

EXHIBIT A

**SUPREME COURT OF THE STATE OF NEW YORK
COURTY OF KINGS**

SUSANNA MIRKIN and BORIS MIRKIN,

**Individually and on Behalf of all Others Similarly
Situated,**

Plaintiffs,

v.

**XOOM ENERGY, LLC, and
XOOM ENERGY NEW YORK, LLC,**

Defendants.

SUMMONS

Index No.

**Date Index Number Purchased:
April 18, 2018**

JURY TRIAL DEMANDED

TO THE ABOVE NAMED DEFENDANTS:

PLEASE TAKE NOTICE THAT YOU ARE SUMMONED to answer the Complaint in this action and to serve a copy of your answering documents on the Plaintiffs' attorney at the address indicated below within twenty (20) days after service of this Summons, exclusive of the day of service, or within thirty (30) days after service is complete if the Summons is not delivered personally to you within the State of New York.

YOU ARE HEREBY NOTIFIED THAT should you fail to answer, a judgment will be entered against you by default for the relief demanded in the Complaint.

Dated: April 18, 2018
Armonk, NY

By: /s/ Steven L. Wittels
Steven L. Wittels
J. Burkett McInturff
Tiasha Palikovic
WITTELS LAW, P.C.
18 Half Mile Road
Armonk, New York 10504
Telephone: (914) 319-9945
Facsimile: (914) 273-2563
slw@wittelslaw.com
jbm@wittelslaw.com
tpalikovic@wittelslaw.com

Daniel Hymowitz
HYMOWITZ LAW GROUP, PLLC
1629 Sheepshead Bay Road
Brooklyn, NY 11235
Telephone: (718) 807-9900
Facsimile: (866) 521-6040
daniel@hymowitzlaw.com

Andrey Belenky
Dmitry Kheyfits
KHEYFITS P.C.
1140 Avenue of the Americas, 9th Floor
New York, NY 10036
Phone: (212) 203-5399
Facsimile: (212) 203-6445
abelenky@kheyfits.com
dkheyfits@kheyfits.com

Counsel for Plaintiffs and the Class

Defendants' Addresses:

XOOM Energy, LLC
11208 Statesville Road, Ste. 200
Huntersville, NC 28078

XOOM Energy New York, LLC
11208 Statesville Road, Ste. 200
Huntersville, NC 28078

Venue:

Plaintiffs designate Kings County as the place of trial because Plaintiffs Susanna and Boris Mirkin reside in this county, Defendants do business in this county, and Defendants are licensed to do business in the State of New York. Further, substantial acts in furtherance of the alleged improper conduct occurred within this county.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

SUSANNA MIRKIN AND BORIS MIRKIN,
Individually and on Behalf of All Others
Similarly Situated,

Plaintiffs,

v.

XOOM ENERGY, LLC, and XOOM
ENERGY NEW YORK, LLC,

Defendants.

Index No.:

CLASS ACTION COMPLAINT

Jury Trial Demanded

CLASS ACTION COMPLAINT

Plaintiffs Susanna Mirkin and Boris Mirkin, by their attorneys Wittels Law, P.C., Hymowitz Law Group, PLLC, and Kheyfits P.C. bring this action in their individual capacity, and on behalf of a class of persons defined below, against Defendants XOOM Energy, LLC (“XOOM-Energy”) and XOOM Energy New York, LLC (“XOOM-NY”) (collectively “XOOM” or “Defendants”) and hereby allege upon personal knowledge as to themselves and their own acts, and as to all other matters upon information and belief, based upon, *inter alia*, the investigation made by their attorneys, as follows:

NATURE OF THE ACTION

1. This action seeks to redress the improper pricing practices of Defendants that have caused thousands of New York consumers to pay many millions of dollars more for their residential gas and electricity than they should otherwise have paid.

2. Traditionally, residential energy was supplied by regulated utilities like Con Edison. The rates utilities could charge were strictly controlled. In the 1990s, however, Enron’s

unprecedented lobbying campaign resulted in deregulation of state energy markets in New York and elsewhere such that consumers were permitted to choose from a variety of companies selling residential energy. Seizing on deregulation, independent energy service companies (“ESCOs”) like XOOM have grown rapidly.

3. Price is the most important consideration for energy consumers. Given that there is no difference at all in the commodity that XOOM supplies as opposed to the consumer’s utility, the only reason a consumer switches to an ESCO like XOOM is for the potential savings offered in a competitive market as opposed to prices offered by a regulated utility. That is, after all, the entire point of energy deregulation.

4. Defendants take advantage of deregulation by offering a teaser rate that is lower than the local utility’s rate. When the teaser rate expires after a brief period, sometimes as short as a month, Defendants charge a variable rate, which they represent in their customer contract is based on Defendants’ supply cost. Yet the rate Defendants charge is *not* based on supply costs as required by the contract but is instead a substantially higher rate based on Defendants’ price gouging.

5. Defendants’ conduct injures New York consumers and is unlawful. In fact, XOOM’s variable rates are significantly higher than those otherwise available in the energy market. XOOM’s business model is simple: after the teaser rate expires, it charges exorbitant rates that are not based on Defendants’ supply costs. As a result, New York consumers are being fleeced millions of dollars in exorbitant residential energy charges. Residential energy costs are a significant portion of most New York families’ budgets. To prey on consumers as Defendants have done here is unconscionable.

6. This suit is brought pursuant to the common law of New York on behalf of a class

of consumers who purchased residential electricity or gas from XOOM at any time within the applicable statutes of limitations preceding the filing of this action through and including the date of judgment. It seeks, *inter alia*, injunctive relief, actual damages and refunds, interest, attorneys' fees and the costs of this suit.

7. Only through a class action can XOOM's customers remedy Defendants' ongoing wrongdoing. Because the monetary damages suffered by each customer are small compared to the much higher cost a single customer would incur in trying to challenge XOOM's unlawful practices, it makes no financial sense for an individual customer to bring his or her own lawsuit. Further, many customers don't realize they are victims of XOOM's deceptive conduct. With this class action, Plaintiffs and the Class seek to level the playing field and ensure that companies like XOOM engage in fair and upright business practices.

PARTIES

8. Plaintiffs Susanna Mirkin and Boris Mirkin are married and reside in Brooklyn, New York.

9. Defendant XOOM-NY is a limited liability company that was formed under the laws of the State of New York, with its principal place of business located in Huntersville, North Carolina. XOOM-NY is the wholly owned subsidiary of Defendant XOOM-Energy. XOOM-NY is XOOM-Energy's agent in New York and has apparent authority to act on XOOM-Energy's behalf. XOOM-NY and XOOM-Energy use the same corporate logo and share the same principal place of business. On information and belief, XOOM-NY has no separate offices or letterhead. On information and belief, XOOM-NY does not have its own management or employees. When Defendants issue new releases about New York, they do so under the XOOM-Energy's brand. On information and belief, the XOOM-Energy management and employees conduct the affairs of XOOM-NY. On information and belief, XOOM-NY does

not have its own payroll. On information and belief, to the extent XOOM-NY maintains any corporate policies those policies were developed and implemented by XOOM-Energy's management and employees. On information and belief, XOOM-NY does not advertise or have a website. Rather XOOM-NY procures and enrolls customers through co-Defendant XOOM-Energy's advertisements and website. On information and belief, XOOM-Energy authorized XOOM-NY to procure and enroll customers through co-Defendant XOOM-Energy's website. On information and belief, all XOOM marketing directed at New York consumers was created by or at the request of XOOM-Energy. On information and belief, XOOM-Energy is fully aware that XOOM-NY has apparent authority to act on XOOM-Energy's behalf.

