

September 15, 2017

**VIA ELECTRONIC FILING**

Hon. Kathleen H. Burgess  
Secretary to the Commission  
New York State Public Service Commission  
Albany, NY 12223-1350

Re: Case 15-M-0127 – In the Matter of Eligibility Criteria for Energy Service Companies  
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

Dear Secretary Burgess:

The City of New York (“City”) hereby submits the attached pre-filed direct testimony of the New York City Policy Panel for filing in the above-referenced proceedings.

Copies of the City’s pre-filed direct testimony are being served herewith on the active parties to this proceeding. Please contact me with any questions.

Respectfully submitted,

COUCH WHITE, LLP

*Amanda De Vito Trinsey*

Amanda De Vito Trinsey

Attachments

cc: Administrative Law Judge Ashley Moreno (via email; w/att.)  
Administrative Law Judge Erika Bergen (via email; w/att.)  
Active Parties (via email; w/att.)

Before the  
New York State Public Service Commission

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**In the Matter of**

**Case 98-M-1343**

**In the Matter of Retail Access Business Rules.**

**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 15-M-0127**

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

**September 15, 2017**

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Prepared Direct Testimony of:

New York City Policy Panel:

Michael Tiger  
Susanne DesRoches  
Daniel Tietz

On Behalf of:

The City of New York

1

**INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS**  
3 **ADDRESS.**

4 A: Mr. Tiger – My name is Michael Tiger. I am the Deputy General Counsel of the  
5 New York City Department of Consumer Affairs (“DCA”), the main office of  
6 which is at 42 Broadway, New York, New York.

7 Ms. DesRoches - My name is Susanne DesRoches. I am the Deputy Director for  
8 Policy, Infrastructure for the New York City Mayor’s Office of Recovery and  
9 Resiliency and am currently overseeing energy regulatory affairs in the New York  
10 City Mayor’s Office of Sustainability. My business address is 253 Broadway, 14th  
11 Floor, New York, New York.

12 Mr. Tietz – My name is Daniel Tietz. I am the Chief Special Services Officer of  
13 the New York City Human Resources Administration/Department of Social  
14 Services (“HRA”). My business address is 4 World Trade Center, 150 Greenwich  
15 Street, 38th floor, New York, New York.

16 **Q. ON WHOSE BEHALF ARE YOU SUBMITTING THIS TESTIMONY?**

17 A. We are submitting this direct testimony before the New York Public Service  
18 Commission (“PSC”) on behalf of the City of New York (“City”).

19 **Q: PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND**  
20 **PROFESSIONAL EXPERIENCE.**

21 A. Mr. Tiger – I graduated from Columbia Law School in 2001 with a Juris Doctor  
22 degree and from Cornell University in 1998 with a Bachelor of Arts degree. Before

1 becoming Deputy General Counsel of DCA in December 2016, I was a partner at  
2 Hughes Hubbard & Reed LLP in New York City. As Deputy General Counsel,  
3 among other things, I supervise the counsel who bring cases under the New York  
4 City Consumer Protection Law, oversee the work of our Appeals Unit, and assist  
5 with the review and drafting of legislation and rules.

6 Ms. DesRoches – I have a Bachelor Degree in Industrial Design from the Pratt  
7 Institute and a Master in Public Administration Degree in Environmental Science  
8 and Policy from Columbia University School of International & Public Affairs. I  
9 have been in my current position since September 2015. In this role, I oversee  
10 analysis and advocacy on a wide range of regulatory and legislative energy matters  
11 before the New York State and federal government for the Mayor’s Office of  
12 Sustainability. I also lead the City’s efforts to adapt infrastructure systems across  
13 the region to the risks of climate change, with a specific focus on the infrastructure  
14 resiliency recommendations in the City’s strategic plan, *One New York: The Plan  
15 for a Strong and Just City* (“*OneNYC*”). I oversee a team responsible for  
16 implementing a cohesive program of resiliency initiatives across several key areas,  
17 including energy, telecommunications, water/sewer/waste, and transportation.  
18 Prior to joining the City, I served as the Chief for Resilience and Sustainability in  
19 the Engineering Department of the Port Authority of New York & New Jersey.

