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The Lights are On: Shining a Spotlight on the Retail Energy Market Reveals the Need for Enhanced Consumer Protections

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**THE LIGHTS ARE ON: SHINING A SPOTLIGHT ON THE
RETAIL ENERGY MARKET REVEALS THE NEED FOR
ENHANCED CONSUMER PROTECTIONS**

*Carrie Scrufari**

“All life is an experiment”

~ Ralph Waldo Emerson

“If we did all the things we are capable of, we would
literally astound ourselves.”

~ Thomas Edison¹

ABSTRACT

In the 1990s, New York embarked on an experiment of epic proportions when it sought to restructure what had become a regulated monopoly of an industry: its energy sector. Like many other states, New York sought to increase competition within the energy sector to drive down prices for consumers and expand the range of renewable energy options that were available. After waiting nearly three decades, New York appears poised to finally assess the efficacy of this great experiment. Years of escalating consumer complaints, Attorney

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1. Quoted in *Energy to Lead: 2015 New York State Energy Plan*, New York State Energy Planning Board, Vol 1, at 8, file:///Users/carriescrufari/Downloads/2015-state-energy-plan.pdf.

General investigations, and analysis by the Department of Public Service Staff have revealed that residential consumers are not faring as well as the State had hoped. Since 2014, New Yorkers electing to receive energy commodity service from companies competing with the default utilities were overcharged to the tune of one billion dollars. In households where families struggle to make ends meet and often must choose between putting dinner on the table or keeping the heat on, any overcharge on an energy bill creates a public health hazard. Having faced its third polar vortex in five years, more New York families than ever before confront the Hobson's choice of paying for food or paying for energy at a time when costs have never been higher. This article argues for the necessity of implementing additional consumer protection measures in the retail access energy market.

INTRODUCTION

What are society's most important needs? What is essential to ensure survival? Physiologically, humans require clean air, water, and food, but meeting these basic needs often requires another resource. Upon waking, before most people take a sip of water or a bite of breakfast, they do something else just as vital to their survival. If they are lucky, most people take one action before any other – turning on a light switch. Before consuming food or drink, people consume another vital resource equally necessary to health and wellbeing: energy. Indeed, energy is often a prerequisite to fulfilling other basic needs. Drinking water and eating breakfast usually require turning on a tap, opening a refrigerator, or lighting a stove. In modern society, most people rely on energy to access the jobs that allow them to pay for food and drink, whether it be by car, bus, or train. Even those who walk or bike to their place of employment rely on energy the moment they turn on an office light, fire up a computer, or make a phone call – all tasks likely necessary to earning the paychecks that allow for continued survival. Energy becomes even more immediate to survival for humans inhabiting parts of the globe prone to extreme heat or cold. Thus, air, food, water, *and* energy are all crucial to humans' continued survival as a species and as a society.

The Herculean task before governments around the world is determining how to meet these basic needs without destroying the global ecosystem. Habitat is just as crucial for survival, as it supports

continued access to clean air, food, and water. With climate change threatening many populations' ability to continue meeting their basic needs, lives across the globe depend on crafting solutions that can be implemented immediately.

Civil society recognized climate change as a threat to global existence at the twenty-first session of the Conference of the Parties (COP) in Paris in 2015 by committing "to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius."² The Paris Agreement entered into force on November 4, 2016.³ To date, 175 of the 197 Parties to the Convention have ratified the Agreement.⁴

Despite global consensus on the need to mitigate the effects of, and adapt to, climate change,⁵ President Donald Trump announced on June 1, 2017, "[i]n order to fulfill my solemn duty to protect America and its citizens, the United States will withdraw from the Paris Climate Accord."⁶ The response of other elected officials, similarly charged with safeguarding the health and welfare of American citizens, was immediate. New York Governor Andrew M. Cuomo announced the state's commitment to adhere to the standards contained in the Paris Accord "regardless of Washington's irresponsible actions," and signed an Executive Order "confirming New York's leadership role in

2. Conference of Parties' Twenty-first Session, U.N. Framework Convention on Climate Change, *Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter *Paris Agreement*]. http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf; *see also id.* at art. 2(1)(a).

3. *Paris Agreement – Status of Ratification*, UNFCCC, (last visited Apr. 13, 2018).

4. *Paris Agreement*, *supra* note 2. *See also* Progress Tracker, Work Programme Resulting from the Relevant Requests Contained in Decision 1/CP.21, United Nations Climate Change Secretariat, June 20, 2017, http://unfccc.int/files/paris_agreement/application/pdf/pa_progress_tracker_200617.pdf.

5. *See generally* Intergovernmental Panel for Climate Change (IPCC). Climate Change 2007: Synthesis Report; Summary for Policymakers, IPCC, 2007, http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm.

6. White House Office of the Press Secretary, Statement by President Trump on the Paris Climate Accord, Rose Garden (June 1, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-agreement>.

protecting our citizens, our environment, and our planet.”⁷ Cuomo, in concert with California Governor Edmund G. Brown Jr. and Washington State Governor Jay R. Inslee, formed the United States Climate Alliance – a coalition of states acting to uphold the commitments of the Paris Agreement.⁸ Cuomo’s rationale for upholding the Paris Agreement was simple and premised on basic survival. Quoting projected estimates of rising sea levels of one to four feet by the year 2100, Cuomo declared, “New York State would be devastated. . . . Even at a fraction of that rise, Manhattan as we know it would be gone, not to mention millions of people along the East Coast would be [d]isplaced, with hundreds of billions of dollars of real estate value disappeared.”⁹

The public health consequences associated with failing to shift from fossil fuels to cleaner renewable energy sources are even more immediate than those associated with taking no action to mitigate the effects of climate change. Communities need not wait until 2100 to feel the disastrous effects of carbon emissions or to feel the benefits of reducing those emissions by moving away from fossil fuels. Experts attribute 6.5 million deaths annually to air pollution alone, noting that “[e]nergy production and use is the most important source of air pollution coming from human activity.”¹⁰

7. N.Y. Governor Andrew Cuomo Press Office, Governor Andrew M. Cuomo Signs Executive Order and Commits New York to Uphold the Standards Set Forth in the Paris Accord (June 1, 2017), <https://www.governor.ny.gov/news/governor-andrew-m-cuomo-signs-executive-order-and-commits-new-york-uphold-standards-set-forth>. See also Executive Order No. 166, II (articulating New York’s policy to create a 40% reduction of greenhouse gas emissions by 2030 and an 80% reduction by 2050), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/USClimateAllianceExecutiveOrder.pdf>.

8. See N.Y. Governor Andrew Cuomo Press Office, New York Governor Cuomo, California Governor Brown, and Washington Governor Inslee Announce Formation of United States Climate Alliance; Cuomo, Brown and Inslee Will Serve as Co-Chairs, Urge Other States to Join Alliance (June 1, 2017), <https://www.governor.ny.gov/news/new-york-governor-cuomo-california-governor-brown-and-washington-governor-inslee-announce>.

9. Andrew Ratzkin, *You Say You Want A Rev Solution: Considering New York’s Marquee Energy Initiative As Climate Change Policy*, 41 COLUM. J. ENVTL. L. 471, 473 (2016) (quoting Governor Andrew Cuomo’s speech, Oct. 8, 2015).

10. INTERNATIONAL ENERGY AGENCY, ENERGY AND AIR POLLUTION, 3 (2016), <https://www.iea.org/publications/freepublications/publication/WorldEnergyOutlookSpecialReport2016EnergyandAirPollution.pdf>.

Coal combustion remains the world's largest source of electricity generation.¹¹ Relying on coal for power means releasing particulate matter (linked to respiratory problems such as asthma and lung cancer),¹² sulfur dioxide (correlated with increased risk of death due to respiratory and cardiovascular complications),¹³ and nitrogen dioxide (associated with increased susceptibility to bacterial and viral infections, brachial inflammation, and decreased pulmonary function).¹⁴ Air pollution associated with coal combustion poses more than just respiratory problems. Because coal contains naturally occurring heavy metals such as mercury, these metals are released into the atmosphere as gas when coal is burned; coal combustion at power plants produces 26% of global mercury emissions.¹⁵ This mercury is deposited into waterways where it is converted to methylmercury, contaminating fish at all stages of the food chain and ultimately the humans who consume that fish.¹⁶ When pregnant women consume contaminated fish, the mercury emissions "locally, regionally, and internationally . . . can cause developmental effects in their offspring such as lower intelligence levels, delayed neurodevelopment, and subtle changes in vision, memory, and language."¹⁷

A common argument against transitioning away from coal generation to renewables, such as solar, is that renewables like solar are too expensive and cost consumers too much.¹⁸ However, if the true

11. Erica Burt, et al., *Scientific Evidence of Health Effects from Coal Use in Energy Consumption*, U. ILL. CHI. SCH. PUB. HEALTH, HEALTHCARE RESEARCH COLLABORATIVE 4 (2013), https://noharm-uscanada.org/sites/default/files/documents-files/828/Health_Effects_Coal_Use_Energy_Generation.pdf (noting that "forty percent of world electricity comes from coal combustion.").

12. U.S. Env'tl. Prot. Agency, Integrated Science Assessment for Particulate Matter, EPA/600/R-08/139F (2009).

13. U.S. Env'tl. Prot. Agency, Integrated Science Assessment for Sulfur Oxides - Health Criteria, EPA/600/R-08/047F (Sept. 2008).

14. U.S. Env'tl. Prot. Agency, Integrated Science Assessment for Oxides of Nitrogen-Health Criteria, EPA/600/R-08/071 (July 2008). *See also* N.Y. STATE ENERGY PLANNING BOARD, THE ENERGY TO LEAD, IMPACTS & CONSIDERATIONS 8 (2015) [hereinafter ENERGY TO LEAD].

15. Burt, et al., *supra* note 11, at 8.

16. *Id.*

17. *Id.* at 9 (citing WORLD HEALTH ORG. (WHO), *Exposure to Mercury: A Major Public Health Concern. Public Health and Environment* 3 (2007)).

18. This argument is made despite the majority of cost-benefit studies showing a net benefit from solar. *See* Josh Garskof, *How Utilities Are Fighting Back on Solar*

health and environmental costs of coal generation were included, consumer bills could triple.¹⁹ Some studies suggest that if all external costs of generating coal-fired electricity were accounted for, such costs would increase the price of electricity by 17.8 cents per kilowatt hour,²⁰ reaching \$500 billion annually.²¹ Other estimates accounting for the true cost of coal-fired electricity, namely environmental damage and impacts to public health, set the total price of electricity as high as 45 cents per kilowatt hour.²²

Given the high environmental and public health costs associated with coal generation, it is not surprising that many states such as New York are making strong public policy decisions to advance the proliferation of renewable resources. Shifting to cleaner, renewable sources of energy generation such as solar while decreasing coal usage can benefit the climate, public health, and the economy. Experts predict that the “public health benefits associated with reduced operating time of fossil-fuel generators can exceed \$300,000 for each reduced ton of fine particulate emissions” before even considering the environmental and public health benefits of reducing sulfur dioxide and nitrogen dioxide emissions.²³

Experts recognize that coordinated energy systems planning is essential for states “to comprehensively analyze and respond to emerging affordability, environmental, reliability, economic planning and national security effects of supplying energy.”²⁴ Since the turn of

Power, CONSUMER REPS. (June 30, 2016), <https://www.consumerreports.org/energy-saving/how-utilities-are-fighting-back-on-solar-power/>.

19. Burt, et al., *supra* note 11, at 10.

20. Kilowatt hours is the unit of measurement used to describe the amount of energy consumers use. See Charles M. Pratt, *Electric Regulation in the State of New York*, ASS’N BAR CITY NEW YORK COMM. ON ENERGY 1, 5, n.7 (Feb. 9, 2007), http://www.nycbar.org/pdf/report/Dereg_report.pdf. Kilowatts are also used to express the amount of electric power that customers demand and a generator’s ability to supply that demand with its generating capacity. See *id.* at 5, n.8.

21. Paul R. Epstein, *Full Cost Accounting for the Life Cycle of Coal*, 1219 ANN. N.Y. ACAD. SCI. 73, 73 (2011).

22. Ben Machol & Sarah Rizk, *Economic Value of U.S. Fossil Fuel Electricity Health Impacts*, ENV’T INT’L 52, 75-80 (Feb. 2013).

23. Richard L. Revesz & Burcin Unel, *Managing the Future of the Electricity Grid: Distributed Generation and Net Metering*, 41 HARV. ENVTL. L. REV. 43, 91–2 (2017).

24. Pratt, *supra* note 20, at 24.

the century, New York's Committee on Energy has suggested that "the State's most significant energy issue is the encouragement of construction of new generating capacity in regions of the State where it is needed."²⁵ Multiple reports and studies conducted throughout the early 2000s indicated that New York would face an energy supply shortage if it did not take steps to increase capacity.²⁶ Thus, the New York State Committee on Energy concluded in 2007 that "steps should be taken to facilitate the addition of new generating capacity."²⁷

New York's challenge is the same one that the global community now faces: determining how to ensure generating capacity, transmission, and distribution in ways that safeguard public health, protect the environment, and reduce contributions to global warming.²⁸ Even before President Trump withdrew from the Paris Agreement, New York was grappling with this challenge and attempting to resolve it with Cuomo's 2014 Reforming the Energy Vision (REV) initiative. REV seeks to transform the energy market in New York, with the hope of charting a path forward that other states may follow.

REV is ambitious in what it seeks to accomplish. The initiative is situated in largely uncharted territory and it is not without its fair share of criticism. Even cautious optimism may be premature, as leading experts note that "[n]othing like the REV has ever been done before. As such, its success, even as a deregulatory measure, must be considered contingent and uncertain."²⁹ REV is a series of collective, interrelated experiments on a massive scale. Given the dire effects of climate change and the public health impacts of energy production, the stakes of this experiment have never been higher. Many regulators and stakeholders question how the vision will be put into practice – a Herculean or Sisyphean task (or both), depending on who weighs in:

25. *Id.* at 25.

26. *See e.g.* NYISO, The Comprehensive Reliability Planning Process Reliability Needs Assessment, 4 (Dec. 21, 2005) (finding that, "because of load growth and no resource additions, the forecasted system for the next five years did not meet reliability criteria, meaning the system was not adequate to safely meet consumers energy requirements at all times in the face of scheduled and unscheduled outages"). *See also* New York City Energy Policy Task Force, New York City Energy Policy: An Electricity Resource Roadmap, 9-12 (Jan. 2004), http://www.nyc.gov/html/om/pdf/energy_task_force.pdf.

27. Pratt, *supra* note 20, at 11.

28. *Id.* at 25.

29. Ratzkin, *supra* note 9, at 476.

[t]he REV has been called, even by its advocates, ‘devilishly complex’ . . . it promises to be a highly bureaucratic endeavor. Indeed, even among many people who should know – such as key industry participants and environmental advocates – it is hard to find individuals who profess truly to understand the REV. Given that lack of understanding, how can we, whether as citizens or policy makers, really be sure that the REV will deliver on its generalized emissions reduction promises?³⁰

Getting REV right would have significant, far-reaching impacts. A key component of REV is the integration of clean, renewable sources of energy generation into the electric grid. The successful integration of these resources – called Distributed Energy Resources or DERs – can have far-reaching impacts not just in terms of energy, but also in terms of agriculture, water, and land use. For example, the installation of solar panels (called distributed solar generation) can “improve water quality and address land degradation issues exacerbated by fossil fuel power plants.”³¹ The REV experiment strikes right at the intersection of energy, agriculture, water, and land use issues, all of which are tied to climate change.

If implemented properly – and if successful – REV has the potential to reduce emissions from the two largest sectors of society contributing to climate change: electricity and agriculture.³² Energy and food systems are inextricably intertwined. Many call the challenges arising from the intersection of these fields “wicked problems” because they escape resolution by any single solution.³³ Alternative energy systems, such as the nascent DER market in New York, could provide a potential systems-based solution that addresses the challenges in both the energy and agricultural sectors. For example, placing renewable

30. *Id.*

31. Revesz & Unel, *supra* note 23, at 92.

32. MICHAEL BLOOMBERG & CARL POPE, *CLIMATE OF HOPE: HOW CITIES, BUSINESSES, AND CITIZENS CAN SAVE THE PLANET* 155 (St. Martin’s Press 2017). Electricity and heat production account for 25% of GHGs, while agriculture and forestry account for 24%. *See id.*

33. Horst W. J. Rittel & Melvin. M. Webber, *Dilemmas in a General Theory of Planning*, 4 *POL’Y SCI.* 155, 160-69 (1973) (coining the phrase “wicked problems” to describe the particularly difficult-to-solve social policy problems).

energy systems like solar panels and anaerobic digesters onto farm land could shift reliance away from carbon-emitting sources of energy, thereby reducing GHGs. However, creating this shift requires implementing public policies targeted at incentivizing and regulating this developing market in ways that both maximize the value of DERs to the grid and local food systems and provide adequate consumer protection measures, especially for farmers.

