

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

- Case 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State.
- Case 98-M-1343 - In the Matter of Retail Access Business Rules.
- Case 06-M-0647 - In the Matter of Energy Service Company Price Reporting Requirements.
- Case 98-M-0667 - In the Matter of Electronic Data Interchange.

REPORT OF THE COLLABORATIVE REGARDING PROTECTIONS FOR  
LOW INCOME CUSTOMERS OF ENERGY SERVICES COMPANIES

Dated: November 5, 2015

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REPORT OF THE COLLABORATIVE REGARDING PROTECTIONS FOR LOW INCOME  
CUSTOMERS OF ENERGY SERVICES COMPANIES

I. INTRODUCTION AND BACKGROUND

In its Order Granting and Denying Petitions for Rehearing in Part dated February 6, 2015, the Public Service Commission affirmed that when an Energy Service Company (ESCO) serves a participant in a utility low income assistance program (Assistance Program Participant, or APP), it must satisfy one of two conditions.<sup>1</sup> First, the ESCO must guarantee that the APP will pay no more than the APP would have paid as a customer of the utility. Alternatively, the ESCO must provide the APP with energy-related value-added products or services in a manner that does not dilute the effectiveness of the financial assistance programs.<sup>2</sup>

The Commission directed Department of Public Service Staff (Staff) to lead a collaborative to address implementation issues concerning this requirement, including: (1) identifying a mechanism by which ESCOs can confirm, at the point of sale (POS), whether a potential customer is an APP; (2) defining the energy-related value-added products or services which satisfy the Commission's criteria and may be offered to APPs; and (3)

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<sup>1</sup> In defining APPs, the Commission Order apparently contemplated that for at least one utility, customers could be Utility Home Energy Assistance Program (HEAP) recipients but not enrolled in the utility's low income assistance program. Discussions in the collaborative revealed that is no longer the case. Accordingly, throughout this report, the term APP refers only to utility low income assistance program participants.

<sup>2</sup> Case 12-M-0476, et al., Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015), p. 6 (February 2015 Order).

determining how protections will be provided to existing ESCO APPs and ESCOs customers who become APPs.<sup>3</sup>

The collaborative met on March 19, April 17, June 25, July 23, and October 16, 2015. In addition, several smaller group discussions were held on specific issues. Collaborative participants included: Staff; all major electric and/or natural gas utilities in New York State (jointly, Utilities); ESCO associations including the Retail Energy Supply Association (RESA) and the New York State Energy Marketers Coalition; several individual ESCOs; representatives of consumers including the Department of State's Utility Intervention Unit (UIU), Public Utility Law Project (PULP), AARP, and the City of New York (City) (collectively Consumer Advocates); and the Office of Temporary and Disability Assistance (OTDA). Collaborative participants identified, discussed and assessed various approaches to addressing the issues identified by the Commission. Additionally, for the purposes of this report, definitions are consistent with those in the UBP.

In discussing the energy-related value-added products of services which ESCOs may offer to APPs, collaborative participants recognize the responsibility of individual companies to comply with federal and State antitrust and lobbying laws. A statement summarizing these obligations was read and discussed at a collaborative meeting and is part of the formal record in this case.

## II. STATUTORY AND REGULATORY FRAMEWORK

During the collaborative meetings conducted in this matter, there has been extensive discussion about access to information about customers. Specifically, the collaborative

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<sup>3</sup> Id., pp. 7-8.

discussed whether third parties, such as ESCOs, can be provided with the financial status of APPs and disclosure of the identity of those customers participating in assistance programs, without customer consent.

Several parties including Consumer Advocates and Utilities assert that state and federal law provides the Commission no flexibility in resolving these issues. The ESCOs take the view that the Commission should further explore the possibility that a customer's APP status could be released from the utilities (who have this information) to ESCO without a customer's affirmative consent, with appropriate safeguards, for the limited purposes of implementing the Commission's February 6, 2015 Order.<sup>4</sup>

The New York State Codes, Rules and Regulations (NYCRR) provide that customer information shall be released to another person only pursuant to individual consent, pursuant to a Court Order or under narrow circumstances when there is an applicable legal exception to confidentiality provided for under statute and/or regulation. Public assistance information may be disclosed for a purpose directly connected with the administration of public assistance in accordance with a legal exception to confidentiality provided for under 18 NYCRR 357.2(a). Federal regulation defines administration of public assistance to include providing services to public assistance applicants and recipients.<sup>5</sup> However there are prohibitions regarding the re-disclosure of public assistance information and

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<sup>4</sup> ESCOs further assert that a precedent exists for such a limited release in the Commission's December 3, 2010 Order in Case 07-M-0548, Energy Efficiency Portfolio Standard, Order on Rehearing Granting Petition for Rehearing, (issued December 3, 2010), p. 19.

<sup>5</sup> 45 CFR §205.50.

limitation on its use when provided to a person or entity entitled to receive public assistance data, absent individual consent. Under the NYCRR, "the public welfare official providing such data is assured that: (1) the confidential character of the information will be maintained; (2) the information will be used for the purposes for which it is made available, such purposes to be reasonably related to the purposes of the public welfare program and the function of the inquiring agency; and (3) the information will not be used for commercial or political purposes." State and federal law and regulations also limit the disclosure or use of information obtained from APPs receiving food stamps. (See 18 NYCRR §387.2; 7 CFR §272.1(c); 7 U.S.C. § 2020(e)(8)).

Absent an applicable legal exception to confidentiality provided for by statute or regulation, informed consent, or a Court Order, Federal and State law appears to prohibit social services agencies and utilities from disclosing customer information for individuals that are receiving or have applied to receive public assistance. See 42 U.S.C. §§ 130d-130d-9; 42 CFR § 431.306; 45 CFR § 205.50(A); 45 CFR Parts 160, 162 and 164; New York State Social Services Law §§ 136, 367-b(4) and 369(4); and 18 NYCRR 357(a). It should be noted that there are no legal exceptions that would permit the disclosure of Supplemental Needs Assistance Program records (a qualifying social services program for New York City's low income program) for purposes of status verification. See 7 U.S.C. § 2020(e)(8); 7 CFR § 272.1(c); and 18 NYCRR 387.2(j). Further, New York Public Officers Law §§ 96 and 96-a prohibits governmental officials from disclosing any record or personal information, including customer social security numbers, without the

voluntary written consent of the subject or statutorily identified cause.

III. A MECHANISM BY WHICH ESCOS CAN VERIFY A CUSTOMER'S APP STATUS AT THE POINT OF SALE

As explained in the February 2015 Order, ESCOs must know whether a prospective customer is an APP in order to comply with these requirements, and must be able to confirm the customer's APP status when marketing to the customer. The Commission directed that the collaborative consider "available technologies and mechanisms" for ESCOs to confirm a prospective customer's APP status at the POS.<sup>6</sup>

The collaborative considered several options. Some parties proposed that utilities provide lists of APP and/or non-APP customers to ESCOs to facilitate ESCO identification of a potential customer's APP status, as is current practice in Massachusetts, Pennsylvania, and Delaware. The consensus of the collaborative is that providing non-utility parties access to lists or databases of customers' APP status would be contrary to Commission policy and federal and state privacy laws that the customer must provide authorization for their APP status to be shared with non-utility parties.<sup>7</sup>

Several parties requested exploration of an approach under which the state agency(ies) which manage the assistance programs that are prerequisites for participation in a utility low income assistance program would assist in creation of a database of participants which could be accessed by ESCOs. Staff investigated that option with OTDA, which supervises and

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<sup>6</sup> Id., p. 7.

<sup>7</sup> See February 2015 Order, p.7, footnote 8.

administers HEAP as well as other income-based assistance programs in New York State. OTDA's responsibilities include establishing procedures by which consumers apply for assistance and develop the content of the application(s), including the conditions to which applicants consent to sharing information regarding their low income status. OTDA advises that it would not be possible to create a database of HEAP participants which can be accessed by ESCOs, since many HEAP participants have not consented to sharing their low income status with ESCOs.<sup>8</sup> Further, modification of HEAP applications to enable applicants to provide such consent would not address this issue because the majority of HEAP recipients in New York are enrolled automatically in HEAP based on their participation in other assistance programs, including those not related to energy. OTDA also cautioned that it would be inappropriate for applicants for non-energy-related assistance programs to be asked to provide their consent to have personal information shared with vendors of energy services.

The collaborative also explored whether utilities could create a mechanism which ESCOs could use to verify the APP status of a prospective customer who has provided consent for the ESCO to do so. The utilities agreed that they could enable ESCOs to instantaneously obtain confirmation of a customer's participation in a utility low income assistance program in near real-time, provided: (1) utilities would be given adequate time to implement technological solutions, and (2) that all costs resulting from implementation efforts in this proceeding will be tracked and recovered. This can be done for some utilities by modifying existing systems used by ESCOs to obtain customer

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<sup>8</sup> HEAP participants have never been asked to provide consent but prospectively, this consent could be obtained through the ESCO contracting process or some, as yet, undetermined means.

information to add a field identifying the utility customer's low income status, or for others by developing new web-based or interactive voice response (IVR) systems to provide such information. The solution varies among the utilities, but all solutions provide the result that the Commission contemplated in the February 2015 Order: instantaneous and near real-time access to confirmation of a customer's participation in assistance programs. Since this information is currently available to utilities, it can be provided in a consistent manner and updated in a similar fashion as would be done in current utility systems.

The consensus of the collaborative is that the solutions identified by the utilities accomplish the Commission's directive and allows ESCOs to obtain a point-of-sale confirmation of whether a customer is participating in a utility assistance program. Furthermore, the methods detailed below either build off existing systems with which ESCOs are familiar interacting, or will provide new easy to access tools for ESCOs to obtain this information.

All of the utility proposals require that to have access to information indicating whether a customer is participating in a utility assistance program, the ESCO must enter a customer's account number after making an affirmative representation that the ESCO obtained the customer's consent to

obtain their low income status.<sup>9</sup> Collaborative participants discussed whether other information, such as the last four digits of the customer's social security number, could obviate the need for the ESCO to obtain and provide the customer's account number. Collaborative participants also discussed Commission policy<sup>10</sup> which now requires that the account number be presented before the utility provides access to sensitive customer-specific information. Several parties, including the utilities stated that this policy appropriately protects customer-specific information and should not be modified.

Consistent with the Uniform Business Practices Section 4(B) (2), the utilities' proposal is premised on their ability to presume that the ESCO obtained proper consent when accessing this information. For some utilities that would have to modify existing systems, the modification would provide ESCOs access to customer-information beyond whether the customer is an APP, such as usage information.

