

**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.

**REPLY COMMENTS ON DPS STAFF WHITEPAPERS ON ESCO
REFERENCE PRICES, EXPRESS CUSTOMER CONSENT FOR
CONTRACT CHANGES, AND PERFORMANCE BONDS**

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I. INTRODUCTION

The Public Utility Law Project of New York (Utility Project or PULP) appreciates the opportunity to provide Reply Comments in response to the initial comments filed by a wide range of parties on the three New York State Department of Public Service Staff (Staff) whitepapers filed on May 4, 2016. It is clear from the initial comments that few of the Staff's suggestions concerning ESCO reference prices, express consent, and performance bonds have garnered consensus support. Rather there are only two areas with a strong consensus amongst the parties, and they are:

- that the Staff proposed methodology for calculation of a reference price for fixed rate service is not acceptable; and
- The Staff options for security or performance bond mechanisms suffer due to vagueness.

This consensus of rarely aligned parties merits serious consideration by the Commission and close scrutiny of Staff's recommendations.

These Reply Comments will discuss and summarize those aspects of the Comments with which it agrees and underline both some areas of disagreement, and the basis for said disagreement. Overall, the Commission should:

- ensure ESCO commodity service customers receive savings compared to the prices of full service utility company rates for energy;
- require ESCOs to receive express consent from customers when making alterations to a contract or changing contract conditions at renewal, including price changes; and
- ensure that ESCOs post enough security to cover customer overcharges when ESCO charges are reconciled with what a full service utility would charge.

II. PRICE BENCHMARK WHITEPAPER

A. ESCO Customers Should be Guaranteed Price Savings

The Commission order issued on February 23 of 2016 expressly limited ESCO residential customer enrollment to situations where the customers were guaranteed savings in comparison to prices at full service utilities, unless the electricity provided was at least 30% renewable, in which case no upper price boundary would exist. The DPS Staff proposal unjustifiably, and in derogation of the Commission's stated policy, would allow ESCOs to charge in excess of full service utility rates for fixed rate offerings, and should therefore be rejected. Consumer organizations are in consensus on this point, as demonstrated by the following comment:

- "As stated, the Commission should never require mass market consumers to pay to ESCOs more than they would pay to utilities unless the premium the ESCO receives is offset by the value the ERVAS provides to the consumer. A fixed price contract, by definition, provides no value to consumers unless consumers experience savings." [See, UIU/NYAG joint comment at p. 12]

The UIU/NYAG¹ comment illustrates the critical point that fixed price contracts do not necessarily lead to price savings, and may cost much more. While avoiding variable prices may be a salesman's talking point to convince customers to take ESCO service, the Staff proposal does nothing to require a showing that the price stabilization provides added value commensurate with the premiums it would allow ESCOs to charge for the price stabilization. As the Utility Project pointed out, there are other ways to add stabilization to bills, such as levelized billing, and ESCO contracts have loopholes that may allow the ESCO to renege on promises of fixed rates when spot market prices spike. Without proof that the Staff proposed added premium allowed for a fixed price rate adds value commensurate with the premium, the proposal will allow for a continuation of unjustified overcharging for basic commodity service.

¹ The Utility Intervention Unit of the Department of State (UIU) and New York Attorney General (NYAG) filed jointly in the initial comment period of this case.

Furthermore, no ESCO submitted comments supporting Staff's reference price proposal for fixed rate offerings. The following comments illustrate the position taken by many ESCOs:

- "The question is not whether ESCO prices are competitive with utility charges but whether the utility charges are properly designed." [See Infinite Energy Comment at p. 4]
- "If the Commission requires all fixed-rate products to fall within the proposed formula parameters, it is likely that customers will pay much more for energy as soon as there is a change in the current price environment." [See, Impacted ESCO Coalition Comment at p. 5]

The Joint Utilities' comment makes a valid point that it is impossible to know how Staff's proposed benchmark formula for fixed rate offers compares to "real-world valuations."² The lack of data stems from ESCO refusals to allow public access to how they compute costs. However, a study conducted by the UIU demonstrated that fixed rate contracts do not necessarily lead to customer savings. Also, if a full service utility has a fixed rate, ESCOs should be challenged to meet or beat it, not charge more. This would properly reset the market so that competition would work to benefit consumers. For example, one ESCO, Viridian, now advertises that it provides a 50% green commodity service that charges 5% less than a full service utility such as Niagara Mohawk.

