

EXHIBIT M

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V.

Defendants.

Mot. Seq. 11

2) I have presented extensive amounts of expert testimony on competitive retail energy market issues at the state and federal level in several different regulatory, judicial and legislative forums. My CV and a detailed listing of my testimony are provided as **Exhibit 1**.

Affidavit of Frank Lacey

Page 2

3) I have spent my entire post-graduate school career working on competitive energy market issues, beginning with the development of competitive generation entities, evolving into the development of competitive transmission entities. I worked on some of the very early efforts to develop retail energy markets including the unbundling of vertically integrated utilities and establishing stranded costs to compensate the utilities for the transition to a competitive energy market. Since 2001, I have worked directly with energy businesses including competitive energy supply corporations (“ESCOs”), demand response providers and their respective customers. As such, I have extensive experience with how ESCOs price various products, the costs they need to cover, and similar issues.

4) I have a Bachelor of Science degree from the University of Maryland and a Master of Science in Industrial Engineering from Carnegie Mellon. My areas of concentration at Carnegie Mellon were finance, entrepreneurship and environmental management.

5) This affidavit rebuts the various unfounded assumptions, assertions and conclusions set forth in the Affidavit of Dr. Robert Sinclair in Support of Plaintiffs’ Motion for Class Certification (“Sinclair Affidavit” or “Sinclair Aff.”), and provides the following opinions:

- a. A rollover default variable rate is standard in the industry for customers who opt to do nothing at the expiration of the fixed-price term of their contracts;
- b. Liberty Power complied with the terms of its Terms and Conditions by basing its variable rate on electricity market pricing;
- c. The margin component of Liberty Power’s rollover default variable rate is competitive and consistent with that charged by other ESCOs in New York with respect to a rollover default variable rate;
- d. A reasonable customer acting reasonably has the ability easily to determine whether Liberty Power’s rollover default variable rate was a competitive rate;
- e. The margins associated with a fixed rate term contract are not an appropriate comparator to the margins associated with a rollover default variable rate;

Affidavit of Frank Lacey

Page 3

f. The utility rate does not represent a competitively priced, market-based rate for electricity and is not an appropriate comparator to a rollover default variable rate;

g. The costs to serve a customer vary depending on a large number of variables, and therefore any comparison of Liberty Power's rates to a comparator's rates must be done on a customer-by-customer basis.

6) In connection with this Affidavit, I have reviewed the First Amended Class Action Complaint, including exhibits, the deposition testimony of Jose Albarran, Rajiv Kakar, Derik Viner, Matthew Fuller, the Affirmation of Matthew Fuller in Opposition to Motion to Compel, the Sinclair Affidavit, the Affidavit of Dr. Robert Sinclair in Opposition to Defendants' Motion for Summary Judgment, the Affidavit of Dr. Robert Sinclair in Support of Motion to Amend, the Court's Decision/Order on Motion for Summary Judgment, Liberty Power's Customer Terms and Conditions applicable to the New York Rollover Variable Rate Plan, and certain documents produced by the parties in this litigation, including LP00119-122, LP00269-272LP00375, LP00376-433, LP00434, LP00435, LP00687-710, and BLT000732-740.

Rollover Default Variable Rates Are the Industry Standard

7) Approximately 20 years ago, New York adopted a policy of competitive retail energy markets as a complement to the competitive wholesale energy markets that were developing. The New York Independent System Operator ("NYISO") manages the wholesale electricity markets in New York, and delivers commodity-level wholesale energy, priced at centralized load zones, or hubs, across New York. The NYISO generates hourly prices for electricity in each of its hubs in both the day-ahead market and in the hourly, or real-time, market.

8) The retail electricity markets in New York are regulated by the New York Public Service Commission ("PSC"). The PSC regulates the rules that the individual utilities¹ impose in

¹ There are currently seven utilities in New York: Central Hudson Gas & Electric Corporation, Consolidated Edison ("ConEd"), Long Island Power Authority, Niagara Mohawk, NYSEG, Orange and Rockland Utilities, Inc., and

Affidavit of Frank Lacey

Page 4

their respective markets and also regulates the business practices of ESCOs. In each of the retail markets in New York, the distribution utility provides a customer with default service – retail delivery of electricity – if the customer chooses not to elect an ESCO for that service.

9) In contrast to wholesale electricity markets, retail energy markets are granular and customer focused. Each utility in New York manages its own retail market, with unique rules and cost components for default service and for supplier service. The rules governing retail service across New York are similar amongst the utilities, however, they are not uniform. As a result, a customer that has locations in two or more separate utility territories, for example, offices in New York City and Albany, will likely see different rates, different cost components and a different set of rules and protocols governing their supplier(s) at each location. Regardless of where they are located in the State, customers receive an electricity price from their supplier that is unique to their home or business that will vary based on a number of factors.

10) In New York, customers who wish to leave their host utility's default service will enter into a contract with an ESCO for an electricity product that is available in the market. When retail contracts expire, customers have several options: they can renew their contract with Liberty Power; they can contract with a new ESCO or move to their utilities' default service; or they can simply do nothing at all. By doing nothing at the expiration of the contract, which in many cases is an affirmative choice, the customer stays with its current ESCO pursuant to the "end of term" provisions that were included in the original contract. The PSC ruled in 2010 that contract renewal provisions that moved a customer to a rollover variable rate did not require additional affirmative consent from the customer.

Rochester Gas and Electric. The ConEd service territory includes three wholesale electricity zones, Zones H (northern Westchester), I (southern Westchester), and J (New York City).

Affidavit of Frank Lacey

Page 5

11) It is the market standard in New York for ESCOs to include a contract clause that moves customers to a rollover default variable-rate product at the expiration of the initial contract term for electricity supply if they fail to take other action. Accordingly, if customers fail to exercise their other options at the expiration of the initial term of their electricity supply contract, most customers will migrate to a rollover default variable-rate electricity product. It is not practical, nor is it in the customer's best interest, to have contracts renew to any other electricity product other than a non-binding, month-to-month variable-rate product.