20 Mr. Tietz – I graduated from New England Law with a Juris Doctor in 1991  
21 (admitted to practice law in Massachusetts and New York); from the University of  
22 Massachusetts-Boston with a Bachelor of Arts in 1988; and from the Milwaukee

1 County General Hospital School of Nursing in 1982. I joined HRA in June 2014  
2 as Chief Special Services Officer. As Chief Special Services Officer of HRA, I  
3 oversee programs that focus on the most vulnerable New Yorkers, including the  
4 HIV/AIDS Services Administration, Customized Assistance Services, Adult  
5 Protective Services, Emergency and Intervention Services (including emergency  
6 food assistance and domestic violence shelters and services), the Home Care  
7 Services Program, and Crisis and Disaster Management. As part of this role, I  
8 oversee approximately 2,500 employees.

9 **Q: PLEASE DESCRIBE DCA AND ITS MISSION.**

10 A: Mr. Tiger – DCA’s mission is to protect and enhance the daily economic lives of  
11 New Yorkers to create thriving communities. DCA serves New York City’s  
12 consumers, businesses, and working families, enforcing laws and providing  
13 services that address the needs of New Yorkers, from their wallets to their  
14 workplaces. DCA licenses almost 80,000 businesses and individuals in over 55  
15 different business categories. DCA also enforces the City’s consumer protection  
16 and licensing laws and other laws that regulate the marketplace and prohibit  
17 deceptive acts and misleading marketing practices.

18 DCA’s Office of Financial Empowerment (“OFE”) is the first local  
19 government initiative in the nation with a mission to educate, empower, and protect  
20 New Yorkers with low incomes so they can build assets and make the most of their  
21 financial resources. OFE provides free, professional, one-on-one financial  
22 counseling at over 20 Financial Empowerment Centers across the city.

1           DCA’s Office of Labor Policy and Standards (“OLPS”) is a dedicated voice  
2           in city government for workers in New York City. OLPS’ mandate is to enforce  
3           key workplace laws and rules; to educate workers, employers, and the public about  
4           local, state and federal workplace protections; and to conduct original research and  
5           use it to advance new policy initiatives that are responsive to a changing economy.

6   **Q:   WHAT DOES HRA DO?**

7   A.   Mr. Tietz – HRA provides temporary help to individuals and families with social  
8           service and economic needs to assist them in reaching self-sufficiency. HRA serves  
9           more than three million New Yorkers through essential, diverse programs and  
10          services such as energy assistance, temporary cash assistance, public health  
11          insurance, and Supplemental Nutrition Assistance Program.

12   **Q.   WHAT TYPE OF ENERGY ASSISTANCE DOES HRA PROVIDE?**

13   A.   Mr. Tietz – HRA administers benefits through HEAP to help low-income  
14          homeowners and renters pay bills for electricity, heating fuel, energy equipment,  
15          and related repairs and replacements. HEAP is a federally funded program that  
16          assists eligible households with grants to pay regular and emergency energy costs  
17          for heating and cooling.

18                 HRA also administers a Utility Assistance Program (“UAP”), which assists  
19          individuals and families who are elderly, blind, disabled, mentally impaired, or  
20          residing in a neglected or hazardous environment and require financial assistance  
21          for their energy bills, primarily in cases where customers are faced with termination  
22          of services due to nonpayment, theft of service, or meter tampering. UAP is a state-

1 mandated program, and HRA is the designated liaison between these individuals  
2 and families and the utility companies.

3 **Q: WHAT DOES THE MAYOR'S OFFICE OF SUSTAINABILITY DO?**

4 A. The New York City Mayor's Office of Sustainability oversees the City's multi-  
5 layered OneNYC climate resiliency program and works on citywide sustainability  
6 policy development, oversight and implementation in coordination with relevant  
7 agencies. The Mayor's Office of Sustainability also works with other agencies to  
8 coordinate relevant policy with federal, state and local stakeholders.

9 **PURPOSE OF TESTIMONY**

10 **Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

11 A: The purpose of this testimony is to provide input in response to the *Notice of*  
12 *Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and*  
13 *Exhibits* ("Notice") that was issued on December 2, 2016 in Cases 98-M-1343, 12-  
14 M-0476 and 15-M-0127. The City's testimony (1) submits that there is place for  
15 energy service companies ("ESCOs") to operate in the New York City market so  
16 long as they are providing real and measurable value to customers at just and  
17 reasonable rates, (2) supports strengthening consumer protections and PSC  
18 oversight over ESCOs, (3) supports improving ESCO contract transparency, and  
19 (4) supports improving marketing practices.

