] 43 U.S. at 359-60 ("In the instant case . . . the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27 (a) and 29 (a) and its Disciplinary Rule 2-101 (B).").
[17] 466 U.S. 558 (1984).
[18] 466 U.S. at 602 ("[A]lthough the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct that Ronwin challenges was in reality that of the Arizona Supreme Court.").
[19] *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc,.* 445 U.S. 97 (1980).
[20] 466 U.S. at 600.
[21] 475 U.S. 260 (1986).

violation of section 1 of the Sherman Act. The appellant contended that Berkeley's rent control ordinance should be struck down because the "fixing" of rents that resulted from that ordinance would have been illegal if undertaken by private parties alone. Strikingly similar claims have been made by the parties opposed to the adoption of ESCO referral programs similar to O&R's proven "Switch and Save" program.[22]

The Supreme Court held that the fact that the challenged conduct would be illegal price fixing if undertaken by landlords acting collusively to be wholly irrelevant where the restraint was imposed by the state acting as sovereign rather than through the joint action of the landlords:

> Had the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city, their activities would not be saved from antitrust attack by claims that they had set reasonable prices out of solicitude for the welfare of their tenants . . . . What distinguishes the operation of Berkeley's Ordinance from the activities of a benevolent cartel is not that the Ordinance will necessarily have a different economic effect, but that the rent ceilings imposed by the Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control.[23]

As in *Hoover v. Ronwin*, the Court concluded that the antitrust claims in *Fisher v. City of Berkeley* should be rejected without the need for any inquiry into the Supreme Court's two-pronged standard for "state action" immunity for private actors.[24]

In *Evans v. New York State Public Service Commission,*[25] the United States Court of Appeals for the Second Circuit ("the Second Circuit") followed these Supreme Court precedents in rejecting a Sherman Act challenge to the Commission's rate-setting and rule-making powers

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[22] In Supplemental Comments on O&R's retail access program submitted in Case 00-M-0504 on April 11, 2005, the New York State Electric & Gas Company and Rochester Gas & Electric Company observed that: "Indeed if Power Switch were not a regulated program, ESCOs could not agree to provide one standard discounted price under antitrust statutes." As previously noted, however, Direct Energy is not proposing that ESCOs be allowed to enter into any such agreement.

[23] 475 U.S. at 266 (citations omitted).

[24] 475 U.S. at 270 ("We therefore need not address whether, even if the controls mandate section 1 violations, they would be exempt under the state action doctrine from antitrust scrutiny").

[25] 287 F. 3d at 43 (2d Cir. 2002).

in the telecommunications sector. Specifically, the Second Circuit affirmed a lower court ruling that the Commission had "immunity from the Sherman Act claims because the PSC order was an act of government to which the antitrust laws do not apply."[26] It is therefore clear that the Commission may adopt tariff provisions and/or rules establishing a uniform state-wide ESCO referral program modeled on O&R's successful "Switch and Save" program without fear that the Commission or its employees will be found to have engaged in price fixing in violation of section 1 of the Sherman Act.

### B. The Sherman Act Does Not Apply To Parties Petitioning The PSC In Good Faith

The Supreme Court has recognized that interested parties petitioning state governmental authorities to exercise the state's sovereign power in ways that allegedly restrain competition are also exempt from liability under the Sherman Act. This exemption flows from the fact that the Sherman Act was not intended to interfere in any way with good faith efforts to petition the government for relief of any kind.

For example, in *Eastern Railroad Presidents Association v. Noerr Motor Freight*,[27] the Supreme Court concluded that the Sherman Act did not apply to concerted action by several railroads to secure the passage of state laws and the adoption of state law enforcement policies that were allegedly intended to limit the ability of motor carriers to compete with railroads. In reaching this conclusion, the Supreme Court began by once again confirming that the Sherman Act was adopted to regulate business conduct rather than governmental action:

> It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co. of New Jersey v. United States* that the Sherman Act forbids only those trade restraints and monopolizations that are erected or attempted, by the acts of individuals or combinations of individuals or corporations.

[26] 287 F. 3d at 46.
[27] 365 U.S. 127 (1961).

> Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question of whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate the Constitution.[28]

The Court then went on to reject the use of the Sherman Act to regulate the process by which citizens petition their government to effect the passage of such laws and the adoption of such enforcement policies as equally inimical to our democratic tradition:

> To hold that the government retains the power to act in this representative capacity and yet hold, at the same time that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis in the legislative history of that Act.[29]

In addition, the Court also noted that regulation of political speech under the Sherman Act would raise serious constitutional problems:

> Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.[30]

This holding was reaffirmed by the Supreme Court in *United Mine Workers v. Pennington,*[31] and the protection for good faith petitioning of governmental authorities established in those two cases is frequently referred to as the *Noerr-Pennington* doctrine.

