

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

In the Matter of Eligibility Criteria for Energy Service 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 12-M-0476
In the Matter of Retail Access Business Rules))	Case 98-M-1343

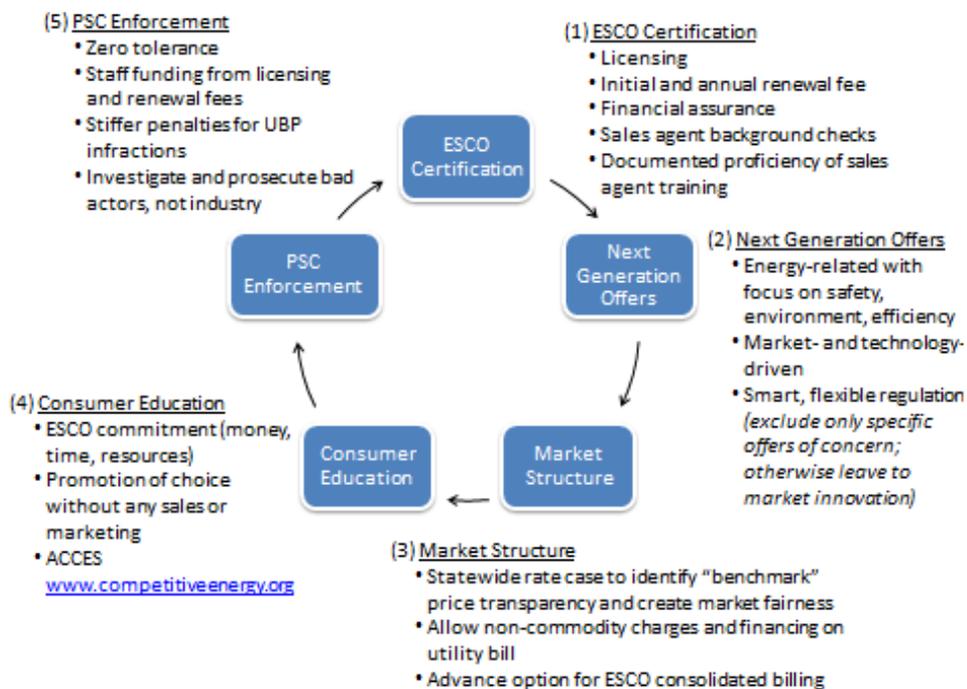
**COMMENTS OF THE
NEW YORKSTATE ENERGY MARKETERS COALITION
ON STAFF WHITEPAPERS RELATED TO PERFORMANCE BONDS,
REFERENCE PRICES AND EXPRESS CONSENT**

The New York State Energy Marketers Coalition (“NYSEMC”)¹ respectfully submits these Comments in response to the Notice issued on May 10, 2016 by the New York State Public Service Commission’s (“PSC” or “The Commission”) in relation to the above-referenced Cases. This Notice seeks further input on three (3) important topics as they relate to potential requirements applicable to energy service companies (ESCOs) associated with their marketing of energy and energy-related value-added products and services to mass market customers. These Comments follow closely some specific concepts discussed during a series of collaborative meetings the PSC Staff held with ESCOs, utilities, consumer advocates, and other stakeholders regarding the retail energy market in New York.

¹ The NYSEMC is comprised of several like-minded retail electricity and natural gas suppliers who advocate for consumer choice in a competitive market of innovative products and services. Coalition participants are active suppliers in more than twenty states. The comments expressed in this filing represent the position of NYSEMC as a whole but may not represent the views of any individual member of NYSEMC.

NYSEMC has on multiple occasions provided extensive and detailed comments regarding the merits of continuing to support and nurture an innovative and competitive energy marketplace in New York State. In related Comments filed on March 17, 2016, NYSEMC proposed a **five-step systems approach** which we continue to believe can serve as a roadmap to address concerns shared by all parties regarding the behavior of a small number of ESCOs without permanently supplanting the prudent financial and operational commitment which has been made by many reputable companies towards a competitive energy market.² This five-step approach includes the following:

Resetting the New York Retail Energy Market



For purposes of these Comments, NYSEMC will limit its focus to the ESCO **Certification** and **Market Structure** portions of this systems approach to address the

² NYSEMC Comments on Resetting Retail Markets, Case 15-M-0127, filed March 17, 2016.

three whitepapers issued by Staff on May 4, 2016 and included in the Notice filed May 10, 2016. While we realize other parties are focused on points of law and legal arguments surrounding the Commission's desire to reset the marketplace, we believe our Comments offer practical solutions which can improve the market without dismantling it.