20 **Q. ARE YOU SPONSORING ANY EXHIBITS WITH YOUR TESTIMONY?**

21 A. No.

1 **Q: PLEASE SUMMARIZE YOUR TESTIMONY AND**  
2 **RECOMMENDATIONS.**

3 A: We provide the following broad recommendations:

- 4 1) ESCOs should provide real and measurable value to customers at just and  
5 reasonable rates, including, where applicable, guaranteed savings for low  
6 income assistance program participants (“APP”) customers over what such  
7 customers would otherwise pay to the utility.
- 8 2) Consumer protections and PSC oversight of ESCOs should be strengthened,  
9 including the implementation of a licensing process for ESCOs that utilizes  
10 strict standards and imposes financial penalties for non-compliant ESCOs.
- 11 3) Contracts should provide transparent disclosure of pricing and contract  
12 duration/terms, expand the three-day rescission/cancelation period to at  
13 least ten days, and require affirmative consent from customers upon any  
14 material change to the customer’s agreement with an ESCO.
- 15 4) ESCO marketing practices should be improved to provide customers with  
16 greater protections against aggressive sales representatives or marketers  
17 representing themselves as the utility.

18 **Q: WHAT IS THE BASIS FOR YOUR RECOMMENDATIONS?**

19 A: The City’s recommendations are based on years of participation in the development  
20 of the PSC’s retail marketplace and from assisting New York City residents with  
21 energy-related issues. For example, over the last decade, the City has frequently  
22 submitted comments and been an active participant in the PSC’s retail market



1 proceedings. In 2007, with the New York State Consumer Protection Board  
2 (“CPB”) and DCA petitioned the PSC to adopt and implement stringent marketing  
3 standards for ESCOs to protect consumers from predatory marketing practices. In  
4 2008, DCA responded to proposed revisions to the Uniform Business Practices  
5 (“UBP”) and advocated for the use of plain language disclosures and clear  
6 standards for communicating with customers whose primary language is not  
7 English. In 2010, DCA submitted recommendations regarding the PSC’s  
8 implementation of the Consumer Bill of Rights. Thereafter, in 2013 and 2014,  
9 DCA submitted comments to the PSC regarding ESCO marketing practices, urging  
10 the PSC to take meaningful action to empower consumers through complete and  
11 accurate disclosure of current prices and to curtail deceptive ESCO marketing  
12 practices.

13 In 2015, the City was an active participant in a Department of Public Service  
14 (“DPS”) Staff-led collaborative that examined how ESCOs can serve APPs  
15 (hereinafter “ESCO Low Income Collaborative”). Thereafter, in 2016 the City  
16 participated in DPS Staff’s series of meetings to discuss resetting the retail energy  
17 markets for mass market customers. The City also offered comments to the PSC  
18 on three DPS Staff Whitepapers that were issued addressing express consent,  
19 benchmarking reference prices, and the need for performance bonds and other  
20 security interests.

21 **Q: TO WHICH OF THE PSC’S QUESTIONS DO YOU RESPOND?**

1 A: The recommendations herein are broad in scope. Because there is some overlap  
2 between the questions in the Notice, each topic discussed in our testimony may be  
3 applicable to one or multiple Notice questions. As such, the topics below should  
4 not be narrowly construed as only answering certain Notice questions, but should  
5 be read comprehensively as the City's full position. We have structured our  
6 testimony as follows:

- 7 • Topic One responds generally to Question 1 of the Notice.
- 8 • Topic Two responds generally to Questions 3, 5 and 6 of the Notice.
- 9 • Topic Three responds generally to Question 16 of the Notice.
- 10 • Topic Four responds generally to Questions 7 and 8 of the Notice.

11  
12 **TOPIC ONE: ESCOS MUST PROVIDE REAL AND MEASURABLE VALUE TO**  
13 **CUSTOMERS AT JUST AND REASONABLE RATES**  
14

15 **Q: WHAT IS YOUR GENERAL POSITION ON THE RETAIL ENERGY**  
16 **MARKETPLACE IN NEW YORK?**

17 A: The City has been a longtime supporter of a fair and transparent retail marketplace  
18 that empowers consumers to make better and more informed decisions regarding  
19 their energy services. However, the retail marketplace has proven time and time  
20 again to be very difficult for mass market customers – especially low income APPs.