Liberty Power's Offerings During the Relevant Period

12) I understand that, during the relevant period, Liberty Power primarily offered contracts for a fixed price per kilowatt hour ("kWh") for a defined period of time. (Kakar Dep. at 21, 38, 45; Viner Dep. at 47).

13) The Terms and Conditions applicable to such fixed rate contracts generally provide that Liberty Power would provide the customer with notice in advance of the expiration of the contract term, and that service would automatically continue with Liberty Power at a default variable rate unless the customer renewed or canceled service.

14) I understand from the deposition testimony of Liberty Power's representatives that, consistent with applicable law, Liberty Power mailed customers the notice required by the contracts and encouraged customers to renew with Liberty Power at a new fixed rate.

15) Customers also received the Terms and Conditions applicable to the New York Rollover Variable Rate Plan. The "Rate" term of the Terms and Conditions specified that Liberty Power would establish the rate "based upon the electricity market pricing, including capacity, ancillary services, losses, generation and any other miscellaneous charges (including but not limited to, ISO/RTO or PUC fees)."

Affidavit of Frank Lacey

Page 6

16) The term “based upon the electricity market pricing” is understood in the industry as meaning that the rate would fluctuate with market electricity rates. It does not imply guaranteed savings, which some contracts will expressly require. Nor does it imply a rate that is similar to a utility rate, which as explained below is not representative of competitively priced, market rates for electricity.

17) I understand that at all relevant times, Liberty Power’s rollover default variable rate fluctuated with market electricity rates, consistent with the Terms and Conditions. Accordingly, Liberty Power did not breach its agreement to provide a variable rate based on electricity market pricing.

Dr. Sinclair’s Basic Conclusions Are Misguided at Best

18) I understand that Plaintiffs’ argument is not that Liberty Power failed to calculate the rollover default variable rate in accordance with the terms of the Terms and Conditions. For example, Dr. Sinclair opines that a “reasonable variable rate” would reflect “the delivered NYISO wholesale costs for electricity at a given location (which include transmission charges) plus operating costs and a margin.” (Sinclair Aff. ¶ 14, *see also id.* ¶ 20.) These are the components of Liberty Power’s rollover default variable rate.

19) Rather, Plaintiffs argument is that the margin component of Liberty Power’s rollover default variable rate – which includes administrative overhead, other costs, and profit – is “too high” and thus renders the rollover default variable rate not “commercially reasonable” and “above-market.” (Sinclair Aff. ¶ 22.)

20) Dr. Sinclair fails to identify any authority or evidence for the proposition that the margin component of a rollover default variable rate must be capped generally, or that Liberty Power’s margin does not reflect its actual costs and expenses and a reasonable profit. In New

Affidavit of Frank Lacey

Page 7

York, there are no regulations that govern an ESCO's operating costs or profits, which are subject to the forces of competition.

21) Significantly, Dr. Sinclair fails to compare Liberty Power's rollover default variable rate or margin with that of other ESCOs. The only appropriate comparison for Liberty Power's rollover default variable rate is what other ESCOs charge with respect to their rollover variable rate. Only ESCOs sell what is essentially the same products and services. Dr. Sinclair made no attempt to measure or understand how other competitive suppliers price a rollover variable-rate product.

22) Based on my experience in working with ESCOs and understanding the costs and risks associated with a rollover default variable rate, as well as my understanding of realities of a deregulated market, I have concluded that Liberty Power's rollover default variable rate and margin are in line with that of other ESCOs, and reflects the costs to serve rollover customers as well as the risks of customers on month-to-month variable-rate products.

23) Plaintiffs' contention that Liberty Power should be subject to some type of price cap conflicts with New York's decision to deregulate. In New York, it has been determined that competitive forces should be used to manage pricing in lieu of the former regulated approach. Competitive forces in New York constrain Liberty Power's margin at a fair and competitive level, including with respect to the rollover default variable-priced service.

24) Dr. Sinclair's contention that Liberty Power's margins "were not formed under competitive conditions" (Sinclair Aff. ¶ 24) is not accurate. While the rollover variable rate plan is a default product that is not offered directly, the rate is subject to fierce competition because customers subject to the rate are free to leave Liberty Power at any time with no penalty, and have a vast number of options in New York. There are approximately seventy ESCOs selling electricity

Affidavit of Frank Lacey

Page 8

to customers in Manhattan. Because ConEd still holds a 70% to 80% market share, about seventy suppliers are serving only 20% to 30% the market. With this level of competition, it is not feasible to suggest that Liberty Power has any ability to hold its prices and margins “above market.” If Liberty Power were charging rates and margins that the market deemed “too high,” it would lose customers. Indeed, Liberty Power is aware that at certain price points, they will lose customers (*see* Viner Dep. at 254-257), a market signal that is indicative of a competitive market.

Dr. Sinclair’s Purported Damages Analysis Must Be Rejected Out of Hand

25) While Plaintiffs maintain that they are entitled to recover damages for Liberty Power’s use of a margin that is allegedly “too high,” Dr. Sinclair’s proposed method of calculating damages would result in the recovery of far more than any margin imposed by Liberty Power. Indeed, both of Dr. Sinclair’s proposed damages approaches would require Liberty Power to disgorge more than 100% of the margin in every month.

26) Table FL-1 shows that Dr. Sinclair’s estimates of monthly damages presented in his “Illustration of Damages for a BLT Restaurant in New York City” (Sinclair Table 3) are higher than the margins that Liberty Power applied to the variable-rate product in 2011.