Now you can enjoy energy that's minus the carbon, and minus the second-guessing about your rate. With minus-5TM from Viridian, what you pay for energy will be discounted 5% less than the utility, no matter how low the utility rate may

² "The Joint Utilities take no position on Staff's proposed benchmark reference prices. The Joint Utilities note, however, that absent any numerical backcast or example, it is not possible to know how the formulae compare to real-world valuations." Joint Utilities at p. 8.

go. So you can relax and know you've got the rate thing locked up: You're cool with minus-5™.

See Attachment A, *Viridian Minus5*. If this ESCO is actually beating the utility price with a green product then the ESCO opposition to the Commission's reset of the market to assure customer benefit, and insistence upon "reference prices" above those of the full service utility, is merely rent-seeking by failing competitors who want license to charge customers more.³ If this ESCO is not providing real savings, the Commission should take appropriate action, even if it is providing a green service that under the market reset order would have no limit on price.

B. Any Reference Price Chosen by the Commission Should Not be Based on ESCO Offer Prices.

If the Commission does decide to use reference prices, the reference price should not be determined by looking at what prices ESCOs offer customers. This is a position that was proposed by Constellation in the following comment:

"During the course of collaborative discussion, another suggestion raised was an alternative benchmark that is derived from an average of actual ESCO offer prices in market" [See, Constellation Comment at p. 2]

Plainly, this suggestion should not be adopted. The purpose of the reset order is to protect ESCO customers from the overcharging that has historically defined ESCOs, contrary to the Commission expectation that the introduction of competition from ESCOs would

³ Viridian's claimed 5% savings are not with respect to actual charges of the full service utility, but with respect to an "index" of estimated full service utility charges prepared by the ESCO. Online reviews indicate controversy exists over this ESCO's marketing practices and savings claims in Connecticut. See <http://www.yelp.com/biz/viridian-energy-norwalk>.

lower prices below those charged by full service utilities. The reference price was proposed by Staff in an effort to mitigate overcharging by redefining it, rather than eliminating it. If the reference price is to be based on ESCO offer prices, the pattern of overcharging originally targeted for scrutiny would be perpetuated, it would simply no longer be defined as overcharging despite being in excess of the utility's default prices.

C. Parties are Confused over What Happens When an ESCO Charges Prices Over the Staff-Proposed Reference Price

PULP continues to oppose the Staff reference price proposal, as it is inconsistent with the Commission's savings requirement, but concurs with UIU, NYAG and the City of New York that, if there is to be a benchmark, there must be clear guidelines dictating procedure when an ESCO charges prices in excess of the stated benchmark price.⁴ While not offering an exhaustive compliance protocol, PULP would like to put forth two requirements in the process. First, the reference price should be a hard price-ceiling for ESCOs, and any loopholes allowing ESCOs to charge above the reference price with no consequence should be eliminated. Second, ESCOs' compliance with the reference price should be monitored on a monthly basis. Finally, PULP believes that the Commission has the unambiguous power to enforce a limit on prices for all or part of electric service, and should exercise it.

III. AFFIRMATIVE CONSENT WHITEPAPER

⁴ See UIU/NYAG Comment at p.16; See City of New York Comment at p. 3.

A. Material Changes to Contracts Must Be Expressly Consented to by Customers.

PULP notes the consensus amongst consumer groups that the DPS Staff whitepaper on affirmative consent was completely outside of the scope of the original February 23 order issued by the Commission. Despite Staff's proposal of an implied consent and/or "negative option" regime for ESCOs, PULP reiterates that customer inaction cannot be seen as action, or affirmative consent, or express consent, when material changes to a contract are proposed by ESCOs in mailed notices and effectuated with no response from the customer. Critical comments that support this position include the following:

- "A renewed ESCO contract that includes materially different terms than the original is effectively a new contract altogether." [See, UIU/NYAG joint comment at p. 16.]
- "If the notice method proposed by Staff were to be implemented, once a customer signs up with an ESCO, the ESCO would potentially have the ability to renew and re-enroll the customer on new and different products (with differing prices) unless and until the customer affirmatively opted out of being served by the ESCO." [See, City of New York Comments at p. 2.]

