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

INITIAL COMMENTS OF THE JOINT UTILITIES ON STAFF WHITEPAPERS

Consolidated Edison Company of New York, Inc. ("Con Edison"), Orange and Rockland Utilities, Inc. ("O&R"), Central Hudson Gas & Electric Corporation ("Central Hudson"), The Brooklyn Union Gas Company d/b/a National Grid NY ("KEDNY"), KeySpan Gas East Corporation d/b/a National Grid ("KEDLI"), and Niagara Mohawk Power Corporation d/b/a National Grid (together with KEDLI and KEDNY, "National Grid"), National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation ("NYSEG") and Rochester Gas and Electric Corporation ("RG&E")[1] (together, the "Joint Utilities"), hereby submit these initial comments in response to Notice Seeking Comments (the "Notice") , issued May 10, 2016 in the above-referenced proceedings. In the Notice, the State of New York Public Service Commission ("Commission") seeks comments concerning the following New York State Department of Public Service Staff ("Staff") whitepapers (the "Whitepaper" or "Whitepapers")

[1] NYSEG and RG&E are subsidiaries of AVANGRID.

issued on May 4, 2016 in the above-referenced proceedings: (1) performance bonds or other security interests for energy services companies ("ESCOs"); (2) reference prices for ESCO products; and (3) express consent from ESCO customers.

1. STAFF WHITEPAPER REGARDING ESCO PEFORMANCE BONDS OR OTHER SECURITY INTERESTS

<u>Comments:</u>

The Joint Utilities agree with Staff that additional creditworthiness criteria and security should be considered in the context of determining ESCO eligibility. Utilities should not be required to hold security or determine if or when such security should be drawn upon; rather, the Commission would more appropriately obtain such security. The Commission should make clear that the Joint Utilities are not responsible to cover credits owed by ESCOs to customers, including in those instances where an ESCO participates in a utility purchase of receivables ("POR") program. If the utilities will be required to provide pass through any credits owed to customers, such credits owed to customers by ESCOs must be covered by some form of security, as discussed more fully below. To the extent security does not cover required credits, the Joint Utilities should not be responsible for covering the cost of such credits. In such case where the utilities are required to provide credits, while the utilities maintain their current ability to recover costs through any available security, incremental security is necessary in the event existing security instruments are not adequate to cover credits.

Security requirements must be set based on the financial risk to customers associated with the service commitments made by an ESCO at any point in time. At a minimum, financial security should be adequate to cover the price savings guarantee and other elements of the Reset

Order over the life of the service contract between the ESCO and each customer. These comments focus on the security necessary to meet price guarantees, but we acknowledge Staff and the Commission have an interest in obtaining security for other potential commitments, such as penalties for non-compliance with the Uniform Business Practices ("UBPs").[2]

To the extent the ESCO price guarantee applies only to mass market customers, it makes sense to limit price guarantee-related security requirements to ESCOs that serve mass market customers. If the Commission or Staff recommends that security requirements be extended to other classes of customers, the Joint Utilities will address issues associated with security requirements for those customers at that time.

The Whitepaper details a number of methods for determining the security requirements that can be categorized into two categories: (1) ESCO-specific security requirements based on each ESCO's potential liability for price guarantees to its customers, and (2) generic, tier-based requirements for security based on the number of customers, load served, ESCO revenues, and other similar factors. The Joint Utilities believe that security requirements must be based on each ESCO's potential liability for price guarantees or the provision of renewable power. In other words, security must be based upon a calculated amount of dollars at risk. Moreover, ESCOs should provide periodic updates concerning the amount of required security to the Commission.

Additionally, the Commission should make clear that all risk associated with revenues not billed by the utility be dealt with between the ESCO and the customer. In other words, for customers served by an ESCO that are dual-billed and the ESCO bills the customer directly for

[2] The Joint Utilities reserve their right to comment on proposals concerning security requirements in such instances once Staff and/or the Commission release proposed guidelines or rules governing those types of security requirements.

supply, the Joint Utilities should have no obligation to obtain security or to provide credits to customers.

