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Monthly meeting - Public Service Commission - 9-15-2016

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

MEETING OF THE PUBLIC SERVICE COMMISSION

Thursday, September 15, 2016
10:30 a.m.
Three Empire State Plaza
Agency Building 3, 19th Floor
Albany, New York

COMMISSIONERS

AUDREY ZIBELMAN, Chair

GREGG C. SAYRE
PATRICIA L. ACAMPORA

DIANE X. BURMAN

1 Monthly meeting - Public Service Commission - 9-15-2016

2 (The session commenced at 10:33 a.m.)

3 CHAIR ZIBELMAN: Morning everyone.

4 Before we actually begin session today, I
5 want to acknowledge we have some very special guests with
6 us. One of the things that NARUC does, the National
7 Association of Regulatory Utility Commissions, is they
8 have a group that works on an international basis so that
9 there can be international exchanges of ideas on how to
10 oversee regulated utilities across the world. And from
11 time to time, individual commissions are asked to host
12 members of the -- the international community so that we
13 can have exchange for ideas.

14 I'd -- you know, I'd like to say that this
15 is actually pretty -- is a great honor because oftentimes
16 the members of the community ask to work with a particular
17 commission because of the -- their thoughts about how that
18 commission can assist them. So this week we've had the
19 pleasure of hosting members of the Armenian regulatory
20 community. And we've had our Staff working with a number
21 of people in the -- in the -- from their regulators to
22 talk about an exchange of ideas of what's happening in
23 Armenia.

24 So I'd like to take an opportunity to
25 welcome three members, Mr. Sergei Gignon (phonetic

1 Monthly meeting - Public Service Commission - 9-15-2016
2 spelling) and I'm going to -- who is head of the
3 development and monitoring department, Mr. Garagan
4 Bachraman (phonetic spelling), who is head of the tariff
5 policy department, and Mr. Hite Gosalum (phonetic
6 spelling) -- and I'm hoping I didn't really murder your
7 names -- who's head of the financial analysis department.

8 We also are joined today by Dr. Marina
9 Vardanyan, who is with the U.S.A.I.D., who is helping
10 sponsor this group.

11 So I want to first of all thank you being
12 here. Thank you for taking the time and exchanging your
13 ideas with us.

14 And also thank you to the Staff for doing -
15 - for hosting this week and -- and having this
16 opportunity.

17 So welcome and I hope you tell us that the
18 way we process things is similar to the way you do or it'd
19 be interesting to hear how -- how your commission works
20 versus our commission. So thank you very much.

21 With that -- that, I'd like to call the
22 session of the Public Service Commission to order.
23 Secretary Burgess, are there any changes to the final
24 agenda?

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1 Monthly meeting - Public Service Commission - 9-15-2016

2 SECRETARY BURGESS: Good morning, Chair and
3 Commissioners. There are no changes to the final agenda
4 this morning.

5 CHAIR ZIBELMAN: Thank you.

6 Our first item today is Item 501. And this
7 is a petition on behalf of the New York Telecommunications
8 Industry for relief of the 518 numbering plan. And Lauri
9 Mullen who is an analyst with the telecommunications unit
10 is here, as well as Karen.

11 So welcome, Lauri, and please begin.

12 MS. MULLEN: Thank you.

13 Good morning Chair and Commissioners.

14 What we have before you is a proposed order
15 in response to the North American Numbering Plan
16 Administrator's, or NANPA's petition that you had just
17 mentioned. In the May 16th, 2016, petition NANPA advised
18 the Commission that its most recent forecast indicated
19 that the supply of telephone numbers in the 518 area code
20 would exhaust in the first quarter of 2019.

21 It provided 2 options for relief in the
22 petition, the geographic split and the all-services
23 overlay. NANPA's recommended option, the overlay option,
24 assigns a new area code to the same geographic region
25 currently served by the exhausting 518 area code,

1 Monthly meeting - Public Service Commission - 9-15-2016
2 resulting in 2 area codes serving the same footprint.
3 Under this option, all consumers in the region would
4 retain their current telephone number and 10-digit dialing
5 would be required for all calls.

6 Department Staff supports this option, as
7 well. Time has proven that is less costly, less
8 disruptive, and less likely to frustrate customers and
9 more likely to enhance the public interest, rather than
10 the geographic split that was also identified.

11 So in a recent development in this
12 proceeding, NANPA filed a supplement on August 31st, 2016.
13 It notified the Commission that the 518 area code exhaust
14 forecast had been accelerated to the third quarter of 2017
15 due to unprecedented demand for numbering resources.

16 The change in exhaust forecast does not
17 change Staff's recommendation of an overlay to provide the
18 relief, but it does create a shorter than usual timeframe
19 for implementation of the relief.

20 The demand for telephone numbers is related
21 to new technologies and services, which translates into
22 more devices needing more telephone numbers. This has,
23 for years, been the main driver behind the utilization
24 phone numbers.

25

1 Monthly meeting - Public Service Commission - 9-15-2016
2 Typically, in discussions about the
3 proliferation of technology, consumers mostly speak about
4 cell phones and tablets and E-readers. But there are many
5 more devices that require phone numbers, such as vehicle
6 Wi-Fi, remote medical monitors, and even G.P.S. ankle
7 monitoring devices. When you consider also that it is
8 typical nowadays that an individual has more than one of
9 these devices, you can easily see how the demand for
10 numbers rises exponentially.

11 It's also important to note the
12 conservation measures that have been put into -- in effect
13 in New York over the last 15 years or so. Under
14 Commission direction, both thousand block pooling and
15 reclamation efforts took place and were extremely
16 successful in staving off area code relief all across the
17 state. However, these strategies can no longer help
18 eliminate the need for area code relief in 518.

19 So we have a clear need for 518 area code
20 relief especially in light of this new forecast. It is
21 because of the timing of this revised forecast that Staff
22 believes it's important to bring this in front of you
23 today. With a shorter than usual time to implement the
24 relief, a shorter than usual timeline to advise and
25 educate the public has been created. So today's session

1 Monthly meeting - Public Service Commission - 9-15-2016
2 serves as another opportunity to inform the public of the
3 new exhaust date and next steps.

4 Having said that, Staff recommends that the
5 Commission approve the petition of NANPA on behalf of the
6 New York Telecommunications Industry and to establish an
7 all-services distributed area code overlay as the
8 appropriate means of providing numbering relief for the
9 518 area code.

10 Staff also recommends that this Commission
11 direct carriers to file a joint plan to activate a new
12 area code and individual plans for outreach and education,
13 all of which are to be consistent with the shorter than
14 usual timeline needed to implement the approved overlay
15 relief.

16 Thank you.

17 CHAIR ZIBELMAN: Thank you very much.

18 I actually -- I have a question for you.
19 And if you don't -- if you don't know now, we can -- we
20 can certainly come back to it. I notice in one of the
21 comments that we received under this, some of the
22 commenters asked if there was a way we could get 235 as
23 the area code, which I thought was actually quite clever
24 because that would be A.D.K. and that could be a nice
25 Adirondack kind of linkage.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 MS. MULLEN: Yes.

3 CHAIR ZIBELMAN: Is there a -- do we have
4 any influence over the selection?

5 MS. MULLEN: We -- we don't have any
6 influence. We did reach out to NANPA just to -- typically
7 NANPA makes that decision independently of us. But we did
8 -- because that comment did actually garner a little bit
9 of support amongst other commenters, we reached out. And
10 NANPA advised that it would not be possible because we
11 already have an exchange in New York -- in the 518 area
12 code, 235, so it wouldn't be --.

13 CHAIR ZIBELMAN: Oh.

14 MS. MULLEN: And it had been reserved in
15 another case, so it's not a possibility.

16 CHAIR ZIBELMAN: It would be interesting to
17 see if maybe we could -- we could reserve something
18 similar. I thought that was a great idea.

19 I have no further questions. I think that
20 it is important that we move this forward. It's -- I --
21 and normally when we've had these matters before us
22 before, the question has been we thought there was an
23 exhaust and then the exhaust wasn't going to happen so we
24 would have additional time. It seems like in this

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1 Monthly meeting - Public Service Commission - 9-15-2016
2 instance it's just the converse that this exhaust is
3 happening more quickly.

4 I know sometime -- you know, this -- these
5 things have been contentious in the past, but it seems in
6 this instance there's a little less anxiety. I know --
7 and I'm aware that some of the commenters were interested
8 in trying to do the division, but I believe that, you
9 know, ultimately I -- I agree with Staff's recommendation
10 that it's better to do the overlay. It's less disruptive
11 for businesses.

12 And while there's a inconvenience of going
13 from 7 to 10, I think for those of us who live in larger
14 communities that's -- you easily adjust to that. So I --
15 I intend to vote for this item.

16 And thank you, and welcome to the
17 Commission.

18 MS. MULLEN: Thank you very much.

19 CHAIR ZIBELMAN: Any further comments? Mr.
20 Sayre?

21 COMMISSIONER SAYRE: Clearly, the big
22 tradeoff here is that with a geographic split, half the
23 customers, the ones who get the new area code have to
24 change all their telephone numbers. I lived through that
25 process in Rochester when Buffalo got area 716 and we all

1 Monthly meeting - Public Service Commission - 9-15-2016
2 -- all had to change to 585, and it wasn't pleasant. I'm
3 not sure that the Rochester area yet has forgiven the
4 P.S.C. for giving 716 to Buffalo.

5 The downside to the overlay is -- is,
6 clearly, that we have to have mandatory 10-digit dialing.
7 I don't think it's half as bad as the alternative. I'm
8 old enough to have lived through the transition from 5-
9 digit dialing to 7-digit dialing, and we did that with
10 rotary phones and without any speed calling, at least in
11 my household. Believe me, 3 digits on a touch tone pad is
12 a lot faster than 2 digits on a rotary phone. But we
13 lived through that with a little grumbling and it worked
14 fine.

15 So I think overall the 518 area is going to
16 manage this transition just fine.

17 CHAIR ZIBELMAN: Glad you admitted how old
18 you are.

19 Commissioner Burman, did -- did you have
20 any comments? Yeah, go ahead, Commissioner Burman.

21 COMMISSIONER BURMAN: So when I -- when I
22 look at this, I'm mindful of the fact that we're sort of
23 at an inflection point. We have seen, in other
24 proceedings, where the forecast goes from, you know, one
25 year to another and happens. It changes, goes up, goes

1 Monthly meeting - Public Service Commission - 9-15-2016
2 down. And depending on whether you wait or you act, you
3 know, the -- the time period and the forecasting may
4 change.

5 So in this case, obviously, we got a
6 forecast in May of 2016 that said that the numbering would
7 exhaust in 2019. Less than 3 months later, August 31st,
8 we got another forecast that said the original forecast
9 was -- is now being revised, and it's 2017. That does
10 concern me and I'm wondering what the process is for
11 forecasting so that we're not caught short.

12 Here we are being asked to speed it up.
13 Now you might say then we should always anticipate that it
14 may happen sooner rather than later, but there are
15 significant issues, whether you do one way or another,
16 that people have to contend with the change in and of
17 itself. But there are, you know, there are -- there are
18 processes and there are concerns making sure that there's
19 enough education and outreach, especially to the alarm
20 companies and to folks who may be relying on certain
21 medical devices, et cetera.

22 So I just kind of want to understand what
23 we're doing in terms of making sure that we're getting
24 accurate forecasting and that we can make determinations
25 on whether to act or not based on those forecasts.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 MS. MULLEN: That's a great point. And --
3 and I -- I'll bring that back to NANPA to discuss their
4 process with the carriers about the forecasts. I'm much
5 more conversant with the other side of it and the -- and
6 the decision process making to assign numbering resources.
7 And that as -- as -- as long as carriers are submitting
8 their requests for numbering resources in accordance with
9 the guidelines and the -- the requirements, the requests
10 are granted.

11 And then -- and really, relief activity
12 can't happen until that number of available resources
13 passes a certain threshold. That, I'm more familiar with,
14 but I will bring that back to NANPA and discuss that
15 carrier NANPA relationship with the forecast.

16 COMMISSIONER BURMAN: Thank you. Because
17 this is the first one I think that I've seen the quickest
18 change in a forecast so dramatically.

19 MS. MULLEN: There were three other area
20 codes that also were recently updated. Not in New York
21 State but it's happening.

22 CHAIR ZIBELMAN: So is it -- and it would
23 be an interest -- it's an interesting question because,
24 you know, we're seeing increased proliferation of devices.
25 And, particularly, I think, you know, if you look at car

1 Monthly meeting - Public Service Commission - 9-15-2016
2 models, telephones in cars that you brought up, I mean,
3 more and more even when you don't ask for the option, you
4 -- you have the option. So I'd be curious as to whether
5 they are updating their forecasting techniques for
6 demographics.

7 MS. MULLEN: Great point. I'll take that.

8 COMMISSIONER BURMAN: And then the other
9 thing is -- is that I think it's very important that we
10 focus even more so on our education and outreach, not just
11 of the companies, but of our own focus on what we do to
12 inform the general public, especially the ones that need
13 the information in a -- you know, that address the alarm
14 companies, you know, letterhead issues, a lot of different
15 things that may be necessary.

16 So it's important that we really --
17 especially because of the condensed time, you know, the
18 implementation is that much more important that it -- it
19 gets done right.

20 MS. MULLEN: Correct. That will be a -- a
21 major topic in the industry meeting that will take place
22 once the order is enacted.

23 COMMISSIONER BURMAN: Okay. And
24 specifically focused on their vulnerable populations.

25 MS. MULLEN: Very good.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 MS. GEDULDIG: The -- as part of the --
3 part of the order also requires the carriers to file
4 public outreach and education plans with -- with the
5 Department. So we'll have access to their specific plans
6 and can make sure that they address the vulnerable
7 populations.

8 COMMISSIONER BURMAN: So based on that, I
9 am going to concur because, based on the official record
10 that we have before us, we must act since the North
11 American Numbering Plan Administrator determined that
12 there's an impending area code exhaust. And our own
13 failure to act now may trigger the federal government to
14 unilaterally act and impose its own plan on the affected
15 communities. Or more importantly, our failure to act now
16 may put in harm's way residents and business owners in the
17 affected area if there's no action in the area code
18 exhaust.

19 However, I do think -- this is why I concur
20 rather than in whole with the majority. I do think that
21 we must very much look at the continued accuracy of the
22 forecasting estimates from the North American Numbering
23 Plan Administrator and be mindful even more so of our own
24 educational and outreach components that we -- we at the
25 Commission and the Department need to do.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 CHAIR ZIBELMAN: Commissioner Acampora?

3 COMMISSIONER ACAMPORA: I'd just like to
4 follow up on what Commissioner Burman had said. I
5 remember when attending a NARUC conference that I was
6 introduced to someone from NANPA. And I think it might be
7 a good idea to have someone come and talk to us about
8 this, to have the conversation in person, rather than just
9 to get some kind of correspondence from them, because
10 there are questions.

11 And I can see this happening more,
12 possibly. And, you know, we hate to act in haste, but we
13 need to get this approved now. And in the past when we've
14 had the requests that have estimated properly, it's worked
15 out fine. We haven't had a problem. But the outreach and
16 education, I'd like to take that a step further.

17 And I see Michael is sitting at the table.
18 So I'd like to see -- make sure that we are working with
19 the customers and the companies to make sure that there is
20 a sufficient amount of outreach so that people are not
21 confused or caught short. And we all know how that
22 happens. So we have to make every effort possible.

23 And again, you know, use the resources that
24 are out there, including all the various levels of

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1 Monthly meeting - Public Service Commission - 9-15-2016
2 government and officials who have access to the public
3 that will be affected by it.

4 MS. MULLEN: Great.

5 MR. CORSO: Duly noted.

6 CHAIR ZIBELMAN: Michael did you want to
7 add something?

8 MR. CORSO: I was going to say duly noted.
9 We'll take care of that. We've heard that throughout the
10 Commission and absolutely make sure. Thank you.

11 CHAIR ZIBELMAN: I -- I believe that the
12 Staff, in the past, of these changes have done an
13 excellent job. So I appreciate the Commissioners'
14 concern. I -- I, for one, feel that the -- you know,
15 while there's always anxiety going in, the process that
16 we've used has been very effective in -- in communicating.
17 And I -- I haven't heard any bad outcomes coming from a
18 change. But, you know, maybe they didn't get to us.

19 But in any event, I know our Staff is very
20 concerned about these issues, as well. And I have full
21 confidence that they're going to do everything they can to
22 make sure that people are appreciative of the change and
23 can take appropriate steps.

24 But thank you for the comments.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 If there are none further, I'm going to
3 take a vote. All those in favor of Item 501, please
4 indicate by saying aye.

5 COMMISSIONER SAYRE: Aye.

6 COMMISSIONER ACAMPORA: Aye.

7 COMMISSIONER BURMAN: And I concur and will
8 be issuing a separate written statement.

9 CHAIR ZIBELMAN: Okay. Since it's a 4 to 0
10 in favor, we're -- the item is passed. So we'll move on.

11 The next items are Items 201, 202, and 203.

12 Items 201, 202, and 203 are related to
13 various energy service companies for violations of the
14 Uniform Business Practices. They're going to be presented
15 today by Luann Scherer, who's the acting director for the
16 Office of Consumer Services. Bruce Alch and Christine
17 Bosity are also here and I know they've worked on this item
18 and are available for questions. And we also have our
19 esteemed counsel, Tom Dwyer, who is also available to talk
20 about these items.

21 So, Luann, please begin.

22 MS. SCHERER: Okay. Good morning, Chair
23 Zibelman and Commissioners. I am presenting on Items 201,
24 202, and 203, orders to show cause against Smart One

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1 Monthly meeting - Public Service Commission - 9-15-2016
2 Energy, L.L.C., Marathon Energy Corporation, and A.B.C.
3 Energy, L.L.C.

4 Before I discuss the specifics of these
5 items, I would like to explain our process for determining
6 which ESCOs to review for U.B.P. compliance. An ESCO
7 investigation is generally initiated because of customer
8 complaints to the Department. It is not the number of
9 complaints, but rather the nature of the complaints that
10 result in an investigation. A large number of complaints
11 attributed to a single ESCO, however, is usually an
12 indicator of a potential U.B.P. violation. Even a few
13 complaints about slamming, marketing, or other U.B.P.,
14 that's the Uniform Business Practices, violations can lead
15 to an investigation.

16 When an investigation results in findings
17 of wrongdoing, we have historically attempted to resolve
18 the wrongdoing informally. For example, if an ESCO fails
19 to report its program offerings monthly or submit its
20 quarterly historic pricing information, Staff will attempt
21 to resolve the violation by sending reminders and/or
22 making calls to the ESCOs.

