

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

\_\_\_\_\_)  
**In the Matter of Eligibility Criteria for**)  
**Energy Service Companies.**)  
\_\_\_\_\_)

**Case 15-M-0127**

\_\_\_\_\_)  
**Proceeding on the Motion of the Commission**)  
**to Assess Certain Aspects of the Residential**)  
**and Small Non-Residential Retail Energy**)  
**Markets in New York State.**)  
\_\_\_\_\_)

**Case 12-M-0476**

\_\_\_\_\_)  
**In the Matter of Retail Access Business Rules.**)  
\_\_\_\_\_)

**Case 98-M-1343**

**POST-HEARING REPLY BRIEF OF  
RETAIL ENERGY SUPPLY ASSOCIATION**

David G. Burch, Jr.  
Ekin Senlet  
Forrest T. Young  
Barclay Damon LLP  
125 East Jefferson Street  
Syracuse, New York 13202  
*Counsel for RESA*

Dated: April 30, 2018

**TABLE OF CONTENTS**

	<b>Page</b>
I. PRELIMINARY STATEMENT .....	1
III. ANALYSIS.....	5
A. REGULATORY REGIME.....	5
1. Commission’s Vision in Opening the Competitive Markets .....	5
2. Application of Public Service Law to ESCOs [Notice Questions 2, 3, 4, 12 and 20] .....	9
a) Scope of Commission Jurisdiction Under the PSL.....	9
b) Should ESCOs Be Required To File Tariffs?.....	12
3. Enforcement Powers Over ESCOs [Notice Questions 2 and 19] .....	13
a) Commission’s Enforcement Mechanisms and Efforts.....	13
b) Attorney General’s Enforcement Mechanisms and Efforts .....	17
B. USEFULNESS & ACCURACY OF COMPARING ESCO AND UTILITY RATES .....	19
1. Utility Bill Comparison Methodologies [Notice Questions 12, 16 and 17] .....	19
2. Utility Delivery and Supply Cost Allocations [Notice Questions 12, 16 and 17] .....	23
C. RESPONSE TO COMMISSION’S INQUIRIES ON THE FUTURE OF ESCOs IN THE MASS MARKET .....	25
1. Should Retail Choice Continue In New York? [Notice Questions 1, 6 and 20] .....	25
a) ESCOs’ Role in Residential Markets.....	27
b) ESCOs’ Role in Non-Residential Markets .....	27
2. ESCOs’ Place in the Competitive Market [Notice Questions 9, 12 and 13] .....	27
a) Whether ESCOs have “Market Power” .....	27
b) The Functionality of Competitive Markets for Retail.....	28
c) ESCOs’ Impact on Commodity Prices: Rates in the Fully Regulated Market.....	31

3.	Future Product Offerings [Notice Question 6].....	34
	a) Variable-Rate, Commodity-Only Products.....	35
	b) Fixed-Price Products.....	36
	c) Renewable Energy Products .....	37
	d) Value-Added or Bundled Products .....	38
	e) CCA Products .....	38
4.	ESCOs’ Role in the Commission’s Energy Policies, Including REV and CES .....	39
5.	ESCO Eligibility Requirements .....	40
6.	ESCO Reporting and Collateral Posting Requirements [Notice Questions 3, 6 and 20] .....	40
7.	ESCO Marketing Practices .....	42
8.	Customer Information and Cyber Security .....	43
9.	Purchase of Receivables and Billing Process [Notice Questions 8, 9, 12, 13 and 20] .....	43
	a) Purchase of Receivables .....	43
	b) Billing Methodologies .....	44
	(1) Utility Consolidated Billing.....	44
10.	Customer Complaints [Notice Questions 6, 7, 9, 12, 13 and 14] .....	45
11.	Transparency [Notice Questions 12, 13, 16, 17 and 20].....	47
12.	Customer Renewal Process [Notice Question 20].....	49
13.	Customer Shopping Tools [Notice Questions 16, 17 and 20] .....	49
14.	Customer Choice [Notice Questions 9, 12, 13, 18 and 20].....	49
15.	Examples of Competitive Market Frameworks in Other States .....	49
16.	State Agency & Consumer Advocacy Group Actions.....	49
17.	Energy Brokers .....	49
IV.	CONCLUSION: SPECIFIC RECOMMENDATIONS TO THE COMMISSION .....	49

## I. PRELIMINARY STATEMENT

The Retail Energy Supply Association (“RESA”)<sup>1</sup> submits this Reply Brief pursuant to the January 19, 2018 Ruling on Schedule and Briefs issued in this proceeding. In this Reply Brief, RESA responds to the arguments and claims made in the Initial Post-Hearing Briefs of the Department of Public Service Staff (“Staff”), the Utility Intervention Unit and the New York Attorney General (“UIU/NYAG”), and the Public Utility Law Project (“PULP”).

In their initial briefs, the non-ESCO parties continued to advance their erroneous theory that *all* ESCO customers are “victims” of predatory ESCO marketing tactics. However, the evidence in the Record demonstrates that competitive retail markets have offered consumers *alternatives to default utility service in which customers find value.*<sup>2</sup>

The Commission’s assessment of New York’s retail markets should focus on its original vision and goals for the competitive energy marketplace.<sup>3</sup> Chief among the Commission’s explicit objectives were *consumer choice*,<sup>4</sup> and *overall energy price reductions*<sup>5</sup> for consumers. Despite the need for continued market improvements, the Record demonstrates unequivocally that the Commission’s objectives have indeed been achieved.

---

<sup>1</sup> The positions expressed in this filing represent the position of the Retail Energy Supply Association as an organization, but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable, and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial, and industrial energy customers.

<sup>2</sup> Hearing Exhibit 1110; *see also* TR. 843, ln. 11 through TR. 844, ln. 5 (showing that ESCOs have provided a less expensive alternative to default utility service in each year between 2005 and 2015).

<sup>3</sup> *See* Cases 94-E-0952 *et al.*, *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Regarding Competitive Opportunities for Electric Service, Opinion No. 96-12 at 25-30 (issued May 20, 1996) (hereafter “Opinion No. 96-12”) (detailing the Commission’s vision and goals for New York’s retail markets).

<sup>4</sup> The Commission explicitly stated that “increased customer choice among types of services and prices to be paid should mean allowing customers throughout the State the opportunity to choose among a number of suppliers (such as generators and energy service companies (ESCOs)) of electricity and other services. Customers will be able to choose to lower their levels of electric service in return for economic benefits.” Opinion No. 96-12 at 28.

<sup>5</sup> The Commission explicitly stated that “market forces overall are expected to produce, over time, rates that will be lower than they would be under a regulated environment. As we move toward competition, our expectation is that rates overall will be reduced.” Opinion No. 96-12 at 28.

Today, across all retail markets, New York consumers have access to over 200 different energy service providers.<sup>6</sup> In 2016, there were approximately 910,000 New York electricity customers enrolled on ESCO service, and approximately 720,000 gas customers enrolled with ESCO service.<sup>7</sup> Together, these 1.6 million New York customers have made an affirmative choice to source their energy needs through non-utility competitive retail energy markets. The Commission should honor the free exercise of that choice. The evidence presented in the Record establishes that ESCOs are providing consumers with energy related products and services that are simply unavailable from the default utilities.<sup>8</sup> The mere existence of diverse product and service offerings presents a sharp contrast to the limited energy choices available to consumers under the old monopoly-driven utility model.<sup>9</sup> This evidence proves that the Commission's explicit goal of increasing consumer choice has been advanced by competitive retail markets.

The Record is also replete with detailed evidence that retail markets in New York have actually reduced energy prices.<sup>10</sup> Specifically, the Record shows that between 2008 and 2016 electricity prices in New York have declined across all market sectors, including residential.<sup>11</sup> New York electricity prices fell roughly 12 percent during those eight years.<sup>12</sup> The stark differences in price trends between monopoly jurisdictions and consumer choice jurisdictions demonstrate that the marked price reductions are not a coincidence.<sup>13</sup> The decline in electricity

---

<sup>6</sup> TR. 832, ln. 18 through TR. 833, ln. 1.

<sup>7</sup> TR. 832, lns. 16-17.

<sup>8</sup> See TR. 1126, ln. 1 through TR. 1137, ln. 19 (Mr. Lacey detailing the diverse variety of products and service offered by ESCOs in New York and around the country).

<sup>9</sup> TR. 1126, lns. 6-12 (Mr. Lacey describing Commission's criticisms of the rate-regulated monopoly paradigm which had failed to spur innovation).

<sup>10</sup> See generally Hearing Exhibit 1130.

<sup>11</sup> Hearing Exhibit 1130 at 19-20.

<sup>12</sup> *Id.* at 20.

<sup>13</sup> *Id.* at 16-18 (indicating that between 2008 and 2016, electricity prices across all sectors in monopoly jurisdictions *rose* 14.95 percent, while electricity across all retail choice jurisdictions *fell* 8.00 percent).

prices is indeed the result of market design and robust competition.<sup>14</sup> Notably, the non-ESCO parties did not offer any evidence to the contrary, and even admitted that they did not conduct any analysis to determine what energy prices might have been without retail energy markets.<sup>15</sup> Thus, the unrefuted evidence on the Record establishes that the Commission's explicit goal of *overall* energy price reductions has been achieved.<sup>16</sup>

Despite this, Staff continues to advocate for wholesale changes to the retail competitive markets by instituting a price ceiling on nearly *all* competitive retail market offerings that will reduce customer choice and leave customers exposed to the inherently volatile,<sup>17</sup> and non-transparent utility default service rate that is set based on tariff formula that is not accessible and incomprehensible to energy customers.<sup>18</sup> Staff even acknowledged that their recommendations would have the effect of preventing some consumers that have achieved energy savings from continuing their ESCO service.<sup>19</sup> Therefore, Staff's recommendations would result in outcomes that the Commission specifically intended to prevent.<sup>20</sup>

Further, the Record indicates that ESCOs provided less expensive alternatives to default utility service in every year between 2005 and 2015.<sup>21</sup> Therefore, *without ESCO alternatives* to the default utility in any given retail market, *consumers would have no opportunity to access savings* on their energy costs. The non-ESCO parties' repeated claims that ESCOs have failed to

---

<sup>14</sup> *Id.*

<sup>15</sup> TR. 2658, ln. 24 through TR. 2659, ln. 5.

<sup>16</sup> Opinion No. 96-12 at 28 (Commission identifying lower overall energy prices as the *primary* objective behind opening *competitive* retail markets in New York).

<sup>17</sup> TR. 2389, ln. 19 through TR. 2390, ln. 25; TR. 2391, ln. 20 through TR. 2392, ln. 4 (Staff Panel acknowledging that commodity markets are volatile and that fixed-rate products, like fixed-rate mortgage products, can limit consumer exposure to swings market volatility).

<sup>18</sup> TR. 2228, lns. 11-12 (Staff acknowledging that utility tariffs are not transparent to general customers).

<sup>19</sup> TR. 2841, lns. 4-12.

<sup>20</sup> Opinion No. 96-12 at 28 (Commission identifying lower overall energy prices as the *primary* objective behind opening competitive retail markets in New York).

<sup>21</sup> Hearing Exhibit 1110; *see also* TR. 843, ln. 11 through TR. 844, ln. 5 (showing that ESCOs have provided a less expensive alternative to default utility service in each year between 2005 and 2015).

demonstrate “value” represent a fundamental and troubling disregard for the purpose and function of competitive markets. Value determinations in a competitive market are appropriately reserved for individual consumers to make.<sup>22</sup> The Record demonstrates that if consumers are dissatisfied with their ESCO service, they can shop around to select an alternative ESCO provider or even choose to revert back to default utility service.<sup>23</sup> In fact, RESA has recommended that the Commission adopt an accelerated switching model that would allow customers to switch their energy suppliers even more freely to take advantage offers in which they find value.<sup>24</sup>

Beyond the Commission’s original objectives for retail energy markets, the State’s Reforming the Energy Vision (“REV”) initiative and the Clean Energy Standard (“CES”) present new opportunities for the competitive market to provide value to consumers. As previously noted in RESA’s Initial Brief, REV seeks to increase electric system efficiencies; provide greater customer choice; and accelerate the development of clean energy and energy efficiency technologies.<sup>25</sup> REV is explicitly directed at moving the electric system forward through customer empowerment and enhanced customer knowledge that will support effective management of the total energy bill.<sup>26</sup> This simply cannot be achieved through Staff’s recommendations, which would have the practical effect of forcing millions of New York energy

---

<sup>22</sup> TR. 837, lns. 2-7 (RESA’s expert Dr. Makhholm stating that “Consumers should determine value placed on products and services in the marketplace by shopping and switching to products and services offered by ESCOs. Simply put, if consumers find the market prices too high, or the value of the products does not meet their expectations, those customers would simply purchase alternative or substitute products. This is how competitive markets function.”).

<sup>23</sup> TR. 833, lns. 11-15.

<sup>24</sup> TR. 1174, ln. 3 through TR. 1175, ln. 3.

<sup>25</sup> Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Order Instituting Proceeding at 3 (issued Apr. 25, 2014) (the “REV Order”).

