

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**

INITIAL 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”) support the Commission’s efforts to promote energy efficiency, renewable energy, low-cost energy supply, market reliability and customer protection in the retail energy markets. Commenters appreciate the opportunity to submit these Initial 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

¹ These Initial 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. Commenters’ Reply Papers in the *Matter of Family Energy, Inc.* proceeding (“Reply Papers”), are attached hereto as Attachments 1 through 4, and are incorporated as if fully set forth herein. Commenters also incorporate by reference their previously filed comments in this proceeding.

At the outset, Commenters reiterate their contention 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 stated in prior proceedings that it lacks jurisdiction to regulate ESCO rates, stating **“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

A review of the Performance Bond and Benchmark Price Whitepapers demonstrates that they are based on and designed to further the *ultra vires* Reset Order.³ Thus, the Benchmark Price Whitepaper expressly states that:

“ESCOs are required to offer the price guarantee with respect to the utility commodity price as articulated in the Reset Order. For ESCOs wishing to bundle energy related value added products or services with a commodity product, the ESCO must guarantee savings with respect to the commodity portion of the product and disclose in the customer disclosure statement the additional cost attributed to the energy related value added product or service.”

(Benchmark Price Whitepaper, at 2) (emphasis added). Likewise, the Performance Bond Whitepaper states that the purpose of a performance guarantee is, in part, to **“ensure the price savings guarantee and other elements of the Reset Order.”** (Performance Bond Whitepaper, at 5). Commenters maintain that to the extent the Performance Bond and

including their Initial Comments, filed Mar. 18, 2016; Reply Comments, filed April 4, 2016; and Petition for Rehearing, filed Mar. 24, 2016, including all attachments to such submissions.

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 It does not appear that the Express Consent Whitepaper relies on or furthers the Reset Order. Instead, it interprets and provides additional options meeting the Express Consent requirement, which Commenters support.

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. Moreover, as stated previously, 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 comments on the Whitepapers:

Performance Bond Whitepaper

With regard to the Performance Bonds or Other Security Interests, Commenters generally support the concept of a performance guarantee as proposed by the Commission. However, Commenters would like to reiterate their concerns about proper implementation and the limited purpose of the proposed requirement, as discussed in their Initial Comments and their Reply Comments to the Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers, issued Feb. 23, 2016.⁴

Commenters wish to first reiterate the limited purpose of the bond: it should be used only as a financial security to ensure ability to pay—not as a draw down or escrow account. Commenters maintain that it is not the purpose of the performance guarantee to issue refunds to customers or for any purpose related to general complaints directed at an ESCO. More importantly, the bond should **only** be used after the ESCO has been provided full due

⁴ Case 15-M-0127 et al., *In the Matter of Eligibility Criteria for Energy Service Companies*, Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers (issued Feb. 23, 2016).

process in the form of an on-the-record pre-deprivation evidentiary administrative hearing pursuant to SAPA § 401.

Finally, the Commission should also consider other standard forms of performance guarantees, not just bonds, such as a letter of credit or a parental guarantee. Any type of performance guarantee should be held by the Commission **only**, not by the utilities. Commenters maintain that the Purchase of Receivables mechanism should not be used for the performance security—or any other purpose beyond its original intended function of facilitating ESCO billing.

As noted in our previous comments, the Commission should consider the Pennsylvania model. Generally, the Pennsylvania model consists of a minimum \$250,000 bond upon licensing that is adjusted annually based on gross receipts.⁵ Similar to Commission's proposal, the bond provides a reserve for the Commission to draw from as a last resort for making customers whole or for failure to pay assessed penalties.⁶

Benchmark Price Whitepaper

Staff's Benchmark Price Whitepaper proposes that a twelve-month fixed-price product offered at or below the published reference price will be considered "just and reasonable" (a proposition that Commenters maintain is *ultra vires*). The Benchmark Price Whitepaper provides that reference prices would be posted by Staff (or a consultant) approximately six weeks prior to the beginning of each twelve-month period. Any price

⁵ 52 Pa. Code § 54.40

⁶ As stated in our prior comments, the PSL §§ 25 and 25-a penalty provisions referenced in the February 23 Notice Seeking Comments do not apply to ESCOs. As such, at this time, the performance security would only be available to make customers whole for contractual obligations. It could not be used for recovery of penalties or for the purposes of the Reset Order. This is because at this time there is no statutory authorization for monetary penalties and the TRO prohibits enforcement of the Reset Order's price guarantee provisions.

above the reference price would be potentially subject to Staff review and possible compliance action.

First, it appears that the proposed lag time between price offering and enrollment at the quoted price would in most cases far exceed the timelines established in the “Accelerated Switching” orders. As recently as December 2015, the Commission emphasized the goals of accelerated switching in advancing retail choice policies, stating that: “[r]educing the time interval between customer choice and execution facilitates customer engagement with their chosen provider, lessens consumer confusion, and ensures that the retail energy market is responsive to consumer demands.”⁷

Moreover, in direct conflict with the stated policies of the Accelerated Switching orders, the proposed six week enrollment delay will create customer confusion and deny customers the benefit of their retail choice decision for up to six weeks. Moreover, the process of explaining the “sign up today for energy service in six weeks” will be unduly complex and confusing, and may ultimately be a barrier to retail access.

Accordingly, the Benchmark Price Whitepaper proposal should be rejected because it conflicts with very recent Commission policies on accelerated switching, will deny customers the acknowledged benefits of their retail choice (as in the case of a delayed fixed-price offering), and will make for a less transparent and efficient retail energy marketplace for mass-market customers.

⁷ Case 12-M-0476, et al. - *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Order Authorizing Accelerated Switching of Natural Gas Commodity Suppliers and Related Matters (issued Dec. 23, 2015). See also Case 12-M-0476, et al. - *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Order Authorizing Accelerated Switching of Commodity Suppliers (issued Dec. 15, 2014) (stating that “[a] tighter temporal connection between customer choice and execution will encourage customers to be more engaged in the marketplace, and will lessen confusion, as customers will see the fruit of their energy provider decision in a more timely fashion. Greater customer engagement will help to ensure that the retail energy market responds to customer demands”).

Express Consent

With regard to the Express Consent Whitepaper, Commenters generally support the proposal for adoption of a “three-notice mailing” alternative method for obtaining express consent from mass-market customer renewals and material changes. Based on Commenters’ experience in Pennsylvania, this process is both reasonable and pragmatic.

Commenters’ sole criticism is that that Express Consent Whitepaper implies that the term “affirmative consent,” from the Reset Order, and “express consent,” from the UBP (and GBL 349-d), are the identical.⁸ The Commission should eliminate confusion in the marketplace by making it crystal clear that these terms mean the same thing.

Conclusion

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

⁸ Express Consent Whitepaper, at 1-2.

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Respectfully submitted,

On behalf of Major Energy Services, LLC and
Major Energy Electric, LLC

Adam Small

Adam Small, Esq., General Counsel
Major Energy Services, LLC
100 Dutch Hill Road, Suite 310
Orangeburg, NY 10962

On behalf of Family Energy, Inc.

Jeffrey Donnelly

Jeffrey Donnelly, Director of Regulatory Affairs
& Compliance
Family Energy, Inc.
100 Milverton Drive, Suite 608
Mississauga, ON L5R 4H1

CC: All Parties (by electronic filing).

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