10. On information and belief, XOOM-NY possesses actual authority to act on XOOM-Energy's behalf in New York. On information and belief, XOOM-Energy's management, employees, or other individuals contracted by XOOM-Energy drafted the customer contract at issue in this litigation. On information and belief, XOOM-Energy caused Defendants to breach their contracts with Plaintiffs and the Class.

11. On information and belief, XOOM-NY is entirely dominated by XOOM-Energy. On information and belief, XOOM-NY observes no corporate formalities. On information and belief, XOOM-NY keeps no corporate records or minutes and has no officers or directors elected in accordance with its by-laws. On information and belief, XOOM-Energy commingles assets with XOOM-NY. On information and belief, XOOM-Energy pays all of XOOM-NY's bills. On information and belief, XOOM-NY's revenues are not recorded independently, but are treated as part of XOOM-Energy's revenues. On information and belief, XOOM-NY has no assets and passes all revenues to XOOM-Energy. On information and belief, XOOM-NY does not own real property. On information and belief, any real property owned by Defendants is owned by

XOOM-Energy or other entities controlled by XOOM-Energy. On information and belief, XOOM-NY's marketing and sales data are not recorded independently but are treated as part of XOOM-Energy's marketing and sales data. On information and belief, XOOM-NY does not have an independent marketing and sales department and does not utilize marketing and sales software for its sole benefit. Instead, on information and belief, XOOM-NY uses XOOM-Energy's marketing and sale channels and software.

12. In sum, XOOM-NY is a shell company through which XOOM-Energy operates in New York. XOOM-NY is XOOM-Energy's agent in New York with authority to bind New York consumers to XOOM's customer contract.

13. Defendant XOOM-Energy is a limited liability company that was formed under the laws of the State of Delaware, with its principal place of business located in Huntersville, North Carolina. On information and belief, XOOM-NY is XOOM-Energy's alter ego because XOOM-Energy exercises complete domination and control of XOOM-NY so that XOOM-NY has no independent identity. XOOM-Energy supplies electricity, natural gas, and renewable energy through its wholly-owned subsidiaries, which in New York is XOOM-NY.

JURISDICTION AND VENUE

14. This Court, as a court of general original jurisdiction, has subject matter jurisdiction over, and is competent to adjudicate, the causes of action set forth in this complaint.

15. This Court has personal jurisdiction over Defendant XOOM-NY under CPLR § 301 because it is a limited liability company organized under the laws of the State of New York.

16. This Court has personal jurisdiction over Defendant XOOM-Energy under CPLR § 302 because it transacts business in New York. On its website, XOOM-Energy states as follows:

Based in Huntersville, North Carolina, XOOM Energy, is a progressive,

independent energy retailer. Through its wholly-owned subsidiaries, XOOM Energy supplies natural gas, electricity and renewable energy to residential, small business, mid-market and large commercial customers in deregulated energy markets in 18 states, plus the District of Columbia, and Canadian provinces of Alberta and Ontario, in 100+ utility markets across North America.

Additionally, on its website, www.xoomenergy.com, that is registered and administered by XOOM-Energy (not XOOM-NY), it advertises various energy plans to New York residential and commercial customers and enables New York consumers to enroll as XOOM customers:

How do I enroll? It's simple. If you are the account holder or legally authorized person on the account, you may enroll right here online. It only takes a few minutes – all you need is your utility bill to get started.

17. Venue is proper in the county of Kings under CPLR § 503(a) because Plaintiffs Susanna Mirkin and Boris Mirkin reside in Brooklyn, NY.

SUBSTANTIVE ALLEGATIONS

Energy Deregulation and Resulting Wide-Spread Consumer Harm

18. In 1996, New York deregulated the sale of retail gas and electricity. As a result of deregulation, New York consumers can purchase natural gas and electricity through third-party suppliers while continuing to receive delivery of the energy from their existing public utilities. These third-party energy suppliers are known as energy service companies, or “ESCOs.” Since New York opened its retail gas and electric markets to competition, approximately two million New York consumers have switched to an ESCO.

19. ESCOs are subject to minimal regulation by New York’s utility regulator, the New York State Public Service Commission (the “PSC”). ESCOs like XOOM do not have to file their rates with the PSC, or the method by which those rates are set. The PSC also does not limit in any way the prices ESCOs charge.

20. ESCOs play a middleman role: they purchase energy directly or indirectly from companies that produce energy and sell that energy to end-user consumers. However, ESCOs do

not *deliver* energy to consumers. Rather, the companies that produce energy deliver it to consumers' utilities, which in turn deliver it to the consumer. ESCOs merely buy gas and electricity and then sell that energy to end-users with a mark-up. Thus, ESCOs are essentially brokers and traders: they neither make nor deliver gas or electricity, but merely buy energy from a producer and re-sell it to consumers.

21. If a customer switches to an ESCO, the customer's existing utility continues to bill the customer for both the energy supply and delivery costs. The only difference to the customer is which company sets the price for the customer's energy supply.

22. After a customer switches to an ESCO, the customer's energy supply charge (based either on a customer's kilowatt hour [electricity] or therm [gas] usage) is calculated using the supply rate charged by the ESCO and not the regulated rate charged by the customer's former utility. The supply rate charged is itemized on the customer's bill as the number of kilowatt hours ("kWh") or therms multiplied by the rate. For example, if a customer uses 145 kWh at a rate of 10.0¢ per kWh, the customer will be billed \$14.50 (145 x \$.10) for their energy supply.

23. Almost all states that deregulated their energy markets did so in the mid to late 1990s. This wave of deregulation was frantically pushed by then-corporate superstar Enron. For example, in December 1996 when energy deregulation was being considered in Connecticut,

"the most aggressive proponent" of deregulation, Enron CEO Jeffrey Skilling said:

Every day we delay [deregulation], we're costing consumers a lot of money It can be done quickly. The key is to get the legislation done fast.¹

24. Operating under this concocted sense of urgency, the states that deregulated

¹ Keating, Christopher, "Eight Years Later . . . 'Deregulation Failed,'" *Hartford Courant*, Jan. 21, 2007.

suffered serious consumer harm. For example, in 2001 forty-two states had started the deregulation process or were considering deregulation. Today, the number of full or partially deregulated states has dwindled to only seventeen and the District of Columbia. Even within those states several have recognized deregulation's potential harm to everyday consumers and thus only allow large-scale consumers to shop for their energy supplier.

25. Responding to shocking energy prices, many key players that supported deregulation now regret the role they played. For example, reflecting on Maryland's failed deregulation experience, a Maryland Senator commented:

Deregulation has failed. We are not going to give up on re-regulation till it is done.²

26. A Connecticut leader who participated in that state's foray into energy deregulation was similarly regretful:

Probably six out of the 187 legislators understood it at the time, because it is so incredibly complex. . . . If somebody says, no, we didn't screw up, then I don't know what world we are living in. We did.³

27. XOOM takes advantage of deregulation and the lack of regulatory oversight to charge New York consumers exorbitant rates for residential electricity and gas. In theory, energy deregulation allows consumers to shop around for the best energy rates, and it allows consumers to take advantage of market-based rates that decline when wholesale costs decline. However, XOOM exploits deregulated markets with false promises that its energy rates are based on its actual and estimated supply costs. In fact, XOOM's rates are not reflective of

² Hill, David, "State Legislators Say Utility Deregulation Has Failed in its Goals," *The Washington Times*, May 4, 2011.

³ Keating, *supra*.

Defendants' supply costs.