21 **Q: HOW HAVE RETAIL MARKET FAILURES AFFECTED RESIDENTS OF**  
22 **NEW YORK CITY?**

23 A: As set forth in more detail below, DPS Staff reports that mass market customers –  
24 especially APP customers – in the city who switch to ESCO service oftentimes end

1 up paying higher prices for electric and gas supply service than they otherwise  
2 would have paid if they purchased their commodity directly from the utility. These  
3 increased supply payments are particularly damaging to APP customers because  
4 such increased energy charges ultimately negate any rate reduction they receive on  
5 their delivery service from the utility's low income assistance program or other  
6 State or Federal assistance. Moreover, a lack of product innovation in the  
7 marketplace means that these higher costs are not accompanied by other energy-  
8 related value-added products ("ERVAS") that help customers ultimately reduce  
9 their utility bills.

10 **Q: WHAT IS AN ERVAS?**

11 **A:** In its February 25, 2014 *Order to Improve Residential and Small Nonresidential*  
12 *Retail Access Markets* in Case 12-M-0476 ("February 2014 Order"), the PSC put  
13 forth that a "value-added" product is one that generally "exceeds the expectations  
14 associated with provision of what is otherwise an undifferentiated commodity."

15 In furtherance of the February 2014 Order, DPS Staff convened the ESCO  
16 Low Income Collaborative to address, among other things, a definition for ERVAS  
17 for long income APP customers. The City participated in that collaborative and  
18 recommended a number of guidelines for ERVAS including: (1) products provided  
19 for free, or at a discount, through government entities or action should not be  
20 considered ERVAS; (2) a DPS Staff proposal to establish a representative price for  
21 ERVAS that would be amortized over a one-year period (with interest) and  
22 collected from customers on a per-kWh or per-therm basis should be rejected; (3)

1 advanced thermostats or other energy management equipment provided at no  
2 charge to APP customers could be considered ERVAS; and (4) more data is needed  
3 to understand the number of APP customers who might benefit from maintenance  
4 and/or repair of home energy equipment, particularly when the customer does not  
5 own or control the building furnace.

6 **Q: DID THE ESCO LOW INCOME COLLABORATIVE REACH A**  
7 **CONSENSUS ON A DEFINITION FOR ERVAS?**

8 A: No. Ultimately, the Collaborative was unable to reach a consensus on products that  
9 could be considered ERVAS within the PSC's guidelines.

10 **Q: HAS THE COMMISSION TAKEN ACTION SINCE THE END OF THIS**  
11 **COLLABORATIVE?**

12 A: Yes. On December 16, 2016, the PSC issued a prohibition on service to APP  
13 customers by ESCOs (hereinafter "December 2016 Order"). However, the PSC  
14 left open the opportunity for ESCOs to petition the PSC for a waiver of the  
15 prohibition to serve low income customers if they provide a guaranteed savings  
16 program to APP customers. The December 2016 Order noted that such waiver  
17 petitions would be reviewed on a case by case basis.

18 **Q: DOES THE CITY SUPPORT THE PSC'S PROHIBITION?**

19 A: We believe that the PSC was acting in the best interests of consumers in their  
20 December 2016 Order. As the City has noted in past proceedings, if ESCOs are to  
21 serve low income APP customers, such service should be limited to where the  
22 ESCO is offering guaranteed savings over what the customer would otherwise pay

1 to the utility, or when the ESCO is providing the APP customer with an ERVAS  
2 that provides real and measurable value to the customer.

3 **Q: HISTORICALLY, HAVE ESCOS PROVIDED CUSTOMERS WITH**  
4 **GREATER SAVINGS?**

5 A: No. In its December 15, 2016 Order, the PSC reported that its ESCO Low-Income  
6 Collaborative “revealed that no qualifying cost-saving value-added products could  
7 be identified and that ESCOs were generally unable, or unwilling, to provide  
8 guaranteed price savings to APP customers. Strikingly, nowhere in the [ESCO Low  
9 Income] collaborative process or the comments following that process did the  
10 ESCOs directly dispute that, as a general proposition, ESCO APP customers pay  
11 more than utility [low-income] customers.”