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[28] 365 U.S. at 135-36 (footnote omitted).
[29] 365 U.S. at 137 (footnoted omitted).
[30] 365 U.S. at 137-38.
[31] 381 U.S. 657 (1965).

### C. The Sherman Act Does Not Apply To Utilities Complying With Valid Commission Rules and Tariffs

Once the Commission has exercised its sovereign legislative power to adopt tariff provisions and/or rules establishing an ESCO referral program, utilities subject to the Commission's jurisdiction will be subject to substantial penalties for any failure to implement that program.[32] Utility actions taken in response to such an express state mandate are exempted from the federal antitrust laws for two reasons:

First and foremost, the Supreme Court has recognized that section 1 of the Sherman Act applies only to *voluntary* agreements and is therefore not applicable to private conduct mandated by a valid state law. For example, in *Fisher v. City of Berkeley* the Supreme Court rejected the contention that the rent control ordinance at issue in that case forced landlords to become unwilling participants in a price-fixing conspiracy prohibited by the Sherman Act:

> Under Berkeley's Ordinance, control over maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board. While the Board may choose to respond to an individual landlord's situation for a special adjustment of a particular rent ceiling, it may decide not to. . . . There is no meeting of the minds here. . . . The owners of residential property in Berkeley have no more freedom to resist the city's rent controls than they do to violate any other local ordinance enforced by substantial sanctions.[33]

The Supreme Court's reasoning in *Fisher v. City of Berkeley* applies with equal force to utilities regulated by the Commission. Like the landlords in *Fisher v. City of Berkeley*, utilities in New York State also face substantial sanctions for failure to comply with the Commission's rules and the provisions of their Commission-approved tariffs. In such circumstances, the "meeting of the

[32] *See* N.Y. Pub. Serv. L. § 25 (1) (McKinney 2000) (specifying a penalty of $100,000 per day for failure to comply with any Commission order).
[33] 475 U.S. at 267.

minds" required to establish that a utility is a participant in a private conspiracy in restraint of trade cannot exist.[34]

Second, utilities complying with rules and tariffs mandated by the Commission also fall within the broad "state action" immunity established in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[35] In that case, the Supreme Court established a two-pronged test for private parties seeking immunity from antitrust prosecution as a result of actions authorized or required by state programs displacing competition:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised by the State itself."[36]

The federal courts have recognized that the Commission's regulation of utilities under the Public Service Law satisfies both these requirements. For example, in *Capital Telephone Company v. City of Schenectady*,[37] the court ruled that the first prong of the *Midcal* test, that the state adopt an express policy of displacing competition, was satisfied by section 97 of the Public Service Law. Section 97 prohibits telephone companies from constructing any telephone system until they have obtained both a municipal franchise and approval from the Commission for the

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[34] Direct Energy is aware that in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Supreme Court rejected a utility's claim that it was immunized from claims that its free "light bulb exchange" program violated the anti-monopoly provisions of section 2 of the Sherman Act, 15 U.S.C. § 2, because that program was authorized by its tariff filed with the Michigan Public Service Commission ("the Michigan PSC"). Importantly, however, the Supreme Court found in that case that the State of Michigan did not delegate legislative authority to the Michigan PSC to regulate the sale and distribution of light bulbs. 428 U.S. 584. Thus, this light bulb exchange program was not a valid exercise of Michigan's sovereign legislative power. In contrast, the program at issue in this case involves access to utility call centers, which clearly constitute "real estate, fixtures and personal property operated, owned, [and] used" by the utilities "to facilitate the distribution, sale or furnishing of electricity for light, heat or power" and are therefore "electric plants" within the meaning of section 2 (12) of the New York Public Service Law, N.Y. Pub. Serv. L. § 2 (12) (McKinney 2000). Section 66 (1) of the New York Public Service Law, N.Y. Pub. Serv. L. § 66 (1) (McKinney 2000), gives the Commission "general supervision of all . . . electric plants owned, leased, or operated by any . . . electric corporation."

[35] 445 U.S. 97 (1980).

[36] 445 U.S. at 105 (citations omitted).