Below is a summary of each utility proposal. As emphasized above, all of the proposals require that ESCOs obtain customer consent prior to accessing this information, which the utilities believe is a vital customer protection. For each

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<sup>9</sup> Customers can locate their account number on their utility bill and provide it to an ESCO. Utilities have a number of ways to provide customers with copies of their bill and billing information in an expeditious manner. In addition, to assist customers in easily obtaining their account numbers to provide to ESCOs, some utilities have IVR systems which allow the customer to access account, upon provision of personal identification information, e.g. the last four digits of their social security number, to immediately obtain their account number.

<sup>10</sup> See, Case 98-M-1343, Accent Energy LLC, Order Denying Petition and Making Other Findings (issued November 7, 2006); see also, Uniform Business Practices, § 5, Appendix A, Attachments 1, 2, and 3.

utility proposal, the ESCO will get customer consent to verify APP status by expressed consent, a signed writing, third party verification (TPV), or by click-through for online purchases.

Consolidated Edison Company of New York Inc. (Con Edison), Orange & Rockland Utilities, Inc. (O&R), New York State Electric & Gas Corporation (NYSEG), Rochester Gas and Electric Corporation (RG&E), and Central Hudson Gas & Electric Corporation (Central Hudson) propose to modify existing systems that ESCOs currently have access to so that ESCOs can obtain an accurate and near real-time confirmation of whether a customer is presently participating in the Companies' assistance programs. These systems can be accessed through any remote internet connection, including smart phones and tablets after an ESCO enters its username and password. The indicator would look similar to the usage and billing history websites which currently display some or all of the following information: the county, municipality, sales tax rate, meter number, next scheduled read date, bill cycle, bill frequency, rate code, load zone, ICAP, load profile, usage factor and 24 months of usage for electric and gas. No credit information would be provided. Without performing a full detailed design and acquiring necessary program and test resources, Con Edison, O&R, NYSEG, RG&E, and Central Hudson estimate these services could be made available in three months and will cost approximately \$50,000 for each company.

National Fuel Gas Distribution Corporation (NFG) and National Grid propose to build a new secure website to display a customer's APP status.<sup>11</sup> The website will be instantaneously accessible on a 24/7 basis from any place with a remote internet

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<sup>11</sup> National Grid also proposes to develop an IVR system allowing ESCOs to obtain this information.

connection,<sup>12</sup> including smart phones and tablets, provided, however, that the City, UIU, PULP and AARP submit that no such facility shall be created that does not follow the National Institute for Standards and Technology's best practices. To access the customer's status for point-of-sale purposes, an ESCO would log in using a unique ID and password. With this new website, only a customer's assistance program information would be made available, not a full "customer contact information set" or a set of credit and payment history. Without performing a full detailed design and acquiring necessary program and test resources, NFG and National Grid estimates these services could be made available in three to six months, at an estimated cost of \$50,000 for NFG and \$250,000 for National Grid.

The Consumer Advocates identified several concerns with this proposal. They submit that acting on the presumption that the ESCO has obtained proper consent lends itself to the potential for customer abuses. Therefore, ESCOs should be required to provide proof of customer consent to disclose their APP status to the utility upon enrolling a customer for service. If no such evidence is presented by the ESCO, the customer's energy service should not be switched from the utility.

In response, Utilities noted that this proposal by Consumer Advocates is contrary to the way the retail markets currently operate in accordance with the UBPs, whereby the utilities are obliged to presume that an ESCO has obtained the appropriate consent of customers. The utilities oppose any paradigm where they would be responsible for obtaining, storing, evaluating or managing in any way customer consents. The

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<sup>12</sup> The ESCO would be responsible for providing its own internet access.

utilities believe that this type of policing of ESCOs (or other DER providers) is inappropriate.

The Consumer Advocates also expressed concern about the privacy implications of Con Edison's, O&R's, NYSEG's and RG&E's point of sale (POS) proposal, and oppose the transfer of such customer data. Consumer Advocates prefer the POS proposal advanced by NFG and National Grid, as the data provided is limited to whether the customer is an APP or not. The Consumer Advocates also submit that the costs associated with developing and maintaining a POS verification mechanism and database should not be borne by the utilities and collected from ratepayers. These costs should instead be funded by the ESCOs. Finally, the Consumer Advocated submit that if ESCOs were to be authorized by the PSC to receive such confidential data, it must be conditioned upon their agreeing to be subject to the privacy protection duty imposed upon utilities by § 65 of the public service law, and such cyber security orders of the FERC as may be applicable.

IV. ESCO POINT OF SALE REQUIREMENTS INCLUDING OBTAINING A CUSTOMER'S CONSENT TO VERIFY APP STATUS

The Collaborative discussed the processes and protocols that the ESCO would follow at the POS, including to obtain the consumer's authorization to verify the consumers' APP status. The Commission concluded that ESCOs must secure the potential customer's authorization before a utility can disclose the consumer's APP status to the ESCO.

Collaborative participants considered various options applicable to what might occur at the POS between the ESCO representative and the Customer. The following summarizes the positions discussed by the Collaborative. In some areas, the

viability of an option might depend on the interpretation of a particular term or phrase that appears in the sections of the UBPs that apply to ESCO sales. These instances are noted and discussed below.

A. Door-to-Door, Face-to-Face and Telemarketing (outbound or inbound) sales

The options for door-to-door, face-to-face, and telemarketing sales depend to some extent on whether an ESCO has any available offers that meet one of the two criteria for sales to APPs, as established in the Commission's February 5, 2015 Order: "The ESCO must guarantee that the customer will pay no more, on an annual basis, than the customer would have paid as a full service customer of the utility, or the ESCO must provide Assistance Program Participants with energy-related value-added products or services."<sup>13</sup> ESCOs with at least one offer that complies with one or both of these criteria would have the following POS options available.

Option 1A

The ESCO representative may ask the customer about his or her APP status and obtain the customer's consent to verify APP status, at the outset or during the early part of a sales visit or call, and confirm the customer's status at the premises or on the call through remote query of the utility database. The ESCO representative may proceed with the sales process for appropriate products based on the result of the query.

Option 1B

The ESCO representative may ask the customer his or her APP status and obtain the customer's consent to verify APP status, at the outset or during the early part of a sales visit

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<sup>13</sup> February 2015 Order at p. 6.

or call, and then confirm the customer's status at the time of enrollment. The enrollment would proceed if the customer's stated APP status matched the status in the utility database. If the stated APP status did not match the one contained in the utility database, the ESCO could either (i) cancel the enrollment, or (ii) contact the customer with an appropriate offer based on the customer's APP status, and modify the enrollment if the customer agreed to the product offered.<sup>14</sup>

As noted in the February 2015 Order, "ESCOs have no obligation to serve any customer," so ESCOs without offers that meet either criterion for serving APP customers would still be allowed to participate in the market. ESCOs without compliant offers would have to be prepared, however, to screen out APP customers during the sales process so that the possibility of an APP customer being served on a non-compliant plan would be minimized. The Collaborative identified the following options for ESCOs without an APP-compliant offer.

Option 2A

The ESCO representative would ask the customer his or her APP status and obtain the customer's consent to verify APP status, at the outset or during the early part of the sales visit or call, and confirm the customer's status at the premises or on the call through remote query of the utility database. The sales process would continue if the customer is shown by the database not to be an APP customer. The sales process would be

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<sup>14</sup> If a customer who was not, in fact, an APP customer identified his or herself as an APP customer at the outset of a sales call and had agreed to purchase an APP-compliant product, upon discovering that the customer was not an APP customer upon querying the database, the ESCO would also have the option of allowing the enrollment to continue, as the Order contains no prohibition against non-APP customers being offered or served on APP-compliant products or service plans.

discontinued if the customer is shown by the database to be an APP customer.

Option 2B

The ESCO representative would ask the customer his or her APP status at the outset or during the early part of the sales visit or call, and then rely on the customer's representation of his or her APP status without querying the utility database. If the customer states that he or she is an APP customer, the sales process would be discontinued. If the customer states that he or she is not an APP customer, the sales process would proceed. If the customer purchases the non-APP compliant product offered, the customer's consent for the ESCO to verify APP status would be obtained through the TPV and APP status would be confirmed upon enrollment. If the customer mistakenly identified his or herself as non-APP, the enrollment would be canceled.

It was discussed among Collaborative participants that these two options would potentially comply with the Commission's Order. Two other options were discussed at the Collaborative meetings, and their viability would depend on the Commission's interpretation of its February 2015 Order. At page 7 of the Order, the Commission stated that "ESCOs, upon marketing to a customer, must ask the customer if he or she is enrolled in a utility administered low income discount program or HEAP."

(Emphasis added). Because the marketing process involves several steps, other options may be available to ESCOs without compliant offers depending on whether the Commission would allow the ESCO representative to ask the customer about his or her APP status during later steps in the process rather than at the beginning. The goal of these options, as expressed by several ESCO participants in the Collaborative, would be to avoid, if

possible, a discussion about a customer's APP status at the beginning of the sales call where the ESCO would not be making any APP-compliant offers and had reason to believe that the prospective customer was not enrolled in a utility administered assistance program or HEAP. However, the utilities supported an approach that would require the ESCO to obtain consent at the onset of the sales contact.

Option 3

The ESCO proceeds on the assumption (based on geographical or other publicly available data) that the customer is not an APP customer. If the customer purchases a product, the ESCO would obtain the customer's consent during the TPV call for the ESCO to inquire about the customer's APP status, and confirm the customer's APP status either in real-time or upon enrollment. If the prospective customer is, in fact, an APP customer, the sale would be canceled. This approach assumes that asking the customer his or her APP status at the TPV stage satisfies the February 2015 Order's directive to ESCOs to ask customers about their APP status "upon marketing to a customer."

Option 4<sup>15</sup>

The ESCO proceeds on the assumption (based on geographical or other publicly available data) that the customer is not an APP customer. The ESCO would obtain the customer's consent to verify his or her APP status, through the TPV. If the customer purchases a product, the ESCO would confirm the customer's APP status upon enrollment (rather than during the TPV process). If the customer proved to be an APP customer, the

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<sup>15</sup> There was no consensus among Collaborative participants that this option would comply with the Commission's February 2015 Order due to the requirement that the ESCO must ask the customer about their APP status at the point of sale.

enrollment would be canceled. This approach assumes that the combination of standard terms of service representing that the customer is non-APP and giving the ESCO permission to discover the customer's APP status (which would be allowed by the terms and conditions presented to the customer at the POS satisfies the February 2015 Order's direction to ESCOs to ask customers about their APP status "upon marketing to a customer."