This article argues for the necessity of implementing adequate consumer protection measures in the retail access energy market before distributed energy resources can be successfully integrated on farms to mitigate climate change. Using New York's retail access energy market as an analytical lens, this Article proceeds in three parts. Part I discusses how energy production and consumption impact public health, especially for vulnerable populations, resulting in the need for unique regulation of this sector. Part II describes New York's history of regulation and deregulation of the energy sector and concludes with recent energy initiatives. Part III details a series of concerns related to these new initiatives and proposes policy recommendations for correcting market abuses and implementing additional consumer protection measures in the retail access energy market.

I. ENERGY ISSUES ARE PUBLIC HEALTH ISSUES

Experts have recognized that access to safe and reliable electricity is necessary “for achieving good health and lack of access to it as ‘one of the principal barriers to the fulfillment of human potential and well-being.’”³⁴ One need only consider recent power outages from the 2017 hurricane season to observe the crippling effects of losing access to this vital resource. For example, after Hurricane Irma tore through the Atlantic, Florida Power and Light's president and CEO, Eric Silagy, estimated that half of Florida's population was without power – totaling nearly 10 million people.³⁵ In such instances, access to power

34. ENERGY TO LEAD, *supra* note 14, at 64 (quoting Anil Markandya, *Electricity Generation and Health*, THE LANCET 370, 979-90 (2007)).

35. Katie Zezima, *Officials: Half of Florida lacks power*, THE WASH. POST (Sept. 11, 2017), https://www.washingtonpost.com/national/2017/live-updates/weather/hurricane-irma-a-monster-storms-devastating-path/officials-half-of-florida-lacks-power/?utm_term=.d735bebd1850 [<https://perma.cc/AFD2-P6P7>].

can quickly become life or death; lack of access to life supporting machines in nursing homes and hospitals, exposure and heat exhaustion, and carbon monoxide poisoning from generators can all result from power outages.³⁶

Absence of reliable energy also exacts an emotional toll. Months after Hurricane Maria tore through Puerto Rico, half of the electric grid was still down.³⁷ Reports of the rising toll on Puerto Ricans' mental health was in the news, despite not commanding the same attention as the visible wounds and downed power lines.³⁸ The psychological and physiological stress is far from over; estimates still predict parts of the island could remain dark for months.³⁹

In addition to natural disasters, world events and politics can create fuel shortages (consider America's energy crisis in the 1970s resulting from the 1973 OPEC oil embargo), as can climate extremes in the absence of any storm (such as sustained droughts decreasing Venezuela's ability to harness electricity due to the country sourcing 70% of its electric generation from hydropower facilities).⁴⁰ Despite awareness that "health depends on political as well as social, economic and cultural forces," there are very few studies examining the effect that politics has on health, especially when those politics implicate energy demand and therefore influence public health outcomes.⁴¹ Nevertheless, if politics is defined as "who gets what, when and how," it stands to reason that politics necessarily effect how public policy

36. See e.g., Jim Turner, *Hurricane Irma death toll in Florida at 34 – and rising*, TALLAHASSEE DEMOCRAT (Sept. 18, 2017), <http://www.tallahassee.com/story/news/2017/09/18/irma-death-toll-florida-34-and-rising/677493001/> [<https://perma.cc/VQZ6-LDEB>].

37. See Quil Lawrence, *In Puerto Rico, The Crisis After Hurricane Maria is Taxing Residents' Mental Health*, NAT'L PUB. RADIO (Nov. 13, 2017), <https://www.npr.org/2017/11/13/563894775/in-puerto-rico-the-crisis-after-hurricane-maria-is-taxing-residents-mental-health> [<https://perma.cc/F4XK-ZYMV>].

38. See *id.*

39. See Frances Robles & Patricia Mazzei, *Parts of Puerto Rico Won't Have Power for 8 Months. What's the Holdup?*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/puerto-rico-power-outage.html> [<https://perma.cc/NG53-YT9E>].

40. See Gretchen Bakke, *The Electricity Crisis in Venezuela: A Cautionary Tale*, THE NEW YORKER (May 17, 2016), <https://www.newyorker.com/tech/elements/the-electricity-crisis-in-venezuela-a-cautionary-tale> [<https://perma.cc/U8M5-43CX>].

41. Vincent Navarro, *Politics and Health: A Neglected Area of Research*, 18 EUR. J. OF PUB. HEALTH 354 (2008).

may be implemented in the health sector.⁴² Because politics often determines who receives what services subsidized by whom, it follows that public policy can influence energy demand, thereby implicating health outcomes.

Beyond natural disasters, international relations, politics, and extreme climatic conditions such as drought, poverty is another factor depriving entire communities of safe or reliable access to electricity. Current estimates suggest that 12.7% of the U.S. population⁴³ lives in poverty – a total of 40.6 million people.⁴⁴ In addition to income level, energy burden is an important indicator of whether a family is likely to experience a lack of access to energy. One's energy burden is "the percentage of a customer's income spent on energy."⁴⁵ Experts calculate that an energy burden greater than 6% renders energy unaffordable.⁴⁶ Lower-income households bear energy burdens of 10-20%. This is far higher than the energy burden carried by middle-to-upper income households, which typically carry energy burdens of 1-5%.⁴⁷ Energy burdens above 6% that suggest the cost of energy is unaffordable are significant because "[n]umerous studies have established the link between energy unaffordability and poor health outcomes. In particular, utility shutoffs, bill debt, and inefficient weatherization have been linked to increased cases of pneumonia, bronchitis, other illnesses, and hunger among low-income communities."⁴⁸ Due to the high social costs of energy unaffordability, federal and state financial assistance programs exist to help low-

42. Amanda Glassman & Kent Buse, *Politics, and Public Health Policy Reform*, 5 INT'L ENCYCLOPEDIA OF PUB. HEALTH 163 (2008).

43. See JESSICA L. SEMEGA ET AL., INCOME AND POVERTY IN THE UNITED STATES: 2016 12 (U.S. Census Bureau ed., 2017).

44. See *id.* For a one-person household, the poverty level was set at \$12,228 in 2016 (gross income), \$15,569 for a family of two, and \$24,563 for a family of four. See *id.* at 43.

45. Adrienne L. Thompson, *Protecting Low-Income Ratepayers As the Electricity System Evolves*, 37 ENERGY L. J. 265, 268–69 (2016).

46. See Adam Chandler, *Where the Poor Spend More Than 10 Percent of Their Income on Energy*, THE ATLANTIC (June 8, 2016), <https://www.theatlantic.com/business/archive/2016/06/energy-poverty-low-income-households/486197/> [<https://perma.cc/N9GM-6DHP>].

47. See *id.*

48. See Thompson, *supra* note 45, at 270.

income families pay their energy bills.⁴⁹ Nevertheless, such programs do not provide sufficient assistance to everyone in need.⁵⁰

High energy burdens and government assistance programs that fail to fill the gaps mean that many consumers must make a Hobson's choice every month: deciding whether to pay the energy bill or whether to pay for other vital needs such as medical services and food.⁵¹ In New York alone, more than one quarter-million customers every year experience involuntary utility shut-offs, while one in eight residential New York customers have a utility bill more than two months in arrears.⁵² Addressing the energy burdens consumers face must be a key consideration of any public policy seeking to shift energy consumption away from fossil fuels and towards renewable sources:

[b]ecause these ratepayers already carry a significantly higher energy burden than other customers, they are particularly vulnerable to rising costs and to the rate structure reforms contemplated in most grid modernization processes active today. The question becomes, then: as these

49. See U.S. DEP'T OF HEALTH AND HUM. SERV., *Energy Assistance*, BENEFITS (2017), <https://www.benefits.gov/benefits/browse-by-category/category/27>. The program eligibility requirements for participating in the federal Low Income Home Energy Assistance Program (LIHEAP) are calculated based on income level and the percentage of income spent on energy bills; for example, to qualify, a one-person household must earn less than \$17,820 per year, a two-person household less than \$24,030, and a four-person household less than \$36,450; see also U.S. DEP'T OF HEALTH AND HUM. SERV., *Low Income Home Energy Assistance Program (LIHEAP)*, BENEFITS (2017), <https://www.benefits.gov/benefits/benefit-details/623> [hereinafter LIHEAP].

50. See Chandler, *supra* note 46. For example, in North Carolina, less than 50 percent of families in need received adequate financial assistance. See *id.* Moreover, less than a quarter of families who meet LIHEAP eligibility requirements actually receive those benefits. See GENE FALK ET AL., *NEED-TESTED BENEFITS: ESTIMATED ELIGIBILITY AND BENEFIT RECEIPT BY FAMILIES AND INDIVIDUALS* 39 (Congressional Research Service ed., 2015).

51. See Chandler, *supra* note 46; see also Dan Boyce & Jordan Wirfs-Brock, *Energy Assistance Struggles to Meet Demand*, COLORADOAN (May 24, 2016), <http://www.coloradoan.com/story/news/2016/05/23/energy-assistance-programs-struggle-meet-demand-low-income-coloradans/84812402/> [<http://perma.cc/KEA7-UVLE>].

52. See State of N.Y. Pub. Serv. Comm'n, Order Adopting Regulatory Policy Framework and Implementation Plan, Case 14-M-0101 (Feb. 26, 2015).

electricity system reforms proceed, what policies can be implemented to complement the overarching goals of these reforms, while also protecting low-income customers?⁵³

Integrating renewable sources of energy into the electric grid is necessary to help states like New York fulfill their environmental pledges. Yet, policy makers must keep in mind that the goal cannot be renewables at any cost. The need for integrating renewable resources into the electric grid must be balanced with providing necessary consumer protections to ensure ratepayers already facing insurmountable energy burdens are not paying more than necessary.⁵⁴

II. REGULATING NEW YORK'S ELECTRICITY MARKET

High energy prices motivated the restructuring of New York's electricity market in the 1990s. New York's electricity market was originally a regulated monopoly. The utilities were vertically integrated entities, meaning that they provided consumers with the generation, transmission, distribution, and sale of electricity. New York began efforts to deregulate or restructure its electricity market by allowing entities other than utilities to sell electricity to end-users.⁵⁵ The restructuring process attempted to replace the monopoly system of electric utilities with an open, competitive market for consumers to select electricity suppliers while still receiving delivery through the same local utilities' power lines.⁵⁶ The New York State Public Service Commission (the Commission) envisioned allowing additional participants into the commodity market to encourage competition, provide better commodity service, offer diverse energy products with added value, and lower costs for consumers.⁵⁷

53. Thompson, *supra* note 45, at 285.

54. *See infra* Part II.B.

55. New York also permitted other entities to sell the commodity of natural gas to end-users, but this article focuses solely on the electric industry. *See e.g.*, *See* State of N.Y. Pub. Serv. Comm'n, Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market, Case 93-G-0932 (Dec. 20, 1994).

56. *See* "Restructuring," *Glossary*, U.S. ENERGY INFO. ADMIN. (2017), <https://www.eia.gov/tools/glossary/index.php?id=R>.

57. *See* State of N.Y. Pub. Serv. Comm'n, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Regarding

A. The Process of Restructuring: 1990s

In lieu of regulating electric utilities as monopolies, the Commission has been committed for decades to encouraging competition with the hope of lower prices for consumers.⁵⁸ The Commission set about restructuring New York's electricity market in reliance on its experiences in the natural gas and telecommunications industries, noting that "[w]here genuine competition has replaced regulated monopoly, customers have had little reason for regret."⁵⁹ Policy makers in the state believed that allowing competition would encourage lower prices through increased energy efficiency and demand response efforts.⁶⁰

Energy efficiency refers to the conservation of energy and a reduction in the amount of energy used. Improved energy efficiency increases the electricity generation and transmission capacity that can then be dedicated elsewhere.⁶¹ Common energy efficiency measures include air sealing and insulating buildings or purchasing certified

Competitive Opportunities for Electric Service, Case 94-E-0952 (May 20, 1996); *see also* Stephen P. Sherwin, *Deregulation of Electricity in New York: A Continuing Odyssey 1996-2001*, 12 ALB. J. SCI. & TECH. 263, 268-70 (2001). Given that the Commission still possesses some regulatory authority over the electricity market (including the utilities and other market participants), this article asserts that New York's deregulation of its electricity markets is more properly described by the term "restructuring" rather than "deregulation" and therefore uses the former term.

58. *See e.g.*, Restructuring of the Emerging Competitive Natural Gas Market, *supra* note 57; *see also* State of N.Y. Pub. Serv. Comm'n, Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, Case 94-C-0095 (May 22, 1996).

59. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57.

60. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57. Notably, at this time, ESCOs offer demand response programs only to large commercial and industrial customers – not to mass market customers. *See* State of N.Y. Pub. Serv. Comm'n, In the Matter of Eligibility Criteria for Energy Service Companies et al., Case 15-M-0127 (Dec. 12, 2017) (cross-examination testimony of the Impacted ESCO Coalition, admitting they do not offer demand response programs to residential customers despite claiming demand response programs as one of the unique value-added services that they provide above the default utility service).

61. *See* Center for Climate and Energy Solutions, An Illustrative Framework for a Clean Energy Standard for The Power Sector 5 (2011).

energy efficient household appliances.⁶² Such energy efficiency measures can be considered a type of DER because these measures generate energy savings, often calculated in terms of “negawatts,” that can then be used elsewhere in the grid.⁶³

In contrast, demand response programs rely on consumers to voluntarily participate in programs that encourage the adjustment of energy usage to certain times of day when there is less demand on the power grid or when more renewable energy is available.⁶⁴ Successful demand response programs provide consumers with the opportunity to receive incentives in return for reducing non-essential energy use or shifting use to non-peak energy consumption times of the day.⁶⁵ In addition, demand response programs reduce congestion on the electric grid and contribute to reducing greenhouse gas emissions created from residential and commercial sectors of the energy market.⁶⁶ For example, the New York Independent System Operator (NYISO)⁶⁷ facilitates two types of demand response programs: reliability-based demand response programs and economic-based demand response programs.⁶⁸ The purpose of NYISO’s reliability-based programs is to relieve stress on the grid when demand for electricity is above the normal peak period levels due to unplanned events like extreme heat, inclement weather, and transmission outages.⁶⁹ In return for load reduction when the electric grid is stressed, consumers are provided with monetary compensation.⁷⁰ Similarly, the economic-based

62. *See id.*

63. *See id.*

64. *See* ENVIRONMENTAL DEFENSE FUND, WHAT IS DEMAND RESPONSE? (2014).

65. *See id.*

66. *See id.*

67. The NYISO regulates New York’s transmission facilities to ensure the reliability of the state’s power system and coordinates the wholesale market (including daily purchases of electricity and related operations) to distribute the electricity supply throughout the state. *See* NEW YORK INDEPENDENT SYSTEM OPERATOR (2018), <https://home.nyiso.com/>.

68. NYISO DEMAND RESPONSE PROGRAMS: FREQUENTLY ASKED QUESTIONS (FAQS) FOR PROSPECTIVE RESOURCES, NEW YORK INDEPENDENT SYSTEM OPERATOR (2016). The two programs within the reliability-based category are the Installed Capacity – Special Case Resource Program and the Emergency Demand Response Program.

69. *See id.* at 1.

70. *See id.*

demand response programs also seek to reduce load demand.⁷¹ However, the economic-based programs are different in that they allow consumers the opportunity to receive compensation at any time for participating in load reduction, regardless of the reliability needs of the grid.⁷²

In seeking lower prices for consumers through energy efficiency and demand response efforts, regulators responsible for restructuring New York's electricity market aimed to do so in accordance with the principles of resource management, customer service, reliability and safety, competitive market characteristics, and economic efficiency/development.⁷³ During the ensuing collaborative restructuring process, all stakeholders agreed on the general principles but they disagreed on which principles were primary.⁷⁴ For example, the Commission emphasized the "economic and environmental well-being" of the state and opined that this principle was primary above all others.⁷⁵ In contrast, the state Consumer Protection Board argued for a stronger focus on reducing rates for all consumers. The environmental agencies (i.e. the State Energy Office, the Department of Environmental Quality, and the New York State Energy Research and Development Authority [NYSERDA]) took a third position, advocating for additional policy guidance on transitioning to more robust competition.⁷⁶

71. *See id.* at 2. The two programs that are economically based include: the Day Ahead Demand Response Program and the Demand-Side Ancillary Services Program.

72. *See id.* at 2.

73. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57. Fourteen other states and the District of Columbia also have restructured or deregulated their electricity and gas energy markets (California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Virginia), while other states have partially or fully restructured the electricity or the gas retail access market. *See Map of Deregulated Energy States and Markets (Updated 2017)*, ELECTRIC CHOICE (2017), <https://www.electricchoice.com/map-deregulated-energy-markets/>.

74. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57.

75. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57.

76. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57.

Despite general agreement to transition New York's energy industry away from a regulated monopoly and towards a competitive market, the process involved several complexities. Shifting from a regulated monopoly to a competitive market required grappling with a loss of tax revenue,⁷⁷ managing utility investor expectations,⁷⁸ achieving environmental goals,⁷⁹ and fulfilling social responsibilities.⁸⁰ Since the early 1990's the Commission warned of the need for coordination of resources in transitioning to a competitive market, lest "any substantial near term reduction in prices and/or bills for some customers . . . largely come at the expense of increased prices to others."⁸¹ The themes of balancing costs for consumers, mitigating environmental harm, and striving for interagency coordination recurred throughout the restructuring process.