FINANCIAL ASSURANCE DOES NOT HAVE TO BE LIMITED TO PERFORMANCE BONDS TO BE EFFECTIVE

Following a detailed discussion during the recent collaborative meetings, including a presentation by Direct Energy, NYSEMC believes that the Commission has enough information to make a decision on applying the requirement of a reasonable demonstration of financial assurance for ESCOs. 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.

However, NYSEMC strongly believes that a variety of methods – not simply a performance bond – should be allowed to demonstrate and support financial assurance of ESCOs. These should include a corporate guaranty or qualified letter of credit and/or collateralization of accounts receivable. 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). The financial assurance required should allow for the maximum level of flexibility and compliance by ESCOs of all sizes and types.

NYSEMC does not think it is in the best interest of the utilities, ESCOs, or Commission to have the utilities hold the security. This is highly impractical given the different positions each utility holds in their service territory. It is best to ultimately require ESCOs to post or guaranty to the Commission.

As stated previously, this financial assurance should relate specifically to the ESCOs performance of its express obligations described in the contract with a customer, and should not be duplicative of any utility financial requirements (i.e., pledged account receivables). The purpose of this financial assurance is to back up the commitment of the ESCO in meeting its obligations to its customers as stated in their contract. Nothing more.

BASE REFERENCE PRICES ON AN INNOVATIVE MARKET, NOT ON COMPLICATED” FORMULAS CONSUMERS WILL NOT UNDERSTAND

In its May 19, 2016 Order Adopting a Ratemaking and Utility Model Policy Framework,³ the Commission made two extremely important observations. First, it was noted that “Across all aspects of the economy, 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.”⁴ Subsequently, within just a few pages of the detailed 170 page Order, the Commission asserted that “Rather than specifying or pre-approving all of the actions it believes need to be taken, the Commission will allow markets to bring forward the best options to achieve the broad policy objectives identified by the State.”⁵

NYSEMC could not agree more.

During the recent collaborative meetings associated with the subject of these Comments, significant discussion centered on the establishment of a reasonable and practical price-to-compare (“PTC”); from which PSC Staff would monitor and review the performance of ESCOs relative to their ability to guarantee savings and/or provide a bona fide energy-related, value-added component to the energy purchase. For the past two decades, the utility price has been presented as the sole benchmark for competitive

³ Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision.

⁴ May 19, 2016 Order, p. 4.

⁵ Ibid, p. 9.

comparison. However, utilizing the utility price as the PTC has been proven to be flawed for several reasons; chief among them – the fact that utilities have possessed the ability to pass along all risk to the consumer and obtain recovery on decisions or conditions which change at a later date, often over extended periods of time such as a year or more. In addition, utilities are able to socialize their costs over their entire ratepayer base at incrementally smaller numbers over longer periods, all while guaranteeing a specific return on their investment.

In the retail market environment, real-time pricing and the cost of protecting that price needs to be recognized. In addition, the utility is allowed to account for all of its administrative expenses associated with customer management, including that guaranteed profit, on the delivery portion of its bill. For these reasons, a benchmark reference price system which is a reflection of the market itself – and not a formulaic construct – is the only practical way to proceed.

If the Commission's objective is to help create market transparency, encourage competition, and provide a simple means of comparison for the consumer, it is critical that a benchmark is established which is easily understandable and easily verifiable by consumers themselves, not to mention the Commission Staff.

The complicated methodology and formulas proposed in Staff's whitepaper on benchmark reference prices will simply not accomplish that goal. During the most recent 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 comment in fact indicated that there would be a certain degree of error with any formula or index.

There is no better way – ***in fact, no other way*** – to provide consumers with what is going on in an open, competitive marketplace than to show just that – an actual listing of the

pricing, terms and conditions by category (variable, fixed, flat, and value-add) of the offers which all competitors provide (including the utility), which are backed by the financial assurance of performance that they will follow through on what they are offering to consumers. Then, armed with transparent information and a personal motivation to choose what is best for themselves, including the option to stay with their utility, consumers really do have the “power to choose.”

This is the definition of competition and the only real representation of an innovative, progressive, and competitive marketplace.

Any attempt at a formula which includes components which will be “decided periodically by the PSC,” or “cover costs of load shaping,” “cover ESCO customer acquisition, financing, labor...” or determine an appropriate level of acceptable “supplier margin,⁶” is fraught with complication, unfairness, arbitrariness; and, completely undermines the ability of an ESCO to respond timely to consumer preferences in a real-time market with innovation, as well as subverts the ability of the consumer to choose based upon comparative knowledge of the marketplace. Any use of a formula approach would need to have consistent and highly skilled oversight by Staff, with equal representation by ESCOs. The formulas outlined are neither workable nor practical, and suggest that a constraint on the market place which will disallow all manner of true competition.

NYSEMC understands the importance of prices. However, the current approach to regulate pricing – in addition to being clearly outside of the authority of current Public Service Law – may very likely limit innovation and drive more narrowly defined product offerings, which will erode the level of competition in New York, limit new investment into the acquisition of new customers, and perhaps result in the exit of some well qualified ESCOs.