23 Regarding actions initiated for U.B.P.
24 violations and prior to February 23rd, 2016, a notice of
25 apparent failure or an N.O.A.F. was issued after an

1 Monthly meeting - Public Service Commission - 9-15-2016
2 informal process failed to remedy the problems. The
3 N.O.A.F., depending on the nature of the U.B.P.
4 violations, generally requires the ESCO to provide
5 documentation supporting the enrollment of customers that
6 have filed complaints with O.C.S.

7 In review of the documents provided by the
8 ESCO in response to the N.O.A.F., Staff will determine if
9 the ESCO followed the U.B.P. requirements for marketing
10 and/or enrolling customers. If an ESCO's N.O.A.F.
11 response is inadequate in any way or if we continue to
12 receive complaints after the N.O.A.F., we will recommend
13 that the Commission issue an order to show cause, which
14 requires the ESCO to explain why, based on the findings
15 and allegations, it should not be subject to consequences.

16 The order to show cause provides an
17 opportunity for the ESCO to explain why its eligibility
18 should not be revoked and/or what steps they have put in
19 place to prevent the problems from recurring. It is also
20 an opportunity for the ESCOs to work with Department Staff
21 to ensure compliance with the U.B.P.

22 The February 23rd, 2016, resetting order
23 stated that the Commission will not wait for patterns or
24 repetitious behavior to take appropriate action in
25 response to U.B.P. violations and, instead, indicated that

1 Monthly meeting - Public Service Commission - 9-15-2016
2 the Commission will proceed directly with an order to show
3 cause. This modification, according to the Commission
4 order, and I'm quoting, will facilitate timely and
5 forceful Commission action against entities which violate
6 the rules to the detriment of consumers and market
7 development.

8 In February 26, Chair Zibelman formed an --
9 a Department audit team with responsibility for reviewing
10 ESCO complaints and, if appropriate, bringing action
11 against the ESCOs. The purpose of the Department audit
12 process is to systematically review complaints against
13 each ESCO to address deficiencies.

14 Since February, the team has reviewed
15 complaints against several ESCOs. The reviews have
16 focused on complaints of questionable marketing practices
17 and customer slamming. At the same time as the Department
18 audit effort, O.C.S., the Office of Consumer Services, has
19 continued to monitor ESCO complaints for emerging issues.

20 Turning now to Item 201, which is an order
21 to show cause against Smart One, L.L.C. Smart One was
22 subject to the Department audit team process established
23 by the chair. For the period beginning October 1, 2015,
24 through February 23rd, 2016, the Department received 22
25

1 Monthly meeting - Public Service Commission - 9-15-2016
2 complaints from customers about Smart One and its
3 practices.

4 Again, it is important to note that the
5 number of complaints do not always drive an investigation.
6 Rather, it is the nature of the complaints. In this case
7 the complaints -- the complaints alleged slamming, failure
8 to comply with third party verification requirements, and
9 misleading and/or deceptive marketing tactics, including
10 that the marketer claimed to represent the distribution
11 utility.

12 To further Staff's investigation of the 22
13 complaints, an N.O.A.F. was issued to Smart One on April
14 17th, 2016. A response was received from Smart One on May
15 18, 2016. Staff's review of the documentation provided in
16 its response to the N.O.A.F. revealed Smart One's
17 noncompliance with several U.B.P. requirements. As such,
18 Staff recommends that further process be initiated
19 regarding Smart One.

20 Regarding Items 202 and 203, the orders to
21 show cause against Marathon Energy Corporation and A.B.C.
22 Energy, L.L.C., Staff's investigation of A.B.C. Energy and
23 Marathon was initiated after Don Myers (phonetic
24 spelling), an O.C.S. analyst reviews -- reviewed
25

1 Monthly meeting - Public Service Commission - 9-15-2016
2 complaints against these ESCOs which he recognized were
3 not consistent with the U.B.P.

4 Mr. Myers reported his suspicions to Robin
5 Taylor of the retail access staff. And collectively,
6 Robin and Don identified what we believe is a pattern of
7 customer deception and egregious violations of the
8 Commission's Uniform Business Practices. Staff's
9 investigation revealed that A.B.C. and Marathon use a
10 marketing company called Atlantis Business Consulting,
11 which is also referred to as A.B.C. or Atlantis
12 Production. We also understand that Atlantis Business
13 Consulting and A.B.C. Energy, L.L.C. are affiliated
14 companies.

15 According to information received in the
16 course of Staff's investigation, Atlantis or A.B.C. call
17 customers and schedule appointments to discuss a free
18 L.E.D. lighting program that it states it is working with
19 the distribution utility on. When the customer agrees to
20 the appointment, he or she is asked to have his or her
21 energy account available for the appointment.

22 In one recording that we reviewed, the
23 customer asked specifically if the appointment will affect
24 his energy supplier and the A.B.C. rep states definitively
25 no. When the A.B.C. rep subsequently meets with customer

1 Monthly meeting - Public Service Commission - 9-15-2016
2 to discuss the free lighting program, the customer is
3 asked to sign a document in agreement that he or she
4 received the free lights. As we understand it, based on
5 multiple customer complaints, including complaints from
6 customers for which English is a second language, the
7 A.B.C. rep does not discuss with the customer that their
8 energy supply will be provided by an ESCO.

9 What the customer is actually signing is a
10 lease for free light bulbs and also an agreement that his
11 or her -- his or her energy supply will be provided by
12 Marathon, A.B.C. Energy, or a combination. The agreement
13 further explains that the customer has, quote, sold its
14 right to their account, giving A.B.C. authority to
15 purchase energy on the customer's behalf completely at the
16 discretion of A.B.C. in exchange for energy efficiency
17 products and services.

18 Neither Marathon nor A.B.C. comply with the
19 U.B.P. third party verification requirements. The ESCO's
20 justification for ignoring the U.B.P. requirement for
21 T.P.V. is that A.B.C. had prearranged appointment with the
22 customer. However, because the customer appointment was
23 established to discuss free lightbulbs, not the customer's
24 energy supplier, the ESCO should not be allowed to avoid
25 the U.B.P. requirements.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 Since we do not have T.B. -- T.P.V.s, we
3 don't know if customers actually understood that the free
4 lightbulbs included losing the choice over their energy
5 supplier. When the customer tries to cancel the
6 agreement, generally because his or her energy bill has
7 increased significantly, the customer is told that he or
8 she must pay outrageous early termination fees in the
9 thousands of dollars. Staff observed one instance where
10 the customer was billed over seven thousand dollars for
11 early termination fees related to energy supply and free
12 lightbulbs.

13 While the U.B.P. and General Business Law
14 limits the termination fees associated with door-to-door
15 sales, it does not limit early termination fees in the
16 event of an enrollment that was made through a prearranged
17 appointment. Again, in this -- these cases, the
18 appointments was for free lightbulbs. Terminations for
19 energy for both A.B.C. and Marathon should be capped at
20 the limits allowed for door-to-door sales.

21 Over the last several years, Staff has
22 reviewed thousands of ESCO complaints. However, the level
23 of customer outrage is particularly evident in the cases
24 against Marathon and A.B.C. Further, and most troubling,
25 we can help the customers who complain to us, but we have

1 Monthly meeting - Public Service Commission - 9-15-2016
2 no way of knowing how many customers were enrolled with
3 Marathon or A.B.C. Energy in what appears to us as a very
4 deceptive bait-and-switch manner.

5 Staff recommends that the Commission
6 approve the 3 orders to show cause before you today which
7 will require the ESCOs to explain why, within 7 days, it
8 should not be precluded from enrolling new customers and
9 to also explain why, within 30 days, the Commission should
10 not revoke its eligibility to operate in New York. We are
11 hoping, during this period, that the ESCOs that are
12 subject to the orders to show cause will take stock in
13 their business practices and work diligently with the
14 Department to resolve issues.

15 This concludes my presentation. Bruce
16 Alch, Chris Bosy, and I are available to respond to
17 questions.

18 CHAIR ZIBELMAN: Thank you, Luann.

19 And I also want to thank not just the 3 of
20 you, but also the Staff team that works in Office of
21 Consumer Services who fielded these complaints and -- and
22 brought them to our attention.

23 When we addressed the ESCO matter last
24 February, one of the concerns that -- that the Commission
25 looked at was the fact that you could have continuing

1 Monthly meeting - Public Service Commission - 9-15-2016
2 patterns of behavior that were creating consumer harm and
3 that there -- because we were trying, through the process,
4 to work things out with the ESCOs, there was a delay in
5 getting it to the Commission.

6 So one of the things that we -- we looked
7 at was to have a process so that Staff could use its
8 discretion. And if a matter seemed particularly egregious
9 and/or could create harm to consumers, to bring it in
10 front of us so that we could act more quickly to resolve
11 the matter. And these are the first times that we're
12 actually using this new process.

13 As -- as Luann mentioned, you know, one of
14 the things that I think is important is that -- for us is
15 that we get this market right. And that's why I asked
16 Staff to go through all of the ESCOs so we could begin
17 addressing matters in a systematic way. So the fact that
18 these 3 matters are in front of us is not a question of
19 will these be the only matters or are there others. I
20 think Staff is going through all of it. But the 2,
21 Marathon and A.B.C., where -- it came out of complaints
22 that originated. And I -- I applaud Staff for quickly
23 looking at this and saying this is something we've got to
24 nip in the bud. So that's why it's in front of us today
25 so we can address it formally.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 One of the things that -- that struck me as
3 I went through the complaints themselves -- and what Staff
4 does is they basically take verbatim down the -- the
5 statements of the customers and then the responses -- is I
6 believe at least 2 of the complaints customers said I did
7 not want to change my energy supplier, I got burned
8 before.

9 And to me, this is something that should be
10 really chilling not just to -- to all the ESCO community
11 because this is exactly what we're trying to do in this
12 reset, is that these folks, the people who were affected,
13 not only now feel that they were abridged and their
14 economic interests were abridged and they were done so
15 unfairly, but they now have a soured feeling towards
16 anyone in the retail competitive market.

17 And that's exactly what we're trying to do,
18 through this ESCO process, is to get behaviors done
19 correctly so that when people have innovative ideas and
20 offerings and services that can benefit consumers, they'll
21 be welcomed into the business or welcomed into the home
22 because people will see it as a potential value.

23 When we have people who feel like they --
24 they were signing up for lightbulbs and then suddenly find
25 out that they have a new supplier and the prices are going

1 Monthly meeting - Public Service Commission - 9-15-2016
2 up, that just not -- not only sours them on the company,
3 but it sours them on the whole process. And that's why I
4 think it's so important that we act quickly and work with
5 these companies.

6 The other point that I -- I want to make --
7 I mean, this is an order to show cause. It's a very
8 serious action on the part of this Commission. It's
9 serious because we're looking to prevent consumer harm.
10 But it's not necessarily a suggestion that there's only
11 one outcome. And the expectation now is that we work with
12 the companies, find out exactly what was going on. If, in
13 fact, there were not violations, then that will be taken
14 care of. But if there were violations, one of the things
15 that the Staff will do is start looking at what's the
16 right remedy.

17 And our -- our concern here, ultimately, is
18 to get consumer value. I keep saying our north star is
19 consumers. If we can find ways to work things out so that
20 there's consumer benefit, which is really what we're all
21 about, that's what we're looking to do. But in the
22 meantime, we cannot have people go around where folks
23 think they're buying a lightbulb or getting -- or getting
24 free lightbulbs and suddenly finding out that they have a
25 supplier they don't know and their prices of energy to go

1 Monthly meeting - Public Service Commission - 9-15-2016
2 up, and then when they ask to get out of the deal because
3 they didn't understand the deal, they're suddenly told
4 well you have to pay these tremendous fees.

5 I mean, how -- I mean, what -- as
6 consumers, none of us would tolerate that kind of
7 treatment. And so as regulators, we need to make sure it
8 doesn't occur.

9 So I -- I appreciate Staff going forward on
10 the Smart One. I think it's a pattern of -- of conduct.
11 I'm hoping, again, that we'll get with the company, we'll
12 figure out what went on. We'll figure out how to
13 straighten things out. And if the company wants to
14 provide legitimate services and value-added services and
15 benefits to consumers, we're -- we would welcome them with
16 open arms.

17 So you know, I look at this all as a very
18 important step in a very serious process. But ultimately,
19 we are not going to tolerate violations of our rules that
20 end up in economic harm for consumers and, frankly, are
21 damaging not just for the consumers but for the entirety
22 of the market.

23 So I intend to support these items. And,
24 again, appreciative of Staff and their way of -- of
25 bringing these to us in -- in such a timely manner.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 So with that, I'm happy to take further
3 questions and comments. Commissioner Sayre?

4 COMMISSIONER SAYRE: I completely concur
5 with the chair's characterization of the facts in this
6 case. The facts are absolutely chilling. If these
7 allegations of slamming, fraud, and other egregious
8 misconduct are established in the further workings of this
9 proceeding, I will be very happy to vote to throw the book
10 at these companies when it comes back to the Commission.

11 I'm personally not convinced, at least not
12 yet, that these companies should continue to operate in
13 this state. But I'm open to looking at what comes back to
14 us the next time we see these cases at the Commission.
15 It's as simple as that.

16 CHAIR ZIBELMAN: Thank you.

17 Commissioner Acampora?

18 COMMISSIONER ACAMPORA: We've been down
19 this road so many times. And honestly, I -- I can't thank
20 the Staff enough for the work that they've done to shore
21 up our U.B.P. But there, again, we always find that there
22 are some bad players, and they will go out of their way to
23 do harm to the consumer. And it really is very important.
24 And one of the most important things that we do here is to
25 protect customers.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 And as the chair said, here we are in
3 moving REV forward and giving good companies the
4 opportunity to participate and give consumers choice, and
5 then we have some bad players that come along and do sour
6 this for the future of others because they're going to
7 tell their friends, their family.

8 And it always seems that the bad players
9 always go to those consumers who are the weakest. And you
10 know, if we don't protect them nobody will. And so I
11 agree with Commissioner Sayre. I would like to throw the
12 book at them right now, but I'm willing to wait and see
13 how they respond. But this has been an ongoing problem
14 and something that, thank goodness, we have such a
15 wonderful Office of Consumer Services that stay on top of
16 this. And we try to thwart this. But there's always
17 something in the way.

18 And we really need to, I think, further
19 think about remedies in -- in going forward. But thank
20 you very much for bringing this to our attention.

21 CHAIR ZIBELMAN: Commissioner Burman?

22 COMMISSIONER BURMAN: So I am looking at
23 this, and at this session it seems to have gotten mixed.
24 I thought we were going individually with the different
25 items, but then it got mixed with all three together, as

1 Monthly meeting - Public Service Commission - 9-15-2016
2 well as discussing, generically, the February 23rd order.
3 So I am having to take pause because I am a little
4 confused and concerned.

5 So let's address first, from a process
6 perspective, each for me -- and I have questions -- each
7 of the individual order to show causes. Now the question
8 I have, which I think is for counsel, is what is the legal
9 requirement on the order to show cause?

10 Because I'm hearing throwing the book at
11 people and I didn't think that we were making a
12 determination on whether or not there were actual
13 violations that required a final determination on that. I
14 thought this was an order to show cause, which was not
15 making a judgement on the final determination.

16 CHAIR ZIBELMAN: If I -- if I can, before
17 counsel responds, I -- I didn't hear either Commissioner
18 Sayre or Commissioner Acampora suggest that they would
19 make a final decision today. What I -- what I heard is
20 what we're -- we're trying to do, which is --

21 COMMISSIONER ACAMPORA: Wait.

22 CHAIR ZIBELMAN: -- wait. It's just that I
23 think they were responding to the nature of the complaints
24 and suggesting that if they do bear out, they would
25 certainly be prepared to look at -- cease -- having them

1 Monthly meeting - Public Service Commission - 9-15-2016
2 cease operations. But they also recognize we have process
3 in front of us and that's -- that's where -- where we are.

4 So I don't think anyone's suggesting we're
5 making a final decision today.

6 MR. DWYER: And Commissioner Burman, your
7 characterization of an order to show cause is correct.
8 This really brings the matter before the Commission and it
9 directs the company to show cause why penalties shouldn't
10 be assessed upon them, based on the -- the investigation
11 of Staff.

12 CHAIR ZIBELMAN: So it, essentially,
13 imposes the burden on the company now.

14 MR. DWYER: Right.

15 COMMISSIONER ACAMPORA: Right.

16 COMMISSIONER BURMAN: Okay. So now let's
17 step back. Since February 23rd, 2016, this is the first
18 time that we're bringing order to show causes on these
19 types of violations?

20 MS. SCHERER: No. Since February 23rd,
21 this is the first time that we're bringing orders to show
22 cause without an N.O.A.F. process. And that would be the
23 2, the A.B.C. and Marathon. In those cases, the order to
24 show cause is pursuant to complaints that regarding in
25 moments that occurred after February 23rd, 2016.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 The Smart One order to show cause is
3 pursuant to the old process, where we -- we sent an
4 N.O.A.F. and worked with them prior to the order to show
5 cause.

6 COMMISSIONER BURMAN: Okay. So we're
7 really looking at two order to show causes under a
8 different process, and the first one. So that does
9 explain some of my questions.

10 I'm going to look at the draft order for
11 Smart One. Out of the 21, I believe, complaints, how many
12 of those were pre-February 23rd?

13 MS. SCHERER: All -- they --

14 COMMISSIONER BURMAN: All of them.

15 MS. SCHERER: -- they were all.

16 COMMISSIONER BURMAN: Right. Okay. And
17 out of those, if I'm correct, how many customers were
18 never actually enrolled with Smart One?

19 MS. BOSY: I believe it's 6.

20 COMMISSIONER BURMAN: Okay.

21 MS. BOSY: After they -- after the
22 complaint came in, they responded to complaints, saying
23 that the customer dropped or requested to be dropped
24 before the actual enrollment occurred.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 COMMISSIONER BURMAN: Okay. And out of
3 those 15 then left who were signed up, enrolled, how many
4 of those, after being notified -- after the company being
5 notified of a complaint, worked out a refund or some other
6 arrangement with the customers?

7 MS. BOSY: I'm -- I'm -- I believe all of
8 them had come to a -- an agreement between the company and
9 the customer.

10 COMMISSIONER BURMAN: Okay. And did the
11 customers sign something, stating that they were satisfied
12 with the -- the -- the complaint and the process?

13 MS. BOSY: I believe they did.

14 COMMISSIONER BURMAN: Okay. And were we
15 involved in that from the perspective of we reviewed it
16 and we determined that the case was closed? How many of
17 the 21 cases did we, prior to today, close?

18 MS. BOSY: I believe the Office of Consumer
19 Services closed -- they're all closed, I believe, unless
20 it was escalated and then the customer then came back and
21 said they were -- were not satisfied. But I believe that
22 they've all been closed.