B. Electronic, Internet, and On-Line Sales

There was general consensus among the Collaborative participants that these processes should be more uniform without limiting the ability to protect consumer privacy, assuming the ability to link from an ESCO's on-line process to the utility's APP database and to run a query in real-time. The utilities indicated that this may be possible. If it is not possible to link the ESCO's on-line process to the utility's APP database then the ESCO is still required to manually verify the customer's APP status. Regardless of whether an ESCO has an APP compliant offer or not, the ESCO would, at some point in the on-line process, ask the customer for his or her APP status and permission to confirm that status through the utility database. There was a consensus among the ESCOs with APP compliant offers that confirmation of an APP's status should come early in the sales process in order to direct the appropriate offers to the customer. ESCOs without APP compliant offers might want to put the confirmation later in the sales process, if the ESCO believed that it would be an unnecessary distraction at the outset of the on-line process.

The Consumer Advocates submit that the confirmation of an APP's status should come as early as possible in the online process regardless of whether an ESCO has an APP compliant

product or not. It would not be in the customer's interest to spend time going through the sales process if there is ultimately no benefit available to them.

Because on-line customers might be more willing to disclose their APP status (as opposed to a customer opening the door to or answering a telephone call from a stranger asking about the customer's income status), ESCOs would almost certainly prefer to confirm the customer's APP status during the on-line process rather than waiting until the enrollment process. However, it is possible that some ESCOs might prefer only to ask the customer to state his or her APP status during the on-line process (based, perhaps, on the belief that the time to query the utility database will cause an unacceptably high number of customers to abandon the on-line process), and then confirm that status on enrollment (having received the customer's consent to check the APP status either during the TPV or at some other stage of the process). This work stream would resolve to the equivalent of the options discussed above (Options 1B and 2B), in which the ESCO would take some action after discovering the customer's APP status upon enrollment.

C. Consent to Discover APP status

There was some discussion at the Collaborative meetings about how ESCO representatives should handle the scenario in which a customer declined to give consent to allow the ESCO to discover his or her APP status. In instances in which the customer declines to provide such consent in the TPV process, the requirements for a sale have not been completed and the customer cannot be enrolled.

V. CUSTOMER CONSENT TO VERIFY APP STATUS GOING FORWARD

ESCOs do not, in general, currently have consent to obtain the APP status of their own customers. As a result, they are unable to identify which of their customers must be offered a compliant product if they are to be served by the ESCO. The Collaborative discussed whether, on a going forward basis, ESCOs could obtain consent from their customers to obtain the customer's APP status, and concluded that ESCO contracts should be modified on a going forward basis so that signatories provide such consent. With this information, ESCOs can more readily communicate directly with their APP customers to inform them of qualified products.

The Collaborative discussed modifying ESCO residential contracts, including renewals, within 90 days of the effective date of a prospective Commission Order, to include a clause stating that by enrolling, the customer agrees that the ESCO may obtain the customer's APP status from the utility. In addition, as of that date, TPV scripts must be modified to include a customer's APP status in the list of information that the customer is authorizing be released by the utility to the ESCO. This proposal was generally supported by a majority of collaborative members.

The Consumer Advocates do not consider the modification of contracts so that signatories agree to the release of their APP status to be informed consent. They assert that customers, particularly APP customers, often times do not fully read and/or comprehend ESCO contracts because such documents have the tendency to be long, contain complex language, and prove difficult for customers to read due to the small font. To address this concern, Consumer Advocates propose that, similar in form to the seller disclosure form in real

estate transactions, ESCOs should be required to have customers sign a separate form providing consent to discover APP status of no smaller than 14-point type, written in plain English. The ESCO shall disclose the following in such a form: (1) that the customer will be revealing their APP status; (2) that the ESCO will not use such information for any purpose other than this enrollment process; and (3) the ESCO will not disclose or sell such customer data to any third party. BlueRock offers its contract as exemplary of the qualities that Consumer Advocates have identified.

VI. PROTECTIONS FOR EXISTING APP CUSTOMERS OF ESCOS AND ESCO CUSTOMERS WHO BECOME APPS

The Commission recognized that additional consideration is required regarding how these new protections should be provided to existing APP customers of ESCOs and to ESCO customers who become APPs. It directed that the collaborative consider how to best protect these customers.<sup>16</sup>

Collaborative participants devoted considerable resources to address these issues. Some Collaborative participants support a solution that is consistent with existing contracts between ESCOs and their customers. Accordingly, most Collaborative participants recommend that information be provided to APP customers of ESCOs to inform them of their new protections and allow them to make an informed decision consistent with their contract.

APP customers of ESCOs in the midst of a contract including early termination fees, may elect to exit that contract and pay the early termination fee, or may choose to remain with that ESCO until the contract expires.

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<sup>16</sup> February 2015 Order, p. 8.

Alternatively, the Consumer Advocates submit that an APP customer already in a non-compliant contract should not be required to pay an early termination fee for ending the contract early due to the Commission's February 2015 Order.

Collaborative participants spent considerable effort considering how to ensure that the communications to APP customers of ESCOs regarding their new protections are effective and efficient. An important constraint is that the vast majority of ESCO customers have not provided consent to have their APP status shared with their ESCO. As explained above, the Collaborative discussed the possibility that ESCO contracts be changed going forward, so that ESCO customers provide consent for having their APP status provided to the ESCO, as part of enrolling in ESCO service.

Currently, however, the utility, and not the ESCO, has information regarding individual ESCO customers' APP status. Communications by entities other than distribution utilities designed to inform APP customers of ESCOs of their new protections, will be less targeted, and less efficient, than if conducted by distribution utilities. The Collaborative identified two options to provide information to existing APP customers of ESCOs as well as ESCO customers who become APPs.

A. Information to Inform APPs of New Protections

Most Collaborative participants concluded that a wide range of informational efforts should be undertaken to inform ESCO APP customers of their new protections. These informational efforts include one direct communication with APP customers of ESCOs serving APP customers, as well as outreach by ESCOs, DPS, and representatives of consumers including those participating in the Collaborative.

Utilities offered to fund and send one letter, or other form of efficient communication, to APP customers of ESCOs. That communication would explain that new protections are available that may benefit the APP ESCO customer, and that the customer should contact their ESCO for more information. The draft letter would be subject to review and comment by interested parties, further review by the utility,<sup>17</sup> and approval by Staff. It would be sent within 30-60 days of the effective date of the Commission Order. The collaborative also discussed a second direct communication with APP customers of ESCOs. A consensus was not reached on the need for, or funding of, this communication.

The Consumer Advocates submit that it is the ESCO's responsibility to alert its customer base to the policy changes in the retail marketplace that have resulted from the Commission's February 2015 Order, and how such changes will impact customers. Consumer Advocates assert that ESCOs should be required to distribute and fund a letter annually to customers alerting them to the ESCO's responsibility to APP customers, and the products and services they are required to provide if enrolling an APP customer for service. Additionally, Staff should consider amending the New York ESCO Consumer Bill of Rights to include a provision that addresses APP customers. If, in the end, the utilities are tasked with sending such a letter on ESCOs' behalf, the Consumer Advocates submit that the cost of such a letter and its mailing should be borne by the ESCOs and their shareholders, not the Utilities and ratepayers.

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<sup>17</sup> Since the Utility is sending the letter, it should retain editorial review to ensure that the final version is consistent with the manner in which the utility administers its programs and other utility outreach communications.

ESCOs counter that it is not possible for ESCOs to send a letter to APP customers, because the assistance benefits eligibility status of those customers is unknown to ESCOs. BlueRock only agrees with this suggestion if ESCOs are provided with the APP status of their existing customers, in addition to their new APP customers, whom, should one of these proposals be implemented, will have already disclosed their status to the ESCO. If the ESCO is going to create qualifying plans for APPs, and educate the public to those plans, they should know who they are marketing to, as that would be most efficient and effective. Additionally, BlueRock believes that amending the New York ESCO Consumer Bill of Rights to include a provision that addresses APP customers this is a simple and easy-to-implement way to inform the public, in a way that is easily accessible and understood, and supports that suggestion.

Some ESCOs indicated their willingness and intent to inform their customers of these new protections. Staff offered to include information about new protections for APP customers of ESCOs, in its statewide outreach and education program. It also offered to develop and distribute such information to its network of low income representatives associated with the Low Income Forum on Energy, a joint initiative of Staff and NYSEERDA. Some representatives of low income consumers participating in the Collaborative also offered to distribute such information through their networks, others did not. Communications by each of these entities would inform customers of new protections for APP customers of ESCOs and encourage those customers to contact their ESCO for further information. Customers of Central Hudson, NFG and O&R currently receive a communication from the utility confirming that the customer has been enrolled in a utility assistance program. Utilities that provide such a

communication can include in that communication information related to these new protections for ESCO customers that become APPs. Other utilities can choose to notify the customer via a separate mailing or a bill message. Similar to the discussion above, the communication would direct the APP to reach out to their ESCO for further information.

Customers who become APPs after enrolling with an ESCO should also be advised of their protections concerning ESCO service as soon as is practical, and provided information to assist them in making an informed decision. The collaborative concluded that it is most efficient to rely on utilities to provide this information, until the majority of ESCO customers have provided the ESCO consent to obtain their APP status. Utility records identify whether a customer obtains commodity from an ESCO and, if the recommendations of this collaborative are adopted would also identify whether the customer has provided consent to have their low income status shared with the ESCO. Under this option, utilities would advise ESCO customers whose APP status has changed, of their new protections and options, as applicable, annually within 30 days of the close of the HEAP session, and advise those customers to contact their ESCO for more information.

B. Provide Customers' APP Status to ESCOs

An alternative considered by the Collaborative is for the Commission to direct utilities to provide each ESCO with the APP status of its customers. This information would be provided on a one-time basis for all ESCO customers, and annually thereafter within 30 days of the close of the HEAP season, to reflect changes in ESCO customers' APP status.

Within 15 days of receipt of this information, ESCOs would send one letter, or other form of efficient communication, to their APP customers regarding these new protections. The information included in those communications would be tailored to be directly applicable to the customer, including a list of compliant products that the ESCO offers (if any), information about how those products may meet the customer's needs, as well as other specific options available to the customer. The communication would encourage consumers to contact the ESCO for further information. The draft letter to be used as a template would be developed by ESCOs, subject to review and comment by interested parties and approval by Staff.

Proponents of this approach believe that sharing a customer's low income status with their ESCO would lead to more effective and efficient communications, thereby increasing the likelihood that the low income ESCO customer obtains the benefits which the Commission contemplates, in an expedited manner. This option would require a Commission finding that it is in the public interest to provide customers' low-income status to their ESCO, even though customers have not provided their consent to do so.

Similarly, under this option, utilities would provide individual ESCOs with information identifying changes in the APP status of their customers annually, within 30 days of the close of the HEAP season. Within 15 days of receipt of this information, ESCOs would communicate directly with customers now eligible for new protections as described above, as well with customers no longer eligible to obtain qualified APP products. These communications would encourage consumers to contact their ESCO for further information.