[37] 560 F. Supp. 707 (N.D.N.Y. 1983).

exercise of that franchise.[38] Section 68 of the Public Service Law provides the Commission with substantially identical authority over electric corporations[39] and has been held by the Court of Appeals to express an affirmative state policy of excluding competition among distribution utilities.[40]

The court in *Capital Telephone* also concluded that the "active supervision" prong of the *Midcal* test was satisfied by sections 94, 95, 96 and 100-101(a) of the Public Service Law, which give the Commission broad supervisory authority over the rates, practices and policies of telephone companies.[41] The Commission is provided with virtually identical supervisory authority over electric corporations by sections 66, 69, 69-a and 70 of the Public Service Law.[42] Because the Public Service Law satisfies both prongs of the *Midcal* test, utilities subject to comprehensive cost-based regulation by the Commission are immune from Sherman Act liability for any actions undertaken to implement an ESCO referral program mandated by the Commission.

### D. ESCOs Participating In Commission-Approved ESCO Referral Programs Would Not Violate Section 1 of the Sherman Act

Once the Commission has approved a Switch and Save Program and the utility has received Commission approval of the tariff changes and service agreement forms required to implement that program, all that any individual ESCO would need to do to participate in such a

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[38] 560 F. Supp. at 210 ("This Court believes, therefore, that this grant of authority, an integral part of New York's schedule for the regulation of telephone utilities satisfies the requirement of a 'clearly articulated and affirmatively expressed State policy.'").

[39] N.Y. Pub. Serv. L. 68 (McKinney 2000).

[40] *See, e.g., People ex rel. New York Edison Co. v. Willcox,* 207 N.Y. 86 , 98-99 (1912) ("It is the settled policy of the state arising through an extended and instructive experience to withdraw the unrestricted right of competition between corporations occupying through special consents or franchises the public streets and places and supplying the public with their products or utilities which are well nigh necessities.").

[41] 560 F. Supp. at 210-11 ("In light of the extensive regulatory scheme provided for in the New York Public Service Law, it is clear that New York State closely supervises the granting of franchises to and the subsequent operations of, telephone corporations.").

[42] N.Y. Pub. Serv. L. §§ 69, 69-a and 70 (McKinney 2000).

program would be to inform the utility of the ESCO's unilateral election to take service under those new tariff provisions, to sign any required service agreement, and to provide service to the customers awarded to it under that program.

While it is true that each participating ESCO would be offering the same discount to customers participating in that program as all other participating ESCOs, that action would not constitute an illegal price-fixing agreement among those ESCOs so long as each of those ESCOs made its determination to participate in that program unilaterally and without consultation or coordination with any other ESCOs (outside of protected petitioning conduct). As the Supreme Court noted in *Fisher v. City of Berkeley*, the absence of an agreement among competitors is fatal to any price-fixing claim under section 1 of the Sherman Act:

> The distinction between unilateral and concerted action is critical here. Adhering to the language of section 1, this Court has always limited the reach of that provision to "unreasonable restraints of trade effectuated by a 'contract, combination . . . , or conspiracy' between separate entities.'" Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have there can be no liability under section 1 in the absence of agreement.[43]

Similarly, in *Copperweld Corp v. Independence Tube Corp.*,[44] the Supreme Court held that allegations that a corporation conspired with its wholly-owned subsidiary did not supply the "contract, combination . . . or conspiracy" required by liability under section 1 of the Sherman Act.[45]

Any possible claim that an ESCO unilaterally electing to participate in an ESCO referral program would be entering into a price-fixing agreement with the utility administering that

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[43] 475 U.S. 260, 267.
[44] 467 U.S. 752 (1984).
[45] 467 U.S. at 770 ("The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals").

program must also be rejected. As previously noted, utilities will be subject to substantial penalties if they refuse to participate in any ESCO referral program adopted by the Commission in this proceeding. Accordingly, as long as those utilities do no more than provide the services required by their tariffs and the Commission's rules, the "meeting of the minds" required to establish a "contract, combination . . . or conspiracy" in restraint of trade between an ESCO and a utility cannot occur.

Indeed, if ESCOs unilaterally electing to participate in a utility's ESCO referral program can be accused of entering into an illegal conspiracy, either with each other or with their utility, then business customers throughout the State of New York – and indeed across the Nation – face a similar threat in taking service from utilities at uniform rates established in utility tariffs. The Commission, like most state utility commissions, operates under statutes that prohibit undue discrimination among customers.[46] In recognition of this prohibition against discrimination, the Commission requires utilities to charge all similarly situated retail customers the same rates for electric service, even when those customers compete with one another.