Affidavit of Frank Lacey

Page 9

Table FL-1 Mr. Sinclair's Damages are Greater than the Full Margin Based on "Illustration of Damages for a BLT Restaurant in New York City"			
	Alleged Overcharge (¢ per kwh) (Sinclair Table 3)	Liberty Power Margin Applied (¢ per kwh)	Overcharge as a Percentage of Margin Applied
January	6.19	4.70	132%
February	5.09	4.70	108%
March	5.75	4.70	122%
April	7.36	4.70	157%
May	7.23	4.70	154%
June	5.71	4.70	121%
July	7.58	4.70	161%
August	6.71	4.70	143%
September	6.39	4.70	136%
October	5.66	4.70	120%
November	5.85	4.70	124%
December	6.02	4.70	128%

27) Dr. Sinclair reaches the same erroneous conclusion in his “Alternative Damages Approach using Con Ed MSC” (Sinclair Table 4). In January 2011, his analysis yields alleged damages that are greater than 200% of the margin applied by Liberty Power. Table FL-2 shows the magnitude of alleged damages each month is greater than the total margin applied by Liberty Power to the variable rate product.

Table FL-2 Mr. Sinclair's Damages are Greater than the Full Margin Based on "Alternative Damages Approach Using Con Ed MSC"			
	Alleged Overcharge (¢ per kwh) (Sinclair Table 3)	Liberty Power Margin Applied (¢ per kwh)	Overcharge as a Percentage of Margin Applied
January	10.63	4.70	226%
February	7.32	4.70	156%
March	6.46	4.70	137%
April	8.78	4.70	187%
May	8.66	4.70	184%
June	8.73	4.70	186%
July	9.67	4.70	206%
August	8.91	4.70	190%
September	6.22	4.70	132%
October	6.75	4.70	144%
November	5.16	4.70	110%
December	6.63	4.70	141%

Affidavit of Frank Lacey

Page 10

28) I understand that in 2011, Liberty Power applied a margin of 4.7 ¢/kWh (\$47.00 per MWh) to certain of its variable-rate customers. Accordingly, under Plaintiffs' theory of the case – that this margin is “too high” – any purported “damages” would equal something less than 4.7 ¢/kWh. However, in Tables 3 and 4 of his Affidavit, Dr. Sinclair alleges “overcharges” in every month of 2011 that range from 5.09 ¢/kWh to a high of 10.63 ¢/kWh, clearly much greater than the 4.7 ¢/kWh margin charged. Thus, whether he realizes it or not, Dr. Sinclair has proposed methods of calculating damages that are inconsistent with Plaintiffs' theory of breach and would result in a windfall to Plaintiffs and the putative class.

29) While this issue alone is fatal to Dr. Sinclair's damages approach, there are other serious flaws in his analysis. The use of either his fictional “Market-based Variable Rate” and the MSC as a comparator to Liberty Power's prices each reveal numbers that are far afield of reality, and are clearly intended (1) to overstate any purported damages; and (2) appear to a layperson as “straightforward” and generally applicable to all putative class members. (Sinclair Aff. ¶¶ 45-49.) However, as discussed above and below, Dr. Sinclair's analysis cannot be used for any one customer, let alone an entire class of diverse customers.

30) Dr. Sinclair's approach is inconsistent with the rate term of Liberty Power's Terms and Conditions, which provides that the rate will be “based upon the electricity market pricing, including capacity, ancillary services, losses, generation and any other miscellaneous charges (including, but not limited to, ISO/RTO or PUC fees.” Dr. Sinclair's approaches ignore most of these specifically identified costs, and excludes them from his proposed comparators.

Dr. Sinclair's Proposed “Market-Based Rate” Is Fatally Flawed

31) Rather than compare Liberty Power's default variable rate to that used by other ESCOs, Dr. Sinclair purports to create a hypothetical “Market-based Variable Rate” for New York

Affidavit of Frank Lacey

Page 11

City. In doing so, Dr. Sinclair uses the NYISO New York City wholesale delivered price of electricity, tacks on a hypothetical value for “Miscellaneous Operating Costs,” and similarly creates a hypothetical “margin” purportedly based on the margin applied by Liberty Power to fixed rate term contracts. (Sinclair Aff. ¶¶ 23-28.) The “Market-based Variable Rate” proposed by Dr. Sinclair is materially flawed for multiple reasons.

32) As an initial matter, Dr. Sinclair does not allege that developing such a hypothetical rate is accepted practice in the industry or otherwise complies with industry norms. In my experience, while one might create a theoretical rate for an individual customer based on a number of factors, Dr. Sinclair’s use of the NYISO wholesale delivered rate, a five percent adder for operating costs, and margin applicable to a wholly different product is unacceptable. Similarly unacceptable is Dr. Sinclair’s proposition that his hypothetical rate could be applied generically across different types and sizes of customers with different usage patterns.

33) In any event, Dr. Sinclair’s calculations of the NYISO delivered wholesale energy price is opaque. He failed to provide sources or assumptions made, so his results are not replicable. For the sake of argument, I will assume his base wholesale numbers for electricity delivered to Zone J are accurate. Despite this acceptance, for many other reasons, his use of an unadjusted wholesale market price to determine a theoretical “Market-based Variable Rate” for a customer will yield an artificially low retail rate.