BlueRock believes this is the most efficient and effective method of implementing the notification and adoption of an ESCO APP program. This type of disclosure should be limited to qualified and participating ESCOs. In the case of a competitive RFP bid, the winning ESCO will already by definition have agreed to participation and articulated an APP plan or plans.<sup>18</sup>

The Consumer Advocates strongly oppose the entirety of the proposal set forth in this section B, as they believe it is contrary to State and Federal privacy laws. According to Consumer Advocates, permitting the utilities to annually provide a list of APP customers to ESCOs undercuts the statutory and regulatory requirements surrounding customer consent and confidentiality. They assert that no such exception for the release of confidential information was contemplated by the Commission's February 2015 Order and should not be allowed.

Additionally, the Utilities strongly oppose these proposals and believe that, consistent with Commission policy and the UBPs, no customer-specific information should be shared with ESCOs without affirmative customer consent.

C. Actions to be Taken By ESCOs

Under both options above, APP customers of ESCOs would be provided information regarding their new protections and advised to contact their ESCO for more information. When contacted by a customer regarding these new protections, ESCOs would be required to:

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<sup>18</sup> BlueRock also recommends that the Commission consider threshold eligibility criteria in Case 15-M-0127, which would allow ESCOs meeting specified requirements to obtain information regarding a customers' low income status, pursuant to the exception identified in 18 NYCRR §357.2(a).

(1) Record that the customer is an APP and has contacted the ESCO to obtain more information about this issue. The ESCO must at that time, obtain customer consent to verify the customer's low income status with the utility and perform the verification.

(2) On an on-going basis for that customer, including enrollment in a new contract, contract renewals and the next month of a month-to-month contract, the ESCO may only provide qualified products to that customer. ESCOs choosing not to offer qualified products shall advise the customer that they can no longer serve the customer, the customer can obtain a list of qualified products from the DPS website, and the customer will be automatically enrolled with the utility if it does not chose one of those qualified products within 30 days.

(3) For customers with more than 30 days left in the term of their contract, the ESCO shall advise the customer of their new opportunities and protections, and explain the early termination fee which would be applicable, if any, including consideration of a "change in circumstances" contract provision, if any. For APP customers choosing to continue to purchase a non-qualified product, or any customer that the ESCO has found to be an APP after verification with the utility, the ESCO cannot enroll the customer in a new contract for a non-qualified product, or renew the existing contract.

D. EDI Considerations

Initially, EDI changes were ordered to assist ESCOs in determining whether prospective customers are assistance program participants. While POS confirmation has been proposed to address prospective customers, a customer's APP status may change after the ESCO enrolls and serves the customer. If such

a customer no longer qualifies for an assistance program, the ESCO would no longer be required to offer a compliant product. Discussions during the July 23, 2015 Collaborative meeting touched upon the potential use of EDI by ESCOs to monitor its APP status.

Privacy concerns focused on whether the ESCO has the customer's authorization to request or receive information related to the customer's assistance program participation impacts whether EDI is an appropriate means to communicate such information. While the EDI changes might be straightforward, the system infrastructure and development costs to implement an EDI transaction that provides adequate information while protecting customer privacy and managing access could be substantial.

It is possible that a non-EDI solution may be more cost effective or potentially useful on an interim basis. For example, ESCOs could use the POS mechanisms discussed earlier to obtain changes in customer APP status, i.e. to determine their customer no longer required service with low-income protections. Customer consent obtained by an ESCO should last for the duration of the contract term thereby allowing the ESCO to query the database on more than one occasion.

E. Reporting Requirements

Collaborative participants discussed that it may take some time before all APP customers of ESCOs become aware of their new protections and contact their ESCO to enroll in compliant products. Monitoring the transition process and reporting will assist in identifying best practices which could be shared with other ESCOs. It could also identify issues requiring further exploration.

The consensus of the collaborative is that six and twelve months after the Commission's Order, and annually thereafter, each ESCO shall file a report to the Commission identifying the number of APPs, the number of APPs enrolled in products which guarantee savings in comparison with the utility, and the number of APPs enrolled in other qualified products.

VII. PROPOSAL OF THE CONSUMER ADVOCATES TO EXTEND THE RATE PROTECTION OF LOW-INCOME CUSTOMERS TO ALL RESIDENTIAL ESCO CUSTOMERS

The City, UIU, PULP and AARP note that the complex processes under consideration, the difficulties in identifying all APPs, and the costs and risks attendant to providing ESCOs with customer data regarding APP status could be avoided if the Commission extended the rate protection of low-income customers to all residential ESCO customers. In addition, because, as the Commission has noted, the residential retail market is not workably competitive and prices are not just and reasonable, rate protection for all residential customers is needed.<sup>19</sup>

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<sup>19</sup> The state of Connecticut has determined such rate protections to be warranted. Connecticut Public Act 15-90, An Act Concerning Variable Electric Rates, expressly prohibits electric suppliers from entering into a contract for variable rates - rates that change each month - on or after October 1, 2015 and prohibits suppliers from renewing customers into variable rates on or after October 1, 2015. The Connecticut Public Utilities Regulatory Authority issued a ruling on September 30, 2015 in Docket No. 15-06-15, PURA Variable Electric Rate Study, which states that the rules governing variable electric generation service rates for residential customers in Connecticut are about to change to reflect the new law. See State of Connecticut News Release: PURA INTERIM DECISION CONFIRMS LEGISLATIVE BAN ON VARIABLE RATES, Consumer Counsel Elin Swanson Katz (Sept. 30, 2015).

The Consumer Advocates assert that the Commission has already taken similar action in its submetering regulations, to limit charges when landlords sell electricity to tenants. The Commission adopted an official rule that bars charges in excess of those charged by the utility, by establishing a rate cap, or maximum rate, which may be charged to a submetered resident for electric service. The rate cap applies to all residential tenants, not just those who are low-income. The rules and regulations are detailed in 16 NYCRR Part 96.1(i). Further, if the submeterer does not comply with the Commission's rules, the rate cap may be lowered by the PSC.<sup>20</sup> Consumer Advocates believe that the same could be done here, to discipline ESCOs who violate standards. Consumer Advocates assert that its proposal is also more consistent with PSL § 75, which bars actions to collect any charges for electric or gas service which exceed the charges expressly approved by order of the Commission (which is the utility rate approved in a rate case).

Consumer Advocates believe that extending the ESCO low income customer protections in this Collaborative Report to all residential customers also supports the Commission's objectives in the ESCO Eligibility Proceeding.<sup>21</sup> In that proceeding, Staff issued a proposal to amend the UBP to make ESCO eligibility criteria more stringent to provide better protections to all customers and improve the marketplace. While APP customers are a vulnerable population, the Commission's February 2014 Order<sup>22</sup>

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<sup>20</sup> 16 NYCRR Part 96.2(a)(2).

<sup>21</sup> Case 15-M-0127, Eligibility Criteria for Energy Services Companies.

<sup>22</sup> Case 12-M-0476, et al., Order Taking Actions to Improve The Residential And Small Nonresidential Retail Access Markets (issued February 24, 2014).

held that the ESCO marketplace was not workably competitive for all residential customers, not just APP customers.

RESA opposes the proposal of the Consumer Advocates to extend the low-income unique provisions to all residential customers. RESA believes that this proposal goes beyond the scope of this phase of Case 12-M-0476 which was limited entirely to developing the standards applicable only to low-income customers. It asserts that the appropriate standards for residential customers has previously been examined and resolved in other phases of Case 12-M-0476,<sup>23</sup> and to interpose this position in this context is inappropriate.

RESA also believes that Consumer Advocates' analogy with sub-metering is in error. In the case of sub-metering the situation involves a landlord -tenant relationship where the landlord is providing service associated with the rental of the premises and is essentially bundling the commodity with the rental arrangement. RESA believes that this is not similar to the retail sale of commodity in the competitive market. In addition, RESA also opposes Consumer Advocates' view that that its proposal would be consistent with the Commission's deliberations in Case 15-M-0127, as in that proceeding the Commission is set to determine the eligibility and operating requirements for ESCOs which are issues unrelated to extending low-income standards to all customers.

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<sup>23</sup> See Cases 12-M-0476, et al., Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State (issued October 19, 2012) and Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets (issued February 25, 2014); see also Case 12-M-0476, Notice of Collaborative (issued March 17, 2014) and Order Granting and Denying Petitions for Rehearing In Part (issued February 6, 2015).

BlueRock believes that Consumer Advocates' proposal is outside the scope of this proceeding and includes certain inaccuracies and unsupported assertions. It also believes that Consumer Advocates' proposal is problematic in that it fails to articulate what those protections would be and how such expansion would resolve the challenges of the Collaborative's objective to better serve APP customers of ESCOs. BlueRock asserts that it and the Collaborative could benefit from specific comments on this topic as to how the market is unworkable as applied to low income or APP customers, as that could serve as an indicator how to address the Commission's concerns pertaining to this specific topic. BlueRock also notes that Consumer Advocates fail to explain how Connecticut's action to ban variable pricing for fixed pricing translates to a protection for APPs here in New York. BlueRock also agrees with RESA's statement that the claim of consistency with Case 15-M-0127 is in error.

VIII. PROTECTIONS FOR LOW INCOME ESCO CUSTOMERS DRAFT COLLABORATIVE REPORT: COMPLIANT PRODUCTS

The Commission directed that when an ESCO serves a participant in a utility low income assistant program (Assistance Program Participant or APP), it must satisfy one of two conditions. First, the ESCO must guarantee that the customer will pay no more than the customer would have paid as a customer of the utility. Alternatively, the ESCO must provide the APP with energy-related value-added products or services, including fixed-price products, in a manner that does not dilute the effectiveness of the financial assistance programs. The Commission directed Staff to lead a collaborative to, among other things, identify the energy-related value added products

or services which satisfy the Commission's criteria and may be provided by ESCOs to APPs.

A. Products with Price Guarantee Relative to the Utility Price

The consensus of the collaborative is that few, if any, ESCOs intend to offer a product which guarantees that the customer will pay no more than would have been paid had energy been purchased from the utility. ESCOs cited several reasons for this result, including the practical difficulties of providing a price guarantee while commodity prices offered by the utility are unknown in advance and are subject to out-of-period adjustments, the desire for ESCOs to recover marketing and other costs that utilities do not incur, and the utilities' ability to purchase energy in volumes that many ESCOs cannot.

In compliance with the Commission's Order, mechanisms have been established so that ESCOs wishing to offer such products to APPs, can do so. By December 2015, changes must be made to the EDI protocols to accommodate bill credits that ESCOs serving customers subject to the price guarantee, may be required to provide.

B. Products with Energy-Related Value Added Attributes

The collaborative discussed, at length, the Commission's directive that ESCOs may provide APPs with energy-related value-added products or services (ERVAS), including fixed-price products, in a manner that does not dilute the effectiveness of the financial assistance programs. The ESCOs identified certain products now offered by some ESCOs to residential customers which have the potential to meet that criteria: fixed-price products, products including home energy

management attributes such as advanced thermostats, and products including maintenance and/or repair of home energy-intensive equipment such as furnaces. At this time, many ESCOs now offer fixed-price products to residential customers including APPs, and a small number of ESCOs offer other products which potentially satisfy the Commission's requirements.