12 **Q: SHOULD GUARANTEED SAVINGS BE LIMITED TO APP**  
13 **CUSTOMERS?**

14 A: No. Although low income customers are particularly at risk for being exposed to  
15 ESCO customer abuses and paying higher prices for electric and gas supply, the  
16 PSC specifically found in the February 2014 Order that “the retail energy markets  
17 serving residential and small non-residential customers have failed to provide  
18 [ERVAS similar to those available to large commercial and industrial customers]  
19 to these ‘mass market’ customers.” Such market flaws, therefore, have not been  
20 observed to rest solely with APP customers, and all mass market customers suffer  
21 from a lack of available ERVAS.

1 **Q: WHAT ARE YOUR RECOMMENDATIONS REGARDING WHETHER**  
2 **ESCOS SHOULD BE PERMITTED TO SERVE MASS-MARKET**  
3 **CUSTOMERS, OR WHETHER ESCOS SHOULD BE REQUIRED TO**  
4 **OFFER ERVAS AS A CONDITION TO OFFERING COMMODITY**  
5 **SERVICE?**

6 A: It continues to be the City’s position that ESCOs wishing to operate in New York  
7 must provide real and measurable benefits to mass market customers, including  
8 offering ERVAS to such customers. While a specific definition of ERVAS has yet  
9 to be adopted by the PSC, the City reiterates the same concerns raised in the ESCO  
10 Low Income Collaborative discussed above. Any ERVAS provided in lieu of a  
11 price guarantee must provide real and measurable value to customers, such as  
12 assisting customers with reducing their utility bills. Moreover, an ESCO cannot  
13 simply provide a product or service that the customer would otherwise receive for  
14 free – the ERVAS offered by the ESCO must be legitimate.

15 **Q: ARE THERE ANY ERVAS THAT ESCOS SHOULD BE PERMITTED TO**  
16 **PROVIDE TO MASS MARKET CUSTOMERS?**

17 A: Yes. For example, ESCOs should have the option of providing “green” energy  
18 products to mass market customers as an ERVAS.

19 **Q: WHAT IS A GREEN ENERGY PRODUCT?**

20 A: While this topic has not fully been examined in the context of the retail marketplace,  
21 in the PSC’s February 23, 2016 *Order Resetting Retail Energy Markets and*  
22 *Establishing Further Process* (hereinafter “Resetting Order”) it held that a new

1 green product will “guarantee that at least 30% of the energy provided to the  
2 customer will be generated by renewable sources, eligible under the Commission’s  
3 Environmental Disclosure Labeling Program rules.”

4 **Q: DOES THE CITY SUPPORT GREEN ENERGY PRODUCTS?**

5 A: Yes. The City has an established history of promoting the development and use of  
6 renewable energy, and reducing greenhouse gas emissions, as outlined in Mayor  
7 Bill de Blasio’s *OneNYC* plan. *OneNYC* serves as a blueprint for the City to meet  
8 its sustainability goals in an integrated way. A key component of *OneNYC* focuses  
9 on reducing the City’s greenhouse gas emissions 80 percent by 2050. To provide  
10 leadership to meet this overall goal, the City has set for itself the goal of reducing  
11 greenhouse gas emissions in City-owned buildings by 35 percent by 2025. To  
12 accomplish these goals, the City seeks to maximize the consumption of renewable  
13 power, and seeks to lead by example, ideally having 100% of the City’s load  
14 serviced by renewable sources over the next ten years.

15 The opportunity for mass market customers to have the ability to make an  
16 informed choice to purchase green energy products from ESCOs will further both  
17 the State’s and City’s renewable and carbon reduction objectives.

18 **Q: SHOULD THE DEFINITION OF “GREEN ENERGY PRODUCT”**  
19 **INCLUDE THE PURCHASE AND SALE OF RENEWABLE ENERGY**  
20 **CREDITS?**

21 A: Yes. The definition of green energy product should include the buying and selling  
22 of renewable energy credits (“REC”) or comparable environmental attributes of

1 electricity. Based on a purchase of electric commodity alone, it is impossible to  
2 distinguish the sources of electricity that make up the purchased commodity. That  
3 is, it is impossible to pinpoint which electrons consumed by an end-user ultimately  
4 came from which generators. Instead, the PSC's New York Generation Attribute  
5 Tracking System "mints" RECs for set quantities of electricity generated by  
6 renewable facilities as a means of distinguishing their cleaner-sourced electricity  
7 from other fossil fuel generation sources. RECs therefore have an added value that  
8 should qualify them as ERVAS for purposes of retail energy sales by ESCOs to  
9 mass market customers.