The Joint Utilities do not support a security framework that would permit the requisite amount of security to be moderated based on ESCO historic performance and complaint levels. That approach would not be protective of consumers. The Joint Utilities believe the security must be adequate to cover each ESCO's potential obligations to customers, regardless of historic performance or complaint history.

The second approach suggested by Staff would use a tiered system of security requirements based on the number of customers, total load served, or revenues of the ESCO. This would be a less effective and less consumer-protective method of determining the appropriate amount of security. History on ESCO overcharges suggests that the outliers and "bad players" could have obligations well in excess of the average, which could leave customers vulnerable if such an ESCO suffered financial challenges, and failed to meets its obligations under the price guarantee. This approach would impose the same security requirements regardless of an ESCO's conduct, which would tend to penalize the good performing ESCOs and reward the poor performing ESCOs. It is also impossible to predict when an ESCO, or any other company, may default. Default could occur after many years of good performance. A history of good performance does not help customers if a default occurs. The primary objective of the security requirement is to ensure that adequate resources are available to protect customers if an ESCO fails and is unable to meet its obligations. Under the tiered approach using number of customers, load served, etc., there is no guarantee that adequate security will be available to meet that objective.

The Whitepaper mentions other options that would base the amount of security on the type of customers served, or a flat amount that all ESCOs would post (*e.g.*, regardless of size). Like the generic requirements described above, these options do not ensure adequate security and protection of customers if an ESCO fails to honor price guarantees.

The Whitepaper also discusses use of POR programs and the possibility of supplementing existing creditworthiness criteria between ESCOs and utilities. With regard to the existing creditworthiness criteria (which govern the ESCOs' implementation of the POR, obligations to utilities for operations within the wholesale markets, etc.), the Joint Utilities believe the existing requirements should remain separate and distinct from security requirements connected to the ESCO price guarantee.

The suggestion that the POR be used to administer the security requirement poses a number of concerns. Increasing the POR discount to include a component related to guaranteed savings poses a myriad of accounting issues, and the possibility of conflicts over security interests in receivables. Further, there is no mechanism to segregate amounts that would be used for security and regular POR discount revenue. Increasing the existing POR discount would increase utility revenue associated with the POR program, thereby increasing tax liability, upsetting the utility's rate structure and balance sheet, and creating other accounting complexities. Administering the security through the POR mechanism would also shift the price guarantee burden to the utility by making it responsible for reimbursing customers for amounts owed by ESCOs. For these reasons, the Joint Utilities do not believe the POR is an appropriate means to raise or manage funds to secure ESCO price guarantee obligations.[3]

[3] Where the utility bills the ESCO's commodity under a POR program, the incremental risk exposure resulting from the price savings guarantee may be secured through non-POR instruments as discussed above.

There are other issues, not discussed in the Whitepaper, that merit further consideration. As discussed during the March 15, 2016 Collaborative Meeting,[4] Stakeholders raised a series of important questions regarding administration of security requirements and the nature of the security obtained. The Joint Utilities believe that performance bonds are a particularly difficult form of security to administer – and expose utilities to significant and unnecessary risk in collection. More easily administered and appropriate forms of security are possible, such as irrevocable letters of credit, escrow accounts, or parental guarantees from investment grade companies (*i.e.*, with a credit rating “BBB” or higher from Standard & Poor's, “Baa2” from Moody’s Investor Service, or “BBB” or higher from Fitch Ratings). These forms of security are permitted under the UBP and the form of security is left to the discretion of the utility as long as it is applied in a nondiscriminatory manner. There is no reason to change the current practice as it has worked since its inception to protect customers while allowing ESCOs to participate in the competitive market.