The collaborative discussed which fixed-price products would not dilute the effectiveness of the financial assistance programs received by APPs. Some of the Collaborative participants believe that fixed-price products provide customers with protection from price volatility and may be valuable in household budgeting. They assert that the ability to lock the price of their energy supply is of particular value to APPs, as this segment of the population is least well equipped to deal with the types of price spikes that substantial wholesale market swings can sometimes create. They note that APPs who elected to purchase Fixed Price products from ESCOs, for example, were protected from 30-40% Default Service price increases during the Winter 2013-14 Polar Vortex.

The Consumer Advocates submit that any value-added service needs to guarantee APP customers either a lower bill or a reduction in energy usage. They believe that a fixed-price product that charges the APP customer more than the utility rate does not provide value to customers and does not satisfy the Commission's February 2015 Order.<sup>24</sup> Consumer Advocates believe

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<sup>24</sup> The Consumer Advocates are also concerned that a fixed price product would mask real-time price signals, which the Commission has said is critical in achieving the State's greenhouse gas reduction goals. Endorsement of fixed-price products as having value to low-income residential consumers appears to the Consumer Advocates as contrary to one of the foundational objectives of REV, namely, to encourage customer engagement by providing consumers with real time data about

that if a customer is interested in receiving a more consistent monthly bill, then that customer could simply enroll in the utility's budget billing program which does not charge the customer a premium adder for the fixed monthly price, and also provides the customer with the utility's lower rate.

Collaborative participants discussed the Commission's Order which states that energy-related value-added products for APPs must be structured so that they do not dilute the effectiveness of the financial assistance programs. Approaches to define which fixed-price products meet this criteria were considered in several in-person meetings of the entire collaborative as well as in conference calls and meetings with subgroups of collaborative participants.

The collaborative considered an approach which would require an after-the-fact evaluation of the price the APP paid for the fixed-price product in comparison to what the customer would have paid had energy been purchased from the utility. It was discussed at the collaborative that such an approach is impractical, since participating ESCOs would be obliged to provide a fixed price product with a price guarantee in comparison with prices that are unknown and unknowable at the time the fixed price is established.

The collaborative also considered an approach in which an upper limit on the price at which fixed-price products could be sold to APPs would be established based on prices actually paid by residential customers for such products in a recent time period. The consensus of many Collaborative participants is that this approach does not adequately reflect current market

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the cost of electricity to encourage them to displace use of energy-intensive activities from periods of higher-cost energy to periods of lower-cost energy.

factors, and thus may lead to an upper limit on price which is not in alignment with market realities.

The collaborative discussed and considered two approaches discussed below that are presented to the Commission as options for its consideration. The first approach was primarily developed by Staff to address interests of some Collaborative participants, and the second approach was developed by a group of ESCOs. The first approach would establish fixed prices which could be offered to APPs based on a forward-looking "reference price" calculated based on publicly available information. A list of sources for such information is attached as Appendix A. Additional pre-approved ERVAS could be offered to APPs at prices that, for fixed price products, do not exceed a specified adder in addition to the "reference price," and that, for variable priced products, do not exceed a specified adder in addition to the utility price measured over a twelve-month period. The second approach would establish a competitive bidding process to determine the fixed price as well as the suite of other ERVAS which ESCOs may provide to APPs.

Collaborative participants recognize that both of these proposals include elements which are complex and raise questions which require further exploration.

1. Identification of Compliant Products Through a Forward-Looking Fixed Price "Reference Price" With a List of Other Commission-Approved Value-Added Products

This approach would establish an upper limit on fixed prices that may be provided to APPs, known as a reference price, based on a forward-looking methodology reflecting market prices and other factors. It would also establish a list of other Commission-approved ERVAS that may be offered to APPs.

- i. Fixed Price Products

The collaborative considered development of a methodology which could reasonably and practically be implemented to establish a reference price for a one-year fixed price product, with the reference price reset on the first of each month and the price available to consumers throughout the month. The methodology for electricity, detailed below, is based in part on information provided by the utilities in New York State, at the request of Staff.<sup>25</sup> The same conceptual methodology could be used for natural gas fixed price products.

The reference price may be established based on forward prices for energy and capacity and other related costs ("all-in" price). Historical data may be used to adjust the forward price for liquid trading zones to prices for all non-liquid NYISO Zones (basis) as well as to determine the Ancillary Service costs as a percentage of forward energy prices. In addition, a premium could be added to the "all-in" price to reflect the additional risks the market participant will assume. The sum of the "all-in" price and total risk premium is referred to as the reference price. It could be calculated by zone, made available on the Public Service Commission web site, and updated on a monthly basis. All ESCOs would be able to sell one-year fixed price products to APPs at or below this reference price. Some of the risk factors that could be considered in developing this methodology include the following:

- Volumetric Risk. Entities offering a fixed price may hedge or procure supply for a fixed price at a fixed volume that

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<sup>25</sup> Although this methodology is based in part on input from the Utilities, the Utilities are neither proposing nor supporting the use of this methodology, or any other methodology, to evaluate a reference price to be used to determine prices which ESCOs can charge to APPs. Nor are the Utilities proposing or supporting the use of any fixed price as a reference price for this purpose.

may not reflect actual participation. The premium for this type of risk may be developed using a Swing Option model. Alternatively, a broker may be contacted to price a strategy to mitigate the volumetric risk.

- Holding Period Risk. Forward prices are dynamic and change frequently. There is a risk associated with holding a price fixed for any length of time, and the risk increases as the duration of the open time period increases. Quantifying such a premium may require historical pricing data, which is typically publicly available.
- Credit Risk. Entities offering a fixed price may be subject to credit risk, which includes the cost of doing business, including the cost of securing capital for transactions to support offering a fixed price.

These risks are not meant to be all inclusive. There may be other premiums that market participants want to add to fairly price a fixed price option. The total risk premium would be revisited on an as needed basis, following, for example, an unusual movement in forward prices.

ii. Other ERVAS

As a starting point to identify other ERVAS which may be offered by ESCOs to APPs consistent with the Commission's Order, DPS Staff reviewed value-added products currently being provided by ESCOs to residential customers. In addition to fixed price products, several categories of products now offered to residential customers appear to have the potential to meet the Commission's criteria of not diluting the effectiveness of the financial assistance programs: energy commodity bundled with home energy management attributes such as advanced thermostats, or energy commodity bundled with maintenance and/or repair of

home energy-intensive equipment such as furnaces. In addition, ESCOs may offer additional products in the future which have the potential to meet the Commission's criteria, such as energy commodity bundled with a comprehensive energy audit which provides information on steps that can be taken to reduce energy consumption. Based on a review of typical marketplace pricing, an example price for these value-added services might be \$250 over a one-year period.

Conceptually, the product price, in this case \$250, would be amortized over a one-year period by ESCOs bundling this ERVAS with commodity, so that APPs would pay this amount over time. ESCOs bundling these ERVAS with a variable priced commodity product would be required to guarantee that the customer pays no more over the course of the year, than what would have been paid to the utility plus the representative price of the value-added product. ESCOs bundling this ERVAS with a fixed rate commodity product would be required to charge no more than the fixed reference price for commodity, plus the representative price of the ERVAS. ESCOs bundling these ERVAS with a variable priced commodity product would be required to guarantee that the customer pays no more over the course of the year, than what would have been paid to the utility plus the representative price of the value-added product.

For products with annual recurring cost such as equipment repair and maintenance, an ESCO providing a variable price commodity service with a value-added product above (or as separately approved by the Commission), could offer the bundled product to APPs with a guarantee that over a twelve-month period, the customer would pay no more than would have been paid to the utility plus the annual representative price of the value-added product, in this case, \$250. For all products, both

service related as well as those with a one-time cost such as an advanced thermostat, an "adder," on a per-kWh or per-therm basis may be charged by ESCOs in addition to the variable or fixed reference price, whichever is the case.

The Collaborative discussed the methodology identified in Appendix B, which is intended as a fair and transparent way to establish a per-kWh or per-therm adder for these products, based on the representative price of the value-added element, an annual interest rate of 6%, contract duration determined by the ESCO, and historical usage of the customer. This approach would both protect APP customers, and ensure that ESCOs offering ERVAS to APP customers are able to recover the representative price of those products over the term of the contract.

The adder could be calculated based on the customers' usage during the preceding twelve months. Basing the adder on customer-specific usage, instead of average usage for residential customers as a class, while somewhat more complex, protects both APP customers and ESCOs since it avoids the inter-customer subsidies that would otherwise occur. For example, customers whose usage is above the average would be paying too much for that asset or service; customers whose usage is below the average would be paying too little for the asset or service therefore creating uneconomic cross subsidies between customers. However, ESCOs point out that such an approach would likely not be workable as unlike in the C&I realm, suppliers do not typically obtain or analyze individual residential customers' usage.

As an illustration, an advanced thermostat with a representative price of \$250, would result in an adder of 3.68 cents per kWh for a one-year fixed price contract, for a customer consuming an average of 600 kWh monthly. The table

below identifies the \$ per kWh adder for a one-year contract period, which would be applicable for ERVAS with various representative prices, based on a customer's average monthly usage.

	300 kWh	350 kWh	400 kWh	450 kWh	500 kWh	550 kWh	600 kWh	650 kWh	700 kWh	750 kWh
\$ 100.00	\$ 0.0294	\$ 0.0252	\$ 0.0221	\$ 0.0196	\$ 0.0177	\$ 0.0161	\$ 0.0147	\$ 0.0136	\$ 0.0126	\$ 0.0118
\$ 150.00	\$ 0.0442	\$ 0.0379	\$ 0.0331	\$ 0.0294	\$ 0.0265	\$ 0.0241	\$ 0.0221	\$ 0.0204	\$ 0.0189	\$ 0.0177
\$ 200.00	\$ 0.0589	\$ 0.0505	\$ 0.0442	\$ 0.0393	\$ 0.0353	\$ 0.0321	\$ 0.0294	\$ 0.0272	\$ 0.0252	\$ 0.0236
\$ 250.00	\$ 0.0736	\$ 0.0631	\$ 0.0552	\$ 0.0491	\$ 0.0442	\$ 0.0402	\$ 0.0368	\$ 0.0340	\$ 0.0315	\$ 0.0294
\$ 300.00	\$ 0.0883	\$ 0.0757	\$ 0.0663	\$ 0.0589	\$ 0.0530	\$ 0.0482	\$ 0.0442	\$ 0.0408	\$ 0.0379	\$ 0.0353
\$ 350.00	\$ 0.1031	\$ 0.0883	\$ 0.0773	\$ 0.0687	\$ 0.0618	\$ 0.0562	\$ 0.0515	\$ 0.0476	\$ 0.0442	\$ 0.0412
\$ 400.00	\$ 0.1178	\$ 0.1010	\$ 0.0883	\$ 0.0785	\$ 0.0707	\$ 0.0642	\$ 0.0589	\$ 0.0544	\$ 0.0505	\$ 0.0471

At this point, it would be difficult to identify all forms of value-added products and their associated values. It is recommended by the proponents of this model, that after issuance of a Commission decision adopting the general methodology, the Commission institute a comment period during which interested parties would submit proposals for the adder to be used for specific value-added products.

iii. Advantages and Disadvantages

Proponents of this model believe that use of a forward-looking methodology to determine the fixed price, and development of a list of other ERVAs, which can be offered to APPs has several advantages. Proponents note that these products can be available to APPs at all times, instead of just in specified fixed intervals associated with competitive bidding as described below. In addition, this option provides for potential participation by a large number of suppliers, instead of only the winner of a competitive bidding process. However, this option appears to be complex and require considerable resources to implement on the part of Staff, including updating

the reference price and establishing a list of other qualified ERVAS that may be offered to APPs.