23 COMMISSIONER BURMAN: Okay. So we had
24 reviewed it then at some point and determined that the 21
25 complaints were addressed and satisfactory in some fashion

1 Monthly meeting - Public Service Commission - 9-15-2016
2 that we closed it. I'm not looking to put words in your
3 mouth. I'm just trying to understand from the perspective
4 of why we're here today on these 21, where we have case
5 files where they had been closed and now we've reopened
6 it?

7 CHAIR ZIBELMAN: Well, can I interject here
8 because I -- I believe there's some mischaracterization of
9 why the matter is in front of us?

10 Because -- and so I -- and I -- the U.B.P.
11 and the Commission's authority under the U.B.P. is
12 associated with violations of the rule. It's not
13 necessarily because of unsolved complaints.

14 And so perhaps, I -- you know, the
15 direction where you're headed or it seems your questions
16 are headed is to suggest that the company is now in
17 compliance. And I think the question is why does the
18 Staff believe that, even with these resolutions of the
19 complaints, that it's necessary to pursue the show cause.
20 And -- and I think that -- that maybe Luann or Bruce or --
21 or Christine, you might want to explain that.

22 MS. SCHERER: Right, so --.

23 COMMISSIONER BURMAN: Before you do, let me
24 just explain.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 I'm not making any assumptions on the --
3 the -- the conclusions to be drawn yet at this moment.
4 I'm really just trying to ask and ascertain the
5 information and ask. And that's why I said I may be
6 saying it wrong and that's why I'm asking for
7 clarification from Staff to make sure that I accurately
8 identify it.

9 One of the things that I'm trying to look
10 at is to determine overall why we picked these 3 companies
11 over all the other 200 or so ESCOs that are existing. And
12 looking at our complaint statistics, I understand that a
13 straight-up, looking at a complaint statistic, it's not
14 necessarily the number of complaints, but the type. And
15 if I remember correctly, at the February 23rd, 2016,
16 session we talked about a significant number of
17 complaints. And I think there was a percentage of 30
18 percent deceptive marketing and 25 percent for slamming.

19 So what I'm trying to figure out is out of
20 that what bucket does -- do these 3 fall in that
21 percentage of the 30 and the 25. And now I'm -- I just am
22 trying to clarify because it's difficult for me to
23 understand what the processes are internally, plus we're
24 switching processes, which is when we get to the next two.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 So what I'm trying to determine is, if a
3 case is closed by the consumer services and a letter goes
4 out to the consumer, what triggers it to come back? And
5 do we now have case closed files that we have to relook
6 at? And then it gets to other issues on how long we keep
7 those case -- those files closed, et cetera. So those are
8 the different things that I'm trying to figure out.

9 CHAIR ZIBELMAN: I -- I agree. And that's
10 why I think it's important to talk about why it is in
11 front of us, so that -- that we can provide that
12 clarification.

13 MS. SCHERER: So with regard to Smart One,
14 you know, just because a -- first of all, just because a
15 case is closed doesn't mean there wasn't a U.B.P.
16 violation. With regard to Smart One, when we looked at,
17 through the recently established the February -- the --
18 the audit protocols established in February the internal
19 audit team is doing, we looked at -- they have looked at
20 over 15 ESCOs.

21 There are other ESCOs that are in a state
22 of notice of apparent failure. We're waiting to get
23 responses. There are other ESCOs that, in some cases, had
24 far more complaints where we looked and there were no
25 U.B.P. violations.

1 Monthly meeting - Public Service Commission - 9-15-2016
2 In the case of Smart One, the -- the cases
3 were reviewed. The N.O.A.F. was issued. There were
4 obvious violations to the U.B.P. when we received the
5 response from Smart One. And we've continued to receive
6 complaints against Smart One.

7 So it's appropriate to take a look at what
8 quality assurance is in place so that Smart One doesn't
9 continue to violate the U.B.P. So that's why this one is
10 before you today.

11 COMMISSIONER BURMAN: How many existing
12 open cases, violations of U.B.P., exist on deceptive
13 marketing and slamming?

14 MS. SCHERER: So I believe there's open
15 cases, probably less than 50 deceptive marketing cases as
16 of yesterday. And I believe there's about 75 slamming
17 cases that are open.

18 COMMISSIONER BURMAN: And not all are
19 related to Smart One?

20 MS. SCHERER: No, not at all. But --.

21 COMMISSIONER BURMAN: So this is in total
22 we're looking at 125?

23 MS. SCHERER: No, because when we look at
24 cases, we don't just look at closed cases -- or open
25 cases. If -- if a case is closed, that means the customer

1 Monthly meeting - Public Service Commission - 9-15-2016
2 came back and it was resolved with the ESCO. The ESCO
3 probably sent them back to the utility and re-rated the
4 account which means gave them a refund, but that doesn't
5 change the fact that there was a U.B.P. violation.

6 COMMISSIONER BURMAN: Okay.

7 CHAIR ZIBELMAN: So if I may, just so --
8 for all the Commissioners to understand, I -- when we
9 directed Staff last year -- when I directed Staff last
10 year to form the audit team, it was in light of our
11 decision in February that it was very important that we --
12 we start looking at each of these companies and get things
13 righted.

14 And one of the things I directed Staff --
15 so to the extent that there's any concern about why this
16 company and not another company is I directed Staff to say
17 bring things to the -- to us as soon as they're ready for
18 Commission action. We're going to systematically go
19 through it, so this isn't a let's go after this company
20 rather than that company. This has been the outcome of
21 the process.

22 So it's -- there shouldn't be any
23 suggestion of that Staff decided well let's pick on Smart
24 One and isolate them. This was purely part of the outcome
25 of the process.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 This is the first one that the Staff looked
3 at and felt that it merited further action from the
4 Commission in terms of telling Smart One, as -- as Luann
5 just indicated, you're -- you're violating the U.B.P., you
6 continue to violate the U.B.P. even after we bring it to
7 your attention, we need to make sure you understand what
8 our rules are and you -- and you get it right, and if
9 you're unwilling to conform then we can't have an operator
10 like you in our state. That -- that's what this process
11 is about.

12 So I -- I don't want any implication that,
13 somehow or another, we -- we somehow selected a company
14 and there are other companies that warranted further
15 action. To the extent action is warranted, we're going to
16 continue to bring them to the Commission.

17 MS. SCHERER: And if I can just add that,
18 you know, the Staff of the O.C.S. is not interested in
19 having ESCOs go out of business. We're interested in
20 helping them comply with the rules that have been put in
21 place by the Commission.

22 MS. BOSY: And I'd just like to add that
23 Staff spends a considerable amount of time working with
24 these ESCOs to get them through the application process.
25 We work with them on a one-on-one basis to make sure that

1 Monthly meeting - Public Service Commission - 9-15-2016
2 they understand the rules that they have to follow. And
3 so, you know, we are invested in these companies. We --
4 we know many of them, personally, through constant work
5 throughout the years. So this is not something that we
6 like to do. But it's, unfortunately, something that we
7 need to do at certain times.

8 COMMISSIONER BURMAN: I don't question at
9 all your dedication, your professionalism, and your
10 interest in making sure that the process is done well and
11 you only come to us when you need to. I have been very
12 vocal about concerns on unintended consequences, as well
13 as at being interested in understanding, very much, the
14 complaint process pre-February 23rd, 2016, actually, from
15 the day that I came to the Commission, and post-February
16 23rd, 2016.

17 A change in -- in the process merits also a
18 further discussion on how it works and how folks can
19 properly go through it. Many companies may be still under
20 the mistaken belief that the process is one where they
21 would be working with Staff before it gets to an order to
22 show cause.

23 What if, after today, there are, out of the
24 197 remaining ESCOs, they say we want to work with you on
25 any closed cases that you may be looking to reopen or any

1 Monthly meeting - Public Service Commission - 9-15-2016
2 open cases, so that before you get to the necessity for an
3 order to show cause, as we talked it's a very, you know,
4 significant action, we would like to work through the
5 process with you, explain what we've done, and have
6 resolution that actually is not just for the company, but
7 really for the customers?

8 A majority of -- of customers want
9 satisfied customers, so I would think that there might be
10 some way of triaging it.

11 Now I know you said you've gotten through
12 15 out of the 200 ESCOs since February 23rd, so I'm just
13 trying to figure out what's the next step.

14 MS. SCHERER: Well, as far as --.

15 CHAIR ZIBELMAN: If I -- before --.

16 MS. SCHERER: I'm sorry.

17 CHAIR ZIBELMAN: Before we go -- I mean, I
18 -- I -- first of all, I think that the -- that the
19 process, the audit process is a triage process. And we
20 can certainly go through and -- and talk about how the
21 Staff has triaged the processing of that. So I -- I --
22 it's not like it's alphabetical or anything. There was --
23 there's -- there's a thought process behind how we're
24 presenting things.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 But the other piece is -- is that I -- I
3 want to be clear. The Commission's February order made it
4 absolutely clear that if, in fact, there are U.B.P.
5 violations, the expectation on the part of the Commission
6 is that they will be based on Staff's judgement on the
7 nature of the violation and that they would be brought to
8 a show cause, rather than the notice of apparent failure,
9 so that we can address the most serious abridgements of
10 consumer rights, since that is our focus, as quickly as
11 possible.

12 So I -- I -- we -- we -- I know, in
13 responses to questions, we've provided information to all
14 the Commissioners on how the triage process would work,
15 but I'm happy to have Luann go through it here again.

16 COMMISSIONER BURMAN: And just to be clear,
17 the February 23rd, 2016, order was vacated by -- and while
18 there may be some things that remain, there were -- were
19 sections of the order that were vacated in whole and is
20 still pending matter in some fashion.

21 CHAIR ZIBELMAN: Counsel may want to
22 respond to that. I --.

23 COMMISSIONER BURMAN: Before -- before he
24 responds --.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 CHAIR ZIBELMAN: No -- excuse me,
3 Commissioner. I'm not going to allow you to put something
4 on the record that's not correct.

5 Was that portion of the order vacated?

6 MR. DWYER: Just to be clear, the portions
7 that established the new process for U.B.P. violations
8 were specifically not vacated by the -- Judge Zwack's
9 order.

10 COMMISSIONER BURMAN: Right. And my
11 position and my point that I was raising is that it is --
12 which I was about to ask as a question, was that it is
13 unclear, since we have not had it come back to us in terms
14 of deciding what the next steps are. When we left,
15 February 23rd, we were going to be coming back in a number
16 of days for further decision.

17 So part of the lack of clarity is because
18 there has been a number of different things, actions,
19 judicially as well as regulatorily, that have happened
20 that has caused folks confusion on what still stands. So
21 part of my working through this is, before we make
22 decisions, I want to understand the regulatory certainty
23 and what it means and what it happens to have in terms of
24 the impact and the implementation.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 I'm very happy to hear that there's been an
3 audit team in place, and I'm very happy that we're working
4 through the different issues. I do, and I have echoed
5 this before, want to focus on how we can make sure that we
6 are working very much with the stakeholders, which
7 includes the consumers, and the utilities, and the ESCOs,
8 as well as other folks.

9 In this case, the other 2 cases, 202 and
10 203, involve D.E.R. products, as well. We have
11 outstanding petitions that address the D.E.R. and
12 processes like that. So while we're addressing one piece
13 of it from the ESCO perspective on the straight
14 traditional services, there's also another side to it in
15 terms of, you know, those who may be marketing products
16 that are outside of the ESCO traditional services that we
17 need to be cognizant of.

18 So from the perspective of looking
19 carefully, I -- I understand that you're working hard. I
20 do think it's important to have some clear document or
21 roadmap that makes it very clear now how that's working,
22 who to contact if they are interested in working before it
23 gets to the order to show cause process, how they should
24 do that so that they're -- they're not doing anything
25 inappropriate.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 So that's really part of my desire because
3 the -- the reality is -- is that, at the end of the day,
4 we want to resolve issues positively. And so if it means
5 that we need to drill down and look at all of these -- I'm
6 happy to see that we only have 125 open cases -- and
7 looking at what that means and what we're doing in terms
8 of the closed cases versus the open cases, versus going
9 forward. I know we used to have scorecards. I have not
10 seen them anymore. I am interested if these 3 -- where
11 they rated on the scorecards that we used to have and, you
12 know, what that -- what that means going forward and --
13 and matching it up.

14 MS. SCHERER: So I just want to make sure
15 you understand that the Staff is always willing to work
16 with any ESCO that contacts us. And I think it's safe to
17 say that there isn't an ESCO in the state that doesn't
18 have Chris Bosy's phone number. So we're always here to
19 work with them.

20 If they see a pattern of complaints and
21 they don't understand why, we're more than happy to meet
22 with them and work them, and we always have been.

23 CHAIR ZIBELMAN: So I -- I think -- I mean,
24 unless there's specific questions about this item, I would
25 rather us just move on these. So if you have questions on

1 Monthly meeting - Public Service Commission - 9-15-2016
2 202 or 203, any of the Commissioners? Otherwise, I'd like
3 to move to vote.

4 So with that, all those in favor in Item
5 201, please indicate by saying aye.

6 COMMISSIONER SAYRE: Aye.

7 COMMISSIONER ACAMPORA: Aye.

8 COMMISSIONER BURMAN: And I'm -- and I'm
9 going to concur on all 3 with the caveat that I am very
10 interested in making sure that we have more regulatory
11 certainty and clarity in terms of our processes, and that
12 looking carefully at what we may need to do to better
13 triage what we have.

14 And again, as I've always echoed my
15 willingness to work with folks and help in identifying
16 issues in areas so that at the end of the day we can have
17 a positive resolution. Thank you.

18 CHAIR ZIBELMAN: Thank you.

19 I'm going to assume that applies to 202 and
20 203. So let me just take a vote on 202.

21 All those -- on 201, there are 4 in favor
22 and also the item passes.

23 On 202, all those in favor, please indicate
24 by saying aye.

25 COMMISSIONER SAYRE: Aye.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 COMMISSIONER ACAMPORA: Aye.

3 COMMISSIONER BURMAN: And, again, I concur.
4 And my remarks, again, are consistent. Thank you.

5 CHAIR ZIBELMAN: And so hearing 4 in favor,
6 none opposed, item passes.

7 Item 203, all those in favor, please
8 indicate by saying aye.

9 COMMISSIONER SAYRE: Aye.

10 COMMISSIONER ACAMPORA: Aye.

11 COMMISSIONER BURMAN: I concur, again, with
12 the same caveat.

13 CHAIR ZIBELMAN: So all those -- and since
14 there are 4 in favor and none opposed, the item passes.
15 So thank you very much.

16 We're -- also now have in front of us Item
17 204, which this relates to the petitions that were filed
18 in response to our July order on the provision of services
19 by energy services companies to low-income customers.
20 Thomas Dwyer, Assistant Counsel, is here and, of course,
21 our general counsel, Paul Agresta, is here, as well.

22 Please proceed.

23 MR. DWYER: Thank you.

24 Good morning, Chair Zibelman and
25 Commissioners. As you mentioned, this item addresses the

1 Monthly meeting - Public Service Commission - 9-15-2016
2 petitions filed in response to the July 15th, 2016, order
3 which directed a moratorium on ESCO enrollments and
4 renewals of low-income customers.

5 The -- the main goals behind the July order
6 were first to protect these customers from the higher gas
7 and electricity prices charged by ESCOs. And second, and
8 perhaps most importantly, these customers receive
9 financial assistance from programs that are funded by all
10 taxpayers and ratepayers. And the Commission, since 2014,
11 has expressed concern that these funds are essentially
12 just passed through to the ESCO when a low-income customer
13 takes ESCO service.

14 So there were 3 petitions filed in response
15 to the July order. The National Energy Marketers
16 Association, or NEM, filed a petition for rehearing and
17 clarification. And the Retail Energy Supply Association,
18 or RESA, and National Fuel Gas Distribution, N.F.G., both
19 filed petitions for a clarification.

20 With respect to the petition for rehearing,
21 a rehearing may only be sought on the grounds that the
22 Commission committed an error of law or fact or that new
23 circumstances warrant a different determination.

24 The NEM petition fails to cite any actual
25 error and is, thus, denied. One of NEM's principal

1 Monthly meeting - Public Service Commission - 9-15-2016
2 assertions is that the July order was not issued in
3 conformance with the State Administrative Procedure Act,
4 or SAPA. This item establishes that the order was, in
5 fact, issued in conformance with SAPA and that the
6 moratorium is a logical outgrowth of the collaborative
7 report and the SAPA notice that was issued on that report.

8 However, in order to prevent any undue
9 delay in the implementation of these essential consumer
10 protections, this item will readopt the moratorium on an
11 emergency basis under Section 202.6 of SAPA.

12 This will also allow for additional time
13 for parties to submit additional comments, specifically
14 with respect to the appropriateness of the moratorium, its
15 duration, and the conditions for lifting it.

16 NEM also challenges the Commission's
17 authority to issue a moratorium. And again, as this item
18 explains, the Commission has broad power to restructure
19 the retail markets, including issuing a moratorium on
20 participation within any segment thereof in order to
21 achieve the goal of utilizing competition to result in
22 just and reasonable rates.

23 If the Commission determines that the
24 market is not workably competitive and that just and
25 reasonable rates are not being provided to customers, then

1 Monthly meeting - Public Service Commission - 9-15-2016
2 it not only has the authority to intervene but, in fact,
3 must intervene and may, among other things, end or limit
4 retail access.

5 In addition, NEM also raises 2
6 constitutional claims in its petition. First, NEM argues
7 that the July order violates the Equal Protection Clause
8 of the United States and New York State Constitutions by
9 treating low-income customers differently than other
10 customers.

11 This claim, however, lacks merit. The --
12 in order to survive a challenge under the Equal Protection
13 Clause, the government action need only be rationally
14 related to a legitimate government purpose. In protecting
15 low-income customers and preventing the frustration of
16 ratepayer- and taxpayer-funded assistance programs easily
17 meets that low threshold.

18 Second, NEM argues that the July order is
19 an unlawful taking of ESCO property without just
20 compensation because it would force the ESCO to terminate
21 their contractual relationships with partners and would
22 also cause them to lose investments made in reliance on
23 Commission policy.

24 The July order does not take property under
25 the meaning -- within the meaning of the Fifth Amendment.

1 Monthly meeting - Public Service Commission - 9-15-2016
2 And hence, NEM has not provided a basis for a hearing of
3 the July order. You know, most importantly, the
4 moratorium does not interfere with existing contractual
5 relationships. And also the -- an ESCO will have no
6 protectable property interest in future customers or the
7 proceeds from those customers or future potential business
8 opportunities.

