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Via Electronic Filing

Hon. Kathleen H. Burgess
Secretary
Records Access Officer
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 112223

Re: Cases 15-M-0127, 12-M-0476, 98-M-1343: Comments of the Impacted ESCO Coalition on the Staff Whitepapers on Benchmark Reference Prices, Guaranteed Savings and Performance Bonds/Financial Security

Dear Secretary Burgess:

Enclosed please find the Initial Comments of the Impacted ESCO Coalition ("Coalition") in the above referenced matters.

Should you have any questions or require any additional information, please contact me at (212) 590-0145 or via email at natarafeller@fellerenergylaw.com.

Respectfully Submitted,

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STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Services Companies	**))**	**Case 15-M-0127**
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 14-M-0476**
In the Matter of Retail Access Business Rules	**)**	**Case 98-M-1343**

COMMENTS OF THE IMPACTED ESCO COALITION

On behalf of the Impacted ESCO Coalition ("Coalition")[1] and its members, we submit these comments pursuant to the Commission's Notice Seeking Comments on the three (3) Staff Whitepapers issued on May 10, 2010 ("Whitepapers").[2] In particular, these Comments focus on benchmark pricing, performance bonds and other security instruments, and express consent.

I. Procedural History

On February 23, 2016, the New York State Public Service Commission ("PSC" or "the Commission") issued its "Order Resetting Retail Energy Markets." It also issued a Notice Seeking Comments on the Order, outlining seven (7) issues on which the Commission was seeking further input.[3] Initial Comments to the Resetting Order were submitted on March 14, 2016. Reply Comments were submitted April 4, 2016.

On May 4, the New York Department of Public Service Staff ("DPS Staff" or "Staff") issued Whitepapers offering feedback on three (3) of the seven (7) aspects raised in the February 23 Notice Seeking Comments: (1) performance bonds or other security requirements for energy service companies

[1] These Comments are submitted on behalf of the Coalition generally, but do not necessarily represent the views of individual ESCOs of the Coalition.
[2] Case 15-M-0127 et al., *Notice Seeking Comments* (May 10, 2016).
[3] Case 15-M-0127 et al., *Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers* (Feb. 23, 2016).

(“ESCOs”); (2) benchmarking/reference pricing for ESCOs; and (3) express consent from ESCO customers.[4] On May 10, 2016, the Commission issued a Notice Seeking Comments on the Whitepapers.[5]

Also on May 4, 2016, the Commission published three (3) rulemaking proposals in the New York State Register.[6] The first Notice proposes several revisions to the Uniform Business Practices (“UBP”) with respect to the eligibility criteria of ESCOs, with a strong focus on additional eligibility requirements. The second Notice pertains to proposed amendments to the UBP with respect to the circumstances when ESCOs should be required to post performance bonds or other forms of demonstrated financial capability. The third Notice relates to amendments of the UBP with respect to the use of a “forward-looking reference price” in establishing ESCO prices. The Coalition will be offering comments on the three (3) rulemaking proposals.

II. Commission Must Focus on Adopting Proposals Best Suited to Consumer Protection and Continuation of the Retail Market

The Commission and Staff have repeatedly requested that commenters and participants propose useful and well thought out proposals that will ensure customer protections as well as continue to support a healthy retail market. The approaches suggested below address both of these objectives, and will improve consumer confidence in the market. As we move forward with this process, the Coalition urges the Commission to consider approaches that take into consideration both of these significant goals, as well as provide meaningful solutions to the challenges brought forth by the February 23rd Order.

III. ESCO Performance Bonds or Other Security Interests (February 23 Notice Seeking Comments Issue #6)

In its Whitepaper proposal on ESCO Performance Bonds[7] or Other Security Interests, 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.”[8] The Coalition supports this identified purpose of the performance bond/security requirement to back an ESCO’s obligations under a service agreement.

As a threshold matter, the performance bond/security requirement must be expanded to include a variety of financial instruments. For example, in Pennsylvania, an electric supplier may post either a bond, letter of credit, or parental guarantee to ensure its obligations as a supplier.[9] This will ensure that all ESCOs, regardless of financial position, will be able to post performance security.

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[4] Case 15-M-0127 et al., *Staff Whitepaper on Benchmark Reference Prices*; *Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests*; *Staff Whitepaper on Benchmark Reference Prices* (May 4, 2016).

[5] Case 15-M-0127 et al., *Notice Seeking Comments* (May 10, 2016) (open issues are pending; submission of the instant comments do not indicate that the Coalition agrees with Commission jurisdiction.)