34) Dr. Sinclair’s use of the NYISO wholesale delivered rate to account for energy costs is improper. While Dr. Sinclair acknowledges that Liberty Power likely relies on NYISO spot market purchases and longer-term contracts to meet its rollover default variable rate

Affidavit of Frank Lacey

Page 12

obligations (Sinclair Aff. ¶ 12), he nonetheless uses only “day ahead spot market”² prices for his purported “Market-based Variable Rate.” He does not include any provision for wholesale contracts that would mirror Liberty Power’s contracting practices, nor does he look to the day-ahead market for determining his variable market rate. Pricing for bilateral wholesale contracts, day-ahead energy prices and real-time energy market prices are all different, and to the extent they are the same, it is only a matter of chance, not market forces. For example, over the course of a year, the percentage difference between the day-ahead market price and the real-time market price averages out to be in the single digits. However, on a daily basis, the spread between the two sets of prices can be well above 30%, either positive or negative.³

35) In addition, Dr. Sinclair ignores the costs required to convert wholesale electricity to reliable electricity delivered to the customer’s meter. The process of converting wholesale electricity delivered to a load zone to match a customer’s retail demand at its meter is called load shaping. Dr. Sinclair has not attempted to “load shape” the wholesale energy so that it could be delivered as retail energy, nor has he considered differences in capacity or other cost components. None of the unique variances that drive a customer’s costs are captured in Dr. Sinclair’s development of his purported “Market-based Variable Rate,” which is an inappropriate and incomplete comparator to Liberty Power’s rollover default variable rate.

² The term “day ahead spot market” makes no sense. The NYISO runs a day-ahead market and a real-time market. Both generate hourly prices for wholesale generation in a zone. The real-time market is frequently referred to as the “hourly market” or the “spot market”. Day-ahead markets are not generally considered “spot” markets.

³ See, for example, Table 2: Price Convergence between Day-Ahead and Real-Time Markets Select Zones, 2009-2011, 2011 State of the Market Report for the New York ISO Markets, authored by various principals at Potomac Economics. State of the Market Reports for the NYISO Markets are available for years 2000 through 2018 and can be found at: https://www.nyiso.com/search?q=2014%20state%20of%20the%20market%20report&sortField=_score.

Affidavit of Frank Lacey

Page 13

36) The use of the NYISO wholesale delivered price also fails to account for line losses and unaccounted for energy (“UFE”). Line losses are determined by each utility depending on the service class and voltage level of each customer’s service voltage. Larger customers are often supplied electricity by the utility at the higher “primary” or “transmission” voltages, while smaller customers are typically served at the lower “secondary” voltage. These differences can add up to 6% or more to the cost of energy, in addition to the other costs described below. Similarly, UFE are allocations of surplus or, more typically, deficits in the overall wholesale supply across the utility territory. These can cause swings in costs in some New York utilities by upward of +/-10%, and these costs changes are very unpredictable.

37) The “Market-based Variable Rate” also fails to account for differences in specific capacity charges. Capacity is a charge that is directly tied to the percentage of costs that a customer contributed on the hour of the system peak in the prior year. For example, BLT Fish’s capacity obligation for the months of January through April 2011 was determined based on its electricity usage on August 17, 2009 in the hour between 3:00 PM and 4:00 PM. For the remainder of the year, BLT’s capacity obligation was determined based on their consumption between 4:00 PM and 5:00 PM on July 6, 2010.⁴ The wholesale prices used by Dr. Sinclair appear to capture capacity prices for the system, but it is not certain because he cites no sources for his data. However, using an average monthly capacity charge as Dr. Sinclair appears to have done is inappropriate because customers’ capacity obligations are unique to their homes or business. Additionally, to ensure the electric grid is reliable in the future, the NYISO requires customers to purchase approximately 1.2 times their usage in the peak hour the prior year. An individual customer’s electricity costs cannot

⁴ NYISO, 2019 Load & Capacity Data Gold Book, Table 1-15, found at:
<https://www.nyiso.com/documents/20142/2226333/2019-Gold-Book-Final-Public.pdf/>

Affidavit of Frank Lacey

Page 14

be reasonably determined without consideration of their contributions to the system peak in the prior year and their correlated capacity obligations year over year. It appears that Dr. Sinclair has materially miscalculated capacity costs in his market variable rate analysis

38) Dr. Sinclair also improperly calculates on a percentage basis what he categorizes as “Miscellaneous Operating Costs” incurred by Liberty Power, which include a fee relating to financing, billing transaction costs, balancing and purchase of receivables (“POR”) charge. Some of these costs vary month to month, and they also vary customer to customer. Based on Jose Albarran’s generalized testimony that these components make up about five percent of the total rate, Dr. Sinclair purports to establish a Miscellaneous Operating Costs value equal to five percent of what he calculated as the NYISO wholesale power costs plus a 5.1 cent/kWh margin. (Sinclair Aff. ¶ 23.) By doing so, Dr. Sinclair has underestimated these costs and failed to account for variations among customers.

39) Dr. Sinclair also uses a fictional margin value that has no basis in reality. Dr. Sinclair’s assertion that the default variable margin should be less than a fixed price term rate margin because costs and risks are higher with a fixed price term contract is unsupported and inaccurate. (Sinclair Aff. ¶ 25.) Significantly, Dr. Sinclair cites to no evidence or authority for this statement. In my experience, the costs and risks associated with these two products are different, and the comparison of a fixed price term contract and the rollover default variable rate is apples to oranges at best.

40) Costs and risks, along with the associated cost recovery and risk management needs of the two different types of electricity products, require different management practices. Hedging fixed price retail contracts with wholesale load includes differing layers of risk management and the application of risk premiums in the different cost elements of a retail electric price. The

Affidavit of Frank Lacey

Page 15

effective margin on a fixed price electricity contract could be vastly different from the forecasted margins included in a retail price. In contrast, margins are included at the end of the pricing process for a variable priced customer because the individual cost components are not hedged and not known until they are incurred. Unlike a fixed rate, which can be billed precisely, variable costs which are not known in advance of the billing deadline must be estimated with no opportunity for future cost recovery of shortfalls – a risk that requires a premium.