<sup>26</sup> *Id.* at 3-4.

customers back to a century-old regulatory system that the Commission itself has identified as insufficiently focused on consumer needs.<sup>27</sup>

Staff's recommendations would betray the Commission's original objectives for retail energy markets<sup>28</sup> and frustrate the State's goals under REV and the CES. The non-ESCO parties have presented absolutely no evidence to justify their recommendations to unduly burden the existing competitive market with groundless price regulations and damaging product restrictions that will undo the decades of progress made in achieving the Commission's original goals in establishing the competitive retail markets. In accordance with its pioneering policies to address the State's pressing energy issues, the Commission should make proactive market reforms that advance transparency and consumer choice over Staff's heavy-handed market restrictions. Accordingly, the appropriate path forward is to implement targeted reforms that enhance market transparency while maintaining consumer choice and access to energy cost savings by adopting the recommendations that RESA detailed in its initial brief to achieve these aims.<sup>29</sup>

## **II. BACKGROUND**

### **III. ANALYSIS**

#### **A. REGULATORY REGIME**

##### **1. Commission's Vision in Opening the Competitive Markets**

Both Staff and PULP cite Commission Opinion 96-12 as the source of the Commission's desire to develop competitive opportunities in the New York energy marketplace.<sup>30</sup> PULP's Brief implies that the Commission has already passed final judgment on the value of the retail

---

<sup>27</sup> TR. 1138, ln. 1 through TR. 1142, ln. 3 (Mr. Lacey explaining how ESCOs will contribute to REV and the CES).

<sup>28</sup> Compare Opinion No. 96-12 at 26 (detailing objective to reduce overall market prices and increasing consumer choice among a variety of suppliers) with Staff Brief 4-5 (recommending unsubstantiated and rigid price controls and recommending arcane product restrictions).

<sup>29</sup> See RESA Initial Brief at 83-85, Section IV.

<sup>30</sup> Staff Brief at 20; PULP Brief at 10-11.

markets.<sup>31</sup> PULP's Brief erroneously claims that the Commission has already determined that the State's retail markets are not "workably competitive" and that the "retail competition experiment has failed."<sup>32</sup> However, this proceeding itself is evidence that the Staff and the Commission continue to evaluate the efficacy of the retail markets and remain interested in adopting meaningful reforms that would preserve consumer choice while improving transparency in the marketplace.<sup>33</sup>

PULP correctly indicates that a fundamental objective of opening the retail markets in New York was to "provide the same or better service(s) at prices lower than the default utilities . . . ."<sup>34</sup> However, PULP fails to acknowledge that New York's retail competitive market has achieved the Commission's objective of reducing *overall* energy prices in New York.

Opinion 96-12 states that "competition should result in lower electric prices in New York State overall than currently. The large difference between New York's prices and the national average electric price should begin to shrink, rather than growing as it has under regulation . . . ."<sup>35</sup> The Commission's objective was to modify the cost curve downward, such that, *collectively*, New York energy consumers would receive the same or better services at lower *overall* rates. As the unrefuted evidence in this proceeding establishes, this objective has been achieved.<sup>36</sup>

---

<sup>31</sup> PULP Brief at 10-11.

<sup>32</sup> PULP Brief at 11.

<sup>33</sup> See e.g. Cases 15-M-0127, et al., *In the Matter of Eligibility Criteria for Energy Service Companies*, Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, at 3-8 (issued on Dec. 2, 2016) (hereafter "Notice") (stating that the Commission "continues to examine measures" that would ensure that energy customers receive value and further establishing two procedural tracks that identify and evaluate reform opportunities for improvements in the retail markets).

<sup>34</sup> PULP Brief at 10.

<sup>35</sup> Opinion No. 96-12 at 26.

<sup>36</sup> Hearing Exhibit 1130 at 16-20 (demonstrating that competitive markets reduce *overall* energy costs; showing that competitive markets in New York have reduced energy costs across *all sectors*).

On cross-examination, the Staff Panel explicitly admitted that it did not conduct *any* analysis as to whether the presence of ESCOs in the marketplace has resulted in lower *overall* prices.<sup>37</sup> Thus, the uncontroverted evidence on the record demonstrates that New York has actually seen a *reduction* in the overall electricity costs relative of peer states.<sup>38</sup> Specifically, between 2008 and 2016, *overall* electricity prices in New York *dropped roughly 12 percent across all market sectors* (residential, commercial and industrial).<sup>39</sup> This decline represented the fourth largest reduction in overall electricity prices *for residential customers* in the entire country.<sup>40</sup> This was also the fourth largest overall reduction in electricity prices across *all market sectors* in the country.<sup>41</sup>

Throughout this proceeding, the non-ESCO parties have consistently confused the Commission's goal of reducing aggregate market prices<sup>42</sup> with ensuring that every customer receive a cost savings *vis-à-vis* the default utility rate.<sup>43</sup> Indeed, a review of Principle 1 of Commission Opinion 95-7 reveals that the Commission's goal was always to reduce aggregate market prices, not individual ESCO prices charged to individual customers:

The basic objective of moving to a more competitive structure is to satisfy ~~all~~ consumers' interests at minimum resource cost. Prices should therefore accurately reflect resource costs, and ~~all~~ consumers should have a reasonable opportunity to realize savings and other benefits from competition.<sup>44</sup>

---

<sup>37</sup> TR. 2289, lns. 10-17.

<sup>38</sup> See Hearing Exhibit 1130 (entered by RESA); Hearing Exhibit 1400 (entered by Constellation).

<sup>39</sup> Hearing Exhibit 1130 at 19-20.

<sup>40</sup> *Id.* at 19.

<sup>41</sup> *Id.* at 20.

<sup>42</sup> Opinion No. 96-12 at 26.

<sup>43</sup> Compare Opinion No. 96-12 at 26 (detailing objective to reduce overall market prices) with Staff Brief at 1 (erroneously claiming that ESCO prices are substantially higher).

<sup>44</sup> Cases 94-E-0952 *et al.*, *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Adopting Principles to Guide the Transition to Competition, Opinion No. 95-7 at 5 (issued June 7, 1995).

Notably, in adopting Principle 1, the Commission did not require guaranteed savings and explicitly recognized that competitive markets also offer “other benefits.”<sup>45</sup> In fact, the Commission specifically deleted the word “all” from a prior draft of these principles and explained that that the words “all” in the second and third sentences might imply an assurance that benefits would flow to every individual consumer; a result that the Commission recognized might not be achievable.<sup>46</sup> The Commission noted that “[d]eleting the word ‘all’ in both places avoids the potential to mislead” consumers that savings could be achieved for every customer.<sup>47</sup>

The unrefuted evidence in the Record establishes that retail markets have achieved the Commission’s goal of reducing overall market prices.<sup>48</sup> The Record also demonstrates that the competitive retail market provides consumers with “a reasonable opportunity to realize savings and other benefits from competition.”<sup>49</sup> Significantly, none of the non-ESCO parties presented any evidence to the contrary. This is not surprising given that an honest treatment of the fact that electricity prices have declined would contradict the non-ESCO parties’ erroneous theory that retail markets have not created value for New York customers.<sup>50</sup>

Moreover, during the Evidentiary Hearing, the non-ESCO parties presented *no evidence* that their recommended price controls would provide consumers with a “reasonable opportunity to realize savings and other benefits from competition” or drive overall energy prices down. In fact, implementing Staff’s recommended price controls would actually frustrate the Commission’s original intentions for adopting a competitive marketplace where ESCOs are free

---

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 5-6.

<sup>47</sup> *Id.* at 6.

<sup>48</sup> Hearing Exhibit 1130 at 15-20.

<sup>49</sup> Opinion No. 95-7 at 5 (stating that the Commission’s primary principle in adopting the competitive model was to achieve market-wide energy savings).

<sup>50</sup> See Staff Brief at 3 (falsely alleging that ESCO customers receive nothing more than the same electrons at a higher price).

to innovate and customers are free to choose the best-suited energy service among a variety of market options, including default utility service.<sup>51</sup> Consumer choice through ESCO-supplied alternatives is the *only* mechanism by which customers can achieve savings from default utility rates.<sup>52</sup> New York energy customers should be able to choose the energy service they prefer. Any recommendation that would deprive consumers of that choice would benefit no one and deprive customers of the ability to choose “terms of their service through various contract options, including the design of their rates and the length of their contracts for service.”<sup>53</sup>

Therefore, the Commission should find that the competitive retail marketplace has indeed allowed the State to lower overall energy costs compared to other states. Accordingly, the Commission should protect consumer choice and opportunity to save by adopting the sensible market reforms RESA recommends.<sup>54</sup>

**2. Application of Public Service Law to ESCOs [Notice Questions 2, 3, 4, 12 and 20]**

**a) Scope of Commission Jurisdiction Under the PSL**

When it first opened the retail market, the Commission never granted, nor extended, the same ratemaking authority it has over utilities to the competitive retail markets.<sup>55</sup> This is not surprising in light of the fact that the Commission has enthusiastically endorsed the competitive market model and espoused the clear opinion that “introducing competition to the electric industry in New York has the potential to reduce rates over time, increase customer choice, and

---

<sup>51</sup> Opinion No. 96-12 at 26 (stating that “consumers will have more opportunities to choose a producer of electricity and to decide on preferable energy service options. Consumers should be able to choose not only their suppliers, but also the terms of their service through various contract options, including the design of their rates and the length of their contracts for service.”).

<sup>52</sup> Hearing Exhibit 1110; *see also* TR. 843, ln. 11 through TR. 844, ln. 5 (showing that ESCOs have provided a less expensive alternative to default utility service in each year between 2005 and 2015).

<sup>53</sup> *Cf.* Opinion No. 96-12 at 26.

<sup>54</sup> *See* RESA Initial Brief at 83-85, Section IV.

<sup>55</sup> Opinion No. 96-12 at 25-30 (detailing the Commission’s vision and goals for New York’s retail markets).

encourage economic growth; and we declare our intent to encourage competition wherever feasible.”<sup>56</sup>

The scope of the Commission’s ratemaking authority under the Public Service Law (“PSL”) remains the subject of ongoing litigation.<sup>57</sup> As explained in NEM’s Brief, the Commission has no ratemaking authority under Article Four of the PSL, and only limited, non-ratemaking authority under Article Two of the PSL.<sup>58</sup> The Commission’s authority to regulate ESCO rates under Article 1 of the PSL is at the center of NEM’s and RESA’s appeals before the Court of Appeals.<sup>59</sup> Those appeals will resolve the question of whether the Commission has any authority to regulate ESCO prices.<sup>60</sup> Consequently, until this issue is resolved by the Court of Appeals, any rate-regulation imposed on ESCOs by the Commission would be premature, and in RESA’s view, entirely unauthorized under the PSL.

Not only is Staff’s recommendation for rate regulation beyond the Commission’s legal authority, but it is also entirely inconsistent with the Commission’s clear intention that ESCO prices should be regulated by competitive forces.<sup>61</sup> Nevertheless, Staff has irrationally recommended that the Commission adopt a savings guarantee requirement,<sup>62</sup> which would reduce ESCOs’ incentives for participation in the markets, thereby diluting the choices available

---

<sup>56</sup> Opinion No. 96-12 at 30.

<sup>57</sup> In March 2018, the New York Court of Appeals granted NEM and RESA’s motions for leave to appeal the Third Department’s decision on RESA’s and NEM’s challenges to the Commission’s claimed authority to regulate ESCO rates. *See Matter of Retail Energy Supply v. New York State Public Service Commission*, 152 A.D.3d 1133 (3d Dep’t July 27, 2017) *appeal docketed*, No. 2018-99 (Mar. 27, 2018); *Matter of National Energy Marketers Assn. v. New York State Public Service Commission*, 152 A.D.3d 1122 (3d Dep’t July 27, 2017) *appeal docketed*, No. 2018-99 (Mar. 27, 2018).

<sup>58</sup> *See* NEM Brief at 40-47.

<sup>59</sup> NEM Brief at 45-46; *see also* *Matter of Retail Energy Supply Ass’n v. Pub. Serv. Comm’n of the State of New York*, 152 A.D.3d 1133 (3d Dep’t 2017), *appeal docketed*, No. APL-2018-00047 (N.Y. Mar. 27, 2018).

<sup>60</sup> NEM Brief at 46; *see also* *Matter of Retail Energy Supply Ass’n v. Pub. Serv. Comm’n of the State of New York*, 152 A.D.3d 1133 (3d Dep’t 2017), *appeal docketed*, No. APL-2018-00047 (N.Y. Mar. 27, 2018).

<sup>61</sup> *See* Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace).

<sup>62</sup> *See* Staff Brief at 4.

to consumers that currently exist.<sup>63</sup> Notably, the Commission expressed that market rates were intended to be self-regulating: “[m]arket forces overall are expected to produce, over time, rates that will be lower than they would be under a regulated environment. As we move toward competition, our expectation is that rates overall will be reduced.”<sup>64</sup> Allowing ESCOs to charge market rates is consistent with the Commission’s intention for competitively priced energy services.<sup>65</sup>

On cross-examination, the Staff Panel admitted that they did not conduct *any* studies to determine whether any ESCOs would continue to operate if the Commission were to adopt Staff’s recommendations.<sup>66</sup> On one hand, Staff recommends a mandate for guarantee savings,<sup>67</sup> while on the other hand, states a desire to improve consumer choice *without having done any analysis of the potential impact of their drastic recommendations*.<sup>68</sup>

Contrary to the theories advanced by Staff and UIU/NYAG, the Commission lacks any legal authority under the PSL to impose Staff’s recommended rate regulations on ESCO prices. The lack of legal authority to impose price regulations is entirely consistent with the Commission’s original intention that the retail markets would be a choice-driven marketplace where customers are empowered to choose among a variety of suppliers and products.<sup>69</sup>

---

<sup>63</sup> TR. 288, ln. 154 through TR. 290, ln. 191 (Direct Energy witness Mr. John Hanger describing Commission’s intention to provide incentives for ESCOs to provide diverse products and services).