RESA strenuously objects to the implementation of a proposal such as that described above. RESA's position is that product innovation and differentiation are fundamental to competition and that it is entirely appropriate for regulatory mandates as to the nature and/or structure of competitively offered products and services.

BlueRock disagrees with the technical accuracy of a forward-looking fixed-price based on the proposed reference price. Further, it believes that no matter how comprehensive the historical data, the energy industry by its very nature is not one where any duration of the past can predict future occurrences. BlueRock does agree, however, that this model allows for maximum market participation, competition, and ultimately consumer choice, where the saved expense of the logistical transition could be used directly to foster more robust participation by APPs in selecting available services.

The Consumer Advocates submit that none of the products presented so far throughout the Collaborative provide value to customers, and justify charging customers more than the utility rate. Products that are provided for free, or at a discount, through government entities or action should not be defined as value-added products or services for purposes of this proceeding. With respect to whether or not advanced thermostats might conceivably qualify as ERVAs, for APP customers that pay for heat such a product has the potential to provide value, and lower a customer's energy usage, if other measures, such as professional installation and on-site customer education programs, without charge, are set forth and implemented by the ESCOs. The Consumer Advocates submit that APP customers should

not have to pay for an advanced thermostat, or for the installation and training. At the very least the unit should be provided at a heavily subsidized cost as compared to retail, with no interest.<sup>26</sup> As APP customers may not have access to the internet, the advanced thermostat must have the capability to be programmable at the thermostat and not just remotely.

Regarding maintenance and/or repair of home energy equipment, the Consumer Advocates submit that more data is needed to understand the number of low income consumers in the State of New York that have the ability to benefit from such a proposal, and the mechanism by which value would flow to customers that do not own or control furnaces.<sup>27</sup> The Consumer Advocates submit that a "representative price" should be a one-time only charge and should not be included in whole or part in the rate(s) charged after the ESCO has recouped its initial wholesale (or other discounted) purchase price for "value-added" goods.

The Consumer Advocates have concern with charging customers an ERVAS adder that is assessed based on the customer's historic usage over the past 12 months on a per-kWh or per-therm basis. The proposal is not clear whether the adder will be different for every customer, and whether there will be a true-up mechanism. The Consumer Advocates submit that if an adder were to be implemented, it should be subject to a true-up.

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<sup>26</sup> The Consumer Advocates find 6% interest as an arbitrary figure, and submit that no analysis was done among the collaborative participants to support this figure.

<sup>27</sup> HEAP already administers a Heating Equipment Repair and Replacement Component that is available to help eligible APP customer home owners repair or replace furnaces, boilers and other direct heating components, with a maximum benefit amount of \$6,500.

2. Identification of Compliant Products Through Competitive Bidding

As discussed at collaborative meetings, an ad hoc sub-work group of established New York ESCOs developed a proposed competitive solution to achieve the policy directives of the February 2015 Commission Order. The sub-work group included Constellation, Direct Energy, IGS Energy, Just Energy and NRG Energy. The sub-work group developed an alternative proposal with the objective of overcoming compliance challenges and obstacles to the implementation of the Commission's February 2015 Order, as discussed over the course of the Collaborative meetings. Those challenges and obstacles include privacy concerns regarding customers receiving energy assistance benefits, measuring compliant APP offers against utility default service,<sup>28</sup> and identifying value-added services that may be provided to APPs.

The sub-work group presented a proposal to Staff on September 16, 2015. The version presented to the collaborative at the October 16, 2015 meeting reflects some input from Staff, particularly regarding consistency of the proposal with the Commission's Order.

Collaborative participants acknowledge that the competitive bid/aggregation concept, has a substantial amount of complexity which has not yet been fully developed. Aggregation is a new, emerging concept in New York's energy market and that as such market participants lack experience in the management of aggregations in New York. Should the Commission rule that the ESCO sub-group's proposal for aggregating APP customers be implemented, Collaborative participants believe that additional

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<sup>28</sup> This is discussed further in the section above regarding products with Price Guarantees Relative to the Utility Price.

work with stakeholders will be required to identify the most appropriate partners,<sup>29</sup> methodologies and mechanisms to effectuate that approach.

The ESCO working group believe that this approach addresses the Commission's objectives of ensuring that financial assistance is spent most efficiently on energy service, defines and provides for pricing plans or value-added energy-related products or services to reduce APP customers' overall energy bills, mitigates the challenges raised during the Collaborative regarding identification and confirmation of APP customers and their status, and addresses existing ESCO APP customers as well as customers who may become APP. The proposal is also untested in New York, raises a variety of new and complex issues, and would require much further investigation before it could be implemented.

The ESCO working group believe that the program framework should involve a transparent, competitive bidding process, timed in coordination with annual assistance program cycles to maximize coverage of eligible customers. APP customers would be aggregated by each electric and gas distribution service territory (and ISO Zone, as applicable). A request for proposals (RFP) would be issued, by an entity to be determined, seeking a fixed price product and energy-related value added services meeting high level goals or criteria which are established in any future Commission Order in this

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<sup>29</sup> The ESCO sub-work group reiterates that there are qualified brokers working to manage aggregations in other jurisdictions such as IL and OH, and locally in assisting Sustainable Westchester in its aggregation, and in no way wishes to imply that it would be incumbent upon the utilities themselves to manage aggregations - a process in which they have no experience.

proceeding and reflected in the RFP. Proposals would identify the fixed price, as well as one or more value-added products that are proposed by respondent ESCOs. Review of the proposals would determine a single winner in each ISO Zone as well as the fixed price and value-added products to be provided to APPs. Much of the overall program structure is the same whether customer enrollment is administered through opt-in (Option A) or opt-out (Option B) enrollment.

The ESCO working group proposes that the term of the agreement with winning ESCOs would be for a minimum of two years. A two-year term is desirable for two reasons. First, it would provide APP customers with a longer period of price stability, which may be desirable for this customer base. Second, a longer term (perhaps even beyond two years) would allow bidders to include value-added services intended to lower customers' bills that could not be included in a one-year offering. The length of the term is interrelated to the type - and cost - of the value-added services included in the product offering. If a winning ESCO is going to provide something more than just the commodity, they need to be able to recoup the costs over the course of a long-term contract.

Qualified bids would be judged on pricing plans and value-added energy-related criteria based on Commission-established guidelines defined in the RFP. Such guidelines should not be so prescriptive as to limit innovative products and services. Components of bids would be weighted, such as savings guaranteed by a pricing plan, the forecasted overall reduction to customers' energy bill related to value-added energy-related products, and the experience and capabilities of the bidder.

One winner would be selected for each electric and gas distribution company territory (and ISO Zone as applicable). A single ESCO may be awarded multiple electric and gas tranches, but no single ESCO may be awarded 100 percent of all tranches put out for bid in every territory. Bids would be reviewed and judged by the Department. Final awards would be approved by the Commission.

A reasonable, non-refundable bid fee would be collected from prospective bidders to cover administrative costs as well as a consumer awareness campaign. Winning ESCOs may have a direct communication relationship with customers during the term of the program. However, ESCOs may only offer APP compliant offers to customers.

i. Option A: Opt-in Process

Under an opt-in model APP customers would affirmatively elect to enroll in the program. Staff, in concert with an administrative entity to be determined, would prepare and publish RFPs which would include the aggregate load and number of non-ESCO APP accounts in each utility territory and ISO zone. Aggregate data would be provided to Staff by the utilities for inclusion in the RFPs.<sup>30</sup> The data would not include customer names and addresses. ESCOs would bid based on aggregate load and number of accounts, without knowing the number of customers (and load) that would ultimately be enrolled in the program.

Following the awarding of bids to winning ESCOs, the ESCO working group proposes that utilities would send a letter to APP customers not already being served by ESCOs, informing customers of the opportunity to voluntarily participate in the

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<sup>30</sup> Cost recovery to the utilities for providing the aggregate data would be provided for by the non-refundable bid fee.

program, and directing customers to information resources (to be established) to obtain the details of the offer. The letter would also include information about the process and deadline for authorizing customer enrollment in the program. The letters would be sent by the utilities because they alone know the identity of APP customers in their territory. The cost of the customer mailing would be borne by the winning ESCOs. The LDCs may conduct additional outreach and customer communication at their discretion by bill insert, on the companies' web sites, and through social media. The ESCOs, Staff, and customer advocate agencies and NGOs may supplement the awareness campaign through news releases, website information, social media and Public Service Announcements (PSAs) on mass media outlets to the general public.

APP customers being served by ESCOs will learn collaterally of the program through the broad outreach efforts of the ESCOs, utilities, the Department and customer advocates. Eligible ESCO customers may choose to opt-in to the RFP pool. ESCO customers being served under term contracts would be responsible for satisfying early cancellation fees in order to be eligible for inclusion in the program. The utilities shall notify customers who become eligible for energy assistance after the program has commenced. Customers may opt-in to the program by notifying the LDC.

Following the deadline for customers to submit to the program administrator their authorization to enroll in the program, the utilities would transmit EDI enrollment confirmations to the winning ESCOs, including the typical account information for enrollment transactions. This utility-initiated enrollment transaction is the same as occurred under the former utility customer referral programs. Customers may

cancel their participation in the program at any time without penalty, and shop for ESCO supply service or elect to return to LDC default service.