Beginning in 1996, the Commission (1) directed the electric utilities' divestiture of their generation facilities, (2) coordinated with the NYISO in its operation of the state's wholesale energy market and bulk power transmission system, and (3) permitted the entry of Electric Service Companies (ESCOs) into the retail market space to compete with utilities for the opportunity to sell electricity to end-users.⁸² The

77. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57. When deregulation efforts began in New York, utilities paid state and local taxes to the tune of \$2.1 billion per year. *See id.* Projections anticipated that the next decade would generate \$30 billion of tax revenue. *See id.* The utilities' tax costs are passed on to consumers. *See* MARILYN M. RUBIN, A GUIDE TO NEW YORK STATE TAXES: HISTORY, ISSUES AND CONCERNS vi (2011) (explaining that New York utilities must pay the State Gross Receipts and 9A Corporation Franchise Taxes, local business income and gross receipts taxes, state and local sales taxes, and local property taxes).

78. Utility investors in New York have historically been confident in recovering their prudent investment costs through the rate setting process. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57.

79. For example, utilities might purchase certain amounts of renewable resource generation, promote energy efficiency programs, or educate consumers about demand side management (DSM) or demand-side response (DSR) incentives. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57.

80. For example, continuing to administer New York's Low-Income Home Energy Assistance Program (LIHEAP). *See* LIHEAP, *supra* note 49.

81. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57.

82. COMMITTEE ON ENERGY, ELECTRIC REGULATION IN THE STATE OF N.Y. 1 (The Association of the Bar of the City of New York ed. 2007). Note, the

NYISO operates wholesale market transactions involving generation and bulk power transmission facilities.⁸³ In contrast, the retail markets in which utilities and ESCOs operate include the sale and delivery of energy and capacity to end-users.⁸⁴ The restructuring of New York's electric industry thus required utilities to divest their generation facilities so that they no longer supply end users with electricity derived from their own generating sources.⁸⁵ As a result of the restructuring process, load-serving entities (LSE), which are utilities or ESCOs, have three options to source generation capacity: (1) LSEs with long-term power supply agreements executed prior to restructuring may finish the terms of these legacy agreements; (2) LSEs may maintain multiple medium-term and short-term power supply agreements in their supply portfolios; and (3) LSEs may make capacity purchases in the markets that the NYISO administers.⁸⁶

B. Concerns in the Restructured Market Place

As noted above, the restructuring process involved the entry of ESCOs into the retail energy market to compete with the utilities to sell energy commodities (i.e. natural gas and electricity) directly to New York residents, small business owners, and commercial and industrial customers.⁸⁷ The Commission's purpose in allowing ESCOs to compete with the utilities in the retail energy market was twofold. First, the Commission sought to increase competition in the hopes of lowering the price of energy. Second, the Commission sought to create space for energy suppliers to innovate by providing consumers with a range of other valuable energy products, such as energy efficiency or

Commission possesses no direct regulatory authority over NYISO, as the NYISO's management of the competitive wholesale market falls under the Federal Energy Regulatory Commission's (FERC) authority. FERC authorized the creation of the NYISO in 1998. Order Rejecting Revised Compliance Filing, Federal Energy Guidelines: FERC Reports (FERC), 83 FERC ¶ 61,352 (Oct. 28, 1999).

83. See COMMITTEE ON ENERGY, *supra* note 82. The NYISO oversees auction markets for electric energy, electric capacity, and all ancillary services such as maintaining sufficient operating reserves, control and dispatch, and the capability to start generators in the event of a system shutdown. *See id.* at 5.

84. *See id.* at 6.

85. *See id.* at 9-10.

86. *See id.* at 5-7.

87. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57.

demand response measures.⁸⁸ Regulators also anticipated that ESCOs would eventually offer consumers lower energy prices compared to utilities by finding more efficient and innovative ways to purchase energy on the wholesale market and passing the savings on to consumers.⁸⁹ The Commission expected the market to “produce, over time, rates that will be lower than they would be under a regulated environment.”⁹⁰

1. History of Proceedings and Problems in the Retail Energy Market

The Commission’s ultimate goal was not merely to provide ESCOs with access to the retail energy market; rather, ESCOs were a means to achieving the end of providing consumers with lower energy prices and other valuable benefits.⁹¹ The Commission recognized that market restructuring was an evolutionary process requiring oversight and regulation because retail competition was fraught with “significant risks and requires considerable caution, and should be provided only if it is in the best interests of all consumers.”⁹² Accordingly, the

88. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57; *see also* Sherwin, *supra* note 57, at 268-70. At the evidentiary hearing, New York Department of Services Staff (“DPS Staff”) testified that they had reviewed the various products ESCOs claimed to offer and compared those products to the prices ESCOs were charging above default utility service. For example, for ESCOs claiming to offer value added services such as LED lightbulbs and thermostats, DPS Staff explained that “those products are variously available as a general commodity in hardware stores, Lowes, Home Depot, at a very reasonable price. And therefore, any premium associated for those products offered by the ESCO, that value was not commensurate with the premium that the ESCOs were charging for those products.” *See* In the Matter of Eligibility Criteria for Energy Service Companies et al., *supra* note 60, at 2500-01.

89. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57, at 30-39.

90. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57, at 28-30.

91. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57, at 30-33.

92. *See* In the Matter of Competitive Opportunities Regarding Electric Service, *supra* note 57, at 13 (quoting recommended decision of Administrative Law Judge).

Commission committed itself to monitoring market development and stated that it would “take corrective action should problems arise.”⁹³

a. The Commission Creates (and Repeatedly Revises) a Set of Uniform Business Practices

At first, the Commission monitored the market by creating an eligibility process for ESCOs seeking to enter the retail energy market.⁹⁴ Once the Commission deemed an ESCO eligible, the ESCO could then sell electricity and gas directly to consumers.⁹⁵ To ensure adequate consumer protections in this new competitive market, in February 1999 the Commission established the Uniform Business

93. See State of N.Y. Pub. Serv. Comm’n, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services, Case 94-E-0952 (May 19, 1997).

94. See State of N.Y. Pub. Serv. Comm’n, Uniform Business Practices, Case 98-M-1343 (2014). As of 2015, such requirements included, among others, providing a sample standard sales agreement for each customer class, procedures for obtaining customer authorization for the ESCO to access customers’ historic usage, internal procedures to prevent unauthorized switching of customer accounts from utilities to ESCOs (slamming), copies of marketing materials, copies of the ESCOs’ quality assurance program, disclosure of any criminal or regulatory sanctions imposed against any senior officers of the ESCO in the last three years, and a list of all third-party agents the ESCO contracted with to market to potential customers. See *id.* at 6-7.

95. See Uniform Business Practices, *supra* note 94, at 2 (defining ESCOs as entities “eligible to sell electricity and/or natural gas to end-use customers using the transmission or distribution system of a utility” and stating that such ESCOs “may perform other retail service functions”). New York has a long-standing public policy of prioritizing residents’ access to commodity energy services, recognizing that such access is central to protecting the health, safety, and welfare of citizens. See Home Energy Fair Practices Act and Energy Consumer Protection Act, Public Service Law, Art. 2 § 44(1)(30) (2003) (“HEFPA”) (the “continued provision of . . . gas, electric and steam service to all residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest.”). HEFPA provides New York residents with various consumer protections, such as procedures for customer billing, payment, and complaints. See *e.g.*, *id.* at § 32 (termination); *id.* at § 33-34 (multiple dwelling shut-offs); *id.* at § 35 (reconnection); *id.* at § 36 (deposits); *id.* at § 37 (deferred payments); *id.* at § 38 (budget plans); *id.* at § 40 (third-party notice before termination). The New York Legislature extended these protections to ESCO customers through the Energy Consumer Protection Act of 2002. See Energy Consumer Protection Act, N.Y. STAT. L. 2002, CH. 686. (2002).

Practices (UBP). The UBP provides a minimum set of guidelines to which ESCOs must adhere to maintain their eligibility to serve retail customers.⁹⁶ The UBP is intended to standardize practices among the utilities and the ESCOs to protect consumers.⁹⁷

Since establishing the UBP, the Commission has modified them several times to address changes in the market and the enhanced need for consumer protection. For example, on October 15, 2008, the Commission amended the UBP in response to ESCOs employing improper marketing practices.⁹⁸ In its October 2008 Order, the Commission attempted to enhance the marketing standards to “provide even greater confidence and security to consumers.”⁹⁹ In 2010, the Commission further amended the UBP, requiring ESCOs to provide consumers with notice of a Consumer Bill of Rights whenever retail services are offered.¹⁰⁰ Due to ESCOs’ continued questionable marketing behavior (and behavior of their sales agents), the Consumer Bill of Rights provides, among other things: “[n]o person who sells or offers for sale any energy services for, or on behalf of, an ESCO shall engage in any deceptive acts or practices in the marketing of energy services.”¹⁰¹ In addition, the ESCO Consumer Bill of Rights expressly permits the New York State Attorney General to bring a civil action against any ESCO suspected of violating the Bill of Rights provisions.¹⁰² The Consumer Bill of Rights also authorizes citizen suit provisions as another means of seeking redress for violations.¹⁰³ The Commission amended the UBP yet again on February 25, 2014,

96. *See* Uniform Business Practices, *supra* note 94.

97. *See* State of N.Y. Pub. Serv. Comm’n, Opinion and Order Concerning Uniform Business Practices, Case 98-M-1343 (1999).

98. *See* State of N.Y. Pub. Serv. Comm’n, Order Adopting Amendments to the Uniform Business Practices, Case 98-M-1343 (2008).

99. Press Release, N.Y. Pub. Serv. Comm’n (Oct. 15, 2008) (on file with author).

100. *See* State of N.Y. Pub. Serv. Comm’n, Order Implementing Chapter 416 of the Laws of 2010, Case 98-M-1343 (2010); *see also* Energy Services Company Consumers Bill of Rights, § 349-d (2011).

101. *See* Energy Services Company Consumers Bill of Rights, *supra* note 100, at § 349-d(3).

102. *See* Energy Services Company Consumers Bill of Rights, *supra* note 100, at § 349-d(9).

103. *See* Energy Services Company Consumers Bill of Rights, *supra* note 100, at § 349-d(10).

requiring greater transparency of ESCO prices to protect mass market customers (i.e. residential and small business customers).¹⁰⁴

b. The New York State Attorney General Investigates

Despite the additional consumer protections contained in the UBP, abuses persisted in the market place. Years of Attorney General investigations have revealed hundreds of customer complaints related to deceptive ESCO marketing tactics.¹⁰⁵ For example, customers complained of being charged higher prices, not receiving promised savings on their energy bills, and being the recipients of harassing door-to-door sales behavior. Customers also expressed that ESCO sales agents demonstrated a general disregard of the UBP consumer protection provisions, including failing to provide customers with a written copy of the ESCO Consumer's Bill of Rights and failing to provide customers with written notice of the right to cancel contracts within three days.¹⁰⁶ Since 2000, the Attorney General's investigations have resulted in eight settlements that provided injunctive relief and millions of dollars in restitution and penalties.¹⁰⁷

104. *See* State of N.Y. Pub. Serv. Comm'n, Order Taking Actions to Improve the Residential and Small Non-residential Retail Access Markets, Case 12-M-0476 (2014).

105. It is also important to recognize that the number of complaints "is typically the tip of the iceberg." *See* State of N.Y. Pub. Serv. Comm'n, In the Matter of Eligibility Criteria for Energy Service Companies et al., Case 15-M-0127 (2017) (NYAG expert witness Jane Azia testifying to the NYAG complain rates for ESCO customers). For example, in HIKO, the NYAG received "about 300 complaints over three years as the time period that was covered by the settlement, but refunds were made to approximately 2,500 people who were found to be eligible." *Id.* at 1794-95.

106. *See* THOMAS P. DiNAPOLI, OVERSIGHT OF COMPLAINT ACTIVITY 8 (New York State Office of the State Comptroller ed., 2017) (auditing the period from January 1, 2012 through August 19, 2016 and finding 150% increase in complaints, from 1,956 to 4,922).

107. *See e.g., In the Matter of Total Gas & Electric, Inc.*, Assurance of Discontinuance Pursuant to Executive Law §63 (15) (Mar. 9, 2001) [hereinafter TG&E AOD]; *People v. ECONnergy Energy Co.*, N.Y. Cnty. Sup. Ct. No. 401384/02 (Sept. 23, 2003) [hereinafter ECON Consent Judgment]; *People v. ECONnergy Energy Co.*, N.Y. County Supreme Court Index No. 401384/02 (filed Mar. 26, 2002) [hereinafter ECON Petition]; *In the Matter of New York Energy Savings Corp.*, Assurance of Discontinuance Pursuant to Executive Law § 63(15) (July 14, 2008) [hereinafter U.S. Energy Savings AOD]; *In the Matter of New York Energy Savings Corp.*, Addendum to the Assurance of Discontinuance Pursuant to

For example, the Attorney General's Office launched an investigation of Energy Plus, a Delaware-based ESCO serving New Yorkers with its principal offices in Philadelphia, Pennsylvania.¹⁰⁸ As a result of this investigation, the Attorney General's Office concluded that Energy Plus had made false and misleading savings claims to customers, failed to fully disclose the extent of its early termination fees, and did not clearly disclose other material terms and conditions of its contracts as required under the UBP and the New York's General Business Law and Executive Law.¹⁰⁹ Energy Plus' website and written advertising materials claimed that its prices were lower than, or competitive with, the prices that the utilities were charging consumers. For example, a review of Energy Plus' direct mail offers revealed that the company claimed its energy rates were "market based" and "competitive" or "risk-free."¹¹⁰ However, the investigation revealed that Energy Plus customers were paying up to \$440 more per year than similarly situated customers receiving commodity service from the default utility service provider.¹¹¹

In addition to paying higher commodity prices, Energy Plus customers were also told they could cancel their contracts at any time. However, Energy Plus routinely delayed processing such cancellations by a period of two months, forcing consumers to continue paying

Executive Law § 63(15) (Sept. 14, 2009) [hereinafter U.S. Energy Savings AOD Addendum]; *In the Matter of Columbia Utilities, LLC*, Assurance of Discontinuance Pursuant to Executive Law § 63 (15) (Apr. 12, 2011) [hereinafter Columbia AOD]; Letter from Keith Gordon, Asst. Attorney General, Bureau of Consumer Frauds, to Dietrich Snell, Counsel for Columbia Utilities, LLC and Columbia Utilities Power, LLC (Feb. 28, 2014); *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of New York, of HIKO Energy, LLC*, Assurance of Discontinuance Pursuant to Executive Law § 63 (15) (Oct. 1, 2014) [hereinafter HIKO AOD]; *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of New York, of Energy Plus Holdings LLC and Energy Plus Natural Gas LLC*, Assurance of Discontinuance Pursuant to Executive Law § 63(15) (Aug. 28, 2017) [hereinafter Energy Plus AOD]; and *A.G. Schneiderman Announces \$550,000 Settlement With Energy Service Company That Illegally Deceived New York Consumers* (Apr. 22, 2018), <https://ag.ny.gov/press-release/ag-schneiderman-announces-550000-settlement-energy-service-company-illegally-deceived> (Liberty Press Release).

108. See Energy Plus AOD, *supra* note 107, at ¶ 8.

109. See Energy Plus AOD, *supra* note 107, at ¶ 13-29.

110. See Energy Plus AOD, *supra* note 107, at ¶ 14.

111. See Energy Plus AOD, *supra* note 107, at ¶ 15.

higher rates for an additional sixty days.¹¹² Energy Plus also induced customers to enroll in commodity service with cash back offers and other enrollment bonuses, but failed to disclose that such rewards were not available until after customers had been receiving ESCO commodity service for at least two months; in other instances, consumers were not deemed eligible to receive the rewards until they had been enrolled with the ESCO for a full year.¹¹³

On August 28, 2017, Energy Plus settled the claims by paying \$800,000 in restitution to the Attorney General's Office for distribution to former customers.¹¹⁴ The settlement also required Energy Plus to meet several other conditions, including the cessation of making misleading marketing representations and a requirement to provide potential customers with twelve consecutive months of rate comparisons between the local utility and Energy Plus if it wished to make any savings claims.¹¹⁵ Energy Plus also agreed to implement training and monitoring of its customer service representatives and sales agents.¹¹⁶

Deceptive marketing practices were even more egregious for ESCOs that engaged in door-to-door sales communications with residential consumers or small business owners. The Attorney General's Office recently settled another case with the ESCO HIKO after investigating the company's door-to-door marketing practices. HIKO is a New York corporation and was authorized by the Commission to sell electricity and natural gas to residential and commercial customers throughout the state.¹¹⁷ From 2011 to 2014, more than 300 consumers lodged complaints with the Commission regarding HIKO's marketing practices, which included hiring third-party marketers to solicit customers through door-to-door and telemarketing channels.¹¹⁸ The Attorney General's investigation revealed that HIKO was making misleading savings claims¹¹⁹ and

112. *See* Energy Plus AOD, *supra* note 107, at ¶ 18.