Contrary to the consumer advocates' position, there was widespread support amongst utility companies for the alterations proposed by DPS staff in the affirmative consent whitepaper. For example, the following utility companies and ESCOs voiced support for viewing three attempts at notification of contract changes as akin to affirmative consent: Central Hudson, Consolidated Edison, Impacted ESCO Coalition, Constellation New Energy, and the New York State Energy Marketer Coalition, and Great Eastern Energy. Great Eastern Energy's comment on the Affirmative Consent whitepaper is illustrative of many of the utility companies' positions:

"While three notices seem a bit cumbersome, we accept it as a necessary trade off in order to satisfy requirements of the UBP and ensure that customers are appropriately notified of renewals and material changes to their contracts." [See, Great Eastern Energy Comment at p. 5.]

Although under Staff’s proposal three mailings would be made, there would be only one actual notice informing customers of the substantive changes proposed to be made, and not “three notices” as claimed by the utilities. (The first mailing only tells customers to watch for the actual notice. The second mailing is the actual notice of changes. The third mailing is a postcard reminding the customer to read the second mailing.) The utility companies mistakenly believe that the affirmative consent requirements outlined in the UBP and New York State General Business Law 349-d(6) are aimed at ensuring customers receive notification regarding forthcoming contract alterations. They are not. The purpose of an affirmative consent requirement is to ensure that the customer is not shifted into a contract to which the customer did not knowingly or willingly agree. An ESCO must obtain express consent to contract alterations from customers, no matter how cumbersome the process is or how many “notices” are mailed. Any position adopted by the Commission must be in accord with this analysis. |.....

B. Any Notification or Consent Received Electronically Must Be Legitimate.

PULP concurs with comments urging the Commission to require ESCOs to show that electronic notification, or consent obtained electronically, was understood by the customer. The following comment summarizes this position:

“To the extent that an ESCO wishes to obtain “written” consent via electronic communication, the ESCO must obtain the customer’s express consent to notice in a manner consistent with best available practices (including, for example, ensuring that such notice is made available in the customer’s primary language; or potentially using a two-step process including both a website sign-up form and a follow-up email that contains instructions to confirm consent).” [See, Joint Comment by UIU and NYAG at p. 17]

These requirements are critical for ensuring that customers understand (1) that

they are agreeing to contract changes and (2) what those contract changes entail. PULP also notes that allowing for electronic notification and consent would make the contract alteration process less “cumbersome.”

IV. Performance Bond Whitepaper

A. Widespread Support for the General Use of Performance Bonds

Regardless of the specific mechanisms for a performance bond system, there was widespread support from the parties – both utilities and ESCOs, and consumer groups – for implementing a system that would require ESCOs to post financial security. For example, the following ESCOs and utilities voiced support for the Performance Bond Whitepaper: Major Energy Electric Services, Consolidated Edison, Family Energy, the Impacted ESCO Coalition, Agway Energy Services, Energy Cooperative of America, Constellation New Energy, and Infinite Energy, amongst others. Similar to PULP’s position, the following comments voice support for a performance bond system generally:

- “Staff proposed a separate performance bond/security requirement, the purpose of which would be to, “ensure an ESCO’s ability to, at a minimum, ensure the price savings guarantee and other elements of the Reset Order.” The Coalition supports this identified purpose of the performance bond/security requirement to back an ESCO’s obligations under a service agreement.” [See, Impacted ESCO Coalition at p. 3]
- “The Joint Utilities agree with Staff that additional creditworthiness criteria and security should be considered in the context of determining ESCO eligibility.” [See, Joint Utilities comment at p. 2]

Acknowledgement from a plethora of utility companies that ESCOs need to be subject to heightened security measures should encourage the Commission to continue exploring different ways to implement a performance bond system, provided however that such a system must be specified with particularity as noted below.

B. The Commission Must Expand and Clarify Key Aspects of Any Performance Bond System

PULP reiterates its position that the Performance Bond whitepaper suffered due to vagueness. PULP also notes that the vagueness of Staff's proposal was a widespread concern among both utility companies and advocacy entities. The following comments demonstrate this position:

- "However, the risk exposure to be covered by a performance bond continues to be undefined, thus making it impossible to provide an articulate recommendation." [See, M&R Energy Resources at p. 1]
- "While the City does not endorse any particular methodology for calculating such bond or security instrument, the City strongly supports this concept of imposing financial requirements on ESCOs." [See, City of New York at p. 2]
- "There is strong consensus that some form of financial assurance makes sense to protect customers from ESCOs who may default on their obligations, as occurred in Western New York several years ago when an ESCO collected deposits from customers and failed to deliver natural gas to them." [See, NYS Energy Marketers Coalition at p. 3]