The ESCO working group notes that through this approach, the Commission would not have prohibited APP customers from participating in the retail electric market. Customers who do not opt-in to the RFP pool or who choose to drop out of a program during the term will have exercised their lawful right to shop for energy supply service and have affirmatively chosen to not take advantage of a program created for their benefit by the Commission. In order to be consistent with the Commission's February 2015 Order, the ESCO sub-group recommends that APP customers who choose not to participate in the program - or choose to discontinue participation, shall be requested to consent to have their status as APP customers released to ESCOs, who will be able to either offer those customers compliant products or avoid them in their marketing efforts if they have no compliant products. If an APP customer neither wants to participate in the aggregation nor consent to have his or her status as an APP customer released to ESCOs, then the customer has effectively declined to participate in the program created by the Commission. The ESCO sub-group argues that part of the policy objective of recognizing the agency of APP customers should be the recognition that they should be allowed not to participate in the program, provided their decision is an informed one.

The ESCO proponents of the RFP proposal do not support Option A. The ESCO sub-work group argues that the benefit of several years' worth of experience with aggregation in multiple jurisdictions supports the efficacy of Opt-Out Aggregation vis-à-vis Opt-In. Retail energy suppliers have extensive "real-

world" experience in the government aggregations of the Illinois and Ohio markets.

It is a generally-accepted principle amongst suppliers that if a municipality chooses an Opt-Out mechanism for their aggregation, the winning supplier can expect to sign-up somewhere in the neighborhood of 80-90 percent of the residential customers in that community. Conversely, when communities instead choose Opt-In, participation is likely to range from as little as one percent to an upper-limit of 10-15 percent of the customers. Additionally those jurisdictions which choose Opt-In for their aggregations see lesser rather than greater supplier participation.

The ESCO working group notes that in order for Opt-In to work even 20 percent as well as a standard Opt-Out aggregation, there needs to be a highly-engaged owner of the aggregation. Suppliers' experience with "ideal" Opt-in communities is that in order to achieve the 15 percent or so participation, the community in question must be extremely committed to aggregation, issuing press releases and holding press conferences; working to get on the local news and conducting multiple public meetings and additional outreach.

The effort necessary to improve the take rate of an opt-in program will likely diminish the savings or other value to the products bid by ESCOs. Further, the uncertainty associated with an opt-in model and low take rates for an opt-in program reduce the likelihood of investment in products that could help APP customers save on their overall energy bills.

In a proposed aggregation solution for New York APP customers, such a level of engagement is unlikely to be possible or if possible, unlikely to be sustained. Such a program would by definition be substantially more geographically diffuse than

a traditional aggregating entity (even when considering that the APP aggregation would be managed at the utility or perhaps utility/zonal level); and as such, opportunities for the types of intense, deep, sustained and local engagement that characterize the very few historically successful Opt-In aggregations will be limited. The ESCO sub-work group concludes, and BlueRock concurs, that Option A is not realistic and should not be considered by the Commission.

ii. Option B: Opt-out Process

The ESCO sub-work group supports an opt-out mechanism for customer enrollment in the RFP program. Under an opt-out model well-informed APP customers would affirmatively elect to not participate in the program.

As with Option A described above, Staff, in concert with a to-be-determined administrative agency, would prepare and publish RFPs which would include the aggregate load and number of non-ESCO APP accounts in each territory and ISO zone. Data would be provided to Staff by utilities, who would recover the reasonable cost of providing this data from the non-refundable bid fee. The data would not include customer names and addresses. Bids would be judged on the same weighted factors as described above: pricing plans and value-added energy-related criteria based on Commission-established guidelines defined in the RFP.

Customers would receive two (2) opt-out notices following the awarding of bids to ESCOs. The cost of the notices would be borne by the winning ESCOs. The utilities would send letters to APP customers not already being served by ESCOs, informing customers of the details of the program offer, their opportunity to voluntarily participate in the program, and their option to decline to participate in the program by

affirmatively opting-out to the program administrator. Customers may opt-out by telephone, email or by returning a pre-paid business reply card (BRC). A 20-day opt-out period, consistent with the Commission's order in the Sustainable Westchester community choice aggregation petition is recommended.<sup>31</sup>

As with Option B described above, the pre-enrollment customer communications would be managed by the LDCs because only the LDCs have access to the identity of APP customers. Similar to Option B, the LDCs may conduct additional outreach and customer communication by bill insert, on the companies' web sites and through social media. The ESCOs, Staff, and customer advocate agencies and NGOs may supplement the awareness campaign through news releases, website information, social media and Public service Announcements on mass media outlets to the general public.

APP customers being served by ESCOs will learn of the program through the outreach efforts of the ESCOs, utilities, the Department and customer advocates. Eligible customers being served by ESCOs may choose to opt-in to the RFP pool. ESCO customers being served under term contracts would be responsible for satisfying early cancellation fees in order to be eligible for inclusion in the program.

Customers who become eligible for energy assistance after a program has commenced would be notified by the utility and be given an opportunity to opt-out. ESCO customers who become APP after the commencement of a program in their service

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<sup>31</sup> Case 14-M-0564, Petition of Sustainable Westchester for Expedited Approval for the Implementation of a Pilot Community Choice Aggregation Program within the County of Westchester, February 26, 2015.

territory may opt-in upon meeting the early cancelation obligations of their contract, as applicable.

Following the deadline for customers to submit their authorization to enroll in the program the utilities would transmit EDI enrollment confirmations to the winning ESCOs, including the typical account information for enrollment transactions. This utility-initiated enrollment transaction is the same as occurred under the former customer referral programs. Customers that opt-out will have a switch block placed on their account.

Customers who become enrolled in the program may cancel their participation in the program at any time without penalty, and shop for ESCO supply service or elect to return to LDC default service. Such customers who wish to shop with ESCOs must contact the utility to affirmatively elect to remove the switch block from their account.

Proponents of this approach note that the Commission would not have prohibited APP customers from participating in the retail electric market. Customers who voluntarily remove the switch block from their account will have affirmatively chosen to waive their participation in the low income customer program created for their benefit by the Commission.

iii. Perceived Advantages and Disadvantages of the Proposed RFP Enrollment Methods

In comparison with the forward-looking methodology, an RFP approach has the following major advantages and disadvantages.

- It will result in significantly greater customer participation, and thereby better satisfies the Commission's goal.
- The predictability and favorable hedge environment of an opt-out program combined with the opportunity to serve

large groups of customers will likely result in more competitive bids by well-qualified ESCOs, featuring innovative energy-related value-added products.

- The costs of acquiring customers through an RFP process are lower than through conventional marketing. Cost savings are likely to be passed through in the form of the offers made in response to the RFP.
- Opt-out enrollment is consistent with the Commission's order in the Sustainable Westchester community choice aggregation petition, in which the Commission waived the Uniform Business Practices to allow for the enrollment of customers and transmittal of customer information by the utility to the ESCO without express customer consent in recognition of the economies of scale and bargaining power that are "expected to translate into tangible benefits for customers."<sup>32</sup>
- Competitive bidding among ESCOs will identify the value-added services to be available to APPs, rather than the utility regulator as in the forward-looking pricing model.
- From an administrative perspective there is virtually no difference between the costs of an Opt-Out vis-à-vis an Opt-In aggregation from a supplier's perspective.
  - One of the inherent benefits to consumers of aggregation is the lower cost to acquire customers through this means as opposed to one-on-one "organic" growth
    - Aggregations' lower CTA can be passed on to consumers by the winning Supplier
    - The degree of those savings is interrelated to the number of customers acquired relative to the

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<sup>32</sup> Ibid, at 12.

fixed cost of participating in an serving  
customers through an aggregation

Accordingly, the aforementioned potential savings are dependent upon the structure of the aggregation. To the extent that the Commission's goals with regard to aggregation are limited to a cent per kWh commodity charge, it should be understood that Opt-Out will almost certainly result in a lower unit cost for NY consumers.

The ESCO working group believes that the proposed RFP program with Option B, while different than the approach in the February 2015 Commission Order, is nevertheless consistent with the Commission's overall objectives of ensuring that customer financial assistance is spent most efficiently on energy service, defining pricing plans or value-added energy-related products or services to reduce APP customers' overall energy bill, and addressing existing ESCO APP customers as well as customers who may become APP. The ESCO working group submit that the RFP proposal is a workable alternative to the requirements for ESCOs and LDCs contained in the February Order. It is supported by Constellation, Direct Energy, IGS Energy, Just Energy and NRG Energy.

BlueRock Energy also agrees that the competitive RFP process with an opt-out function is the preferred proposal of all of those found in this document, with the added conditions of threshold qualifications for participating ESCOs, and requiring that all bids provide more than one choice for the ESCO's APP program, and scores bids higher the more qualifying options a bidder provides for APPs to choose from.

The Consumer Advocates have significant concerns that the proposal for the PSC to conduct a procurement via RFP for 3rd party services to go to 3rd party beneficiaries, is outside

the scope of the State Finance Law. Assuming that such a model requires changes to State law, it is important to note that the PSC's involvement in authoring, scoring and/or "awarding" an RFP for ESCO services to ratepayers would conceivably subject the procurement process to the responsible bidder (e.g., "Vend-Rep") analysis, and to the oversight of the State Comptroller and Attorney General.<sup>33</sup> The Consumer Advocates submit that the competitive bidding process proposed by the ESCOs places much of the onus and burden of complying with the Commission's February 2015 Order on other parties, such as the Commission, Staff, the Utilities and the Consumer Advocates. As proposed, such parties will be required to expend significant resources to participate, market and monitor the RFP process and implementation of an aggregated program.

The Consumer Advocates believe that an opt-out method for APP customers is inappropriate.<sup>34</sup> They assert that such a proposal would be akin to slamming, or forcibly migrating, APP customers to taking service from an ESCO and potentially paying higher energy rates than they currently pay while receiving no value in return. For APP customers, where often times English

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<sup>33</sup> Such oversight by the separately elected statewide officials whose role in guaranteeing government contracting transparency and accountability is constitutional in nature, and it is difficult to imagine how a PSC drafted/scored/awarded RFP for ESCO services could be conceived to be in the public interest without the role of those public officials.

<sup>34</sup> The City of New York believes that an opt-out method could be potentially viable, so long as robust consumer protections are developed. Such protections should focus on consumer comprehension and responsiveness. As APP customers are a vulnerable population, an opt-out method should be accompanied by Staff and ESCO customer outreach, in multiple languages, to ensure that customers understand the offer and terms for commodity service they are being enrolled in, and their choice not to participate.

is not their first language, an opt-out program would be impractical and predatory, and would result in many customers being enrolled with an ESCO by default for lack of understanding.

