

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.**

**COMMENTS ON AMENDMENTS TO UNIFORM BUSINESS PRACTICES
("UBP") SUBMITTED PURSUANT TO THE STATE ADMINISTRATIVE
PROCEDURE ACT ("SAPA")**

Major Energy Services, LLC, Major Energy Electric, LLC and Family Energy, Inc. (collectively, the "Commenters") submit these Comments on SAPA Notices PSC 18-16-00013-P ("Staff Proposal SAPA Notice"); PSC-18-16-00014-P ("Performance Bond SAPA Notice"); PSC-18-16-00016 ("Reference Price SAPA Notice"); PSC-18-16-00018-P ("Express Consent SAPA Notice"), dated May 4, 2016 in the above-referenced proceedings (collectively, the "SAPA Notices").¹

At the outset, the Commission should "reset" the rulemaking process itself. At this time, the Commission has solicited public comment through administrative notices and SAPA notices on numerous different proposals that are not coextensive and at times are conflicting, making it difficult for parties to reasonably and comprehensively comment on proposed revisions. Instead of the "shotgun" approach, the Commission should roll out

¹ These Comments are submitted with a full reservation of rights with respect to the claims and arguments made in pending litigation challenging the Reset Order in *Matter of Family Energy, Inc., et al. v. New York State Public Service Commission* (Index No. 874-16) or any other action or proceeding, on the ground that, among other things, it was promulgated in violation of the New York State Administrative Procedure Act and in excess of the Commission's jurisdiction and regulatory authority, is arbitrary and capricious, and violates the United States and New York Constitutions. The Commenters' participation in ongoing administrative proceedings, at any stage of the proceedings, including but not limited to collaborative meetings, technical conferences, comment submissions and rehearing petitions, are made without prejudice to the pending litigation, reserving all rights, and without waiver of any rights, claims or arguments.

proposed changes in a deliberative and straightforward manner so that the market participants have a fair opportunity to contribute and comment on proposed UBP revisions.

In general, Commenters note that many of the proposals do not fully describe discrete changes, but rather suggest generalized changes and solicitation of further design changes and proposals. Such vague proposals do not provide sufficient detail for ESCOs to consider their effectiveness or the impact on their individual businesses or the marketplace.

PSC 18-16-00013-P - July 28, 2016 Staff Proposal

In the Staff Proposal SAPA Notice, the Commission solicits comments on various proposals contained in the Staff Proposal, dated July 28, 2015 (“July 28, 2016 Report” or “Staff Proposal”). Commenters respond to each item as enumerated in the Staff Proposal SAPA Notice as follows:

- 1. Revisions to the application requirements for ESCOs seeking to gain eligibility including disclosure of decisions or investigations in other states that affect, or may affect, the ESCO's ability to operate, identification of methods by which the Applicant intends to market to customers in New York, and the number of complaints on file with public utility commissions in other states. This information is intended to assist Staff in its review of applications to serve as an ESCO in New York, to ensure that applicants can comply with Commission requirements.*

Commenters generally support Staff's proposal to update and enhance its licensing process so that ESCOs operating in New York are reviewed and/or screened for licensing suitability, provided that it is applied only on a prospective basis and not to existing licensed ESCOs and their investment-backed expectations. However, Commenters recommend that the Commission describe any proposed changes to the regulations in sufficient detail so that interested parties can provide meaningful comments. More detail is needed to provide reasonable notice of the proposed changes and due process for applicants. Merely proposing that information from other states be considered and the mode of marketing be detailed in an application is not sufficient.

2. *New requirements that ESCOs operating in New York have at least three years of experience in both financial risk management practices and customer service. An ESCO may demonstrate such expertise through the use of contractors.*

Commenters support Item 2 of the Staff Proposal, provided it is applied on a prospective basis only and not to existing licensed ESCOs and their investment-backed expectations.

3. *A new requirement that ESCOs seeking eligibility should be assessed an application fee.*

Commenters support Item 3 of the Staff Proposal, provided it is applied on a prospective basis only and not to existing licensed ESCOs and their investment-backed expectations.