10 **TOPIC TWO: THE PSC'S OVERSIGHT OF ESCOS SHOULD BE**  
11 **STRENGTHENED**  
12

13 **Q: HISTORICALLY, WHAT HAS THE CITY'S POSITION BEEN ON ESCO**  
14 **OVERSIGHT?**

15 A: The City has generally supported amendments to the UBP that provided greater  
16 protections to consumers.

17 **Q: WHAT IS THE CITY'S CURRENT RECOMMENDATION FOR PSC**  
18 **OVERSIGHT OF ESCOS?**

19 A: The City maintains the position that there is room for the PSC to strengthen its  
20 oversight of ESCOs.

21 **Q: DO YOU HAVE ANY SPECIFIC RECOMMENDATIONS?**

22 A: Yes. It would be beneficial to consumers if the PSC, or the appropriate New York  
23 State agency, implemented a comprehensive licensing structure and assessed  
24 penalties for violations of the UBP or potential future licensing requirements.



1    **Q:    WHY SHOULD THE PSC LICENSE ESCOS?**

2    A:    DCA licenses over 55 different business categories. DCA has found that, where  
3           appropriate, a properly constructed licensing structure can expand consumer  
4           protections without endangering the viability of an industry.

5                 The PSC already has the power to suspend an ESCO’s ability to do business  
6           in New York State. But, a licensing scheme could provide the PSC with greater  
7           power to undertake an assessment of an ESCO’s fitness to market to New Yorkers  
8           before the ESCO opens for business in the State. A licensing scheme could also  
9           benefit ESCOs by providing transparency about the requirements necessary to do  
10          business in New York and by excluding “bad actors” from the industry.

11                Also, as part of a licensing structure, the PSC could consider implementing  
12          other consumer protection requirements. For example, the PSC could require a  
13          security bond, to ensure that consumers can be made whole as a result of  
14          misconduct by ESCOs. DCA now requires a security bond (or similar protection)  
15          from applicants in seven of the industries it licenses.

16   **Q:    DO YOU HAVE ANY OTHER RECOMMENDATIONS?**

17   A:    Yes. Requiring an ESCO to submit an officer certification that the ESCO is in  
18          compliance with the UBP, or other relevant oversight guidelines, as part of any  
19          application for a license to do business in New York would assist in holding ESCOs  
20          accountable and eliminating bad actors.

21   **Q:    WHY IS AN OFFICER CERTIFICATION REQUIREMENT NECESSARY?**

1 A: DCA’s basic license application requires all license applicants to affirm that they  
2 understand that they “must comply with all relevant laws and rules if granted a  
3 license to operate.” In certain license categories, such as process servers and home  
4 improvement contractors, DCA requires additional certifications that the applicant  
5 will comply with specific laws or rules. In the City’s experience, these  
6 certifications are effective enforcement tools against non-compliant licensees.

7 **Q: WHAT IS THE CITY’S POSITION ON THE USE OF PENALTIES AS A**  
8 **COMPONENT OF ESCOS COMPLIANCE MEASURES?**

9 A: Penalties are another important tool to ensure that businesses do not take advantage  
10 of consumers. For example, in every one of the industries for which DCA issues  
11 licenses, DCA can also assess violations against non-compliant businesses.  
12 According to DCA’s rules, violations can result in set penalty amounts, if upheld  
13 by the New York City Office of Administrative Trials and Hearing. The City  
14 Council has also authorized DCA to assess violations for businesses in several  
15 industries for which DCA does not issue licenses, including income tax preparers  
16 and immigration assistance service providers. These violations also can result in  
17 penalties for violations.

18 Penalties would have the effect of forcing ESCOs to be more diligent in  
19 responding to customer complaints. Penalties would also improve ESCO  
20 communications with DPS Staff regarding the ESCO’s efforts to resolve any  
21 existing or potential compliance issues. Of course, the penalties should be fairly

1 drawn and directed at correcting actions that the ESCO controls. But, they should  
2 also be sufficient in magnitude so as not to become mere “costs of doing business.”