[6] http://docs.dos.ny.gov/info/register/2016/may4/pdf/rulemaking.pdf, I.D. No. PSC-18-16-00013-P / Amendments to the Uniform Business Practices of ESCOs, I.D. No. PSC-18-16-00014-P / Amendments to the Uniform Business Practices of ESCOs, I.D. No. PSC-18-16-00015-P / Petitions for Rehearing of the Order Resetting Retail Energy Markets and Establishing Further Process.

[7] “Performance Bond” as used in this comment is not exclusive of other financial instruments to assure security.

[8] Case No. 15-M-0127, *Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests*, (May 4, 2016) pg. 5.

[9] 66 Pa. C.S. Section 2809(c)(1)(i).

A. Flat Bond/Security Requirement Plus Adder

The Coalition suggests a performance bond/security requirement that consists of a flat amount, and an adder proportional to the ESCO's mass market customer load. The amount of the adder may be calculated as based on load volume served to mass market customers set forth in tiers, set annually (i.e. more customers served = higher bond) or based upon the percentage of annual mass market customer revenues of the ESCO (e.g., 10% of ESCO's revenues for commodity sales to mass market customers in the prior calendar year). The amount of the adder may then be adjusted upward or downward to account for the type of customer class served (low income v. residential v. small commercial) and the average charges in excess of what the utility would have charged over the prior calendar year.

The Coalition suggests adopting a hybrid approach similar to Maine, where suppliers are required to post financial security of $100,000, plus an adder proportional to the size of the supplier. Requirement of high, a set amount of $1 million, or $3 million for bonds, as suggested by Direct Energy,[10] is excessive, unduly onerous to smaller ESCOs and may have the unintended consequence of squeezing smaller ESCOs out of the market.

Because the Commission is most concerned about the protection of residential and small commercial customers being protected, ESCOs that serve only commercial customers might not need to post as high a bond as those who cater to mostly mass market customers. Thus it is suggested to base the adder on customer class (i.e. higher bond for residential customers, to the extent required, lower bond for small commercial customers). This is similar to the requirements of Illinois, where bond requirements are tied to the customer classes served. In Illinois, if the supplier is only serving nonresidential electric retail customers with maximum demands of 1MW or more, a $30,000 bond is required. If the supplier is serving electric nonresidential retail customers with annual consumption greater than 15,000 kWh, a $150,000 bond is required. If the supplier is serving all eligible retail customers, a $300,000 bond is required.

A bond calculated based on the number of customers served, the type of customer served, and the average charges in excess of what the utility would have charged in a period, set annually, are reasonable and manageable methods of calculation for the performance bond.

B. The Commission Must Address How Performance Bonds/Security Requirements Will Be Administered

The Commission must still address how the bond/security instruments will be administered. States that require performance bonds have very clear rules concerning the seizure of the bond. The Commission has not yet addressed whether it will have the authority to hold and disperse security assets, and what, if any benchmarks will be used for allowing seizure of the security instrument. The Coalition requests that the Commission provide such clarification, and seperately notice for comment these open issues.

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[10] Case No. 15-M-0127, *Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests*, (May 4, 2016) pg. 3.

III. Benchmarking
(February 23 Notice Seeking Comments Issue #1)

The Whitepaper on Benchmarking addresses several issues, including treatment of Energy-Related Value-Added Services ("ERVAS"), restates the Commission's prior position that variable-rate service must guarantee savings against the utility price, and proposes a reference price formula for fixed-rate products. Comments on each of these issues is discussed in turn below.[11]

A. Requiring Guaranteed Savings for Variable-Rate Products Against the Utility Price is Fundementally Flawed

The Coalition's position with respect to variable-rates remains the same as identified in the March 18, Comments – the practical problems with requiring guaranteed savings raised by commenters and proceeding participants have not been addressed. Substantial evidence has been presented that the utility rate is not indicative of the current market, due to the either monthly or annual reconciliations.

A guaranteed savings product is particularly concerning, since the utilities have never been required to functionally unbundle their service costs. In effect, some supply-related costs are still in the distribution margin of the utility, where the utility will collect it whether or not it actually provides energy supply to the consumer and consumers who actually choose competitive supply pay for such costs twice (to the retailer and to the utility). Rather than comparing an ESCO's variable-rate to the utility's rate, the Coalition recommends calculating an average (or mean) of the ESCOs' posted prices on the Commission's Power to Choose website, and then adjusting as deemed appropriate given then present market factors.