9 And finally, the ESCO has no property right
10 to access and use the utility-owned distribution
11 facilities.

12 So NEM also makes a -- several policy
13 arguments in their petition for a rehearing, including,
14 for example, the restriction on customer choice. And in -
15 - in 2014 and again in 2015, the Commission issued orders
16 that made clear the intent to protect these customers who
17 were receiving a subsidy for their energy costs. And I
18 would also be remiss if I did not recognize that the
19 consumer advocacy groups who work very closely with these
20 customers and thoroughly understand their needs have been
21 supportive of the actions taken in the July order. So
22 while these policy-based claims are addressed individually
23 in this item, they do not state any error of law or fact
24 and there's not grounds for a hearing of the July order.
25

1 Monthly meeting - Public Service Commission - 9-15-2016
2 Finally, all 3 petitions request
3 clarification of the July order with respect to the
4 implementation of the moratorium, itself. And the item
5 before you today provides clarification on all the issues
6 and questions presented by the petitioners.

7 With -- with respect to the next steps, the
8 moratorium adopted under an emergency SAPA will last 90
9 days from the day it is filed with the Secretary of State.
10 And during that time period, the Commission will consider
11 the comments received by parties and can decide to either
12 continue the prohibition on ESCO service to low-income
13 customers, it can discontinue the moratorium, or take
14 other appropriate action.

15 At the same time, Staff is continuing to
16 work through the -- the broader retail reset process to
17 establish the base service offerings that would be in the
18 public interest to the larger pool of mass market
19 customers. Staff believes that once those issues are
20 decided, the issue of what products should be -- must be
21 offered to low-income customers should be revisited.

22 So that concludes my presentation on this
23 item and I'm available to answer any questions you may
24 have.

25 CHAIR ZIBELMAN: Thank you, Counsel.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 So you know, I -- first of all, I -- I do
3 agree. And I would just say straight off I didn't see
4 anything in the petitions for a rehearing that on either
5 legal or fact -- fact policy matter that cause me to want
6 to revisit the issue.

7 I think the fundamental issue that we -- we
8 dealt with in July is this. We have low-income customers
9 who -- who receive discounts. These discounts really are
10 then paid for by other consumers, and that it makes no
11 sense to put consumers in a place where they're actually
12 paying more for energy than they would have been paying if
13 they had taken energy from their local utility and then to
14 have a discount, because it diminishes the value of the
15 discount. So -- so that -- that was the basis of our
16 decision.

17 As we -- as counsel pointed out, we are
18 moving forward in the reset process to look at value-added
19 products. I -- you know, and one of the -- and it may be
20 that we find, later on, there are value-added products
21 that we would say would actually be a benefit to low-
22 income customers, and we would revisit it. That's why we
23 call this a moratorium, as opposed to simply a cessation
24 of -- of the market.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 I think, though, in an abundance of
3 recognition that we do want to continue this dialogue,
4 increased -- using this as an additional SAPA. So taking
5 additional comments provides people another opportunity to
6 tell us why they think we should move differently. And I
7 look forward to hearing it.

8 But you know, ultimately, the question that
9 we kept asking is would you be willing to guarantee prices
10 below what the utility would offer. And I think, for good
11 business reasons, most -- all the ESCOs said that that's a
12 really difficult proposition. And so that puts us in the
13 horns of a dilemma while we're offering these discounts
14 until we have other products that we would feel is -- can
15 provide that kind of benefit.

16 So that's -- that's where I am. I think
17 that no issues have been raised. I think we're providing
18 additional process, which I think is more than fair. The
19 Staff, as counsel pointed out, probably not necessary but
20 I think, you know, consistent with our view of trying to
21 continue this conversation. And therefore, I intend to
22 vote in favor of the item.

23 Any further comments? Commissioner Sayre?

24 COMMISSIONER SAYRE: This item is an
25 example of how we will seriously consider petitions for

1 Monthly meeting - Public Service Commission - 9-15-2016
2 rehearing and clarification. These issues are very
3 complex and we should not and we do not hesitate to make
4 changes in our orders that result in improvements to the
5 benefit of the public interest.

6 But like Chair Zibelman, I am simply not
7 persuaded by the petitions that ask us to back away from
8 our protection of not just low-income consumers, but also
9 scarce federal and state funds for low-income energy
10 assistance, including substantial funds that are paid for
11 through our rate case process by all New York utility
12 ratepayers.

13 My position is that it's just not good
14 public policy to allow energy service companies to market
15 services that result in higher rates, that cause scarce
16 low-income funding resources to go into the pockets of the
17 service providers, when those excess amounts could
18 otherwise be used to help other struggling customers.
19 I'm, therefore, in full support of this item.

20 CHAIR ZIBELMAN: Thank you.

21 Commissioner Burman?

22 COMMISSIONER BURMAN: So when I look at
23 this, I need to remind folks that I voted no on the
24 initial order. I didn't think that it was legally
25 sufficient. And I think that it would potentially have an

1 Monthly meeting - Public Service Commission - 9-15-2016
2 unintended consequence of chilling the market and access
3 of potential opportunities for not only low-income
4 customers, but all customers.

5 Looking at this now, I have a couple of
6 questions as it relates to the actual draft order before
7 us, and just want to make sure that I fully understand it.
8 When does the moratorium end?

9 MR. DWYER: It would end 90 days from the
10 date that the notice is filed with the Secretary of State.

11 MR. AGRESTA: No.

12 CHAIR ZIBELMAN: Counsel?

13 MR. AGRESTA: What ends -- what ends in 90
14 days is the rule on an emergency basis. And then the
15 Commission will decide, after it receives additional
16 comment, whether it will continue to characterize what it
17 did as a moratorium, or will -- will adopt a permanent
18 rule.

19 And a permanent rule that ESCOs can't serve
20 low-income customers in this way does not preclude a
21 decision sometime thereafter that they can now serve low-
22 income customers with some other kind of value-added
23 product if the Commission decides later that that's what
24 would be a good thing.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 COMMISSIONER BURMAN: Did you have
3 something else? You look like --?

4 MR. AGRESTA: No.

5 COMMISSIONER BURMAN: Okay. So then what
6 are the actual next steps in terms of stakeholder
7 outreach?

8 MR. AGRESTA: Okay. So for -- for this
9 item, the -- the Commission would adopt an order that --
10 and there would be a notice of adoption, which also would
11 constitute a notice of proposed rulemaking, which would be
12 filed with the Department of State and would be published
13 in the State Register. A forty-five-day comment period
14 would then follow. Parties would have an opportunity to
15 comment. And then the matter would be brought -- brought
16 back to the Commission as to whether they want to make it
17 permanent or not.

18 COMMISSIONER BURMAN: Okay. When I look at
19 it -- and I went back to the original order and to the
20 transcript, and I noted 6 or more concerns that I had with
21 the original order. None of those concerns have been
22 fully resolved to my satisfaction to merit my changing my
23 vote from that to now.

24 The one thing that's in here in this draft
25 order talks about that the SAPA process is going to get

1 Monthly meeting - Public Service Commission - 9-15-2016
2 redone. And I look at it and I wonder if, really, there
3 is somehow we're misstepping because, in a way, we may
4 have -- and I know that the draft order says otherwise --
5 we may have not done the SAPA process well. And so
6 therefore, as a way to get around or to ensure that we are
7 okay from a SAPA process, we are re-SAPA-ing it or an
8 additional SAPA which is great with providing more notice.

9 But to me, the question I have then is
10 that, in a sense, since we're talking about collaboration
11 and stakeholder engagement, why do we not do the redo and
12 acknowledge that we messed up and that we need to issue a
13 notice from the secretary or from the Commission to go
14 forward on the collaborative process?

15 CHAIR ZIBELMAN: Mr. --.

16 MR. AGRESTA: We -- we did not mess up --

17 COMMISSIONER BURMAN: And I said the draft
18 order would say differently.

19 MR. AGRESTA: -- under any circumstances.
20 And I completely disagree with that characterization. And
21 the item, itself, explains all that. And I believe the
22 majority of the Commission will agree with that
23 characterization.

24 COMMISSIONER BURMAN: Right. And again, I
25 -- I do understand that you would disagree. The majority

1 Monthly meeting - Public Service Commission - 9-15-2016
2 voted for it, initially, and I voted no. So to the extent
3 that it is important for the record, I do look at --.

4 MR. AGRESTA: You -- you also said you
5 thought there were other legal issues with the whole
6 process. You will get another bite at the apple, along
7 with the rest of the Commissioners. So if you'd like to
8 tell me what you're -- not now -- if you want to tell me,
9 between now and the next time we bring this back, what
10 your legal issues are, perhaps we could help you work
11 through some of them.

12 COMMISSIONER BURMAN: That's wonderful. I
13 would love the opportunity to work with Staff directly.

14 I would say that part of the difficulty and
15 the challenges that I do have is looking at this. And
16 again, I would refer folks back to the July session, which
17 I think attempted to express my concerns. I will not read
18 into the record the entire transcript of my comments, but
19 I will, by a reference, incorporate it as part of the
20 reasons why I can't support today voting with the
21 majority.

22 And I do have one other specific issue as
23 it relates to the low-income letters. Can -- can someone
24 explain to me what the current status is on the low-income
25 notice letters and why we're not addressing it here today?

1 Monthly meeting - Public Service Commission - 9-15-2016

2 MS. SCHERER: The letters -- there was a
3 requirement that the letters be submitted at a certain
4 point and mailed at a certain point. And those letters,
5 it's my understanding, have either gone out or are in the
6 process of going out.

7 COMMISSIONER BURMAN: Okay. And so there
8 are no outstanding issues on the low-income letters?

9 I did see in the public files that there
10 have been concerns about the language in the letter.

11 MS. SCHERER: We worked with the utilities.
12 We identified specific language that we were concerned
13 about. We -- in some cases, we advised the utilities to
14 quote the Commission order, rather than interpret the
15 Commission order. I believe the letters are not all
16 alike, but they have a similar message.

17 Do you have more?

18 CHAIR ZIBELMAN: Mr. Alch?

19 MR. DWYER: And -- and during that process,
20 we also took into consideration the comments that were
21 filed --.

22 CHAIR ZIBELMAN: Yo, guys. I'm chair.
23 Wait for me --

24 MR. DWYER: Oh, sorry.
25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 CHAIR ZIBELMAN: -- so I can recognize you
3 for the record.

4 Mr. Dwyer?

5 MR. DWYER: Sorry.

6 I -- I just wanted to add that during that
7 process in working with the utilities, the comments that
8 were filed in the record by a couple of ESCOs were
9 considered in that process.

10 COMMISSIONER BURMAN: Okay. All right. So
11 there's no outstanding issues on the low-income letters,
12 except to the extent that the public files had issues,
13 they've been resolved, and there are no -- no one is
14 unhappy?

15 CHAIR ZIBELMAN: Is there any further --?

16 COMMISSIONER BURMAN: That's a question.

17 CHAIR ZIBELMAN: Is that -- Luann?

18 MS. SCHERER: I -- I don't know that we can
19 say no one's unhappy.

20 COMMISSIONER BURMAN: Okay.

21 MS. SCHERER: I will -- I -- I'll just add
22 one more point. We neglected -- Staff neglected to work
23 with Corning Gas. We kind of just forgot about them, so
24 we will be working with them. We have meetings set up, I
25 believe, in the next couple of days so that they, too,

1 Monthly meeting - Public Service Commission - 9-15-2016
2 will be sending out a letter to their affected ESCOs.
3 They believe there's very few low-income customers that
4 are currently served by an ESCO. So I -- I don't think it
5 will be a huge issue, but that was Staff's mistake.

6 COMMISSIONER BURMAN: Okay. All right.
7 Thank you very much. This was very helpful.

8 CHAIR ZIBELMAN: Okay. Commissioner
9 Acampora, do you have any comments?

10 COMMISSIONER ACAMPORA: Very brief comment.
11 I think what we've talked about in the previous 3 ESCOs
12 and what we're talking about here is one word to describe
13 all of this, and that's being fair. And -- and that's
14 what this Commission does. We're fair. So we're coming
15 back, we're looking at something, we're allowing more
16 comments to come in, and then we will deliberate on that.

17 But I don't think that this -- as we're
18 looking at this particular item, that this was the case of
19 a got you. It's strictly a case of this Commission doing
20 what it always has done and it's instituting fairness to
21 all.

22 We want to be fair to the low-income
23 customers. That's why we instituted the original
24 proceeding. We want to be fair to those customers who put
25 funds that we use to help low-income customers so that

1 Monthly meeting - Public Service Commission - 9-15-2016
2 they can have the same advantages of everyone else. And
3 we want to be fair to the companies that operate and will
4 assist in delivering programs to those people, all of
5 them.

6 So I -- I think that we're doing the right
7 thing today and I'll vote in favor of it.

8 CHAIR ZIBELMAN: Thank you.

9 So that being -- I think we've exhausted
10 this item. So I'm going to move to a vote. All those in
11 favor in Item 204, which is the petition response to the
12 July order and energy service company sales, please
13 indicate by saying aye.

14 COMMISSIONER SAYRE: Aye.

15 COMMISSIONER ACAMPORA: Aye.

16 CHAIR ZIBELMAN: Opposed?

17 COMMISSIONER BURMAN: I'm opposed. Now --.

18 CHAIR ZIBELMAN: Okay. Those 3 in favor
19 and 1 opposed, the recommendations are adopted. Thank
20 you. Thank you.

21 So we're now going to move to the consent
22 agenda. I have -- I want to note that we have an item on
23 the consent agenda related to the Rochester area
24 reliability project. And I want to just note it for the
25 record.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 This has been a tremendous work effort, I
3 believe, for all the parties involved. As the Commission
4 is well aware, this -- this project involves both a
5 substation and a transmission line that was identified as
6 necessary for local reliability needs.

7 The location of the line originally was
8 going to affect the property of the Krenzlers, who are farm
9 -- own a farm in the area. And the Krenzlers were very
10 concerned about the impact of the location on their -- on
11 their farm and requested that we look at it.

12 The -- initially, I think there was a
13 process that was involved where we were concerned that
14 that was the best location. But I would say that this is
15 a really great example of government working in that Staff
16 and -- and the Commission listened to the Krenzlers. We
17 took their concerns seriously. There are other concerns,
18 as well. I mean, this is exactly the type of challenges
19 that we face in this industry.

20 There was no question that the upgrades to
21 the system were necessary for local reliability. That
22 was, I think, largely undisputed or completely undisputed.
23 The question became is when we have to locate
24 infrastructure, there is always competing uses. In this
25 case, there was competing concern around agriculture use

1 Monthly meeting - Public Service Commission - 9-15-2016
2 that was -- certainly affected the Krenzlers directly, but
3 also raised a concern on the part of our own Ag and
4 Markets and our concern because, even statutorily, we have
5 to look out for natural resources and are also concerned
6 about the impact of farmland, of -- of infrastructure, and
7 wanted to minimize any impact in terms of use of farmland.

8 We have a secondary concern all the time
9 about environmental impacts, and citing infrastructure in
10 areas where it would create environmental degradation is
11 also a concern of ours and certainly a concern of our
12 Department of Environmental Conservation.

13 So this was an area where, in fact, the
14 location that was initially selected because of the
15 opposition and I -- and the concerns, we, on our own
16 volition, reopened the matter to take a look at
17 alternatives. We also, under Mr. Corso, began working
18 with the United States Department of Agriculture to take a
19 look at how we could use existing property in federal
20 areas and to get an easement because that was initially
21 not available to us. And we were able to work with the
22 federal government to get a better outcome, as well.

23 So I -- I am -- while this took a while, I
24 think that this is -- really shows what government can do
25 when we can work together collaboratively, take a look at

1 Monthly meeting - Public Service Commission - 9-15-2016
2 competing desires, competing needs, and resolve matters in
3 a way that everyone to the proceeding has now stood up and
4 said this -- this is a good outcome.

5 So I want to, first of all, thank our Staff
6 for their efforts, thank the judges for their efforts in
7 this matter. I know it was a complex matter. When I went
8 through the order, I don't know, Libby, I think you had
9 half your staff working on it.

10 MS. LIEBSCHUTZ: Four judges, yes.

11 CHAIR ZIBELMAN: So it's -- it's certainly
12 long in coming. I also want to note my appreciation to
13 the Krenzlers because of their diligence, their -- and
14 their willingness to really say look this is important.
15 And we, I think, have reached a -- a much better outcome
16 not only for them, but for the community at large. So
17 thank you very much.

18 And we'll move to the consent, but I'm
19 happy if other of my fellow Commissioners want to make
20 comments on this particular matter.

21 COMMISSIONER SAYRE: I completely concur
22 with Chair Zibelman's remarks. It's not surprising that
23 we approved the initial site because it was easier, it was
24 a little cheaper, it required fewer permits. But we
25 didn't really fully understand the nature of -- of the

1 Monthly meeting - Public Service Commission - 9-15-2016
2 local opposition to that site. And once that was brought
3 to our attention, I think we came up with a good result.

4 I do also, specifically, echo the -- the
5 Commissioner's -- the -- the chairman's commendation to
6 the Krenzlers for fighting the good fight on this one. I
7 think we got to the right place.

8 CHAIR ZIBELMAN: Thank you.

9 Further comments? Commissioner Acampora?
10 Commissioner Burman?

11 COMMISSIONER BURMAN: Not on this item.

12 CHAIR ZIBELMAN: Okay.

13 COMMISSIONER BURMAN: On others.

14 CHAIR ZIBELMAN: So with that then, let me
15 ask if there are any further comments then on the consent
16 agenda. Commissioner Burman?

17 COMMISSIONER BURMAN: I just want to make
18 sure, before we vote, that on several items, I clarify my
19 position.

20 On Item 263, which is the utilities' code
21 of conduct, while I may be voting in favor of the item, as
22 to other specifics that go along with the REV pieces of it
23 that I may have had different positions on, it is not
24 changing my position. This is a narrow code of conduct
25 and I am comfortable voting for that.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 On -- I want to just also note we have
3 about 9 sub-metering items on this session. They're sort
4 of the ones that go on -- there's a lot of work that goes
5 on behind the scenes to do the sub-metering items and to
6 make sure that they get done right. We -- we have, on
7 this -- on this session, though, we've had a -- a couple
8 of others, college housing, sub-metering item, as well as
9 geothermal we've had before. And in the past, we've had
10 solar.

11 This is really, you know, one of those
12 items that are very helpful, especially when we look to
13 energy efficiency and other programs that we're working
14 on. And I know that Staff works hard in the sub-metering.
15 So I just wanted to express my gratitude.

16 Also on Item 378, I want to make it clear
17 that I am not weighing in on any specific Indian Point
18 contingency plans. This is specific to this item, itself,
19 as well as the item discusses REV demos. And I want to
20 make it clear that my position on REV demos should be that
21 the Commission should be looking at them. And to the
22 extent that there is a party in this -- in this filing who
23 is seeking to bring forward and -- and discuss REV demos,
24 I -- I welcome that.