<sup>64</sup> Opinion No. 96-12 at 28.

<sup>65</sup> Opinion No. 95-7 at 6 (Commission stating that core principle in opening the competitive energy market was that “increased emphasis should be placed on market-based means or competitively neutral approaches to preserve research, environmental protections, cost effective energy efficiency and fuel diversity.”)

<sup>66</sup> TR. 2258, lns. 8-12.

<sup>67</sup> Staff Brief at 4.

<sup>68</sup> TR. 2258, lns. 8-12.

<sup>69</sup> Opinion No. 96-12 at 28.

**b) Should ESCOs Be Required To File Tariffs?**

Without citing any legal support for its contention, PULP argues that the Commission should require ESCOs to file tariffs with the Commission.<sup>70</sup> Not only is this recommendation in complete contravention of the limits on the Commission’s legal authority,<sup>71</sup> but it is contrary to Staff’s position that tariffs would be ineffective.<sup>72</sup> The expense and administrative burden of implementing such tariffs would be inappropriate.<sup>73</sup> Indeed, PULP itself acknowledges, that “[tariffs] can be extremely complicated and voluminous, and would most likely prove to impose significant costs to ESCO operation.”<sup>74</sup> During the Evidentiary Hearing, Staff similarly acknowledged that tariffs are complicated and not transparent to the general public.<sup>75</sup>

In an equally perplexing argument, Staff cites a 66-year-old decision, which is narrowly related to electric submetering, to argue that the Commission has “very broad powers” sufficient to regulate ESCO rates, service classifications, and terms and conditions under which *utility service* is furnished to customers.<sup>76</sup> Staff’s opposition to ESCO tariffs and simultaneous demand for draconian price regulations and product restrictions evidences their desire to impose price ceiling regulations while circumventing the administrative and procedural steps typically required to impose such regulations. This is illogical and directly cuts against Staff’s arguments for greater transparency in the marketplace.

Aside from the illogical nature of its recommendations on tariffs, PULP’s arguments lack any legal basis for imposing tariffs *or* rate regulations. As previously discussed, the Commission

---

<sup>70</sup> PULP Brief at 11.

<sup>71</sup> See Section III(A)(2)(a) (detailing the limits of the Commission’s authority to regulate ESCO rates).

<sup>72</sup> Staff Brief at 24.

<sup>73</sup> *Id.*

<sup>74</sup> PULP Brief at 11 (emphasis added).

<sup>75</sup> TR. 2228, lns. 8-12.

<sup>76</sup> Staff Brief at 24 (*citing Matter of Campo*).

lacks any authority to regulate ESCO rates.<sup>77</sup> Moreover, not only does the Commission lack authority to require ESCOs to file tariffs,<sup>78</sup> but to require such tariffs would undoubtedly frustrate the Commission’s objectives of competitive, market-based pricing and robust consumer choice.<sup>79</sup>

For these reasons, PULP’s call for tariffs and Staff’s demand for price limitations should be rejected. Instead, the Commission should adopt the sensible reform recommendations set forth in RESA’s Initial Brief.<sup>80</sup>

### **3. Enforcement Powers Over ESCOs [Notice Questions 2 and 19]**

#### **a) Commission’s Enforcement Mechanisms and Efforts**

Contrary to Staff’s assertions,<sup>81</sup> the evidence indicates that the Department’s enforcement efforts between 2014 and 2017 were sporadic.<sup>82</sup> Annual Notice of Apparent Failure (“NOAF”) issuances in that period ranged from two in 2014, up to 45 in 2015, and back down to 12 in 2016 – a 95 percent swing over just three years.<sup>83</sup> These notices are inconclusive by nature (i.e., “apparent” failures) and are not confirmed or verified by any tribunal or court outside the Department.<sup>84</sup> Importantly, the majority of these NOAFs were issued for violations of the Uniform Business Practices (“UBPs”) related to marketing practices.<sup>85</sup> Moreover, on cross-examination, Staff conceded that across the entire ESCO market there has been a “tightening” of ESCO compliance with the UBPs that has collectively demonstrated a “noticeable improvement”

---

<sup>77</sup> See Section III(A)(2)(a) (detailing the limits of the Commission’s authority to regulate ESCO rates).

<sup>78</sup> *Id.*

<sup>79</sup> See Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace).

<sup>80</sup> See RESA Initial Brief at 83-85, Section IV.

<sup>81</sup> Staff Brief at 26.

<sup>82</sup> See TR. 2103, lns. 10-14.

<sup>83</sup> TR. 2103, lns. 10-14.

<sup>84</sup> TR. 2104, ln. 16 through TR. 2109, ln. 4.

<sup>85</sup> TR. 1552, lns. 7-9.

over the past four years.<sup>86</sup> When this fact is considered in conjunction with the dramatic declines in consumer complaints, it is clear that the ESCO market is continuing to mature and stabilize.<sup>87</sup> Consistent enforcement of laws and regulations, which is fundamental to sufficient deterrence against unlawful behaviors in any market,<sup>88</sup> can drive further improvements.

Puzzlingly, Staff states that the Department’s enforcement efforts have been effective, but then submits that those efforts are “not sufficient to address the concerns identified by Staff in its testimony.”<sup>89</sup> Staff acknowledges that nothing in the current UBPs allows the Department to regulate ESCO prices for commodity.<sup>90</sup> This is not surprising given the Commission’s explicit intention that the New York marketplace would allow for *competitive market-based pricing*.<sup>91</sup> Staff’s alarm at the lack of price controls in the UBP<sup>92</sup> highlights their fundamental misunderstanding of competitive markets generally and how the Commission intended the retail markets to function.<sup>93</sup> Staff’s suggestions fail to recognize that the Commission simply does not have any legal authority to regulate ESCO prices.<sup>94</sup> Indeed, for reasons that were explained more fully above, such authority was never intended for the *competitive* markets, which are controlled by *market-based* pricing.<sup>95</sup>

---

<sup>86</sup> TR. 2623, ln. 18 through TR. 2624, ln. 3.

<sup>87</sup> See RESA Initial Brief at 49-50 (detailing the dramatic decline in complaint rates since 2015).

<sup>88</sup> See TR. 1101, lns. 9-13 (Mr. Lacey describing RESA’s position that rigorous and targeted enforcement is needed against specific ESCOs that engage deceptive practices); see also TR. 1271, ln. 11 through TR. 1272, ln. 12 (Mr. Lacey describing how market improvements can be achieved through enhanced enforcement efforts).

<sup>89</sup> See Staff Brief at 26.

<sup>90</sup> See Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace); Opinion No. 95-7 at 5 (stating that the Commission’s primary principle in adopting the competitive model was to achieve market-wide energy savings).

<sup>91</sup> See generally Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace).

<sup>92</sup> Staff Brief at 2 (claiming, without support, that the retail energy markets “are not functioning as the Commission originally intended”); see also TR. 2109, lns. 21-24 (claiming that Staff cannot protect the customers against alleged price gouging by the ESCOs under current UBP).

<sup>93</sup> Compare Staff Brief at 2 with Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace); Opinion No. 95-7 at 5 (stating that the Commission’s primary principle in adopting the competitive model was to achieve market-wide energy savings).

<sup>94</sup> See Section III(A)(2) (describing the scope of the Commission’s authority to regulate ESCO prices).

<sup>95</sup> See Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace).

One of Staff's persistent assertions throughout this proceeding has been that consumers have no "protections against price gouging by ESCOs"<sup>96</sup> and consumers "are unable to address the fundamental flaws in the retail access marketplace which allows the majority of the ESCO community to aggressively market and charge unfettered prices for commodity."<sup>97</sup> The issue with Staff's statement is that it improperly mixes the issues about ESCO pricing with ESCO compliance with the UBP. As described above, the Commission never intended or desired the market to be burdened by strict price regulation.<sup>98</sup> Instead, the Commission desired overall price reductions in the market, and sought to provide consumers with the opportunity to choose retail energy service to achieve savings.<sup>99</sup> The Record reflects that both of these objectives have been achieved through: (1) lower *overall* electricity prices,<sup>100</sup> and (2) the creation of consumer opportunities to choose a lower-priced, alternative energy supplier than their default utility.<sup>101</sup> Staff's relentless calls for strict price regulation demonstrates their fundamental misunderstandings of the retail market's purpose and the Commission's core objectives detailed in their implementing orders.<sup>102</sup> Granting Staff's unfounded requests for such regulation would defeat the Commission's explicit objectives that the retail marketplace would advance consumer choice through market-based competition and overall price reductions for the retail marketplace. Staff's recommendations would impose unsubstantiated and inappropriate price regulation and

---

<sup>96</sup> TR. 2109, lns. 21-24 (Staff Panel claiming that they cannot protect consumers against alleged price gouging by the ESCOs under current UBP).

<sup>97</sup> TR. 2110, lns. 1-5.

<sup>98</sup> See Opinion No. 96-12 at 28 (identifying that increasing consumer choice, and lower *overall* consumer rates were key objectives of the Commission); see also Opinion No. 95-7 at 5 (stating that the objective of the retail marketplace was to provide consumers with a "reasonable opportunity to realize savings," but recognizing that savings might not be achieved by every single consumer).

<sup>99</sup> *Id.*

<sup>100</sup> Hearing Exhibit 1130 at 16-20 (demonstrating that competitive markets reduce *overall* energy costs; showing that competitive market in New York has reduced energy costs across *all sectors*).

<sup>101</sup> Hearing Exhibit 1110; see also TR. 843, ln. 11 through TR. 844, ln. 5 (showing that ESCOs have offered a less expensive alternative to default utility service in each year between 2005 and 2015).

<sup>102</sup> See Opinion No. 96-12 at 25-30; Opinion No. 95-7 at 4-9.

product restrictions<sup>103</sup> that directly conflict with the Commission's explicit objectives for "market-based solutions to public policy issues rather than regulatory mandates."<sup>104</sup>

Staff's own testimony states that the Department's objective in this proceeding is to "weed out bad actors."<sup>105</sup> Staff also agrees that some ESCOs may need additional direct enforcement attention from the Department and the Attorney General's Office with respect to *specific* ESCO violations.<sup>106</sup> Thus, by Staff's own admission, targeted enforcement efforts on a case-by-case basis are appropriate means for the Department to continue to apply pressure on all market participants to comply with the UBPs. Implementing unjustified price controls on a market intended to be controlled by consumer choice and competitive market principles would betray the Commission's foundational goals in establishing the New York markets.<sup>107</sup> Instead, the Commission's oversight of the market should be designed to weed out the companies that consistently violate the UBPs and allow others to thrive.<sup>108</sup> This will protect the obvious advantages of consumer access to savings and other benefits through robust retail markets, while strictly enforcing applicable laws and regulations against violators.

Staff's illogical and unauthorized call for regulation of ESCO rates as a means of Commission enforcement defies the Commission's original intentions for the competitive retail markets and is not authorized by *any* legal authority. Therefore, the Commission should reject Staff's recommendations and instead adopt the sensible recommendations set forth in RESA's Initial Brief.<sup>109</sup>

---

<sup>103</sup> Staff Brief at 4 (outlining Staff's flawed recommendations for price ceiling regulation and product restrictions).

<sup>104</sup> Opinion No. 96-12 at 30 (detailing the benefits of the *competitive* retail market model).

<sup>105</sup> TR. 2239, lns. 6-25 (explaining that the objective of this proceeding is to "weed out bad actors").

<sup>106</sup> TR. 2624, lns. 4-9.

<sup>107</sup> See Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace).

<sup>108</sup> TR. 1155, lns. 8-9.

<sup>109</sup> See RESA Initial Brief at 83-85, Section IV.

**b) Attorney General’s Enforcement Mechanisms and Efforts**

UIU/NYAG’s Brief argues that “industry-wide problems require industry-wide solutions.”<sup>110</sup> UIU/NYAG offers only unsupported, generalized allegations about ESCOs to demand strict price controls that contrast sharply with the Commission’s clear intentions for the competitive markets.<sup>111</sup> UIU/NYAG falsely paints New York’s retail markets as the lawless Wild West, where consumers are left helpless against rampant distortion and fraud on behalf of ESCOs.<sup>112</sup> Notably, despite UIU/NYAG’s exaggerated claims of widespread problems in the ESCO market, UIU/NYAG admitted that it has *only brought seven enforcement actions in the past 17 years*.<sup>113</sup> The NYAG’s enforcement efforts are entirely disconnected from their claims that the industry is “riddled with flaws.”<sup>114</sup>

As offered, UIU/NYAG’s illogical reasoning on the subject of ESCO enforcement operates this way: First, UIU/NYAG claims that enforcement is not enough to improve the retail markets.<sup>115</sup> Next, UIU/NYAG claims that enforcement of the current UBP *could never* be enough to address the problems in the market.<sup>116</sup> Finally, UIU/NYAG recommends additional regulations that by its own admission could not properly be enforced.<sup>117</sup> Tellingly, when asked directly whether the first step should be to enforce the existing regulations that are on the books, UIU/NYAG responded that they “could not offer an opinion” as to whether existing regulations should be enforced before implementing additional regulations.<sup>118</sup>

---

<sup>110</sup> UIU/NYAG Brief at 22.