3 **Q: IS THE CITY PROVIDING TESTIMONY ON WHETHER CURRENT**  
4 **STATE LAW PERMITS THE PSC TO LICENSE ESCOS OR ASSESS**  
5 **PENALTIES?**

6 A: No. We offer no opinion on the jurisdictional framework for PSC oversight of  
7 ESCOs pursuant to the Public Service Law, or whether any changes therein are  
8 necessary for the PSC to either require licensing for, or assess penalties against,  
9 ESCOs. Our testimony on this topic is limited to whether, as a matter of policy, it  
10 would be beneficial to consumers for the PSC to have these powers.

11 **Q: ARE THERE OTHER MEASURES THAT COULD BE IMPLEMENTED**  
12 **TO STRENGTHEN THE PSC’S OVERSIGHT OF ESCOS?**

13 A: Yes. The City has previously supported the PSC’s expanded definition of “ESCO  
14 marketing representative” that encompasses the ESCO and its employees, agents,  
15 contractors, or vendors conducting marketing activities on behalf of the ESCO. It  
16 is critical that ESCOs are held responsible for third-parties – whether or not they  
17 are vendors or contractors – acting on their behalf. DCA’s laws and rules similarly  
18 hold businesses accountable for the actions of their agents.

19 The City also supports the PSC’s recent change to the UBP, allowing it to  
20 suspend an ESCO’s ability to market in New York based on a “material pattern of  
21 consumer complaints.” The City encourages the PSC to monitor for such “material

1 pattern” and to suspend any ESCO’s with such a “material pattern” from marketing  
2 in New York.

3 **TOPIC THREE: IMPROVEMENTS TO CUSTOMER CONTRACTS**

4 **Q: ARE ESCO CONTRACT IMPROVEMENTS WARRANTED?**

5 A: Yes. As mass market customers will be entering into such arrangements with  
6 ESCOs for a duration of time, it is vital that there is a greater level of contract  
7 transparency. This includes greater transparency regarding the price of the product  
8 being received and the duration and term of the contract. There are many instances  
9 where ESCOs offer “teaser” rates wherein the customer only receives the  
10 discounted price for a few months and then the price increases to a monthly variable  
11 rate. The PSC should ensure that customers understand what they are buying -  
12 which can oftentimes be complicated products and services.

13 The City also recommends continuing the current practice of requiring  
14 ESCOs to receive affirmative consent from the customer upon any material change  
15 to the customer’s agreement with an ESCO (*see* Uniform Business Practices  
16 Section 5(B)(1)). The City submits, however, that the PSC should expand this  
17 requirement to ensure that an ESCO obtains affirmative consent by the customer to  
18 any rate or product change at re-enrollment. This would include instances wherein  
19 a customer initially signed an agreement for a fixed price contract that  
20 automatically renews as a variable price product that changes the price of  
21 electricity/gas month-to-month unless the customer affirmatively requests to end  
22 the agreement. Given the disparity in energy supply costs charged to mass market

1 customers by ESCOs as compared to utilities, it is the City's position that a contract  
2 price or product change at re-enrollment should be prioritized as material and  
3 require new, express consent of the customer. To be clear, the City is not  
4 advocating that affirmative consent is necessary each time a variable price changes,  
5 if the customer affirmatively consented to a variable price product. The City's  
6 primary concern is when a customer goes from a fixed price product to a variable  
7 price product due to an automatic renewal opt-out contract provision.

8 **Q: SHOULD THE CURRENT THREE-DAY RESCISSION/CANCELATION**  
9 **PERIOD BE EXTENDED?**

10 A: Yes. As a measure of increasing consumer protections, the City supports extending  
11 the ability for mass market customers to cancel an agreement with an ESCO from  
12 three days to at least ten days. Currently, the ESCO sales and switching process  
13 occurs swiftly. A three-day rescission/cancellation period is not a sufficient amount  
14 of time for customers to fully understand the energy product they have signed up  
15 for, or the impacts that such switch may have on a customer's utility bill. For  
16 example, it is probable that a low-income customer has not analyzed how switching  
17 suppliers may dilute any public assistance or utility discount they receive on their  
18 energy bill. Extending the timeframe by which a customer can rescind or cancel an  
19 ESCO agreement will provide greater consumer protections and protect vulnerable  
20 customers from potential abuses.

