

STATE OF NEW YORK  
DEPARTMENT OF PUBLIC SERVICE

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 REPLY TO THE MOTIONS TO MODIFY THE SCHEDULE IN THESE PROCEEDINGS MADE BY THE RETAIL ENERGY SUPPLY ASSOCIATION, DIRECT ENERGY SERVICES, LLC, AND NATIONAL ENERGY MARKETERS ASSOCIATION**

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INTRODUCTION

On June 27, 2017, the Retail Energy Supply Association (RESA) filed a motion requesting a stay of the schedule in the ongoing evidentiary hearings in the above captioned proceedings (RESA Motion). In its motion, RESA requests a stay of the schedule until sixty days after the Commission issues a determination of the pending interlocutory appeals. A letter in support of the RESA Motion was filed on June 30, 2017 by Agway Energy Services. Additionally, on June 29, 2017, Direct Energy Services, LLC (Direct) filed a motion to postpone the due date for initial testimony in the evidentiary hearings pending the completion of the discovery process (Direct Motion). Subsequently, on June 30, 2017, the National Energy Marketers Association (NEM) filed an additional motion to stay the schedule (NEM Motion). Department of Public Service (DPS) Staff (Staff) submits this reply motion in response to all three motions. Staff offers that no stay is necessary, or alternatively, that a more modest extension of two weeks will be sufficient.

DISCUSSION

Staff opposes the RESA, Direct, and NEM Motions as unwarranted attempts to further delay these proceedings. In its last motion to stay the evidentiary hearings, RESA cited, *inter alia*, issues regarding the initiation of the hearings, the scope of the hearings and unresolved discovery disputes, and argued that all of these issues must be resolved before the proceedings could move forward.<sup>1</sup> Since that motion, Your Honors have issued rulings addressing each issue. However, each time an issue is resolved by Your Honors, RESA and/or other Energy Service Company (ESCO) parties file an interlocutory appeal of Your Honor's ruling, or an appeal to the New York Supreme Court. This process of continuing to appeal resolved issues – either at the Commission or at the New York Supreme Court – ensures that even the most mundane discovery disputes take months to resolve. It has been apparent from the onset of these proceedings that the strategy of the ESCO parties is to delay these proceedings for as long as possible in order to maintain the status quo for New York customers who continue to be harmed by overcharges in the Retail Market and unscrupulous ESCO business practices to the benefit of ESCOs.

1. The Pending Interlocutory Appeals

RESA argues that the schedule in the evidentiary hearings must be stayed until there is a decision on the interlocutory appeals before the Commission. There are currently two interlocutory appeals pending before the Commission. The first of which, filed by RESA and Direct on May

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<sup>1</sup> Case 15-M-0127 et al., Motion of Retail Energy Supply Association to Modify Schedules Set Forth in These Proceedings (April 13, 2017).

30, 2017,<sup>2</sup> challenges Your Honors' May 15, 2017 Ruling Denying RESA's Motion to Hold Proceedings in Abeyance.<sup>3</sup> That ruling arose from two motions filed by RESA on April 12, 2017<sup>4</sup> and April 13, 2017,<sup>5</sup> to which Staff replied via a consolidated reply motion.<sup>6</sup> The second interlocutory appeal pending before the Commission was filed on June 12, 2017 by Constellation Energy Gas Choice, LLC (Constellation) and Direct.<sup>7</sup> This appeal was filed in response to Your Honors' May 25, 2017 ruling compelling discovery responses.<sup>8</sup> The first interlocutory appeal does not count as a stay under the Commission rules.<sup>9</sup> The second interlocutory appeal has been stayed by Your Honors,<sup>10</sup> thus RESA can claim no injury on the ruling as long as the stay remains.