4. *A new requirement to allow for denial of an eligibility application. Pursuant to this modification, simply completing the application alone would not automatically result in approval to operate in New York, as it does now. Instead, Staff may recommend that the Commission deny an entity's application, with good cause shown, such as evidence of poor performance in other jurisdictions founded on decisions or regulatory action in other jurisdictions.*

Commenters support Item 4 of the Staff Proposal, provided it is applied on a prospective basis only and not to existing licensed ESCOs and their investment-backed expectations.

5. *New standardized definitions of "fixed price" and "green energy." The proposed definition of fixed price is "all-inclusive prices that will remain the same for the term of the contract." ESCOs who market fixed price products would be required to do so only with products that conform to that definition. The proposed definition of green energy is "electricity from technologies identified by the Commission as RPS [Renewable Portfolio Standard] eligible," and limits use of that term to products conforming to that definition.*

Commenters support Item 5 of the Staff Proposal, provided it is applied on a prospective basis only and not to existing licensed ESCOs and their investment-backed expectations. With respect to fixed-price offerings, Commenters suggest that the definition should incorporate the simple concept of a rate that does not change

for a specified period of time (with a minimum of 12 months) unless an event that is clearly specified in the contract occurs to trigger a change. With respect to the proposed definition of green energy, the proposal appears to conflict with the requirements imposed in the Reset Order, and therefore the SAPA Notice is ambiguous. To the extent that the Commission proposes alternative or additional renewable energy requirements or options for public comment, Commenters respectfully request that a complete proposal be published so that parties have an opportunity to reasonably and comprehensively comment on proposed revisions.

6. *A new requirement that entities claiming to sell green energy must define to the customer in advance, the specific energy source fuel types of the electricity to be provided that are claimed to constitute the green energy.*

Commenters support Item 6 of the Staff Proposal, provided it is applied on a prospective basis only and not to existing licensed ESCOs and their investment-backed expectations. Commenters suggest that a clearly defined, non-misleading definition green energy should be required. However, ESCOs should have flexibility within reason to meet the renewable energy supply commitments to their customers without an undue burden of additional consent or contract modification. For example, ESCOs should be free to source equivalent electricity supply without notice to customers provided that at all times the requirements of the Reset Order are met.

7. *New requirements that that ESCOs be required to use a standard contract for energy commodity service for residential customers, and that the "combined residential sales agreement" attached to the Report be utilized. These requirements are proposed in order to enable consumers to readily understand and compare contracts for energy commodity service.*

Commenters submit that it is inappropriate for the Commission to prescribe the form of contract that is required for arms-length transactions in a deregulated marketplace.

If there are specific contract terms that the Commission or DPS Staff proposes to

require, they should promulgate such terms pursuant to SAPA procedures with full a full notice and comment process.

8. *Development of specific standardized contract language for energy commodity services on key contract provisions for non-residential customers, including: pricing and early termination fees; consumer protections; and procedures applicable to address disputes.*

Commenters submit that it is inappropriate for the Commission to prescribe the form of contract that is required for arms-length transactions in a deregulated marketplace. If there are specific contract terms that the Commission or DPS Staff proposes to require, they should promulgate such terms pursuant to SAPA procedures with full a full notice and comment process. Further, given the effectiveness of the non-residential ESCO market—according to the Commission’s own orders—it is simply unnecessary to regulate contract terms with such customers at this time. Nonetheless, Commenters refer the Commission to their previously filed Initial Comments² and Reply Comments³ on the Commission’s Notice Seeking Comments, issued February 23, 2016, for further comments on revisions to ESCO requirements that may be applicable to Staff Proposal Item 8.

9. *Modifications so that ESCOs deemed eligible to provide commodity service must begin serving customers within two years from the date of Staffs eligibility letter. ESCOs which have not done so would have their eligibility to operate in New York rescinded and would have to reapply. These revisions are proposed to conserve the Staff and utility resources required to ensure compliance with application and other requirements for ESCOs deemed eligible but not serving customers.*

Commenters support Item 9 of the Staff Proposal, provided it is applied on a prospective basis only and not to existing licensed ESCOs and their investment-backed expectations.