<sup>111</sup> Compare UIU/NYAG Brief at 25 (calling for price regulation) with Opinion No. 96-12 at 25-30 (describing the market-based goals and vision of the *competitive* retail marketplace).

<sup>112</sup> See UIU/NYAG Brief at 22-25.

<sup>113</sup> UIU/NYAG Brief at 24.

<sup>114</sup> *Id.*

<sup>115</sup> UIU/NYAG Brief at 22 (claiming case-by-case enforcement is not sufficient).

<sup>116</sup> *Id.* at 24-25 (claiming limited resources constrains NYAG from effectively enforcing the UBP).

<sup>117</sup> *Id.* at 24-25 (claiming that additional regulation is preferable to enforcing existing regulation due to limited resources available for enforcement).

<sup>118</sup> TR. 1659, lns. 16-19.

UIU/NYAG's reasoning misses, or purposefully ignores, the obvious connection that regulations require enforcement to be effective. Regulations without appropriate and necessary enforcement are just words on paper. Essentially, what the UIU/NYAG Panel has argued is that the NYAG's enforcement efforts have been marginally effective, but still insufficient. However, what UIU/NYAG fails to recognize is that, by their own admissions, the *new* regulations they request will not, and cannot, be supported by additional enforcement efforts.<sup>119</sup> This deeply flawed and illogical reasoning should be rejected.

As previously argued in RESA's Initial Brief, robust enforcement that deters bad actors is essential to the proper functioning of any market.<sup>120</sup> UIU/NYAG states unequivocally that "[t]he NYAG is both empowered and obligated to ferret out fraud and illegality in the state of New York and to protect the interests of its people and businesses."<sup>121</sup> RESA enthusiastically agrees and recommends that the Commission not only increase its enforcement activity towards the bad actors in the marketplace, but also encourage the NYAG to employ the enforcement actions necessary to comply with their duty to protect New York consumers. Moreover, the Commission should adopt the recommendations detailed in RESA's Initial Brief to improve market transparency and preserve consumer choice.<sup>122</sup>

---

<sup>119</sup> UIU/NYAG Brief at 24-25 (claiming limited resources constrains NYAG from effectively enforcing the UBP); *see also* TR. 1659, lns. 16-19 (UIU/NYAG Panel stating it is unable to provide an opinion as to whether new UBP regulations could be enforced by the Commission).

<sup>120</sup> RESA Initial Brief at 57-58, Section III(C)(10)(c).

<sup>121</sup> UIU/NYAG Brief at 22.

<sup>122</sup> *See* RESA Initial Brief at 83-85, Section IV.

**B. USEFULNESS & ACCURACY OF COMPARING ESCO AND UTILITY RATES**

**1. Utility Bill Comparison Methodologies [Notice Questions 12, 16 and 17]**

Staff, UIU/NYAG, and PULP all claim that ESCOs have “overcharged” New York customers.<sup>123</sup> More incredulously, Staff alleges, without *any* evidence, that such “overcharges” are the result of ESCO “greed.”<sup>124</sup> Preliminarily, Staff’s suggested definition of an “overcharge” is not based on any legal definition and even diverges from the traditional meaning of the term as it is used colloquially. An “overcharge,” as it is typically used, refers to charges for products or services that are in excess of what was validly agreed to by contract or obligation.<sup>125</sup> Importantly, Staff and the other non-ESCO parties offered absolutely no evidence of *any* ESCO “overcharge” as the term is traditionally understood, nor has Staff even alleged that ESCOs are systematically breaching contract terms or obligations.<sup>126</sup>

Incomprehensibly, in its brief, Staff doubles-down on their deeply flawed bill-comparison approach by offering cherry-picked anecdotes of specific ESCO customers that Staff alleges paid more than they would have if they had accepted service from the default utility.<sup>127</sup> Staff makes the entirely unsupported suggestion that its offered anecdotes are “examples” of “typical” ESCO customer experiences.<sup>128</sup> Revealingly, Staff’s false assertion is not supported by any citation to Record.<sup>129</sup> Thus, Staff’s hand-selection of three extreme examples out of 1.6 million ESCO customers should not be given any weight.<sup>130</sup>

---

<sup>123</sup> Staff Brief at 28; UIU/NYAG Brief at 26; PULP Brief at 13.

<sup>124</sup> *Id.* at 87.

<sup>125</sup> *See* NEM Brief at 50-52.

<sup>126</sup> *See generally* Staff Brief.

<sup>127</sup> *Id.* at 29-35.

<sup>128</sup> *Id.* at 30.

<sup>129</sup> Staff Brief at 30 (alleging, without reference to *any* evidence, that the first example “is typical of the vast majority of what the vast majority of ESCO customers experienced.”).

<sup>130</sup> TR. 832, lns. 16-18.

Throughout this proceeding, the non-ESCO parties have erroneously intertwined their flawed theories on “overcharges” with legitimate concerns about market transparency. As occurs in *all* competitive retail markets, not every customer will pay the same price for a particular product or service.<sup>131</sup> Price dispersion is common and even healthy in competitive markets.<sup>132</sup> Therefore, it is entirely possible, and even expected, that *some* customers may pay more than the default utility. Importantly, contrary to what Staff wrongly suggests, it was *never* the Commission’s intention that every single ESCO customer would save in the retail marketplace.<sup>133</sup> The Commission was instead focused on reducing overall prices, a goal which, as discussed above, has in fact been achieved under the competitive markets.<sup>134</sup>

Against all of the evidence in the Record, Staff’s three anecdotal “examples” confound a myriad of issues including the value of price certainty under fixed-price products, as well as the verified benefits of value-added products.<sup>135</sup> Staff’s flawed price comparison that erroneously compares the fundamentally different products and services of ESCOs with those of utilities is misleading and should be rejected.<sup>136</sup> Staff’s bill comparison analysis is offered as a distraction from the Record, which demonstrates that ESCO alternatives are the only avenue by which consumers can achieve savings compared to the default utility price.<sup>137</sup>

---

<sup>131</sup> TR. 916, ln. 9 through TR. 918, ln. 6 (Dr. Makhholm discussing the natural occurrence of price dispersion in competitive markets); *see also* TR. 1108, lns. 10-12 (Mr. Lacey explaining that price dispersion indicates that “the market is working”).

<sup>132</sup> *Id.*

<sup>133</sup> *See generally* Opinion No. 96-12, 25-30 (detailing the Commission’s vision and goals for New York’s retail markets); *see also* Opinion No. 95-7 at 5 (specifically, see the Commission’s changes to Principle 1, and the deletion of the word “*all*,” where the Commission is effectively rejecting the idea that savings could be achieved or assured to every individual ESCO customer under the retail market model).

<sup>134</sup> Opinion No. 96-12 at 25-30 (describing the market-based goals and vision of the *competitive* retail marketplace).

<sup>135</sup> *See* TR. 1126, ln. 1 through TR. 1137, ln. 19 (Mr. Lacey describing benefits of ESCO products).

<sup>136</sup> TR. 1108, ln. 7 through TR. 1109, ln. 5 (Mr. Lacey explaining the fundamental inaccuracy of Staff’s price comparison).

<sup>137</sup> Hearing Exhibit 1110; *see also* TR. 843, ln. 11 through TR. 844, ln. 5 (showing that ESCOs have provided a less expensive alternative to default utility service in each year between 2005 and 2015).

On cross-examination, Staff even acknowledged the deep flaws in its own analysis. Staff's testimony recognized that their comparison is "not a strict apples-to-apples comparison,"<sup>138</sup> and Staff's Brief acknowledges that "[w]hile this total bill-to-bill comparison methodology remains the most effective, and perhaps the only accurate, way to consistently compare ESCO and utility charges, it does have its limitations."<sup>139</sup> Despite these explicit admissions to the fundamental flaws of its rate analysis, Staff irrationally claims that the Commission should still consider Staff's price comparison persuasive. Consequently, given Staff's own admissions of inaccuracy, adopting Staff's rate analysis would be entirely illogical and baseless. Remarkably, UIU/NYAG admitted on cross-examination that they did not develop their own price comparison analysis and instead simply adopted Staff's analysis in its entirety without conducting their own due diligence to corroborate Staff's conclusions.<sup>140</sup> RESA thoroughly rebutted and disproved the non-ESCO parties' contentions on these issues in its Initial Brief.<sup>141</sup>

More fundamentally, the non-ESCO parties' theory that the outcome of a bill-to-bill price comparison could ever be indicative of market success or failure is simply false. Because ESCOs provide different products than the default utilities, the non-ESCO parties' suggested comparison sets up an apples-to-oranges comparison that is neither relevant nor accurate in determining the value of a particular ESCO service.<sup>142</sup> The Record demonstrates that product differentiation and price dispersion are healthy and normal attributes of any competitive

---

<sup>138</sup> TR. 2131, lns. 11-12.

<sup>139</sup> Staff Brief at 36.

<sup>140</sup> TR. 1717, lns. 6-9 (UIU/NYAG Panel stating that they conducted no independent analysis of Staff's bill comparison data, which formed the basis for Staff's inaccurate and illogical conclusion that ESCOs "overcharge").

<sup>141</sup> RESA Initial Brief at 33-35.

<sup>142</sup> See TR. 1103, ln. 3 through TR. 1117, ln. 13.

market.<sup>143</sup> This is true even in markets that Staff has held up as models for price and product transparency, such as the online travel booking market.<sup>144</sup> Dr. Makhholm pointed out that “one can easily verify this with used book prices on Amazon or hotel prices on Trivago. Such price dispersion exists even for *identical* books or rooms, and yet no one argues that these markets are not workably competitive.”<sup>145</sup> Accordingly the price dispersion seen in the retail energy markets cannot fairly be characterized as unusual for companies providing *differentiated products*, as such price dispersion occurs even in markets with *uniform products*.<sup>146</sup>

Indeed, price dispersion and product differentiation are the underpinnings of consumer choice in a marketplace with diverse consumer demands.<sup>147</sup> Not all consumers want the same things and the customers are willing to pay different prices for different products.<sup>148</sup> The non-ESCO parties’ overly simplistic bill-to-bill price comparison wrongly concludes that all energy consumers care about is price, and the product that is offered by the ESCOs and the default utility is always the same. As demonstrated by the Mercedes versus Toyota example in the Record, both vehicles have a similar purpose, but consumers will likely choose one or the other for very different reasons personal to each individual consumer.<sup>149</sup>

Despite Staff’s entirely unsupported claims that there is no product differentiation in the ESCO market,<sup>150</sup> RESA and others provided significant evidence that ESCOs offer a variety of different types of products and services (fixed-rate, variable-rate, renewable, bundled products,

---

<sup>143</sup> TR. 916, ln. 9 through TR. 917, ln. 19 (Dr. Makhholm describing the common occurrence of price dispersion in markets, *even for identical products*).

<sup>144</sup> TR. 3274, lns. 7-11.

<sup>145</sup> TR. 917, lns. 14-16 (internal quotation omitted) (emphasis added).

<sup>146</sup> TR. 918, lns. 17-19.

<sup>147</sup> See TR. 916, ln. 9 through TR. 917, ln. 19 (Dr. Makhholm describing the common occurrence of price dispersion in markets, *even for identical products*).

<sup>148</sup> See *id.*

<sup>149</sup> See TR. 2512, ln. 10 through TR. 2514, ln. 10; see also TR. 2719, ln. 22 through TR. 2726, ln. 23.

<sup>150</sup> See e.g. TR. 2726, lns. 10-14.

etc.) that are not available from the utility.<sup>151</sup> This evidence completely refutes Staff’s hollow suggestion that ESCOs did not provide “hard evidence” that ESCOs are offering diverse product offerings with value-added service.<sup>152</sup> Accordingly, given the demonstrated diversity of ESCO products and services, any corresponding price dispersion within the retail energy marketplace is entirely unsurprising, and in fact expected.

Staff has repeatedly argued that ESCO pricing and products should be more transparent so that consumers can make a more informed decision in selecting their energy supplier.<sup>153</sup> RESA agrees with Staff and others that reforms should be implemented to make market information more accessible and transparent to consumers. Therefore, the Commission should reject Staff’s recommended price regulations and instead adopt the market reform recommendations set forth in RESA’s Initial Brief.<sup>154</sup>

## **2. Utility Delivery and Supply Cost Allocations [Notice Questions 12, 16 and 17]**

Staff and UIU/NYAG advance the flawed argument that differences in cost structures and allocation are irrelevant to an evaluation of a product’s value to consumers.<sup>155</sup> Specifically, Staff wrongly claims that “ESCO costs are not at issue in these proceedings. What is at issue is the value ESCOs provide to customers and whether or not the prices charged by ESCOs are just and reasonable . . . .”<sup>156</sup> However, that “value” is being measured against utility default service rates that are not fully reflective of the costs to provide that service.

---

<sup>151</sup> See e.g. TR. 1126, ln. 1 through TR. 1137, ln. 19; see also Hearing Exhibit 1103.