25

1 Monthly meeting - Public Service Commission - 9-15-2016

2 I also want to make clear that on Item 563,
3 that's a for-information-only item and we -- I wouldn't be
4 voting on that specific one.

5 I do also want to take a moment of personal
6 privilege and -- you know, the -- the only -- the only
7 Armenian saying that I know is friendship is not born of
8 words alone. And that's a very good thing because the
9 only word I know in Armenian is gavig (phonetic spelling)
10 and I'm not even sure that I'm pronouncing it right.

11 So what I would like you to know is that I
12 -- we are partners and I am very appreciative that you
13 came here. And your Mt. Ararat is a very powerful symbol
14 and, like Noah's Ark, we walk together. So thank you for
15 being here.

16 CHAIR ZIBELMAN: Any further comments?

17 Okay. I'm going to move for a vote to the
18 consent agenda. All those in favor, please indicate by
19 saying aye.

20 COMMISSIONER ACAMPORA: Aye.

21 COMMISSIONER SAYRE: Aye.

22 CHAIR ZIBELMAN: Opposed? Noted. Your --
23 Commissioner Burman's comments.

24 Hearing no opposition, the consent agenda
25 is adopted.

1 Monthly meeting - Public Service Commission - 9-15-2016

2 Are there any further matters in front of
3 us today, Secretary Burgess?

4 SECRETARY BURGESS: There are no further
5 matters today.

6 CHAIR ZIBELMAN: I almost demoted you.

7 SECRETARY BURGESS: And the next Commission
8 session is October 13th.

9 CHAIR ZIBELMAN: Okay. Thank you.

10 And again, thank you to our friends from
11 Armenia. We welcome you and wish you safe travels back
12 home.

13 (The session concluded at 12:06 p.m.)

14 STATE OF NEW YORK

15 I, HANNAH ALLEN, do hereby certify that the
16 foregoing was reported by me, in the cause, at the time
17 and place, as stated in the caption hereto, at Page 1
18 hereof; that the foregoing typewritten transcription
19 consisting of pages 1 through 71, is a true record of all
20 proceedings had at the hearing.

21 IN WITNESS WHEREOF, I have hereunto
22 subscribed my name, this the 22nd day of September, 2016.

23

24

25 HANNAH ALLEN, Reporter

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Monthly meeting - Public Service Commission - 9-15-2016

A	
able 67:21	advised 4:17 8:10 62:13
abridged 27:13,14	advocacy 53:19
abridgements 44:9	affect 22:23 66:8
absolutely 16:10 30:6 44:4	affiliated 22:13
abundance 56:2	ag 67:3
acampora 1:15 15:2,3 17:6 30:17 30:18 32:18,21 33:15 48:7 49:2,10 64:9,10 65:15 69:9 71:20	agency 1:12
accelerated 5:14	agenda 3:24 4:3 65:22,23 69:16 71:18,24
access 14:5 16:2 22:5 52:4 53:10 58:2	agree 9:9 31:11 38:9 55:3 60:22
account 22:21 23:14 40:4	agreement 23:3,10,12 24:6 35:8
accuracy 14:21	agrees 22:19
accurate 11:24	agresta 49:21 58:11,13 59:4,8 60:16,19 61:4
accurately 37:7	agriculture 66:25 67:18
achieve 51:21	ahead 10:20
acknowledge 2:5 60:12	alarm 11:19 13:13
act 11:2,25 14:10,13,14,15 15:12 26:10 28:4 51:3	albany 1:12
acting 17:15	alch 17:16 25:16 62:18
action 14:17 19:24 20:5,10 28:8 40:18 41:3,15,15 43:4 52:13 54:14	alike 62:16
actions 18:23 45:18 53:21	allegations 19:15 30:7
activate 7:11	alleged 21:7
activity 12:11	allen 72:15,25
actual 32:12 34:24 50:24 58:6 59:6	allow 45:3 51:12 57:14
add 16:7 41:17,22 63:6,21	allowed 23:24 24:20
addition 52:5	allowing 64:15
additional 8:24 51:12,13 56:4,5 56:18 58:15 60:8	allservices 4:22 7:7
address 13:13 14:6 20:13 26:25 32:5 44:9 46:11	alphabetical 43:22
addressed 25:23 35:25 53:22	alternative 10:7
addresses 49:25	alternatives 67:17
addressing 26:17 46:12 61:25	amendment 52:25
adironack 7:25	american 4:15 14:11,22
adjust 9:14	amount 15:20 41:23
administrative 51:3	amounts 57:17
administrator 4:16 14:11,23	analysis 3:7
admitted 10:17	analyst 4:9 21:24
adopt 58:17 59:9	ankle 6:6
adopted 54:8 65:19 71:25	answer 54:23
adoption 59:10	anticipate 11:13
advantages 65:2	anxiety 9:6 16:15
advise 6:24	anymore 47:10
	apparent 18:25 38:22 44:8
	appears 25:3
	applaud 26:22
	apple 61:6
	application 41:24
	applies 48:19
	appointment 22:20,21,23 23:21 23:22 24:17
	appointments 22:17 24:18

appreciate 16:13 29:9
appreciation 68:12
appreciative 16:22 29:24 71:12
appropriate 7:8 16:23 19:24
 20:10 39:7 54:14
appropriateness 51:14
approve 7:5 25:6
approved 7:14 15:13 68:23
april 21:13
ararat 71:13
area 4:19,24,25 5:2,13 6:16,18
 6:19 7:7,9,12,23 8:11 9:23,25
 10:3,15 12:19 14:12,17,17
 65:23 66:9 67:13
areas 48:16 67:10,20
argues 52:6,18
arguments 53:13
ark 71:14
armenia 2:23 72:11
armenian 2:19 71:7,9
arms 29:16
arrangement 35:6
ascertain 37:4
asked 2:11 7:22 11:12 22:20,23
 23:3 26:15
asking 37:6 56:9
assertions 51:2
assessed 33:10
assign 12:6
assigns 4:24
assist 2:18 65:4
assistance 50:9 52:16 57:10
assistant 49:20
associated 24:14 36:12
association 2:7 50:16,17
assume 48:19
assumptions 37:2
assurance 39:8
atlantis 22:10,11,12,16
attempt 18:20
attempted 18:17 61:17
attending 15:5
attention 25:22 31:20 41:7 69:3
attributed 18:11
audit 20:9,11,18,22 38:18,19
 40:10 43:19 46:3
audrey 1:14
august 5:12 11:7
authority 23:14 36:11 51:17
 52:2

available 12:12 17:18,19 22:21
 25:16 54:23 67:21
avoid 23:24
aware 9:7 66:4
aye 17:4,5,6 48:5,6,7,24,25
 49:2,8,9,10 65:13,14,15 71:19
 71:20,21

B

b 18:2,6,12,13,23 19:3,9,21,25
 21:17,21,22 22:3,9,11,13,16
 22:24,25 23:7,12,14,16,18,19
 23:20,21,25 24:2,13,19,24
 25:3 26:21 30:21 33:23 36:10
 36:11 38:15,25 39:4,9,12 40:5
 41:5,6 44:4 45:7
bachraman 3:4
back 7:20 12:3,14 30:10,13
 33:17 35:20 38:4 40:2,3 45:13
 45:15 57:7 59:16,19 61:9,16
 64:15 72:11
bad 10:7 16:17 30:22 31:5,8
baitandswitch 25:4
base 54:17
based 11:25 14:8,9 19:14 23:4
 33:10 44:6
basically 27:4
basis 2:8 41:25 51:11 53:2
 55:15 58:14
bear 32:24
began 67:17
beginning 20:23
behalf 4:7 7:5 23:15
behavior 19:24 26:2
behaviors 27:18
belief 42:20
believe 9:8 10:11 16:11 22:6
 27:6 34:11,19 35:7,13,18,19
 35:21 36:8,18 39:14,16 60:21
 62:15 63:25 64:3 66:3
believes 6:22 54:19
benefit 27:20 28:20 55:21 56:15
 57:5
benefits 29:15
best 66:14
better 9:10 48:12 67:22 68:15
big 9:21
bill 24:6
billed 24:10
bit 8:8

bite 61:6
block 6:14
book 30:9 31:12 32:10
born 71:7
bosy 17:17 25:16 34:19,21 35:7
 35:13,18 41:22 47:18
brief 64:10
bring 6:22 12:3,14 26:9 40:17
 41:6,16 61:9 70:23
bringing 20:10 29:25 31:20
 33:18,21
brings 33:8
broad 51:18
broader 54:16
brought 13:2 25:22 44:7 59:15
 59:15 69:2
bruce 17:16 25:15 36:20
bucket 37:20
bud 26:24
buffalo 9:25 10:4
building 1:12
bulbs 23:10
burden 33:13
burgess 3:23 4:2 72:3,4,7
burman 1:16 10:19,20,21 12:16
 13:8,23 14:8 15:4 17:7 31:21
 31:22 33:6,16 34:6,14,16,20
 35:2,10,14,23 36:23 39:11,18
 39:21 40:6 42:8 44:16,23
 45:10 48:8 49:3,11 57:21,22
 59:2,5,18 60:17,24 61:12 62:7
 63:10,16,20 64:6 65:17 69:10
 69:11,13,16,17 71:23
burned 27:7
business 14:16 17:14 18:14 22:8
 22:10,12 24:13 25:13 27:21
 41:19 53:7 56:11
businesses 9:11
buying 28:23

C

c 1:15 10:4 18:2,2,3 19:6 20:18
 20:21 21:21,22,22,24 22:9,11
 22:13,13,16,24,25 23:7,12,14
 23:16,18,21 24:19,24 25:3
 26:21 33:23 41:18
call 3:21 22:16 55:23
called 22:10
calling 10:10
calls 5:5 18:22

cancel 24:5
capped 24:19
caption 72:17
car 12:25
care 16:9 28:14
carefully 46:19 48:12
carrier 12:15
carriers 7:11 12:4,7 14:3
cars 13:2
case 8:15 11:5 21:6 30:6 35:16
 36:4 38:3,5,7,15 39:2,25 46:9
 57:11 64:18,19 66:25
cases 24:17,23 30:14 33:23
 35:17 38:23 39:2,12,15,15,17
 39:24,24,25 42:25 43:2 46:9
 47:6,8,8 62:13
caught 11:11 15:21
cause 17:24 19:13,16 20:3,21
 21:21 25:6,12 28:7 32:9,14
 33:7,9,22,24 34:2,5 36:19
 42:22 43:3 44:8 46:23 52:22
 55:5 57:15 72:16
caused 45:20
causes 32:7 33:18 34:7
caveat 48:9 49:12
cease 32:25 33:2
cell 6:4
certain 11:20 12:13 42:7 62:3,4
certainly 7:20 32:25 43:20 67:2
 67:11 68:11
certainty 45:22 48:11
certify 72:15
cessation 55:23
cetera 11:21 38:7
chair 1:14 2:3 4:2,5,13 7:17
 8:3,13,16 9:19 10:17 12:22
 15:2 16:6,11 17:9,22 20:8,23
 25:18 30:5,16 31:2,21 32:16
 32:22 33:12 36:7 38:9 40:7
 43:15,17 44:21 45:2 47:23
 48:18 49:5,13,24 54:25 57:6
 57:20 58:12 60:15 62:18,22,22
 63:2,15,17 64:8 65:8,16,18
 68:11,22 69:8,12,14 71:16,22
 72:6,9
chairman 69:5
challenge 52:12
challenges 51:16 61:15 66:18
change 5:16,17 9:24 10:2 11:4
 11:16 12:18 16:18,22 27:7

<p>40:5 42:17 changes 3:23 4:3 10:25 16:12 57:4 changing 59:22 69:24 characterization 30:5 33:7 60:20,23 characterize 58:16 charged 50:7 cheaper 68:24 chilling 27:10 30:6 58:2 choice 24:4 31:4 53:14 chris 25:16 47:18 christine 17:16 36:21 circumstances 50:23 60:19 cite 50:24 citing 67:9 claim 52:11 claimed 21:10 claims 52:6 53:22 clarification 37:7 38:12 50:17 50:19 54:3,5 57:2 clarify 37:22 69:18 clarity 45:17 48:11 clause 52:7,13 clear 6:19 44:3,4,16 45:6 46:20 46:21 53:16 70:16,20 71:2 clearly 9:21 10:6 clever 7:23 close 35:17 closed 35:16,19,19,22 36:2,5 38:3,5,7,15 39:24,25 42:25 47:8 closely 53:19 code 4:19,24,25 5:13 6:16,18,19 7:7,9,12,23 8:12 9:23 14:12 14:17 69:20,24 codes 5:2 12:20 cognizant 46:17 collaboration 60:10 collaborative 51:6 60:14 collaboratively 67:25 collectively 22:5 college 70:8 combination 23:12 come 7:20 15:7 31:5 35:8 38:4 42:11 45:13 64:16 comes 30:10,13 comfortable 69:25 coming 16:17 45:15 64:14 68:12</p>	<p>commenced 2:2 commendation 69:5 comment 8:8 58:16 59:13,15 64:10 commenters 7:22 8:9 9:7 comments 7:21 9:19 10:20 16:24 30:3 51:13 54:11 56:5,23 61:18 62:20 63:7 64:9,16 68:20 69:9,15 71:16,23 commission 1:1,4,7 2:1,17,18 3:1,19,20,22 4:1,18 5:1,13 6:1,14 7:1,5,10 8:1 9:1,17 10:1 11:1 12:1 13:1 14:1,25 15:1 16:1,10 17:1 18:1 19:1 19:13,23 20:1,2,3,5 21:1 22:1 22:8 23:1 24:1 25:1,5,9,24 26:1,5 27:1 28:1,8 29:1 30:1 30:10,14 31:1 32:1 33:1,8 34:1 35:1 36:1,11 37:1 38:1 39:1 40:1,18 41:1,4,16,21 42:1,15 43:1 44:1,3,5 45:1 46:1 47:1 48:1 49:1 50:1,10 50:22 51:1,16,18,23 52:1,23 53:1,15 54:1,10 55:1 56:1 57:1 58:1,15,23 59:1,9,16 60:1,13,22 61:1 62:1,14,15 63:1 64:1,14,19 65:1 66:1,3 66:16 67:1 68:1 69:1 70:1,21 71:1 72:1,7 73:1 commissioner 9:21 10:19,20,21 12:16 13:8,23 14:8 15:2,3,4 17:5,6,7 30:3,4,17,18 31:11 31:21,22 32:17,18,21 33:6,15 33:16 34:6,14,16,20 35:2,10 35:14,23 36:23 39:11,18,21 40:6 42:8 44:16,23 45:3,10 48:6,7,8,25 49:2,3,9,10,11 56:23,24 57:21,22 59:2,5,18 60:17,24 61:12 62:7 63:10,16 63:20 64:6,8,10 65:14,15,17 68:21 69:5,9,10,11,13,16,17 71:20,21,23 commissioners 1:13 4:3,13 16:13 17:23 40:8 44:14 48:2 49:25 61:7 68:19 commissions 2:7,11 committed 50:22 communicating 16:16 communities 9:14 14:15</p>
--	--

community 2:12,16,20 27:10 68:16	confusion 45:20
companies 11:20 13:11,14 15:19 17:13 22:14 28:5,12 30:10,12 31:3 37:10 40:12 41:14 42:3 42:19 49:19 57:14 65:3	consent 65:21,23 68:18 69:15 71:18,24
company 22:10 28:2 29:11,13 33:9,13 35:4,8 36:16 40:16,16 40:19,20 41:13 43:6 65:12	consequence 58:2
compensation 52:20	consequences 19:15 42:12
competing 66:24,25 68:2,2	conservation 6:12 67:12
competition 51:21	consider 6:7 54:10 56:25
competitive 27:16 51:24	considerable 41:23
complain 24:25	consideration 62:20
complaint 34:22 35:5,12 37:12 37:13 42:14	considered 63:9
complaints 18:8,9,9,10,13 19:6 19:12 20:10,12,15,16,19 21:2 21:5,6,7,7,13 22:2 23:5,5 24:22 25:21 26:21 27:3,6 32:23 33:24 34:11,22 35:25 36:13,19 37:14,17 38:24 39:6 47:20	consistent 7:13 22:3 49:4 56:20
completely 23:15 30:4 60:20 66:22 68:21	consisting 72:19
complex 57:3 68:7	constant 42:4
compliance 18:6 19:21 36:17	constitute 59:11
comply 21:8 23:18 41:20	constitutional 52:6
components 14:24	constitutions 52:8
concern 11:10 16:14 28:17 40:15 50:11 66:25 67:3,4,8,11,11	consulting 22:10,13
concerned 16:20 32:4 62:12 66:10,13 67:5	consumer 17:16 20:18 25:21 26:2 28:9,18,20 30:23 31:15 35:18 38:3,4 44:10 51:9 53:19
concerns 11:18 25:24 42:12 59:20,21 61:17 62:10 66:17,17 67:15	consumers 5:3 6:3 20:6 26:9 27:20 28:19 29:6,15,20,21 31:4,9 46:7 55:10,11 57:8
concluded 72:13	contact 46:22
concludes 25:15 54:22	contacts 47:16
conclusions 37:3	contend 11:16
concur 14:9,19 17:7 30:4 48:9 49:3,11 68:21	contentious 9:5
condensed 13:17	contingency 70:18
conditions 51:15	continue 19:11 30:12 39:9 41:6 41:16 54:12 56:3,21 58:16
conduct 29:10 69:21,24	continued 14:21 20:19 39:5
conference 15:5	continuing 25:25 54:15
confidence 16:21	contractual 52:21 53:4
conform 41:9	conversant 12:5
conformance 51:3,5	conversation 15:8 56:21
confused 15:21 32:4	converse 9:2
	convinced 30:11
	corning 63:23
	corporation 18:2 21:21
	correct 13:20 33:7 34:17 45:4
	correctly 27:19 37:15
	correspondence 15:9
	corso 16:5,8 67:17
	costly 5:7
	costs 53:17
	counsel 17:19 32:8,17 44:21 49:20,21 54:25 55:17 56:19 58:12
	couple 58:5 63:8,25 70:7

course 22:16 49:20
create 5:18 26:9 67:10
created 6:25
creating 26:2
curious 13:4
current 5:4 61:24
currently 4:25 64:4
customer 18:7 20:17 22:7,19,23
 22:25 23:2,5,7,9,13,15,22,22
 23:23 24:5,7,10,23 34:23 35:9
 35:20 39:25 50:12 53:14
customers 5:8 9:23 15:19 19:5
 19:10 21:2 22:17 23:6 24:3,25
 25:2,8 27:5,6 30:25 34:17
 35:6,11 43:7,8,9 49:19 50:4,6
 50:8 51:25 52:9,10,15 53:6,7
 53:16,20 54:13,19,21 55:8,22
 57:18 58:4,4,20,22 64:3,23,24
 64:25

