

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.**

REPLY COMMENTS OF MAJOR ENERGY SERVICES, LLC, MAJOR ENERGY ELECTRIC, LLC AND FAMILY ENERGY, INC.

Major Energy Services, LLC, Major Energy Electric, LLC and Family Energy, Inc. (collectively, the “Commenters”) submit these Reply Comments on the Commission’s Notice Seeking Comments (“Notice”) on the Staff Whitepapers on: (1) “ESCO Performance Bonds or Other Security Interests” (“Performance Bond Whitepaper”); (2) “Benchmark Reference Prices” (“Benchmark Price Whitepaper”); and (3) “Express Consent” (“Express Consent Whitepaper”), dated May 4, 2016 in the above-referenced proceedings (collectively, the “Whitepapers”).¹

As noted in Commenters’ Initial Comments, it remains our position that the Commission does not have the authority to set “just and reasonable” ESCO rates under the Public Service Law and the Commission’s own Orders. The Commission has expressly

¹ These Reply 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.

stated in prior proceedings that it lacks jurisdiction to regulate ESCO rates, stating that “it is well understood that we [the Commission] lack authority to regulate the rates that an ESCO charges any customer (residential or nonresidential) neither an informal hearing officer nor the Commission may determine that an ESCO’s charges to its customer are improper.”² Commenters maintain that to the extent the Performance Bond and Benchmark Price Whitepapers are expressly or impliedly based on the Commission’s claimed authority to set “just and reasonable” ESCO prices, or seek to further those aspects of the Reset Order, they are invalid for the same reasons as the Reset Order itself. It is simply improper and manifestly unfair to seek comments on matters that are the subject of pending litigation, which would include anything related to the Commission’s assertion of jurisdiction to set “just and reasonable” ESCO prices.

Subject to the foregoing and Commenters’ reservation of rights, we submit the following Reply Comments on the Whitepapers:

Performance Bond Whitepaper

With regard to the Performance Bonds or Other Security Interests, Commenters note that a number of other parties concur in several important points with regard to the performance bond proposal. Specifically, as noted in our Initial Comments, the performance security should be held or administered by the Commission and not the utilities.³ This position is viewed with general agreement, including by the Joint Utilities

² Case 09-G-0289 - *Matter of the Rules and Regulations of the Pub. Svc. Comm’n, Contained in 16 NYCRR, in Relation to Complaint Procedures - Appeal by Ms. Laura Jacobsen of the Informal Decision Rendered in Favor of MX Energy*, Commission Determination (issued Aug. 23, 2010), at 7 (emphasis added).

³ 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”), at 4.

(“JU”)⁴ and New York State Energy Marketers Coalition (“NYSEMC”).⁵ Commenters also note that NYSEMC also concurs in Commenters’ position that the purpose of the performance security should be specifically limited to the securing ability to pay for customer obligations; it is not a general drawdown account for routine customer refunds or other purposes, including penalties (which are not statutorily authorized).⁶

Commenters disagree with other parties to the extent they propose the performance security to serve some additional “compliance” function beyond ability to pay/make customers whole. Thus, Commenters disagree with the improper interpretation of the proposed performance security advocated by PULP,⁷ City of New York⁸ and UIU.⁹ Commenters further urge that the Commission reject UIU’s suggestion to estimate an industry-wide “overcharge” amount to be used for calculating the performance bond.

As noted in Commenters initial comments, the amount of performance security should not be different based on the mode of marketing. Whether or not an ESCO uses the door-to-door mode is completely irrelevant to whether it has security in place to ensure that its customer obligations are performed.¹⁰ There are many other tools at the Commission’s

⁴ Case 15-M-0127 - *Matter of Eligibility Criteria for Energy Service Companies, Initial Comments of Joint Utilities on Staff Whitepapers* (filed June 6, 2016) (“JU Comments”), at 2.

⁵ Case 15-M-0127 - *Matter of Eligibility Criteria for Energy Service Companies, Comments of the New York State Energy Marketers Coalition on Staff Whitepapers Related to Performance Bonds, Reference Prices and Express Consent* (filed June 6, 2016) (“NYSEMC Comments”), at 3.

⁶ See Initial Comments, at 3; NYSEMC Comments, at 4.

⁷ Case 15-M-0127 - *Matter of Eligibility Criteria for Energy Service Companies, PULP Comments on DPS Staff’s Whitepapers on Benchmark Reference Prices for ESCO Commodity Service, Express Customer Consent for ESCO Contract Changes, and Performance Bonds* (filed June 6, 2016) (“PULP Comments”), at 13-14.