21

22

1        **TOPIC FOUR: ESCO MARKETING PRACTICES SHOULD BE IMPROVED**

2        **Q:    IS THE CURRENT STATE OF THE REGULATION OF ESCO**  
3        **MARKETING PRACTICES SUFFICIENT?**

4        A:    No.

5        **Q:    ARE THERE OPPORTUNITIES FOR ESCOS TO IMPROVE THEIR**  
6        **MARKETING PRACTICES?**

7        A:    Yes. The City supports the PSC’s efforts to enact strong consumer protections with  
8        respect to ESCO marketing practices, generally. For example, door-to-door  
9        marketing has been a major source of consumer complaints, particularly from APP  
10       customers, the elderly, non-English speaking, or disabled New Yorkers.

11       **Q:    WHAT ARE SOME OF THE DOCUMENTED GENERAL POTENTIAL**  
12       **CUSTOMER ABUSES ASSOCIATED WITH ESCO MARKETING**  
13       **PRACTICES?**

14       A:    DPS Staff has reported in the past that consumers complain about “ ... aggressive  
15       sales representatives, marketers representing themselves as the utility, [and] an  
16       unauthorized change of providers attributed to the account number that is obtained  
17       from the customer during door-to-door marketing.” (*See* October 18, 2012 Session  
18       Meeting of the Public Service Commission, Transcript pp. 43-44).

19                    Investigations conducted by the Office of the Attorney General have also  
20       found that ESCOs have marketed to consumers at their homes in illegal ways,  
21       including wearing clothes that imitate utility worker uniforms, using intimidation  
22       to persuade consumers to switch providers without researching available options,

1 or making sales to minors or other family members who were not the utility  
2 customer.

3 Also, in its December 2016 Order, the PSC reported that “[a]ccording to the  
4 Consumer Complaint Statistics published on the Department of Public Service  
5 Webpage, there have been over 2,600 initial complaints against ESCOs between  
6 January and October 2016” which includes complaints related to marketing  
7 practices.

8 **Q: HAS THE CITY RECEIVED DIRECT FEEDBACK FROM NEW YORK  
9 CITY RESIDENTS REGARDING MARKETING ABUSES?**

10 A: Yes. Over the last decade, clients at DCA OFE’s Financial Empowerment Centers  
11 have spoken with financial counselors on numerous occasions about personal  
12 experiences with predatory sales tactics employed by ESCOs. OFE Counselors  
13 have also observed that many of their clients are enrolled with ESCOs based on  
14 reviews of their utility bills and have heard about predatory practices during one-  
15 on-one counseling sessions. There have been instances where DCA clients report  
16 being enrolled in ESCO services, although they do not recall consenting to the  
17 services, signing any enrollment documents, or receiving any notification of  
18 enrollment. Moreover, at community outreach events as recently as early 2017,  
19 consumers have expressed their concerns about ESCO marketing practices directly  
20 to DCA Commissioner Salas.

21 **Q: WHAT STEPS SHOULD THE PSC TAKE TO REFORM ESCO  
22 MARKETING PRACTICES?**

1 A: As noted above, the City supports the PSC’s inclusion of “ESCO marketing  
2 representatives” in the UBP and the PSC’s ability to suspend ESCOs that exhibit a  
3 “material pattern of consumer complaints.” The PSC should vigorously enforce  
4 both provisions.

5 The City also strongly supports the steps that the PSC has taken to require  
6 independent third-party verification of door-to-door and telephonic sales. The City  
7 supports the PSC’s proposed amendments to the UBP to further strengthen the  
8 third-party verification process, such as requiring all door-to-door sales to be  
9 verified by a third-party within 30 minutes, and requiring that the ESCO retain all  
10 independent third-party verification records for as long as that customer remains  
11 with the ESCO. The City also supports the PSC’s proposal to explore whether it is  
12 necessary to extend third-party verification procedures to mail solicitations.

13 Finally, the City supports the PSC’s Resetting Order establishing a “do not  
14 knock” rule for door-to-door solicitation, and encourages the PSC to monitor and  
15 enforce violations of that rule.

16 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

17 A. Yes.