NRG Retail Northeast
3711 Market Street
Philadelphia, PA 19104

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 NRG RETAIL ON THE STATE ADMINISTRATIVE PROCEDURE ACT NOTICES PUBLISHED ON MAY 4, 2016 AND THE STAFF WHITEPAPERS ON EXPRESS CONSENT, PERFORMANCE BONDS OR OTHER SECURITY INTERESTS, AND BENCHMARK REFERENCE PRICES

I. Introduction

The retail companies of NRG Energy, Inc. ("NRG Retail")[1] submit these Reply Comments regarding the Public Service Commission's ("Commission" or "PSC") Notices of Proposed Rule Making published in the New York State Register on May 4, 2016, and the subsequent Notice Seeking Comments on three Staff Whitepapers issued on May 10, 2016,[2] as well as to supplement the public record on issues not sufficiently discussed in initial comments

[1] NRG Retail companies operating in New York include Reliant Energy Northeast LLC d/b/a NRG Home, Green Mountain Energy Company, Independence Energy Group LLC d/b/a Cirro Energy, Energy Plus Holdings LLC and Energy Plus Natural Gas LLC.

[2] Cases 15-M-0127, et al., *Notice Seeking Comments* issued May 10, 2016.

by the various stakeholders. Included among the Notices published by PSC in the Register were proposed changes to the Uniform Business Practices ("UBP") governing the eligibility of Energy Services Companies ("ESCOs")[3]. The topics addressed in the White Papers include: Express Consent, ESCO Performance Bonds or Other Security Interests, and Benchmark Reference Prices.

The legality of the Commission's February 23, 2016 Reset Order[4] is currently the subject of litigation between the Commission and several individual ESCOs, and groups that represent ESCOs' interests, including the Retail Energy Supply Association ("RESA")[5], and these comments are without prejudice to that ongoing litigation. *See Retail Energy Supply Assn.* v *Pub. Serv. Commn. of the State of New York*, Sup. Ct., Albany County, March 3, 2016, Zwack, J., Index No. 870-16.

II. Executive Summary

It has been two decades since PSC's landmark policy statement promoting customer choice and touting the potential consumer and system benefits of competitive energy markets.[6] Nevertheless the prevailing regulatory landscape seems rooted in a century-old business model that is not designed to deliver competitive value to customers.[7] In particular, the current retail paradigm in New York requires ESCOs to compete against a "price to compare" that is based on

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[3] NY State Register, Proposed Rule Making, I.D. No. PSC-18-16-00013-P, published May 4, 2016.

[4] Cases 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, *Order Resetting Retail Energy Markets and Establishing Farther Process*, issued February 23, 2016 ("Reset Order").

[5] NRG Energy, Inc. is a member of RESA.

[6] Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service,* Opinion And Order, issued May 20, 1996.

[7] Samuel Insull, 1859 – 1938, generally regarded as the father of energy utility regulation, would have little trouble recognizing the model for distributing and supplying electricity and natural gas in 21st century New York.

pure wholesale energy market energy costs, and does not incorporate any costs associated with marketing, risk associated with a retail business model, customer acquisition costs or even profit. So long as retail energy competition in New York is measured against the rates of regulated public utilities, and continues to be with the permission of, and at the convenience of, the distribution companies, PSC will struggle to achieve its vision of animating energy markets and engaging customers.

Many of the concerns raised in the various Staff Whitepapers about New York's retail energy markets can be traced to the Commission's apparent policy preference that distribution utilities are best able to provide customer service functions that could just as easily (and in many cases, better) be performed by competitive ESCOs. As just one example, ESCOs are required to rely on their distribution utility competitors to perform such basic functions as enrollment and billing. The PSC and distribution companies, either by design or indifference, have created an inconvenient shopping experience for customers, including:

- The need to have one's utility account number in order to switch suppliers;
- The circumstance by which customers must effectively take service with a utility for at least one bill cycle before being able to enroll with a competitive supplier; and
- A cumbersome re-enrollment process with the supplier of their choice merely because they move to a new dwelling.

A New Yorker making a move to Texas would be delightfully shocked by the active price competition and ever-expanding shopping cart of innovative energy efficiency and energy management products available to customers in the Lone Star State – all of which are enabled by Texas's hyper-competitive retail choice platform that largely removes the distribution utilities from the retail equation.