<sup>152</sup> *Id.*

<sup>153</sup> See e.g. TR. 2215, lns. 3-5; see also Staff Brief at 41.

<sup>154</sup> See RESA Initial Brief at 83-85, Section IV.

<sup>155</sup> Staff Brief at 37-38; UIU/NYAG Brief at 26-27.

<sup>156</sup> Staff Brief at 37-38.

The Record demonstrates that utilities currently recover costs to procure electricity in commodity *and* delivery portions of their rates.<sup>157</sup> As Mr. Lacey noted, utilities' ability to shift costs between commodity and delivery rates is in stark contrast to ESCOs, which can only recover these costs through their supply prices.<sup>158</sup> On this point, Mr. Lacey provided detailed testimony as to how Staff's inaccurate and disingenuous bill-to-bill comparisons fail to capture the true picture.<sup>159</sup> For example, Mr. Lacey explained that "all [utility] costs are not currently being billed through the utilities' default service rate; instead, some of these remain in the delivery portion of the bill which is paid by all customers, regardless of whether they are ESCO customers or not. Conversely, ESCOs must collect these costs through their supply charges."<sup>160</sup> Obviously, when drawing side-by-side comparisons of anything, it is important to fully account for all inputs in the calculation. Staff's defective bill-to-bill comparison fails to properly account for these important differences, highlighting the fundamental flaw in their conclusions.

The ESCO parties have agreed that additional reforms can be implemented to improve product and price transparency in the retail marketplace. However, Staff's recommendations would frustrate those goals by constraining consumer choice and depriving consumers of their opportunity to save. Accordingly, the Commission should focus its efforts in improving the retail marketplace by implementing the reforms recommended by RESA to improve transparency while preserving consumer choice.<sup>161</sup>

---

<sup>157</sup> TR. 1150, ln. 18 through TR. 1151, ln. 2; *see also* Cicchetti Testimony, TR. 681 (discussing why any comparison between the improperly unbundled default rates and the ESCO supply prices is both misleading and invalid).

<sup>158</sup> TR. 1151, lns. 2-3.

<sup>159</sup> *See generally* TR. 1149, ln. 18 through TR. 1153, ln. 8.

<sup>160</sup> TR. 1151, lns. 11-14.

<sup>161</sup> *See* RESA Initial Brief at 83-85, Section IV.

**C. RESPONSE TO COMMISSION’S INQUIRIES ON THE FUTURE OF ESCOs IN THE MASS MARKET**

**1. Should Retail Choice Continue In New York? [Notice Questions 1, 6 and 20]**

Staff uses their sweeping claim that competitive markets are not functioning as the Commission originally intended to justify their unsound recommendation that the Commission abandon the retail choice model for an outdated market regime that is constrained by price regulations and product restrictions.<sup>162</sup> Staff makes the unfounded accusation that a “lack of transparency allows ESCOs to charge customers practically whatever they want without consumers’ [sic] understanding that they are paying substantially more than if they received full utility service.”<sup>163</sup> Staff provided absolutely no evidence that ESCOs are able to charge “whatever they want,” nor did Staff demonstrate that such a practice even exists in the markets.<sup>164</sup> Although this claim is completely unsupported, it does highlight Staff’s fundamental misunderstandings of the retail market. Fundamentally, ESCOs can only charge what the markets warrant or they would very quickly go out of business.<sup>165</sup> ESCO pricing, as in all markets, is based on a combination of the ESCOs’ administrative costs and market commodity prices.<sup>166</sup>

The Commission opened the competitive retail markets to allow for robust competition to make available avenues for product innovation and market efficiencies.<sup>167</sup> Implementing Staff’s unsupported recommendations would undermine the Commission’s explicit goal to empower

---

<sup>162</sup> Staff Brief at 41.

<sup>163</sup> *Id.*

<sup>164</sup> See Staff Brief at 40-41.

<sup>165</sup> See TR. 1405, lns. 11-19 (Mr. Lacey explaining that ESCOs should be able to charge market-based rates that are not subject to a “stake in the quicksand”).

<sup>166</sup> See TR. 1151, ln. 4 through TR. 1153, ln. 8.

<sup>167</sup> Opinion No. 96-12 at 25-30 (describing the market-based goals and vision of the *competitive* retail marketplace).

consumers through a choice-based competitive market.<sup>168</sup> That being said, Staff rightly notes that improvements could be implemented to improve transparency,<sup>169</sup> but Staff's recommendations will not improve the market in the ways they claim to desire. The Record demonstrates that Staff's recommendations to restrict consumer choice through unnecessary price regulation would stifle consumer choice, delay product innovation, and reduce competition in the ESCO marketplace.<sup>170</sup> Instead, the Commission should engage the collaborative Track II process of this proceeding and adopt RESA's recommendations to improve transparency while preserving consumer choice and opportunities for consumers to save and realize other benefits as the Commission envisioned.<sup>171</sup>

Over two million New York energy customers have made an affirmative choice to source their energy supply through ESCOs rather than the default utility alternative.<sup>172</sup> ESCO customers always have the option to switch to another ESCO or to return to the utility-provided service if they believe a particular ESCO product is not providing value appropriate to the price charged.<sup>173</sup> As in all markets, not every product or service will be a perfect fit for every customer.<sup>174</sup> Accordingly, it is up to the customers themselves to evaluate the "value proposition" to which Staff frequently refers. The paternalism radiating from Staff's recommendations and improper characterization of all ESCO customers as "victims" is offensive to the intelligence of New York energy consumers. Instead of adopting Staff's misguided theories and recommendations, the Commission should focus on how ESCOs can help expand

---

<sup>168</sup> *Id.*

<sup>169</sup> TR. 3049, lns. 15-23 (Staff Panel stating there are improvements that can be made for communications and understanding between consumers and ESCOs).

<sup>170</sup> See TR. 1154, ln. 8 through TR. 1155, ln. 18.

<sup>171</sup> See RESA Initial Brief at 83-85, Section IV.

<sup>172</sup> TR. 1131, lns. 1-2.

<sup>173</sup> TR. 833, lns. 11-12 (Dr. Makhholm stating that "the ESCO market in New York has very few barriers impeding customers' ability to switch suppliers").

<sup>174</sup> See TR. 399, lns 1-4 (Mr. Sharfman stating that ESCO customers take service to choose from a range of products that best fit their individual needs).

choices for consumers of the products necessary for the State to achieve its goals under REV and the CES.

**a) ESCOs' Role in Residential Markets**

RESA's Initial Brief addresses this Section in detail.<sup>175</sup>

**b) ESCOs' Role in Non-Residential Markets**

RESA's Initial Brief addresses this Section in detail.<sup>176</sup>

**2. ESCOs' Place in the Competitive Market [Notice Questions 9, 12 and 13]**

**a) Whether ESCOs have "Market Power"**

As explained thoroughly in RESA's Initial Brief, Staff's claim that ESCOs exercise market power is completely unsupported by the Record.<sup>177</sup> Nevertheless, Staff asserts that ESCOs must have market power because "ESCO suppliers have been able to consistently charge residential customers in excess of levels charged by the utilities . . . ."<sup>178</sup> As explained in RESA's Initial Brief, Staff's own Herfindahl-Hirschman Index ("HHI") analysis demonstrates there is little to no market concentration in the New York retail markets.<sup>179</sup> Specifically, even the HHI index numbers calculated by Staff, which included the utilities, showed relatively low levels of concentration among ESCOs and, thus, no reason for the Commission to be concerned about the ability of ESCOs to exercise market power.<sup>180</sup> Therefore, Staff's HHI calculations do not even support their own unfounded theory that ESCOs exercise market power and should be rejected.

---

<sup>175</sup> RESA Initial Brief at 15-17.

<sup>176</sup> *Id.* at 17-22.

<sup>177</sup> See RESA Initial Brief 22-25.

<sup>178</sup> Staff Brief at 49.

<sup>179</sup> See RESA Initial Brief 22-24.

<sup>180</sup> TR. 510, lns. 7-14; see also RESA Initial Brief at 23.

Further, Staff's entirely erroneous suggestion that some ESCOs have market power notwithstanding the existence of a variety of consumer choices must also be rejected.<sup>181</sup> Staff's claim that an alleged lack of price transparency may create market power even in markets that provide customers with numerous competing products was disproven by the Department of Justice and Federal Trade Association Merger Guidelines,<sup>182</sup> which clearly indicate that a lack of price transparency actually *reduces* market power, rather than enhances it as Staff erroneously contends.<sup>183</sup> Staff admitted on cross-examination that "a market is more vulnerable to coordinated conduct . . . if terms are offered to customers in a relatively transparent manner."<sup>184</sup> Thus, even if Staff's exaggerated claims of a lack of market transparency were entirely accurate (which RESA vehemently disputes), it would follow that the alleged lack of transparency would actually *reduce*, rather than increase ESCO market power.<sup>185</sup> Therefore, Staff's analysis and arguments that ESCOs maintain market power are fundamentally unsound and inaccurate and should be rejected.

**b) The Functionality of Competitive Markets for Retail**

Staff claims that retail markets are not competitive due to factors such as: (1) ESCOs' ability to charge more than utilities without losing customers; (2) a lack of price transparency; (3) high HHIs; (4) limited ESCO exit from the markets; and (5) limited product differentiation.<sup>186</sup> Staff combines these wholly unsupported claims into the baseless conclusion

---

<sup>181</sup> See TR. 3273, ln. 1-16.

<sup>182</sup> Hearing Exhibit 33, Horizontal Merger Guidelines, at 26.

<sup>183</sup> See TR. 3273, ln. 1-16; see also RESA Initial Brief at 23-24.

<sup>184</sup> See TR. 3327, lns. 4-7.

<sup>185</sup> See generally TR. 3326, ln. 8 through TR. 3327, ln. 22 (Economics Panel acknowledging that market power is reduced by increased market transparency; a direct contradiction to that Panel's own pre-filed testimony).

<sup>186</sup> Staff Brief at 55.

that “competitive forces in the mass markets have failed, and retail commodity markets are not price competitive.”<sup>187</sup>

Significantly, Staff’s unfounded claims are not based on any accepted definition of market competition, but only on their own conclusory theories about the state of competition in the ESCO markets. As noted in RESA’s Initial Brief, the Commission previously defined “workably competitive markets” as:

retail and wholesale markets, uninfluenced by the potential or actual exercise of market power, where customers have a variety of supplier choices and the choice of a number of different products and services.<sup>188</sup>

There is no dispute that there a variety of supplier choices.<sup>189</sup> Further, “[p]erfect information is not necessary for competitive outcomes. Consumers only need to know the price that they are currently paying and the offers from a few companies to produce a (sic) workably competitive prices.”<sup>190</sup> The undisputed evidence in the Record establishes that consumers have access to their current pricing information as well as all of the offers available on the Power to Choose website.<sup>191</sup>

Importantly, Staff itself explicitly acknowledges that ESCOs have been able to offer lower prices, on an annual basis, than the utilities.<sup>192</sup> This admission is significant because it indicates unequivocally the indisputable fact that ESCOs provide the only avenue for savings as

---

<sup>187</sup> *Id.*

<sup>188</sup> Case 00-M-0504, Proceeding on Motion 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 Toward Competition In Retail Energy Markets, slip op. at 12 n.21 (issued and effective Aug. 25, 2004).

<sup>189</sup> TR. 832 ln. 18 through TR. 833, ln. 1 (Dr. Makhholm explaining that there are over 200 ESCOs participating in New York retail markets).

<sup>190</sup> TR. 525, lns. 15-17.

<sup>191</sup> TR. 1305, lns. 10-15 (Mr. Lacey describing how a consumer can easily compare their current energy costs with those of competitors on the Power to Choose website).

<sup>192</sup> Staff Brief at 56 (Staff acknowledging that some ESCOs have been able to offer a lower price, on an annual basis, than the default utility).

compared to the default utility.<sup>193</sup> The fact that ESCOs have provided this opportunity for savings is entirely consistent with the goals and vision that the Commission had when it first implemented the competitive retail markets in the late 1990s.<sup>194</sup>

Despite Staff's unsupported claims to the contrary, the Record is devoid of any evidence of ESCO market power.<sup>195</sup> By contrast, the Record demonstrates that both residential and small non-residential customers have a wide array of attractive choices for their electricity and gas service needs.<sup>196</sup> These choices include access to service from over 200 ESCOs, most of which offer a variety of products.<sup>197</sup> Therefore, under the Commission's own definition, the New York markets are indeed workably competitive as customers have a variety of supplier choices that offer a number of different products and services.<sup>198</sup>

Staff extends its unsupported claims on market power to the topic of market competition.<sup>199</sup> Without any supporting evidence, Staff erroneously claims that competition in the retail marketplace is primarily between ESCOs and the default utility, and that customers are more likely to return to utility service than to switch to another ESCO.<sup>200</sup> The evidence in the Record proves that Staff's allegations on customer switching are patently false.<sup>201</sup> For example, in the Orange and Rockland service territory, the number of gas and electric ESCO customers switching back to default utility service paled in comparison to the overwhelming majority of ESCO consumers that were either switching between ESCOs or switching away from default

---

<sup>193</sup> Hearing Exhibit 1110; *see also* TR. 843, ln. 11 through TR. 844, ln. 5 (showing that ESCOs have provided a less expensive alternative to default utility service in each year between 2005 and 2015).