These comments demonstrate that the performance bond whitepaper only put forth a variety of potential plans without actually detailing or endorsing any plan in particular. PULP reiterates that the Performance Bond system will only be effective if certain proposed aspects are adopted. These aspects are as follow:

1. All ESCOs should be required to post security;
2. The required payment should vary based on the individual ESCO's number of mass-market customers;
3. The security should take the form of an irrevocable letter of credit; and
4. The size of the security should be re-assessed on a bi-annual basis.

PULP believes that these requirements would ensure that ESCO customers are financially

protected from any ESCO pricing-related actions that are against the public interest. These requirements find support from both utility companies and advocacy groups. The following comments illuminate the varied support for the principle of a performance bond:

- “First, the total security would initially reflect an equivalent flat fee or instrument that is required to be posted by each ESCO entering the New York market to be paid to or held by the Commission. Next an additional security component would be applied that would be calculated on the basis of number of customers served by the ESCO.” [See, RESA Comments at p. 5]
- Further, the amount of consideration required should relate specifically to the size of an individual ESCO’s business in New York State (number of customers or annual revenues). [See, NYS Energy Marketers Coalition at p. 3]
- “initially, the security should be posted as an irrevocable letter of credit, in order to enact this customer protection in a timely and efficient manner.” [See, UIU/ NYAG joint comment at p. 18]

Contrary to this analysis, some parties advocated for: (1) a flat fee that would not vary based on the number of customers served by the ESCO; and (2), giving ESCOs latitude in choosing what form of security they could post. The primary motivation for enacting a performance bond requirement is to ensure ESCO customers are not unfairly exposed to financial hardship. This security is critical in regulating ESCOs given the history of deceptive and unfair business practices prevalent in the industry. Allowing a flat, non-variable fee to be paid by all ESCOs leaves open the possibility that the security fund will be too small to cover all of the financial obligations of a failing ESCO. A variable payment, re-assessed bi-annually would help ensure that all ESCOs were paying a fair share, and that the payment size is reflective of the most recent customer statistics.

Requiring an irrevocable letter of credit also helps ensure customer protection. As noted by the UIU and NYAG in their joint comment, a letter of credit is the fastest and most efficient

way in securing customer protection. Allowing for latitude in this area would lead to uncertainties in how securely customers are protected from financial hardship.

C. Clarification of Guidelines For Enforcement Mechanisms Are Needed.

While not specifically mentioned in the original comment submitted by PULP, PULP concurs with the City of New York Comment calling for a document outlining a fully articulated plan that outlines how security funds would be used to mitigate customer losses when an ESCO fails⁵.

PULP recognizes the due process concerns discussed by several ESCOs and offers a few suggestions. First, ESCOs should receive notice and an order to show cause for drawing on the performance bond should be issued. However, the process needs to be expeditious to ensure that customers are made whole after ESCO missteps. PULP recommends that interest should begin to accrue on monies owed to customers immediately that a notice is filed. This would compensate customers for delays in payment and incentivize ESCOs to handle these situations swiftly. Furthermore, a showing that customers were overcharged should be enough to trigger full repayment from the ESCO. No ESCO should be able to claim “internal error” or other mistakes in order to avoid paying.

⁵ See, City of New York Comment at p. 3.

Finally, PULP argues that the appropriate entity to hold the performance bond, whether deposited as an irrevocable letter of credit, or surety bond, or cash and/or cash equivalents, is the New York State Comptroller.

V. CONCLUSION

Based on the Comments submitted by a wide range of parties, it appears that the Staff's suggestions regarding reference prices and performance bonds have been met with broad skepticism. In contrast, as documented in these Reply Comments, there is clear division between ESCOs and advocacy entities in the validity of the Staff's suggestions regarding express consent.

Overall, PULP continues to recommend a program design that:

- requires ESCOs to show that fixed rate contracts provide savings to customers;
- refuses to accept customer silence or inaction as implied consent, and requires actual express consent from the customer; and
- requires ESCOs to post enough security to reimburse customers in the event of overcharging.

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Respectfully submitted,

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Attachment A
Viridian Minus5

(See Attached PDF File Viridian Minus5)