Critically, New York has a foundation of competitiveness upon which to build a 21st century retail energy market. As attested to by John R. Morris, Ph.D., a principal of Economists Incorporated, the New York market is highly competitive, with customers switching between ESCOs on a regular basis, and new ESCOs coming into the market to provide an ever-evolving suite of energy related goods and services. Dr. Morris' detailed findings are attached as Appendix A, and should lay to rest assertions that retail energy markets in New York are not "workably competitive."[8] Dr. Morris further notes that actions by the Commission that limit options for buyers – such as the proposal to restrict ESCOs from providing a full suite of products, as suggested in the Reset Order and the Staff Whitepaper on Benchmark Reference Prices – would affirmatively harm competition and restrict customer access to innovative goods and services provided by New York's ESCOs.

Notably, NRG Retail agrees with the Staff proposals that some aspects of the New York retail energy market could be improved. Specific areas of improvement discussed below include:

- Strengthening the eligibility requirements for ESCOs;
- Adequate notice of contract changes; and
- Appropriate financial security to guarantee "good behavior".

NRG Retail strongly urges the Commission to mark the twentieth anniversary of its Competitive Opportunities Order by constructively applying the lessons learned and the experience of the market to date to enhance, rather than suppress, the retail electric and gas markets in New York. By raising the standards of retail market participants, the Commission can unleash the power of innovation to deliver products that energy customers will want. Leave

[8] Mr. Morris opines that a workably competitive market does not mean that every supplier satisfies the needs of its customers 100 percent of the time. It does mean, however, that buyers are able to switch to alternative suppliers when buyers decide that a supplier's offering is inadequate—whatever the reason.

the distribution utilities to do what they do best, that is delivering energy, ensuring safety, and maintain the reliability of the grid.

III. Proposed Eligibility Criteria for ESCOs

In the May 4, 2016 NY State Register Notice of Rule Making, PSC proposed a dozen amendments to the UBP concerning the eligibility of ESCOs to do business in New York. NRG Retail endorses Staff's initiative to strengthen the eligibility criteria for ESCOs. There are more than 200 companies deemed eligible to serve electricity and natural gas to customers under PSC's current ESCO application process. Provision of electricity and natural gas supply is an essential service to millions of New York energy customers. The companies entrusted by the Commission to supply this vital service should be held to correspondingly high standards of financial fitness, operational competency, and managerial capability and experience. Rigorous eligibility requirements can help improve the caliber of market participants and thereby the overall performance of the retail energy market in New York. Standards that ensure that only highly competent suppliers are in the market leads to fewer enforcement actions and ensures that customers are protected and will help restore consumer confidence in the retail energy market. In support of this goal, NRG Retail recommends the Commission establish a license for ESCOs, rather than just a determination of eligibility.

NRG Retail offers the following recommendations on several of the proposed UBP amendments.

a. Proposed UBP amendment No. 1: ***Disclosure of Regulatory Actions and Complaints in Other States***

NRG Retail supports PSC's proposed application requirement that ESCOs disclose decisions or investigations in other states that affect, or may affect, the ESCO's ability to operate, and the number of complaints on file with public utility commissions in other states.

However, in crafting these new rules, NRG urges the Commission to build in appropriate context around the state complaint data that is included in ESCO applications and updates. Each state has different customer complaint recording protocols, and in some instances, there is no distinction between informal (a customer calls with a comment about their bill amount that is not a violation of regulation) or formal complaints (a public utility commission initiates a compliance investigation on a customer complaint). In other cases, states do not make statistical distinction on the number of customers served by an ESCO compared to complaint volume.[9] NRG Retail recommends the application provide for disclosing only the number of complaints from other states that are directly linked to regulatory compliance. Further complaints data should be calculated as a percentage of the applicant's total served customer population in a given state, rather than as an absolute number.

b. Proposed UBP amendment No. 2. ***Industry Experience and Expertise***

NRG Retail recommends PSC modify its proposal to ensure that ESCOs participating in the New York retail energy market demonstrate that they have an appropriate level of experience. In particular, NRG Retail recommends that the PSC require every ESCO to demonstrate that:

1. Key management personnel have at least five years of experience in technical and financial risk management practices and customer service in the energy supply industry;

[9] Obviously, an ESCO affiliate serving millions of customers outside of New York would expect to see a higher absolute number of complaints than an ESCO affiliate serving a few thousand customers.

