

**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

REPLY 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 reply comments in response to the Notice Seeking Comments² issued in the above-referenced proceedings and the initial comments filed by various parties. 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”) issued on May 4, 2016 in the above-referenced proceedings: (1)

¹ NYSEG and RG&E are subsidiaries of AVANGRID.

² Cases 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, Notice Seeking Comments (“Notice”) (issued May 10, 2016).

performance bonds or other security interests for energy services companies (“ESCOs”); (2) reference prices for ESCO products; and (3) express consent from ESCO customers.

The Notice invited interested parties to submit initial comments on the proposed standards by June 6, 2016 and reply comments by June 20, 2016. The Joint Utilities appreciate the opportunity to submit reply comments. The instant filing focuses on a limited number of key issues of particular importance to the matters being considered in these proceedings and those raised in the comments filed by other parties.

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

The Joint Utilities observe that no party filing initial comments advocates that consumers do not deserve the added protection proposed in the Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests. Put another way, all parties filing comments appear to support providing consumers with necessary protections. The New York State Energy Marketers Coalition correctly observes “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.”³

There is less consensus when the comments delve into the details concerning how and what protections should be afforded consumers. For example, the parties take divergent positions concerning a variety of matters, including the amount of financial assurance required, the items/events subject to securitization and the party charged with holding the security. The Joint Utilities remain resolute with respect to the positions they advocated in their Initial

³ Cases 15-M-0127, et al., Comments of the New York State Energy Marketers Coalition on Staff Whitepapers Related to Performance Bonds, Reference Prices and Express Consent, p. 3.

Comments.⁴ The Commission should require ESCOs to provide financial assurance adequate to protect customers.

In terms of designing an adequate financial assurance mechanism, comments from other parties are instructive. The Utility Intervention Unit (“UIU”) and the Attorney General (“AG”), collectively (“UIU/AG”)⁵, propose “initially, the security should be posted as an irrevocable letter of credit, in order to enact this customer protection in a timely and efficient manner” adding that “the security instrument must be designed foremost to protect consumers. Such a [performance] bond must be payable to ESCO customers.” To the extent utilities are required to provide credits to customers on utility issued bills, there should be no encumbrance on a utility’s ability to access funds from the performance device to offset the bill credits provided to customers. The Joint Utilities believe that directing payment to utilities would achieve the same end as desired by UIU/AG.⁶

The Joint Utilities assert that ambiguities or weakness in the rules defining the financial assurance mechanism will invite litigation and thus delay compensation to customers of ESCOs who default on their obligations. In its comments, the Public Utility Law Project (“PULP”) of New York states that “the security should be posted initially in the form of an irrevocable letter of credit (“LOC”) from each ESCO doing business in the State of New York.”⁷ Any delay in payment decreases the likelihood that the intended recipient will receive appropriate and adequate compensation. For example, within the same territory, a customer could close an

⁴ Cases 15-M-0127, et al., Initial Comments of the Joint Utilities on Staff Whitepapers, June 6, 2016.

⁵ Cases 15-M-0127, et al., Joint Comments of the Utility Intervention Unit and the Attorney General Of The State of New York on the 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, June 6, 2016, pp. 18-19.

⁶ While the Joint Utilities agree with the sentiment expressed by UIU/AG, it may not be feasible for any guarantor to provide for payment directly to ESCO Customers. It may be more appropriate to provide for payment to utilities or the Commission who would be responsible for delivering the credits to affected ESCO customers.

⁷ Cases 15-M-0127, et al., Comments on DPS Staff’s Whitepapers on Benchmark Reference Prices for ESCO Commodity Service, Express Customer Consent for ESCO Contract Changes, and Performance Bonds, June 6, 2016, p.14.

account and open a new account in a manner that provides no discernible link to the prior utility account.⁸

The liquidity of any performance mechanism is essential. The Joint Utilities agree with UIU, the AG and PULP that the preferred security device is an irrevocable letter of credit, but believe that other performance devices may be suitable provided that they function in a manner comparable to an irrevocable letter of credit. If the Commission determines that utilities should hold the financial security, it is critical that the Commission vest in the utilities the discretion to determine which financial security devices are acceptable. For example, surety bonds in particular have a poor performance record.

No matter which party holds the financial security, utilities should never be expected to issue credits to customers absent the provision of adequate funds from the ESCO or the financial security provided by the ESCO to ensure its obligations in cases of ESCO non-performance. Failure to provide for, and allow timely access to, adequate financial security would effectively place the utilities in the role of guaranteeing and subsidizing the ESCOs for their nonperformance, which is a risk that the utilities may avoid presuming ESCO security instruments are properly vetted. Utilities should never be placed in the position of guaranteeing or being financially responsible for ESCO performance.

In its comments, the City of New York submits that “it is also important that Staff develop a guidance document that sets forth transparent standards and enforcement mechanisms for how, and when, performance bonds and security instruments will be used to mitigate instances when an ESCO’s guaranteed performance of a contract has not been met.” The Joint Utilities agree and recommend that following issuance of an Order requiring a financial

⁸ Additionally, customers deserving credits could move outside a utility’s service territory without providing a forwarding address.

assurance mechanism by ESCOs, the Commission should direct Staff to convene a technical conference to design an appropriate guidance document.

Such a guidance document could specify the administrative process to be followed by utilities when it is necessary to draw from the security instruments to fund the credits issued to customers. Regardless of whether pre-approval by Staff or after-the-fact reporting is required, settled procedures in a guidance document should minimize concerns regarding utility actions necessary to deliver credits to customers.

2. STAFF WHITEPAPER ON BENCHMARK REFERENCE PRICES

Comments by Infinite Energy concerning LDC rate design⁹ are not relevant to the discussion because gas utilities in New York do not offer a 12-month fixed price product; they are simply off-point, unsupported in the instant proceeding, and should be dismissed.

3. CONCLUSION

For all the above stated reasons, the Joint Utilities urge the Commission to issue an Order requiring ESCOs to provide financial assurance adequate to protect customers and schedule technical conferences to develop a guidance document that sets forth transparent standards and enforcement mechanisms for how, and when, performance bonds and security instruments will be used to mitigate instances when an ESCO's guaranteed performance of a contract has not been met.

⁹ Cases 15-M-0127, et al., Response to the Commission's Notice Seeking Comments Issued May 10, 2016 by Infinite Energy, June 6, 2016, pp. 3-6.

Respectfully submitted,

/s/ Tinya A. Holt

Tinya A. Holt
Counsel
National Fuel Gas Distribution Corporation
6363 Main St.
Williamsville, NY 14221 -5887
HoltT1@natfuel.com

<p>Noelle M. Kinsch General Counsel Avangrid Networks 99 Washington Avenue, Suite 2018 Albany, NY 12210 noelle.kinsch@avangrid.com</p>	<p>Paul A. Colbert Assoc. General Counsel-Regulatory Affairs Central Hudson Gas & Electric Corporation 284 South A venue Poughkeepsie, NY 12601 pcolbert@cenhud.com</p>
<p>Kerri Kirschbaum Senior Attorney Consolidated Edison Company Of New York, Inc. 4 Irving Place New York, NY 10003-0987 kirschbaumk@coned.com</p>	<p>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</p>
<p>Jeremy J. Euto Senior Counsel II National Grid 300 Erie Blvd. West Syracuse, NY 13202 315.428.3310 jeremy.euto@nationalgrid.com</p>	

June 20, 2016