

June 15, 2017

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VIA ELECTRONIC MAIL

Hon. Ashley Moreno
Hon. Erika Bergen
Hon. David R. Van Ort
Administrative Law Judges
New York State Public Service Commission
3 Empire State Plaza
Albany, NY 12223-1350

Re: Case 15-M-017 – In the Matter of Eligibility Criteria for Energy Service Companies.

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

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

Dear Judges Moreno, Bergen, and Van Ort:

We represent Marathon Power Corporation d/b/a Marathon Energy Corporation (“Marathon”), an energy service company (“ESCO”) operating in the State of New York that is not a party to the above-referenced proceedings. Pursuant to CPLR 2304 and for the reasons outlined below, Marathon respectfully requests that Your Honors withdraw the subpoena *duces tecum* Your Honors issued to Marathon dated May 26, 2017 (the “Subpoena”).¹

As Your Honors are aware, on May 25, 2017 and May 31, 2017, Department of Public Service Staff (“Staff”) filed two letters requesting that Your Honors issue a total of 176 subpoenas *duces tecum* on certain unspecified non-party ESCOs.² Thereafter, Staff provided Marathon with a self-styled “courtesy copy” of the Subpoena late last week.³ A copy of the Subpoena is attached as **Exhibit A**.

¹ Because the Subpoena is not returnable in court, before Marathon can make a motion to quash the Subpoena it is required to request that the same be withdrawn by the “person who issued it” (CPLR 2304). Since you issued the Subpoena, this request is addressed to your attention.

² Cases 15-M-0127, *et al.*: *In the Matter of Eligibility Criteria for Energy Service Companies*, Letter to ALJs RE Subpoenas (Filed May 25, 2017) (enclosing 143 subpoenas *duces tecum* to be signed by the ALJs); Cases 15-M-0127, *supra*, Letter to ALJs Regarding Subpoenas (Filed May 31, 2017) (enclosing an additional 33 subpoenas *duces tecum* to be signed by the ALJs).

³ Marathon reserves any and all objections relating to the Subpoena, including, but not limited to, objections regarding the service thereof.

Marathon's review of the Subpoena revealed numerous and significant procedural and substantive deficiencies that support Marathon moving to a New York State Supreme Court Justice to quash the Subpoena. In brief, the deficiencies identified include, but are not limited to:

1. Staff's failure to provide Marathon with adequate notice of the Subpoena pursuant to both Department of Public Service Rules and Regulations and the Civil Practice Laws and Rules,
2. The improper inclusion of interrogatory-styled requests within the Subpoena that do not seek to compel the production of documents that Marathon possesses,
3. The improper commencement of the Track 1 evidentiary hearing process (the "Evidentiary Proceeding") in the above-referenced proceedings, and
4. The requests to obtain information irrelevant to the Evidentiary Proceeding that would not be subject to discovery even via a validly issued subpoena *duces tecum*.

As a result of these procedural and substantive flaws, and to avoid litigation practice, Marathon respectfully requests pursuant to CPLR 2304 that Your Honors withdraw the Subpoena.

Given the impending return date of the Subpoena (Friday, June 16 2017) and the significant time constraints imposed by the Subpoena, Marathon respectfully requests that Your Honors respond to this withdrawal request no later than **12:00 PM on Friday, June 16, 2017**. Absent withdrawal, Marathon reserves its right to file a motion with the Albany County Supreme Court seeking an order quashing the Subpoena.

If you have any questions or would like to discuss this request further, please contact me directly. Thank you for your continuing attention in this matter.

Sincerely,

/s/ John T. McManus

John T. McManus

Enclosure

cc: Steven Kramer, Esq., Department of Public Service (*via electronic mail*)
Francis Dwyer, Esq., Department of Public Service (*via electronic mail*)

EXHIBIT A

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

In the Matter of Eligibility Criteria for Energy Service
Companies.

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

In the Matter of Retail Access Business Rules.

Case Numbers

15-M-0127

12-M-0476

98-M-1343

SUBPOENA

DUCES

TECUM

THE PEOPLE OF THE STATE OF NEW YORK

TO: Marathon Energy Corporation
MARATHON ENERGY CORPORATION
868 39TH STREET
BROOKLYN, NEW YORK, 11232

YOU ARE HEREBY COMMANDED to produce to the New York State Department of Public Service, 3 Empire State Plaza, Albany, New York, all records, papers, documents, correspondence, and all other writings which you have in your custody or power responding to certain questions and information requests directed to you pursuant to the Interrogatory/Document Request issued February 2, 2017, February 16, 2017, March 16, 2017, and April 3, 2017 in these matters, as set forth herein. To the extent any of this information has already been provided to the New York State Department of Public Service, indicate to whom it was provided and on what date.