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<sup>2</sup> Case 15-M-0127, supra, Retail Energy Supply Association and Direct Energy Services, LLC's Emergency Request For Interlocutory Review of ALJs' Ruling Denying The Motion To Hold The Proceedings In Abeyance And Ruling On Motion To Limit Scope of Proceedings and Request For Stay (May 30, 2017)

<sup>3</sup> Case 15-M-0127, supra, Ruling Denying RESA's Motion to Hold Proceedings in Abeyance (issued on May 15, 2017).

<sup>4</sup> Case 15-M-0127, supra, Motion of Retail Energy Supply Association to Suspend or, In the Alternative, Limit Scope of Proceedings (April 12, 2017).

<sup>5</sup> Case 15-M-0127 supra, Motion of Retail Energy Supply Association to Modify Schedules Set Forth in These Proceedings (April 13, 2017).

<sup>6</sup> Case 15-M-0127 supra, DPS Staff Reply to RESA's Motions (April 21, 2017).

<sup>7</sup> Case 15-M-0127 supra, Interlocutory Appeal and Request for Stay Pending Commission Review of Ruling on Motion to Compel Discovery Responses (June 9, 2017).

<sup>8</sup> Case 15-M-0127, supra, Ruling on Motion to Compel Discovery Responses (issued May 25, 2017).

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<sup>10</sup> Case 15-M-0127, supra, Ruling Granting Stay of May 25, 2017 Ruling (issued June 22, 2017).

Staff proposes that RESA, Direct, and Constellation are improperly utilizing the interlocutory review process. The Commission's regulations state that "Interlocutory review of a ruling by a presiding officer will be available and may be sought only in extraordinary circumstances or in case a request for permission to intervene has been denied."<sup>11</sup> Contrary to an appeal of a New York Supreme Court decision, there is no "appeal as of right" with respect to a ruling made by an Administrative Law Judge in a Commission proceeding. There are no extraordinary circumstances to support the two interlocutory appeals before the Commission and it is apparent that these parties simply intend to appeal any ruling that is not decided in their favor.<sup>12</sup>

Moreover, RESA argues that it would be inappropriate for them to expend resources filing testimony given that the interlocutory appeals may change the scope of the proceedings or render them invalid. As an initial matter, RESA fails to acknowledge that Your Honors have already addressed issues regarding the scope and legitimacy of the evidentiary hearings and that there is no stay of Your Honors' ruling on those issues. Additionally, for purposes of an interlocutory appeal "the prospect of parties incurring additional workload in consequence of a ruling will not in itself constitute extraordinary circumstances."<sup>13</sup> Thus, RESA and other parties

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<sup>11</sup> 16 NYCRR §4.7(a) (emphasis added).

<sup>12</sup> An additional interlocutory appeal was filed by Direct earlier in these proceedings with respect to Your Honor's February 17, 2017 Ruling Clarifying Status of Confidential Information Provided Pursuant to Protective Order; see Case 15-M-0127, supra, Emergency Request for Interlocutory Review of Ruling on Status of Confidential Information Provided Pursuant to Protective Order and Request for Stay (February 30, 2017).

<sup>13</sup> 16 NYCRR §4.7(a).

should be held to the existing schedule regarding the filing of initial testimony and exhibits notwithstanding the fact that RESA and Direct disagree with Your Honors' rulings.

Allowing parties to stall these proceedings by continuing to appeal any ruling will ensure that the evidentiary hearings never progress, and the critical investigation directed by the Commission will be delayed indefinitely. Therefore, for the reasons discussed above, Staff submits that the pending interlocutory appeals do not provide a basis to stay the schedule in these proceedings and that these proceedings should continue as governed by Your Honors' May 15, 2017 ruling.

2. Staff Subpoenas to Non-Party ESCOs

RESA also argues that the existence of the subpoenas duces tecum served on non-party ESCOs operating in New York warrants a stay of the existing schedule. However, the only argument presented on this issue that in any way impacts the timing of testimony is with respect to the extensions of the response date to July 27, 2017, granted to a subset of non-party ESCOs by Your Honors. These extensions do not necessitate a stay of the schedule. Instead, Staff proposes that a two-week extension would allow Staff to receive data prior to the deadline for filing initial testimony. Additionally, Staff proposes that a process be instituted by Your Honors whereby Staff is afforded the opportunity to update their testimony by a certain date in order to analyze the data received on July 27, 2017 and incorporate any necessary information into its testimony. This would facilitate the timely adjudication of these proceedings.

