

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

<b>In the Matter of Eligibility Criteria for Energy Service Companies</b>	) )	<b>Case 15-M-0127</b>
<b>Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State</b>	) ) ) )	<b>Case 12-M-0476</b>
<b>In the Matter of Retail Access Business Rules</b>	) )	<b>Case 98-M-1343</b>

**COMMENTS OF M&R ENERGY RESOURCES CORPORATION REGARDING THE  
ORDER RESETTING RETAIL ENERGY MARKETS FOR MASS MARKET CUSTOMERS**

M&R Energy Resources Corp. (M&R) is a privately-owned natural gas Energy Services Company (ESCO) operating in the New York state since 2002. M&R operates in the downstate market and supplies natural gas to mass market, commercial, industrial and municipal consumers. M&R welcomes this opportunity to respond to the Commission’s request for comments on the Order – Resetting Retail Energy Markets for Mass Market Customers.

**Performance Bonds:**

The Commission, rightly so, is seeking a mechanism by which to insure that any pricing or marketing misconduct by an ESCO will be clearly defined, thus allowing swift action and an immediate remedy. This remedy has centered on the discussion of a performance bond requirement. However, the risk exposure to be covered by a performance bond continues to be undefined, thus making it impossible to provide an articulate recommendation.

Under the proposed price benchmarking guidelines, it is difficult to compare how competitive an ESCO can be and still comply with the formulas outlined. The Staff has yet to present examples of real, empirically based benchmark prices calculated using these formulas. For ESCOs to compare their either historical or current market pricing to the benchmark is impossible. The benchmarking information put forth by Staff presents a formula based on a “one-size fits all” approach without taking into account that varying load factors can result in very different commodity, capacity charges, LDC balancing fees, and so on for each of its clients.

Without granular guidance on price calculations and other basic issues attendant upon the overall discussion, how can any kind of performance bond or security measure be rationally discussed? If an ESCO and/or the bond issuer cannot determine the risk exposure, how can any calculation of the financial impact on the ESCOs be considered in this proceeding? It is literally impossible. Once this level of guidance is provided, a meaningful discussion in this collaborative can take place.

For example, several basic questions remain unanswered:

- Will the performance bond be in place to insure that the fixed price offered by an ESCO will not be higher than the benchmark price? Or is the performance bond protecting against a monthly variable rate that is not equal to or less than an unknown monthly utility rate? These bonds will be entirely different. M&R maintains that risk exposure attendant upon a fixed price contract can be easily vetted by a bond issuer and monitored by the PSC. However, variable rate contracts, which are the actual culprit in the abuse of mass-market customers that led to the proposed imposition of these measures, are problematic for a number of reasons and should be the sole focus of this collaborative. A fixed price contract is a simple, private contract between parties and enforcement of those contracts is a matter of commercial law. A variable rate contract allows for indiscriminate repricing at any time doesn't fit the customary definition of a commercial contract and should be rejected by the Commission during its contract review process unless the variable is related to a particular index/formula for transparency.
- At the May 31<sup>st</sup> conference the Staff mentioned that the performance bond requirement could be applied to the current "Reset" order for any noncompliance including, but not limited to defaulting on fixed priced contracts. What are the other noncompliance issues? The substance of this question will have to be addressed before any meaningful discussion can take place regarding the efficacy of performance bonding in this collaborative. As pointed out above, fundamental details regarding the imposition of performance bonding have not been provided and have rendered the opportunity to meaningfully comment moot.

Providing comments on the issue of performance bonds requires, at the very least, guidance on the following:

### **Performance Bond Cost:**

A bond issuer calculates the premium they charge for performance bonds based on three primary criteria: 1) Bond Type 2) Bond Amount 3) the Covered Risk. Once the bond type, amount, and covered risk are adequately assessed, a performance bond underwriter is able to assign an appropriate bond premium. At this time, as a result of the lack of any granular information regarding these factors, it is impossible to articulate the covered risk in any manner that could lead to a meaningful discussion regarding the performance bond proposal. We recommend that several "straw man proposed performance bonds" be articulated by Staff so that they could be

presented to bond issuers for direct comment. The feedback received would be highly instructive with regard to how this collaborative proceeds on the issue of performance bonds.

### **Bond Type:**

Bonding companies have actuarial information on the lifetime claims history for each bond type. There are thousands of types of performance bonds. Over time, performance bond underwriters are able to determine that some performance bonds entail more risk than others. However, depending on the covered risk and other important factors dusts far unarticulated concerning the characteristics of the bond, it is impossible to meaningfully comment on the issue of performance bonds as presented in this collaborative. Meaningful discussion of this issue in this collaborative will require those characteristics to be well articulated.

### **Bond Amount**

Every performance bond has a designated covered risk and calculated premium to be paid by the ESCO. The bond rate is based on covered risk, and then a bond premium is established in the range 1-15% of the bond amount. As previously discussed, addressing this issue with the information thus far presented is literally impossible.