D

d 2:14,14,24 3:9,18,21 7:24
 13:4 15:3,16,18 22:18 41:22
 46:10,11 48:2 61:7
damaging 29:21
date 7:3 58:10
day 42:15 47:3 48:16 54:9 72:22
days 25:7,9 45:16 54:9 58:9,14
 63:25
deal 29:2,3
dealt 55:8
deception 22:7
deceptive 21:9 25:4 37:18 39:12
 39:15
decide 54:11 58:15
decided 40:23 54:20
decides 58:23
deciding 45:14
decision 8:7 12:6 32:19 33:5
 40:11 45:16 55:16 58:21
decisions 45:22
dedication 42:9
deficiencies 20:13
definitively 22:24
degradation 67:10
delay 26:4 51:9
deliberate 64:16
delivering 65:4
demand 5:15,20 6:9
demographics 13:6

demos 70:19,20,23
demoted 72:6
denied 50:25
department 3:3,5,7 5:6 14:5,25
 18:8 19:20 20:9,11,17,22,24
 25:14 59:12 67:12,18
depending 11:2 19:3
describe 64:12
desire 47:2
desires 68:2
determination 32:12,13,15 50:23
determinations 11:24
determine 19:8 37:10 38:2
determined 14:11 35:16,24
determines 51:23
determining 18:5
detriment 20:6
development 3:3 5:11 20:7
devices 5:22 6:5,7,9 11:21
 12:24
dialing 5:4 10:6,9,9
dialogue 56:3
diane 1:16
didn 3:6 16:18 29:3 32:11,17
 55:3 57:24 68:25
different 13:14 31:24 34:8 38:8
 45:18 46:4 50:23 69:23
differently 52:9 56:6 60:18
difficult 37:22 56:12
difficulty 61:14
digit 10:9
digits 10:11,12
dilemma 56:13
diligence 68:13
diligently 25:13
diminishes 55:14
direct 7:11
directed 40:9,9,14,16 50:3
direction 6:14 36:15
directly 20:2 61:13 67:2
director 17:15
directs 33:9
disagree 60:20,25
discontinue 54:13
discount 55:14,15
discounts 55:9,9 56:13
discretion 23:16 26:8
discuss 12:3,14 18:4 22:17 23:2
 23:7,23 70:23

discusses 70:19	effect 6:12
discussing 32:2	effective 16:16
discussion 42:18	efficiency 23:16 70:13
discussions 6:2	effort 15:22 20:18 66:2
disruptive 5:8 9:10	efforts 6:15 68:6,6
distributed 7:7	egregious 22:7 26:8 30:7
distribution 21:10 22:19 50:18 53:10	either 32:17 54:11 55:4 62:5
division 9:8	electricity 50:7
document 23:3 46:20	eligibility 19:17 25:10
documentation 19:5 21:15	eliminate 6:18
documents 19:7	emergency 51:11 54:8 58:14
doesn 29:8 38:15 39:8 40:4 47:17	emerging 20:19
doing 3:14 11:23 38:19 46:24 47:7 64:19 65:6	empire 1:11
dollars 24:9,10	enacted 13:22
don 7:19,19 8:5 10:7 13:3 21:23 22:6 24:3 28:25 31:10 33:4 39:24 41:12 42:8 47:21 63:18 64:4,17 68:8	ends 58:13,13
doortodoor 24:14,20	energy 17:13 18:2,2,3 21:21,22 21:22 22:13,21,24 23:8,11,12 23:15,16,24 24:4,6,11,19 25:3 27:7 28:25 49:19 50:15,17 53:17 55:12,13 57:9,14 65:12 70:13
downside 10:5	engagement 60:11
dr 3:8	english 23:6
draft 34:10 58:6 59:24 60:4,17	enhance 5:9
dramatically 12:18	enrolled 25:2 34:18 35:3
drawn 37:3	enrolling 19:10 25:8
drill 47:5	enrollment 19:5 24:16 34:24
drive 21:5	enrollments 50:3
driver 5:23	ensure 19:21 60:6
dropped 34:23,23	entire 61:18
due 5:15	entirety 29:21
duly 16:5,8	entities 20:5
duration 51:15	environmental 67:9,10,12
dwyer 17:19 33:6,14 45:6 49:20 49:23 58:9 62:19,24 63:4,5	equal 52:7,12
E	ereaders 6:4
e 22:18 46:10,11	error 50:22,25 53:23
early 24:8,11,15	escalated 35:20
easement 67:20	esco 18:6,11,18 19:4,8,9,10,14 19:17 20:10,13,19 23:8,19,24 24:22 25:23 27:10,18 40:2,2 46:13,16 47:16,17 50:3,12,13 52:19,20 53:5,9 54:12 64:4
easier 68:23	escos 18:6,22 19:20 20:11,15 22:2 25:7,11 26:4,16 37:11 38:20,21,23 41:19,24 42:24 43:12 46:7 50:7 56:11 58:19 63:8 64:2,11
easily 6:9 9:14 52:16	especially 6:20 11:19 13:12,17 70:12
echo 69:4	
echoed 46:4 48:14	
economic 27:14 29:20	
educate 6:25	
education 7:12 11:19 13:10 14:4 15:16	
educational 14:24	

essential 51:9	38:22 44:8
essentially 33:12 50:11	fair 56:18 64:13,14,22,24 65:3
establish 7:6 54:17	fairness 64:20
established 20:22 23:23 30:8 38:17,18 45:7	fall 37:20
establishes 51:4	familiar 12:13
esteemed 17:19	family 31:7
estimated 15:14	far 38:24 43:14
estimates 14:22	farm 66:8,9,11
et 11:21 38:7	farmland 67:6,7
event 16:19 24:16	fashion 35:25 44:20
evident 24:23	faster 10:12
exactly 27:11,17 28:12 66:18	favor 17:3,10 48:4,21,23 49:5,7 49:14 56:22 65:7,11,18 69:21 71:18
example 18:18 53:14 56:25 66:15	february 18:24 19:22 20:8,14,24 25:24 32:2 33:17,20,25 37:15 38:17,18 40:11 43:12 44:3,17 45:15
excellent 16:13	federal 14:13 57:9 67:19,22
excess 57:17	feel 16:14 27:13,23 56:14
exchange 2:13,22 8:11 23:16	feeling 27:15
exchanges 2:9	fees 24:8,11,14,15 29:4
exchanging 3:12	fellow 68:19
excuse 45:2	felt 41:3
exhaust 4:20 5:13,16 7:3 8:23 8:23 9:2 11:7 14:12,18	fewer 68:24
exhausted 65:9	fielded 25:21
exhausting 4:25	fifth 52:25
exist 39:12	fight 69:6
existing 37:11 39:11 53:4 67:19	fighting 69:6
expectation 28:11 44:5	figure 29:12,12 37:19 38:8 43:13
explain 18:5 19:14,17 25:7,9 34:9 36:21,24 43:5 61:24	file 7:11 14:3
explains 23:13 51:18 60:21	filed 5:12 19:6 49:17 50:2,14 50:16,19 54:9 58:10 59:12 62:21 63:8
exponentially 6:10	files 36:5 38:5,7 62:9 63:12
express 61:17 70:15	filing 70:22
expressed 50:11	final 3:23 4:3 32:13,15,19 33:5
extent 40:15 41:15 61:2 63:12 70:22	finally 53:9 54:2
extremely 6:15	financial 3:7 50:9
F	
f 18:25 19:3,8,10,12 21:13,16 33:22 34:4 39:3 50:18	find 27:24 28:12,19 30:21 55:20
face 66:19	finding 28:24
facilitate 20:4	findings 18:16 19:14
facilities 53:11	fine 10:14,16 15:15
fact 10:22 25:25 26:17 28:13 40:5 44:4 50:22 51:5 52:2 53:23 55:5,5 67:13	first 3:11 4:6,20 12:17 26:11 32:5 33:17,21 34:8 38:14 41:2 43:18 50:6 52:6 55:2 68:5
facts 30:5,6	floor 1:12
failed 19:2	focus 13:10,11 44:10 46:5
fails 18:18 50:24	
failure 14:13,15 18:25 21:7	

focused 13:24 20:16
folks 11:20 27:12 28:22 42:18
 45:20 46:8 48:15 57:23 61:16
follow 15:4 42:2 59:14
followed 19:9
footprint 5:2
force 52:20
forceful 20:5
forecast 4:18 5:14,16 6:20,21
 10:24 11:6,8,8 12:15,18
forecasting 11:3,11,24 13:5
 14:22
forecasts 11:25 12:4
foregoing 72:16,18
forgiven 10:3
forgot 63:23
forinformationonly 71:3
form 40:10
formally 26:25
formed 20:8
fortyfiveday 59:13
forward 8:20 29:9 31:3,19 47:9
 47:12 55:18 56:7 60:14 70:23
four 68:10
frankly 29:20
fraud 30:7
free 22:17 23:2,4,10,23 24:3,11
 24:18 28:24
friends 31:7 72:10
friendship 71:7
front 6:22 26:10,18,24 33:3
 36:9 38:11 49:16 72:2
frustrate 5:8
frustration 52:15
fuel 50:18
full 16:20 57:19
fully 58:7 59:22 68:25
fundamental 55:7
funded 50:9
funding 57:16
funds 50:11 57:9,10 64:25
further 8:19 9:19 15:16 17:2
 21:12,18 23:13 24:24 30:2,8
 31:18 41:3,14 42:18 45:16
 56:23 63:15 69:9,15 71:16
 72:2,4
future 31:6 53:6,7

G

g 6:6 50:18

garagan 3:3
garner 8:8
gas 50:6,18 63:23
gavig 71:9
geduldig 14:2
general 13:12 24:13 49:21
generally 18:7 19:4 24:6
generically 32:2
geographic 4:22,24 5:10 9:22
geothermal 70:9
getting 11:23 26:5 28:23,23
gignon 2:25
give 31:4
giving 10:4 23:14 31:3
glad 10:17
go 10:20 26:16 28:22,25 30:22
 31:9 40:18,19 41:19 42:19
 43:17,20 44:15 57:16 60:13
 69:22 70:4
goal 51:21
goals 50:5
goes 10:24,25,25 38:3 70:4
going 3:2 8:23 9:12 10:15 14:9
 16:8,15,21 17:2,14 26:20
 27:25 28:12 29:9,19 31:6,19
 31:24 34:10 40:18 41:15 45:3
 45:15 47:8,12 48:9,19 59:25
 62:6 65:10,21 66:8 71:17
good 4:2,13 13:25 15:7 17:22
 31:3 49:24 56:10 57:13 58:24
 68:4 69:3,6 71:8
goodness 31:14
gosalum 3:5
gotten 31:23 43:11
government 14:13 16:2 52:13,14
 66:15 67:22,24
granted 12:10
gratitude 70:15
great 2:15 8:18 12:2 13:7 16:4
 60:8 66:15
gregg 1:15
grounds 50:21 53:24
group 2:8 3:10
groups 53:19
grumbling 10:13
guarantee 56:9
guests 2:5
guidelines 12:9
guys 62:22

H	
half 9:22 10:7 68:9	identify 37:8
hannah 72:15,25	identifying 48:15
happen 8:23 11:14 12:12	ignoring 23:20
happened 45:19	impact 45:24 66:10 67:6,7
happening 2:22 9:3 12:21 15:11	impacts 67:9
happens 10:25 15:22 45:23	impending 14:12
happy 30:2,9 44:15 46:2,3 47:6 47:21 68:19	implement 6:23 7:14
hard 46:19 70:14	implementation 5:19 13:18 45:24 51:9 54:4
harm 14:16 26:2,9 28:9 29:20 30:23	implication 41:12
haste 15:12	important 6:11,22 8:20 13:9,16 13:18 21:4 26:14 28:4 29:18 30:23,24 38:10 40:11 46:20 61:3 68:14
hate 15:12	importantly 14:15 50:8 53:3
haven 15:15 16:17	impose 14:14
head 3:2,4,7	imposes 33:13
headed 36:15,16	improvements 57:4
hear 3:19 32:17 46:2	inadequate 19:11
heard 16:9,17 32:19	inappropriate 46:25
hearing 32:10 49:5 53:2,24 56:7 71:24 72:20	included 24:4
help 6:17 24:25 48:15 57:18 61:10 64:25	includes 46:7
helpful 64:7 70:12	including 15:24 21:9 23:5 51:19 53:13 57:10
helping 3:9 41:20	income 55:22 58:22
hereof 72:18	inconvenience 9:12
hereto 72:17	incorporate 61:19
hereunto 72:21	increased 12:24 24:7 56:4
hesitate 57:3	independently 8:7
higher 50:6 57:15	indian 70:17
historic 18:20	indicate 17:4 48:5,23 49:8 65:13 71:18
historically 18:17	indicated 4:18 19:25 41:5
hite 3:5	indicator 18:12
home 27:21 72:12	individual 2:11 6:8 7:12 32:7
honestly 30:19	individually 31:24 53:22
honor 2:15	industry 4:8 7:6 13:21 66:19
hope 3:17	inflection 10:23
hoping 3:6 25:11 29:11	influence 8:4,6
horns 56:13	inform 7:2 13:12
host 2:11	informal 19:2
hosting 2:19 3:15	informally 18:18
household 10:11	information 13:13 18:20 22:15 37:5 44:13
housing 70:8	infrastructure 66:24 67:6,9
huge 64:5	initial 57:24 68:23
I	initially 61:2 66:12 67:14,20
idea 8:18 15:7	initiated 18:7,23 21:18,23
ideas 2:9,13,22 3:13 27:19	innovative 27:19
identified 5:10 22:6 62:12 66:5	

instance 9:2,6 24:9
instituted 64:23
instituting 64:20
intend 9:15 29:23 56:21
intent 53:16
interest 5:9 12:23 42:10 53:6
 54:18 57:5
interested 9:7 41:18,19 42:13
 46:22 47:10 48:10
interesting 3:19 8:16 12:23
interests 27:14
interfere 53:4
interject 36:7
internal 38:18
internally 37:23
international 2:8,9,12
interpret 62:14
intervene 52:2,3
introduced 15:6
invested 42:3
investigation 18:7,10,15,16
 21:5,12,22 22:9,16 33:10
investments 52:22
involve 46:10
involved 35:15 66:3,13
involves 66:4
isn 40:19 47:17
isolate 40:24
issue 19:13 51:17 54:20 55:6,7
 60:12 61:22 64:5
issued 18:25 21:13 39:3 51:2,5
 51:7 53:15
issues 11:15 13:14 16:20 20:19
 25:14 38:6 46:4 47:4 48:16
 54:5,19 56:17 57:2 61:5,10
 62:8 63:11,12
issuing 17:8 51:19
item 4:6,6 9:15 17:3,10,17
 20:20 47:24 48:4,22 49:6,7,14
 49:16,25 51:4,10,17 53:23
 54:4,23 56:22,24 57:19 59:9
 60:21 64:18 65:10,11,22 69:11
 69:20,21 70:8,16,18,19 71:2,3
items 17:11,11,12,20,23 18:5
 21:20 29:23 31:25 69:18 70:3
 70:5,12

J

job 16:13
joined 3:8

joint 7:11
judge 45:8
judgement 32:15 44:6
judges 68:6,10
judicially 45:19
july 49:18 50:2,5,15 51:2 52:7
 52:18,24 53:3,21,24 54:3 55:8
 61:16 65:12
justification 23:20

K

k 7:24
karen 4:10
keep 28:18 38:6
kept 56:9
kind 7:25 11:22 15:9 29:6 56:15
 58:22 63:23
know 2:14 7:19 9:4,4,6,9 10:24
 11:3,17 12:24,25 13:13,14,17
 15:12,21,23 16:14,18,19 17:17
 24:3 26:13 28:25 29:17 31:10
 36:14 38:14 41:18 42:3,4 43:3
 43:11 44:12 46:15 47:9,12
 53:3 55:2,19 56:8,20 60:4
 63:18 68:7,8 70:11,14 71:6,7
 71:9,11
knowing 25:2
krenzlers 66:8,9,16 67:2 68:13
 69:6

L

l 1:15 18:2,2,3,3 20:21,21
 21:22,22 22:13,13,18
lack 45:17
lacks 52:11
language 23:6 62:10,12
large 18:10 68:16
largely 66:22
larger 9:13 54:18
lauri 4:8,11
law 24:13 50:22 53:23
lead 18:14
lease 23:10
left 35:3 45:14
legal 32:8 55:5 61:5,10
legally 57:24
legitimate 29:14 52:14
letter 38:3 62:10 64:2
letterhead 13:14
letters 61:23,25 62:2,3,4,8,15

<p>63:11 level 24:22 levels 15:24 libby 68:8 liebschutz 68:10 lifting 51:15 light 6:20 23:10 40:10 lightbulb 28:23 lightbulbs 23:23 24:4,12,18 27:24 28:24 lighting 22:18 23:2 lights 23:4 limit 24:15 52:3 limits 24:14,20 line 66:5,7 linkage 7:25 listened 66:16 little 8:8 9:6 10:13 32:3 68:24 live 9:13 lived 9:24 10:8,13 local 55:13 66:6,21 69:2 locate 66:23 location 66:7,10,14 67:14 logical 51:6 long 12:7 38:6 68:12 longer 6:17 look 10:22 12:25 14:21 29:17 32:25 34:10 37:9 39:7,23,24 47:5 55:18 56:7 57:22 59:3,18 60:2 61:3 66:11 67:5,16,19,25 68:14 70:12 looked 25:25 26:6 38:16,19,19 38:24 41:2 looking 26:23 28:9,15,21 30:13 31:22 34:7 36:2 37:12,13 39:22 40:12 42:25 46:18 47:7 48:12 58:5 61:15 64:15,18 70:21 lose 52:22 losing 24:4 lot 10:12 13:14 70:4 love 61:13 low 52:17 55:21 58:21 lowincome 49:19 50:4,12 52:9,15 54:12,21 55:8 57:8,9,16 58:3 58:20 61:23,24 62:8 63:11 64:3,22,25 luann 17:15,21 25:18 26:13 36:20 41:4 44:15 63:17</p>	<p style="text-align: center;">M</p> <hr/> <p>m 1:11 2:2 3:2,6 9:7 10:2,7,22 11:10 12:4,13 17:2 20:4 29:11 30:2,11,13 31:12 32:10 34:10 34:17 35:7,7 36:2,3 37:2,4,6 37:9,19,21 38:2,8 43:12,16 44:15 45:3 46:2,3 47:5 48:8,8 48:19 54:23 57:19 62:22 65:10 65:17 68:18 71:10,10,17 72:13 mailed 62:4 main 5:23 50:5 major 13:21 majority 14:20 43:8 60:22,25 61:21 making 11:18,23 12:6 18:22 32:11,15 33:5 37:2 42:10 48:10 manage 10:16 mandatory 10:6 manner 25:4 29:25 marathon 18:2 21:21,23 22:9 23:12,18 24:19,24 25:3 26:21 33:23 marina 3:8 market 20:6 26:15 27:16 29:22 51:24 54:18 55:24 57:14 58:2 marketer 21:10 marketers 50:15 marketing 18:13 19:9 20:16 21:9 22:10 37:18 39:13,15 46:15 markets 51:19 67:4 mass 54:18 matching 47:13 matter 25:23 26:8,11 33:8 36:9 44:20 55:5 59:15 67:16 68:7,7 68:20 matters 8:21 26:17,18,19 68:2 72:2,5 mean 13:2 28:7 29:5,5 38:15 43:17 47:23 66:18 meaning 52:25,25 means 7:8 39:25 40:4 45:23 47:4 47:7,12 measures 6:12 medical 6:6 11:21 meet 47:21 meeting 1:1,7 2:1 3:1 4:1 5:1 6:1 7:1 8:1 9:1 10:1 11:1 12:1 13:1,21 14:1 15:1 16:1</p>
--	--