113. *See* Energy Plus AOD, *supra* note 107, at ¶ 22-24.

114. *See* Energy Plus AOD, *supra* note 107, at Part II ¶ 15.

115. *See* Energy Plus AOD, *supra* note 107, at Part II ¶ 4(b).

116. *See* Energy Plus AOD, *supra* note 107, at Part II ¶ 7-14.

117. *See* HIKO AOD, *supra* note 107, at ¶ 8.

118. *See* HIKO AOD, *supra* note 107, at ¶ 11-12.

119. For example, one sales script directed marketers to promise consumers of energy savings of up to 7% over the course of a year on HIKO's variable rate plan.

failing to timely process cancellation requests.¹²⁰ HIKO also engaged in slamming – the illegal practice of enrolling customers without their knowledge or consent.¹²¹ For example, telemarketers would create the impression that they worked for the distribution utilities and then tell customers they were entitled to a “rebate” that could only be processed if the customers provided their account information.¹²² Once the customers provided their account information, HIKO sales representatives switched the customers from utility service to ESCO service without their knowledge.¹²³ HIKO ultimately agreed to pay \$1.25 million in restitution and adhere to other conditions similar to those contained in the Energy Plus settlement.¹²⁴ In addition, HIKO agreed to cease all slamming practices, including representing that its agents worked on behalf of the local distribution utility or failing to obtain signed contracts from the customer of record.¹²⁵

Following another investigation in 2011, the New York Attorney General’s Office settled similar fraudulent marketing claims against an ESCO named Columbia Utilities, LLC and its affiliate, Columbia Utilities Power, LLC (collectively Columbia) for \$2 million.¹²⁶ Although Columbia agreed to implement training and monitoring programs of its marketing agents similar to the programs agreed to by HIKO and Energy Plus, customer complaints persisted. This continued misbehavior led to a modified settlement agreement in 2014 whereby

See id. at ¶ 16. At the same time, the company’s website similarly advertised that consumers would experience lower utility bills. *See id.* at ¶ 16. In fact, the investigation revealed that consumers were routinely paying between \$86 to \$300 more over the course of a year than if they had remained full service customers under the default utility’s service. *See id.* at ¶ 14.

120. For example, the investigation revealed several instances of consumers calling HIKO’s customer service center to cancel their contracts but being unable to reach anyone and they could not leave a voicemail because they received a recording stating the mailbox was full. *See id.* at ¶ 27.

121. *See id.* at ¶ 13-30. For example, one customer complained that a HIKO sales agent had asked to see her utility bill, claiming a need to check the customer’s rate, and then asked for a glass of water. When the consumer left the room to fill a glass of water, the sales agent copied the Distribution Utility account information and falsified consent to switch the customer’s service to the ESCO. *See id.* at ¶ 26.

122. *See id.* at ¶ 20-21.

123. *See id.* at ¶ 20-21.

124. *See id.* at ¶ 21.

125. *See id.* at ¶ 3-7.

126. *See* Columbia AOD, *supra* note 107, at ¶ 31, 55

Columbia agreed, among other things, to cease its door-to-door marketing entirely.¹²⁷

As early as 2008, the Attorney General's Office executed an Assurance of Discontinuance with New York Energy Corp., doing business as U.S. Energy Savings, following an investigation of the ESCO's business practices.¹²⁸ The parties executed an Addendum to the Assurance of Discontinuance in 2009, following subsequent settlement negotiations because consumers continued filing complaints.¹²⁹ The majority of consumer complaints fell into the same categories the Attorney General had investigated in other ESCO cases: promised savings that never materialized, marketers who represented that they were affiliated with the local utility, difficulty reaching a customer service representative through the telephone number provided for contract cancellations, and marketers who failed to disclose the fees associated with contract terminations outside of the statutorily required cancellation period.¹³⁰ As a condition of the settlement, U.S. Energy Savings agreed to a number of verification practices, including explaining that U.S. Energy Savings was not affiliated with the local utility, verifying in writing or via recorded phone calls that all consumer sales contracts demonstrated an actual request to use U.S. Energy Savings as the commodity supplier, disclosing the amount of early termination fees, and guaranteeing that consumers had not been promised less expensive commodity rates compared to the local utility except in instances where the ESCO could demonstrate actual savings.¹³¹ In addition to the verification procedures, U.S. Energy Savings also agreed to engage in a variety of vetting and monitoring practices for its independent sales contractors. Such vetting included requiring disclosure of any misdemeanors and felonies in the hiring application, conducting background checks, checking applicants' references, and terminating contracts with

127. See Columbia AOD, *supra* note 107, at ¶ 46-54; see also Letter from Keith Gordon, *supra* note 107. As a condition of the modified settlement agreement, Columbia was required to seek approval from the Attorney General's Office in the event it wished to resume its door-to-door marketing program. See Letter from Keith Gordon, *supra* note 107.

128. See generally U.S. Energy Savings AOD, *supra* note 107.

129. See generally U.S. Energy Savings AOD Addendum, *supra* note 107.

130. See U.S. Energy Savings AOD, *supra* note 107.

131. See U.S. Energy Savings AOD, *supra* note 107, at 7 ¶ 34.

independent contractors who repeatedly failed to disclose their actual affiliation or who falsely promised consumers immediate savings.¹³²

Such investigations are not a recent phenomenon. The Attorney General's Office has been investigating ESCOs and their marketing practices since the restructuring process began over two decades ago. That such investigations continue – and that addendums to settlement agreements need to be issued after consumers continue filing complaints – suggests that additional regulatory reforms are needed.¹³³

2. Current Proceedings

To date, the Commission has deemed approximately 200 ESCOs eligible to provide electric and natural gas commodity service to New

132. See U.S. Energy Savings AOD, *supra* note 107, at 8-9.

133. For example, in 2002, the Attorney General's Office filed a petition under New York Executive Law § 63(12) for injunctive and monetary relief against an ESCO called ECONergy Energy Company, Inc., alleging that the ESCO engaged in a variety of repeated and persistent deceptive and illegal business practices while marketing its electricity and natural gas services. See ECON Petition, *supra* note 107, at 1 ¶ 2; see also *id.* at 5 ¶ 17 (including actions such as slamming, misrepresenting the identity of its door-to-door sales agents, and misrepresenting the potential savings customers could expect if they switched to ECONergy's commodity service). A Consent Judgment and Order was issued on September 23, 2003, enjoining the ESCO from, among other things, failing to properly secure consumer authorization to switch residential customers to its service; misrepresenting the amount, character, and duration of savings residential consumers could receive by switching service; concealing the identity of its sales agents; and failing to disclose to consumers their right to cancel door-to-door sales contracts within three business days. See ECON Consent Judgment, *supra* note 107, at 6. The Order also required ECONergy to pay restitution to eligible customers in the amount of \$75 plus 15% of the first three months of their ESCO commodity service bill, and to pay \$300,000 to the Attorney General's Office in costs and penalties. See *id.* at 3-6. A similar settlement agreement was reached following the Attorney General's investigation of the ESCO Total Gas & Electric (TG&E) in 2001. See TG&E AOD, *supra* note 107, at 1 ¶ 3. The Attorney General's Office also entered into a settlement agreement in 2000 with Con Edison Solutions, an ESCO formed by the utility Consolidated Edison, following an investigation that revealed the ESCO was automatically renewing fixed price contract customers onto different contracts with new terms unless the customers contacted the company to opt out of the automatic renewal. See Press Release, Attorney General Reaches Settlement with Con Ed Solutions (June 8, 2000) (on file with author). In accordance with the terms of the settlement agreement reached with the Attorney General's Office, Con Ed Solutions sent letters out to its customers clearly articulating the terms of its automatic renewal policy and extended the date by which customers could cancel these contracts. See *id.*

York State consumers.¹³⁴ Consumer complaints about ESCOs' billing and marketing practices persist, despite decades of investigations and settlement agreements conditioning ESCOs' ability to continue serving mass market customers on better training and monitoring of sales agents and better disclosure practices regarding pricing and contract terms. Complaints about misrepresented anticipated savings, slamming, and failure to timely process cancellation requests indicate that the retail access energy market in New York is not working as the Commission intended when it commenced the restructuring process. Accordingly, in October 2012, the Commission undertook a comprehensive review of the State's retail markets serving residential and small commercial customers to address concerns over ESCOs' provision of energy to such customers, particularly low-income consumers.¹³⁵ The Commission observed:

[c]ustomers participating in utility low-income assistance programs are more likely to obtain their energy commodity from an ESCO than residential customers who do not participate in these programs. Further, [Department of Public Service] Staff reports that some ESCOs have substantially more customers participating in the utility's low-income assistance programs, on a percentage basis, than the overall population. Coupled with the fact . . . that many residential ESCO customers pay more than had they purchased their energy commodity from the utility, this raises a concern that the current operation of the retail energy markets may be in conflict with one of our statutory policy requirements. Specifically, it is this Commission's policy that the continued provision of electric and natural gas service to customers is in the public interest.¹³⁶

This comprehensive review lasted for nearly two years and culminated with the Commission issuing an order in February 2014

134. *See* State of N.Y. Pub. Serv. Comm'n, Reset Order, Case 15-M-0127 (Feb. 2016).

135. *See* State of N.Y. Pub. Serv. Comm'n, Order Instituting Proceeding and Seeking Comments Regarding Operation of the Retail Energy Markets in New York State, Case 12-M-0476 (Oct. 19, 2012).

136. *See id.* at 9.

whereby it concluded that although many ESCOs had provided large commercial and industrial consumers with price savings or other valuable products, ESCOs had not provided these same benefits to residential and small commercial consumers, including low-income consumers.¹³⁷

The Commission further determined that the retail energy market for residential and small commercial consumers was not functioning as intended; many ESCOs were simply “generating revenues by offering consumers little more than higher prices” and were often reaping their profits from low-income consumers.¹³⁸ The Commission concluded that burdening consumers with higher ESCO prices not only harmed vulnerable low-income consumers but also undermined the effectiveness of the public-assistance programs, which were designed to lower overall energy bills of such consumers and decrease their energy burden.¹³⁹ To address these harms, the Commission’s February 2014 Order amended the UBP, requiring that ESCOs provide low-income consumers with (1) a guarantee of “savings over what the customer would otherwise pay to the utility” for energy, and/or (2) “energy-related value-added services that are designed to reduce customers’ overall energy bills.”¹⁴⁰

The Commission later stayed implementation of its February 2014 Order to consider petitions for rehearing and to allow for additional public comment on the terms conditioning ESCOs’ continued participation in the retail energy market for low-income consumers.¹⁴¹ Following extensive input from various stakeholders, the Commission issued an order in February 2015 reaffirming its determination that ESCOs serving low-income consumers had to offer either actual energy price savings or energy-related products of real financial value.¹⁴² To effect implementation of its order, the Commission ordered the Department of Public Service Staff (DPS Staff) to convene a Collaborative by holding a series of public meetings with various

137. *See id.* at 10-11.

138. *See id.* at 2-4.

139. *See id.* at 22-24.

140. *See id.* at 24.

141. *See* State of N.Y. Pub. Serv. Comm’n, Order Granting Requests for Rehearing and Issuing a Stay, Case 12-M-0476 (Apr. 25, 2014).

142. *See* State of N.Y. Pub. Serv. Comm’n, Order Granting Requests for Rehearing and Issuing a Stay, Case 12-M-0476 (Feb. 6, 2015).

stakeholders, including several ESCOs and their related trade associations, all major New York utilities, and consumer advocates including the Utility Intervention Unit (UIU),¹⁴³ the Public Utility Law Project (PULP),¹⁴⁴ the American Association of Retired Persons (AARP),¹⁴⁵ and the City of New York.¹⁴⁶

Following a year of meetings and discussions throughout 2015, the Collaborative issued an extensive report, concluding that “few, if any, ESCOs intend to offer a product which guarantees that the customer will pay no more than [he/she] would have been paid had energy been purchased from the utility.”¹⁴⁷ In seeking to preserve the effectiveness of financial assistance programs, the Collaborative noted that any fixed-price product (i.e. an ESCO plan setting a fixed monthly price for energy measured per kilowatt hour rather than a price that fluctuates with the market) that ultimately charged low-income consumers more for energy than the utility would have charged did not provide low-income consumers with any real financial savings.¹⁴⁸

143. The Utility Intervention Unit, housed within the Division of Consumer Protection of the New York Department of State, advocates on behalf of all New Yorkers in all proceedings concerning the affordability of and access to electricity and natural gas service. *See* Notice, Department of State, Division of Consumer Protection, Utility Intervention (Jan. 2, 2013) (on file with author).

144. *See* PUBLIC UTILITY LAW PROJECT, <http://www.pulp.tc/>. PULP advocates on behalf of low income and rural consumers on issues of affordable energy and telecommunications access. *See id.*

145. *See* AMERICAN ASSOCIATION OF RETIRED PERSONS, <http://www.aarp.org/?intcmp=GLBNAV-PL-HOME-HOME>. AARP is a non-profit organization dedicated to improving the quality of life for those 50 years of age and older. *See id.*

146. State of N.Y. Pub. Serv. Comm’n, Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies, Case 12-M-0476, et al., at 2 (Nov. 5, 2015).

147. *Id.* at 32.

148. *Id.* at 33. (Low-income consumers interested in price consistency are better served by enrolling in the utility’s budget billing program, which provides consumers with a flat price each month without extracting a premium for offering a fixed monthly price as the ESCOs charge.); *see id.* at 33-34. DPS Staff testified during the evidentiary hearings regarding its analysis of the prices ESCOs charged for fixed price products and found “a continuous 30% premium associated” with fixed rate plans; *see also* In the Matter of Eligibility Criteria for Energy Service Companies et al., Case 15-M-0127, at 2,502, Evidentiary Hearing (Dec. 6, 2017). Although one of the ESCOs’ expert witnesses testified that during the polar vortex, some ESCO customers saved 10% over utility customers in the coldest month, DPS Staff testified that when considering a 30% premium on average over the course of three years (the

While the low-income Collaborative was underway, the Commission was simultaneously contemplating whether to enact similar restrictions on ESCOs serving all mass market customers, namely residential customers and small commercial customers. On May 12, 2015, DPS Staff led a Technical Conference for all stakeholders to discuss rules regarding the Commission's regulation of DER service providers and products insofar as those providers could also be ESCOs.¹⁴⁹ The goals of the conference included obtaining input from all stakeholders "regarding the design, structure, and level of supervision of DER providers that will be appropriate to ensure consumer protections, while at the same time enabl[ing] markets to develop through fair competition."¹⁵⁰ The Commission also sought to obtain input from stakeholders regarding potential changes to the UBP as they would apply to ESCOs serving all mass market customers.¹⁵¹ Specifically, the Commission endeavored to "increase the participation and benefits of residential and small non-residential customers and . . . reform the State's energy industry to . . . promote penetration of renewable energy resources and enhance customers' ability to manage their energy usage and bills."¹⁵²

DPS Staff subsequently issued a proposal for public comment arising from the Technical Conference.¹⁵³ Following the comment period on the Staff Proposal, the Commission issued an order on February 23, 2016 (Reset Order) that revised the UBP by declaring that ESCOs may only enroll mass market customers via contracts that

relevant period for which all data was available to compare ESCO prices to utility prices from 2014-2016), "a 10% savings in one month does not compare equitably to three years of 30% premium."

149. *See* State of N.Y. Pub. Serv. Comm'n, Notice of Technical Conference, Case 15-M-0180, et al., at 1 (Apr. 21, 2015).

150. *Id.* at 2.

151. *Id.* at 2-3.

152. *Id.* at 3.

153. State of N.Y. Pub. Serv. Comm'n, Comments of the Joint Utilities to the Staff Proposal, Case 15-M-0127, et al., at 1 (July 28, 2015). DPS Staff was still seeking comments on similar issues a year later. *See* N.Y. State Pub. Serv. Comm'n, Notice Seeking Comments, Case 15-M-0127, et al., at 2 (May 10, 2016) (seeking public comment on three DPS Staff whitepapers: performance bonds or other means of demonstrating financial security for ESCOs, reference prices for ESCO products to allow transparent comparisons of ESCO and utility prices, and express consent from ESCO customers regarding contract renewals).

either (1) guaranteed savings compared to what the mass market customers would have paid as a full service utility customer, or (2) provided the customers with at least 30% renewably-sourced electricity.¹⁵⁴ The Reset Order further tasked the Commission, in collaboration with various stakeholder parties, to consider imposing additional long-term conditions on ESCOs and their ability to serve mass market customers, including whether ESCOs should be required to post performance bonds.¹⁵⁵

A suite of legal challenges ensued, including challenges to the Commission's jurisdiction to enact such a prohibition and procedural due process challenges.¹⁵⁶ The New York State Supreme Court in Albany County held that the Commission had broad statutory authority to regulate ESCOs' pricing practices. On appeal, the State of New York Supreme Court, Appellate Division Third Judicial Department upheld this conclusion.¹⁵⁷ However, the Appellate Division vacated

154. *See* State of N.Y. Pub. Serv. Comm'n, Order Resetting Retail Energy Markets and Establishing Further Process, Case 15-M-0127, et al., at 1-2 (Feb. 3, 2016).