2. Each licensed ESCO has a dedicated sales quality assurance function; and

3. An ESCO should be required to demonstrate the expertise and capability necessary to provide a consolidated bill.

In NRG Retail's experience, these three requirements are an indicator of that a given ESCO has the expertise necessary to be operate effectively in retail markets.

c. Proposed UBP amendment No. 4. *Process for Denying or Conditioning an Application for Service*

NRG Retail supports Staff's proposal to modify the UBP so that completing the application alone does not automatically result in approval to operate as an ESCO in New York. To further strengthen Staff's proposal, NRG recommends the Commissioners vote on Staff's recommendation to approve, deny or condition the eligibility of an ESCO's initial application for eligibility. A vote of the Commission should also be required as part of a three year review process for ESCOs to renew their eligibility.

d. Proposed UBP amendment Nos. 5 and 6. *Standardized Definitions of "Fixed Price" and "Green Energy"*

NRG Retail is not opposed conceptually to Staff's proposal to develop consumer-friendly definitions of "Fixed Price" and "Green Energy" for marketing to residential customers. NRG Retail agrees that "fixed" means fixed for the length of the customer's specific contract. Any definition of Fixed Price adopted by the Commission should not be so inflexible as to restrict Force Majeure or regulatory change provisions in ESCO contracts which take into account any change in law or any other action by a governmental authority or the New York Independent System Operator that impact wholesale energy costs beyond an ESCO's control. Further, the Commission should clarify that contracts that renew under their own terms at the end of the fixed term initially specified in the contract should be allowed to continue in accordance with the contract terms as either month to month or for a new fixed term, and upon fulfillment of the customer notices described in Staff's Whitepaper on Express Consent, and discussed in Section IV. of these Reply Comments.

Regarding the proposed definition and disclosures for Green Energy, NRG Retail recommends that Staff explicitly acknowledge Renewable Energy Certificates ("RECs") can be used by ESCOs to demonstrate that they have financially supported renewable resources on behalf of their customers to back up their green energy product claims. Products for which RECs are sourced from outside New York should also be allowed to be marketed as green energy, with appropriate disclosure to the customer of the geographic sourcing, as well as notation on the Environmental Disclosure Label of the geographic location where the RECs were generated. The establishment this year of the New York Generation Attributes Tracking System ("NYGATS") ensures the proper accounting of the creation, transfer and retirement of RECs.

As for Staff's proposal in proposed UBP amendment No. 6 that ESCOs must inform the customer in advance of the specific energy source fuel type in a green energy product, NRG Retail recommends Staff reconsider this proposed rule for purposes of promoting competition. ESCOs can and do compete on the details of their green energy offers. Some ESCOs market a specific renewable resource in their product to attract customers, for example 100 percent wind. Often such products sell at a premium price. Other ESCOs may choose to market their green energy product as being cleaner than system power because it is sourced from renewable generation resources (without reference to a specific type of generation). By having the flexibility to strategically procure renewable energy to match a customer's usage without the restriction of a specific fuel type in advance allows ESCO to provide more competitive products and lower prices. The Commission should allow the customer to determine the green energy product that meets their lifestyle and budget choices.

e. Proposed UBP amendment Nos. 7 and 8. *Standard Contracts or Contract Terms*

NRG Retail is strongly opposed to a requirement for a one-size-fits-all standardized contract. An ESCO contract defines the unique business relationship between customer and ESCO, and ESCOs should be encouraged to compete to provide customers with attractive contractual terms. A contract can also reflect an ESCO's brand "voice." A customer may decide to enroll with an ESCO based on the detailed terms and overall presentation of a contract. Indeed, length and content of a contract is often one of the primary points of differentiation between one company and another. As an example of the competitive value of the customer contract, in 2013 NRG Retail undertook a lengthy and comprehensive examination of its contracts to create a more consumer-friendly, "plain English" language style.