B. The Reference Price Should Be Utilized as a Tool for Customers to Compare Fixed-Rate Offerings Only

The Commission will achieve its goal of assuring price transparency if a fixed-rate reference price is developed for the specific purpose of providing customers with a Price to Compare. The Commission has recognized fixed prices as value add products that offer consumers predictability, and an opportunity to hedge their risk and avoid the impact of seasonal and unpredictable price swings. The Coalition is concerned the proposed Reference Price formula will in fact cause more harm to consumers and retail markets, than good. 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 (which is presently at historic lows). Additionally, ESCOs may determine it is no longer worthwhile to offer fixed-rates under the proposed conditions, causing a

[11] As argued in the March 24, 2016 Petition of the Impacted ESCO Coalition for Rehearing, Reconsideration and Clarification, the Coalition takes the position that the Commission lacks jurisdiction to regulate ESCO prices, and the portion of the Resetting Order that mandates price guarantees and otherwise regulates rates charged by ESCOs is considered *ultra vires*. The Commission's ratemaking authority exists pursuant to Article 4 of the Public Service Law ("PSL"), and the Commission has consistently ruled that ESCOs "are exempt from PSL Article 4 regulation." The Commission's current attempt to regulate ESCO pricing is beyond the scope of their authority under the PSL. While the Coalition submits comments responsive to the May 4 Request, it does so without waivering on its previously stated position.

decrease in fixed price product offerings and decreasing competition in the fixed price marketplace. Before utilization as a comparison tool, issues with the Reference Price formula must be fully resolved.

1. The Methodology of Determining the Reference Price is Questionable

First, the proposed methodology of determining a reference price is not generally utilized in other retail markets. In nearly all other deregulated markets, the utilities procure their energy in default service load auctions ("auctions"). In some instances, these auctions represent a layering approach[12] where the utilities procure load annually following full requirements contracts from auction participants for roughly 1/3 of their then-current default service meters for three (3) year terms, this way each year of default service pricing incorporates the forward assumptions of market participants from the past few years as well as the current, smoothing price impacts for the ratepayer. In other instances, utilities simply auction off the right to service 100% of their default service meters in load auctions for various terms and select the lowest combination of prices. Either way, the use of load auctions to set default service rates for customers utilize competition in a way that drives down margins for market participants and accurately reflects the forward value placed upon the different elements of the cost to serve customers by sophisticated market participants.

In New York, the utilities do not procure power on a forward basis using competitive load auctions, but buy energy and other products on the spot market creating no static reference price or a simple and static alternative for customers to choose in lieu of a fixed-rate (or index/variable-rate for that matter) from an ESCO effectively making the default service rate the "reference price" to which all ESCO offerings are compared. Since this default service rate was set through a competitive auction process, it is fair to assume that all of the forward costs to serve customer load were valued in a competitive, least-cost manner by the auction participants since they are competing in an auction-setting. If New York were to mandate its utilities switch to this procurement methodology for the customer classes in question in this order, then a fair reference price would be established and utility customers would have a clean and easy-to-understand benchmark to compare their ESCO offerings to. Another major problem is that New York has a patchwork of default service policies (some utilities hedge, others rely solely on the day-ahead Locational Based Marginal Price ("LBMP"), still others have scheduled procurements). A consistent policy and practice by utilities of energy supply procurement will add consistency and integrity to the market.

Second, the development of the Reference Price formula is not known. There is a considerable lack of transparency regarding the methods and information on which Staff relied in its development. When parties inquired about accessing the information upon which Staff relied, they were told at the May 31, 2016 Technical Conference that Staff had received input directly from certain ESCOs who provided information and that such information was considered confidential and would not be made publicly available. However, the Commission now asks the public to comment on the merits of a formula for which it had no hand in developing and for which the methodologies and supporting data have not been released.

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[12] Such as in New Jersey, through the Basic Generation Service Auctions.

Third, the Reference Price developed by Staff is neither transparent, sufficient nor easy to administer. The Benchmark Whitepaper provides that "[t]he references prices should be: transparent, sufficient, visible, timely provided and easy to administer." However, The formula for the electric Reference Price, $R_{L,U,M} = E_{L,U,M} *F + C_{L,U,M} + P$, is long, complex, and hard to comprehend. For sophisticated energy consumers, let alone the average mass market customer, the formula is likely too convoluted to understand and will thus deter him or her from investigating the pricing components of which his or her energy bill is comprised. The formula has components that still require definition. The Commission has stated that a "customers' ability to compare options and maximize value has increased greatly, placing competitive pressure on companies that fail to adequately focus on generating consumer value."[13] If the Commission's goal is to promote market transparency, encourage competition, and provide a simple means of comparison for the consumer, any benchmark adopted by the Commission must be easily understandable and easily verifiable by consumers themselves.[14] The Reference Price formulas contained in the Benchmark Whitepaper fails to satisfy these goals.

