

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.

NOTICE OF EVIDENTIARY AND COLLABORATIVE TRACKS
AND DEADLINE FOR INITIAL TESTIMONY AND EXHIBITS

(Issued December 2, 2016)

When the Commission first opened up the energy services market to retail competition, the intended purpose of allowing Energy Service Companies (ESCOs) to serve residential and small non-residential customers (mass-market customers) was to spur innovation in the creation of value-added products, particularly energy efficiency services that regulated rates may not provide, and to create commodity price competition that would result in efficiencies. It was believed that robust competition would result in efficiencies that would be beneficial to customers and would produce just and reasonable rates for commodity service better than would monopoly regulation. The Commission accordingly exercised its ratemaking authority to effectuate competitive access to utility systems by unbundling utility rates into monopoly (transport) and competitive (energy commodity) portions. The Commission's planned policy of regulatory forbearance, under which market pressures set rates for competitive electric commodity suppliers, was upheld based on continued Commission oversight of

the commodity market to ensure that market rates were just and reasonable.¹

Although often necessary, the regulation of monopoly services can be imperfect, administratively burdensome and untimely, and can lead to inefficient pricing. Competitive markets tend to efficiently distribute and allocate resources in society because customers consider their own benefit when choosing how much to consume or to pay for a good or service. The actions of such consumers in a functioning competitive market generally drive prices to a state where marginal benefits equal marginal costs, since customers are not willing to purposefully pay any more than the minimum necessary to obtain the benefits they desire. Similarly, competitive markets tend to be efficient at encouraging sellers to produce goods and services for the lowest cost so as not to lose market share to their competitors. Robust competitive markets typically have the following characteristics: (1) sufficiently large enough number of buyers and sellers to prevent individuals or groups from exclusively influencing the market price; (2) products that can be readily compared; (3) complete information about prices and supplies for both producers and consumers; (4) sellers that face significant elasticity of demand around the market price such that, if a seller charges a higher price, demand will significantly drop because buyers will switch suppliers, and if a seller charges a lower price (below market cost), it will receive significantly less net revenue than if it charged the market price; and (5) few barriers to entry to the market for both buyers and sellers.

¹ Matter of Energy Assn. of New York State v Public Serv. Commn. of the State of N.Y., 169 Misc. 2d 924, 936-37 (Albany County 1996), affd on other grounds, 273 A.D. 2d 708 (3d Dept 2000).

After considerable experience with the offering of retail service to mass market customers by ESCOs, the Commission has determined that the retail markets serving mass-market customers are not providing sufficient competition or innovation to properly serve consumers.² Despite efforts to realign the retail market,³ customer abuses and overcharging persist, and there has been little innovation, particularly in the provision of energy efficiency and energy management services. Commodity price differentiation has not worked, and the market for differentiated services is immature or non-existent. If ESCOs were truly living up to the promise of their function as innovators, it is expected that there would be much greater variety and transparency in the market for goods and services that supply real consumer energy value, insistence from serious participants on rules that govern against consumer fraud, maturity beyond door to door selling, and a consumer base with a much greater degree of satisfaction. While a well designed market could offer these consumer opportunities, it simply does not exist today. Accordingly, the Commission continues to examine measures that must be taken to ensure that these customers receive valuable services and pay just and reasonable rates for commodity and other services. Among the measures to be considered are: (a) whether ESCOs should be completely prohibited from serving their current products to mass-market customers; (b) whether the regulatory regime, rules and Uniform

² Case 12-M-0476, et al., Retail Access, Order Taking Actions to Improve the Residential and Small Non-residential Retail Access Markets (issued February 25, 2014).

³ Case 12-M-0476, et al., supra, Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015); and Case 15-M-0127, et al., Eligibility Criteria for Energy Service Companies, Order Resetting Retail Energy Markets and Establishing Further Process (issued February 23, 2016).