41) There is no basis for Dr. Sinclair's statement that administrative and transaction costs are higher with respect to a fixed rate product. Dr. Sinclair fails to account for, among other costs, the significant activity associated with pricing a rollover variable rate product on a daily basis. These tasks were described by Mr. Viner during his deposition, and include tasks such as load shaping "after the fact", allocating costs from the NYISO, vendors and the utility to customers, bill calculations, bill generation and others. In addition, with variable rate service many of the wholesale costs are not known before a retailer needs to submit its rate for billing. Unlike a fixed term contract with many months to average out costs, each monthly variable rate bill must recover all possible costs because the customer can leave without further cost recovery opportunity. Moreover, there is nothing that requires Liberty Power to allocate its administrative overhead in any particular way. That is, Liberty Power and other ESCOs are free to allocate overhead to various products in any manner.

42) Similarly unsupported is Dr. Sinclair's statement that the risk is higher in a fixed rate arrangement. For example, customer attrition is a far greater risk with a rollover variable-priced customer than it is with a fixed-price customer in the base term of an agreement. Month-to-month variable customers are significantly less certain to continue service and represent additional challenges to forecasting and planning. Attrition imposes significant customer

Affidavit of Frank Lacey

Page 16

acquisition costs on a business just to sustain itself. Similarly, the risk of a customer default is also greater with a rollover variable-priced customer.

43) Dr. Sinclair also ignores the fact that a term contract, which cannot be terminated early except upon payment of an early termination fee, is more valuable to ESCOs, like Liberty Power, than contracts that can be terminated at any time without penalty. For example, retail electricity supply credit facilities provide significantly less borrowing capacity related to month-to-month variable customers than for fixed price contracts as a result of the low confidence in planning and retention. As a result, ESCOs often cannot use their rollover customer portfolio as an asset to support growth. Month-to-month customers only provide that capacity through the cash they generate and, as a result, rollover variable priced service requires higher margin than fixed price term contracts in order to support an equivalent capacity to acquire new customers. The price charged reflects that value, and there is nothing inappropriate about this. This is like getting a better deal on an apartment lease as opposed to renting month-to-month, and the reason it is more costly to purchase an airplane ticket that allows you to cancel or change your reservation, as compared to a ticket that locks you in to a particular flight.

44) There is also no support that Liberty Power's margin should be ascertained by "estimating a reasonable return on invested capital." (Sinclair Aff. ¶ 26.) That is how utility rates for monopoly services are regulated, with the PSC authorizing an allowed rate of return on equity capital for the utility. Liberty Power is not a utility, much less a rate-regulated entity. The notion that ESCOs must limit their profits like a utility is completely antithetical to a deregulated market.

45) A comparison of BLT Fish's default variable rate to an average monthly hypothetical "Market-based Variable Rate" is an improper comparison. BLT Fish's experience is neither representative nor typical of the experience of Liberty Power's portfolio of customers and

Affidavit of Frank Lacey

Page 17

its electricity purchases on behalf of those customers. There is simply no legitimate basis for using an average monthly delivered NYISO wholesale cost to approximate Liberty Power's energy and related costs for even a single customer, much less for all its customers.

The Comparison of Liberty Power's Rollover Variable Rate to ConEd's MSC is Inappropriate

46) Dr. Sinclair's suggestion that the utility Market Supply Charge ("MSC") is an appropriate alternative price to Liberty Power's rollover default variable rate (Sinclair Aff. ¶¶ 33-38) is also flawed for multiple reasons.

47) First, the MSC does not include several cost components that would be applied to a retail customer if they were to take service from ConEd. In addition to the MSC, ConEd's rate for default service includes the Merchant Function Charge ("MFC"), the MSC Adjustment 1, the MSC Adjustment 2, the Clean Energy Standard Service surcharge, and taxes.⁵ The MFC is calculated on a monthly basis and includes costs for supply-related adjustments, credit and collections, uncollectible-bill expenses associated with the MSC, and a transition adjustment. The MSC Adjustment 1 includes costs for reconciling prior months billings and collections, tax adjustments and demand response program costs and benefits. The MSC Adjustment 2 collects costs for re-billing from the NYISO, including interest costs when the re-billing accounts for more than 5% of the MSC, and costs and benefits of hedges that ConEd has contracted. The Clean Energy Standard Service Surcharge collect costs for renewable energy credits, zero emission credits and off-shore wind renewable energy credits. Taxes includes a gross-receipts tax that is embedded in suppliers' rates and must be included in any meaningful rate comparison.

⁵ As is stated on ConEd's website: "If you buy electricity from Con Edison, the total supply charges on your bill are made up of Supply (described below), the Merchant Function Charge, the Clean Energy Standard Supply Surcharge and Gross Receipts Taxes and other surcharges." See <https://www.coned.com/en/rates-tariffs/rates>

Affidavit of Frank Lacey

Page 18

48) Second, the MSC also does not reflect the purchase of receivables (“POR”) charge, which is a billing charge assessed by the utilities for billing customers on behalf of the supplier. There is no question that Liberty Power’s rate must account for this POR charge, and to eliminate it from any comparator artificially deflates the comparator costs. The POR in the ConEd service territory today is 3.05% of the supplier’s bill.⁶

49) Third, the MSC fails to account for three very material differences between an ESCO model and the utility business model. Utilities do not include any operating costs in their default supply service rate. The operating costs of the utilities’ default service businesses are subsidized almost entirely by their distribution business.⁷ In addition, utilities do not include a profit on their default supply service business,⁸ and Dr. Sinclair appropriately agrees that an ESCO is entitled to profit on the rollover default variable rate product. Finally, utilities bear no market risk in the provision of default service. To the contrary, they pass through all costs to customers and must true-up those costs (either shortfalls or overcollections) every month. For all these reasons, a utility retail supply rate is not representative of a market rate electricity and is not a legitimate comparator to an ESCO’s rollover default variable rate.

50) The MSC is also an inappropriate comparator due to the significant differences between individual customers, including rate class, meter read date, and customer usage patterns.