2. *The Accuracy of the Benchmark Price is Similarly Questionable*

The Reference Price formula for electric 12 month fixed-rate products is based, in part on the wholesale market, which the Coalition agrees is a central component of retail market pricing. However, the proposed formula misconstrues how NYISO works and prices its products. The greatest flaw is that the Reference Price formula is relying on historic data to determine a reference price on a prospective basis. As most of NYISO's costs are not predictable, and historic values are not reflected in forward prices, this approach does not reflect the underlying cost realities, and will eventually lead to either too much or too little being embedded in the Reference Price. Further, using load weight and on and off-peak annual averages to establish base energy price, as proposed by Staff, is ultimately untenable as each of these load weightings are different for every individual customer and will never properly reflect the seasonality in individual customer consumption. This can vary the cost to serve a customer so greatly as to render this method completely worthless in its endeavor to provide a just and reasonable benchmark for anything. Similarly, the use of a 10% load adjustment is flawed as these costs are not fixed percentages of the base energy price and change, and thus need to be analyzed on a periodic basis.

The Reference Price for 12 month fixed price product is $R_{L,U,M} = E_{L,U,M} *F + C_{L,U,M} + P$. The issues of greatest concern associated with components of the rate are discussed below.

- F= Multiplier to cover coats of load shaping, ancillary services, etc. However, approaches of evaluating the cost of load shaping, variable load risk, ancillary services, uplift and other related costs to serve load varies greatly from ESCO to ESCO and from time to time. If Staff are in charge of setting these rates instead of adopting a market-based solution, there will be an inherent disconnect, to the detriment of ratepayers. Either ESCOs will simply decline to participate in the New York fixed price market, which in turn will harm ratepayers by limiting their choices, because F is set too low, or ESCOs will have had a lower cost assumed in their

[13] May 19, 2016 Order, p. 4.
[14] In fact, during the June 1, 2016 Technical Conference which discussed Staff's suggested formulas, Staff themselves indicated that all the components of the proposed formula were not yet understood. No real world example was provided, and one Staff recognized that there would be a certain degree of error with any formula or index.

competitive pricing than the PSC-established value for F assumes, and customers will end up paying higher fixed prices for their energy than necessary.

- $C_{L,U,M}$ = ICE ("Intercontinental Exchange") ICAP capacity value. ICE represents almost none of the liquidity in the NYISO ICAP markets; it is incongruous to consider that this would be representative of the forward market for capacity.

- P= Risk premium to cover ESCO customer acquisition, financing labor, POR costs, and taxes. These costs vary so greatly from ESCO to ESCO and for the same ESCO from one-time frame to the next. It is impracticable for the PSC to be setting values for these variables unless it intends to create some sort of comprehensive reporting requirement for all ESCOs in New York concerning each of the elements P is meant to represent, and then updating this value on a periodic basis.

- (Natural Gas) Reference Price; Du = Weighted average cost of pipeline capacity, including fuel / line loss factor (to city gate). Released upstream capacity and basis should be calculated utilizing all primary upstream supply points transporting to the primary delivery point.

- Each of the following terms needs to be defined further, and transparent- Wu = Weather Risk; P=Premium; M=Cushion.

Following the May 31, 2016 Technical Conference, Commission Staff posted Price to Compare worksheets for both electricity and natural gas. The Coalition is still in the process of reviewing the calculations and underlying data with its subject matter experts. The Coalition expects submit supplementary comments on the Price to Compare worksheets once its review is complete.

3. Price Cap Reference Points Will Not Be Accurate if Based on Historic Data

The appropriate starting point for establishing price caps on energy is the wholesale market, and more specifically the forward market for power and gas. The forward market price is subject to all of the information available to the wholesale market at that time of a transaction. *Notably, the historical price has no bearing at all on the forward market cost of energy*. Prices in the forward market are those that can be obtained in an arms-length transaction at the time a concomitant sale is made. When retail energy service companies procure supplies for their customers, the price at which they can purchase those supplies is subject to all of the information available to the wholesale market at that time. This information may be the amount of gas currently in storage, the weather outlook for the time period involved, generation unit outages, or any other expectation or event that could bear on prices. This is important because it establishes the cost of the underlying supply to the retailer.