Significantly, however, an agreement among competitors that serves no purpose beyond fixing or stabilizing the price of products or services purchased for use as inputs in their trade or business is just as unlawful as an agreement to fix the prices those entities charge for the products and services they sell.[47] If utility customers can be sued for price fixing simply because they unilaterally decided to take service from the utility at the uniform prices mandated by the Commission, then the Supreme Court's precedents holding that the Sherman Act does not apply

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[46] *See* N.Y. Pub. Serv. L. § 65 (3) (McKinney 2000) (prohibiting any electric corporation from making or granting "any undue or unreasonable preference or advantage to any person, corporation or locality" and prohibiting such utilities from subjecting "any particular person, corporation of locality . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever").

[47] *See, e.g., United States v. Olympic Provision & Baking Co.*, 282 F. Supp. 819 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 480 (1969) (activities of independent contractors to obtain uniform discounts from suppliers held to be price fixing). *Cf. National Macaroni Mfrs. Ass'n v. FTC*, 345 F. 2d 421, 424 (7th Cir. 1965) (agreement among macaroni manufacturers limiting the amount of durum wheat in macaroni constituted price fixing).

to sovereign state actions by agencies such as the Commission or to utility actions mandated by the Commission could be circumvented through the simple expedient of bringing an antitrust claim against customers taking service at the uniform rates which the Commission was authorized to regulate and the utilities were required to provide under their Commission-approved tariffs.

Moreover, if this broad definition of price-fixing were accepted, then the bid-based markets for energy and other generation-related services operated by the New York Independent System Operator, Inc. ("NYISO") and other regional transmission providers would also violate the federal antitrust laws. As the Commission is aware, these markets uniformly operate under rules proving that all bidders will be paid the price demanded by the highest bidder whose output is required to meet demand. Thus, these markets consistently replace the individual bids submitted by auction participants with a single price "fixed" by the regional transmission provider once it has reviewed all the bids submitted. All suppliers bidding in such markets understand in advance that this rule will apply.

While there can be no doubt that the Sherman Act would be violated if the bidders in any such auction met in advance to agree among themselves on their bids, no one has suggested – or could credibly suggest – that market participants who enter into service agreements with their regional transmission provider and thereafter bid unilaterally in such markets are conspiring either with each other or with their regional transmission provider to "fix" the price of generation services in violation of the Sherman Act. Instead, each market participant's decision to bid into any such auction is regarded as a unilateral auction by that market participant to whom the federal antitrust laws do not apply. There is no reason whatsoever for treating ESCOs

unilaterally electing to participate in a Commission-approved ESCO referral program any differently from generators bidding into such auctions.

## II. COMMISSION-APPROVED SWITCH AND SAVE PROGRAMS DO NOT VIOLATE THE DONNELLY ACT

New York State's own antitrust statute is section 340 of the General Business Law, commonly known as the Donnelly Act.[48] In *Anheuser Busch, Inc. v. Abrams*,[49] the New York Court of Appeals explained that the Donnelly Act was modeled on the Sherman Act and that federal cases interpreting the Sherman Act should be followed by New York courts applying the Donnelly Act except in those limited circumstances where differences between the Donnelly Act and the Sherman Act clearly required a departure from applicable federal precedents:

> Although we do not move in lockstep with the Federal courts in our interpretation of antitrust law . . . , the Donnelly Act – often called a "Little Sherman Act" – should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result.[50]

Thus, as a general matter, and with the exception of the state action immunity discussed in detail below, the federal precedents cited above are equally applicable to cases brought under New York's Donnelly Act.

### A. The Donnelly Act Does Not Apply To The Commission Or Its Employees In The Exercise Of The Commission's Rate Setting And Rulemaking Powers Under the Public Service Law

In language very similar to that used in the Sherman Act, the Donnelly Act is addressed to contracts, agreements or combinations in restraint of trade. The Court of Appeals has clarified that the term "arrangement," which is used in the Donnelly Act but is not found in the Sherman Act, "must be interpreted as contemplating a reciprocal relationship of commitment between two

[48] N.Y. Gen. Bus. L. § 340 (McKinney 2004).
[49] 71 N.Y. 2d 327 (1988).
[50] 71 N.Y. 2d at 335 (citations omitted).

or more legal or economic entities similar to but not embraced within the terms 'contract', 'combinations', or 'conspiracy.'"[51] Accordingly, there is no difference between the language of the Donnelly Act and the language of the Sherman Act that would justify or require a departure by New York courts from the United States Supreme Court's ruling in *Fisher v. City of Berkeley* and the other cases discussed above holding that the antitrust laws apply to "commercial" rather than to "governmental" actions.