28. One of deregulation's main unintended consequences has been the proliferation of ESCOs like XOOM whose business model is primarily based on taking advantage of consumers. As a result of this widespread misconduct, states like New York began enacting post-deregulation remedial legislation meant to "establish[] important consumer safeguards in the marketing and offering of contracts for energy services to residential and small business customers."⁴ As the sponsoring memorandum notes, the ESCO Consumers Bill of Rights, codified as G.B.L. Section 349-d, in 2010 sought to end the exact type of deceptive conduct Plaintiffs challenge here:

Over the past decade, New York has promoted a competitive retail model for the provision of electricity and natural gas. Consumers have been encouraged to switch service providers from traditional utilities to energy services companies. Unfortunately, consumer protection appears to have taken a back seat in this process.

* * *

High-pressure and misleading sales tactics, onerous contracts with unfathomable fine print, *short-term "teaser" rates followed by skyrocketing variable prices*—many of the problems recently seen with subprime mortgages are being repeated in energy competition. Although the PSC has recently adopted a set of guidelines, its "Uniform Business Practices" are limited and omit important consumer protections in several areas. The fact is, competition in supplying energy cannot succeed without a meaningful set of standards to weed out companies whose business model is based on taking unfair advantage of consumers.

Id. at 3–4 (emphasis added).

29. New York regulators have also begun to call out the high levels misconduct that

⁴ ESCO Consumers Bill of Rights, New York Sponsors Memorandum, 2009 A.B. 1558, at 1 (2009) attached as Exhibit 2.

pervade the state's deregulated energy markets. For example, in 2014 the PSC concluded that New York's residential and small-commercial retail energy markets were plagued with "marketing behavior that creates and too often relies on customer confusion."⁵ The PSC further noted "it is extremely difficult for mass market retail energy customers to access pricing information relevant to their decision to commence, continue or terminate service through an ESCO."⁶ The PSC concluded as follows:

[A]s currently structured, the retail energy commodity markets for residential and small nonresidential customers cannot be considered to be workably competitive. Although there are a large number of suppliers and buyers, and suppliers can readily enter and exit the market, the general absence of information on market conditions, particularly the price charged by competitors, is an impediment to effective competition⁷

30. The PSC's complaint data confirms its conclusions. A large percentage of consumer complaints to the PSC concern variable rate pricing like Defendants' where consumers' bills are more or less as advertised during the teaser or fixed rate period, but after this initial period expires, instead of switching the consumer back to the utility the ESCO uses the consumers' inaction to substantially increase the price without further notice or explanation as to how the new rate is determined.

31. Statistics from the New York Attorney General's ("NYAG") office confirm the pattern of activity this consumer class action seeks to combat. From at least the year 2000 to the present, the NYAG has investigated numerous ESCOs' deceptive and illegal business practices.

⁵ CASE 12-M-0476, Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets, at 4 (Feb. 25, 2014).

⁶ *Id.* at 11.

⁷ *Id.* at 10.

These investigations have resulted in at least eight settlements providing for extensive injunctive relief and millions in restitution and penalties.

32. In the last three years, the NYAG has also directly received more than 600 complaints against ESCOs. These complaints demonstrate that the ESCO practices that were the subject of the NYAG's previous settlements continue, and that industry participants like XOOM view regulatory enforcement actions as simply the cost of continuing their fraudulent business practices.

33. The unlawful conduct of ESCOs like XOOM has been devastating to New York consumers. For example, “[a]ccording to the data provided by [New York’s] utilities, the approximately two million New York State residential utility customers who took commodity service from an ESCO collectively paid almost \$1.2 billion more than they would have paid if they purchased commodity from their distribution utility during the 36-months ending December 31, 2016.”⁸ “Additionally, small commercial customers paid \$136 million more than they would have paid if they instead simply remained with their default utilities for commodity supply for the same 36-month period.”⁹ Combining these two groups, New York consumers have been “‘overcharged’ by over \$1.3 billion dollars over this time period.”¹⁰

34. New York’s low-income consumers have also been hit hard. The utilities reported that low-income ESCO customers (a subset of the residential customers mentioned above) “collectively paid in excess of \$146 million more than they would have paid if they took

⁸ CASE 12-M-0476, Department of Public Service Staff Unredacted Initial Brief, at 2 (Mar. 30, 2018).

⁹ *Id.* at 3.

¹⁰ *Id.*

commodity supply from their utility.”¹¹

35. Based on the flood of consumer complaints, negative media reports, and data demonstrating massive overcharges the PSC announced in December 2016 an evidentiary hearing to consider primarily whether ESCOs should be “completely prohibited from serving their current products” to New York residential consumers.¹² In other words, to reassess whether New York’s deregulation experiment has failed everyday consumers.

36. Then, on December 16, 2016, the PSC permanently prohibited ESCOs from serving low-income customers, because of “the persistent ESCO failure to address (or even apparently to acknowledge) the problem of overcharges to [low income] customers”¹³

37. Following the first part of the evidentiary hearing announced in December 2016, on March 30, 2018, PSC staff reached the following conclusions about ESCOs in New York:

[M]ass market ESCO customers have become the victims of a failed market structure that results in customers being fooled by advertising and marketing tricks into paying substantially more for commodity service than they had remained full utility customers, yet thinking they are getting a better deal. Rather than fierce ESCO against ESCO price competition working to protect customers from excessive charges, ESCOs have deliberately obfuscated prices and resisted market reforms such that the Commission’s decision to allow ESCOs access to the utility distribution systems to sell electric and gas commodity products to mass market customers has proven to be no longer just and reasonable.¹⁴

* * *

[T]he Commission must direct that mass market ESCO customer bills

¹¹ *Id.*

¹² CASE 12-M-0476, Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, at 3 (Dec. 2, 2016).

¹³ CASE 12-M-0476, Order Adopting A Prohibition On Service To Low-Income Customers By Energy Services Companies, at 3 (Dec. 16, 2016).

¹⁴ CASE 12-M-0476, Department of Public Service Staff Unredacted Initial Brief, at 1 (Mar. 30, 2018).

disclose a relative bill comparison showing the current bill charges and what the customer would have paid had they taken delivery and commodity from their utility.¹⁵

* * *

The primary problem with the retail markets for mass market customers is the overcharging of customers for commodity due to the lack of transparency to customers on ESCO prices and products; this lack of transparency allows ESCOs to charge customers practically whatever they want without customers' understanding that they are paying substantially more than if they received full utility service. Consequently, potential commodity customers attempting to choose between the ESCO offerings and the default utility service cannot readily determine which ESCO offers the best price for comparable products or if the ESCOs' prices can possibly "beat" or even be competitive with the utility's default commodity service for the duration of the contract term.