² Case 15-M-0127, *Matter of Eligibility Criteria for Energy Service Companies, Initial Comments of Major Energy Services, LLC, Major Energy Electric, LLC and Family Energy, Inc.* (filed Mar. 18, 2016)

³ Case 15-M-0127, *Matter of Eligibility Criteria for Energy Service Companies, Reply Comments of Major Energy Services, LLC, Major Energy Electric, LLC and Family Energy, Inc.* (filed Apr. 4, 2016)

10. *An amended dispute resolution process to address disputes between ESCOs and utilities. The dispute resolution process now applicable to ESCO-utility disputes would be modified in several respects to enhance efficiency, including by establishing a strict end-date to the process, creating a standard simple form on the agency's website to be used for all informal complaints, and establishing an expedited process to be used for emergencies that would reduce the steps needed to take action.*

Commenters support Item 10 of the Staff Proposal, provided it is applied on a prospective basis only and not to existing licensed ESCOs and their investment-backed expectations.

11. *New provisions regarding the oversight of energy brokers to address an increasing number of complaints in which consumers allege that energy brokers provided inaccurate or misleading information concerning ESCO products and services. The proposed modifications would require ESCOs to identify and provide contact information for entities, including energy brokers, which market to customers on behalf of the ESCO, or sell lists of potential customers to the ESCO.*

Commenters support Item 11 of the Staff Proposal, provided it is applied on a prospective basis only and not to existing licensed ESCOs and their investment-backed expectations. Commenters refer the Commission to their previously filed Initial Comments⁴ and Reply Comments⁵ on the Commission's Notice Seeking Comments, issued February 23, 2016, for further comments on revisions to ESCO requirements that may be applicable to Staff Proposal Item 11.

12. *Development of a process by which existing ESCOs seeking to maintain their eligibility to operate in New York can complete a Supplemental Application which reflects any new requirements approved by the Commission. Under the proposal, ESCOs would have 90 days after a Commission Order on ESCO Eligibility to submit a completed Supplemental Application to the Department, or file with the Secretary a request for an extension of up to 90 days, including any justification for the additional time. ESCOs not submitting completed applications in the time required would be subject to having their authority to provide service in New York rescinded by the Commission without further process.*

Commenters oppose Staff Proposal Item 12. Commenters cannot reasonably comment on the merits or fairness of requiring a supplemental application without a

⁴ See *supra* n.2.

⁵ See *supra* n.3

complete understanding of the “new requirements approved by the Commission.” While 90 days is demonstrably better than the manifest injustice of 10 days that was included in the Reset Order, even 90 days may not be sufficient depending on the particular requirement. As noted above, the Commission should consider a stepwise approach so that all proposals can be fairly understood, in context, and commented upon in due course.

PSC 18-16-00014-P - Performance Bond

The New York State Public Service Commission (PSC) is considering amendments to the Uniform Business Practices (UBP) with respect to whether and the circumstances when ESCOs should be required to post performance bonds or other forms of demonstrated financial capability or financial security; what magnitude is appropriate; and how performance bonds or alternative security should be administered. One purpose of demonstrating financial capability or financial security would be to ensure that ESCOs are capable of fulfilling their obligations to the distribution utility. Another purpose of demonstrating financial capability or financial security would be to ensure that ESCOs fulfill their obligations to their retail customers. The consideration of administration will include, but not be limited to, a consideration of the distribution utility being the administrator/standby trustee of any performance bonds or other forms of demonstrated financial capability or financial security, with compensation for performing that role in the form of a fee or charge payable by ESCOs. Any changes to the UBP would require Commission approval. The PSC may adopt, reject or modify, in whole or in part, the changes proposed, and may resolve related matters.