1. Provide separate audited financial statements at the New York State Energy Service Company (ESCO) business level for the years 2011 through 2016. Include an Income Statement, Balance Sheet, and Statement of Cash flows and related disclosure notes. In addition, provide the auditor's report regarding the ESCO's financial statements. If no separate audited financial statements are available, then provide the schedules & work-

papers supporting the New York State ESCO's financial results contained in the parent Company's consolidated tax return (Form 1120) for the years 2011 through 2016.

2. For each calendar year 2011 through 2016, provide description of each service plan offered by the ESCO in which customers were enrolled (a "Product") and include the dates the Product was offered. As part of the description identify each value added benefit (e.g., loyalty reward discounts, reward points, etc.) provided the customer under the service plan. From January 2011 through December 2016, provide all Products in chronological order based on the commencement date the Product was offered to customers.
3. For each month of each calendar year 2011 through 2016, provide the following information in as each corresponds to the Product provided in the list from Question 2:
 - a. Number of Customers – Total number of customers each month enrolled in the Product.
 - b. Aggregate Amount Billed to Utility – The total amount billed to the utility for all customers taking service under each Product. This should not include the Purchase of Receivables discount amount.
 - c. Aggregate Credit Amount Issued to all Customers – Total monthly dollar amount issued to all customers for each Product that is not accounted for in the "Aggregate Amount Billed to Utility" above. Any single credit issued that spans multiple months, like an annual customer credit, should be noticed in the month it was issued. Note - This does not include any value added services, e.g. a furnace cleaning. Value added services should be described in the Product description from question 2 and monetized in the bullet below.
 - d. Cost of Value Added Benefits - total monthly dollar amount of the cost incurred in providing the value added benefits to all customers for each product.
4. With reference to the response provided in Question 2, for each calendar year 2011 through 2016, provide a break down for each value added benefit and the monetized amount the ESCO recorded as an expense and or liability for providing that value added benefit. An average amount should be provided if a single value added benefit can be

monetized using multiple amounts (e.g. the ESCO may have multiple furnace cleaning companies that charge the ESCO different amounts to perform the same value added benefit).

5. Indicate which customer groups your firm currently serves as of January 1, 2017. Please make an affirmative indication, stating either yes or no, for each of the following customer groups: Residential Electric; Small Commercial (not demand metered) Electric; Larger Commercial and Industrial (demand metered) Electric; Residential Gas; Small Commercial (less than 750 dekatherms/year) Gas; and, Larger Commercial and Industrial (750 dekatherms/year or greater) Gas.
6. Provide filed copies of the ESCO's New York State General Business Corporation Franchise Tax Return form CT-3, and any required attachments, for the years 2011 through 2016.
7. For the period 2011 through 2016, provide total kWh sold for both Columns A and B that corresponds with the reported sales of electricity - as referenced in Form CT-3, Part 6, line 2 (Section 210-A.2). Provide the purchased cost of kWh sold for both Columns A and B for the period 2011 through 2016.
8. For the period 2011 through 2016, provide total MCF sold for both Columns A and B that corresponds with the reported sales of physical commodity (gas) – as referenced in Form CT-3, Part 6, line 27 (Section 210-A.5(a)(2)(I)). Provide the purchased cost of MCF sold for both Columns A and B for the period of 2011 through 2016.
9. With respect to customer surveys:
 - a. Related to ESCO services provided to mass-market customers in New York State (NYS), provide copies of any survey(s) and survey(s) results for which your company provided input information. Include any surveys performed of your Company's customers, or for ESCO customers in general. The focus of the requested surveys includes, but is not limited to customer satisfaction, customer churn or migration rate from Utility to ESCO, ESCO to Utility, or ESCO to ESCO, and desirable energy related products or services. For each survey,

indicate the name of the entity that conducted the survey and indicate the type of entity (ESCO, polling firm, academia, etc.). For each survey, indicate who provided funding for the survey, or any other pertinent information in order to provide clarity into the reason for the survey, how it was conducted, and for whom the survey was intended.

- b. Related to part a, above, provide any other NYS ESCO mass market customer related survey your Company has in its possession.
- c. As parts A & B request NYS surveys only, also provide customer satisfaction surveys performed in other states, regions, or the United States. Under the same considerations outlined in Parts a and b of this question, for each survey conducted in another state, clearly identify and discuss the similarities and differences between how that state operates the retail competition program and how NYS operates retail competition.