⁸ Case 15-M-0127 - *Matter of Eligibility Criteria for Energy Service Companies, Comments of the City of New York* (filed June 6, 2016) (“NYC Comments”), at 3.

⁹ Case 15-M-0127 - *Matter of Eligibility Criteria for Energy Service Companies, Joint Comments of the Utility Intervention Unit and the Attorney General of the State of New York on SAPA Notices Published on May 4, 2016 and on the Staff Whitepapers on Express Consent, Performance Bonds or other Security Interests, and Benchmark Reference Prices* (filed June 6, 2016) (“UIU Comments”), at 17-18.

¹⁰ 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) at 21. Commenters

disposal to ensure compliance with marketing standards; the amount of performance security is simply not rationally related to such standards.

Commenters disagree with the Joint Utilities that the performance security must perfectly correspond to the exact customers obligations of each ESCO.¹¹ While the Joint Utilities' suggestion is not without logic, it would simply be unreasonable and unworkable to implement in practice. Commenters believe that a simple, uniform requirement will be the most effective. On the other hand, Commenters agree with the Joint Utilities that, to the extent performance security requirements are tailored to characteristics of individual ESCOs, the performance security should only be applicable to the mass-market sector of the ESCOs' customers or load. Similarly, Commenters agree with RESA that, to the extent that an ESCO does not serve customers on a price guarantee basis, no performance security should be necessary at all.

Finally, Commenters agree with the City of New York that the Commission needs to more fully develop rules for application of any performance security requirements,¹² including due process procedures. As articulated in our Initial Comments, the performance security should only be called after the ESCO has been provided full due process in the form of an on-the-record pre-deprivation evidentiary hearing pursuant to SAPA § 401.¹³ Without including the specifics of that aspect of the proposal, comments are necessarily incomplete.

specifically disagree with the two-tier proposal espoused by Direct Energy (Mar. 11., 2016) and Constellation Energy (June 6, 2016).

¹¹ JU Comments, at 2-3.

¹² NYC Comments, at 3.

¹³ Initial Comments, at 3-4.

Benchmark Price Whitepaper

With respect to the Benchmark Price Whitepaper, many parties agree that the proposal is deeply flawed and should not be adopted for a variety of reasons, including: (1) the fact that the underlying comparison to the utility supply rate is improper because the utility rate structure has not been fully unbundled; and (2) because of the utilities' ability to make after-the-fact adjustments (as National Grid did after the polar vortex). Importantly, even PULP and UIU urge that the benchmark price proposal is flawed and should not be used.

Commenters also agree with the comments of Direct Energy Services, LLC that federal antitrust laws preempt the Commission's attempt at ratemaking in the ESCO market since the Legislature has not established a state policy of displacing competition in the ESCO market, which is consistent with numerous PSC opinions and orders.¹⁴

Express Consent

As stated in our Initial Comments, Commenters are supportive of the express consent proposal as a reasonable and pragmatic change that is similar to successful models in other states. Commenters urge the Commission to reject arguments against the express consent proposal urged by City of New York and PULP. The express consent proposal is a realistic appraisal that is consistent with the legislative intent and in the public interest.

¹⁴ Case 15-M-0127, *Matter of Eligibility Criteria for Energy Service Companies, Direct Energy Services, LLC Comment on Staff Whitepapers* (filed Mar. 18, 2016), at 6-15; Initial Comments, at 1-3 & n.1.

Energy-Related Value-Added

Commenters agree with the suggestion of NYSEMC¹⁵ and Agway,¹⁶ among others, that the Commission should not require “unbundling” of bundled offerings with energy-related value-added services and products.

Effective Date

Given the significant changes that are proposed in the Whitepapers and other recent SAPA rulemaking notices, Commenters suggest that any rule changes should be adopted with an orderly transition period. As such, Commenters agree with Agway that any changes to the ESCO market should not be effective until, at the earliest, March 1, 2017.¹⁷

Conclusion

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

¹⁵ NYSMEC Comments, at 7; .

¹⁶ Case 15-M-0127, *Matter of Eligibility Criteria for Energy Service Companies, Comments of Agway Energy Services, LLC on Benchmark Reference Prices and Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests* (filed June 6, 2016) (“Agway Comments”), at 3.

¹⁷ *Id.* at 4-5.

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Respectfully submitted,

On behalf of Major Energy Services, LLC and
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