

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 15-M-0127 - In the Matter of Eligibility Criteria for Energy Service Companies.

Case 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State.

Case 98-M-1343 - In the Matter of Retail Access Business Rules.

STAFF OPPOSITION TO DIRECT ENERGY'S MOTION TO STRIKE

INTRODUCTION

Department of Public Service staff (Staff) opposes the motion filed on April 11, 2018 on behalf of Direct Energy Services, LLC, Direct Energy Business, LLC, Direct Energy Business Marketing, LLC and Gateway Energy Services Corporation (collectively, Direct Energy) to strike a portion of the Staff initial brief at page 58. Direct Energy claims that the language cited is not supported by the record, was never advanced by Staff at any earlier stage of these proceedings, and is objectively false. For the reasons that follow, Staff respectfully requests that Your Honors deny Direct Energy's motion to strike in its entirety.

ANALYSIS

Direct Energy refers to two sentences it seeks to strike on page 58 of our Initial Brief that did not include a citation. However, it intentionally omits the immediately preceding sentence in that paragraph (which includes a citation) supporting the proposition that customers are increasingly switching back to the utility. Moreover, as discussed directly below, this assertion is supported by numerous sections of the transcripts, Exhibit 726 (SEP-1), and is also restated

(including a citation) at pages 60-61 of the Staff Initial Brief. Staff does not assert that no customers switch from one ESCO to another, but instead have asserted numerous times that customers are increasingly switching from ESCOs to the utility for commodity service.

Any claim that this assertion was never advanced by Staff at any earlier stage of these proceedings is disingenuous at best. In its rebuttal testimony, the Staff Economics Panel introduced testimony and an exhibit advancing and supporting this assertion. (Tr. 4172, lns. 9-23; Exh. 726 (SEP-1)). In fact, Staff's pre-filed testimony specifically stated "[a]s evident in Exhibit 726 (SEP-1), residential mass market customers, on average, are not actively shopping in a manner that results in residential customers switching significantly away from utility service to ESCO offerings. In contrast, over the 2014 through 2016 period of the data contained in Confidential Exhibit 701 (JSA-1), and Exhibit 726 (SEP-1) indicates that residential customers appear to be, on average, switching back to utility service." (Tr. 4172, lns. 9-23).

Although Direct Energy, and the other parties, had the opportunity to cross examine the Staff Economics Panel on this point at the hearings, none did so. Instead, Direct Energy filed a motion to strike this very assertion once before on December 18, 2017. There, Direct Energy asserted that the finding that customers were switching back to the utilities at an increasing rate did not rebut the initial testimony of any party. Staff clearly showed that such was not the case, and Your Honors denied Direct Energy's motion by ruling dated January 19, 2018. This latest motion is simply an additional attempt to remove this proven fact from the record.

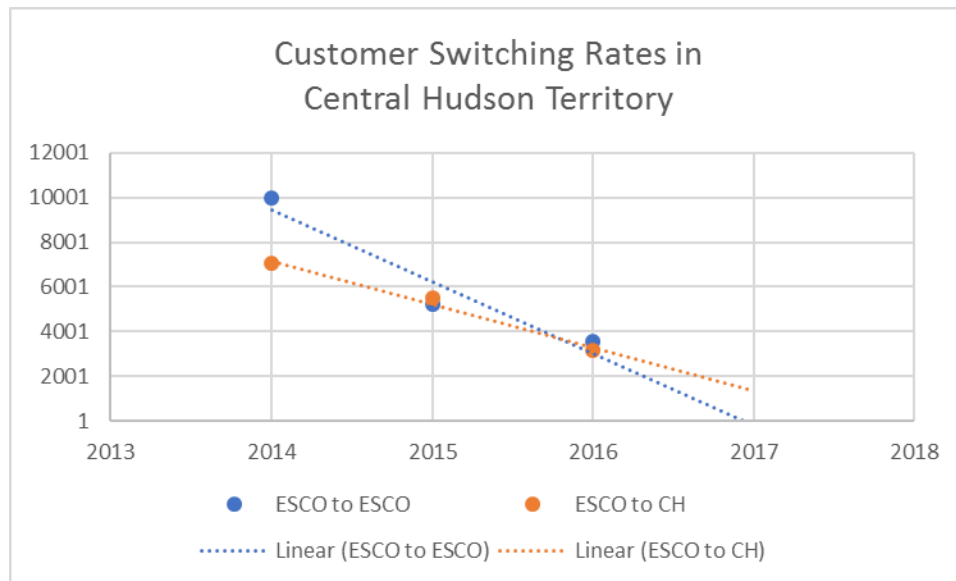
Additionally, it appears that the motive underlying this latest motion is to introduce a new exhibit. Worrisome is