10. With respect to customer comparison tools:

- a. Related ESCO services provided to mass-market customers in NYS, provide copies of, and/or links to, any comparison shopping tool that your company maintains, or any comparison tool maintained by another entity to which your company provides input information. For each link and/or tool, clearly explain what type of services or prices are included. For example, if the link or tool includes average pricing for all customers, actual commodity offerings for which customers can sign up, or other clarification as to how to interpret the meaning of offered prices in order to remove any confusion. For each link or tool, indicate the name of the entity which maintains the link or tool and whether that entity is an ESCO, Government, academia, or etc. For each link or tool, indicate who provided funding for the link or tool, or any other pertinent information in order to provide clarity into the reason for the link or tool, how it is maintained, and for whom the link or tool was intended.
- b. As part a, above, requests NYS links or tools only, also provide links or tools done for comparison shopping in other states, regions, or the entire United States. Under the same considerations outlined in Part A of this question, for each link or

tool conducted in another state, clearly identify and discuss the similarities and difference between how that state operates the retail competition program and how NYS operates retail competition.

11. Indicate, for each state or jurisdiction in which you offer commodity service to residential and small commercial customers, if you participate in a POR system with recourse, without recourse, or both. For an answer in the affirmative indicate by stating “with recourse”, “without recourse”, or “both” for that state. For an answer in the negative indicate by stating “No” for that state.
12. Page seven of the *Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits* issued on December 2, 2016 in Cases 15-M-0127 et al. required that the profitability of ESCOs for a recent period of time be examined in this proceeding. Based on this provide the following information on a calendar basis for the period 2011 through 2016 for your New York operations:
 - a. Revenues earned from the sales of electricity.
 - b. Revenues earned from the sales of natural gas.
 - c. Cost of electricity sold.
 - d. Cost of natural gas sold.
 - e. Return to equity earned on sales of electricity. Show both the net income and equity capital components of the calculation and how these amounts were derived from the accounting records of the Energy Service Company.
 - f. Return to equity earned on sales of natural gas. Show both the net income and equity capital components of the calculation and how these amounts were derived from the accounting records of the Energy Service Company.
13. What would be the impact to your business if either or both of the following utility services were no longer available and each ESCO was responsible for billing and collection of its own accounts receivables?
 - a. Consolidated utility billing, and
 - b. Purchase of receivables.

14. Provide a copy of the New York State Income or Corporation Franchise Tax return or Information return where the ESCO's New York operations are reported, including all required schedules and attachments, filed for the years 2011-2016. If these tax returns were previously provided identify the interrogatory response under which they were provided.

Personal appearance is not required to respond to this subpoena. The requirements of this subpoena may be met by delivery of the material by mail, commercial courier service on or before June 16, 2017. Non-confidential responses can be provided to Collen Reynolds at Collen.Reynolds@dps.ny.gov, or mailed to:

Collen Reynolds
New York State Department of Public Service
3 Empire State Plaza – 18th floor
Albany, NY 12223-1350

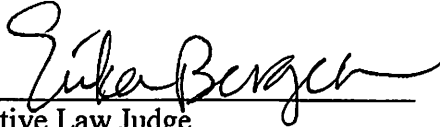
Confidential treatment may be requested for materials where appropriate pursuant to Public Officers Law §§87(2)(d) and 89(5)(a)(1). Confidential documents can be filed with the Records Access Officer (RAO) electronically at recordsaccessofficer@dps.ny.gov, or mailed to:

Records Access Officer
New York State Department of Public Service
3 Empire State Plaza – 18th floor
Albany, NY 12223-1350

When submitting confidential responses to this subpoena with the RAO, include: (1) a letter addressed to the RAO requesting confidentiality and making a prima facie case therefor; (2) a copy of the confidential document; (3) a copy of the document, with information alleged as confidential redacted. Further instructions regarding how to file confidentially with the RAO can be found on the Department of Public Service webpage at www.dps.ny.gov. Questions for the RAO can be directed to (518) 486-2661.

This subpoena is authorized and issued pursuant to New York Public Service Law (PSL) §§19 and 66(10), and New York Civil Practice Law and Rules §2302(a). Failure to comply with this subpoena is punishable as a misdemeanor as provided for by PSL §19(2).

Dated: Albany, New York
May 26, 2017



Administrative Law Judge
New York State Public Service Commission
3 Empire State Plaza
Albany, New York 12223