155. State of N.Y. Pub. Serv. Comm'n, Order Resetting Retail Energy Markets and Establishing Further Process, Case 15-M-0127, et al., at 20 (Feb. 23, 2016). Performance bonds are required in other industries to demonstrate financial capability. For example, contractors are often required to provide a surety bond that cover the costs of any labor delegated to a subcontractor. Such surety bonds act as a form of credit used to reimburse homeowners in the event that a claim arises out of the work performed; *see* Romualdo P. Eclavea, *Contractors' Bonds Summary February 2018 Update*, 17 AM. JUR. 2d (Feb. 2018). Stakeholders in the retail access collaborative were directed to consider the magnitude of any potential bonds and how such bonds would be administered most efficiently. *See also* Reset Order, *supra* note 134, at 2.

156. *See* Nat'l Energy Marketers Ass'n et al. v. N.Y. State Pub. Serv. Comm'n., 2016 N.Y. Slip Op. 26233, at *1 (Sup. Ct. Albany County July 22, 2016); Retail Energy Supply Ass'n et al. v. N.Y. State Pub. Serv. Comm'n., (Albany County Index No. 870-16); Family Energy Inc. et al. v. N.Y. State Pub. Serv. Comm'n., (Albany County Index No. 874-16), Decision/Order issued July 22, 2016 (Zwack, J); *aff'd* Matter of National Energy Marketers Ass'n. v. Pub. Serv. Comm'n., 2017 NY Slip Op 05901 (July 27, 2017) and Matter of Retail Energy Supply Ass'n. v. Pub. Serv. Comm'n., 2017 NY Slip Op 05908, at *7 (July 27, 2017).

157. *See* Matter of Retail Energy Supply Assn. v. Public Serv. Comm'n., 2017 NY Slip Op 05908, at *7 (July 27, 2017) ("In fact, it is the [Public Service Commission] PSC's broad jurisdiction that enabled it to allow ESCOs access to utility systems in the first place. The PSC essentially maintains that this same authority allows it to impose limitations on ESCO rates as a condition to continued access. We agree.").

certain portions of the order on due process grounds and remitted the matter to the Commission for further proceedings.¹⁵⁸

Meanwhile, after considering the low-income Collaborative Report and the extensive record developed over years of administrative proceedings, the Commission issued an order in July 2016 enacting a moratorium on ESCOs' sale of energy to low-income consumers.¹⁵⁹ The Commission concluded that such a moratorium was necessary to protect low-income consumers, as ESCOs had demonstrated that they were either unwilling or unable to offer products to low-income consumers that resulted in cost savings compared to the rates charged by utilities.¹⁶⁰ Through the moratorium, the Commission also sought to ensure that "the financial benefits provided to [low-income consumers] through utility low-income assistance programs are not absorbed by ESCOs, who in turn, provide gas and electricity at higher prices without corresponding value."¹⁶¹

As with the order enacting limitations on ESCOs service to mass market customers, a series of legal challenges ensued following the Commission's moratorium on low-income service. After two ESCO trade associations, Retail Energy Supply Association (RESA) and National Energy Marketers Association (NEMA), petitioned for a rehearing of the July 2016 Order, the Commission reaffirmed its determination in a September 2016 Order. The September 2016 Order found that a moratorium was necessary because the Collaborative proceedings had made clear that ESCOs would not be able to provide price guarantees or valuable energy products to low-income consumers "anytime in the near future."¹⁶² NEMA, BlueRock Energy, Inc., Residents Energy, LLC and Verde Energy USA New York, LCC (collectively NEMA) and RESA then filed lawsuits seeking a temporary restraining order (TRO) and a permanent injunction of the

158. Nat'l Energy Marketers Ass'n et al. v. N.Y. State Pub. Serv. Comm'n., at *9; *aff'd* in part, Matter of Nat'l Energy Marketers Ass'n. v. Pub. Serv. Comm'n., 2017 NY Slip Op 05901 (July 27, 2017); Matter of Retail Energy Supply Ass'n. v. Pub. Serv. Comm'n., 2017 NY Slip Op 05908, at * 8-9 (July 27, 2017).

159. State of N.Y. Pub. Serv. Comm'n, Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies, Case 12-M-0476 et al., at 17-18 (July 15, 2016).

160. *Id.*

161. *Id.* at 10.

162. State of N.Y. Pub. Serv. Comm'n, Order on Rehearing and Providing Clarification, Case 12-M-0476 et al., at 14 (Sept. 19, 2016).

Commission's July 2016 and September 2016 Orders. On September 28, 2016, the Albany County Supreme Court granted the TRO, preventing the implementation of the Commission's July and September Orders until further order from the Court.¹⁶³

The next month, the Commission published a Notice of Proposed Rulemaking in the State Register to advise the public that it was considering modifying the July 2016 and September 2016 Orders.¹⁶⁴ Following a full statutory notice and comment period, the Commission issued an order in December 2016, reaffirming the necessity of the protections provided in the July 2016 and September 2016 Orders.¹⁶⁵ The December 2016 Order thus converted the moratorium in the July 2016 and September 2016 Orders into a permanent prohibition on ESCO service to low-income consumers by prohibiting ESCOs from enrolling new low-income consumers or renewing the contracts of existing low-income consumers.¹⁶⁶ The Commission explained that an immediate prohibition on ESCO service to low-income consumers was necessary to protect consumers from abusive conduct and to protect the taxpayers and other ratepayers who fund the energy assistance program subsidies to low-income consumers.¹⁶⁷ However, the December 2016 Order permitted ESCOs willing or able to guarantee savings to low-income consumers to seek a waiver from the general prohibition on providing service to mass market customers.¹⁶⁸ Finally,

163. *Nat'l. Energy Marketers Assn. v. N.Y. State Pub. Serv. Comm'n.*, 60 N.Y.S. 760, 764-65 (N.Y. Sup. Ct. 2017).

164. *See* 38 N.Y. Reg. 16 (Oct. 5, 2016).

165. *See* State of N.Y. Pub. Serv. Comm'n, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State, Case 12-M-0476 et al., at 3 (issued Dec. 16, 2016).

166. *Id.* at 19.

167. *Id.* at 9.

168. *Id.* at 23-34. The Commission explained that it would consider granting a waiver if an ESCO could demonstrate (a) an ability to calculate what the customer would have paid to the utility; (b) a willingness and ability to ensure that the customer would pay no more than what would have been owed to the utility; and (c) appropriate reporting and an ability to verify compliance with these requirements. *See id.* To date, four ESCOs have successfully petitioned for a waiver of the prohibition and is permitted to provide commodity service to participants in utility low-income assistance programs. *Id.* at 4 (finding that M&R failed to provide sufficient details regarding its price calculations and failed to report any demonstrated guaranteed savings); *see also id.* (finding that Drift failed to provide

the Commission noted that it would continue pursuing reforms for mass market customers and acknowledged the possibility that successfully resolving issues in the energy retail market could eventually obviate the need for any prohibition on ESCO service in the future.¹⁶⁹

NEMA and RESA amended their petition to challenge the December 2016 Order, in addition to the July and September 2016 Orders. The Albany County Supreme Court dismissed this petition on June 30, 2017.¹⁷⁰ The court first noted that it had previously determined that the Commission had authority to regulate ESCOs.¹⁷¹ The court then held that the Commission's findings regarding low-income energy customers were rational and supported by the record.¹⁷² Notably, the court rejected as unsupported the ESCOs' contention that "there is value in the different products ESCOs offer . . . the gift cards ESCOs offer a low-income rate payer are actually paid for by the ratepayer through the [Home Energy Assistance Program] HEAP assistance, and hardly meet an energy need."¹⁷³ The Court went on to note that ESCOs' fixed price plans did not constitute a unique, value-added service because the utilities "always had to offer fixed rate billing" through their budget programs.¹⁷⁴

The Commission's low-income prohibition was set for implementation in fall 2017, but legal challenges still abound.¹⁷⁵ In

the requisite calculations to demonstrate how it would ensure a lower price than the utilities and was unable to report on its proposed guaranteed savings plan offering); *id.* at 5-6 (finding after a review of Ambit's documents and calculations that it adequately demonstrated it could provide 1% savings to customers through its Guaranteed Savings Plan and that if no savings occur, Ambit would issue a refund check to the customer).

169. *See* Order Adopting a Prohibition on Service to Low-income Customers by Energy Service Companies, *supra* note 164, at 3.

170. *Nat'l. Energy Marketers Assn.*, 60 N.Y.S. at 765.

171. *Id.* at 768.

172. *Id.* at 772-73 (reasoning the Commission's findings were "well written, exceptionally comprehensive, address all of petitioners' arguments, and are well supported by the record").

173. *Id.* at 774.

174. *Id.*

175. The ESCOs have appealed Judge Zwack's June 2017 order upholding the Commission's moratorium on ESCOs serving low-income customers granting leave for appeal. *Nat'l. Energy Marketers Assn. v. N.Y. State Pub. Serv. Comm'n.*, Motion No. 2018-100, 2018 N.Y. LEXIS 495, at *1 (N.Y. Mar. 27, 2018) (granting leave to

March 2018, the New York Court of Appeals granted the motions of RESA and NEMA seeking leave to appeal from the Third Department's decision upholding the Commission's jurisdiction to regulate ESCOs.¹⁷⁶ In the meantime, the Commission continues its consideration of whether to enact a prohibition on ESCO service to mass market customers and/or what other market reforms are needed in this sector of the retail energy market. An evidentiary hearing on this matter occurred before two administrative law judges in November 2017 and December 2017, and post hearing briefs on the issues were filed in April and May 2018.¹⁷⁷

III. RECOMMENDATIONS FOR REGULATORY REFORM

As is clear from the history of these proceedings, the Commission has been unable to correct the market abuses that persist after New

appeal). Meanwhile, a private plaintiff filed a putative class action lawsuit against the Commission in the Federal District Court of the Northern District, alleging various statutory and constitutional challenges to the Commission's moratorium on ESCO service for low-income customers. The Northern District Court denied the plaintiff's motion for a TRO staying the Commission's Low-Income Moratorium and rejected plaintiff's request that the court deny her motion for a preliminary injunction so that she could appeal. Plaintiff appealed to the Second Circuit anyway and requested a TRO. Judge Cabranes entered a temporary stay of the Commission's Order until a full motions panel could hear and decide the motion. If the Second Circuit denies plaintiff's TRO request, the case will be remanded back to the district court where the Commission's motion to dismiss and plaintiff's motion for a preliminary injunction remain pending.

176. 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). Briefs are due in May and July 2018, with oral argument occurring in the fall of 2018.

177. See Case 15-M-0127, et al. See also State of N.Y. Pub. Serv. Comm'n, Notice Seeking Comments on Revisions to the Uniform Business Practice (Mar. 8, 2017) (The Commission is also considering what revisions should be made to the UBP to address current problems in the market to: (1) incorporate protections to prevent early termination or cancellation fees in the event of energy account holders death before the end of the contract term; (2) eliminate the appearance of an ESCO representative's full name on the identification badge worn by the marketer while soliciting to potential customers; and (3) other related matters and housekeeping items).

York restructured its energy industry. Investigations into various ESCOs and settlement agreements negotiated with the Attorney General's Office have not eradicated market abuses, and neither have various revisions to the UBP. Thus, unless or until the current abuses in the ESCO retail energy market are eliminated, ESCOs should be prohibited from offering products to mass market consumers that do not either guarantee savings or guarantee a value-added service in the form of renewable energy generation and sourcing that is sufficient to offset the premium paid to the ESCOs. The volume of customer complaints is further demonstration of the retail energy market's failure. As such, a strong regulatory response targeted to remedying the causes of such complaints is necessary.¹⁷⁸ This targeted response should consist of a prohibition on ESCOs serving all mass market customers with procedures enacted for ESCOs to seek a waiver from this prohibition if they can demonstrate: (1) guaranteed savings below the default utility price or (2) additional value provided from renewably sourced energy in excess of what the current renewable utility mix already provides.¹⁷⁹ In addition, reforms still must be made to the UBP and should consist of amending the section pertaining to contract renewals and material changes. Notably, any regulatory measure is only as strong as its enforcement. Therefore, the Commission should monitor the market for compliance and enforce the UBP through the imposition of penalties and other fines where necessary.

A. The Commission has Jurisdiction to Enact a Prohibition on Mass Market Service

As a preliminary matter, the Commission possesses jurisdiction to issue a prohibition or otherwise condition the ability of ESCOs to serve mass market consumers. Article 1 of the Public Service Law grants the Commission broad statutory authority to regulate ESCOs:

178. See State of N.Y. Pub. Serv. Comm'n, Order Resetting Retail Energy Markets and Establishing Further Process Case 12-M-0476, at 12 (Feb. 23, 2016) (finding an increase in abuses in the ESCO market and customer complaints despite repeated modifications to the UBP to strengthen consumer protections).

179. See DPS Staff Direct Panel Testimony, *supra* note 167, at 71 (discussing current utility generation mixes comprised of almost 30% renewable sources).

[t]he jurisdiction, supervision, powers and duties of the public service commission shall extend . . . [t]o the manufacture, conveying, transportation, sale or distribution of . . . electricity for light, heat or power . . . to electric plants and to the persons or corporations owning, leasing or operating the same.¹⁸⁰

The Commission's regulatory authority encompasses ESCOs as entities selling energy to New York consumers.¹⁸¹ To exercise this authority, the legislature granted the Commission not only specifically enumerated duties but "also all powers necessary or proper to enable [the Commission] to carry out the purposes" of the Public Service Law.¹⁸²

Article 1, Section 5 further mandates that the Commission, "shall encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources."¹⁸³ Section 5 is broad enough to encompass Commission oversight of ESCOs as necessary to promote the values of economy, efficiency, and public safety.¹⁸⁴ Given that the REV initiative has the goal of promoting clean energy through the development and deployment of DERs,¹⁸⁵ Article 1, Section 5 of the Public Service Law requires Commission oversight of any new markets and programs in which ESCOs choose to participate as DER

180. N.Y. Pub. Serv. Law § 5(1)(b) (2018).

181. *See* State of N.Y. Pub. Serv. Comm'n, Order Adopting ESCO Price Reporting Requirements And Enforcement Mechanisms Case 06-M-0647, at 10 (Nov. 8, 2006) (applying price-reporting requirements to ESCOs pursuant to article 1 authority); *see also* State of N.Y. Pub. Serv. Comm'n, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing Case 98-M-1343, at 10 (Oct. 27, 2008) (explaining that the Commission has "well-understood jurisdiction over ESCOs and their marketing practices" under Article 1).

182. N.Y. Pub. Serv. Law § 4(1).

183. N.Y. Pub. Serv. Law § 5(2) (emphasis added).

184. *Shall*, BLACK'S LAW DICTIONARY (10th ed. 2014).

185. *See* State of N.Y. Pub. Serv. Comm'n, Order Instituting Proceeding Case 14-M-0101 (Apr. 25, 2014).

suppliers¹⁸⁶ to ensure the adequate “performance of their public service responsibilities.”¹⁸⁷

In addition, the Commission has authority under Article 4 of the Public Service Law to regulate the terms and conditions by which ESCOs are permitted to access public utility infrastructure to sell energy to consumers.¹⁸⁸ The Commission exercised these statutory powers when it restructured the retail access energy market, requiring that public utilities permit ESCOs to access the utilities’ distribution systems.¹⁸⁹ The Commission necessarily retained this same discretion to alter the terms and conditions of ESCOs’ access to the distribution system in the future.¹⁹⁰ Articles 1 and 4 of the Public Service Law vest the Commission with continuing supervision over the restructured market created to ensure that competition provides consumers with lower energy prices and valuable energy products.¹⁹¹

Article 2, Section 53 of the Public Service Law also provides authority for the Commission’s jurisdiction, as ESCOs fall within the definition of an entity that “sells or facilitates the sale or furnishing of . . . electricity to residential customers.”¹⁹² Article 2 of the Public Service Law contains the Home Energy Fair Practices (HEFPA) provisions, which impose legislatively mandated rules relating to energy service for residential consumers who could suffer great harm if their service is terminated due to nonpayment of energy bills.¹⁹³

186. *See* State of N.Y. Pub. Serv. Comm’n, Order Adopting Regulatory Policy Framework and Implementation Plan Case 14-M-0101 (issued Feb. 26, 2015) (“Framework Order”).

187. N.Y. Pub. Serv. Law § 5(2).

188. *See* N.Y. Pub. Serv. Law §§ 4(1), 5(1)(b), 66, 66-d.

189. *See also* Rochester Gas & Elec. Corp. v. Pub. Serv. Com., 119 A.D.2d 353, 354-56 (3d Dep’t 1986).