Thus, as the current retail access mass markets are structured, customers simply cannot make fully informed and fact-based choices on price . . . since the terms and pricing of the ESCO product offerings are not transparent to customers. For variable rate products this is due, in large part, to the fact that ESCOs often offer "teaser rates" to start, and after expiration of the teaser rate, the rate is changed to what is called a "market rate" that is not transparent to the customer, and the contract signed by the customer does not provide information on how that "market rate" is calculated.¹⁶

* * *

ESCOs take advantage of the mass market customers' lack of knowledge and understanding of, among other issues, the electric and gas commodity markets, commodity pricing, and contract terms (which often extend to three full pages), and in particular, the ESCOs' use of teaser rates and "market based rate" mechanisms that customers are charged after the teaser rate expires. In fact, ESCOs appear to be unwilling to provide the necessary product pricing details as to how those "market based rates" are derived to mass market customers in a manner that is transparent so as to enable an open and competitive marketplace where customers can participate fairly and with the necessary knowledge to make rational and fully informed decisions on whether it is in their best interest to take commodity service from their default utility, or from a particular ESCO among competing but

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 41–42 (citations omitted).

equally opaque choices.¹⁷

38. As for the ESCOs' claim that their marketing and overhead costs explain the overcharges, PSC staff found that these costs do "not justify the significant overcharges" ESCOs levied on New York consumers.¹⁸ Likewise, when the ESCOs claimed that their provision to consumers of so-called value-added products such as light bulbs and thermostats contributed to their excessive rates, PSC staff found that "these sorts of value-added products is at best de minimis and does not explain away the significantly higher commodity costs charged by so many ESCOs."¹⁹ Instead, PSC staff reached the following conclusion:

The massive \$1.3 billion in overcharges is the result of higher, and more often than not, significantly higher, commodity costs imposed by the ESCOs on unsuspecting residential and other mass market customers. These Overcharges are simply due to (1) the lack of transparency and greed in the market, which prevents customers from making rational economic choices based on facts rather than the promises of the ESCO representative, and (2) obvious efforts by the ESCOs to prevent, or at least limit, the transparency of the market. These obvious efforts include the lack of a definition for "market rate" in their contracts, resulting in the fattening of ESCOs' retained earnings.²⁰

39. This class action, which seeks damages, restitution, penalties, and equitable relief is further proof that residential energy deregulation has been an abject failure.

XOOM Charges Improperly High Electricity Rates

40. XOOM engages in a classic bait and switch deception scheme. XOOM lures consumers into switching to its electricity supply service by offering teaser rates that are much lower than its regular rates.

¹⁷ *Id.* at 86 (citations omitted).

¹⁸ *Id.* at 37.

¹⁹ *Id.* at 87.

²⁰ *Id.*

41. In or around March 2013, Plaintiff Boris Mirkin enrolled (in his wife Susanna Mirkin's name) through the XOOM-Energy website into the SimpleFlex Plan with the advertised rate of 8.99¢/kWh. Plaintiff Boris Mirkin believed he was enrolling with the entity that controls the "Xoom" brand, to wit XOOM-Energy. Shortly after the enrollment, Plaintiffs received Defendants' "XOOM Energy: New Customer Enrollment" e-mail attaching the "Electricity Sales Agreement," (referred to as "XOOM's customer contract") and attached hereto as Exhibit 1.

42. In May 2013, Plaintiffs' electricity account was switched to XOOM for electricity supply. Thereafter, Plaintiffs paid the rate that they were charged.

43. Plaintiffs were initially placed on an introductory teaser rate of 9.39¢ per kWh for electricity for the first month of service. After the first month on the teaser rate, XOOM charged Plaintiffs exorbitant variable month-to-month rates for electricity.

44. XOOM's customer contract represents that "[customer's] monthly variable rate is based on XOOM's *actual and estimated supply costs* which may include but not be limited to prior period adjustments, inventory and balancing costs."

45. Any reasonable consumer would understand that based on these representations XOOM's variable rate would reflect XOOM's costs for purchasing electricity at wholesale prices.

46. But the rates XOOM charged Plaintiffs were not commensurate with XOOM's supply costs.

47. Plaintiffs paid XOOM's variable rate through November 2013. In November 2013, Plaintiffs cancelled their service with XOOM. The following table identifies the billing periods during this time, the variable rates XOOM charged Plaintiffs, and the "Market Supply Cost," which corresponds to a rate that reflects "actual and estimated supply costs," as required

by the XOOM customer contract:

Period	XOOM Rate	Market Supply Cost	Difference in %
5/10/2013-6/11/2013	9.39 (<i>teaser</i>)	11.03	-14.87%
6/11/2013-7/11/2013	12.50	11.89	5.13%
7/11/2013-8/9/2013	15.05	12.36	21.76%
8/9/2013-9/10/2013	15.55	10.1	53.96%
9/10/2013-10/8/2013	14.79	10.12	46.15%
10/8/2013-11/7/2013	15.57	9.82	58.55%

48. In the above table, the column “Market Supply Costs” were estimated based on the costs of a retailer supplying a residential customer for each period. The supply costs included (load-weighted) Zone J day-ahead prices, ancillary services costs, capacity costs, renewable portfolio standard (RPS) costs, and various charges and taxes related to New York’s Independent Systems Operator. A substantial margin to cover retailer fixed costs has also been included.

49. XOOM’s rate was consistently and substantially higher than the rate based on Defendants’ supply costs, which demonstrates that XOOM’s rate is not set in accordance with XOOM’s customer contract.

50. Notably, the teaser rate was the *only* month when XOOM’s rate was lower than the rate based on Defendants’ supply costs.

51. The cost of wholesale energy is the primary component of the non-overhead costs XOOM incurs. Indeed, XOOM concedes and represents as much, listing its “actual and estimated supply costs which may include but not be limited to prior period adjustments” as the first factor in its definitive list of pricing components.

52. The other factors XOOM identifies in its customer contract is “inventory,” which is not pertinent to electricity, and “balancing costs” that affect XOOM’s variable rate insignificantly in terms of the overall costs XOOM incurs to provide retail electricity. Therefore,

these other cost factors cannot explain the drastic increases in XOOM's variable rate or the reason its rates are disconnected from the wholesale supply cost.

53. With discovery of XOOM's actual costs, and profits, Plaintiffs will be able to create an even more precise model showing what XOOM's prices should have been under the terms of its customer contract. This model will also further demonstrate XOOM's exorbitant and unconscionable energy charges.

54. As established above, XOOM's breaches its customer contract as consumers do not receive a price based on the specified factors, i.e., "XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments." Instead, consumers are charged rates that are substantially higher and untethered to the supply costs. XOOM intentionally fails to disclose this material fact to its customers because no reasonable consumer—including the Mirkins—who knows the truth about XOOM's exorbitant rates would choose XOOM as an electricity supplier.

55. XOOM knows full well that it charges a rate that is unconscionably high, and that it reaps outrageous profits to the direct detriment of New York consumers without regard to the consequences high utility bills cause such consumers. As such, XOOM's actions were actuated by actual malice or accompanied by wanton and willful disregard for consumers' well-being.

56. XOOM's conduct caused injury to Plaintiffs because under the XOOM customer contract, their rate should have been based on XOOM's supply costs, which it was not.

57. Had XOOM charged Plaintiffs a rate that was actually based on Defendants' supply costs, Plaintiffs would have been charged a substantially lower rate and they were injured accordingly when they paid their residential energy bills.

CLASS ACTION ALLEGATIONS

58. Plaintiffs sue on their own behalf and on behalf of a Class for damages and

injunctive relief under CPLR § 901 *et seq.*

59. The Class is preliminarily defined as all XOOM customers in the State of New York who were charged a variable rate for electricity or gas at any time within the applicable statutes of limitations preceding the filing of this action through and including the date of class certification.

60. Excluded from the Class are the officers and directors of Defendants, members of the immediate families of the officers and directors of Defendants, and their legal representatives, heirs, successors or assigns and any entity in which they have or have had a controlling interest. Also excluded are all federal, state and local government entities; and any judge, justice or judicial officer presiding over this action and the members of their immediate families and judicial staff.

61. Plaintiffs do not know the exact size of the Class since such information is in the exclusive control of Defendants. Plaintiffs believe, however, that based on the number of XOOM customers, the Class encompasses thousands of individuals whose identities can be readily ascertained from Defendants' records. Accordingly, the members of the Class are so numerous that the joinder of all such persons is impracticable.