### **Applicants History/Risk**

Bonding companies attempt to predict the risk that bonding an applicant represents. If the bond is perceived to be a high risk it will equate to paying a higher bond premium. Since the bond companies are providing a financial guarantee on the future performance of those who are bonded, they must have a clear picture of the ESCO's history. While there are some indicators of an ESCO's performance history, for instance its dealings with pipelines, commodity providers, customer complaint records, and others, the adequacy of these historical records should be presented along with the strawman bond proposals that we have proposed so that they could be provided to bond issue is for comment and feedback.

### **What the Commission hasn't suggested is what constitutes good or acceptable performance.**

A performance bond being considered in this collaborative is clearly meant to support the guarantee of good performance of ESCOs. If an ESCO has a stellar record of superior performance, then that ESCO has already demonstrated that it has the performance, ability and reputation to support its customers. The suggestion that those same ESCOs should be subject to heightened financial burdens simply because other ESCOs, many of which that have large balance sheets, have violated the rights of their customers and have been discovered is

nonsensical. The fact is that small ESCOs that reside in New York State, that employ New York State residents, pay New York State taxes that live in the communities that they serve, should be treated as special, not deviant, if they have an exemplary performance record. To do otherwise would be to ignore the very factual underpinnings of the suggestion in this collaborative that performance bonding should be considered. Both exemplary and poor performance records should be strongly considered in any proposal to financially burden ESCOs in doing business in our state.

We ask the Commission to recognize that when discussing additional financial measures that smaller ESCOs are no less significant to the competitive market than large, out-of-state operated and headquartered ESCOs. These local ESCOs are leading in innovation, are closer to their customers than large ESCOs, recognize and act upon local issues and a plethora of other important factors that should be considered by the Commission in the consideration of performance bonding. A burdensome performance bonding requirement may force some smaller, New York State focused ESCOs out of the marketplace for no reason except the ease of regulation of by only considering and painting all ESCO's with a broad brush. Does the Commission really want to eliminate the good, local, highly performing ESCOs that have a history of conducting their business in an exemplary manner? We think not.

M&R Energy proposes in lieu of financial security measures; strict qualification measures for new and existing ESCOs, the PSC to exercise their current authority to expand and penalize misconduct and to monitor PSC compliance. UBP Section 2.D.6.b. provides the PSC with the power to act on any of several conditions not met in Section 2.D.5. It is difficult to accept that Section 2.D.6.b is not adequate if it is actually enforced. The PSC may want to consider an independent contractor be responsible for reviewing instances of misconduct and non-compliance rather than shift the entire financial burden to good performing ESCO's in the form of burdensome performance bonding. It also seems unlikely that the burdens on Staff would be lessened to any great degree by administering a performance bonding function.

### **Definition of Mass-Market**

If the Commission continues to move forward with financial security measures, then we suggest that it be (1) limited to residential customers only and (2) be based on the size of the ESCO and number of residential customers served. Small commercial customers are served under a completely different tariff than residential customers and are easily distinguished from them. A commercial customer of any size is in business, not distracted by the same day-to-day conditions that residential customers experience. The idea that a commercial customer who is in business making business decisions on a daily basis, including P&L responsibilities, is incapable of making the choices incumbent upon the choice of an ESCO seems to be overly paternalistic and unnecessary. It also imposes an additional burden on the ESCO. That additional burden will no doubt result in the small commercial customer paying more than is necessary to exercise its

choice and where to buy its energy commodity. This is a suggestion that should be abandoned in its entirety.

## **Conclusion**

We have articulated a number of concerns in these comments. However, the gist of these comments is that the information that has been provided thus far during this collaborative regarding the issues surrounding performance bonding requirements has been wholly inadequate to make any discussion meaningful. We have proposed that the staff put forth “strawman bond proposals” that can be used to circulate in the bond issuer community. In addition, the types of historical factors that can be provided to bond issuers to assess the likely future behavior of a specific ESCO should also be submitted for an assessment of their adequacy. We’ve made other suggestions that we strongly recommend to the Staff in the Commission.

M&R remains committed to continuing this discussion and has raised concerns on both sides of this issue. These are first; we believe that there should be consequences for poor or unacceptable behavior on the conduct of ESCOs that take advantage of residential customers. Second, we believe that whatever performance bonding requirements are put in place should not unduly burden ESCOs that have performed well simply for the sake of having a uniform policy that will be easy for the Staff and the Commission to administer. If our suggestions are too difficult given the current resources of the PSC staff, then an independent contractor should be retained rather than push the burden over to non-offending ESCOs.

Respectively,

*/s/ Melissa A. Massimi*

Melissa A. Massimi

President

M&R Energy Resources Corp.