190. *See* Campo Corp. v. Feinberg, 279 A.D. 302, 305-07 (3d Dep’t 1952) (reasoning that the Commission possessed authority under Article 4 to regulate access to public-utility service and ban nonutility landlords from engaging in practice of submetering); *see also* State of N.Y. Pub. Serv. Comm’n, Statement of Policy on Further Steps Toward Competition in Retail Energy Markets, Case 00-M-0504, at 18 (Aug. 25, 2004) (reiterating the Commission’s “regulatory involvement [should] be tailored to reflect the competitiveness of the market”).

191. *See* Rochester Gas & Elec. Corp. v. Pub. Serv. Com., 71 N.Y.2d 313, 320-22 (1988); *see also* Energy Ass’n v. PSC, 169 Misc. 2d 924, 932-35 (N.Y. Sup. Ct. 1996).

192. N.Y. Pub. Serv. Law § 53.

193. *See* PSL § 30

When HEFPA was first passed and incorporated into the Public Service Law in 1981, the Commission found that HEFPA did not apply to ESCOs because utilities remained the provider of last resort for consumers and ESCOs did not have authority to terminate consumers' energy service.¹⁹⁴ Subsequent to the Commission's finding, the legislature amended Article 2 in 2002 to both apply HEFPA's requirements to ESCOs and to afford ESCOs the ability to suspend residential consumers' energy service.¹⁹⁵ However, this Article 2 amendment left unaltered the Commission's jurisdiction over ESCOs in Articles 1 and 4 of the Public Service Law. Thus, the Article 2 amendment merely created a floor of legislatively mandated consumer protections that the Commission must maintain for all residential consumers irrespective of whether those consumers obtain their energy service from an ESCO or a regulated utility.¹⁹⁶

A central tenet of statutory interpretation advises the reader not to "be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."¹⁹⁷ Here, the entirety of the Public Service Law guarantees that all members of the public receive safe and reliable access to electricity. When the Commission created new markets and programs to allow ESCOs access to the grid to serve the retail market, it had authority to "introduce competition into a monopolistic marketplace and thus lower prices to consumers."¹⁹⁸

It is therefore axiomatic that the Commission similarly has authority to regulate how ESCOs operate and ensure they serve the public interest in these new markets and programs. Accordingly, enactment of a prohibition on ESCOs serving mass market customers would be a proper exercise of authority insofar as the prohibition would protect consumers from the current predatory business practices ESCOs employ and ensure that the retail market operates fairly. If the

194. *See* Op. 97-5, at 22-24; *see also* N.Y. Pub. Serv. Law Art. 2, §§30-52.

195. *See* Ch. 686, § 2, 2002 N.Y. Laws 3657, 3657-61; *see also* Mem. of State Consumer Protection Board, *reprinted in* Bill Jacket for Ch. 686, at 9-10(2002) [hereinafter CPB Mem.]; N.Y. Pub. Serv. L. Art. 2 § 30; 16 NYCRR § 11.1.

196. *See* CPB Mem., *supra* note 194, at 9-10.

197. *United States v. Boisdoré's Heirs*, 49 U.S. 113, 122 (1850).

198. *Energy Ass'n of New York State v. Public Serv. Comm'n of the State of New York*, 169 Misc. 2d 924 (Albany County Sup. Ct. 1996) (citing *CNG Transmission Corp. v. New York State Public Serv. Comm'n*, 185 A.D.2d 671 (4th Dep't. 1992)).

Commission chose to prohibit ESCOs from serving mass market customers, it would be carrying out its fundamental purpose of ensuring that energy resources remain affordable to the public.¹⁹⁹

B. A Prohibition on Mass Market Service is Appropriate

During discovery and the submission of testimony in the fall of 2017 and through the end of the evidentiary hearings concluding in December 2017, various parties have proposed that the Commission prohibit ESCOs from serving mass market customers if ESCOs cannot offer consumers guaranteed savings. While many ESCOs seek to perpetuate the status quo, others propose enacting various bans on ESCO service, including the DPS Staff, UIU, the New York Attorney General's Office, and PULP.²⁰⁰ The ultimate issue in these proceedings is how to regulate the retail access market so that consumers receive lower energy prices, additional valuable energy products, and renewable energy options. Even one of the ESCO's own experts conceded that some action is warranted and that the Commission was correct when it noted that "[w]hile a well-designed market could offer these consumer opportunities, it simply does not exist today." Of the many proposals contemplated in these proceedings, the DPS Staff's proposal has the most merit and should be adopted by the Commission. Nevertheless, the proposal would benefit from further refinements.

199. *See* Matter of Energy Ass'n, 169 Misc. 2d 924, 927-32 (Sup. Ct. Albany County 1996).

200. *See* State of N.Y. Pub. Serv. Comm'n, DPS Staff Panel Direct Testimony, at 20-21 Case 15-M-0127 (Sept. 15, 2017); *see also* State of N.Y. Pub. Serv. Comm'n, UIU/NYAG Panel Direct Testimony Case 15-M-0127, at 22 (Sept. 15, 2017); State of N.Y. Pub. Serv. Comm'n, Barbara Alexander Direct Testimony on behalf of PULP Case 15-M-0127, at 72 (Sept. 15, 2017). Although not a party to these proceedings, AARP responded to the questions the Commission sought to answer in these proceedings, especially the question of whether ESCOs should be prohibited in total or in part from serving mass market customers. In response to that question, AARP answered that "ESCOs should not supply mass-market customers if it cannot be shown that they are matching or beating the customer's incumbent utility price." State of N.Y. Pub. Serv. Comm'n, Responses of AARP to Commission Questions, Case 15-M-0127, at 1-2 (Sept. 15, 2017).

1. The DPS Staff's Proposal: A Good Starting Place

The primary reason residential consumers elect to take commodity service from an ESCO is the belief that they will save money on their energy rates compared to what the default utility offers. A secondary reason residential consumers choose to obtain commodity service from an ESCO is if they are assured of receiving a green energy product.²⁰¹ Mindful of these motivations, in September 2017 the DPS Staff proposed that the Commission prohibit ESCOs from serving mass market consumers unless ESCOs can provide customers with: (1) guaranteed savings below the default service utility price, (2) 100% renewably-sourced products, or (3) community choice aggregation options.²⁰² DPS Staff recommend that:

except for instances where an ESCO is willing and able to provide a durable guaranteed savings when measured against the default utility service, where an ESCO is willing and able to provide a value-added electric commodity renewable resource energy product where 100% of the electricity provided each calendar year was generated from renewable resources, or in the context of community choice aggregation, the retail access market for mass market customers should be shut down.²⁰³

DPS Staff recommend that the Commission prohibits ESCOs from enrolling any new mass market customers and that current mass market customers be transitioned back to default utility service as

201. *See* State of N.Y. Pub. Serv. Comm'n, Evidentiary Hearing Case 15-M-0127, at 2,206-08 (Dec. 5, 2017) (DPS Staff Policy Panel testifying on the topic of consumer choice in the New York energy market).

202. *See id.* at 20-21. Staff noted that, based on data received thus far, the community choice aggregation model provided a potential pathway for ESCOs to serve mass market customers and lower prices that those set by the default utility by "maximizing the economies of scale and benefits," especially where the aggregator could "fully evaluate competing ESCO supply offers." *Id.* at 130. Staff noted that community choice aggregation models were still in their infancy in New York and that while such models held potential, they still required monitoring and supervision. *See id.* at 128-30. A full discussion and analysis of community choice aggregation models is outside the scope of this article.

203. *Id.* at 21.

existing contracts with ESCOs expire.²⁰⁴ Thus, the DPS Staff’s proposal essentially creates a prohibition on ESCOs serving mass market customers with three limited exceptions to the general prohibition. The second of these limited exceptions – the provision of 100% renewably sourced energy – was included in recognition of Governor Cuomo’s “strategy to lead on climate change and grow New York’s economy by building a cleaner, more resilient and affordable energy system for all New Yorkers . . . by stimulating investment in clean technologies like solar, wind, and energy efficiency.”²⁰⁵ DPS Staff further recognized that the governor’s REV initiative was working “to ensure that New York State reduces its statewide greenhouse gas emissions forty percent by 2030 and achieves the internationally-recognized target of reducing emissions eighty percent by 2050.”²⁰⁶ Accordingly, DPS Staff fashioned a solution to the ESCO market problem that still allows for New Yorkers to participate in the REV initiative by “securing 100% renewable commodity contracts” if ESCOs are willing and able to provide them. The DPS Staff noted that such products “will likely come at a premium to the traditional utilities’ rate offerings” and that perhaps ESCOs could compete in this niche renewable market space to provide the lower prices and value the Commission had originally envisioned when it first restructured the state’s energy market.²⁰⁷ Under the DPS Staff’s proposal, any ESCO offering such a product must guarantee that 100% of the energy provided is derived from biomass, biogas, hydropower, solar, or wind.²⁰⁸ As part of monitoring the 100% renewably-sourced exception to the general prohibition on ESCOs serving the mass market, DPS Staff also recommended that the Chief Executive Officer (CEO) of the

204. *Id.*

205. *Id.* at 70.

206. *See id.* at 71.

207. *See id.* Staff further explained that it set the renewable generation requirement at 100% because some utility service territories already provide a generation mix consisting of approximately 30% renewables and “that the bar for ESCO products should be set higher.” *Id.* Staff also recommended that any prices the ESCOs charged for 100% sourced renewable products be revisited in a Track II proceeding to ensure that the premiums charged provided “reasonable value to the customers in relation to the cost of supplying such products.” *Id.* at 74.

208. *See* DPS Staff Panel Direct Testimony, *supra* note 199, at 73. Such a guarantee is also subject to the definitions and other provisions and delivery rules of the Commission’s Environmental Disclosure Program.

ESCO annually file and certify with the Commission that all mass market enrollments and contracts adhere to the Commission's Environmental Disclosure Program regarding environmental attributes of the energy generation and attendant delivery rules.²⁰⁹

2. Refining the DPS Staff's Proposal: Additional Enhancements Are Necessary

The September 2017 DPS Staff proposal is laudable for many reasons. Weeks of evidentiary hearings on the proposal in November and December 2017 revealed that the current system of regulation and the existing UBP are not sufficient to protect mass market consumers from continued abusive ESCO marketing behavior, and the ESCOs have thus far appeared largely unwilling to amend their business practices in the absence of an Attorney General's investigation. Multiple ESCOs testified during the hearings that they lack any kind of customer service evaluation or monitoring system to ensure and demonstrate compliance with the existing UBP.²¹⁰ Multiple ESCOs were also unable to testify during the hearings as to the kind of value-added services they currently offer to consumers to justify the commodity service price differences compared to the default utility.²¹¹

209. *Id.* at 74. Failure to certify or maintain specific records available for auditing purposes would result in the disqualification of the ESCO's eligibility to provide "any services to any customers in New York State." *Id.*

210. *See* State of N.Y. Pub. Serv. Comm'n, Evidentiary Hearing, Case 15-M-0127, at 136 (Nov. 29, 2017) (Great Eastern Energy's expert Ronald Lukas testifying that he could not explain in detail how the ESCO monitored compliance with the UBP and he could not opine on what would be "too frequent" an occurrence of UBP violations before the company would consider changing its business practices).

211. *See id.* at 195 (Direct Energy's expert Michael Kagan testifying that he was unable to provide with particularity any value-added products or green products Direct Energy currently offered New York residential consumers to justify the differences in commodity price between the ESCO and the utilities); *see also id.* at 550 (Direct Energy's expert witness Dr. John R. Morris admitting, when asked whether his analysis included any quantifiable data to support his assertion that ESCO energy supply products are distinguishable from the utilities' supply products, that the "value is largely not quantifiable"); *id.* at 756 (NEMA's expert witness Dr. Jeff Makhholm admitting that he could not identify any ESCOs in New York that are providing energy commodities generated by renewable sources at a higher rate than utilities).

One ESCO president testified that he offers his customers a bundled, package deal including boiler service, LED lightbulbs, and electricity at a fixed price per kilowatt hour consumed. However, because the bundled services are billed together, he admitted that “customers wouldn’t have any way of knowing how much they were paying for commodity service, versus the LED lightbulbs, versus the boiler maintenance” service.²¹²

The UIU/NYAG Expert Panel testified that after a review of all the discovery generated in the case, they “did not see sufficient quantitative evidence that would explain the observed price disparity between ESCO and Utility products.”²¹³ Despite the lack of evidence demonstrating ESCOs were providing additional value to consumers in their product offerings that justified higher prices than utility products, one ESCO expert opined that “[t]here should not be price regulation. There should not be a limit” and that ESCOs should “be allowed to charge what the market will bear.”²¹⁴ Given these realities, the DPS Staff’s proposal balances the need for enhanced consumer protections while recognizing that ESCOs may still have a role to play in providing renewable energy as part of the REV initiative. However, a few refinements and additional regulatory reforms would enhance the consumer protections presented in the current proposal.

a. The Procedure for a Written Waiver Process Should be Explicitly Articulated in the UBP

To the extent that the Commission adopts aspects of the DPS Staff’s proposal and enacts a prohibition on ESCOs serving mass market customers, the Commission should also explicitly articulate a written waiver process ESCOs may follow if they believe they can meet the above-stated criteria (i.e. price savings compared to the default utility service, 100% renewably-sourced generation, or community choice

212. State of N.Y. Pub. Serv. Comm’n, Evidentiary Hearing, Case 15-M-0127, at 4,046 (Dec. 12, 2017) (IEC’s expert witness and president of Brown’s Energy Services, LLC Michael Palmese testifying regarding his business model and pricing plans).

213. *See e.g.* State of N.Y. Pub. Serv. Comm’n, Evidentiary Hearing, Case 15-M-0127, at 1,938 (Dec. 4, 2017).

214. *See e.g.* State of N.Y. Pub. Serv. Comm’n, Evidentiary Hearing, Case 15-M-0127, at 1,405 (Dec. 1, 2017) (cross-examination of RESA’s expert Mr. Frank Lacey).

aggregation). Such a waiver process should be clearly explained in a revised version of the UBP. Delineating the steps to securing a waiver would clarify the conditions under which such service may be allowed to mass market consumers. To that end, the waiver process should include, at a minimum, a requirement that ESCOs file their waiver petitions and discovery requests or responses on the New York State Department of Public Service's Document and Management Master (DMM) system.²¹⁵ The waiver process should also include the opportunity for public comment, the filing and submission of which would be available on the DMM site. Finally, the Commission should set forth in the UBP what its review and approval process will be for deeming an ESCO eligible to serve mass market customers. Such a review should be conducted annually to ensure any ESCO serving mass market customers continues complying with all local, state, and federal laws. In the event an ESCO violates any of the terms of the UBP, the Commission should pursue appropriate enforcement mechanisms, including revocation of the ESCO's eligibility to serve mass market customers.

b. The UBP Contract Renewal Provisions Should be Amended

In addition to amending the UBP to include a written waiver process for ESCOs seeking to serve mass market customers, the UBP should also be revised with respect to Section 5(B)(5)(d), the provision pertaining to material changes and contract renewals. Presently, this provision of the UBP provides that:

no material changes shall be made in the terms or duration of any contract for the provision of energy by an ESCO without the express consent of the customer obtained under the methods authorized in the UBP. This shall not restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and the customer's option to reject the renewal terms. A customer shall not be charged a termination fee as set forth in Section 5.B.3.1.a herein, if the customer objects to such

215. *See* Why Become a Registered User of the Document and Matter Management (DMM) System?, N.Y. DEP'T OF PUB. SERV., www.dps.ny.gov.

renewal within three business days of receipt of the first billing statement under the agreement as renewed. Regarding contract renewals, with the exception of a rate change, or an initial sales agreement that specifies that the agreement renews on a monthly basis with a variable rate methodology which was specified in the initial sales agreement, all changes will be considered material and will require that the ESCO obtain the customer's express consent for renewal.²¹⁶

DPS Staff did not recommend revising any of the above language in the UBP in its September 2017 proposal.²¹⁷ As currently written, this language essentially allows ESCOs to re-enroll customers at the expiration of a fixed rate plan to a higher priced month to month variable plan without obtaining customers' express consent to renew a contractual relationship with the ESCO under different terms than the original contract.²¹⁸

Section 5(B)(5)(d) of the UBP states that "no material changes shall be made in the terms or duration of any contract for the provision of energy by an ESCO without the express consent of the customer . . . with the exception of a rate change. . . ." The language is ambiguous because it is unclear whether switching a customer from a fixed rate contract to a variable rate contract at the time of renewal is a material contract change that would require express customer consent, or whether this switching constitutes a "rate change" that is exempt from the express consent requirement. The term "rate change" is not defined within the definitions section of the UBP.²¹⁹ Thus, a definition of "rate change" should be added to Section 1 of the UBP to expressly indicate that switching a customer from a fixed price contract to a variable

216. State of N.Y. Pub. Serv. Comm'n, Uniform Business Practices, Case 98-M-1343, at 27 (Feb. 2016).

217. See State of N.Y. Pub. Serv. Comm'n, UBP Redline, Case 15-M-0127 (Sept. 15, 2017).

218. PULP refers to this situation as a "negative option renewal process" and explains that such a process impacts a significant number of customers who "do not understand they their prices have changed or why the ESCO can make such a change." See Barbara Alexander Direct Testimony *supra* note 199, at 62.