62. Plaintiffs are adequate class representatives. Their claims are typical of the claims of the Class and do not conflict with the interests of any other members of the Class. Plaintiffs and the other members of the Class were subject to the same or similar conduct. Further, Plaintiffs and the Class sustained substantially the same injuries and damages arising out of Defendants' conduct.

63. Plaintiffs will fairly and adequately protect the interests of all Class members. Plaintiffs have retained competent and experienced class action attorneys to represent their

interests and those of the Class.

64. Questions of law and fact are common to the Class and predominate over any questions affecting only individual Class members, and a class action will generate common answers to the questions below, which are apt to drive the resolution of this action:

- a. Whether XOOM breached its contract with New York customers by charging variable rates not based on the factors specified in the customer agreements;
- b. Whether XOOM breached the covenant of good faith and fair dealing by exercising unilateral price-setting discretion in bad faith, i.e., price gouging;
- c. Whether Plaintiffs and the Class have sustained damages and, if so, the proper measure thereof; and
- d. Whether XOOM should be enjoined from continuing to charge variable rates not based on the factors specified in the customer agreements.

65. A class action is superior to all other available methods for resolving this controversy because i) the prosecution of separate actions by Class members will create a risk of adjudications with respect to individual Class members that will, as a practical matter, be dispositive of the interests of the other Class members not parties to this action, or substantially impair or impede their ability to protect their interests; ii) the prosecution of separate actions by Class members will create a risk of inconsistent or varying adjudications with respect to individual Class members, which will establish incompatible standards for Defendants' conduct; iii) Defendants have acted or refused to act on grounds generally applicable to all Class members; and iv) questions of law and fact common to the Class predominate over any questions

affecting only individual Class members.

66. Accordingly, this action satisfies the requirements set forth under CPLR §§ 901 and 902 *et seq.*

FIRST CAUSE OF ACTION
(Breach of Contract)

67. Plaintiffs incorporate by reference the preceding allegations as if fully set forth herein, and further allege as follows:

68. Plaintiffs and the Class entered into a valid contract with Defendant XOOM for the provision of electricity.

69. Pursuant to the XOOM's customer contract, XOOM agreed to charge a variable rate for electricity based on "XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs."

70. Pursuant to the contract, Plaintiffs and the Class paid the variable rates charged by XOOM for electricity.

71. However, XOOM failed to perform its obligations under the contract because XOOM charged variable rates for electricity and gas that were not based on "XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs."

72. Plaintiffs and the Class were damaged as a result because they were billed, and they paid energy rates that were substantially higher than they would have been had XOOM based its rates the criteria set forth in XOOM's customer contract.

73. By reason of the foregoing, XOOM-Energy and XOOM-NY are jointly and severally liable to Plaintiffs and the other members of the Class for the damages that they have suffered as a result of XOOM's actions, the amount of such damages to be determined at trial.

SECOND CAUSE OF ACTION
(Breach Of Implied Covenant Of Good Faith And Fair Dealing)

74. Plaintiffs incorporate by reference the preceding allegations as if fully set forth herein, and further allege as follows:

75. Every contract in New York contains an implied covenant of good faith and fair dealing in the performance and enforcement of the contract. The implied covenant is an independent duty and may be breached even if there is no breach of contract's express terms.

76. Under the XOOM's customer contract, XOOM has unilateral discretion to set the variable rates for electricity based on "XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs."

77. Plaintiffs reasonably expected that the variable rates for electricity would reflect the market prices for electricity and that Defendant XOOM would refrain from price gouging. Without reasonable expectations, Plaintiffs and other Class members would not have agreed to buy energy from Defendants.

78. Defendants breached the implied covenant of good faith and fair dealing by arbitrarily and unreasonably exercising its unilateral rate-setting discretion to price gouge and frustrate Plaintiffs and other Class members' reasonable expectations that the variable rates for electricity would be based on "XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs."

79. XOOM acted in bad faith when it made contractual promises to base its rates on "XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs" knowing full well that its rates were substantially higher than rates that are actually based on these criteria

80. As a result of Defendants' breach, XOOM-Energy and XOOM-NY are jointly and

severally liable to Plaintiffs and other Class members for actual damages in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(Unjust Enrichment)

81. Plaintiffs incorporate by reference the preceding allegations as if fully set forth herein, and further allege as follows:

82. By engaging in the conduct described above, XOOM has unjustly enriched itself and received a benefit beyond what was contemplated in XOOM's customer contract, at the expense of Plaintiffs and the other members of the Class.

83. It would be unjust and against equity and good conscience for Defendants to retain the overpayment Plaintiffs and the Class made for excessive energy charges.

84. By reason of the foregoing, XOOM-Energy and XOOM-NY are jointly and severally liable to Plaintiffs and the other members of the Class for the damages that they have suffered as a result of Defendants' actions, the amount of which shall be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Susanna Mirkin and Boris Mirkin respectfully request that this Court:

- A. Issue an order certifying the Class defined above, appointing the Plaintiffs as Class Representatives and designating their attorneys as Class Counsel;
- B. Determine that XOOM breached the customer contract with the Class and enter an appropriate order awarding monetary and injunctive relief;
- C. Determine that XOOM breached the implied covenant of good faith and fair dealing and enter an appropriate order awarding monetary and injunctive relief;
- D. Determine that XOOM has been unjustly enriched as a result of its wrongful conduct, and enter an appropriate order awarding restitution and monetary damages to the Class;
- E. Enter an order granting all appropriate relief on behalf of the Class under

applicable law;

- F. Render an award of compensatory damages, the amount of which is to be determined at trial;
- G. Enter a judgment of damages in an amount of at least \$50,000,000, including interest, costs, reasonable attorneys' fees, costs and expenses; and
- (h) Grant all such other relief as the Court deems appropriate.

Dated: Armonk, New York
April 18, 2018

By: /s/ Steven L. Wittels
 Steven L. Wittels
 J. Burkett McInturff
 Tiasha Palikovic
 WITTELS LAW, P.C.
 18 HALF MILE ROAD
 ARMONK, NEW YORK 10504
 Telephone: (914) 319-9945
 Facsimile: (914) 273-2563
 slw@wittelslaw.com
 jbm@wittelslaw.com
 tpalikovic@wittelslaw.com

Daniel Hymowitz
 HYMOWITZ LAW GROUP, PLLC
 1629 Sheepshead Bay Road
 Brooklyn, NY 11235
 Telephone: (718) 807-9900
 Facsimile: (866) 521-6040
 daniel@hymowitzlaw.com

Andrey Belenky
 Dmitry Kheyfits
 KHEYFITS P.C.
 1140 Avenue of the Americas, 9th Floor
 New York, NY 10036
 Phone: (212) 203-5399
 Facsimile: (212) 203-6445
 abelenky@kheyfits.com
 dkheyfits@kheyfits.com

Counsel for Plaintiffs and the Class

Exhibit 1

XOOM Energy New York, LLC
13850 Ballantyne Corporate Place
Suite 150
Charlotte, NC 28277

Telephone 1-888-997-8979
Fax 1-800-627-8113

ELECTRICITY SALES AGREEMENT

Residential Service - New York

RESIDENTIAL DISCLOSURE STATEMENT

XOOM SimpleFlex Variable Price Product	Your rate for energy purchases will be a variable rate, per kWh, that may change on a monthly basis, plus taxes and fees, if applicable. Your monthly variable rate is based on XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs. You are responsible for all charges assessed and billed by your local utility for all applicable utility charges, which are not included in your rate.
Length of the Agreement and end date	Unless otherwise noted, the term of this Agreement shall be on a month-to-month basis.
Process you may use to rescind the Agreement without penalty	You may cancel your acceptance of the Agreement with XOOM at any time within three (3) business days of your enrollment authorization and receipt of this Agreement without penalty or cancellation fee by calling XOOM at 1-888-997-8979 or by sending an email to customercare@xoomenergy.com .
Amount of Cost Recovery Fee and method of calculation	No cost recovery fee for variable service.
Amount of Late Payment Fee and method of calculation	1.5% on overdue balances
Guaranteed Savings	There are no guaranteed savings in this Agreement at this time.