<sup>194</sup> Opinion No. 96-12 at 25-30 (describing the market-based goals and vision of the *competitive* retail marketplace).

<sup>195</sup> *Supra* Section III(C)(2)(a).

<sup>196</sup> TR. 832, ln. 18 through TR. 833, ln. 1.

<sup>197</sup> *Id.*

<sup>198</sup> *See generally* TR. 1126, ln. 1 through TR. 1142, ln. 3 (Mr. Lacey detailing the plethora of ESCO products and services available in the New York markets and other competitive markets around the country).

<sup>199</sup> Staff Brief at 58.

<sup>200</sup> *Id.*

<sup>201</sup> *See generally* Hearing Exhibit 85 (providing utility responses to Direct Energy Interrogatories).

utility service to ESCO service in every single month from January 2014 through December 2016.<sup>202</sup> This was true of gas customers as well, except for only one month, May 2016, where the total number of new ESCO enrollments or switches between ESCOs still outnumbered the number of customers switching back to utility service.<sup>203</sup> Therefore, because Staff's claims on customer switching lack any support in the Record, and are in fact *directly contrary to the evidence presented*, they must be rejected.

**c) ESCOs' Impact on Commodity Prices: Rates in the Fully Regulated Market**

Without citing any support, Staff erroneously asserts that ESCOs' ability to consistently charge more than default utilities is evidence of market failure.<sup>204</sup> The premise that ESCOs' share of the market could ever be symptomatic of overall market success or failure is simply absurd. In fact, despite Staff's claims of declining ESCO market share among residential customers, Staff provides no analysis as to what this alleged decline in market share, *even if true*, would mean with regard to the functioning of the markets.<sup>205</sup> Instead of providing a valid basis for this illogical reasoning, Staff reverts to their repeated argument alleging that ESCOs have failed to meet their burden of demonstrating value.<sup>206</sup> Similarly, UIU/NYAG reiterates their unfounded claims that the ESCO parties failed to meet their burden of demonstrating value through energy cost savings, or renewable alternatives.<sup>207</sup>

---

<sup>202</sup> Hearing Exhibit 85 at 8-13 (Orange and Rockland response data to DE-Utilities-1 demonstrating consumer switching was far greater toward and between ESCOs, compared to the number of customers switching to the utilities from ESCOs), also at 9-11 (demonstrating that ESCOs received more new electric customers from the utility or from other ESCOs than the utility received from ESCOs in *every single month*).

<sup>203</sup> *Id.* at 13 (demonstrating that ESCOs received more new gas customers from the utility or from other ESCOs than the utility received from ESCOs in *every month, except May 2016*).

<sup>204</sup> Staff Brief at 60.

<sup>205</sup> See Staff Brief at 59-62.

<sup>206</sup> Staff Brief at 62.

<sup>207</sup> UIU/NYAG Brief at 29-30. *But see, e.g.*, TR. 1126, ln. 1 through TR. 1149, ln. 6.

Without question, the Commission's original intentions for the competitive retail markets were *not* directed at driving market share in one direction or another.<sup>208</sup> The Commission's explicit aims were directed at lowering overall energy prices across the entire New York energy markets, and increasing consumer choice among types of energy products and services.<sup>209</sup> The Record is replete with substantial evidence establishing that the current retail markets have met the Commission's objectives.

First, with regard to energy prices, the undisputed evidence in the Record reflects that New York has in fact experienced marked reductions in energy costs consistent with the Commission's original goals.<sup>210</sup> In fact, this decline represented the fourth largest reduction in overall electricity prices *for residential customers* in the entire country.<sup>211</sup> This decline in energy prices was also the fourth largest overall reduction in electricity prices across *all market sectors*.<sup>212</sup> Absent the opening of competitive energy markets, these energy price reductions would not have been possible.<sup>213</sup> Furthermore, Staff acknowledges that ESCOs have been able to offer lower prices, on an annual basis, than the default utility.<sup>214</sup> In keeping with the Commission's intentions for the retail market, preserving consumer *access* to energy savings and choice among products and suppliers must be central in any discussion for market reforms.<sup>215</sup>

---

<sup>208</sup> See Opinion No. 96-12 at 25-30 (not identifying market share shift as a goal of the competitive market, but rather that the retail markets would provide customers with an opportunity to save and more choices).

<sup>209</sup> Opinion No. 96-12 at 29.

<sup>210</sup> See generally, Hearing Exhibit 1130 (detailing the effect of ESCO participation on energy market prices).

<sup>211</sup> *Id.* at 19.

<sup>212</sup> *Id.* at 20.

<sup>213</sup> See Hearing Exhibit 1130 at 15-21 (evidencing the massive difference in historical electric price trends in competitive and monopoly jurisdictions).

<sup>214</sup> Staff Brief at 56.

<sup>215</sup> See Opinion No. 96-12 at 28 (identifying that increasing consumer choice, and lower *overall* consumer rates were key objectives of the Commission); see also Opinion No. 95-7 at 5 (stating that the objective of the retail marketplace was to provide consumers with a "reasonable opportunity to realize savings," but recognizing that savings might not be achieved by every single consumer).

Second, the Record reflects that approximately 200 ESCOs offer a multitude of differentiated products to attract particular customers in New York.<sup>216</sup> These products are differentiated by price, product attributes, brand loyalty, product bundling, and more.<sup>217</sup> The Power to Choose website offers consumers with a tool to compare prices and products to evaluate which energy product best meets their specific energy needs.<sup>218</sup> Mr. Lacey provided considerable testimony detailing not only the types of products that are currently offered in New York, but also the types of products that could be offered in the future if RESA's recommended reforms are adopted by the Commission.<sup>219</sup> In light of this evidence, Staff's unsupported claims regarding a lack of competition in the ESCO markets must be rejected.

The Record demonstrates that competitive markets have been instrumental in reducing overall energy costs to New York consumers,<sup>220</sup> and provide the only avenue by which consumers have the opportunity to realize savings as compared to the default utility.<sup>221</sup> The non-ESCO parties failed to provide any evidence to the contrary, and instead have attempted to divert attention toward their irrelevant claims of purported ESCO "overcharges." Accordingly, the Commission should reject Staff's baseless recommendations for price regulation, and instead implement changes to improve price and product transparency, while maintaining consumer choice and access to savings and other benefits that are only available from the competitive market.<sup>222</sup>

---

<sup>216</sup> TR. 1113, lns. 9-17; TR. 1114, Table FL-1 (detailing a variety of product differentiation techniques).

<sup>217</sup> *Id.*

<sup>218</sup> TR. 1168, lns. 1-7.

<sup>219</sup> See TR. 1126, ln. 1 through TR. 1137, ln. 19.

<sup>220</sup> Hearing Exhibit 1130 at 16-20 (demonstrating that competitive markets reduce overall energy costs; showing that competitive markets in New York have reduced energy costs across all sectors).

<sup>221</sup> Hearing Exhibit 1110; see also TR. 843, ln. 11 through TR. 844, ln. 5 (showing that ESCOs have provided a less expensive alternative to default utility service in each year between 2005 and 2015).

<sup>222</sup> RESA Initial Brief at 83-85, Section IV.

### 3. Future Product Offerings [Notice Question 6]

UIU/NYAG claims that ESCOs failed to provide “quantitative evidence demonstrating” their claims that they can provide value added services that would “justify the differences in ESCO and utility pricing.”<sup>223</sup> Similarly, Staff argues that “ESCOs should have the burden of proof, and should not be allowed to argue that ESCOs have no role in quantitatively defending the value of their products.”<sup>224</sup> These arguments ignore or dismiss the substantial testimony provided by Mr. Lacey and others about the value of fixed-rate, variable-rate, bundled, and other value-added products and services that are *currently offered by ESCOs*.<sup>225</sup>

Astonishingly, despite the significant testimony from RESA witnesses Dr. Makhholm and Mr. Lacey, Staff repeatedly claims that the ESCOs are “derelict in their duty to defend the reasonableness of their high-priced sales . . . .”<sup>226</sup> First and foremost, it is not Staff’s role to decide what constitutes a reasonable price for any particular product or service. Under the premise of customer choice, this value determination is appropriately left to the customer, and the customer alone.<sup>227</sup> Moreover, Staff’s claims ignore the substantial evidence in the Record that ESCO customers pay market-based prices for products they value<sup>228</sup> in a market that was incontestably intended to be driven by competitive, market-based principles.<sup>229</sup>

---

<sup>223</sup> UIU/NYAG Brief at 32.

<sup>224</sup> Staff Brief at 62.

<sup>225</sup> See e.g. TR. 1126, ln. 1 through TR. 1149, ln. 6.

<sup>226</sup> Staff Brief at 54.

<sup>227</sup> See Opinion No. 96-12 at 25-30 (describing the market-based goals and vision of the *competitive* retail marketplace).

<sup>228</sup> See e.g. TR. 1117, ln. 19 through TR. 1118, ln. 2 (Mr. Lacey explaining that ESCO customers are smart and they understand the value proposition offered by the ESCOs); see also TR. 4221, lns. 12-15 (Suburban Propane/Agway witness describing that “[ESCOs] operate[] in a competitive market, and determining factor of Agway’s success or failure is if [the ESCO] offers the proper mix of products and services, at prices demanded by its consumers. Its value proposition must be reasonable in order for [an ESCO] to remain in business.”).

<sup>229</sup> Opinion No. 96-12 at 25-30 (describing the market-based goals and vision of the *competitive* retail marketplace).

There is substantial evidence in the Record that demonstrates that there are numerous innovative products available in the retail markets.<sup>230</sup> Staff and UIU/NYAG's approach would not encourage further innovation, but instead, would actually decrease the product offerings available to consumers in direct contravention of the Commission's forward thinking REV initiative, and the goals set under the CES and the results already seen in other states which have been more innovative in their approaches.<sup>231</sup> Notably, Staff itself admitted that adopting its sweeping recommendations may result in customers paying more than they otherwise would have paid if they had stayed with an ESCO.<sup>232</sup> This outcome would have the exact opposite effect of what Staff has sought to promote.

Accordingly, Staff and UIU/NYAG's suggestions that evidence of future product offerings are irrelevant, along with their misinformed and impracticable recommendations for price controls should be rejected.

**a) Variable-Rate, Commodity-Only Products**

UIU/NYAG offers the conclusory argument that the ESCO parties have presented no evidence that variable rate products could justify any premium above utility pricing and therefore should be required to guarantee savings.<sup>233</sup> Staff rejected Mr. Lacey's sensible suggestion for a stakeholder process to explore collaborative solutions arguing that it amounted to stalling and stonewalling.<sup>234</sup>

Mr. Lacey testified in detail that variable-rate products are generally offered at a lower cost and are often a good fit for consumers that want to take an active role in energy efficiency

---

<sup>230</sup> TR. 1132, ln. 16 through TR. 1137, ln. 19 (Mr. Lacey detailing opportunities for product advancement).

<sup>231</sup> See TR. 1138, ln. 1 through TR. 1142, ln. 3 (Mr. Lacey detailing the conflicts between Staff's recommendations and the State's objectives under the REV initiative and the CES).

<sup>232</sup> TR. 2841, lns. 4-12.

<sup>233</sup> UIU/NYAG Brief at 34.

<sup>234</sup> Staff Brief at 64.

and are willing to maximize the advantages of lower rates through adjustments to their own energy consumption.<sup>235</sup> Notably, variable rate products can also be bundled with other value-added products and services, such as smart thermostats, which can enhance value for consumers.<sup>236</sup> This combination empowers consumers to maximize savings by creating greater efficiencies in their daily routine.<sup>237</sup>

### b) Fixed-Price Products

Staff erroneously claims that ESCOs have failed to demonstrate value attributable to fixed-price products.<sup>238</sup> Staff and UIU/NYAG make the incorrect allegation that premiums associated with fixed-price products are not proportionate to the value they create.<sup>239</sup> UIU/NYAG continue to advance the disproven argument that consumers would be better off with the utility offered budget billing, rather than the ESCO fixed-price products.<sup>240</sup> Staff wrongly equates and compares utility budget billing and ESCO fixed-price products as if they were mutually exclusive.<sup>241</sup> However, the Record clearly indicates that fixed-price products and budget billing have distinctly unique benefits and are not mutually exclusive.<sup>242</sup> The distinctions between these offerings were fully explained in RESA's Initial Brief.<sup>243</sup>

The underlying issues motivating Staff and UIU/NYAG's attacks against ESCO products revolve around price and product transparency.<sup>244</sup> Accordingly, the Commission should adopt

---

<sup>235</sup> TR. 1130, lns. 5-14 (Mr. Lacey detailing the value associated with variable-rate products).

<sup>236</sup> TR. 1127, ln. 8 through TR. 1128, ln. 15.

<sup>237</sup> TR. 1193, lns. 14-18.

<sup>238</sup> Staff Brief at 64-65.

<sup>239</sup> UIU/NYAG Brief at 34; Staff Brief at 66-67.

<sup>240</sup> UIU/NYAG Brief at 36.

<sup>241</sup> Staff Brief at 66.

<sup>242</sup> TR. 2676, ln. 9 through TR. 2678, ln. 10 (Staff Panel explicitly acknowledging budget billing programs and fixed-price ESCO products are *not mutually exclusive*, and can be used in combination).