⁶ See: <https://www.coned.com/-/media/files/coned/documents/business-partners/escos-news/esco-newsletter-issue-2019-25-purchase-of-recievables-discount-rate.pdf?la=en>

⁷ The ConEd tariffs do not specifically say that operating costs are not included, however, they detail the costs that are included. There is no inclusion of operating costs or expenses in the list of items that are included in the supply rate to customers. It is well documented that default service providers throughout the US, including New York, do not include operating costs in their default service prices. See “Default Service Pricing - The Flaw and the Fix: Current Pricing Practices Allow Utilities to Maintain Market Dominance in Deregulated Markets,” *The Electricity Journal*, 32(3), April 2019, pp. 4-10. Also, this issue has surfaced in recent rate proceedings in MD, PA and NJ.

⁸ The ConEd website clearly states that “Supply costs and taxes and fees are not set by Con Edison and are collected and distributed without profit.” See <https://www.coned.com/en/accounts-billing/your-bill/about-con-edisons-rates>

Affidavit of Frank Lacey

Page 19

The MSC varies based on the day of a customer's meter reading. For example, a January invoice in 2014 might have included costs for the Polar Vortex, which drove prices to extreme high levels. Alternatively, the set of customers who received their bills early in the month would not see the Polar Vortex costs until their February invoice. Liberty Power's rates are calculated based on meter read date (Viner Dep. 106). Accordingly, any comparison to the MSC must reflect the same meter-read dates, energy costs and other data.

51) The MSC also fails to reflect capacity charges for "EL 9" customers like Plaintiff. EL 9 customers are large commercial and industrial accounts. ConEd calculates the capacity charges for EL 9 customers on an individual basis.

52) A customer's rate class also will cause a customer's rates to vary significantly during the course of a month. For example, during the relevant period, both Plaintiffs were classified by ConEd as "EL 9". As the data below shows, EL 9 customers' MSC rates are very different than other types of customers' rates. Because EL 9 customers vary so widely, ConEd does not include the cost of capacity in its MSC calculation for these customers. Using the MSC calculator⁹ that can be found on ConEd's website, I determined that:

- a. A residential customer receiving utility service for the interval July 5 through August 3, 2011 would have been billed the MSC rate of 13.1523 ¢/kWh.
- b. An "EL 2" small commercial customer receiving utility service for the interval July 5 through August 3, 2011 would have been billed the MSC rate of 15.7418 ¢/kWh.
- c. A "EL 9" large commercial customer receiving utility service over that same time horizon would have been billed 8.3795 ¢/kWh (exclusive of capacity charges) for the MSC portion of its bill.

⁹ ConEd's MSC calculator can be accessed at <https://apps.coned.com/CEMyAccount/csol/MSCcc.aspx>

Affidavit of Frank Lacey

Page 20

53) Dr. Sinclair applied an MSC rate of 8.86 ¢/kWh for July 2011 in his alternate damages approach using ConEd's MSC as a proxy for what a customer should have paid that month. As is represented above, 8.86 ¢/kWh dramatically understates the MSC rate that residential and small commercial customers would have paid to the utility for electricity service and the MSC is only one component of several that would be included in the customer's energy bill from the utility. It also dramatically underestimates the amount BLT Fish would have paid since the price excludes its capacity obligation. In some instances, Dr. Sinclair's proposed MSC approach understates what a customer would have paid by over 75%.

Any Comparison of Variable Rates Must Be Done on An Individual Basis

54) Dr. Sinclair's proposed approach of using the simplistic calculation of a single monthly "variable market rate" and applying it to all putative class members is inappropriate. Each of Liberty Power's customers is unique in many respects, and impose different costs on the system. The differing costs are a result of a number of factors, including the rate class, size and location of the customer, the customer's energy consumption pattern, capacity obligations, meter cycle, and load profile, among many other things. Because different customers impose different costs on Liberty Power, any rate compared to the rollover default variable rate charged to one customer would need to reflect all of these factors.

55) Nonetheless, Dr. Sinclair proposes to compare Liberty Power's default variable rates to a generalized, average monthly hypothetical "Market-based Variable Rate" that is adjusted solely based on customer location. (Sinclair Aff. ¶¶ 39-42.) Similarly, Dr. Sinclair proposes to compare Liberty Power's default variable rates to a customer's default utility MSC. (*Id.* 44.) There is no valid basis for such a comparison, much less for using a single comparator for a portfolio of diverse customers.