Business Practices (UBP) applicable to ESCOs need to be modified to implement such a prohibition, to provide sufficient additional guidance as to acceptable rates and practices of ESCOs, or to create enforcement mechanisms to deter customer abuses and overcharging, including whether the Commission decision not to subject ESCOs to Article 4 of the Public Service Law should be revisited; and (c) whether new ESCO rules and products can be developed that would provide sufficient real value to mass-market customers such that new products could be provided to them by ESCOs in the future in a manner that would ensure just and reasonable rates.

Please take notice that in furtherance of these efforts, two procedural tracks are established in these proceedings for the consideration of measures "(a)", "(b)" and "(c)" described above. Track I shall be for the consideration of measures "(a)" and "(b)" and shall include an evidentiary hearing at which sworn testimony and exhibits will be subject to cross-examination, followed by the filing of post-hearing briefs prior to Commission action. Track II shall be for the consideration of measure "(c)" and shall include collaborative meetings of interested parties, collaborative or party reports or proposals, and the opportunity to comment in writing prior to Commission action.

Please take further notice that Track I initial pre-filed testimony and exhibits must be filed on or before April 7, 2017. An Administrative Law Judge will be assigned to conduct and oversee the evidentiary hearing process of Track I. The assigned Administrative Law Judge will work with the parties to establish other Track I milestones and set the schedule for them, including the date for the evidentiary hearing and the schedule for post-hearing briefs.

It is anticipated that Staff of the Department of Public Service will provide testimony and exhibits in Track I along with the testimony of ESCOs, regulated utilities, consumer groups, and other interested parties. All parties to these proceedings may be subject to discovery regarding Track I issues. Parties submitting Track I testimony and exhibits should address the following topics where relevant to their positions:

1. Whether ESCOs should be prohibited in total or in part from serving their current products to mass-market customers, or whether ESCOs should be required to offer value-added energy efficiency and energy management services as a condition to offering commodity services.
2. Whether the regulatory regime of how the Commission applies the Public Service Law to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs is deterred. In particular, the Commission has not applied Article 4 to ESCOs, based on a construction that Public Service Law §66(1) only applies to utilities with plant in public streets.⁴ Is that construction justified today? Would it be appropriate to revisit that construction in light of subsequent events, such as the adoption of the 2002 amendments to the Home Energy Fair Practices Act? If the construction is revisited, would it be appropriate and beneficial to customers and in the public interest to apply the restrictions of Public Service Law §65 to ESCOs?
3. Whether the regulatory regime of how the Commission applies the Public Service Law to ESCOs should be modified to ensure adequate enforcement mechanisms, including penalties, to deter customer abuses and overcharging. In this regard, please comment on whether it is possible for the Commission to seek penalties against ESCOs under the current regime, pursuant to which they are only regarded as "gas" and/or "electric" corporations under PSL Article 1, or if it is necessary to also regulate ESCOs under Article 4 to seek penalties against ESCOs? If Article 4

⁴ Case 94-E-0952, Competitive Opportunities Regarding Electric Service, Opinion No. 97-17 (issued November 18, 1997), mimeo p. 34.

regulation is deemed necessary, then what burdens would such regulation impose? For instance, would it be possible for ESCOs to obtain "incidental" regulation under Public Service Law §66(13) and would such "incidental" regulation serve the public interest? Would ESCOs also be subject to undue burdens if they needed to obtain approval for stock issuances under Public Service Law §69 or the transfer of stocks, plant or franchises under Public Service Law §70? Should ESCOs be further regulated as to credit worthiness?