In fact, historical prices could be inordinately low or very high relative to current forward market prices. If price caps are set based on these historical prices (for example Day-Ahead LMBP), then huge problems occur.[15] If prices were inordinately low in the past, then the price cap would be far

[15] In the Texas electric choice program, PUC rules cap certain customer prices at about 60 mills above the 30-day trailing real-time settlement point price ("RTSPP"), an historical price that typically bears no relationship to the forward market for

too low to allow the retailer to set a retail price that provides cost recovery and a reasonable return. Retailers would have to exit the market during these episodes, or otherwise refuse service to customers who desire to choose competitive supply. One must then add in the cost to procure, cost of service, deliver, bill and collect, and then add in a reasonable profit margin to arrive at a price that can be offered to customers.

4. *Setting Fixed-Rate Price Benchmarks Six (6) Weeks in Advance Will Not Yeild Accurate Market Prices*

The PSC proposal to set benchmarks 6-weeks in advance is will not due to timing of issuing benchmark and lack of options for fixed-rate products as at present, only a 12-month product is discussed. The timeline proposed by the PSC effectively prevents customers from contracting for power further than 6-weeks in advance of the expiry of their current contract, greatly limiting the customer's options in terms of when to lock into a fixed price and unnecessarily constricts options for fixed-rate products. The further in advance a benchmark is set, the more likely it is to be inaccurate (or even obsolete).

A posting date for benchmark pricing of 6-weeks prior also carries unnecessary risk for both the customer and the ESCO. Once established – 6-weeks prior to the beginning of the first month in the 12-month period – the price will almost immediately be obsolete; the wholesale market responds to supply and demand assessments that are constantly changing. If the underlying wholesale cost to serve increases, then no offers will be made. If, however, the wholesale cost decreases, then competition will keep the price moving downward notwithstanding the outdated reference price.

The further out a benchmark is calculated, the less likely it is to be a useful indicator of price. If the Commission does select to move forward with the proposed Reference Price methodology, the Coalition recommends working with the retail industry to develop a mechanism true-up the reference price based on day of implementation.

C. Packaging of Commodity Plus Energy-Related Value-Added Services Is Essential to Proper Pricing

The Coalition supports the Commission's goal of protecting customers against unscrupulous ESCOs, and ensuring that consumers are receiving true value-added benefits. However, the Coalition is concerned that the approach described in the Benchmark White Papers, issued May 4, 2016, to decouple the price of the commodity and value added service will adversely impact ESCOs' ability to continue marketing and serving customers.

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power in the state. This benchmark has been very low recently. Should this summer's prices move significantly higher, these products will cease to be offered for fear of violating the PUC rules. A quick example, if the trailing 30-day RTSPP at June 30 was $24.00 per megawatt-hour, but the forward market for July is trading over $100.00 per megawatt-hour. A retailer would have a cost of $100.00 (assume no cost to serve), but only be able to charge $84.00 (60 mills over the 30-day trailing RTSPP). One would question the business judgment of an ESCO that entered into this kind of transaction; offers would not be made until the price cap was raised.

The way in which ESCOs could offer ERVAS to the market by decoupling rates is flawed. First, it is difficult to decouple and price out each ERVAS component when the sum is more valuable than the parts. Second, though the Commission will not opine on the cost of ERVAS, the obligation that the underlying price must still meet the proposed variable-rate/fixed-rate requirements is problematic. Given that it is difficult, if not impossible, to assign a numerical value to ERVAS, this cost element cannot be properly incorporated into the rate requirements of the Commission.

In lieu of this approach, the Coalition recommends adoption of ERVAS standards and development of alternative commodity products, in addition to the 30% Electric Green Energy product described in the Resetting Order.

IV. Express Consent
(February 23 Ordering Paragraph #2)

The Coalition supports the alternative 3-step notice requirement for renewals and material changes, which is consistent with the notice requirements of other states, including Pennsylvania. The Coalition fully supports allowing ESCOs to communicate such noties electronically to customers that have consented to electronic receipt of such notices.

V. Conclusion

The Impacted ESCO Coalition supports the Commission's objective to "address the unfair business practices currently found in the energy services industry and to ensure residential and small nonresidential commercial customers (mass market customers) are receiving value from the retail energy markets." However, any attempt by the Commission to address "unscrupulous" ESCOs should be narrowly tailored so as not to adversely impact companies with positive histories of compliance and who provide a real value to residential and small commercial customers in New York State.

Respectfully Submitted,

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