AGREEMENT TO SELL AND PURCHASE ENERGY: This is an agreement between XOOM Energy New York, LLC ("XOOM Energy") and you the Customer ("you") under which you shall initiate electricity service and begin enrollment with XOOM Energy (the "Agreement"). Subject to the terms and conditions of this Agreement, XOOM Energy agrees to sell and deliver, and you agree to purchase and accept the quantity of electricity, as estimated by XOOM Energy, necessary to meet your requirements based upon consumption data obtained by XOOM Energy or the delivery schedule of the Local Distribution Utility (the "LDU"). The amount of electricity delivered under this Agreement is subject to change based upon data reflecting your consumption obtained by XOOM Energy or the LDU's delivery schedule.

TERM: This Agreement shall commence as of the date your notice regarding the change of your provider to XOOM is deemed effective by the LDU, and shall continue on a month-to-month basis. You may provide written notice of termination or call XOOM at 1-888-997-8979 or call your delivery company to terminate the Agreement. XOOM may terminate this Agreement by providing 30 days' written notice to you.

PRICE: The price for all electricity sold under this Agreement shall include and be subject to all applicable taxes. XOOM will invoice you monthly for electricity delivered under this Agreement, as measured by the LDU, and you will pay each invoice in full within 20 days of the invoice date or be subject to a late payment charge of 1.5% per month. If you fail to pay each invoice in full within 20 days of the invoice date, then, in addition to any other remedies that it may have, XOOM may terminate this Agreement upon 15 days written notice to you.

BILLING: You will receive a single bill for both commodity and delivery costs from the LDU. Failure to make full payment of XOOM Energy charges due on any consolidated bill prepared by the LDU for XOOM Energy will be grounds for disconnection of utility services and commodity service in accordance with NYPSC rules and regulations on the termination of service. Your payments remitted in response to a consolidated bill shall be pro-rated (when so required) in

accordance with procedures adopted by the New York State Department of Public Service (the "DPS"). A \$35 fee will be charged for all returned payments.

ASSIGNMENT: You may not assign its interests in and delegate its obligations under this Agreement without the express written consent of XOOM Energy. XOOM Energy may sell, transfer, pledge, or assign the accounts receivable, revenues, or proceeds hereof, in connection with any financing agreement, purchase of accounts receivables program or billing services agreement, and may assign this Agreement and the rights and obligations there under, to another energy supplier, energy services company or other entity as authorized by the DPS.

INFORMATION RELEASE AUTHORIZATION: You authorize XOOM Energy to obtain and review information regarding your credit history from credit reporting agencies and the following information from the LDU: consumption history; billing determinants; utility account number; credit information; public assistance status; existence of medical emergencies, status as to whether you have a medical emergency, is human needs, elderly, blind or disabled and data applicable to cold weather periods under PSL § 32 (3); and information pertaining to PSL § 33, tax status and eligibility for economic development or other incentives. This information may be used by XOOM Energy to determine whether it will commence and/or continue to provide energy supply service to you and will not be disclosed to a third party unless required by law. Your acceptance of this Agreement shall constitute authorization for the release of this information to XOOM Energy. This authorization will remain in effect during the Initial Term and any Renewal Term. You may rescind this authorization at any time by providing written notice thereof to XOOM Energy or by calling XOOM Energy at 1-888-997-8979. XOOM Energy reserves the right to cancel this Agreement in the event you rescind the authorization.

CONSUMER PROTECTION: The services provided by XOOM Energy to you are governed by the terms and conditions of this Agreement. XOOM Energy will provide at least 15 days' notice prior to the cancellation of service to you. You may obtain additional information by contacting XOOM Energy at 1-888-997-8979 or the DPS at 1-888-697-7728, or by writing to the DPS at: New York State Department of Public Service, Office of Consumer Services, Three Empire State Plaza, Albany, New York 12223, or through its website at www.dps.ny.gov.

CANCELLATION: You may rescind this Agreement within 3 business days after the signing or receipt of this Agreement, whichever comes first, by contacting XOOM Energy at 1-888-997-8979 or by email at customercare@xoomenergy.com. You are liable for all XOOM Energy charges until you return to the LDU or go to another supplier. A final bill will be rendered within twenty (20) days after the final scheduled meter reading or if access is unavailable, an estimate of consumption will be used in the final bill, which will be tried-up subsequent to the final meter reading.

AGENCY: You hereby appoint XOOM Energy as agent for the purposes of (i) acquiring the supplies necessary to meet your electricity needs, and (ii) arranging, contracting for and administering transportation and related services over transmission facilities and those of the LDU needed to deliver electricity to your premises. These services are provided on an arm's length basis and market-based compensation is included in the price noted above.

TITLE: All electricity sold under this Agreement shall be delivered to a location considered the "Point of Delivery", which shall be at the NY ISO XOOM Energy load bus (located outside of the municipality where you reside), and shall constitute the point at which title transfers and the sale occurs. XOOM Energy will indemnify and hold harmless you from all taxes, royalties, fees or other charges incurred before title passes with respect to the electricity provided hereunder.

WARRANTY: This Agreement, including applicable attachments, constitutes the entire Agreement between you and XOOM Energy. XOOM Energy makes no representations or warranties other than those expressly set forth in this Agreement, and XOOM Energy expressly disclaims all other warranties, express or implied, including merchantability and fitness for a particular use.

FORCE MAJEURE: XOOM Energy will make commercially reasonable efforts to provide electricity hereunder but XOOM Energy does not guarantee a continuous supply of electricity to you. Certain causes and events out of the control of XOOM Energy ("Force Majeure Events") may result in interruptions in service. XOOM Energy will not be liable for any such interruptions caused by a Force Majeure Event, and XOOM Energy is not and shall not be liable for damages caused by Force Majeure Events. Force Majeure Events shall include acts of God, fire, flood, storm, terrorism, war, civil disturbance, acts of any governmental authority, accidents, strikes, labor disputes or problems, required maintenance work, inability to access the local distribution utility system, non-performance by the LDU (including, but not limited to, a facility outage on its electricity distribution lines), changes in laws, rules, or regulations of any governmental authority or any other cause beyond XOOM Energy's control.

LIABILITY: The remedy in any claim or suit by you against XOOM Energy will be solely limited to direct actual damages. By entering into this Agreement, You waive any right to any other remedy in law or equity. In no event will either XOOM Energy or You be liable for consequential, incidental, indirect, special or punitive damages. These limitations apply without regard to the cause of any liability or damages. There are no third-party beneficiaries to this Agreement.

CONTACT INFORMATION: You may contact XOOM's Service Contact Center at 1-888-997-8979 during hour business hours which are posted on our website at www.xoomenergy.com (contact center hours subject to change) or write to XOOM Energy New York, LLC at: 344 South Poplar Street, Hazelton, PA 18201. You may also contact the DPS for inquiries regarding the competitive retail energy market at 1-888-697-7728.