that Direct Energy failed to indicate that this information is already summarized in the record. The information that Direct Energy would like to have added as a new exhibit to the record was obtained by Direct Energy in the responses of the New York utilities to Information Requests (IR) DE-Utilities 1 and 2, and was summarized in exhibits already in the record in the Rebuttal Testimony of Dr. John R. Morris; Exhibits 678 (JRM-9R), 677 (JRM-10R), 677 (JRM-11R), and 677 (JRM-12R). Furthermore, IRs DE-Utilities 1 and 2 asked for the total number of ESCO electric and gas customers who switched, making no distinction between mass market and large Commercial and Industrial customers, and thus is of little significance in this proceeding focusing on mass market customers.

While Staff notes that moving to strike portions of a party's initial brief (as opposed to refuting the assertion on reply) is an unusual strategy, even more unusual is the attempt to, after the hearings, supplement the record with a new exhibit to refute this allegedly unsupported assertion. However, if one looks at the data contained in the new exhibit proposed by Direct Energy, it supports the very language Direct Energy seeks to strike.

Looking at the table presented at page 3 of the instant Direct Energy motion, it is readily apparent that customers are in fact switching from ESCOs back to the utilities at an increasing rate as compared to the rate of customers switching between ESCOs. While the overall number of ESCO-to-ESCO switches in the Central Hudson territory exceed the total number of ESCO-to-utility switches in two of the three years presented, the delta between the two numbers is shrinking. The below graph, created using Direct Energy's table, highlights this point. Staff included a linear trendline, extended an additional year, to show that customers are switching from one

ESCO to another at a progressively lower rate than customers switching from ESCOs back to the utility. In other words, when looking at the total body of customers switching presented in Direct Energy's table, the percentage of customers switching back to the utility is increasing - ESCO to Central Hudson switches in 2014 is approximately 40 percent, and in 2016 is approximately 47 percent.



Thus, not only is the assertion challenged by Direct Energy supported in the transcript, exhibits, and elsewhere in the Staff Initial Brief, the assertion is also supported by the very data Direct Energy provided in its motion.

Ultimately, Direct Energy seeks to taint the record in its own way by proposing absolute numbers in a few tables that purportedly show "clear proof of the false and misleading nature of DPS Staff's claims" by raw numbers alone. Staff has shown, with academic rigor, that as the average percent difference in the total bill between ESCOs and utilities increases, utility shares increase. Direct Energy has made no attempt to statistically defend that observed variations in customer switching are due to competition. In fact, Staff has shown that utility shares of the commodity markets at issue in Track I are

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increasing, except for Consolidated Edison Company of New York, Inc. electric, and that those increases in market shares are in response to ESCOs charging in excess of the utility.

This type of frivolous motion practice has plagued these proceedings from the start, and has wasted the time of both the parties to these proceedings and Your Honors. For the reasons stated above, Staff respectfully requests that Your Honors deny Direct Energy's motion to strike in its entirety.

Respectfully submitted,

/s/

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/s/

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cc: Administrative Law Judges and All Parties