219. See State of N.Y. Pub. Serv. Comm'n, Uniform Business Practices, Case 98-M-1343, at 1-5 (2015).

priced contract at the time of renewal is not a rate change, but rather a material change that requires a customer's express consent.

Alternatively, the UBP could be revised to expressly indicate that switching a customer from a fixed price contract to a variable price contract at the time of renewal constitutes a "billing option." Section 5 applies only to material changes to a contract and renewals but not "changing billing options."²²⁰ As such, were a switch from a fixed price contract to a variable price contract to be considered a "billing option" and not a "rate change," the exception to obtaining express customer consent would not be available.

Whichever revision is ultimately enacted, the Commission should clarify whether it interprets the term "rate change" as encompassing the situation described above – namely, an ESCO switching a customer from a fixed rate contract to a variable rate contract at the time of renewal. If such a switch is considered a "rate change," then express customer consent is not required under the current rules. However, switching a customer from a fixed price plan to a variable price plan arguably constitutes a material contract change (and not merely a rate change) such that express customer consent should be required.

In addition to stating that rate changes are an exception to the general rule that all material changes to a contract require express customer consent, Section 5(B)(5)(d) of the UBP also provides that express consent is not required for "an initial sales agreement that specifies that the agreement renews on a monthly basis with a variable rate methodology which was specified in the initial sales agreement." Parties to the ESCO retail access proceedings have presented evidence that many ESCO contracts do not properly disclose the "variable rate methodology" employed when setting residential or small commercial rates and that consumers fail to understand these nuances in billing rates.²²¹ Accordingly, this exception to obtaining express customer consent should also be eliminated from the UBP.

220. *See* State of N.Y. Pub. Serv. Comm'n, Uniform Business Practices, Case 98-M-1343, at Section 5(A) (2015) (stating "This Section does not establish practices for obtaining other energy-related services or changing billing options.").

221. *See e.g.*, Barbara Alexander Direct Testimony, *supra* note 199, at 62 (explaining that, based on her analysis, "most of the ESCO contractual terms do not properly disclose the 'variable rate methodology,' as required by the UBP, in a manner that would allow any customer to either understand the basis for the resulting

C. *A Prohibition on Mass Market Marketing Would Likely Pass Constitutional Muster*

If the Commission decided not to adopt the DPS Staff September 2017 proposal in full and instead only prohibited ESCOs from engaging in door-to-door marketing and telemarketing to residential customers, such a ban would nonetheless assist in providing much-needed additional consumer protections to the retail energy market space. If the Commission proceeded to enact such a ban on marketing, it is almost certain that the ESCOs would challenge the ban and seek to strike it down as an unconstitutional restriction on free speech under the First Amendment.²²² However, it is doubtful whether any such legal challenge would succeed. Where, as here, the record demonstrates that lesser restrictions have not been sufficient to achieve the asserted governmental interest advanced by the restriction on commercial speech, there is a colorable argument that a total ban in the form of a prohibition on door-to-door and telephonic marketing is necessary.

During the November and December 2017 evidentiary hearings, an ESCO named Infinite Energy claimed that any ban on ESCO door-to-door and/or telephonic marketing service to residential customers would violate the First Amendment.²²³ Infinite Energy relied on *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*²²⁴ to support its constitutional argument. However, *Central Hudson* is distinguishable from the instant case. In *Central Hudson*, the issue was whether the Commission could impose a regulation banning an electric utility from advertising to promote the use of electricity.²²⁵ In December 1973, the Commission ordered New York utilities to cease all advertising that promoted the use of electricity when it became apparent that the state had insufficient fuel stocks to continue meeting consumer demand throughout the 1973-1974 winter.²²⁶ When the fuel shortage eased three years later, the

rate or determine whether the resulting rate conformed to the stated methodology in the terms and conditions”).

222. *See* Infinite Energy, Inc. d/b/a Intelligent Energy Ex., DC-1 (Oct. 27, 2017).

223. *See id.*

224. *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

225. *Id.*

226. *See id.* at 558-59.

Commission sought public comment on whether the ban on utility promotional advertising should continue.²²⁷ Central Hudson opposed the ban, claiming it violated the First and Fourteenth Amendments.²²⁸ The trial court and intermediate appellate court upheld the Commission's order, and the New York Court of Appeals affirmed, concluding that the governmental interest in the advertising ban outweighed the constitutional value of the commercial speech.²²⁹

The Supreme Court of the United States reversed.²³⁰ The Court noted that the Constitution affords less protection to commercial speech than other forms of expression and that such protection "turns on the nature both of the expression and of the governmental interests served by its regulation."²³¹ The Court began its analysis by noting that the government was permitted to ban forms of communication that were "more likely to deceive the public than to inform it."²³² Where the communication is not misleading, the government must assert a substantial interest that would be achieved by restricting the commercial speech. Whether the restriction serves a substantial interest turns on two criteria: (1) whether the restriction directly advances the governmental interest involved, and (2) whether the governmental interest could be served by lesser restrictions on the commercial speech.²³³ Restraints that only indirectly advance the governmental interest involved or that are not narrowly drawn are impermissible.²³⁴ Accordingly, *Central Hudson* established a four-part analysis when commercial speech is at issue:

1. Whether the speech concerns lawful activity and is not misleading (thus demanding First Amendment protections);
2. Whether the asserted governmental interest is substantial;
3. Whether the regulation directly advances the governmental interest asserted;

227. *See id.* at 559.

228. *See id.*

229. *See id.* at 560-61.

230. *See id.* at 561.

231. *Id.* at 563.

232. *Id.*

233. *Id.* at 564.

234. *Id.* at 565-60.

4. Whether the restriction is not more extensive than necessary to serve that interest.²³⁵

In *Central Hudson* the Court found that advertisements by utilities and unregulated firms are protected commercial speech, absent extraordinary conditions, thus satisfying the first prong.²³⁶ The Court further found that the second prong was met because the State's expressed interest in maintaining fair and efficient rates was a clear and substantial governmental interest.²³⁷ While the Court deemed the link between the advertising prohibition and the utility's rate structure tenuous "at most," it determined that a direct link existed between the state's interest in fuel conservation and the Commission's order, thereby satisfying the third prong.²³⁸ *Central Hudson*, therefore, turned on the fourth prong of the analysis. The Court ruled that "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests."²³⁹ As such, the State's regulation could not be upheld.

In the current proceedings, if the Commission ultimately chooses to accept the DPS Staff's proposal to prohibit ESCOs from engaging in door-to-door sales and telemarketing to residential customers, a legal challenge to the Commission's adoption of the proposal would likely focus on whether restrictions on advertising are permissible under the First and Fourteenth Amendments. Using the four-part analysis set forth in *Central Hudson*, such a ban is likely to withstand constitutional scrutiny.

First, given the record in the recent proceedings, a court may conclude that the ESCOs fail to satisfy the first prong of the *Central Hudson* analysis insofar as the ESCOs' marketing practices are deceptive and misleading, thereby warranting no constitutional protection under the First Amendment. If a court agrees with that premise, the analysis would end, and the ban would be upheld. If a court disagreed and found that ESCOs' marketing was constitutionally protected speech, the court would then likely conclude that the asserted governmental interest – providing affordable energy prices for

235. *Id.* at 567.

236. *See id.* at 567-68

237. *Id.* at 569.

238. *Id.*

239. *Id.* at 570.

consumers – is substantial pursuant to the reasoning stated in *Central Hudson*. Under the third prong, regulation in the form of a ban on door-to-door and/or telephonic marketing directly advances the governmental interest asserted because ESCO marketing leads consumers to pay significantly higher rates for commodity service than the default utility service charges. Fourth and finally, there is a valid argument that a total ban on such marketing practices is required to serve the asserted governmental interest insofar as decades of Attorney General investigations, multiple UBP revisions, and numerous stakeholder collaboratives and technical conferences have not remedied the problems. During the November and December 2017 hearing, the New York Attorney General’s expert witness testified that her investigations over the last seventeen years were indicative of a broken industry, “because the complaints that we receive . . . they’re a similar type. They’re slamming[,] they’re promises of substantial savings, they’re failure to provide contracts, they’re high-pressure sales. And these are patterns of practices that we see.”²⁴⁰ Moreover, years of enforcement actions have not fully resolved issues in the market and the New York Attorney General cannot “bring enforcement actions against every entity that engages in these practices. The fact is that we have . . . multiple ongoing investigations into ESCO companies right now concerning the same type of practices.”²⁴¹ Accordingly, on these facts, a court would likely find that a restriction on ESCOs’ marketing to residential customers would not violate the First Amendment.

240. State of N.Y. Pub. Serv. Comm’n, Evidentiary Hearing, Case 15-M-0127, at 1,622 (Dec. 4, 2017) (testimony of Jane Azia, Chief of the Consumer Fraud’s Bureau at the New York Attorney General’s Office).

241. *Id.* at 1,623. It is also important to note that the NYAG has found wide-spread non-compliance even after settling enforcement actions with ESCOs. In one case, the NYAG “found 70% non-compliance with the verification procedures.” *Id.* at 1826; *see also id.* at 1921 (explaining that when the NYAG was conducting compliance reviews, including quality assurance logs that were provided after the settlement, to ensure the ESCOs were complying with the “provision verifying that all sales representatives who engaged in door-to-door solicitations comply with laws . . . the compliance information that was produced indicated that there was only . . . 30% were compliant with the AOD [Assurance of Discontinuance]”).

D. A Prohibition on Mass Market Service Will Not Regulate ESCOs out of the REV Arena

Possible constitutional challenges aside, another common argument against implementing a prohibition on ESCOs serving mass market customers is that ESCOs are required to fulfill the potential of REV and increased regulations will prevent ESCOs from innovating in the renewable energy space. Trade associations representing the interests of ESCOs in policy proceedings have claimed that the instant proceedings are not consistent with REV and that prohibiting ESCOs from serving mass market customers “would undermine the role imagined for ESCOs in the REV proceeding and thereby upend the REV proceeding as a whole.”²⁴² In response to suggestions of enacting a prohibition on ESCOs serving the mass market, ESCO representatives argue that

regulating ESCOs out of . . . New York’s mass-market would eliminate an entire group of intermediaries and extend monopoly energy services back to the transmission grid (in the case of electricity) – which should not be seen as anything other than a retrograde movement back from energy delivery innovation targeting climate change in the United States.²⁴³

Such claims are interesting insofar as the challenges in the ESCO market have long pre-dated REV and its related policy proceedings. As a preliminary matter, such arguments appear as a retroactive pretext to justify the continued operation of ESCOs in the mass market. The Attorney General’s Office has been investigating ESCOs’ marketing and business practices for over two decades, and the instant proceedings were commenced in 2012, two years before REV even existed.²⁴⁴ Thus, for ESCOs to now claim that REV identified

242. State of N.Y. Pub. Serv. Comm’n, Direct Testimony of Jeff Makhholm on behalf of RESA, Case 15-M-0127, at 63 (Sept.15, 2017).

243. *Id.* at 60.

244. *See* State of N.Y. Pub. Serv. Comm’n, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Case 14-M-0101 (Apr. 25, 2014).

numerous environmental goals “that can only be achieved efficiently by” them appears disingenuous at best.²⁴⁵ At worst, it is inaccurate.

Admittedly, the need to regulate must be balanced against the need to innovate. The energy sector is New York’s largest source of GHGs, responsible for 86% of emissions.²⁴⁶ It is clear that cleaner, renewable sources of generation are necessary if New York wants to maintain its position as a leader in innovating climate change mitigation strategies. However, providing additional consumer protections will not regulate ESCOs out of the REV arena. Enacting a prohibition on ESCOs’ service to mass market customers except in instances where the ESCOs certify that 100% of the electricity they provide is sourced from renewable generation preserves ESCOs’ ability to participate in REV if they so choose. If the Commission adopts the DPS Staff’s proposal, not only would ESCOs be free to provide value-added services in the form of renewably-sourced products that assist New York in meeting its environmental goals, they would be required to do so in the absence of guaranteeing lower prices than utility service.

Contrary to claims that increased regulation would frustrate the goals of REV, the DPS Staff proposal would force ESCOs to facilitate New York’s climate change mitigation goals present in REV.²⁴⁷ REV

245. *See* Direct Testimony of Jeff Makhholm on behalf of RESA, *supra* note 241, at 64.

246. *See* N.Y. STATE RESEARCH AND DEVELOPMENT AUTHORITY, N.Y. STATE GREENHOUSE GAS INVENTOR: 1990-2014 FINAL REPORT (2017).

247. Article 6 of New York’s Energy Law had required the New York State Energy Planning Board agencies (the Commission, NYSEEDA, Department of Transportation, Department of Economic Development, and DEC) to review and update as necessary a state energy master plan every two years. *See* N.Y. Energy Law § 6-106 (2016); *see also* COMMITTEE ON ENERGY, *supra* note 82. Components of the State Energy Plan consisted of forecasting requirements, summaries of the state’s suppliers for meeting forecasted requirements, analysis of emerging energy trends, and recommendations for appropriate administrative and legislative action. On January 1, 2003, the law expired and New York lacked a comprehensive state energy planning process until 2014 when Governor Andrew Cuomo created the Reforming the Energy Vision policy. The REV led to the creation of the Draft 2014 N.Y. State Energy Plan (Draft 2014 SEP), which garnered tens of thousands of public comments and resulted in the N.Y. State Energy Planning Board’s creation of the 2015 N.Y. State Energy Plan. ENERGY TO LEAD, *supra* note 14, at 11. The 2015 Plan was touted as “a comprehensive roadmap to build a clean, resilient, and affordable energy system for all New Yorkers.” The Plan consists of two volumes: the first contains a series of policy recommendations and analysis and the second discusses

is expected to “build an integrated energy network able to harness the combined benefits of the central grid with clean, locally generated power.”²⁴⁸ As such, REV is intended to transform how New York utilities operate by allowing them to (1) earn return in energy efficiency and distributed energy resource markets, (2) use price signals to encourage system efficiency, and (3) take advantage of technological advancements and innovation.²⁴⁹ REV envisions a market whereby private sector investment assists with transitioning the state to clean energy, rather than government and ratepayers bearing the brunt of the costs.²⁵⁰

The Commission has acknowledged that that the, “[d]evelopments of markets in which vendors offer innovative services of value to consumers, and in which consumers can participate with confidence, is critically important to the success of the Reforming the Energy Vision (REV) initiative.”²⁵¹ However, the Commission realizes it is equally true that “[r]etail energy markets focused on commodity-only products, and in which ESCOs do not meet expectations of many customers, will thwart these objectives.”²⁵² If ESCOs are unable or

energy use, supply and demand forecasts, inventory of state greenhouse gas emissions, and the environmental and public health costs associated with energy production. *See* ENERGY TO LEAD, *supra* note 14; *see also* N.Y. STATE GREENHOUSE GAS INVENTORY AND FORECAST: INVENTORY 1990-2011 AND FORECAST 2012-2030, NYSERDA (2015). A detailed analysis of the REV proceedings is outside the scope of this article, as such proceedings were complex, spanned several years, and involved comments and collaborative working groups of nearly 300 parties. *See* State of N.Y. Pub. Serv. Comm’n, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Order Adopting Regulatory Policy Framework and Implementation Plan, Case 14-M-0101, at 5 (Feb. 26, 2015).

248. ENERGY TO LEAD, *supra* note 14, at 7.

249. *See* ENERGY TO LEAD, *supra* note 14, at 38-40. REV also recognizes that low-to moderate-income (LMI) consumers spend disproportionate shares of their income on their energy bills, while also being less likely to have access to clean sources of energy. The REV plan will strive to deploy more distributed energy resources in LMI communities to bring energy costs down for these consumers while seeking to lessen the impact of air pollution caused from the siting of many fossil fuel generation and transportation facilities in those communities. One quarter of New York’s population qualify as LMI.

250. *See* ENERGY TO LEAD, *supra* note 14, at 52.

251. State of N.Y. Pub. Serv. Comm’n, Order Resetting Retail Energy Markets and Establishing Further Process, Case 15-M-0127, at 3 (Feb. 23, 2016).

252. *Id.*

unwilling to offer products beyond the commodity-only offerings of utilities and cannot increase the percentage of renewable energy in the generation mix, then they are not currently achieving the goals of REV.