DISPUTE RESOLUTION: In the event of a billing dispute or a disagreement involving XOOM's service, you should contact XOOM's Customer Care Center at the telephone number listed above, in writing at 344 South Poplar Street, Hazleton, PA 18201 or by email at customercare@xoomenergy.com. You must pay the bill in full, except for the specific disputed amount, during the pendency of the dispute. If the parties cannot resolve the dispute within 45 days, either party may avail itself of all remedies available under law or equity. A dispute or complaint relating to a residential customer may be submitted by either party at any time to the DPS pursuant to its Complaint Hearing Procedures ("Procedures") by calling DPS at 1-800-342-3377 or by writing to the DPS at: New York State Department of Public Service, Office of Consumer Services, Three Empire State Plaza, Albany, New York 12223, or through its website at: www.dps.ny.gov.

CHOICE OF LAWS: This Agreement shall be governed by the laws of the state of North Carolina without recourse to such states choice of law rules.

TAXES AND LAWS: Except as otherwise provided in the Agreement or provided by law, all taxes of whatsoever kind, nature and description due and payable with respect to service provided under this Agreement, other than taxes based on XOOM Energy's net income, shall be paid by You, and You agree to indemnify XOOM Energy and hold XOOM Energy harmless from and against any and all such taxes. This Agreement is subject to present and future legislation, orders, rules, regulations or decisions of a duly constituted governmental authority having jurisdiction over this Agreement or the services to be provided hereunder.

INSOLVENCY: You represent that you are financially able and willing to fulfill the terms and conditions of this Agreement and that you have not filed, are not in the process of filing or plan to begin any bankruptcy proceedings. You acknowledge and agree that this Agreement and the transaction(s) contemplated under this Agreement constitute a "forward contract" within the meaning of the United States Bankruptcy Code. To the fullest extent possible, you agree to waive the provisions afforded by Section 366 of the United States Bankruptcy Code and acknowledge that for purposes of the application of principles afforded "forward contracts" the provisions of Section 366 shall not apply to you or to this Agreement.

REGULATORY CHANGES: If at some future date there is a change in any law, rule, regulation or pricing structure whereby XOOM Energy is prevented, prohibited or frustrated from carrying out the terms of the Agreement, at its sole discretion XOOM Energy shall have the right to cancel this Agreement on 15 days' notice to You.

EMERGENCY SERVICE CONTACTS: In the event of an electric power outage or other emergency, please use the following toll-free numbers to directly contact your utility:

- Rochester Gas & Electric 1-800-743-1701
- National Grid 1-800-892-2345
- Consolidated Edison 1-800-752-6633
- NYSEG 1-800-572-1131

PARTIES BOUND: This Agreement is binding upon the parties hereto and their respective successors and legal assigns.

Exhibit 2



Watch Live

Bill No.: A01558

Summary Actions Votes Memo Text *(Printer friendly text)*

A01558 Summary:

BILL NO A01558C

SAME AS SAME AS S02361-C

SPONSOR Gianaris (MS)

COSPNSR Pheffer, Robinson, Dinowitz, Gabryszak, Rosenthal, Schimel, Clark, Schroeder, Colton

MLTSPNSR Alfano, Boyland, Brennan, Crouch, Errigo, Fields, Galef, Giglio, Glick, Gottfried, Gunther, Hyer-Spencer, Kellner, Koon, Latimer, Lopez V, Magee, Maisel, McDonough, McKeivitt, Millman, Reilly, Rivera, J, Saladino, Sweeney, Weisenberg, Wright

Add S349-d, Gen Bus L

Requires energy services companies to provide customers with a consumer bill of rights; establishes civil cause of action and civil penalties for violations of such provisions.

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A01558 Memo:

BILL NUMBER:A1558C

TITLE OF BILL: An act to amend the general business law, in relation to establishing an energy service company consumers bill of rights

PURPOSE OR GENERAL IDEA OF BILL: This bill establishes important consumer safeguards in the marketing and offering of contracts for energy services to residential and small business customers.

SUMMARY OF SPECIFIC PROVISIONS: Bill S1 adds a new S349-d to the General Business Law to set forth an energy services company consumers bill of rights. Subdivision 1 defines the terms "energy services" (electricity and/or natural gas), "energy services company" or "ESCO" (an entity eligible to sell energy services to end-use customers using the transmission or distribution system of a utility), "customer" (any person sold or offered an energy services contract by an ESCO for residential utility service or through door-to-door sales), and "door to door sales."

Pursuant to subdivision 2, any person who sells or offers for sale any energy services for or on behalf of an ESCO shall (a) properly identify himself or herself and the energy services company or companies which he or she represents; (b) explain that he or she does not represent a distribution utility; (c) explain the purpose of the solicitation; (d) provide each prospective customer with a statement of an "ESCO consumers bill of rights" developed by the Public Service Commission (PSC), in consultation with the Long Island Power Authority (LIPA), the Consumer Protection Board (CPB) and the Department of Law; and (e) provide contracts and other written materials in the language used to solicit the prospective customer.

Subdivision 3 provides that no person selling or offering energy services for or on behalf of an ESCO shall engage in any deceptive acts or practices in such marketing.

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Subdivisions 4-7 set forth the following ESCO contract requirements:

> no required prepayment for energy services - an ESCO may offer a customer an option of prepayment which can be cancelled without penalty within 90 calendar days.

> no fee for termination or early cancellation of the contract in excess of \$100 if less than 12 months remain in the contract term, \$200 if the remaining term is twelve months or more, or twice the estimated bill for energy services for an average month (to charge this fee, an ESCO must provide the customer, when the contract is offered, with that customer's estimated average monthly bill for energy services and the fee that would be charged thereon).

> no material changes in the terms or duration of any contract for energy services without the express consent of the customer, provided that the automatic renewal of contracts is allowed only if the ESCO follows

explicit statutory requirements, including clear advance notice and a period for opting out without any termination fee, and any additional regulatory protections adopted by the PSC or LIPA.

> all variable charges shall be clearly and conspicuously identified.

Per subdivision 8, any contract for energy services which does not comply with the applicable provisions of this section shall be void and unenforceable as contrary to public policy and any waivers by a buyer shall be deemed void and unenforceable by the ESCO.

Subdivision 9 authorizes the Attorney General, upon his own motion or upon referral from the PSC, LIPA or CPB, to bring a civil action against any ESCO that violates any provision of this section and to recover (a) a civil penalty not to exceed \$1000 per violation and (b) costs and reasonable attorney's fees. In any such proceeding the court may direct restitution.

Subdivision 10 authorizes a right of private action by any person who has been injured by reason of any violation of S349-d to enjoin such unlawful act or practice and/or recover actual damages or \$500, whichever is greater. The court may, in its discretion, increase the award to an amount not to exceed three times the actual damages up to \$10,000, if it finds a willful or knowing violation. The court may award reasonable attorney's fees to a prevailing plaintiff.

Subdivision 11 preserves the existing authority of the PSC and LIPA to limit, revoke or suspend an ESCO's eligibility for violation of requirements enforceable by the respective agency.

Subdivision 12 preserves such agencies' existing authority to adopt additional compliance requirements relating to the types of products offered by ESCOs and the manner in which they are marketed to residential and commercial customers.

Bill SS2 & 3 provide that the PSC and LIPA, respectively, shall amend their consumer protection regulations and related guidelines, practices and policies to incorporate the provisions of bill S1.

Bill S4 charges the PSC, in consultation with LIPA, CPB and the Attorney General to develop a short, plain-language statement of an "ESCO consumers bill of rights" which summarizes the protections afforded to consumers of energy services by this chapter and other applicable laws.