3. Ongoing Discovery Disputes

RESA and Direct argue that their discovery disputes with the New York Utilities provide justification for a stay of the schedule. In its motion, RESA offers that only now that it

has been provided access to the ESCO Keys is it able to analyze the data provided by the utilities in these proceedings. In response, Staff notes that, with the exception of the ESCO Keys, all parties have had access to the utility data for the same amount of time as Staff. The ESCO Keys simply allow one to connect a specific company name to the individual supplier number provided in the utility data sets. Therefore, full analysis could have been performed on this data since the day it was received. In other words, the inability to single out any one ESCO in the data set does not preclude any party from analyzing the voluminous data provided by the utilities, and such analysis could easily be performed using the individual supplier number identifier. In any event, Your Honors issued a ruling granting RESA's consultant access to the ESCO Keys permitting RESA to assign company names to the data points already in their possession.<sup>14</sup> Staff offers that any delay in analyzing the utility data rests solely with RESA and its consultant, and is not a basis to delay the schedule in these proceedings.

Direct likewise states that it has been unable to analyze the utility data without access to the ESCO Keys and that it has yet to be provided with such Keys. Staff again offers that the utility data can be meaningfully analyzed without the ESCO Keys. Additionally, Your Honors recently issued a ruling clarifying the June 8, 2017 ruling and directing that the consultants of Direct be provided with the ESCO Keys.<sup>15</sup> Therefore, given that Direct has had access to the vast majority

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<sup>14</sup> Case 15-M-0127, supra, Ruling on RESA's Motion to Compel Disclosure of ESCO Keys (issued on June 8, 2017).

<sup>15</sup> Case 15-M-0127, supra, Ruling Clarifying June 8, 2017 Ruling on RESA's Motion to Compel Discovery of ESCO Keys (issued June 30, 2017).

of utility data for the past four months, and that it now has access to the ESCO Keys, a stay of the schedule is not warranted. Finally, with respect to the argument raised by both RESA and Direct regarding the applicability of the June 8, 2017 Ruling to National Fuel Gas Distribution Corporation (NFG), that issue has likewise been resolved by Your Honors' June 30, 2017 clarification ruling, and thus does not warrant a stay of the existing schedule.

With respect to the two remaining motions to compel filed by RESA and pending before Your Honors,<sup>16</sup> Staff offers that only a modest extension of the schedule is warranted based on these motions. Your Honors have recently issued a ruling granting both motions directing production of the requests information within five days of the ruling.<sup>17</sup> In its motion, RESA anticipates a ruling from Your Honors and indicates that it will still require additional time to review and analyze the data. However, instead of staying the schedule completely, a two-week extension would allow RESA to access and analyze the data and provide their analysis as part of their testimony.

#### 4. Alleged FOIL Issues

RESA claims, and Staff refutes, that the Protective Order in these proceedings<sup>18</sup> is insufficient to prevent disclosure of ESCO information under the Freedom of Information

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<sup>16</sup> Case 15-M-0127, supra, Motion of Retail Energy Supply Association to Compel Consolidated Edison and Orange and Rockland to Provide Responses to RESA Information Requests (May 1, 2017); and Motion of Retail Energy Supply Association to Compel National Fuel Gas Distribution Corporation to Provide Responses to RESA Information Requests (May 3, 2017).

<sup>17</sup> Case 15-M-0127, supra, Ruling on RESA Motions to Compel Augmented Discovery Responses (issued July 5, 2017).

<sup>18</sup> Case 15-M-0127, supra, Ruling Adopting Protective Order and Notice to Non-Parties (issued February 17, 2017).



