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June 20, 2016

Via Electronic Filing

Hon. Kathleen H. Burgess
Secretary
Records Access Officer
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 112223

Re: Cases 15-M-0127, 12-M-0476, 98-M-1343: Reply Comments of Impacted ESCO Coalition on the Staff Whitepaper on Express Consent, Performance Bonds or Other Security Interests, and Benchmark Reference Prices

Dear Secretary Burgess:

Enclosed please find the Reply Comments of the Impacted ESCO Coalition ("Coalition") in the above referenced matters.

Should you have any questions or require any additional information, please contact me at (212) 590-0145 or via email at natarafeller@fellerenergylaw.com.

Respectfully Submitted,

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STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Services 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 14-M-0476**
In the Matter of Retail Access Business Rules	**)**	**Case 98-M-1343**

REPLY COMMENTS OF THE IMPACTED ESCO COALITION

Introduction:

On behalf of the Impacted ESCO Coalition ("Coalition") and its members, we submit these comments pursuant to the Notice Seeking Comments on the three (3) Staff Whitepapers issued on May 10, 2016 ("Whitepapers"). In particular, these comments focus on the issue of a benchmarking reference price.

A. Consent

As noted in the IEC's June 6, 2016 "Comments of the Impacted ESCO Coalition on the Staff Whitepapers on Benchmark Reference Prices, Guaranteed Savings and Performance Bonds/Financial Security," the Coalition supports the alternative 3-step notice requirement for renewals and material changes, which is consistent with the notice requirements of other states, including Pennsylvania. The Coalition fully supports allowing

ESCOs to communicate such notices electronically to customers that have consented to electronic receipt of such notices.[1]

The IEC objects to the suggestion of the "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" ("Joint Comments") that "price" be added to the definition of "material provision" under UBP. With respect to variable rate contracts, this is an unworkable proposal. Further, if applied to month-to-month, variable-rate contracts, ESCOs would be required to get affirmative customer consent as often as once a month, every month, for the duration of the agreement. As many customers do not typically respond consent notices, many customers would be unenrolled from contracts of which they were fully informed of and wished to remain enrolled in. Almost universally, variable-rate contracts provide customers with the option to terminate with thirty (30) days' notice. For this and the above stated reasons, it is harmful to customers to include "price" within the definition of material provision, as it is dismissing the choice the customer *chose* to make.

B. Benchmarking Reference Price

1. Reference Price Formula

The Coalition reasserts the position outlined in its June 6 Comments – which is in alignment with the position of both ESCOs and consumer protection groups – that the proposed Reference Price formula will cause more harm than good to consumers and retail

[1] Case No. 12-M-0476 et al., "Comments of the Impacted ESCO Coalition," June 6, 2016, at 10.

markets. The Coalition agrees with the comments of a number of other parties that the Reference Price is too complicated for the average consumer and will do little to advance the Commission's stated policy goals of increasing transparency and consumer education.

Both ESCOs and consumer protection groups agree that the Reference price is unacceptably vague and unworkable. In their joint comments, the AG and UIU assert that the Reference Price Whitepaper's proposals are "vague and unworkable, and would not protect customers."[2] PULP states that it would cause the Commission to spend considerable time "resolving the inadequacies of its own complex formulae." PULP further states that "[i]t would not be in the public interest to approve the benchmarking algorithm proposed by Staff in its Pricing Whitepaper because it is vague, incomplete, and leaves many important issues unresolved"[3] and "Staff's benchmark pricing algorithms are unacceptably vague. There is no analysis by Staff of how its benchmark pricing algorithm impacts the allowed percentage above rates of the distribution utility, or overall profitability of an ESCO, or whether the price is just and reasonable in relation to actual costs based on a factual record."[4]

Similarly, RESA's Comment notes that the formula contains "factors which do not sufficiently or adequately replicate how retail pricing is accomplished as well as all the

[2] Case No. 12-M-0476 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, at 11.
[3] Case No. 12-M-0476 et al., "[PULP's]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, at 10.
[4] *Id*., at 9.

inputs that go into developing a retail price" and goes on to list the extensive number of factors on which there is insufficient clarity or information. [5]

The Coalition also agrees with RESA's objections to the 6-week timeline proposed by Staff. The "timing associated with the calculation of the reference price needs to be carefully calibrated to ensure comparability of the reference price to conditions when the ESCO actually markets the product. There can be serious differences arising due to the different timing periods from when the price is calculated and when the ESCO attempts to market the product in the market. This may be due to, inter alia, weather Regulatory Changes, world unrest, government policy or fuel costs—all of which can impact on pricing." [6]