Bill S5 sets forth a severability clause for the provisions of the legislation.

SUMMARY OF SPECIFIC AMENDMENTS: New S349-d(1)(d) is amended to clarify that visits to a buyer's premises pursuant to a requested appointment are not considered "door-to-door sales."

Clarifications are made to new S349-d(2) as follows: requirements pertaining to ESCO marketer identification and provision of a copy of the ESCO consumers bill of rights are made applicable to residential

customers and door-to-door sales, while the ban against engaging in deceptive acts and practices is relocated to a new subdivision 3 and remains applicable to all marketing activities. (The ensuing subdivisions are renumbered accordingly.)

Subdivision 4 of S349-d is amended to permit ESCOs to offer customers contracts providing for prepayment on an optional basis only, with an extended rescission period of 90 days. Subdivision 5 was amended to provide that the \$100 limit on early termination fees applies to all contracts with less than a full year remaining in the contract. Longer contracts would be subject to a maximum fee of \$200. ESCOs that offer contracts with a termination fee based on the customer's average monthly bill would have to provide the customer's estimated average bill and the actual fee amount prior to execution of the contract.

Renumbered S349-d(6) is amended to permit renewal of contracts, with additional consumer protections where the renewal is automatic (i.e. without the customer's express consent).

Further amendments also exclude marketing to commercial accounts at trade or business shows, conventions or expositions from the "door-to-door sales" definition, incorporate recommendations to provide a greater role for the Consumer Protection Board in safeguarding the interests of customers, clarify an ESCO's responsibilities in soliciting new or renewal business, and provide a more realistic level of maximum recoverable damages. Finally, the bill is amended to ensure that the existing authority of the PSC and LIPA to protect consumer's interests is preserved.

EFFECTS OF PRESENT LAW WHICH THIS BILL WOULD ALTER: Chapter 686 of 2002 extended the provisions of the Home Energy Fair Practices Act (HEFPA) to cover ESCOs, but its protections only apply after a contract has been executed. This bill would augment recently-adopted PSC guidelines for ESCO marketing, protect consumers from excessive termination fees and deceptive marketing of initial contracts and renewals, make fair marketing standards broadly enforceable on a statewide basis, and extend protections to small business customers who are often targeted by unscrupulous door-to-door marketers without being covered under any current PSC protections.

JUSTIFICATION: Over the past decade, New York has promoted a competitive retail model for the provision of electricity and natural gas. Consumers have been encouraged to switch service providers from traditional utilities to energy services companies. Unfortunately, consumer protection appears to have taken a back seat in this process. The pressing need for consumer protections in dealing with ESCOs is highlighted by recent news items from around the state:

> Stopped outside her home in Flushing by a uniformed salesman promising her utility bills will be cut in half, a senior citizen signs a contract with an energy services company (ESCO). When she finds out later that the contract is for 5 years and her monthly bills are \$200 higher, she tries to cancel - only to be told that she must pay an \$1800 "exit fee".

> A small business owner in Brooklyn is convinced to sign an energy services contract by a sales agent's assurances that the price would be fixed and he could save at least \$200 a month. After a few months, his monthly bill had doubled, and he learned that the contract had a variable charge that fluctuated wildly -- and that canceling it would cost him \$7000.

> Complaints from various communities cite ESCO marketing reps masquerading as utility employees, making misleading statements to induce people to sign a contract, and even switching consumers' energy suppliers without their knowledge or consent.

High-pressure and misleading sales tactics, onerous contracts with unfathomable fine print, short-term "teaser" rates followed by skyrocketing variable prices -- many of the problems recently seen with subprime mortgages are being repeated in energy competition. Although the PSC has recently adopted a set of guidelines, its "Uniform Business Practices" are limited and omit important consumer protections in several

areas. The fact is, competition in supplying energy cannot succeed without a meaningful set of standards to weed out companies whose business model is based on taking unfair advantage of consumers.

This bill would build on the approach taken by the PSC by (1) extending consumer protections statewide, including to customers in LIPA's service territory; (2) protecting small businesses from being victimized by dishonest door-to-door marketing; (3) protecting customers from excessive termination fees, "bait-and-switch" contract changes and deceptive renewal practices; (4) allowing broader enforcement; and (5) providing clear, plain-language notices of an ESCO consumer's rights. The bill requires the PSC and LIPA to adopt regulations including the following mandatory consumer protections:

- >requiring ESCO marketing reps to identify themselves as such and explain that they don't represent a utility;
- >ensuring that any prepayments are at the customer's discretion and providing an adequate time period for the customer to assess the ESCO's performance before locking in a prepayment option;
- >limiting cancellation fees to \$100 (\$200 for a multi-year contract) or an amount twice the initial estimated average monthly bill;
- >all variable charges must be clearly and conspicuously identified;
- >no contract terms could be changed without the consumer's affirmative consent, and any automatic renewals would have to follow strict guidelines to protect customers; and
- > a short, plain language "ESCO consumer bill of rights (to be developed by the PSC, LIPA, CPB and Attorney General) will be given to prospective customers in writing or repeated in telephone sales pitches.

These safeguards would apply to "door-to-door sales" to small businesses as well as residential customers. The Attorney General could prosecute violations of marketing standards including those referred by the PSC, LIPA or CPB, or consumers could enforce the standards themselves through third-party actions.

These provisions will go a long way toward restoring an orderly marketplace where consumers can make informed decisions on their choices for gas and electric service with the confidence that state government will prevent fraudulent practices and ensure a level playing field.

PRIOR LEGISLATIVE HISTORY: A.10180-B (2008) - passed Assembly, referred to Senate Rules Committee.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS: Minimal.

EFFECTIVE DATE: 150th day after becoming law and applicable to all energy services sold or offered for sale on or after such date; provided, however, that the PSC and LIPA are immediately authorized and directed to take any and all actions, including but not limited to the promulgation of any necessary rules, necessary to fully implement the provisions of this bill on such date.

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AFFIDAVIT OF SERVICE

Case: Index #507892/2018	Court: Supreme Court	County: Kings, NY	Job: 2215695
Plaintiff / Petitioner: Susanna Mirkin & Boris Mirkin		Defendant / Respondent: Xoom Energy, LLC & Xoom Energy New York, LLC	
Received by: Same Day Serves		For: Wittels Law	
To be served upon: Xoom Energy, LLC			

I, Rick Francis, being duly sworn, depose and say: I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to make service of the documents and informed said person of the contents herein


Recipient Name / Address: Coshanda James; Xoom Energy, LLC , 11208 Statesville Rd Suite 200, Huntersville, NC 28078

Manner of Service: Authorized, Apr 23, 2018, 11:12 pm EDT

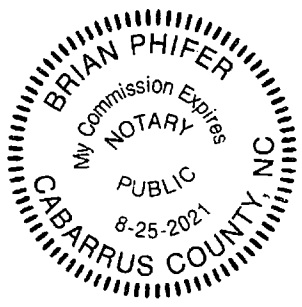
Documents: Summons & Complaint; Exhibits 1&2

Additional Comments:

1) Successful Attempt: Apr 23, 2018, 11:12 pm EDT at 11208 Statesville Rd Suite 200, Huntersville, NC 28078 received by Coshanda James; Xoom Energy, LLC .


 Rick Francis _____
 Date 4/23/18

Same Day Serves
4100 Carmel Rd. Suite #277
Charlotte, NC 28226
(704) 951-4057



Subscribed and sworn to before me by the affiant who is personally known to me.


 Notary Public _____
 Date 4/24/18 Commission Expires 8/25/21