BEFORE THE
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 14-M-0101
In the Mater of Retail Access Business Rules.	:	Case 98-M-1343

**COMMENTS OF
CONSTELLATION ON THE
STAFF WHITEPAPER REGARDING
ESCO PERFORMANCE BONDS OR OTHER SECURITY INTERESTS**

In response to the State of New York Public Service Commission ("Commission") May 4, 2016, *Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests* and *Staff Whitepaper on Express Consent*,[1] as issued in the above-docketed proceedings, Constellation NewEnergy, Inc. ("CNE"), Constellation Energy Gas Choice, LLC, Constellation Energy Power Choice, LLC, Constellation Energy Services-New York, Inc., and Constellation NewEnergy-Gas Division, LLC (collectively, "Constellation") – hereby submits its Comments on the Performance Bond and Express Consent Whitepapers.

[1] *In the Matter of Eligibility Criteria for Energy Service Companies, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Market in New York State*,; *In the Matter of Retail Access Business Rules*, Case Nos. 15-M-0127, 12-M-0476 and 98-M-1343, *Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests* (May 4, 2016) ("*Performance Bond Whitepaper*") and *In the Matter of Eligibility Criteria for Energy Service Companies, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Market in New York State*,; *In the Matter of Retail Access Business Rules*, Case Nos. 15-M-0127, 12-M-0476 and 98-M-1343, *Staff Whitepaper On Express Consent* (May 4, 2016) ("*Express Consent Whitepaper*").

INTRODUCTION

Constellation, a wholly-owned subsidiary of Exelon Corporation ("Exelon") is part of Exelon's national retail energy platform that offers electric and natural gas commodities, energy efficiency, load management, demand response, behind-the-meter renewable development, and other Distributed Energy Resources applications. These competitive retail customers include almost two million residential customers as well as more than 160,000 commercial, industrial, public sector and institutional customers – including two-thirds of the Fortune 100.

COMMENTS ON PERFORMANCE BOND WHITEPAPER

In the Commission's Order Resetting Retail Energy Market for Mass Market Customers,[2] the Commission set forth for consideration certain new requirements applicable to ESCOs, including whether and under what circumstances an ESCO should be required to post performance bonds or other forms of demonstrated financial capability. The Performance Bond Whitepaper provides a good summary of the current state of affairs for ESCOs posting security -- an ESCO's participation in a utility's retail access program is contingent upon satisfaction of creditworthiness requirements and provision of any required security. The purchase of receivables program ("POR") requires an agreement between the ESCO and the distribution utility called a Billing Services Agreement whereby the utility has a priority security interest with a first right of access to all of the ESCOs accounts receivable arising out of the ESCO charges billed by the utility. Despite these existing safeguards, the Commission requested comment in the February 23rd Order as to whether and under what circumstances ESCOs should be required to further post performance bonds or other forms of demonstrated financial capability. If so, what magnitude is appropriate and how can

[2] *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 Market in New York State*, Case 12-M-0476; *In the Matter of Retail Access Business Rules*, Case 98-M-1343, *Order on Resetting Retail Energy Markets for Mass Market Customers* (Feb. 23, 2016) ("*Order*").

this be administered most efficiently? In the Whitepaper, the Staff reviewed the comments received on performance bonds, and noted these comments demonstrated that ESCOs operating in New York are generally supportive of a performance bond requirement. As reported in the Performance Bond Whitepaper, there appears to be a general consensus that the amount of the bond should vary with the number of customers or load served, with one ESCO suggesting a bond requirement of either $1 million or $3 million depending on whether the ESCO sells door-to-door. Consistent with what is standard in the industry, many stakeholders support that the bond be payable to the Commission rather than the utility.

In reviewing this feedback, Staff concludes that the purpose of these additional security requirements is to ensure the price savings guarantee and other elements of the February 23rd Order. Staff concluded that the additional security requirements should apply to ESCOs that are serving mass-market customers and could be based on the number of customers the ESCO serves, the annual revenues or the quantity of electric or gas provided to customers. Specifically, Staff offers several options. First, Staff suggests setting a performance bond or security interest annually, based on the number of customers served by an ESCO and the average charges in excess of what the utility would have charged in the prior period. Staff's second option is to calculate the performance bond or security instrument based solely on the number of customers served, establishing tiers based on the number of customers requiring larger bonds for larger customer bases. This approach also could be done using the amount of load rather than the number of customers. Third, the performance bond instrument could be based on the percentage of annual revenues of the ESCO, such as a bond requirement set at ten percent of the ESCO's annual revenues for commodity sales in the prior calendar year. Staff also suggested a flat performance bond amount assessed based on the type of customers served. Finally, Staff suggested using the existing POR discount or supplementing existing utility creditworthiness criteria.