Commenters respectfully refer to their Initial Comments and Reply Comments on the PSC Whitepapers with regard to the Performance Bond SAPA Notice.⁶ As noted in prior comments, the sole purpose of the performance security is to secure ability to pay for customer obligations only, such as the price guarantee. It is not a general ESCO fund for routine customer refunds or for penalties (which are not statutorily authorized in any case). Nor is it the purpose of the performance security to secure obligations to distribution utilities. Finally, the performance security

⁶ Case 15-M-0127 - *Matter of Eligibility Criteria for Energy Service Companies, Initial Comments of Major Energy Services, LLC, Major Energy Electric, LLC and Family Energy, Inc.* (filed June 6, 2016) (“Initial Comments”). See also Case 15-M-0127 - *Matter of Eligibility Criteria for Energy Service Companies, Reply Comments of Major Energy Services, LLC, Major Energy Electric, LLC and Family Energy, Inc.* (filed June 20, 2016) (“Reply Comments”), at 4.

should not be administered by the distribution utilities, but rather should be held and administered by the Commission.

PSC 18-16-00016-P - Reference Price

The New York State Public Service Commission (PSC) is considering amendments to the Uniform Business Practices (UBP) with respect to the products ESCOs could be allowed to offer residential and small commercial customers. The consideration of products will include, but not be limited to, the use of a forward-looking reference price calculated based on publicly available information as the basis for establishing a fair forward-looking price upon which ESCO products could be built in a manner that would ensure just and reasonable rates for ESCO customers. The reference price could be established based on forward prices for energy and capacity and other related costs. The reference prices may or may not incorporate a risk premium, such as to establish a going forward fixed-price reference price. The reference prices could be established by commodity, load zone, service territory, and product, or other measure. The reference prices could be calculated by Department of Public Service Staff, or a third party, and could be made available on the Public Service Commission web site, and updated on a monthly or other periodic basis. Individual ESCO products could include a premium above or discount below the reference price to reflect the additional risks the customer or ESCO would assume for certain products. The Commission is also considering whether for combined commodity and energy-related value-added products, the price of the commodity component should be disclosed to customers along with the total price as a mandatory requirement so that the customer has the information necessary to judge the fair worth of the value-added component. Various ESCO products could possibly be built upon a reference price foundation including, but not limited to: variable-priced commodity products; variable-priced commodity products with an energy-related value-added product, fixed-price commodity products; and fixed-price commodity products with an energy related value-added product. The Commission may consider what actions will be taken against an ESCO that exceeds the reference price for certain products. Any changes to the UBP would require Commission approval. The PSC may adopt, reject or modify, in whole or in part, the changes proposed, and may resolve related matters.

Commenters respectfully refer to their Initial Comments and Reply Comments on the PSC Whitepapers with regard to the Reference Price SAPA Notice.¹

Commenters maintain that establishing “just and reasonable” ESCO prices, by a forward-looking reference price, or otherwise, is beyond the Commission’s authority.

PSC 18-16-00018-P - Express Consent

The New York State Public Service Commission (PSC) is considering amendments to the Uniform Business Practices (UBP) with respect to the circumstances when an ESCO must obtain a customer's express consent for a modification to a sales agreement. The Commission is considering modifying the definition of a "material" change that would require consent, including to what extent regulatory changes affecting products offered affect materiality, and whether changes related to price may in some circumstances be considered material changes. The Commission is also considering alternatives to consent, such as enhanced notice. Any changes to the UBP would require Commission approval. The PSC may adopt, reject or modify, in whole or in part, the changes proposed, and may resolve related matters.

¹ See *supra* n.8.

Commenters respectfully refer to their Initial Comments and Reply Comments on the PSC Whitepapers with regard to the Express Consent SAPA Notice for the Express Consent.⁸ Commenters support the proposed “enhanced notice” mailings as detailed in the Express Consent Whitepaper. Commenters maintain that “regulatory changes” should not trigger material change consent requirements and any proposal in this regard should not impinge upon the industry standard “regulatory changes” contract term. Commenters would generally support notice requirements for changes in variable rates in narrowly limited circumstances or otherwise support a requirement for clear and conspicuous notice in the contract. In general, however, a requirement that all price changes are “material” should be rejected as unnecessary.

Conclusion

Major Energy Services, LLC, Major Energy Electric, LLC and Family Energy, Inc. appreciate the opportunity to submit these Comments and further assist the Commission in its efforts address the needs of the retail energy markets. Commenters reserve the right to submit additional Comments as needed.

⁸ *Id.*

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Respectfully submitted,

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