This conclusion is confirmed by several court cases and by an opinion issued by New York's Attorney General. In an opinion issued to the Central New York Regional Transportation Authority ("the Authority") on August 20, 1974, New York's Attorney General assured the Authority that it would not be subject to prosecution under the Donnelly Act if it decided to discontinue certain bus lines, even if the result of that action would be to leave private motor carriers serving those routes in a monopolistic position. The Attorney General explained that the Donnelly Act does not apply to state agencies such as the Authority:

> As established by Public Authority Law, § 1325, the Authority is designated as a "public benefit corporation" and, also as a "state agency". The wording of the [Donnelly Act], as well as [its] judicial history, reveals no intention to include a state agency within the scope of the Act.[52]

In *Electrical Inspectors, Inc. v Village of Lynbrook,*[53] the Appellate Division, Second Department ("the Second Department") similarly rejected a challenge to an amendment to the Code of the Village of Lynbrook brought under the Donnelly Act. The Second Department found the Code revisions in question to be within the scope of the Village's legislative powers under New York law and concluded that, in such circumstances, "the choice among permissible

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[51] *State v. Mobil Oil Co.*, 38 N.Y. 2d 460, 464 (1976).
[52] 1974 Op. N.Y. Att. Gen. 224, 225 (1974).
[53] 293 A.D. 2d 537 (2d Dept. 2002).

alternatives is to be made by the village, not by [the parties] or the courts."[54] Similarly, in *Commonwealth Electrical Inspection Services, Inc. v. Town of Clarence,*[55] the Appellate Division, Fourth Department, rejected a Donnelly Act challenge to a municipal ordinance, finding the Town's actions in adopting the ordinance to be a unilateral exercise of governmental authority rather than a private agreement in restraint of trade:

> We conclude that the action taken by each of the municipalities in this case, consisting of the enactment of a particular ordinance, was purely unilateral and thus was not accomplished by means of the essential statutorily proscribed "contract, agreement, arrangement or combination."[56]

In reaching this conclusion, the court expressly relied on a ruling by the United States Court of Appeals for the Third Circuit rejecting similar claims brought under the Sherman Act in *Englert v City of McKeesport,*[57] which decision was in turn based largely on the Supreme Court's decision in *Fischer v. City of Berkeley* discussed above.[58]

Even in the absence of these clear precedents, it is unlikely that a New York court would construe the Donnelly Act as applying to governmental actions taken by a state agency such as the Commission, since such a construction of the Donnelly Act would place that legislation in direct conflict with the provisions of law under which that agency was acting (in this case the Public Service Law). New York's courts are understandably reluctant to adopt a construction of any two statutes enacted by the State Legislature that would put those two legislative acts in direct conflict where those statutes can reasonably be interpreted in a manner that avoids any

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[54] 293 A.D. 2d at 538, *citing D'Angelo v. Cole*, 67 N.Y. 2d 65, 69 (1986).
[55] 6 A.D. 3d 1185 (4th Dept. 2004).
[56] 6 A.D. 3d at 1186.
[57] 872 F.2d 1144 (3d Cir. 1989), *cert denied,* 493 U.S. 851 (1989).
[58] *See* 872 F.2d at 1150 ("It is well settled, however, that a restraint established through unilateral action by the government is not transformed into concerted action merely because the government enforces it. 'A restraint imposed unilaterally by government does not become concerted action within the meaning of the [Sherman Act] simply because it has a coercive effect upon parties who must obey the law.'") (*quoting Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986)).

such conflict.[59] Moreover, where a conflict cannot be avoided, New York courts have generally given effect to the most recent legislative pronouncement,[60] particularly where the first statute is general in nature and the second law is narrow and specific.[61] Both these principles of statutory interpretation favor giving effect to the Public Service Law in any conflict with the Donnelly Act. The Public Service Law was initially adopted as Chapter 4480 of the New York Laws of 1910, one year after passage of the Donnelly Act, which was first adopted as Chapter 25 of the New York Laws of 1909. Moreover, the Public Service Law, which applies only to certain utility companies, is much narrower in scope than the Donnelly Act, which applies to all businesses operating in New York State. Thus, it is not at all surprising that New York courts interpreting the Donnelly Act have followed federal precedents holding the Sherman Act to be inapplicable to sovereign state actions.

### B. The Donnelly Act Does Not Apply To Parties Petitioning The PSC In Good Faith

In *Chladek v. Verizon NY Inc.*[62] the United State District Court for the Southern District of New York ("the Southern District") invoked the *Noerr Pennington* doctrine in rejecting Sherman Act and Donnelly Act claims alleging that Verizon restrained competition when it asked the Commission to revise its tariff to phase out accounting and billing services previously furnished to certain "Information Providers" providing pay-per-call information services. The Southern District held that Verizon's filing with the Commission "clearly sought a favorable

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[59] *See, e.g., Consolidated Edison Co. v. Department of Environmental Conservation*, 71 N.Y. 2d 186, 195 (1988) ("Generally a statute is not deemed impliedly modified by a later enactment unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted.") (citations and internal quotations omitted).