Affidavit of Frank Lacey

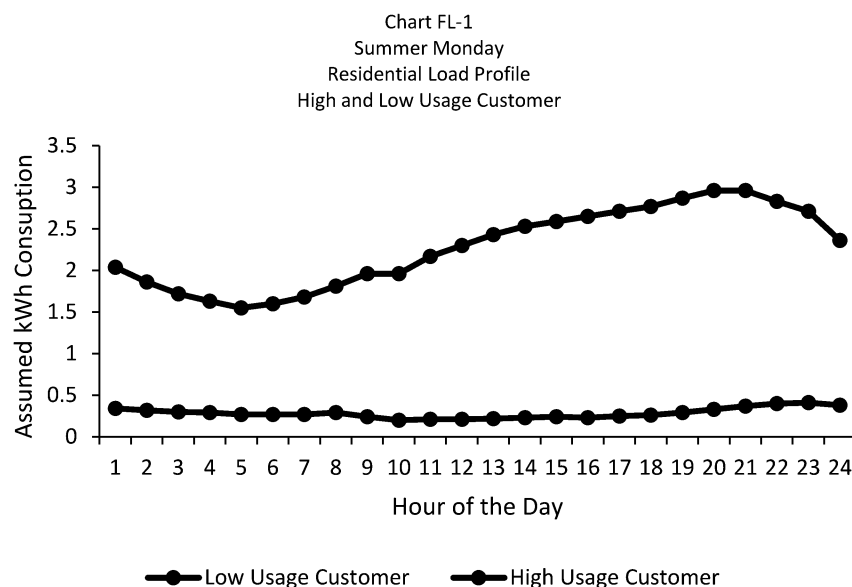
Page 21

56) Being classified as an “EL 9” large commercial and industrial customer, BLT Fish (the entity Dr. Sinclair uses in his examples) is not representative of Liberty Power’s default variable rate customer portfolio. EL 9 customers do not receive a uniform price from ConEd, but instead receive prices specific to their own usage pattern, and capacity charges are assessed individually. Smaller customers, on the other hand, are “load profiled” by their utility with “assumed” usage patterns and capacity obligations. These assumptions are made in order to allocate costs to customers who do not have meters that measure hourly consumption. While the “profiles” are assigned by the utility, they are used to allocate costs regardless of the customer’s electricity supplier.

57) Indicative of more refined granularity within customer class, Chart FL-1 shows “assumed” electricity usage patterns for two different residences – one a large consumer of electricity and the other, a small consumer of electricity. The utility “assumes” that both of these customers maximize their consumption toward the end of the day. The larger use customer is assumed by the utility to consume an increasing amount of electricity beginning in the mid-morning. Because of these utility assumptions, or “profiles” assigned to customers, the costs to serve the higher usage customer will be greater because energy is priced higher during the daytime hours than it is at night. ConEd applies at least six different usage profiles to residential customers, based on their annual consumption.

Affidavit of Frank Lacey

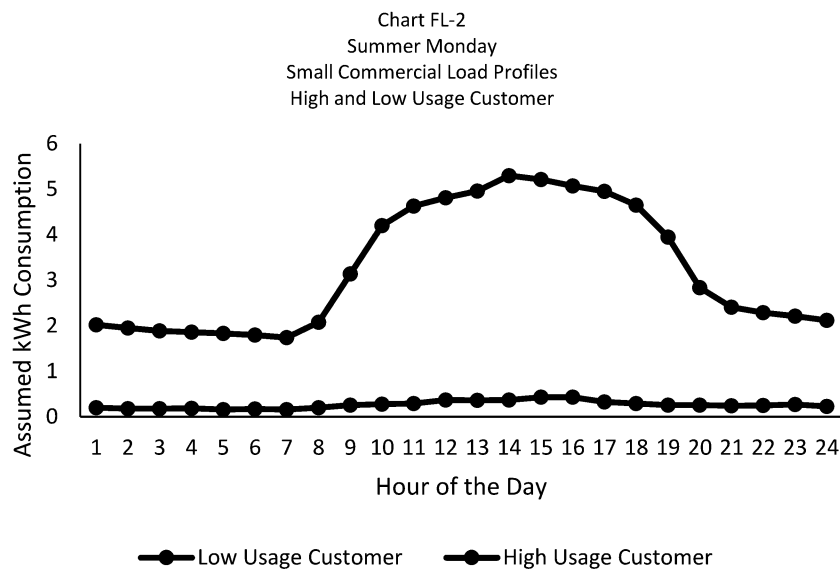
Page 22



58) Chart FL-2 shows “assumed” electricity usage patterns for two different small commercial enterprises. Both of these customers are assumed to maximize their consumption during the middle of the day, however, the variance in assumed usage patterns between the two types of customers is quite visible. The costs to serve the high usage customer will be greater because energy is priced higher during the daytime hours than it is at night. The larger customer is estimated to use 69% of its electricity between 8:00 AM and 8:00 PM. The smaller customer is assumed to consume only 62% of its power in those same hours.

Affidavit of Frank Lacey

Page 23



59) A customer's capacity charges will also impact the costs that Liberty Power will incur to serve its customers. Capacity charges are fixed monthly costs. An ESCO is charged a monthly price per kilowatt ("\$/kW-month"), not a kWh price. A typical customer sees only a ¢/kWh rate, so the supplier converts the fixed charge to a variable charge to recover the costs from its customer.

60) Two businesses might have the exact same monthly capacity obligation. One might be a small manufacturing facility that runs three shifts six days a week. The other might be an office building that is open from 8:00 AM to 6:00 PM, five days a week. The same fixed charge will result in a much lower unit price (per kWh) for the company that is open around the clock than it will be for the office building that is open five days a week because the manufacturer is consuming more kWh over which the fixed charge will be divided.

61) Each customer's capacity obligation is priced differently every month and would need to be addressed individually when creating any legitimate comparator to the rollover default

Affidavit of Frank Lacey

Page 24

variable rate. Total costs and per-kWh costs for capacity can vary widely for a single customer from month to month based on the natural fluctuations in electricity consumption, establishing what is akin to a monthly fingerprint. Table FL-3 uses the data from the ConEd load profiles shown in Charts FL-1 and FL-2 to show how capacity costs for different customers can vary on a “per kWh” basis within the same month. Table FL-3 shows that on a unit basis, capacity costs can vary by almost 70% between customers. A small residential customer might only pay 1.2 cents per kWh for capacity, but a larger commercial customer will pay 2.0 cents per kWh.

Table FL - 3				
Capacity Costs for Different Customers				
Assumed Capacity Cost:	\$ 2.25 / kW-Week			
	Customer Profile			
	Residential		Small Commercial	
	Small	Large	Small	Large
Peak Hour Usage (kW)	0.25	1.37	0.33	4.95
Total Capacity Cost	\$ 0.56	\$ 3.08	\$ 0.74	\$ 11.14
Weekly kWh	48	211	45	545
Cost for Capacity (\$/kWh)	\$ 0.012	\$ 0.015	\$ 0.017	\$ 0.020

62) Thus, any comparator to Liberty Power’s rollover default variable rate must reflect each customers’ cost components¹⁰ in each month. For example, in 2014, the wholesale price of energy in the day-ahead market peaked at approximately double the peak price in 2015 and at five times the peak in 2016. Prices for ancillary services were as much as five times higher in 2014 than they were in 2015. These spikes occurred during an extreme cold-weather event referred to as the Polar Vortex. Additionally, in 2015, the NYISO added a new ancillary service to its portfolio. These variances in market pricing and market design demonstrate the need for

¹⁰ In addition to significant differences in wholesale costs, smaller customers are covered by a variety of protected class consumer protection rules and regulations which imposes a host of other operating costs on retail electricity suppliers serving those customers. Yet, Dr. Sinclair proposes no differentiation between large and small customers.