<sup>243</sup> RESA Initial Brief at 33-35.

<sup>244</sup> See Staff Brief at 67 (claiming without support that ESCOs maintain a 'buyer-beware' mentality with regard to customer information and market transparency); see also UIU/NYAG Brief at 36-37 (alleging that "ESCO customers cannot discern how much price certainty costs").

reform measures consistent with RESA's recommendations to improve transparency while preserving consumer choice and access to savings.<sup>245</sup>

**c) Renewable Energy Products**

Staff attempts to defend its arbitrary recommendation for a 100 percent renewable standard on the anecdotal basis that simply because *one* ESCO is currently offering a 100 percent green product at guaranteed savings, that this standard should be expected across the board.<sup>246</sup> However, Staff failed to put forth any evidence that customers want their choices limited in this way. By Staff's own admission its recommendation was based *solely* on Mr. Alch's personal opinion, without any regard for broader public opinion or energy demands in the State.<sup>247</sup> Notably, Mr. Alch later admitted the flaw in this reasoning when he acknowledged that increasing renewable energy consumption across a broader section of the market could also result in the same benefits to the State's overall energy mix.<sup>248</sup>

In their brief, UIU/NYAG allege that, because ESCOs do not generate green energy, they cannot contribute to the growth of renewable sources in the State.<sup>249</sup> However, UIU/NYAG's claim fails to account for the fact that neither utilities, nor ESCOs, directly generate renewable power; thereby, highlighting the flawed logic for its conclusions.

The Record indicates that ESCOs already offer green products and those product offerings will continue to expand.<sup>250</sup> Indeed, ESCOs marketed renewable energy products long before the State adopted mandated portfolio standards.<sup>251</sup> RESA's Initial Brief provides detailed

---

<sup>245</sup> See RESA Initial Brief at 83-85, Section IV.

<sup>246</sup> Staff Brief at 71.

<sup>247</sup> TR. 2311, lns. 14-23.

<sup>248</sup> TR. 2313, lns. 3-20.

<sup>249</sup> UIU/NYAG Brief at 38 (citing TR. 765, lns. 8-12).

<sup>250</sup> TR. 1141, lns. 1-2.

<sup>251</sup> TR. 1141, lns. 2-3.

analysis of the evidence indicating ESCOs' role in advancing the State's renewable goals.<sup>252</sup> The ESCO community can provide significant assistance in achieving the State's goals without being required to limit the choices available to consumers to one type of renewable product offering; the Commission simply needs to enable them to do so by implementing the sensible market reforms outlined in RESA's Initial Brief.<sup>253</sup>

**d) Value-Added or Bundled Products**

UIU/NYAG claims that ESCOs have offered limited evidence of market innovation and that ESCOs did not provide sufficient evidence to quantify the value of their value-added products and services.<sup>254</sup> Further, without any evidence, Staff claims that the *only* ESCO product that could justify a "premium" over the default utility price is a 100 percent renewable product.<sup>255</sup> Despite Staff and UIU/NYAG's unsupported claims that ESCO value-added products cannot justify any premium, the Record speaks for itself. Mr. Lacey provided substantial testimony documenting the diverse variety of ESCO products and services.<sup>256</sup>

Again, Staff and UIU/NYAG present arguments on this topic specifically relate to price and product transparency.<sup>257</sup> Rather than denying all consumers the option to choose ESCO-supplied energy service as these parties recommend, the Commission should adopt the sensible market reforms outlined in RESA's Initial Brief.<sup>258</sup>

**e) CCA Products**

Staff claims that energy service through a CCA is acceptable because it "utilizes an independent expert or aggregator that works with the municipality to arrange favorable terms in

---

<sup>252</sup> RESA Initial Brief at 35-38.

<sup>253</sup> RESA Initial Brief at 83-85, Section IV.

<sup>254</sup> UIU/NYAG Brief at 39-40.

<sup>255</sup> Staff Brief at 71-72.

<sup>256</sup> See e.g. TR. 1126, ln. 1 through TR. 1137, ln. 19; see also Hearing Exhibit 1103.

<sup>257</sup> See Staff Brief at 71-72; UIU/NYAG Brief at 39-41.

<sup>258</sup> RESA Initial Brief at 83-85, Section IV.

ways that individual customers have not been able to do.”<sup>259</sup> However, Staff then recommends, without supporting authority, that CCA facilitators be limited to Not For Profits and municipalities.<sup>260</sup> Mr. Lacey testified that For Profit business models would likely provide better service given the fact that those profits are often “reinvested in customer education, product development, and research efforts, all of which can lead to greater consumer benefits.”<sup>261</sup> While CCA programs should be required to follow public contracting rules, the Record indicates that CCA programs should also be afforded flexibility to select energy suppliers who can best assist communities in meeting their individual energy needs.<sup>262</sup> Thus, Staff’s recommendation should be rejected.

#### **4. ESCOs’ Role in the Commission’s Energy Policies, Including REV and CES**

Without citation to any evidence for support, Staff claims that “ESCOs are not essential to [REV or the CES] and, to date, have done little to materially contribute to either initiative.”<sup>263</sup> Similarly, UIU/NYAG argues that “the ongoing REV initiative does not justify the continued operation of ESCOs in the mass market.”<sup>264</sup> These arguments fail to appreciate REV’s intention to spur greater innovation<sup>265</sup> and fail to recognize the foundational aims underlying why the Commission opened the competitive markets in the first place.<sup>266</sup>

---

<sup>259</sup> Staff Brief at 72-73.

<sup>260</sup> Staff Brief at 74.

<sup>261</sup> TR. 1279, lns. 10-14.

<sup>262</sup> TR. 1280, lns. 1-4.

<sup>263</sup> Staff Brief at 75.

<sup>264</sup> UIU/NYAG Brief at 45.

<sup>265</sup> Recently the Commission has confirmed its continued commitment to consumer choice, stating “[t]he electric system is increasingly anachronistic in the limited choices offered to customers and limited interoperability between customers and providers. Public comment in this proceeding has been clear in the demand for more control over energy choices. The intent of REV is to enable electric customers to drive markets in a productive and efficient way.” Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Order Instituting Proceeding at 23 (issued Apr. 25, 2014) (“REV Order”).

<sup>266</sup> See Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace).

Preliminarily, Staff's suggestion that the State can achieve the REV and CES goals without competitive ESCO markets is not supported by any evidence in the Record.<sup>267</sup> The State's aggressive energy agenda cannot be achieved through an outdated monopoly model that was previously rejected due to the common belief that the rate-regulated monopoly utility service had failed to create incentives for improved energy efficiency and product innovation.<sup>268</sup> Indeed, the Commission and the Department should be building partnerships within the energy industry to achieve the State's goals.<sup>269</sup> Staff's product and pricing restriction recommendations cast potential allies aside and endorse antiquated policy proposals that would return the State's energy industry to a monopoly-driven model first developed at the beginning of the Twentieth Century.<sup>270</sup> Instead, the Commission should adopt an "all hands on deck" approach in order to meet the State's REV and CES goals.

#### **5. ESCO Eligibility Requirements**

RESA's Initial Brief addresses this Section in detail.<sup>271</sup>

#### **6. ESCO Reporting and Collateral Posting Requirements [Notice Questions 3, 6 and 20]**

Staff spuriously alleges that the collective argument from the ESCO parties calling for heightened bonding requirements is "part of a hidden agenda advanced by the larger ESCOs to weed out the smaller ESCOs."<sup>272</sup> Staff urges the Commission to reject calls from the ESCO

---

<sup>267</sup> Staff Brief at 75.

<sup>268</sup> TR. 1126, lns. 11-12.

<sup>269</sup> See TR. 1141, ln. 14 through TR. 1142, ln. 3 (Mr. Lacey describing the potential partnership that should exist between the Commission to achieve the State's REV and CES goals).

<sup>270</sup> TR. 1139, ln. 7 through TR. 1142, ln. 3 (Mr. Lacey explaining the benefits of ESCOs in the energy marketplace, and arguing that ESCOs should be welcomed as part of the State's initiatives under REV and the CES).

<sup>271</sup> RESA Initial Brief at 38-41.

<sup>272</sup> Staff Brief at 78.

parties for increased bonding and collateral posting as such requirements would not result in more just and reasonable rates.<sup>273</sup>

Staff does not cite any supporting evidence for its claim that requiring modest bonding requirements would “weed out” or prevent new or small ESCOs from participating in the retail markets.<sup>274</sup> To the contrary, both UIU/NYAG and RESA offered testimony that such bonding requirements would improve UBP compliance, add yet another tool to the Commission’s enforcement arsenal, and provide ready ability to compensate wronged customers.<sup>275</sup> Requiring a minimum level of demonstrated capability and financial assurances will not keep start-ups from entering the market; rather, it will force market entrants to demonstrate that they have the requisite experience and financial foundation to effectively provide service to customers.<sup>276</sup> The Record demonstrates that New York’s lack of existing bonding or collateral posting requirements is a marked departure from the approach adopted by other states with competitive retail markets.<sup>277</sup>

Staff’s unfounded argument against requiring additional performance bonds or other collateral assurances is in direct contrast to the recommendations made by UIU/NYAG.<sup>278</sup> RESA agrees with UIU/NYAG’s suggestions that a consumer-focused security could serve as a practical deterrent against violations of the UBPs, but disagrees with UIU/NYAG’s suggestion that the level of bond be related to the amount of a specific ESCO’s alleged “overcharges.”<sup>279</sup> Bad actors should be eliminated from the State’s retail energy markets through a combination of

---

<sup>273</sup> *Id.*

<sup>274</sup> See Staff Brief at 78.

<sup>275</sup> See TR. 1311, ln. 8 through TR. 1312, ln. 14; TR. 1544, ln. 1 through TR. 1145, ln. 6.

<sup>276</sup> TR. 1170, lns. 5-12; TR. 1172, lns. 3-6.

<sup>277</sup> Hearing Exhibit 1120 (showing that Illinois, Pennsylvania, Maine, Ohio, California, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New Hampshire, and the District of Columbia all have security requirements with varying levels of financial security required).

<sup>278</sup> See TR. 1542, lns. 18-19; TR. 1544, ln. 1 through TR. 1145, ln. 6.

<sup>279</sup> See TR. 1311, ln. 8 through TR. 1312, ln. 14.

reforms that: (1) prevent specific bad actors from entry into the markets in the first place;<sup>280</sup> and (2) effectively weed out any miscreant market participants no matter the size of the company.<sup>281</sup>

Accordingly, RESA recommends that the Commission convene a collaborative process to determine the appropriate dollar amount, or methodology that should be adopted for ESCO bonding requirements.

## 7. ESCO Marketing Practices

UIU/NYAG claims that affirmative consent should be required before enrolling customer at the expiration of ESCO contracts.<sup>282</sup> UIU/NYAG also recommends a prohibition on door-to-door marketing; a prohibition on all outbound telemarketing; and further that ESCOs be required to disclose all investigations and complaints.<sup>283</sup> These recommendations are supported only by UIU/NYAG's generalized and conclusory arguments of consumer benefit without any solid foundation of demonstrated value in other markets.<sup>284</sup>

Nevertheless, RESA generally agrees that ESCOs can do more to improve transparency and has accordingly made a variety of sensible recommendations to that end.<sup>285</sup> Specifically, Supplier Consolidated Billing ("SCB") should be implemented to enhance direct relationships between customers and ESCOs.<sup>286</sup> Staff and other non-ESCO parties have not responded to RESA's proposal for implementation of an SCB model in New York, and have not provided any evidence to indicate that the SCB models would not provide measurable benefits to the market.

---

<sup>280</sup> See TR. 1170, ln. 3 through TR. 1172, ln. 6 (Mr. Lacey explaining benefits of bonding and additional experience requirements to improve market performance and eliminate bad actors).

<sup>281</sup> See TR. 1101, ln. 9-13 (Mr. Lacey detailing RESA's position that swift enforcement against specific ESCOs that engage in unlawful or deceptive practices is the most appropriate means of enforcement); *see also* TR. 1155, ln. 6-18 (Mr. Lacey explaining that Commission oversight should be designed to weed out existing bad actors).

<sup>282</sup> UIU/NYAG Brief at 45-46.

<sup>283</sup> UIU/NYAG Brief at 46.

<sup>284</sup> UIU/NYAG Brief at 47 (citing to generalized direct testimony that lacks verifiable support for UIU/NYAG's proposals and recommendations for reform).

<sup>285</sup> RESA Initial Brief at 83-85, Section IV.

<sup>286</sup> See TR. 1200, ln. 3 through TR. 1201, ln. 17.

Furthermore, RESA has made detailed recommendations regarding enhanced notice requirements to be issued for contract renewals, changes in product type, and significant changes in rate structure.<sup>287</sup> RESA offered detailed recommendations in its Initial Brief for market reforms that would increase transparency while preserving consumer choice and access to savings on their energy costs.<sup>288</sup> Market reforms focused on transparency should be explored further during the Track II phase of this proceeding.