Staff has done a good job of synthesizing the feedback provided surrounding what additional security requirements would be helpful in meeting the objectives the Commission set forth in the February 23rd Order and provides an adequately comprehensive list of possible solutions. The ESCOs and customers are best served when regulations are simple, transparent and easy to apply any additional security requirement for ESCOs serving mass-market customers should align with these principles.

Constellation is supportive of the suggestion of a performance bond to meet the stated objectives, provided it is a "surety" and called upon as a last resort and due process is afforded. Out of the options presented, a flat fee is easiest to administer. To the extent that any "scalar" is applied to increase a bond or other security requirement based on customer numbers, the starting bonding requirement needs to be significant enough to serve its purpose. In addition, any scalar that increases the bond requirement as it applies to ESCOs should be capped so as not to become excessive and the requirement should be reviewed annually. Finally, tying performance bonding requirements to ESCO rating systems would be a complicated and potentially subjective undertaking and would require ESCOs to expend unnecessary energy towards ensuring an equitable ESCO rating process.

While the proposed $1 million for ESCOs not selling door-to-door and $3 million for ESCOs that are may not be the appropriate amounts, Constellation generally supports the idea of a two-tier fixed performance bond requirement – one for ESCOs that sell door-to-door and a lower requirement for ESCOs that do not rely on a door-to-door sales channel. Should the Commission pursue this approach, the Commission should review annually both the amounts and the ongoing need to distinguish between ESCOs using a door-to-door channel and those that do not.

CONSTELLATION COMMENTS ON EXPRESS CONSENT WHITEPAPER

The February 23rd Order required that ESCOs must receive affirmative or express consent from mass-market customers prior to renewal from a fixed rate or guaranteed savings product into a contract that provides renewable energy but does not guarantee savings. The objective of the express consent requirement is to ensure that mass-market customers have adequate notice and a complete understanding of any changes to their electric service. The existing UBP provisions on express consent provide consumer protections against among other things, unauthorized switching or slamming. As part of the Staff's review of this express consent issue, Staff reviewed notice requirements used in other jurisdictions as an alternative to an express or affirmative consent requirement for renewing customers at the end of their electric supply contract term or making material changes to the agreement. Staff proposed a three-notice procedure as an alternative to express consent requiring 1) an initial letter notice sent 45-60 days in advance of a contract termination date or material change in contract term advising customer of the pending change, 2) a second letter notice sent 30 days in advance explaining the change and providing the customer's options, among other required information and 3) a postcard sent two to three days after the second notice letter advising the customer to read the second notice.

Express consent is simply not necessary with respect to renewals. Customers choose an ESCO at enrollment. . Constellation agrees that an alternative to affirmative consent is appropriate so long as customers understand the proposed changes to their energy supply contract and are apprised of their options with enough lead time prior to the change. Staff's proposal is likely to protect consumers while offering ESCOs the ability to serve their customers without unnecessary interruption.

CONCLUSION

Constellation appreciates this opportunity to submit its Comments on the Performance Bond and Express Consent Whitepapers. For the reasons provided herein, the Commission should focus on additional security requirements that are substantial enough to ensure compliance with the February 23rd Order, yet simple to calculate and apply without the need for excessive bond re-postings based on customer or revenue number changes. Additionally, Staff's proposal to amend the UBP to add an alternative to the provisions requiring express consent is appropriate.

Respectfully submitted,

Christopher Wentlent
Manager, State Regulatory Affairs,
Exelon Corp.,
810 7th Avenue, Suite 400
New York, NY 10019
(607) 343-0500
Christopher.Wentlent@Constellation.com

*/s/H. Rachel Smith*_____
Holly Rachel Smith, Esq.
Assistant General Counsel
Exelon Business Services Company
111 Market Place, Suite 500C
Baltimore, Maryland 21202
(410) 470-3713
holly.smith@exeloncorp.com

On Behalf of Constellation

DATED: June 6, 2016