Affidavit of Frank Lacey

Page 25

individualized customer analyses that incorporate the exact time frames a customer was served by Liberty Power's variable rate product and what the appropriate alternative price would have been during those exact time frames.

Dr. Sinclair's Analysis Fails to Consider Benefits and Mitigation

63) Dr. Sinclair's analysis also fails to consider benefits that a customer might have received from Liberty Power not reflected in the energy costs, as well as the other options available to Plaintiffs and other customers that would mitigate any purported damages.

64) Dr. Sinclair also fails to consider options for customers to mitigate damages. Liberty Power's customers that had been migrated to the rollover default variable rate product were free at any time to (1) renew with Liberty Power at a fixed rate; or (2) terminate service with Liberty Power and switch to the default utility or to another ESCO.

65) Notably, customers have always had the ability during the relevant period to compare the rate they are paying with that charged by the utility or other ESCOs. The rate charged by an ESCO is clearly stated on a customers' utility invoice. Customers can compare that rate to what a utility would charge simply by going to the utility's website. ConEd, for example, provides a rate calculator on its website.¹¹ Customers can obtain energy offers from ESCOs on the PSC's website,¹² and there are also a number of websites that will provide electricity rate quotes from multiple ESCOs.¹³ There is also a steady stream of market pricing information from the many ESCOs that operate in New York that is regularly coming at customers through various means,

¹¹ See <https://www.coned.com/en/rates-tariffs/rates>

¹² See <http://documents.dps.ny.gov/PTC/home>

¹³ See, e.g., www.chooseenergy.com

Affidavit of Frank Lacey

Page 26

such as advertising, field sales and telemarketing. Furthermore, many commercial customers use brokers, who can obtain rate proposals from a large number of ESCOs.

66) Therefore, a reasonable consumer acting reasonably can easily determine whether the rate he or she is paying is a competitive market rate as compared to other ESCOs, or a rate that is higher or lower than that charged by the utility.

67) Significantly, commercial customers frequently hire energy consultants, hire employees with energy markets expertise or utilize the services of a broker or aggregator working on their behalf.

68) Dr. Sinclair's analysis also omits one less-quantifiable but significant factor – customer preferences. At some point in time, each of the customers served by Liberty Power made a conscious decision to leave their utility's default service. They also agreed that, at the end of their term contract, if they opted to do nothing, they would continue to receive supply from Liberty Power at a variable rate. The competitive energy market is one way for customers to express their preferences. Customers could prefer a variable rate to receiving utility supply for many reasons, including flexibility in advance of a move, potential transactional activity, term contract anxiety, waiting for the right price signal, desire to get a tax break, brand affinity, or other reasons.

69) Dr. Sinclair is wrong when he suggests that Liberty Power could have "simply discontinued" customers and placed them back at the default utility. First, such actions would have violated Liberty Power's contractual agreements with its customers. Second, moving customers to another supplier without their consent constitutes slamming. Third, such actions ignore the choice of many customers to remain with an ESCO and not receive service from the utility. Dr. Sinclair's suggestion is contrary to regulatory rules and established market design.

Affidavit of Frank Lacey

Page 27

Summary

70) Liberty Power complied with its obligation to provide a variable rate based on electricity market pricing.

71) Liberty Power's rollover default variable rate, and the margin included in that rate, are competitive and commercially reasonable in relation to rollover variable rates and margins charged by other ESCOs in New York State.

72) The forecasted margin in a fixed price term rate is not an appropriate comparison for the margin included in the rollover default variable rate.

73) A hypothetical "Market-based Variable Rate" as developed by Dr. Sinclair for purposes of this litigation is not an appropriate comparator to the Liberty Power rollover default variable rate because, among other things, it significantly underestimates the costs to serve.

74) The utility MSC is not an appropriate comparator to the Liberty Power rollover default variable rate because, among other things, it significantly underestimates the costs to serve.

75) Any comparison of rates must be done on an individual, customer-by-customer basis, and take into consideration the myriad factors that impact the costs each individual customer imposes on the system.

76) Dr. Sinclair cites no authority whatsoever for his "opinion" that Liberty Power's rollover default variable rate is not commercially reasonable or above-market.


77) While Dr. Sinclair may be a utilities and wholesale market expert, he has no competitive retail markets experience, which is apparent in his analysis. Dr. Sinclair proposes to treat Liberty Power like a regulated utility, and its customers like utility customers.

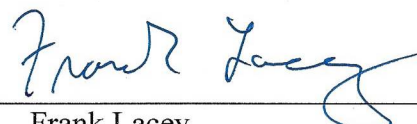
Affidavit of Frank Lacey

Page 28

78) As a result, not surprisingly, Dr. Sinclair overestimates any purported "damages" to one unspecified Plaintiff, and underestimates the complexity of retail market energy pricing and determining purported "damages" across a diverse portfolio of customers.

Sworn to before me this 20th day
of February, 2020


Notary Public
ACTIVE 48841831v5


Frank Lacey

Commonwealth of Pennsylvania - Notary Seal
Cristina Avila, Notary Public
Chester County
My commission expires May 16, 2022
Commission number 1324358
Member, Pennsylvania Association of Notaries