Consumer Advocates believe that the competitive bidding process proposed by the ESCOs in this Collaborative is not consistent with the Commission's Order in the Sustainable Westchester community choice aggregation petition. First, Sustainable Westchester, the program administrator, is a New York State not-for-profit corporation whose members include several municipalities in Westchester County.<sup>35</sup> Second, the Commission only approved the project to move forward for a short duration, as a pilot/demonstration program, so that the State can gain experience with community choice aggregation programs and explore their potential benefits for consumers.<sup>36</sup> Third, Sustainable Westchester had been working on a community choice aggregation proposal for two years, which included detailed analyses and plans, in addition to a number of municipalities going through the governance process to adopt resolutions addressing community choice aggregation.<sup>37</sup> According to the Consumer Advocates, the competitive bidding process proposed by the ESCOs is not consistent with the Commission's February 2015 objectives because it does not ensure that APP customers will be spending their public assistance benefits on a product that will bring them value. The ESCOs' competitive bidding proposal does not contain any proposed products for the Commission to consider and determine have value. There is no way of knowing whether

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<sup>35</sup> Case 14-M-0564, *supra*, Order Granting Petition in Part (February 26, 2015), p. 2.

<sup>36</sup> Id. at 13.

<sup>37</sup> Id. at 2.

the competitive bidding proposal included in this Collaborative Report is a workable alternative to what the Commission contemplated in its February 2015.

The Consumer Advocates suggest that before a sui generis competitive proposal of this nature be considered for implementation, that a evidentiary proceeding be carried out to determine by use of incontrovertible evidence on the record whether or not the ESCO marketplace is or is not workably competitive, and whether ESCOs have provided service at just and reasonable rates to low-income consumers. The Joint Utilities strongly oppose the ESCOs proposal at this time for myriad reasons. First, and perhaps most importantly, they note that this proposal has not been adequately reviewed, discussed, or evaluated for its appropriateness or applicability in the context of providing protections for APPs and not diluting the effectiveness of utility assistance programs. The proposal, which presents an entirely new construct, would have significant impacts on the utilities. Joint Utilities also point out that there is no guarantee that the ESCO's bidding process would actually produce a result consistent with the Commission's goals for low income customers; particularly in the opt-out scenario it could expand the number of customers for which the effectiveness of financial assistance programs is diluted.

Utilities also express concern regarding the ESCOs' comparison of their proposal to community choice aggregation. They note that the Commission is still carefully considering CCA in New York in a generic proceeding and has yet to adopt standards related to how CCA should be implemented. Moreover, Utilities assert that the ESCO proposal cannot be compared to CCA where a municipality passes a resolution or voters pass a referendum electing to move forward with CCA. There are also

many complex administrative difficulties that must be reviewed to see if the ESCO proposal has merit.

The utilities also oppose the ESCO proposal because it places all outreach and education on the utilities (and Staff and consumer advocates). Utilities note that in contrast, in the Sustainable Westchester CCA pilot, all of the outreach and education is to be conducted by the municipality or Sustainable Westchester. The utilities believe that the same should be true for any type of assistance program aggregation. The ESCO proposal is contrary to the process envisioned in the Staff White Paper in the generic CCA proceeding and the processes used in other jurisdictions with established CCAs. In those existing programs, the responsibility for informing, educating, and administering opt-out programs is squarely placed on the municipality that has chosen to implement a CCA program. Utilities urge that any assistance program aggregation should have a similar administrator that is not the utility. To require the utilities to perform these functions would be inconsistent with the existing utility-ESCO relationship and the Commission-approved Uniform Business Practices. The utilities appropriately do not have access to ESCO/customer contracts and thus cannot and should not notify residents of their terms. Finally, the utilities generally are opposed to an opt-out program and believe that opt-in programs more appropriately protect customers from unwanted switches of commodity suppliers.

IX. PROPOSAL OF NATIONAL FUEL GAS DISTRIBUTION: IMPLEMENTATION OF THE RATE PROTECTION OF LOW-INCOME CUSTOMERS TO LOW INCOME ESCO CUSTOMERS WITHOUT THE ERVAS EXCEPTION

During the October 16, 2015 collaborative meeting, NFG opined that at this point in time, the goal to provide APP with ERVAS in a manner that does not dilute the effectiveness of the

financial assistance programs may not be feasible at this point in time. As such, NFG proposes that the Commission should adopt the proposition that APPs are best served and best protected through utility commodity service or through ESCOs that provide commodity with a price guarantee (Price Guarantee Proposition). In the Reforming the Energy Vision<sup>38</sup> (REV) Proceeding's early stage of development, it has been difficult to quantify the "value" in ERVAS potentially offered by ESCOs. The proposed combination of commodity service and ERVAS (Commodity/REV Combinations) that would provide a cost-effective benefit to APPs has proven elusive to both define and conclusively quantify.

Delaying the APP price guarantee until cost-effective Commodity/REV Combinations emerge allows certain ESCOs to continue to charge APPs a rate greater than what the utility would have charged; counter to the remedy offered in the February 2014 Order and re-affirmed in the February 2015 Order on Rehearing. Commodity/REV Combinations may someday be available but for now, that date is indeterminate.

Under the Price Guarantee Proposition, APPs would not be precluded from procuring or receiving ERVAS in the REV marketplace. As a standalone service, separate from either ESCO-provided or utility-provided commodity, it may be possible for a non-utility distributed energy resource provider to offer to ERVAS to APPs. Additionally, non-market means of providing ERVAS to APPs may be more effective until a robust competitive market further develops. When that occurs, cost-effective Commodity/REV Combinations should naturally emerge for all

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<sup>38</sup> Case 14-M-0101, Reforming the Energy Vision, Order Instituting Proceeding (issued April 25, 2014).

customers. At that point in time, the Commission could revisit the Price Guarantee Proposition.

X. CONCLUSION

The Collaborative submits this Report in compliance with Ordering Clause four of the Commission's February 6, 2015 Order in this proceeding.

PUBLIC SOURCES FOR IDENTIFICATION OF REFERENCE  
PRICE FOR ESCO FIXED PRICE OFFERS

Forward market prices are available from the Chicago Mercantile Exchange (CME) internet site:

<http://www.cmegroup.com/market-data/settlements/>

The applicable monthly codes are:

K3 - NYISO Zone A On-Peak  
K4 - NYISO Zone A Off- Peak  
Q5 - NYISO Zone C On-Peak  
A3 - NYISO Zone C Off-Peak  
55 - NYISO Zone E On-Peak  
58 - NYISO Zone E Off-Peak  
4L - NYISO Zone F On-Peak  
4M - NYISO Zone F Off-Peak  
D3 - NYISO Zone J On-Peak  
D4 - NYISO Zone J Off-Peak  
T3 - NYISO Zone G On - Peak  
D2 - NYISO Zone G Off - Peak  
NRS - NYISO ROS UCAP  
NNC - NYISO NYC In-city UCAP

NYISO "LHV" UCAP Prices are not list on the CME website, however, forward "LHV" prices may be calculated based on a ratio of historical "LHV" to In-City and/or ROS prices (from the NYISO website, see below)

DAM and Real Time LBMP for all zones and generators are available from the following NYISO website:

[http://www.nyiso.com/public/markets\\_operations/market\\_data/custom\\_report/index.jsp](http://www.nyiso.com/public/markets_operations/market_data/custom_report/index.jsp)

Prices for the Strip, Spot and Monthly UCAP auctions for the various UCAP localities are available from the following NYISO websites:

Strip Auction

[http://icap.nyiso.com/ucap/public/auc\\_view\\_strip\\_detail.do](http://icap.nyiso.com/ucap/public/auc_view_strip_detail.do)

Monthly Auction

[http://icap.nyiso.com/ucap/public/auc\\_view\\_monthly\\_detail.do](http://icap.nyiso.com/ucap/public/auc_view_monthly_detail.do)

Spot Auction

[http://icap.nyiso.com/ucap/public/auc\\_view\\_spot\\_detail.do](http://icap.nyiso.com/ucap/public/auc_view_spot_detail.do)

Prices for Ancillary Services for 10 min sync, 10 min non-sync and regulation for east and west are available from the following NYISO website:

[http://www.nyiso.com/public/markets\\_operations/market\\_data/custom\\_report/index.jsp](http://www.nyiso.com/public/markets_operations/market_data/custom_report/index.jsp)

The price for NTAC is available from the following NYISO website:

<http://mis.nyiso.com/public/P-62list.htm>

The prices for SSCD injections and withdrawals are available from the following NYISO website:

[http://www.nyiso.com/public/webdocs/markets\\_operations/market\\_data/pricing\\_data/rate\\_schedule\\_1/2015/2015%20Sched%20One%20Posting%20-non-Physical.pdf](http://www.nyiso.com/public/webdocs/markets_operations/market_data/pricing_data/rate_schedule_1/2015/2015%20Sched%20One%20Posting%20-non-Physical.pdf)

The price for Rate Schedule 2 - Voltage Support is available from the following NYISO website:

[http://www.nyiso.com/public/markets\\_operations/market\\_data/miscellaneous/index.jsp?docs=rate-schedule-1](http://www.nyiso.com/public/markets_operations/market_data/miscellaneous/index.jsp?docs=rate-schedule-1)

All other ancillary services are allocated on a load ratio share and should be known by ESCOs participating in the NYISO markets.

Methodology for Calculating the Adder for  
Energy Related Value Added Services

The following formula is intended to reflect a fair and transparent way for an up-front cost of an asset incurred or service rendered by an ESCO ( $K$ ) to be recovered via a monthly per-kWh add factor ( $A$ ).

The monthly per-kWh adder ( $A$ ) is given by

$$A = \frac{K(1+r)t}{y}$$

where ( $K$ ) is the up front cost of the asset cost or service cost<sup>39</sup>, ( $t$ ) is the term of the contract or finance term expressed in the number of actual monthly payments, and ( $r$ ), the monthly interest rate<sup>40</sup>, and ( $y$ ) is an estimate of the actual kWh usage for each individual customer over the  $t$  month term of the contract. The monthly usage used to estimate ( $y$ ) will not be fixed, however the cost ( $K$ ) and interest rate ( $r$ ) will be fixed for all low income customers for the purposes of calculating the monthly per-kWh amount.

For example:

- a) A NEST thermostat which costs \$200 ( $K$ ),
- b) and an allowed yearly interest rate of 6% ( $i$ ),

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<sup>39</sup> For a service such as home heating repair, the expected costs to be incurred over the course of the contract or finance period ( $t$ ) will be valued as ( $K$ ) and stated as an all-in price, regardless of how much the APP participant uses the service.

<sup>40</sup> The monthly interest rate ( $r$ ) is a function of the appropriate yearly interest rate ( $i$ ), a value to be determined at a later date

$$r = e^{\frac{\ln(1+i)}{t}} - 1$$

- c) over a twelve (12) month contract or finance period ( $t$ )
- d) translates into an effective monthly interest rate of 0.4868% ( $r$ ),
- e) using average kWh per month usage of 600 kWh ( $y$ )
- f) translates into a monthly per-kWh adder of \$0.02944/kWh ( $A$ ),
- g) a monthly billed charge of \$17.67,
- h) and a fully recovered cost of \$212 over the contract or finance period ( $x$ ).