## **8. Customer Information and Cyber Security**

RESA's Initial Brief addresses this Section in detail.<sup>289</sup>

## **9. Purchase of Receivables and Billing Process [Notice Questions 8, 9, 12, 13 and 20]**

### **a) Purchase of Receivables**

Staff recommends that the Commission implement reforms to the existing purchase of receivables ("POR") system to allow for utility recourse for ESCO receivables.<sup>290</sup> Staff argues that ESCO markets are mature and that POR without recourse can have potentially unfair effects on ESCOs and their customers by allowing ESCOs with higher uncollectibles to be shielded by utility collection under the current POR system.<sup>291</sup>

Although RESA agrees with Staff that the current POR system should be reformed, Staff's recommendations fail to address the fundamental issues with the Consolidated Utility Billing ("CUB") model. RESA's Initial Brief discusses the flaws of the CUB model in great detail.<sup>292</sup> To address the failings of the current CUB and POR system, RESA recommends the

---

<sup>287</sup> TR. 1189, lns. 2-11.

<sup>288</sup> RESA Initial Brief at 83-85, Section IV.

<sup>289</sup> RESA Initial Brief at 43-45.

<sup>290</sup> Staff Brief at 80-81.

<sup>291</sup> Staff Brief at 81-82.

<sup>292</sup> See RESA Initial Brief at 46-49.

long-term solution of moving to an SCB system, which would eliminate the need for POR.<sup>293</sup> However, in the short-term, RESA recommends implementing a claw back provision based on an ESCO's bad debt owed to the utility, which would weed out bad players in the market.<sup>294</sup> Staff did not provide any evidence challenging or rebutting the practicality of such a claw back provision.<sup>295</sup> Staff proposes only a crude and poorly considered modification of the POR system without a long-term strategy to enhance the ESCO billing model.<sup>296</sup> Staff cites *zero evidence* from the Record to support their recommendation for POR with recourse under the arcane and inefficient CUB model that exists today.<sup>297</sup>

Accordingly, Staff's unsupported recommendations should be rejected, and the Commission should adopt RESA's sensible proposal to move toward an SCB model that will improve market transparency.

## **b) Billing Methodologies**

### **(1) Utility Consolidated Billing**

Without citation to any evidence, Staff states that the CUB model "lowered ESCOs' barrier to market entry, and greatly simplified their back office operational requirements."<sup>298</sup> Similarly without support from the Record, Staff argues that CUB should continue and that the Commission should require "mass market" ESCO customer bills to include a side-by-side comparison showing the current bill charges and what the customer would have paid under a utility contract.<sup>299</sup>

---

<sup>293</sup> RESA Initial Brief at 48-49; *see also* TR. 1196, ln. 19 through TR. 1201, ln. 17 (Mr. Lacey describing RESA's proposed billing enhancements in detail).

<sup>294</sup> RESA Initial Brief at 45-46; *see also* TR. 1197, lns. 1-20.

<sup>295</sup> *See* Staff Brief 81-82.

<sup>296</sup> Staff Brief 81-82.

<sup>297</sup> *See* Staff Brief 82.

<sup>298</sup> Staff Brief at 82.

<sup>299</sup> Staff Brief at 82-83.

As discussed above, and in RESA's Initial Brief,<sup>300</sup> Staff's recommendations to continue the current CUB system will not improve transparency and will not inspire a more direct and interactive relationship between ESCOs and their customers. The current utility billing construct is one of the primary constraints to implementing more innovative products and services today.<sup>301</sup> The Record establishes that a direct relationship can only be achieved by moving to the SCB model that RESA has recommended.<sup>302</sup>

Accordingly, Staff's recommendation to continue the existing CUB system should be rejected. Instead, the Commission should adopt RESA's recommendations to implement a shift to a SCB model that will improve market transparency, offer a platform for more innovative products and services, and provide a direct line of communication between ESCOs and their customers.<sup>303</sup>

#### **10. Customer Complaints [Notice Questions 6, 7, 9, 12, 13 and 14]**

Although consumer complaints should be taken seriously, these complaints do not justify the non-ESCO parties' broad-brushing of all ESCOs as engaging in prohibited behavior. Staff claims that ESCO complaint rates were several times the per capita complaint rates of utilities in 2014.<sup>304</sup> Without support or reference to any evidence, UIU/NYAG claims that high complaint rates "reflect consumer dissatisfaction with higher prices that they are paying to ESCOs than they would have paid as utility customers."<sup>305</sup> Without any support, UIU/NYAG argues that,

---

<sup>300</sup> RESA Initial Brief at 46-49.

<sup>301</sup> TR. 1199, lns. 18-20.

<sup>302</sup> See TR. 1198, ln. 15 through TR. 1201, ln. 17.

<sup>303</sup> See RESA Initial Brief at 46-49; see also RESA Initial Brief at 83-85, Section IV.

<sup>304</sup> Staff Brief at 84.

<sup>305</sup> UIU/NYAG Brief at 47.

because customers receive bills from utilities, it “stands to reason that many consumer complaints to utilities would actually concern ESCOs.”<sup>306</sup>

RESA’s Initial Brief provides detailed analysis disproving each of the non-ESCO parties’ claims and overt mischaracterizations about ESCO complaint rates.<sup>307</sup> Staff’s continued reliance on *old data* from the Polar Vortex period<sup>308</sup> highlights the flawed theories underlying their analysis. The thorough complaint analysis conducted by Mr. Lacey demonstrates that, in 2016, the residential complaint rate and the complaint rate across all customers were practically the same between ESCOs and utilities.<sup>309</sup> Significantly, Staff explicitly acknowledges Mr. Lacey’s finding that the ESCOs’ customer complaint rate in 2016 was identical to that of the utilities, but Staff fails to provide any evidence or rebuttal argument to refute Mr. Lacey’s findings.<sup>310</sup> In fact, Staff has explicitly acknowledged the improvement in ESCO complaint numbers in 2016.<sup>311</sup> However, what Staff disingenuously characterizes as a “modest improvement”<sup>312</sup> was actually a **40 percent decline** between 2015 (5,044) and 2016 (2,995).<sup>313</sup> Complaint rates have continued to decline through 2017.<sup>314</sup> Moreover, Staff admits that improved ESCO “tightening” of compliance with the UBP, which was likely a driving force behind ESCOs’ improved complaint rates.<sup>315</sup>

---

<sup>306</sup> UIU/NYAG Brief at 49.

<sup>307</sup> RESA Initial Brief at 49-59.

<sup>308</sup> See e.g. TR. 2492, ln. 9 through TR. 2493, ln. 17 (Staff Panel acknowledging their price comparison analysis included data from the Polar Vortex in February 2014, which Staff admitted was an “outlier” period).

<sup>309</sup> *Id.*

<sup>310</sup> See Staff Brief 84-85.

<sup>311</sup> TR. 2102, lns. 6-9.

<sup>312</sup> TR. 2102, ln. 7.

<sup>313</sup> TR. 1245, lns. 2-5.

<sup>314</sup> *January 2018 – Monthly Report on Consumer Complaint Activity*, DPS OFFICE OF CONSUMER SERVICES at 16 (Published Feb. 28, 2018) available at: <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/448C499468E952C085257687006F3A82?OpenDocument>.

<sup>315</sup> TR. 2623, ln. 18 through TR. 2624, ln. 3.

Staff and the other non-ESCO parties have attempted to use Staff's inaccurate complaint analysis to justify their recommendations to impose baseless price regulation and other market restrictions.<sup>316</sup> Adopting Staff's recommendations would constrain consumer choice and actually deny consumer access to savings on their energy costs.<sup>317</sup> Accordingly, UBPs reform, in combination with enhanced enforcement efforts, should be the primary focus of market improvements. RESA provided recommendations to achieve these aims in its Initial Brief.<sup>318</sup>

### **11. Transparency [Notice Questions 12, 13, 16, 17 and 20]**

Staff argues that the current retail markets are not transparent and therefore customers cannot make a reasonably informed decision to select ESCO-supplied energy products.<sup>319</sup> UIU/NYAG asserts similarly erroneous contentions, claiming without support that consumer confusion in the retail markets is widespread.<sup>320</sup> Staff's unsubstantiated claims are entangled with Staff's objectively false theory that consumers require "complete" information to make a "rational decision."<sup>321</sup> Without any support, Staff alleges that mandated price comparisons on "mass market" customer bills would cure the alleged problems in the markets.<sup>322</sup>

The Record demonstrates that consumers only need to know the price that they are currently paying and the offers from a few competing companies to produce a workably competitive market.<sup>323</sup> Despite advancing the unsupported claim that buyers require "perfect" or "complete" information to make rational decisions, Staff admitted that "perfect information" is

---

<sup>316</sup> See Staff Brief 83-85.

<sup>317</sup> *Id.*

<sup>318</sup> See RESA Initial Brief at 83-85, Section IV.

<sup>319</sup> Staff Brief at 85.

<sup>320</sup> UIU/NYAG Brief at 50.

<sup>321</sup> *Id.*

<sup>322</sup> Staff Brief 89-90.

<sup>323</sup> TR. 525, lns. 15-17.

“rarely” available in any market.<sup>324</sup> Therefore, the non-ESCO parties’ continued contention that “perfect information” is required is simply false and should be rejected.

Staff claims that websites like Kayak.com and Priceline.com are prime examples of consumer shopping tools that improve market transparency.<sup>325</sup> Surprisingly, despite its repeated critique of market transparency, Staff admitted that it made no recommendations to improve the Power to Choose website.<sup>326</sup> In fact, Staff only mentions the Power to Choose website once, and even then it is only referenced in the context of describing how the Commission directed the Department to improve the website. Staff acknowledged in its testimony that consumers are able to visit the Power to Choose website and readily compare ESCO prices with that of the default utility.<sup>327</sup> Staff also specifically acknowledged that the Power to Choose website identifies the price, product type (fixed or variable), contract length, and whether the product is renewable or not.<sup>328</sup> Therefore, customers already have access to a direct price comparison tool that provides substantial product information and pricing. Customers can easily compare the available ESCO prices with that of the default utility rate and other ESCO offers at the click of a mouse.

The Record provides substantial evidence detailing the information that is currently available to consumers. In addition to the Power to Choose website, consumers also benefit from standardized contract summaries as required by the UBPs, as well as from product information available on the ESCOs’ own websites.<sup>329</sup> Ready access to this volume of information affords customers the ability to make informed decisions.<sup>330</sup> Thus, Staff and

---

<sup>324</sup> TR. 3405, lns. 15-17.

<sup>325</sup> TR. 3274, lns. 5-11.

<sup>326</sup> TR. 2227, lns. 17-19.

<sup>327</sup> TR. 2823, ln. 2 through TR. 2824, ln. 9.

<sup>328</sup> *Id.*

<sup>329</sup> TR. 833, lns. 6-13.

<sup>330</sup> TR. 833, lns.12-13.

UIU/NYAG's exaggerated claims that New York energy customers do not have access to sufficient market information should be rejected.

RESA has acknowledged throughout this proceeding that improvements can and should be implemented to further enhance market transparency. In fact, RESA has provided substantial testimony and detailed recommendations for how transparency can be improved.<sup>331</sup> Unlike the recommendations of Staff, RESA's recommendations are directed at improving market transparency while maintaining the goals of consumer choice and access to savings and other benefits as the Commission had originally intended.<sup>332</sup>

- 12. Customer Renewal Process [Notice Question 20]**
- 13. Customer Shopping Tools [Notice Questions 16, 17 and 20]**
- 14. Customer Choice [Notice Questions 9, 12, 13, 18 and 20]**
- 15. Examples of Competitive Market Frameworks in Other States**
- 16. State Agency & Consumer Advocacy Group Actions**
- 17. Energy Brokers**

RESA's Initial Brief addresses this Section in detail.<sup>333</sup>

#### **IV. CONCLUSION: SPECIFIC RECOMMENDATIONS TO THE COMMISSION**

As evidenced during the Evidentiary Hearing, retail energy markets provide an essential tool for promoting consumer choice and overall market price reductions. Staff and the other non-ESCO parties' heavy-handed recommendations for price and product regulations are entirely inconsistent with the Commission's original goals for the retail markets, and would frustrate the State's objectives under REV and the CES. The Record demonstrates that there is room for meaningful reforms that would increase market transparency and allow consumers to make more

---

<sup>331</sup> RESA Initial Brief at 83-85, Section IV.

<sup>332</sup> See Opinion No. 96-12 at 25-30 (describing the goals and vision of the *competitive* marketplace).

<sup>333</sup> RESA Initial Brief at 82-83.

informed energy supply decisions. Accordingly, RESA requests that the Commission implement the reform recommendations outlined in RESA's Initial Brief.<sup>334</sup>

If executed, these reforms would enhance market transparency, while simultaneously preserving consumer access to energy costs savings through ESCO alternatives to default utility service. Protecting and enhancing consumer choice in the retail markets must be paramount in any reform efforts. RESA urges the Commission to take this opportunity to enact meaningful reforms necessary to meet the energy challenges of the Twenty-First Century.

Dated: April 30, 2018

Respectfully submitted,

/s/

David G. Burch, Esq.  
Forrest T. Young, Esq.  
Barclay Damon LLP  
125 East Jefferson Street  
Syracuse, New York 13202  
TEL: 315.425.2788  
dburch@barclaydamon.com  
fyoung@barclaydamon.com

Ekin Senlet, Esq.  
Barclay Damon LLP  
80 State Street  
Albany, New York 12207  
TEL: 518.429.4231  
esenlet@barclaydamon.com

*Attorneys for  
Retail Energy Supply Association*

---

<sup>334</sup> See RESA Initial Brief at 83-85, Section IV.