Law (FOIL).<sup>19</sup> Staff relies on its previous arguments as to why the Protective Order sufficiently protects ESCO data in these proceedings,<sup>20</sup> but notes that it would be impractical to stay the evidentiary hearings until the challenge brought by Direct in New York Supreme Court is resolved.<sup>21</sup> Initially, this issue only relates to access to a portion of ESCO data by a small number of parties: state agencies other than DPS. Additionally, given the likelihood of appeals in that case, it may be many months before that case is resolved. Staying the entire evidentiary hearings pending that case, which only impacts a limited segment of discovery, would improperly put these proceedings on hold pending a potentially lengthy court case. Finally, Your Honors recently issued a ruling addressing the access to ESCO data by other state agencies.<sup>22</sup> This ruling modified the Protective Order to include Exhibit 2, which allows state agencies wishing to receive protected information to execute an agreement binding them to any DPS Records Access Officer (RAO) determination of confidentiality.

5. Direct Arguments Regarding the Access to Non-Party Data

In its motion, Direct also raises arguments regarding the access to non-party data provided confidentially to the RAO. These arguments are similar to those presented in a June 29,

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<sup>19</sup> Public Officers Law, Art. 6.

<sup>20</sup> Case 15-M-0127, supra, Staff Letter in Opposition to Direct's Interlocutory Appeal (March 29, 2017).

<sup>21</sup> In the Matter of Application of Direct Energy Services, LLC, v. New York State Public Service Commission, et al. (Albany Co. Index No. 02664-17).

<sup>22</sup> Case 15-M-0127, supra, Ruling Clarifying State Agency Party Obligations with Respect to Protected Information (issued June 29, 2017).

2017 motion to compel filed by NEM (NEM Compel Motion).<sup>23</sup> Staff already responded to those arguments in its reply to the NEM Compel Motion.<sup>24</sup>

6. Cooperation with Staff Data Requests

Finally, while Staff opposes a stay of the existing schedule, Staff proposes that any extension should be limited to two weeks, and coupled with an agreement by the ESCO parties to comply with Staff information requests and/or commit in a formal manner to moving these proceedings forward, and submit to the final determinations of Your Honors and the Commission. Without such a commitment, it is apparent that the ESCO parties will continue to unnecessarily delay these proceedings. As Justice Zwack astutely pointed out in his recent decision on a related Retail Market matter, "[w]hat can also be reasonably concluded is that the ESCOs have instead focused on litigation to frustrate the plain purpose of the PSC and PSL – consumer protection...."<sup>25</sup> The New York Supreme Court has recognized the proclivity of NEM and RESA to invoke litigation to hinder the implementation of necessary consumer protections. Staff requests that Your Honors do the same and prevent the NEM, RESA, and Direct from continuing to delay these proceedings through unwarranted challenges and appeals that border on the frivolous.

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<sup>23</sup> Case 15-M-0127, supra, Motion to Compel Staff of the Department of Public Service to Provide Responses to Information Requests (June 29, 2017).

<sup>24</sup> Case 15-M-0127, supra, Staff Reply to NEM Motion to Compel and Direct Energy's Request for Access to Information Provided to Department of Public Service Staff (July 6, 2017).

<sup>25</sup> Matter of National Energy Marketers Assoc. et al. v New York State Public Service Commn., (Albany Co. Index No. 5860-16); Matter of Retail Energy Supply Assoc. et al. v New York State Public Service Commn., (Albany Co. Index No. 5693-16), slip op. at 20 (June 30, 2017).

CONCLUSION

For all the above reasons, Staff respectfully requests that Your Honors deny the motions of the Retail Energy Supply Association, Direct Energy Services, LLC, and the National Energy Marketers Association. Alternatively, Staff proposes that any extension of the schedule be limited to two weeks, and accompanied with necessary conditions to ensure that these proceedings advance without undue delay.

Respectfully submitted,

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