The DPS Staff's proposal regarding the 100% renewable energy option for serving mass market customers would ensure that ESCOs are actually working to achieve REV goals.²⁵³ One party in particular expressed its desire for a requirement that ESCOs be required to offer 100% renewable energy because, although ESCOs may currently offer some green products, "it's important . . . that the information about where those RECs [Renewable Energy Credits] are coming from is transparent and what percentage of that power is, in fact, green power."²⁵⁴ Another expert witness expressed concern that based on her review of terms and conditions and actual renewable energy products being marketed to New York consumers, "too many of these offers reflect ESCO purchases of Renewable Energy Credits or RECs from jurisdictions outside New York and, as a result, will not provide any incremental renewable energy resources in the New York wholesale market."²⁵⁵

Experts believe that "[t]he changing climate should be seen as a series of discrete, manageable problems that can be attacked from all angles simultaneously. . . . Each part of the problem of climate change has a solution that can make our society healthier and stronger."²⁵⁶

253. The evidence to date suggests that under the current regulatory framework, the majority of ESCOs are not incrementally increasing the penetration of renewables in the State of New York. *See* State of N.Y. Pub. Serv. Comm'n, Evidentiary Hearing Case, 15-M-0127, at 4,174 (Dec. 12, 2017). The DPS Staff Economics Panel testified that "a comparison of emissions profiles reveals information on the mix of valued renewable energy in each ESCO's supply portfolio. Our direct testimony notes the similarity of emissions profiles between ESCOs, suggesting little difference in the renewable mix provided by ESCOs. Given the similarity of those profiles, it is unreasonable to assume that, on average, ESCOs provided added value in terms of green energy." *See id.*

254. *See* State of N.Y. Pub. Serv. Comm'n, Evidentiary Hearing, Case 15-M-0127, at 1,502-03 (Dec. 1, 2017) (testimony of the City of New York's expert witness panel). The Panel further opined that the percentage of green power it would like to see in order to help aid the City's goals as outlined in One NYC is 100% and therefore consistent with DPS Staff's proposal).

255. State of N.Y. Pub. Serv. Comm'n, Evidentiary Hearing, Case 15-M-0127, at 3,519 (Dec. 11, 2017) (PULP's expert witness Barbara Alexander testifying on current ESCO green product offerings).

256. BLOOMBERG & POPE, *supra* note 32, at 159.

ESCOs certainly could be part of that solution, but only if they are required to offer quantifiable value-added products, such as renewable generation in excess of the current utility mix. To that end, adopting the DPS Staff's proposal that requires ESCOs to serve mass market customers with either a savings guarantee below the utility price or a 100% renewable energy product advances the goals of REV. Importantly, as DPS Staff members testified during the evidentiary hearings, "[t]here are ESCOs and utilities that provide 100%. It's imminently doable."²⁵⁷

Nevertheless, the Commission might wish to consider permitting other tiers of renewable energy products into the mass market place as a means of introducing more price transparency for consumers. For example, it is conceivable that consumers might be interested in a 50% renewable product, a 75% renewable product, and a 100% renewable product. It is likely that such products can only be produced at a premium above the default utility rates, and one would expect that as the percentage of renewable generation increases in the product, so too would the price of the product. If the Commission allowed ESCOs to compete for mass market customers based on advertising and certifying tiers of renewable energy products (and publishing the price differences for varying renewable products), then consumers could make more informed choices about whether to pay more money for renewables or to remain with the default utility service. Therefore, ESCOs' experts' claims that ending mass market service would end the renewable energy industry in New York are unfounded under either a 100% renewable only requirement scenario or a tiered system.²⁵⁸

Not only will additional oversight not regulate ESCOs out of the REV arena, but such enhanced consumer protections are vital to developing another energy market imagined in REV: DERs. Correcting abuses in the ESCO market is necessary to creating a thriving DER market. Throughout the evidentiary hearing, multiple ESCOs expressed their desire to expand by offering mass market

257. State of N.Y. Pub. Serv. Comm'n, Evidentiary Hearing, Case 15-M-0127, at 2,572 (Dec. 6, 2017).

258. State of N.Y. Pub. Serv. Comm'n, John Hanger Rebuttal Testimony, Case 15-M-0127, at 3 (Oct. 27, 2017).

customers not only commodity services but also DER services.²⁵⁹ For example, Alan Tilley, Co-founder and Director of Power Operations at Drift Marketplace, Inc., which intends to operate as both an ESCO and a DER, opined during the hearing that “if the outcome of this proceeding results in a shutdown of the current mass retail market, the development of the new DER marketplace will be severely compromised.”²⁶⁰ ESCO expert economist Dr. Jeff Makhholm similarly expressed the belief that “removing ESCOS from the electric and gas markets would significantly impair ESCOS’ ability to provide DER service for customers.”²⁶¹ Possible DER products include a Community Distributed Generation (CDG) subscription, energy efficiency programs, battery storage, and on-site solar photovoltaic (PV) systems. One can easily imagine a scenario in which an ESCO seeks to provide commodity electricity service to a residential customer and also provides DER service through installation of solar panels and perhaps a battery storage unit. DPS Staff experts even admitted during the evidentiary hearings that they were “expecting that the ESCOs will play a significant role, especially to the extent that they become DER providers in the REV marketplace.”²⁶²

Given the deception and fraudulent marketing claims that have occurred in the ESCO arena, it is necessary that such abuses be corrected so that they do not negatively impact the renewable DER space. Consumer protection measures are all the more necessary in the DER space where contracts for solar panels can last 20 years, far longer than an electric commodity contract that typically spans a few months to a year.

Recognizing the need for safeguards and adequate consumer protection measures in this new space – especially since most mass market customers do not have extensive energy bill management experience – the Commission sought comments from stakeholders on

259. *See* State of N.Y. Pub. Serv. Comm’n, Evidentiary Hearing, Case 15-M-0127, at 4,069-76 (Dec. 12, 2017) (discussing the testimony of the Impacted ESCO Coalition panelists’ desires and intentions of expanding their businesses to provide DER service in addition to ESCO commodity service).

260. State of N.Y. Pub. Serv. Comm’n, Initial Testimony of Alan Tilley, Case 15-M-0127, at II-4, 18-21 (Sept. 15, 2017).

261. *See* Direct Testimony of Jeff Makhholm on behalf of RESA, *supra* note 241, at 71.

262. *See* Evidentiary Hearing, *supra* note 256, at 2,599.

its proposed Uniform Business Practices for Distributed Energy Resource Suppliers (UBP-DERS) in April 2017.²⁶³ Specifically, the Commission sought comments on (1) the DPS Staff's Supplemental Whitepaper addressing the Commission's oversight of distributed energy resource suppliers (DERS);²⁶⁴ (2) the draft UBP-DERS;²⁶⁵ (3) a set of rules governing, among other things, DER suppliers' business and marketing practices; and (4) the initial DER Oversight Staff Proposal.²⁶⁶

Since the DER market is in its infancy and many customers may not be familiar with the technologies, it is especially important that the Commission implement regulatory safeguards that protect customers from possible deception and establish the consumer confidence necessary for the market to thrive. Concerns regarding deception and misinformation spilling over from the ESCO space to the DER space are not unfounded. At the June 19, 2017 Technical Conference, a representative from NYSERDA, when discussing the NY-Sun program,²⁶⁷ noted that Lead Generators – third-parties who market DER products to customers and then sell the list of interested customers to a particular DER supplier such as a solar company – have already been the source of some customer complaints.²⁶⁸

Getting REV right means correcting market failures in the ESCO world and preventing abuses in the DER market. The Commission is taking steps towards achieving these important public policy goals with the recent issuance of its Order Establishing Oversight Framework and Uniform Business for Distributed Energy Resource

263. State of N.Y. Pub. Serv. Comm'n, Notice Seeking Comments on Proposed Standards, Case 15-M-0180 (Apr. 12, 2017).

264. State of N.Y. Pub. Serv. Comm'n, Supplemental Staff Whitepaper on DER Oversight, Case 15-M-0180 (Apr. 11, 2017).

265. Supplemental Staff Whitepaper on DER Oversight, *supra* note 263, at Appendix A.

266. Supplemental Staff Whitepaper on DER Oversight, *supra* note 263, at Appendix B.

267. See *NY-Sun*, N.Y. STATE ENERGY RESEARCH & DEV. AUTHORITY (2017), <https://www.nyserda.ny.gov/All-Programs/Programs/NY-Sun>.

268. State of N.Y. Pub. Serv. Comm'n, NY-Sun Customer Protections and Concerns, Case 15-E-0180 (Apr. 11, 2017).

Suppliers in October 2017.²⁶⁹ While the UBP-DERS is an important first step in trying to protect the nascent DER market from some of the abuses occurring in the ESCO market, it is unclear at this time how the UBP and the UBP-DERS will apply to a single company that intends to act both as an ESCO and as a DER if a prohibition on ESCO service to mass market customers is put in place. For example, if the Commission adopts the DPS Staff's proposal as written, it is unclear whether an ESCO providing a bundled 100% renewable commodity product with DER service such as solar panels could engage in door-to-door marketing. It is also unclear which provisions would govern customer consent and contract renewals of such bundled services.

Several commenters urged consolidation of the UBP for ESCOs and the UBP-DERS, but the Commission noted that "the complexity of the ongoing ESCO proceeding makes modifications to the UBP impractical."²⁷⁰ Nevertheless, the Commission agreed with commenters "that a single document should ultimately be created to avoid confusion or unnecessary duplication"²⁷¹ and directed DPS Staff to begin issuing a plan for combining the documents as soon as practicable.²⁷² Regardless of the recommendations that the administrative law judges make to the Commission regarding the ESCO evidentiary hearing following the submission of parties' post-hearing briefs, the Commission must be mindful of the ambiguities that currently exist in the two sets of UBPs. Indeed, it would be prudent for the Commission to consider consolidating the UBP for ESCOs and the UBP-DERS immediately if it intends to allow ESCOs to continue serving mass market customers in any fashion.

The importance of the ongoing ESCO proceedings cannot be understated. The evidentiary hearings in late 2017 elicited much testimony on the significance of encouraging innovation to facilitate REV and climate change mitigation efforts in the energy sector around the world. One expert opined, "[a]s energy distributors – particularly electric companies – face a new wave of interest in new sources of green and decentralized power production, New York has become a

269. State of N.Y. Pub. Serv. Comm'n, Order Establishing Oversight and Framework and Uniform Business Practices for Distributed Energy Resource Suppliers, Case 15-M-0180 (Oct. 19, 2017).

270. *Id.* at 22.

271. *Id.*

272. *Id.*

magnet for international study in new energy markets as delegations from around the world come to meet the REV staff and study the initiative.²⁷³ If REV is to be successful, it requires greater regulatory oversight of ESCOs and DER service providers, not less.

E. A Note About Far-Reaching Impacts

It should also be noted that correcting abuses in the ESCO market, preventing abuses in the DER market, and getting REV right would allow New York to not only achieve emission reductions in the energy sector, but also in the second largest sector that contributes to climate change: agriculture.²⁷⁴ It is no secret that energy generation and transmission can result in the permanent loss of agricultural lands.²⁷⁵ New York State lost 600,000 acres of agricultural lands between 2001 and 2010.²⁷⁶ Energy is necessary for agricultural operations and irrigation, as well as food preservation and transportation.²⁷⁷ Moreover, methane emissions are the second largest source of New York's GHG emissions (fuel combustion emissions being the largest).²⁷⁸ The primary sources of methane emissions are landfills, agricultural animals, and natural gas leaks from the pipes in New York's transmission and distribution system.²⁷⁹ REV directs NYSERDA to "work with private partners, regulators, and stakeholders representing the agricultural, food processing, and source separated food-waste management sectors to develop and spur market adoption of innovative and replicable solutions, including anaerobic digester biogas production and use, to deliver operational and energy productivity gains, and additional revenue streams."²⁸⁰ In addition, REV requires the Department of Agriculture and Markets, NYSERDA, and Department of Environmental Conservation to

273. See Direct Testimony of Jeff Makhholm on behalf of RESA, *supra* note 241, at 73.

274. Electricity and heat production is the largest contributing sector to climate change. See *Global Emissions by Economic Sector*, U.S. ENVTL. PROT. AGENCY (2017), <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>.

275. ENERGY TO LEAD, *supra* note 14, at 61.

276. *Id.*

277. *Id.* at 63.

278. *Id.* at 13.

279. *Id.*

280. See ENERGY TO LEAD, *supra* note 14, at 76.

“develop a comprehensive, cost-effective strategy to support in-state, sustainable, low-carbon fuel production using agricultural and organic waste feedstock, especially as a substitute for petroleum fuels imported from out-of-state.”²⁸¹

Harnessing the power of DERs could have significant impacts on the agricultural sector because anaerobic digesters are one type of DER being developed in the market place. Anaerobic digesters on farms, coupled with biogas electric generators can “market locally-sourced clean energy, contribute consistent, base load power to the grid, reduce loads on transmission and distribution equipment, and provide wasted heat for onsite and offsite use. In particular, excess power generated by farms could benefit the grid by serving local electric loads in the areas around these farms.”²⁸² Anaerobic digestion on farms can not only reduce GHG emissions associated with manure from livestock, but it can also reduce GHG emissions attributable to food waste in landfills because these facilities can use manure blended with food waste.²⁸³ Farmers’ utility bills can be reduced by using anaerobic digestion, which can also provide an alternative income stream if farmers sell excess energy back to the grid.²⁸⁴ However, if ESCO market abuses continue uncorrected and spill into the DER market, the likelihood of anaerobic digesters appearing on farms or in communities in numbers large enough to make an impact on GHG emissions is slim.²⁸⁵

281. *See id.* at 77.

282. ENERGY TO LEAD, *supra* note 14, at 38.

283. *Id.*; *see also* NORMAN SCOTT ET AL., USING FOOD WASTES IN FARM-BASED ANAEROBIC DIGESTERS (CORNELL MANURE MANAGEMENT PROGRAM 2005).

284. ENERGY TO LEAD, *supra* note 14, at 39.

285. Admittedly, correcting abuses in the retail access energy market will not remove all existing barriers standing in the way of a thriving DER market. As one of the many REV working groups has admitted, another challenge to growing the DER market is “the lack of standardization of metering, verification and reporting requirements.” *See* State of N.Y. Pub. Serv. Comm’n, Reforming the Energy Vision (REV) Working Group 1: DSPP Markets, Final Report & Attachments, Case 14-M-0101, at 8 (July 8, 2014). Additional technical challenges involve the need to monitor and regulate DER installations. *See id.* at 9. Other challenges exist on an economic level, such as the ability of DER providers to finance the costs of such projects or the need to incent utilities to accept DERs as an alternative to investing in transmission and distribution upgrades. Such challenges are being addressed in related proceedings, such as Case 15-E-0751 Value of Distributed Energy Resource (VDER) proceedings and related working groups.

CONCLUSION

In the 1990s, New York embarked on an experiment of epic proportions when it sought to restructure an industry that had previously been a regulated monopoly: the energy industry. Like many other states, New York sought to increase competition within the energy sector to drive down prices for consumers and expand the range of renewable energy options that were available. After waiting nearly three decades, New York appears poised to finally assess the efficacy of this great experiment. Years of escalating consumer complaints, Attorney General investigations, and analysis by the DPS Staff have revealed that residential consumers are not faring as well as the State had hoped. Since 2014, New Yorkers electing to receive energy commodity service from companies competing with the default utilities were overcharged to the tune of one billion dollars. In households where families struggle to make ends meet and often must choose between putting dinner on the table or keeping the heat on, any overcharge on an energy bill creates a public health hazard. More families than ever before must continue confronting the Hobson's choice of paying the food bill or paying the energy bill when both costs have never been higher.²⁸⁶

The status quo is not sustainable. The Commission stands poised at a crossroads. It can continue allowing ESCOs to serve mass market customers and rely on the Attorney General to investigate and enforce the law. However, the last two decades have shown that enforcement efforts alone are insufficient to yield the desired results. Alternatively, the Commission can prohibit ESCOs from serving mass market customers until ESCOs can deliver on the promises for which they were allowed to enter the market in the first place: lower prices, valuable energy products designed to lower consumers' bills, and innovative services like DERs and renewable green products. The Commission's primary purpose must be to protect ratepayers from

286. State of N.Y. Pub. Serv. Comm'n, Evidentiary Hearing, Case 15-M-0127, at 3,855 (Dec. 12, 2017) (according to PULP's CPA expert witness William D. Yates, "[d]uring the worst winter on record in New York State, ESCOs contributed \$149,431,097 of net extra cost to the affordability problems facing residential utility customers").

potential market harms.²⁸⁷ Adoption of the DPS Staff proposal – with the additional modifications discussed above – establishes a comprehensive regulatory scheme that both protects consumers and promotes fair competition in the ESCO market and the emerging DER market.

Adoption of the DPS Staff proposal will implement proper consumer protections while fulfilling the promise of REV and ensuring New York is successful in its climate change leadership efforts. The ESCO market is a cautionary tale. If similar abuses also proliferate in the nascent DER market, it will be difficult to inspire the consumer confidence necessary for that market to thrive or for other renewable energy efforts to succeed. Regulatory intervention is appropriate where, as here, the industry to be regulated “is of such significance to every aspect of the economy and to life itself that the State does not have the luxury of leisurely waiting for the market to correct itself.”²⁸⁸ The spotlight is on and the evidence is in: New York consumers deserve better. The Commission’s time to act is now.

287. State of N.Y. Pub. Serv. Comm’n, Evidentiary Hearing, Case 15-M-0127, at 3,005 (Dec. 7, 2017) (DPS Staff Policy Panel testifying that the Commission’s “overarching concern” is “rate payers receiving . . . safe and adequate service at a just-and-reasonable rate”). *See also id.* at 3041 (testifying that the “priority is the protection of the customer”).

288. ENERGY TO LEAD, *supra* note 14, at 11.