[60] *See, e.g., Abate v. Mundt*, 25 N.Y. 2d 309, 318 (1969) ("Under familiar principles of statutory construction, the conflict between these two provisions must be resolved by holding that the latter section impliedly repealed the former insofar as they are in conflict . . . .").

[61] *See, e.g., East End Trust Co. v. Othen*, 255 N.Y. 283, 285 (1931) ("[W]hat is special or particular in the latter of the two statutes supersedes as an exception whatever in the earlier statute is unlimited or general.").

[62] 2003 U.S. Dist. LEXIS 9478 (S.D. N.Y. 2003), *aff'd*, 2004 U.S. App. LEXIS 7278 (2d Cir. 2004).

governmental action – the filing of a new tariff that would phase out IP service" which was protected by the *Noerr Pennington* doctrine.[63] The court went on to make clear that "Dismissal here applies equally to federal antitrust claims and state claims under the Donnelly Act."[64] Interestingly, the claims against Verizion rejected by the Southern District in the *Chladek* case appear to have been based on the same underlying facts as the claims which the Second Circuit refused to permit the plaintiff in *Evans v. New York State Public Service Commission* to bring against the Commission directly.[65]

Similar Donnelly Act claims have also been rejected on the basis of the *Noerr Pennington* doctrine in other federal court decisions. For example, in *Music Center S.N.C. DiLuicano Pison & C. v. Prestini Musical Instruments Corp.*,[66] the United States District Court for the Eastern District of New York ("the Eastern District") ruled that the *Noerr Pennington* doctrine applied to claims under the Donnelly Act as well as to claims under the Sherman Act:

> Plaintiffs have suggested no reason why or how the policies underlying the Donnelly Act would be ill-served by the application of *Noerr* immunity to these claims. Accordingly, *Noerr* must apply in much the same manner to immunize claims based on non-sham litigation.[67]

Similarly, in *Agfa Corp. v. United States Marketing Group, Inc.*,[68] the Southern District again applied the *Noerr Pennington* doctrine to dismiss claims made under the Donnelly Act.[69]

To the best of Direct Energy's knowledge, no New York court has been called on to address the applicability of the *Noerr Pennington* doctrine to Donnelly Act claims. New York

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[63] 2003 U.S. Dist. LEXIS 9478 at 6.
[64] 2003 U.S. Dist. LEXIS 9478 at 6 n.1.
[65] *See* 2003 U.S. Dist. LEXIS 9478 at 5 ("In *Evans*, the Second Circuit affirmed Judge Wood's holding that the state action doctrine precluded an antitrust challenge to the order. Plaintiffs again artfully frame their pleading by bringing suit against the private actor, Verizon, only.").
[66] 874 F.Supp. 543 (E.D.N.Y. 1995).
[67] 874 F.Supp. at 555.
[68] 2003 U.S. Dist., LEXIS 11760 (S.D.N.Y. 2003).
[69] 2003 U.S. Dist., LEXIS 11760 at 6-7.

courts have, however, recognized that the First Amendment concerns underlying the *Noerr Pennington* doctrine apply with equal force to other claims under New York law that would otherwise chill free access to government policy makers. For example, in *I.G. Second Generation Partners, L.P. v. Reade*,[70] the court dismissed a claim that the filing of a declaratory judgment action in New York State court constituted a tortious interference with contracts:

> Also lacking viability was plaintiffs' claim that the prior action brought by defendants tortiously interfered with its contract with a third party. Defendant's commencement of the declaratory judgment action is immunized by the *Noerr-Pennington* doctrine, which holds, essentially, that parties may not be subjected to liability for petitioning the government.[71]

Similar claims were also rejected by the Second Department in *Alfred Weissman Real Estate, Inc., v. Big V Supermarkets, Inc.*[72] These precedents make clear that the New York courts will apply the *Noerr-Pennington* doctrine to any attempt to use state law, including the Donnelly Act, to impose sanctions on protected political speech.

### C. The Donnelly Act Does Not Apply To Utilities Complying With Valid Commission Rules and Tariffs

As at least one party in this proceeding has pointed out in its comments,[73] the broad "state action" immunity recognized by the federal courts under the Sherman Act does not apply in proceedings under the Donnelly Act.[74] The reason for this difference is that the state action immunity is based on principles of federalism, under which the federal courts have sought to provide broad deference to state authorities adopting policies that restrain competition in pursuit

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[70] 17 A.D. 3d 206 (1st Dept. 2005).