Moreover, there are a variety of other administrative issues related to security that warrant further discussion. For instance, mechanisms would need to be established for the ESCO to notify the Joint Utilities that credits are due to customers, the amount of the credit and the customers to which the credit should be applied.[5] Utilities cannot determine when it is appropriate to draw upon these funds to credit the customers, which customers should receive the credits, and the size of the credit that any specific customer should receive.[6] Depending on the time lag between the identification of an ESCO price charged that exceeds the utility price, and

[4] A collaborative meeting was convened by Staff at the Department of Public Service’s Offices on Tuesday March 15, 2016 from 10:30 A.M to 3:00 P.M. to discuss the Commission’s Resetting Order.

[5] For example, the EDI Working Group is working to develop modifications to EDI transactions that are designed for use by ESCOs to communicate Assistance Program Participant credits to utilities.

[6] It is unclear how credits may be required and/or applied in the case of ESCOs making green product commitments or providing other value-added services.

the calculation and provision of the credit, it may be necessary to identify a means to credit customers who are no longer served by either the ESCO or the utility. Mechanisms will be needed to help customers understand the credits, answer questions about the credits, and address customer concerns that the credits may not have been appropriately calculated or provided in a timely manner. In general, none of these matters should be the responsibility of the utility; all of them should be the responsibility of the ESCO. Finally, the Joint Utilities should be permitted cost recovery for any costs of administrative or system changes that may be required as a result of any Order in this proceeding.

In light of the challenges that the Commission and/or utilities could face in holding and administering such funds, the Joint Utilities believe the Commission should consider establishing a separate fund, funded by ESCOs and managed by the Commission or another state-sponsored entity.[7] The separate fund could collect and administer the assurances of performance and pay customer claims in the event an ESCO fails to meet its obligations.

The Joint Utilities continue to believe the mechanics of the assurance of performance (*e.g.,* which party calculates the amount of the assurance provided, who holds it, under what conditions it can be drawn upon, and other practices) will require further discussion during upcoming technical conferences.

2. STAFF WHITEPAPER ON EXPRESS CONSENT

The Joint Utilities recognize that, while the proposed express consent process in the Whitepaper is an expansion of the current UBP, it is equally important that the Commission reiterate its longstanding requirement in the UBP that the utilities must assume ESCOs have

[7] Examples of funds established to collect and maintain a source of funding include the New York Environmental Protection Fund and the State Insurance Fund.

received the proper customer consent when receiving an enrollment. Specifically, Section 4.B.2 of the UBPs provides that "[a] distribution utility and a MDSP [meter data service provider] shall assume that an ESCO obtained proper customer authorization if the ESCO is eligible to provide service and submits a valid information request." Therefore, any express consent requirements adopted by the Commission should recognize, and be consistent with, the language of the UBPs.

3. STAFF WHITEPAPER ON BENCHMARK REFERENCE PRICES

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.

4. CONCLUSION

The Joint Utilities appreciate the opportunity to submit comments and look forward to further discussion and deliberation with Staff, stakeholders, and customers on these important issues.

Respectfully submitted,

Kerri Kirschbaum
Senior Attorney
Consolidated Edison Company
Of New York, Inc.
4 Irving Place
New York, NY 10003-0987
kirschbaumk@coned.com

Paul A. Colbert Assoc. General Counsel-Regulatory Affairs Central Hudson Gas & Electric Corporation 284 South A venue Poughkeepsie, NY 12601 pcolbert@cenhud.com	Jeremy J. Euto Senior Counsel II National Grid 300 Erie Blvd. West Syracuse, NY 13202 315.428.3310 jeremy.euto@nationalgrid.com
Amy A. Davis Cullen and Dykman LLP 99 Washington Avenue, Suite 2020 Albany, New York 12210-2822 adavis@cullenanddykman.com Attorneys for New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation	Ty Holt Counsel National Fuel Gas Distribution Corporation 6363 Main St. Williamsville, NY 14221 -5887 HoltT1@natfuel.com
Noelle M. Kinsch General Counsel Avangrid Networks 99 Washington Avenue, Suite 2018 Albany, NY 12210 noelle.kinsch@iberdrolausa.com	