Finally, the Coalition reiterates that the retail adder of 2 cents too low. Other states which use adders use a much higher amount; Texas, for example, has an adder of 6 cents.[7]

2. Value-Adds

The Coalition reiterates its opposition to the proposed 'unbundling' of energy products and energy-related value-added services ("ERVAs"). Given the inherently subjective nature of 'value,' the Coalition does not support any attempt to quantify their monetary value, and asserts doing so will be detrimental to customers and ESCOs alike.

ERVAs such as in-home energy audits, net metering, warranties on home heating and cooling equipment, and the installation of nests and other smart-metering products are

[5] Case No. 12-M-0476 et al., "Comments of the Retail Energy Supply Association on the Staff Whitepapers," June 6, 2016, at 7.
[6] *Id*., at 11.
[7] RESA has also stated that the 2 cents adder is too low and cites Texas as an example. *Id*., at 15.

hard to assign a financial value to; nevertheless, they are invaluable as educational tools that help customers learn about their consumption patterns and minimize their energy usage, and thus their energy bill. These tools also serve to advance the Commission's goals as outlined in the on-going Renewing the Energy Vision ("REV") proceeding.

In fact, the Commission itself has recognized the inherent value of ERVAS by stating in the Resetting Order that

> [a]ny new green product offerings by ESCOs after the date of this Order must guarantee that at least 30% of the energy provided to the customer will be generated by renewable sources, eligible under the Commission's Environmental Disclosure Labeling Program (EDP) rules, to ensure that these products contribute to greater renewable energy achievement.[8]

By exempting this product, ESCOs will be incentivized to purchase RECs and other environmental products, which will lead to the development of more in-state renewable power (without passing the cost of the same on to ratepayers as an extra charge on their utility bill), and achieve the policy goals outlined in REV.

The Coalition also recommends that the Commission take into consideration the fact that there likely could be a substantial difference in the types and relevance of ERVAs provided to residential and small commercial customers, and that customers are best served if the ERVAs and commodity remain a bundled price.

C. Financial Security

The Coalition has further refined its recommended proposal for calculating an ESCO's Performance Bond/Security Instrument. As per the stated objective in the May 4, 2016 "Staff Whitepaper Regarding ESCO Performance Bonds and Other Security

[8] Case No. 15-M-0127, et al., "Order Resetting Retail Energy Markets and Establishing Further Process," Feb. 23, 2016, at 15.

Instruments," "[p]erformance bonds serve to guarantee performance and completion of the terms of a contract, and help demonstrate the credibility of contractors."[9] Any performance bond or financial instrument posting requirement must be proportional to the number of mass market customers the ESCO serves. However, it is important that all ESCOs, regardless of size post a performance bond with the Commission and, regardless of the number of mass market customers, all ESCOs should post a minimum bond/financial security requirement at $100,000. Essentially, the formula would be:

(# of MMC) multiplied by ($Y) = FSR where:

MMC= Mass Market Customers

Y= Amount to be determined

FSR= Financial Security Requirement, which may not be less than $100,000

This method is simple, reasonable, and equitable, and well-suited to the Commission's goal of protecting mass market customers.

The requirement of a set amount of $1 million, or $3 million for bonds, as suggested by other commenters, is excessive, unduly onerous to smaller ESCOs and will likely have the consequence of squeezing smaller ESCOs out of the market. The Coalition suggests that the Commission seek comments from stakeholders on developing Factor Y.

The Commission must still address how the bond/security instruments will be administered. States that require performance bonds have very clear rules concerning the

[9] Case 15-M-0127 et al., "Staff Whitepaper Regarding ESCO Performance Bonds and Other Security Interests," (May 4, 2016), at 3.

seizure of the bond. The Commission has not yet addressed whether it will have the authority to hold and disperse security assets, and what, if any benchmarks will be used for allowing seizure of the security instrument. The Coalition requests that the Commission provide such clarification, and separately notice for comment these open issues.

D. Conclusion

For the foregoing reasons, the Impacted ESCO Coalition respectfully urges the Commission to adopt the proposed reforms in the May 4 Notice of Proposed Rulemaking, with the modifications discussed herein.

Respectfully submitted,

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