NRG Retail sees no consumer benefit from adopting a standard contract, as proposed by Staff. The UBP already prescribes at length the information that must be included in ESCO Sales Agreements, which provides the Commission adequate assurance that ESCOs are fully disclosing pertinent contractual details.[10] Additionally, the UBP provides for a standardized, uniform Customer Disclosure Statement that is required on page one of residential customer agreements.[11] The at-a-glance format of the Customer Disclosure Statement provides customers with important information covering key contract provisions such as:

- Price
- Fixed or variable offer

[10] Case 98-M-1343, *Uniform Business Practices*, revised February 2016, Section 5.B.4.a. – j.

[11] *Ibid*., Section 5.B.4.b. and Attachment 4.

- Length of agreement
- Rescission rights and process
- ETF, if applicable
- Late Payment Fee
- Provisions for renewal of agreement
- Conditions under which savings are guaranteed, if applicable

Given that the Commission already mandates disclosure of these key terms, NRG Retail questions the need for further state intervention in the competitive markets.

f. Proposed UBP amendment No. 11. ***Broker and Marketing Vendor Oversight***

NRG Retail supports the establishment of a registration process and oversight of energy brokers and third party marketing vendors. Complaints to the Commission regarding brokers and third-party marketing vendors should be tracked and be transparent to the public, just like complaints against ESCOs. NRG Retail disagrees with the proposed requirement for ESCOs to identify and provide contact information for such entities. Energy brokers typically do not work for a single ESCO, but rather solicit offers or bids from multiple ESCOs on behalf of customers. ESCOs have no control over such entities. The Commission's objective would be better served by requiring brokers and third party marketing vendors to register directly with the PSC. As a result, the information PSC seeks would be readily available to the Commission through the registration process.

IV. Staff Whitepaper on Express Consent

NRG Retail disagrees with comments submitted by the Public Utility Law Project of New York ("PULP"), the Utility Intervention Unit ("UIU") and the Attorney General ("AG") in opposition to aspects of Staff's proposal on express consent. NRG Retail endorses Staff's proposal of a minimum of three notices for renewals and material changes to customer contracts. NRG Retail agrees that Staff's proposal for three separate notices is the appropriate number of communications "touch points" for providing timely information that customers can use to monitor and manage their energy service. NRG Retail further supports Staff's proposal that electronic notices be allowed, with customer authorization. Staff's proposal is similar to customer notice requirements in effect in Pennsylvania since July 2014 for retail electric customers.[12] In fact, Staff's proposal goes further than the Pennsylvania rules by requiring a third, "reminder" notice.

There is indirect evidence of the effectiveness of a multi-notice regimen. Staff at the Pennsylvania Public Utility Commission ("PAPUC") has not conducted cause-and-effect analysis of the impact of the electric customer notice rules. However, PAPUC is in the process of revising its natural gas disclosure rules to incorporate the same notice requirements implemented for electric in 2014, which strongly suggests that professional staff at PAPUC believes that the notice requirements are useful to customers.[13]

Additionally, NRG Retail is the leading retail electric service provider in Pennsylvania in terms of number of mass market customers served. NRG Retail analyzed customer complaints before and after July 2014 when the new notice requirements went into effect. NRG Retail saw a 47% decrease in the complaint rate regarding billing and contract-related matters, as measured by complaints to the company's customer service call center. Correspondingly, the complaint

[12] 52 Pa. Code §§ 54.5 and 54.10

[13] PA PUC Docket L-2015-2465942, *Rulemaking to Amend and Add Regulations to Title 52 of the Pennsylvania Code, Sections 62.72, 62.75, and 62.81 Regarding Customer Information Disclosure Requirements for Natural Gas Suppliers Providing Natural Gas Supply to Residential and Small Business Customers;* adopted April 21, 2016.

rate – compared to all NRG Retail Pennsylvania customer call volume – was about 46 percent lower than before July 2014.

In November 2014 the Connecticut Public Utilities Regulatory Authority ("PURA") adopted a package of customer notice requirements to "facilitate consumers in making informed decisions about their generation options."[14] The requirements included notices about the customer's options at the end of a fixed rate term, future price changes, and historic price data, among other things. In its recent Annual Report to the Legislature on the state of electric competition, PURA reported that electric customer complaints fell sharply between 2014 and 2015, the same period during which customers began receiving additional and enhanced notices about their retail supply contracts. According to PURA's Report, "[t]otal complaints registered for calendar year 2015 represent a decrease of approximately 63% from the previous year. Most notably, complaints regarding billing issues have decreased by almost 80% as of the date of this report."[15] Again, this highlights the power of requiring ESCOs to provide clear notices to customers prior to material changes in the supplier-customer relationship.