4. Whether the regulatory regime of how the Commission applies the Public Service Law to ESCOs should be modified to guide ESCOs toward acceptable rates and practices and deter customer abuses and overcharging. In particular, if the Commission decides that Public Service Law Article 4 applies to ESCOs, should the Commission use the discretionary authority of Public Service Law §66(12)(a) to require filing of tariffs by ESCOs in order to ensure that ESCO bills be no greater than utility bills? If so, should the Commission require filing of tariffs by all ESCOs, just ESCOs offering commodity-only service, or just ESCOs that have been determined to charge prices in excess of utility bills? Should the Commission take steps to void existing ESCO contracts if it tariffs ESCO services?
5. Whether the rules applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred. If so, then should the authority be imposition of Public Service Law Article 4 and/or other requirements created by Public Service Law Article 6?
6. Whether the Uniform Business Practices (UBP) applicable to ESCOs should be modified to ensure that customer abuses and overcharging by ESCOs are deterred.
7. Whether door-to-door and outbound telemarketing practices of ESCOs to mass market customers should be prohibited, and whether other ESCO marketing practices should be prohibited?
8. Whether the purchases of receivables system regarding mass market customers should be modified in any way, including but not limited to imposing "purchase with recourse" provisions or tiered discount rates so that ESCOs with abusive practices bear more financial risk from such practices?

9. The prices for retail gas and/or electric service charged to and paid by mass-market customers of ESCOs in the recent past, including, at a minimum, calendar years 2014 and 2015 and as much of 2016 as may be available, and the prices those customers would have paid for comparable utility service. If different products are offered (e.g., fixed vs. variable), the prices by product offering. In addition to annual data, seasonal (summer and winter) and monthly data should be provided where possible and relevant. Data for residential and small commercial customers should be provided separately. Data for electric and natural gas products should be provided separately. Where an ESCO product has been offered for more than five years, the last five years of historical data should be provided. Parties providing significant quantities of data should consult with Staff as to providing the data in a useful electronic format.
10. Data setting forth the number of customers served by ESCOs, by ESCO, for 2014, 2015, and so much of 2016 as is available.
11. Data setting forth the volume of sales in total dollars and in kWh, by ESCO, for 2014, 2015, and so much of 2016 as is available.
12. Evidence that an ESCO has, in fact, in recent years offered or is currently offering lower prices on an annual basis compared to the incumbent utility consistently, including number of customers served and total volume of sales in both dollars and kWh. Such evidence should also include an analysis of whether that price offering has been profitable or resulted in a loss to the ESCO.
13. Whether, given the current retail market structure, it is possible for an ESCO to profitably offer lower prices on an annual basis compared to the incumbent utility consistently and, if possible, how it can be done.
14. The number and nature of customer complaints regarding i) retail prices and bills and ii) sales and marketing practices from a) customers directly to ESCOs, b) from customers to utilities about ESCOs, by ESCO, and c) customers to the Commission about ESCOs, by ESCO during calendar years 2014 and 2015 and as much of 2016 as it is available.
15. ESCO marketing and sales practices, including printed materials, customer contracts, scripts for telephone or

door-to-door solicitations, and other training materials for ESCO sales people for practices in effect during calendar years 2014, 2015, and 2016. Such evidence should include all efforts by ESCOs to ensure that they and their personnel comply with the Uniform Business Practices (UBP) and that they otherwise avoid any deceptive marketing practices.

16. The ability of mass-market customers to obtain information about relative prices and offerings of ESCOs and regulated utilities and to understand such information, including evidence regarding the transparency of the retail market for mass-market customers and the level of knowledge in that market.
17. Tools that are available in the public domain that customers can use to do comparison shopping.
18. Specific customer surveys that shed light on customers' understanding about retail choices available and how to make informed choices.
19. Actions by state agencies or consumer advocacy groups to protect customers, to monitor the state of the retail market customers, to provide information, or to lodge complaints or impose discipline in the case of improper ESCO practices, including specific concrete steps the group has taken and any results obtained from those actions.
20. Actions that have been taken or that could be taken to strengthen the retail market or otherwise to provide consumer protections sufficient to protect mass-market customers from overcharges or deceptive marketing practices. For instance, if the Commission decided to subject ESCOs to Article 4 of the Public Service Law would it be appropriate to require ESCOs to obtain Certificates of Public Convenience and Necessity under Public Service Law §68 in order to provide commodity service?

Track II activities shall be initiated by Staff of the Department of Public Service upon notice to all parties in these proceedings.

(SIGNED)

KATHLEEN H. BURGESS
Secretary