17:1 18:1 19:1 20:1 21:1 22:1	months 11:7
23:1 24:1 25:1 26:1 27:1 28:1	moratorium 50:3 51:6,10,14,17
29:1 30:1 31:1 32:1 33:1 34:1	51:19 53:4 54:4,8,13 55:23
35:1 36:1 37:1 38:1 39:1 40:1	58:8,17
41:1 42:1 43:1 44:1 45:1 46:1	morning 2:3 4:2,4,13 17:22
47:1 48:1 49:1 50:1 51:1 52:1	49:24
53:1 54:1 55:1 56:1 57:1 58:1	mouth 36:3
59:1 60:1 61:1 62:1 63:1 64:1	move 8:20 17:10 47:25 48:3 56:6
65:1 66:1 67:1 68:1 69:1 70:1	65:10,21 68:18 71:17
71:1 72:1 73:1	moving 31:3 55:18
meetings 63:24	mt 71:13
meets 22:25 52:17	mullen 4:9,12 8:2,5,14 9:18
members 2:12,16,19,25	12:2,19 13:7,20,25 16:4
mentioned 4:17 26:13 49:25	multiple 23:5
merit 52:11 59:22	murder 3:6
merited 41:3	myers 21:23 22:4
merits 42:17	
mess 60:16	N
message 62:16	n 18:25 19:3,8,10,12 21:13,16
messed 60:12	33:22 34:4 39:3 50:18
michael 15:17 16:6	name 72:22
mindful 10:22 14:23	names 3:7
minimize 67:7	nanpa 4:16,17,23 5:12 7:5 8:6,7
mischaracterization 36:8	8:10 12:3,14,15 15:6
misconduct 30:8	narrow 69:24
misleading 21:9	naruc 2:6 15:5
misstepping 60:3	national 2:6 50:15,18
mistake 64:5	natural 67:5
mistaken 42:20	nature 18:9 19:3 21:6 32:23
mixed 31:23,25	44:7 68:25
models 13:2	necessarily 28:10 36:13 37:14
modification 20:3	necessary 13:15 36:19 56:19
moment 37:3 71:5	66:6,21
moments 33:25	necessity 43:2
monitor 20:19	need 6:18,19 13:12 14:25 15:13
monitoring 3:3 6:7	29:7 31:18 41:7 42:7,11 46:17
monitors 6:6	47:5 48:12 52:13 57:23 60:12
monthly 1:1 2:1 3:1 4:1 5:1 6:1	needed 7:14
7:1 8:1 9:1 10:1 11:1 12:1	needing 5:22
13:1 14:1 15:1 16:1 17:1 18:1	needs 53:20 66:6 68:2
18:19 19:1 20:1 21:1 22:1	neglected 63:22,22
23:1 24:1 25:1 26:1 27:1 28:1	neither 23:18
29:1 30:1 31:1 32:1 33:1 34:1	nem 50:16,24,25 51:16 52:5,6,18
35:1 36:1 37:1 38:1 39:1 40:1	53:2,12
41:1 42:1 43:1 44:1 45:1 46:1	never 34:18
47:1 48:1 49:1 50:1 51:1 52:1	new 1:3,12 4:7,24 5:21 6:13,20
53:1 54:1 55:1 56:1 57:1 58:1	7:3,6,11 8:11 9:23 12:20 25:8
59:1 60:1 61:1 62:1 63:1 64:1	25:10 26:12 27:25 45:7 50:22
65:1 66:1 67:1 68:1 69:1 70:1	52:8 57:11 72:14
71:1 72:1 73:1	nice 7:24

nip 26:24
noah 71:14
noncompliance 21:17
normally 8:21
north 4:15 14:10,22 28:18
note 6:11 21:4 65:22,24 68:12
 70:2
noted 16:5,8 59:20 71:22
notice 7:20 18:24 38:22 44:8
 51:7 58:10 59:10,11 60:8,13
 61:25
notified 5:13 35:4,5
nowadays 6:8
number 2:20 5:4 12:12 18:8,10
 21:5 37:14,16 45:15,18 47:18
numbering 4:8,15 5:15 7:8 11:6
 12:6,8 14:11,22
numbers 4:19 5:20,22,24 6:5,10
 9:24

O

o 18:25 19:3,6,8,10,12 20:18
 21:13,16,24 33:22 34:4 39:3
 41:18
observed 24:9
obvious 39:4
obviously 11:5
occur 29:8
occurred 33:25 34:24
october 20:23 72:8
offer 56:10
offered 54:21
offering 56:13
offerings 18:19 27:20 54:17
office 17:16 20:18 25:20 31:15
 35:18
official 14:9
officials 16:2
oftentimes 2:15
oh 8:13 62:24
okay 13:23 17:9,22 33:16 34:6
 34:16,20 35:2,10,14,23 40:6
 59:5,8,18 60:7 62:7 63:10,20
 64:6,8 65:18 69:12 71:17 72:9
old 10:8,17 34:3
once 13:22 54:19 69:2
oneonone 41:25
ones 9:23 13:12 70:4
ongoing 31:13
open 29:16 30:13 39:12,14,17,24

43:2 47:6,8
operate 25:10 30:12 65:3
operations 33:2
operator 41:9
opportunities 53:8 58:3
opportunity 2:24 3:16 7:2 19:17
 19:20 31:4 56:5 59:14 61:13
opposed 49:6,14 55:23 65:16,17
 65:19 71:22
opposition 67:15 69:2 71:24
option 4:23,23 5:3,6 13:3,4
options 4:21
order 3:22 4:14 13:22 14:3
 19:13,16,22 20:2,4,20 28:7
 32:2,7,9,14 33:7,18,23 34:2,4
 34:7,10 42:21 43:3 44:3,17,19
 45:5,9 46:23 49:18 50:2,5,15
 51:2,4,8,20 52:7,12,18,24
 53:3,21,24 54:3 57:24 58:6
 59:9,19,21,25 60:4,18 62:14
 62:15 65:12 68:8
orders 17:24 21:20 25:6,12
 33:21 53:15 57:4
original 11:8 59:19,21 64:23
originally 66:7
originated 26:22
outcome 28:11 40:20,24 67:22
 68:4,15
outcomes 16:17
outgrowth 51:6
outrage 24:23
outrageous 24:8
outreach 7:12 11:19 13:10 14:4
 14:24 15:15,20 59:7
outside 46:16
outstanding 46:11 62:8 63:11
overall 10:15 37:10
overlay 4:23,23 5:17 7:7,14
 9:10 10:5
oversee 2:10
owners 14:16

P

p 6:6 10:4 18:6,12,13,23 19:3,9
 19:21,25 21:17 22:3 23:19,20
 23:21,25 24:2,13 30:21 36:10
 36:11 38:15,25 39:4,9,12 40:5
 41:5,6 44:4 45:7 72:13
pad 10:11
page 72:17

<p> pages 72:19 paid 55:10 57:10 part 14:2,3 28:8 40:24 44:5 45:17,21 47:2 61:14,19 67:3 participate 31:4 participation 51:20 particular 2:16 64:18 68:20 particularly 12:25 24:23 26:8 parties 51:13 54:11 59:14 66:3 partners 52:21 71:12 party 21:8 23:19 70:22 passed 17:10 50:12 passes 12:13 48:22 49:6,14 patricia 1:15 pattern 22:6 29:10 47:20 patterns 19:23 26:2 paul 49:21 pause 32:3 pay 24:8 29:4 paying 55:12,12 penalties 33:9 pending 44:20 people 2:21 11:16 15:20 16:22 27:12,19,22,23 28:22 32:11 56:5 65:4 percent 37:18,18 percentage 37:17,21 period 11:3 20:23 25:11 54:10 59:13 permanent 58:17,19 59:17 permits 68:24 person 15:8 personal 71:5 personally 30:11 42:4 perspective 32:6 35:15 36:3 46:13,18 persuaded 57:7 petition 4:7,16,17,22 7:5 50:16 50:20,24 52:6 53:13 65:11 petitioners 54:6 petitions 46:11 49:17 50:2,14 50:19 54:2 55:4 56:25 57:7 phone 5:24 6:5 10:12 47:18 phones 6:4 10:10 phonetic 2:25 3:4,5 21:23 71:9 pick 40:23 picked 37:10 piece 44:2 46:12 pieces 69:22 </p>	<p> place 6:15 13:21 19:19 39:8 41:21 46:3 55:11 69:7 72:17 plan 4:8,15 7:11 14:11,14,23 plans 7:12 14:4,5 70:18 players 30:22 31:5,8 plaza 1:11 pleasant 10:2 please 4:11 17:3,21 48:5,23 49:7,22 65:12 71:18 pleasure 2:19 plus 37:23 pockets 57:16 point 10:23 12:2 13:7 28:6 35:24 45:11 62:4,4 63:22 70:17 pointed 55:17 56:19 policy 3:5 52:23 53:12 55:5 57:14 policybased 53:22 pool 54:18 pooling 6:14 populations 13:24 14:7 portion 45:5 portions 45:6 position 45:11 57:13 69:19,24 70:20 positions 69:23 positive 48:17 positively 47:4 possibility 8:15 possible 8:10 15:22 44:11 possibly 15:12 postfebruary 42:15 potential 18:12 27:22 53:7 58:3 potentially 57:25 power 51:18 powerful 71:13 practices 17:14 18:14 20:16 21:3 22:8 25:13 prearranged 23:21 24:16 preclude 58:20 precluded 25:8 prefebruary 34:12 42:14 prepared 32:25 presentation 25:15 54:22 presented 17:14 54:6 presenting 17:23 43:24 pretty 2:15 prevent 19:19 28:9 51:8 </p>
---	---

preventing 52:15
previous 64:11
prices 27:25 28:25 50:7 56:9
pricing 18:20
principal 50:25
prior 18:24 34:4 35:17
privilege 71:6
probably 39:15 40:3 56:19
problem 15:15 31:13
problems 19:2,19
procedure 51:3
proceed 20:2 49:22
proceeding 5:12 30:9 64:24 68:3
proceedings 10:24 72:20
proceeds 53:7
process 3:18 9:25 11:10 12:4,6
 16:15 18:5 19:2 20:12,22
 21:18 26:3,7,12 27:18 28:3
 29:18 32:5 33:2,22 34:3,8
 35:12 40:21,25 41:10,24 42:10
 42:14,17,20 43:5,19,19,19,23
 44:14 45:7 46:23 54:16 55:18
 56:18 57:11 59:25 60:5,7,14
 61:6 62:6,19 63:7,9 66:13
processes 11:18 37:23,24 46:12
 48:11
processing 43:21
product 58:23
production 22:12
products 23:17 46:10,15 54:20
 55:19,20 56:14
professionalism 42:9
program 18:19 22:18 23:2
programs 50:9 52:16 65:4 70:13
prohibition 54:12
project 65:24 66:4
proliferation 6:3 12:24
pronouncing 71:10
properly 15:14 42:19
property 52:19,24 53:6,9 66:8
 67:19
proposed 4:14 59:11
proposition 56:12
protect 30:25 31:10 50:6 53:16
protectable 53:6
protecting 52:14
protection 52:7,12 57:8
protections 51:10
protocols 38:18

proven 5:7
provide 5:17 19:4 29:14 38:11
 56:15
provided 4:21 19:7 21:15 23:8
 23:11 44:13 51:25 53:2
providers 57:17
provides 19:16 54:5 56:5
providing 7:8 56:17 60:8
provision 49:18
public 1:1,4,7 2:1 3:1,22 4:1
 5:1,9 6:1,25 7:1,2 8:1 9:1
 10:1 11:1 12:1 13:1,12 14:1,4
 15:1 16:1,2 17:1 18:1 19:1
 20:1 21:1 22:1 23:1 24:1 25:1
 26:1 27:1 28:1 29:1 30:1 31:1
 32:1 33:1 34:1 35:1 36:1 37:1
 38:1 39:1 40:1 41:1 42:1 43:1
 44:1 45:1 46:1 47:1 48:1 49:1
 50:1 51:1 52:1 53:1 54:1,18
 55:1 56:1 57:1,5,14 58:1 59:1
 60:1 61:1 62:1,9 63:1,12 64:1
 65:1 66:1 67:1 68:1 69:1 70:1
 71:1 72:1 73:1
published 59:12
purchase 23:15
purely 40:24
purpose 20:11 52:14
pursuant 33:24 34:3
pursue 36:19
put 6:12 14:16 19:18 36:2 41:20
 45:3 55:11 64:24
puts 56:12

Q

quality 39:8
quarter 4:20 5:14
quarterly 18:20
question 7:18 8:22 12:23 26:18
 32:7 36:17 42:8 45:12 56:8
 60:9 63:16 66:20,23
questionable 20:16
questions 8:19 15:10 17:18
 25:17 30:3 32:6 34:9 36:15
 44:13 47:24,25 54:6,23 58:6
quickest 12:17
quickly 9:3 26:10,22 28:4 44:10
quite 7:23
quote 23:13 62:14
quoting 20:4

R	
r 46:10,11	regarding 18:23 21:19,20 33:24
raised 56:17 67:3	region 4:24 5:3
raises 52:5	register 59:13
raising 45:11	regulated 2:10
rate 57:11	regulatorily 45:19
rated 47:11	regulators 2:21 29:7
ratepayer 52:16	regulatory 2:7,19 45:22 48:10
ratepayers 50:10 57:12	rehearing 50:16,20,21 53:13 55:4 57:2
rates 51:22,25 57:15	related 5:20 17:12 24:11 39:19 52:14 65:23
rationality 52:13	relates 49:17 58:6 61:23
reach 8:6	relationship 12:15
reached 8:9 68:15	relationships 52:21 53:5
read 61:17	reliability 65:24 66:6,21
readopt 51:10	reliance 52:22
ready 40:17	relief 4:8,21 5:18,19 6:16,18 6:20,24 7:8,15 12:11
reality 47:3	relook 38:5
really 3:6 12:11 13:16 27:10 28:20 30:23 31:18 33:8 34:7 37:4 43:7 47:2 55:9 56:12 60:2 66:15 67:24 68:14,25 70:11	relying 11:20
reasonable 51:22,25	remain 44:18
reasons 56:11 61:20	remaining 42:24
receive 19:12 39:5 50:8 55:9	remarks 49:4 68:22
received 7:21 20:24 21:14 22:15 23:4 39:4 54:11	remedies 31:19
receives 58:15	remedy 19:2 28:16
receiving 53:17	remember 15:5 37:15
reclamation 6:15	remind 57:23
recognition 56:3	reminders 18:21
recognize 33:2 53:18 63:2	remiss 53:18
recognized 22:2	remote 6:6
recommend 19:12	renewals 50:4
recommendation 5:17 9:9	reopen 42:25
recommendations 65:19	reopened 36:5 67:16
recommended 4:23	rep 22:24,25 23:7
recommends 7:4,10 21:18 25:5	repetitious 19:24
record 14:9 45:4 61:3,18 63:3,8 65:25 72:19	report 18:19 51:7,7
recording 22:22	reported 22:4 72:16
recurring 19:19	reporter 72:25
redo 60:11	represent 21:10
redone 60:2	request 54:2
refer 61:16	requested 34:23 66:11
reference 61:19	requests 12:8,9 15:14
referred 22:11	require 6:5 25:7
refund 35:5 40:4	required 5:5 32:13 68:24
regard 38:13,16	requirement 23:20 32:9 62:3
	requirements 12:9 19:9 21:8,17 23:19,25
	requires 14:3 19:4,14
	rerated 40:3

resa 50:18
resapaing 60:7
reserve 8:17
reserved 8:14
reset 27:12 54:16 55:18
resetting 19:22
residents 14:16
resolution 43:6 48:17
resolutions 36:18
resolve 18:17,21 25:14 26:10
 47:4 68:2
resolved 40:2 59:22 63:13
resources 5:15 12:6,8,12 15:23
 57:16 67:5
respect 50:20 51:14 54:3,7
respond 25:16 31:13 44:22
responded 34:22
responding 32:23
responds 32:17 44:24
response 4:15 19:8,11,25 21:14
 21:16 39:5 49:18 50:2,14
 65:11
responses 27:5 38:23 44:13
responsibility 20:9
rest 61:7
restriction 53:14
restructure 51:18
result 18:10 51:21 57:4,15 69:3
resulting 5:2
results 18:16
retail 22:5 27:16 50:17 51:19
 52:4 54:16
retain 5:4
rev 31:3 69:22 70:19,20,23
revealed 21:16 22:9
review 18:6 19:7 20:12 21:15
reviewed 20:14 21:24 22:22
 24:22 35:15,24 39:3
reviewing 20:9
reviews 20:15 21:24
revised 6:21 11:9
revisit 55:6,22
revisited 54:21
revoke 25:10
revoked 19:18
right 13:19 23:14 26:15 28:16
 31:12 33:14,15 34:16 36:22
 41:8 45:10 53:9 60:24 63:10
 64:6 65:6 69:7 70:6 71:10

righted 40:13
rights 44:10
rises 6:10
road 30:19
roadmap 46:21
robin 22:4,6
rochester 9:25 10:3 65:23
rotary 10:10,12
rule 36:12 58:14,18,19
rulemaking 59:11
rules 20:6 29:19 41:8,20 42:2