Finally, should Staff decide to modify the definition of material change, NRG recommends an exception for changes to customers' fuel mix when the customer's price is not affected. The fuel mix can change over the course of a contract term based on a variety of factors such as weather, seasonality impacts on renewable generation, fuel prices, generation outages, and transmission limitations. Additionally an ESCO may make a change in the type of renewable energy certificates it purchases or whether to supply more renewable energy than the contract minimum without a change in price to the customer. In sum, improving the product

[14] P. 14 - Docket 13-07-18, ***Error! Reference source not found.****;* Final Decision adopted November 5, 2014.

[15] P. 7, Docket No. 15-01-26, Public Utilities Regulatory Authority, *Annual Report to the Legislature – The State of Electric Competition*, May 4, 2016.

without charging the customer more should not be considered a material change. NRG Retail is not aware of another industry that requires the customer to consent to a unilateral improvement of its service.

V. <u>Staff Whitepaper on ESCO Performance Bonds or Other Security Interests</u>

NRG Retail agrees with Staff that as a demonstration of financial eligibility ESCOs should be required to post security, which may be called upon by the Commission in the event of specified defaults by the ESCO in its obligations to customers, or for refunds to customers as a result of a Commission enforcement action. NRG Retail agrees with comments by RESA recommending the Commission should be flexible and allow ESCOs to post various methods of security such as bonds, Letters of Credit, parental guarantees, and other security methods.

NRG Retail also agrees with the Joint Utilities that PSC, not the distribution utilities, should be responsible for holding and managing the security. Further, to preserve the due process rights of ESCOs there is a need for Staff to establish a transparent process governing how the Commission will call on the security. NRG Retail agrees with RESA that this process should include a notice to the ESCO advising that the security will be called on and a reasonable time period for the ESCO to challenge the security call. A final determination on a security call, following the exhaustion of a prescribed process, should require an order of the Commission.

VI. <u>Staff Whitepaper on Benchmark Reference Prices</u>

NRG Retail has consistently expressed its opposition to efforts by the Commission to regulate ESCO prices and limit ESCO product offerings. The PSC does not have the authority under the Public Service Law ("PSL") to regulate ESCO prices. Even if the Commission had such jurisdiction under Article 4, the PSC would need to adjudicate a ratemaking proceeding for every eligible ESCO and conduct evidentiary hearings to set just and reasonable rates, as well as provide ESCOs the opportunity to recover costs and earn a return on capital expenditures, just as the Commission does for the utilities. NRG Retail, as a member of RESA, supports the lawsuit *Retail Energy Supply Assn.* v *Pub. Serv. Commn. of the State of New York,* and points to the arguments made in briefs by RESA counsel in that case, as well as the discussion of ESCO prices in the affidavit of John Morris beginning at Paragraph 18, attached as Exhibit A.

While NRG Retail will not engage in an effort to improve PSC's benchmark reference price in these comments, we will however suggest that if the Commission sincerely wishes to provide customers with an easy method, or guide, to compare ESCO offers, it should publicize, on a monthly basis, average prices by type of offer posted on the Commission's Power To Choose website, with the inclusion of the distribution utilities' monthly variable rate calculated into the average. Finally, NRG Retail encourages PSC to leave product preference to customers, and product development to innovators. NRG Retail shares the Commission's vision of moving the retail market away from commodity-only offers to an expanded array of value-added products, but dictating and limiting ESCO offers by regulation is not the way to achieve that goal.

VII. <u>Conclusion</u>

NRG Retail appreciates this opportunity to provide reply and supplemental comments to the Commission on its May 4, 2016 Notices of Proposed Rule Making and Notice Seeking Comments on the Staff Whitepapers.

Respectfully submitted,

NRG Energy, Inc.

By: ______________________________

John Holtz
Director – Market Development & Regulatory Affairs
NRG Retail
3711 Market Street, Suite 1000
Philadelphia, PA 19104

Dated: June 24, 2016

Attachments:
Exhibit A – Affidavit of John. R. Morris