⁶ Methodology components outlined in Staff Whitepaper on Benchmark Reference Prices (May 4, 2016), pp. 3-7.

For this reason, we believe the Commission should establish reference prices for energy commodities which are indicative of the market prices – **including the utility offering**, which represents one important, default option, but only when the commodity default price reflects the otherwise avoided costs which are recovered through distribution rates. This benchmark compilation (as posted on the PSC’s Power to Choose website) can serve as the most reliable, up-to-date, accurate representation of the marketplace. It can be averaged (by offer type if needed), and that number can be easily calculated and posted for consumers to see and understand. Then, to address the Commission’s mission of ensuring consumer protection, utilize the financial assurance mechanism provided by ESCOs to hold each ESCO accountable to their contractual responsibilities. In other words, to ensure they are providing exactly what they indicate during their sales pitch. To enforce that this is taking place does not require any further regulation – simply the application of existing UBP requirements.

This same approach can also apply to energy-related, valued-added offerings. Some value-added offers are so inextricably tied to the commodity that they cannot – *nor should not* – be separated, in that they enhance the purchase of the commodity itself. If certain “non-energy-related” components need to be defined, the Commission can do so; however, the PSC should not stifle or restrain energy-related products while at the same time stating that they promote a reformation of a new “energy vision.”

As such, value-added products should be exempt from an index price comparison, as it defeats the very purpose of the value-added offering. Value-added products should include any offering directly related to energy use and or consumption behind the meter (efficiency, repair service, energy controls). Certain ESCOs absorb the cost of these value-added service as a cost of doing business, or otherwise embed it within the overall supply cost with little or no margin. Here again, so long as the ESCO provides what is outlined in their sales agreement, these are the kinds of competitive behaviors which create new

markets – just as gasoline stations used to do with various product offers to develop customer loyalty and long-term relationships.

If the Commission is truly dedicated to the development of a competitive energy marketplace where consumers can take control of the energy and energy-related purchases which they believe fit their needs, an open marketplace needs to be cultivated. The majority of ESCOs eligible to market in New York State provide options for consumers who wish to purchase commodity, and in some cases energy-related value-added services in the marketplace. The Commission should embrace this effort.

ADVANCED NOTICES ON CONTRACT RENEWALS AND/OR CHANGES ARE PRACTICAL – TWO NOTICES ARE SUFFICIENT

As outlined in the May 4, 2016 Staff Whitepaper, the Uniform Business Practices (“UBP”) have evolved over the past several years with respect to the type and level of notification needed by consumers when changes are made to their ESCO contracts.

Staff accurately report that the Commonwealth of Pennsylvania does not require express or affirmative consent for contract expiration or material change, so long as customer notices are provided to enable the consumer the opportunity to respond if desired. By requiring ESCOs to send a total of three (3) notices to customers over a 45-60 day period, with such notices and messages as consistent with a standard renewal notice under UBP Section 5, NYSEMC believes that more than adequate notice and information is provided to consumers.

As such, NYSEMC agrees with Staff’s recommendation, suggesting only that it may be possible that two (2) notices would achieve the same result sought by the Commission without confusing the consumer. Regardless, we believe that this form of express consent, in combination with additional scrutiny on ESCO certification and enforcement, provides a workable and practical approach.

CONCLUSION

NYSEMC has attempted in these Comments to provide limited, specific, direct, and reasonable responses to the positions set forth in the three (3) Staff Whitepapers related to performance bonds, benchmark reference prices, and express consent. While we realize other open issues remain in the Commission's efforts to reset the retail energy market in New York, we believe the positions set forth in our comments, in combination with Staff's efforts, have the ability to find workable solutions to the challenges we face in the current marketplace without unnecessarily harming competition.

It is extremely counterproductive to sacrifice the *entire* energy marketplace as a reaction to the egregious behavior of a small number of market participants which can be addressed through more stringent ESCO certification and enforcement.

Smart, flexible regulation can assure consumer protection, but should not try to encompass the only acceptable offers which may be offered in the marketplace. That will stifle competition and innovation. Otherwise, New York will never achieve an active, robust market, and consumers will surely not take control of their energy purchases, as there will be no opportunity or incentive to do so.

We continue to believe that a focus on our five-step systems approach can allow for a positive shift in the New York State energy marketplace to the immediate benefit of all consumers. Several ESCOs have worked extremely hard to introduce and cultivate innovative products, renewable power, price competition and energy efficiency. We cannot afford to take a step backward.

NYSEMC looks forward to working with our collaborative party colleagues and Commission Staff on finding a reasonable, workable path forward.

Respectfully submitted,
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