S

s 2:22 3:7,9 4:16,16,23 5:17
 6:6,11,22,25 8:15,20 9:2,6,9
 9:10,10,12,14 10:4,7 11:9,18
 12:2,21,23 13:9,16 14:12,16
 14:17 15:14 16:15 17:9,15
 18:14 19:6,10 20:18 21:12,15
 21:16,22,24 22:8,8,16 23:15
 23:19,23 24:2 26:15,24,24
 27:17 28:3,4,7,8,10,10,15,20
 28:21 29:10 30:5,15 31:16
 32:5,22 33:3,3,4,16 34:19
 36:8,11,12,19 37:5,6,13,22
 38:9,10 39:7,9,14,16 40:15,19
 40:22,23 41:10,18 42:6 43:3
 43:13,22,22,23,23 44:3,6 45:4
 45:8 46:2,14,20,21 47:2,16,18
 47:24 50:25 51:16 53:24 55:22
 56:11,16,16 57:13 58:23 59:24
 61:12 62:5 63:11,16,19 64:3,5
 64:13,13,19,20,23 68:11,11,22
 68:22 69:5,5 70:4 71:3,8,14
 71:23
safe 47:16 72:11
sales 24:15,20 65:12
sapa 51:4,5,7,11 54:8 56:4
 59:25 60:5,7,8
satisfaction 59:22
satisfactory 35:25
satisfied 35:11,21 43:9
saying 17:4 26:23 28:18 34:22
 37:6 48:5,24 49:8 65:13 71:7
 71:19
sayre 1:15 9:20,21 17:5 30:3,4
 31:11 32:18 48:6,25 49:9
 56:23,24 65:14 68:21 71:21
says 60:4
scarce 57:9,15

<p> scenes 70:5 schedule 22:17 scherer 17:15,22 33:20 34:13,15 36:22 38:13 39:14,20,23 41:17 43:14,16 47:14 62:2,11 63:18 63:21 scorecards 47:9,11 second 23:6 50:7 52:18 secondary 67:8 secretary 3:23 4:2 54:9 58:10 60:13 72:3,4,7 section 51:11 sections 44:19 see 6:9 8:17 15:11,17,18 27:22 30:14 31:12 47:6,20 55:3 62:9 seeing 12:24 seeking 70:23 seen 10:23 12:17 47:10 segment 51:20 selected 41:13 67:14 selection 8:4 sending 18:21 64:2 sense 55:11 60:10 sent 34:3 40:3 separate 17:8 september 1:10 72:22 sergei 2:25 serious 28:8,9 29:18 44:9 seriously 56:25 66:17 serve 58:19,21 served 4:25 64:4 serves 7:2 service 1:1,4,7 2:1 3:1,22 4:1 5:1 6:1 7:1 8:1 9:1 10:1 11:1 12:1 13:1 14:1 15:1 16:1 17:1 17:13 18:1 19:1 20:1 21:1 22:1 23:1 24:1 25:1 26:1 27:1 28:1 29:1 30:1 31:1 32:1 33:1 34:1 35:1 36:1 37:1 38:1 39:1 40:1 41:1 42:1 43:1 44:1 45:1 46:1 47:1 48:1 49:1 50:1,13 51:1 52:1 53:1 54:1,12,17 55:1 56:1 57:1,14,17 58:1 59:1 60:1 61:1 62:1 63:1 64:1 65:1,12 66:1 67:1 68:1 69:1 70:1 71:1 72:1 73:1 services 5:21 17:16 20:18 23:17 25:21 27:20 29:14,14 31:15 35:19 38:3 46:14,16 49:18,19 57:15 </p>	<p> serving 5:2 session 2:2,4 3:22 6:25 31:23 37:16 61:16 70:3,7 72:8,13 set 63:24 seven 24:10 shore 30:20 short 11:11 15:21 shorter 5:18 6:23,24 7:13 shouldn 33:9 40:22 show 17:24 19:13,16 20:2,21 21:21 25:6,12 28:7 32:7,9,14 33:7,9,18,21,24 34:2,4,7 36:19 42:22 43:3 44:8 46:23 shows 67:24 side 12:5 46:14 sign 23:3 35:11 signed 35:3 significant 11:15 37:16 43:4 significantly 24:7 signing 23:9 27:24 similar 3:18 8:18 62:16 simple 30:15 simply 55:23 57:6 single 18:11 site 68:23 69:2 sitting 15:17 slamming 18:13 20:17 21:7 30:7 37:18 39:13,16 smart 17:24 20:21,21 21:2,13,14 21:16,19 29:10 34:2,11,18 38:13,16 39:2,5,6,8,19 40:23 41:4 solar 70:10 sold 23:13 soon 40:17 sooner 11:14 sorry 43:16 62:24 63:5 sort 10:22 70:3 sought 50:21 sour 31:5 soured 27:15 sours 28:2,3 speak 6:3 special 2:5 specific 14:5 47:24 61:22 62:12 70:17,18 71:4 specifically 13:24 22:23 45:8 51:13 69:4 specifics 18:4 69:22 </p>
--	---

speed 10:10 11:12	submit 18:19 51:13
spelling 3:2,4,6 21:24 71:9	submitted 62:3
spends 41:23	submitting 12:7
split 4:22 5:10 9:22	subscribed 72:22
sponsor 3:10	subsequently 22:25
staff 2:20 3:14 5:6,17 6:21 7:4 7:10 9:9 16:12,19 18:20 19:8 19:20 21:12,15,18,22 22:5,8 22:16 24:9,21 25:5,20 26:7,16 26:20,22 27:3 28:15 29:9,24 30:20 33:11 36:18 37:7 40:9,9 40:14,16,23 41:2,18,23 42:21 43:21 44:6 47:15 54:15,19 56:19 61:13 63:22 64:5 66:15 68:5,9 70:14	subsidy 53:17
stakeholder 59:6 60:11	substantial 57:10
stakeholders 46:6	substation 66:5
stands 45:20	successful 6:16
star 28:18	suddenly 27:24 28:24 29:3
start 28:15 40:12	sufficient 15:20 57:25
state 1:3,11 6:17 12:21 30:13 38:21 41:10 47:17 51:3 52:8 53:23 54:9 57:9 58:10 59:12 59:13 72:14	suggest 32:18 36:16
stated 19:23 72:17	suggesting 32:24 33:4
statement 17:8	suggestion 28:10 40:23
statements 27:5	supplement 5:12
states 22:18,24 52:8 67:18	supplier 22:24 23:24 24:5 27:7 27:25 28:25
stating 35:11	supply 4:19 23:8,11 24:11 50:17
statistic 37:13	support 8:9 29:23 57:19 61:20
statistics 37:12	supporting 19:5
status 61:24	supportive 53:21
statutorily 67:4	supports 5:6
staving 6:16	sure 10:3 11:18,23 14:6 15:18 15:19 16:10,22 29:7 37:7 41:7 41:25 42:10 46:5 47:14 48:10 58:7 69:18 70:6 71:10
stay 31:15	surprising 68:22
step 15:16 29:18 33:17 43:13	survive 52:12
steps 7:3 16:23 19:18 45:14 54:7 59:6	suspensions 22:4
stock 25:12	switching 37:24
stood 68:3	symbol 71:13
straight 46:13 55:3	system 66:21
straighten 29:13	systematic 26:17
straightup 37:13	systematically 20:12 40:18
strategies 6:17	
strictly 64:19	T
struck 27:2	t 3:6 7:19,19 8:5,12,23 10:2,7 12:12 13:3 15:15 16:17,18 23:21 24:2,2,3 28:25 29:3,8 30:19 31:10 32:11,17 33:4,9 38:15,15 39:8,24 40:4,19,22 41:9,12 42:8 47:17,17,21 55:3 57:24 58:19 61:20 63:18 64:4 64:17 68:8,25 71:3
struggling 57:18	table 15:17
subject 19:15 20:22 25:12	tablets 6:4
submetering 70:3,5,8,14	tactics 21:9
	take 2:24 13:7,21 15:16 16:9,23 17:3 19:24 25:12 27:4 30:2 32:3 39:7 48:20 52:24 54:13

67:16,18,25 71:5	third 5:14 21:8 23:19
taken 28:13 53:21 55:13	thomas 49:20
takes 50:13	thoroughly 53:20
talk 2:22 15:7 17:19 38:10	thought 7:23 8:18,22 31:24
43:20	32:14 43:23 61:5
talked 37:16 43:3 64:11	thoughts 2:17
talking 60:10 64:12	thousand 6:14 24:10
talks 59:25	thousands 24:9,22
tariff 3:4	three 1:11 2:25 12:19 31:25
taxpayerfunded 52:16	threshold 12:13 52:17
taxpayers 50:10	throw 30:9 31:11
taylor 22:5	throwing 32:10
team 20:9,14,22 25:20 38:19	thursday 1:10
40:10 46:3	thwart 31:16
techniques 13:5	time 2:11,11 3:12 5:7 6:23 8:24
technologies 5:21	11:3 13:17 20:17 30:14 33:18
technology 6:3	33:21 41:23 51:12 54:10,15
telecommunications 4:7,9 7:6	61:9 67:8 72:16
telephone 4:19 5:4,20,22 9:24	timeframe 5:18
telephones 13:2	timeline 6:24 7:14
tell 3:17 31:7 56:6 61:8,8	timely 20:4 29:25
telling 41:4	times 26:11 30:19 42:7
terminate 52:20	timing 6:21
termination 24:8,11,14,15	today 2:4 3:8 4:6 6:23,25 17:15
terminations 24:18	25:6 26:24 32:19 33:5 35:17
terms 11:23 41:4 45:13,23 46:15	36:4 39:10 42:23 54:5 61:20
47:7 48:11 59:6 67:7	61:25 65:7 72:3,5
thank 3:11,12,14,20 4:5,12 7:16	told 24:7 29:3
7:17 9:16,18 12:16 16:10,24	tolerate 29:6,19
25:18,19 30:16,19 31:14,19	tom 17:19
48:17,18 49:4,15,23 54:25	tone 10:11
57:20 64:7 65:8,19,20 68:5,6	top 31:15
68:17 69:8 71:14 72:9,10	topic 13:21
thereof 51:20	total 39:21
thing 13:9 58:24 59:24 65:7	touch 10:11
71:8	tradeoff 9:22
things 2:6 3:18 9:5 13:15 26:4	traditional 46:14,16
26:6,14 27:2 28:14,19 29:13	transcript 59:20 61:18
30:24 37:9 38:8 40:12,14,17	transcription 72:18
43:24 44:18 45:18 52:3	transition 10:8,16
think 8:19 9:13 10:7,15 12:17	translates 5:21
12:25 13:9 14:19,20 15:6	transmission 66:5
26:14,20 28:4,23 29:10 31:18	travels 72:11
31:19 32:8,11,23 33:4 36:17	treating 52:9
36:20 37:17 38:10 43:9,18	treatment 29:7
46:20 47:16,23 55:7 56:2,6,10	tremendous 29:4 66:2
56:16,17,18,20 57:24,25 61:17	triage 43:19 44:14 48:13
64:4,11,17 65:6,9 66:12,22	triaged 43:21
67:24 68:8,15 69:3,7	triaging 43:10

tries 24:5
trigger 14:13
triggers 38:4
troubling 24:24
true 72:19
try 31:16
trying 9:8 26:3 27:11,17 32:20
 36:3 37:4,9,19,22 38:2,8
 43:13 56:20
turning 20:20
two 34:7 37:24
type 37:14 66:18
types 33:19
typewritten 72:18
typical 6:8
typically 6:2 8:6

U

u 3:9 18:6,12,13,23 19:3,9,21
 19:25 21:17 22:3 23:19,20,25
 24:13 30:21 36:10,11 38:15,25
 39:4,9,12 40:5 41:5,6 44:4
 45:7
ultimately 9:9 28:17 29:18 56:8
unclear 45:13
understand 11:22 22:12 23:4
 29:3 36:3 37:12,23 40:8 41:7
 42:2 45:22 46:19 47:15,21
 53:20 58:7 60:25 68:25
understanding 42:13 62:5
understood 24:3
undisputed 66:22,22
undue 51:8
unfairly 27:15
unfortunately 42:6
unhappy 63:14,19
uniform 17:14 18:14 22:8
unilaterally 14:14
unintended 42:12 58:2
unit 4:9
united 52:8 67:18
unlawful 52:19
unprecedented 5:15
unsolved 36:13
unwilling 41:9
updated 12:20
updating 13:5
upgrades 66:20
use 15:23 22:9 26:7 53:10 64:25
 66:25 67:7,19

uses 66:24
usual 5:18 6:23,24 7:14
usually 18:11
utilities 2:10 46:7 62:11,13
 63:7 69:20
utility 2:7 21:11 22:19 40:3
 55:13 56:10 57:11
utilityowned 53:10
utilization 5:23
utilizing 51:21

V

v 23:21 24:2
vacated 44:17,19 45:5,8
value 27:22 28:18 55:14
valueadded 29:14 55:18,20 58:22
vardanyan 3:9
various 15:24 17:13
vehicle 6:5
verbatim 27:4
verification 21:8 23:19
versus 3:20 47:8,8
view 56:20
violate 20:5 39:9 41:6
violates 52:7
violating 41:5
violation 18:12,21 38:16 40:5
 44:7
violations 17:13 18:14,24 19:4
 19:25 22:7 28:13,14 29:19
 32:13 33:19 36:12 38:25 39:4
 39:12 44:5 45:7
vocal 42:12
volition 67:16
vote 9:15 17:3 30:9 48:3,20
 56:22 59:23 65:7,10 69:18
 71:17
voted 57:23 61:2,2
voting 61:20 69:21,25 71:4
vulnerable 13:24 14:6

W

wait 11:2 19:23 31:12 32:21,22
 62:23
waiting 38:22
walk 71:14
want 2:5 3:11 11:22 16:6 25:19
 27:7 28:6 36:21 41:12 42:24
 43:8 44:3,21 45:22 46:5 47:4
 47:14 55:5 56:3 58:7 59:16

61:8 64:22,24 65:3,22,24 68:5 68:12,19 69:17 70:2,16,19 71:2,5 wanted 63:6 67:7 70:15 wants 29:13 warrant 50:23 warranted 41:14,15 wasn 8:23 10:2 38:15 way 3:18,18 7:22 11:15 14:16 19:11 25:2 26:17 29:24 30:22 31:17 43:10 58:20 60:3,6 68:3 ways 28:19 weakest 31:9 week 2:18 3:15 weighing 70:17 welcome 2:25 3:17 4:11 9:16 29:15 70:24 72:11 welcomed 27:21,21 went 27:3 29:12 59:19 68:7 whereof 72:21 wifi 6:6 willing 31:12 47:15 56:9 willingness 48:15 68:14 wish 72:11 witness 72:21 wonder 60:2 wonderful 31:15 61:12 wondering 11:10 word 64:12 71:9 words 36:2 71:8 work 2:16 19:20 25:13 26:4 28:4 28:11,19 30:20 41:25 42:4,24 43:4 44:14 47:15,19,22 48:15 53:19 54:16 61:10,13 63:22 66:2 67:21,25 70:4 workably 51:24 worked 10:13 15:14 17:17 34:4 35:5 62:11 working 2:20 15:18 22:18 41:23 42:21 45:21 46:3,6,19,21,22 63:7,24 66:15 67:17 68:9 70:13 workings 30:8 works 2:8 3:19 25:20 42:18 70:14 world 2:10 wouldn 8:12 71:3 written 17:8 wrong 37:6	wrongdoing 18:17,18 <hr/> X <hr/> x 1:16 <hr/> Y <hr/> yeah 10:20 year 10:25 40:9,10 years 5:23 6:13 24:21 42:5 yesterday 39:16 yo 62:22 york 1:3,12 4:7 6:13 7:6 8:11 12:20 25:10 52:8 57:11 72:14 <hr/> Z <hr/> zibelman 1:14 2:3 4:5 7:17 8:3 8:13,16 9:19 10:17 12:22 15:2 16:6,11 17:9,23 20:8 25:18 30:16 31:21 32:16,22 33:12 36:7 38:9 40:7 43:15,17 44:21 45:2 47:23 48:18 49:5,13,24 54:25 57:6,20 58:12 60:15 62:18,22 63:2,15,17 64:8 65:8 65:16,18 68:11,22 69:8,12,14 71:16,22 72:6,9 zwack 45:8 <hr/> 0 <hr/> 0 17:9 06 72:13 <hr/> 1 <hr/> 1 20:23 65:19 72:17,19 10 1:11 2:2 9:13 10digit 5:4 10:6 12 72:13 125 39:22 47:6 13th 72:8 15 1:10 6:13 35:3 38:20 43:12 15th 50:2 16th 4:17 17th 21:14 18 21:15 197 42:24 19th 1:12 <hr/> 2 <hr/> 2 4:21 5:2 10:12 26:20 27:6 33:23 46:9 52:5 200 37:11 43:12
--	---

201 17:11,12,23 20:20 48:5,21
2014 50:10 53:15
2015 20:23 53:15
2016 1:10 4:17 5:12 11:6 18:24
 19:22 20:24 21:14,15 33:17,25
 37:15 42:14,16 44:17 50:2
 72:22
2017 5:14 11:9
2019 4:20 11:7
202 17:11,12,24 21:20 46:9 48:2
 48:19,20,23 51:11
203 17:11,12,24 21:20 46:10
 48:2,20 49:7
204 49:17 65:11
21 34:11 35:17,24 36:4
22 20:24 21:12
22nd 72:22
235 7:22 8:12
23rd 18:24 19:22 20:24 32:2
 33:17,20,25 34:12 37:15 42:14
 42:16 43:12 44:17 45:15
25 37:18,21
26 20:8
263 69:20

3

3 1:12 10:11 11:7 25:6,19 26:18
 37:10,20 47:10 48:9 50:14
 54:2 64:11 65:18
30 1:11 25:9 37:17,21
31st 5:12 11:7
33 2:2
378 70:16

4

4 17:9 48:21 49:5,14

5

5 10:8
50 39:15
501 4:6 17:3
518 4:8,19,25 5:13 6:18,19 7:9
 8:11 10:15
563 71:2
585 10:2

6

6 34:19 51:11 59:20

7

7 9:13 25:7
71 72:19
716 9:25 10:4
75 39:16
7digit 10:9

8

9

9 70:3
90 54:8 58:9,13
9152016 1:1 2:1 3:1 4:1 5:1 6:1
 7:1 8:1 9:1 10:1 11:1 12:1
 13:1 14:1 15:1 16:1 17:1 18:1
 19:1 20:1 21:1 22:1 23:1 24:1
 25:1 26:1 27:1 28:1 29:1 30:1
 31:1 32:1 33:1 34:1 35:1 36:1
 37:1 38:1 39:1 40:1 41:1 42:1
 43:1 44:1 45:1 46:1 47:1 48:1
 49:1 50:1 51:1 52:1 53:1 54:1
 55:1 56:1 57:1 58:1 59:1 60:1
 61:1 62:1 63:1 64:1 65:1 66:1
 67:1 68:1 69:1 70:1 71:1 72:1
 73:1