[71] 17 A.D. 3d at 208.

[72] 268 A.D.2d 101, 107 (2d Dept. 1999) ("Although the *Noerr-Pennington* doctrine initially arose in the antitrust field, the courts have expanded it to protect First Amendment petitioning of the government from claims brought under Federal and State law, including claims asserted pursuant to 42 USC § 1983 and common-law tortious interference with contractual relations.").

[73] *See* Comments of Niagara Mohawk at 7-11.

[74] *See, e.g., Electrical Inspectors Inc., v. Village of Lynbrook,*, 293 A.D. 537, 538 (2d Dep't 2002); *Electrical Inspectors v. Village of East Hills*, 320 F. 3d 110, 123 (2d Cir. 2003).

of other state objectives. Such broad deference to another "sovereign" is not necessary when an antitrust statute is alleged to conflict with another statute adopted by the same sovereign, whether that sovereign is the State of New York or the United States.

Not surprisingly, federal courts have been called on to decide in a number of Sherman Act cases whether other federal statutes provide private parties with an implied antitrust immunity. In such cases, the federal courts have invariably ruled that implied repeal of the Sherman Act is "disfavored" and that implied exemptions from the Sherman Act are limited to those "necessary to make the [other act] work."[75]

Even under this strict standard, however, the Supreme Court has held that where a federal agency is authorized to and does establish rates, charges, terms and conditions of service to which private parties must adhere under penalty of law, the Sherman Act cannot be applied to regulated entities that are simply complying with those legislative requirements. For example, in *Gordon v. New York Stock Exchange*,[76] the Supreme Court held that because the Securities and Exchange Commission ("SEC") was authorized to establish uniform sales commission rates which all securities dealers were required to charge under penalty of law, such securities dealers could not be prosecuted under the Sherman Act simply for charging the uniform sales commission rates "fixed" by the SEC:

> [T]o deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. It is clear from our discussion in Part III, *supra,* that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC. If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate

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[75] *See, e.g., Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("[I]it is a cardinal principle of construction that repeals by implication are not favored. . . . Repeal [of the Sherman Act] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.") (citations and internal quotation marks omitted).

[76] 422 U.S. 659 (1975).

> of the courts or of the SEC. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.[77]

As previously noted, the New York Court of Appeals' holding in *Anheuser Busch, Inc. v. Abrams*[78] requires New York courts to adopt the same approach the issue of implied Donnelly Act immunities that the federal courts applied in *Silver* and *Gordon,* unless differences in the Donnelly Act, its legislative history or state policy require a different result. One factor that may require New York courts to extend greater deference to state agencies like the Commission than federal courts extend to federal administrative agencies is provided by the Court of Appeals' established policies for construing conflicting statutes. As previously noted, where two state statutes conflict, the Court of Appeals has consistently given effect to the most recent enactment, particularly where that more recent statute is specific in nature and the previous statute is more general. Both these factors favor giving more rather than less effect to the Public Service Law in cases where it conflicts with the Donnelly Act. If anything, therefore, New York courts should apply a less strict standard to implied immunity requests under the Donnelly Act than the federal courts apply to similar requests under the Sherman Act.

At least one New York court has applied the *Silver* standard in rejecting a claim of implied immunity from the Donnelly Act arising out of the authority given to the New York State Department of Agriculture and Markets under article 2 of the Agriculture and Markets

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[77] 422 U.S. at 689-90 (citations and footnotes omitted).
[78] 71 N.Y. 2d 327 (1988).

Law.[79] In *People v. Elmhurst Milk & Cream Co.*,[80] the Supreme Court of Kings County made clear that the standard to be applied to any claim of an implied immunity to claims brought under the Donnelly Act should be the same standard employed by the federal courts in cases seeking to establish an implied immunity under the Sherman Act:

> A court will cede its jurisdiction over an antitrust case to the exclusive jurisdiction of a regulatory agency only when it finds that "its exercise of jurisdiction is so repugnant to the regulatory scheme that the regulatory scheme would be destroyed by virtue of the court's adjudication." (7 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 44A.01[1]; see *Otter Tail Power Co. v United States*, 410 U.S., at p 372; *United States v Philadelphia Nat. Bank*, 374 U.S. 321, 350-351.) This doctrine of exclusive jurisdiction is invoked rarely, and only where an express substantive exemption in the regulatory statute immunizes the specific activities involved in the antitrust action (see *Otter Tail Power Co. v United States*, 410 U.S. 366, *supra; Hughes Tool Co. v Trans World Airlines*, 409 U.S. 363; *Minneapolis & St. Louis Ry. Co. v United States*, 361 U.S. 173; *Georgia v Pennsylvania R. R. Co.*, 324 U.S., at p 457) or where the court must imply a legislative intent to immunize the challenged activity in order to make the regulatory scheme work (*Silver v New York Stock Exch.*, 373 U.S., at p 357; *Pan Amer. World Airways v United States*, 371 U.S. 296, 305). Courts are very reluctant to imply immunity from the existence of a "'pervasive regulatory scheme'". (See *California v Federal Power Comm.*, 369 U.S., at p 485; *United States v Radio Corp. of Amer.*, 358 U.S., at p 350)[81]

Although the court in *People v Elmhurst Milk & Cream Co.* rejected claims of an implied Donnelly Act immunity, that court agreed with the court in *People v. Dairylea Cooperative, Inc.*,[82] which ruled that an implied Donnelly Act immunity would have been found to exist if the Commissioner of Agriculture and Markets had exercised his statutory authority to establish rules prohibiting certain types of conduct which the Commissioner found to be unfair or deceptive:

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[79] N.Y. Ag. & Mkts. L. Art. 2 (McKinney 2004).
[80] 116 Misc. 2d 140 (Sup. Ct. Kings County 1982).
[81] 116 Misc. 2d at 145-46.
[82] 114 Misc. 2d 421 (Sup. Ct. Bronx County 1982).

> This court agrees with the opinion of Justice Di Fede in *People v Dairylea Coop.* (114 Misc. 2d 421), that until and unless the Commissioner of Agriculture and Markets promulgates rules specifying what conduct constitutes an unfair method of competition or an unfair and deceptive practice, the administration of the Dairy Promotion Act cannot possibly conflict with the Attorney-General's enforcement of the Donnelly Act.[83]

Accordingly, where a state agency has acted to establish legally binding requirements, private businesses that do no more than comply with those binding legal requirements cannot be found to violate the Donnelly Act.

### D. ESCOs Participating In Commission-Approved ESCO Referral Programs Would Not Violate the Donnelly Act

As is the case under the Sherman Act, ESCOs participating in a Commission-approved ESCO referral program would avoid antitrust liability under the Donnelly Act not because of any formal exemption from those antitrust statutes, but rather because their actions would be entirely unilateral in nature. Like the Sherman Act, the Donnelly Act has no applicability to such purely unilateral conduct. The Court of Appeals made this point clear when it held in *State v. Mobile Oil Co.*[84] that "The addition of a conclusory allegation as to the effect of a described practice (here effecting restraint of trade) cannot operate, of course, to bring a one-sided practice which is outside the scope of the statute within its proscription."[85] Accordingly, there is no basis for holding ESCOs liable under the Donnelly Act for their unilateral actions in taking (or not taking) service under the rates, terms and conditions for utility services established by the Commission in utility tariffs.

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[83] 116 Misc. 2d at 150. As the court in noted in the *Elmhurst* case, the Appellate Division, Fourth Department has concluded that the Agriculture and Markets Law does create an implied immunity to the Donnelly Act. *Margrove, Inc. v. Upstate Milk Cooperative, Inc.*, 79 Misc. 2d 309, 315-16 (Sup. Ct. Monroe County 1974), *aff'd sub nom. Margrove Inc. v. Wegman's Food Markets*, 49 A.D. 2d 669 (4th Dept. 1974) ("The plan of the State Legislature was clear, to remove agricultural co-operative associations from the operation of the Donnelly Act and to devise special legislation, under the auspices of a strong Farm and Markets Department, to correct any abuses these associations might create.").

[84] 38 N.Y. 2d 460 (1976).

[85] 38 N.Y. 2d at 464.

## CONCLUSION

WHEREFORE, for the above-stated reasons, Direct Energy Services, LLC respectfully requests that the Commission:

1. Reject any claim that a state-wide ESCO referral program based on the proven Switch and Save model would violate either section 1 of the Sherman Act or the Donnelly Act; and

2. Adopt a state-wide ESCO referral program based on the proven Switch and Save model, rather than on the untested and conceptually unsound Notice Referral Program.

Respectfully submitted,

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Dated: October 7, 2005

Attorney for Direct Energy Services, LLC

## CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Reply Comments of Direct Energy, Inc. to be served via e-mail upon each person designated on the electronic service list established by the Commission in Case 05-M-0858.

Dated at Albany, New York this 7th day of October, 2005.

Claudia A. McDowell