

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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
In the Matter of Energy Service Company Price Reporting Requirements))	Case 06-M-0647
In the Matter of Electronic Data Interchange)	Case 98-M-0667

**COMMENTS OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM)¹ hereby submits comments on the Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies (ESCOs) filed in the above-referenced proceedings pursuant to the December 1, 2015, Notice Seeking Comments and subsequent extension granted by the Secretary. The Report is the culmination of a series of technical conferences convened by Staff. The technical conferences examined issues associated with the implementation of a new requirement adopted by the Commission pertaining to ESCO service to customers participating in low income assistance programs. In a February 25, 2014, Order the Commission decided that,

¹ The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies.

ESCOs serving customers participating in utility low income assistance programs must do so with products that guarantee savings over what the customer would otherwise pay to the utility. To comply with this guarantee, an ESCO must be able to compare actual customer bills to what the customer would have been billed at the utility's rates and, on at least an annual basis, provide any required refund as a credit on the customer's bill. Alternatively, ESCOs may also provide these customers energy-related value-added services that are designed to reduce customers' overall energy bills as described above.²

As memorialized in the Report, the technical conference participants examined issues associated with developing potentially compliant products. The Report also discusses the fundamental issue of providing a mechanism by which ESCOs can verify a customer's Assistance Program Participant (APP) status both for the purposes of marketing to new customers and serving existing customers. Staff and the industry participants are to be commended for their efforts in the technical conferences to explore these issues.

In the intervening years that have passed since the Commission adopted the approach to ESCO service to APP customers, much has changed. In February 2014, the impacts of the polar vortex on retail energy markets were peaking. To be clear, the polar vortex was a wholesale market phenomenon. Retail marketers were harmed by that unforeseeable, unhedgeable wholesale market event. However, retail marketers rose to the challenge and made changes to better meet the needs of consumers. In addition to an enhanced focus on customer service and satisfaction, ESCOs are also focused on finding ways to offer consumers new and innovative value-added products and services. Since the polar vortex, prices have also lowered substantially.

NEM continues to caution the Commission against the implementation of restrictions on the ability of low income consumers to exercise choice for energy commodity or energy-related

² Cases 12-M-0476, et. al., Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets, issued February 25, 2014, page 24.

value-added services. A government-sanctioned program that results in consumer redlining and discrimination violates basic rights of privacy and due process as well as State policy in favor of energy choice and retail competition. Moreover, the paternalistic assumption that APP customers should not be permitted to exercise individual choices in energy commodity supply and energy-related value-added services, is misplaced and wrong. There is great diversity across the State in population density, economic activity, and income levels. It is incorrect to presume the relative value that a consumer will place on the provision of a smart thermostat versus energy efficient lighting or any other product or service, in the context of their own individual circumstances. Attempts to capture these disparate circumstances and to develop a generalized program to meet the individual needs of APP consumers, will likely fall short. Indeed, of any group, APP customers benefit the most from the ability to manage their energy costs, through competitive supply and energy-related value added service options, because energy expenses constitute a disproportionately large part of their budget. Particularly because of the significant change in circumstances since the February 2014 Order, the perceived need for the discriminatory restrictions on ESCO service to APP customers has become even less justified.

Moreover, the focus in the February 2014 Order on energy-related value-added services is closely tied to the Commission's efforts in the Reforming the Energy Vision (REV) proceeding, which was formally initiated two months later. The groundbreaking REV proceeding is exploring ways to enhance consumer engagement in the marketplace and to promote the availability of Distributed Energy Resources (DERs), which are energy-related value-added products and services, by ESCOs and other competitive entities. A number of barriers have been identified to achieving the Commission's goal of increasing the availability of competitive offerings of DER products some of which include: providing ESCOs with timely access to

useable customer data; availability of financing mechanisms; the development of an online DER marketplace; and reforming existing utility rate mechanisms that disincent the utility from providing access to their system to ESCOs and other DER providers. As is to be expected in a landmark proceeding presenting so many questions, including many issues of first impression, all of these issues are currently the subject of active study and review. It is entirely premature to adopt requirements applicable to APP customer participation with energy-related value-added services unless and until these important issues underlying ESCOs' ability to develop innovative products have come to resolution. Only then will ESCOs have all of the requisite tools to develop a robust suite of energy-related value-added services to serve the needs of *all* consumers. As such, until these significant REV issues are resolved, attempts to identify and develop requirements for APP products in the instant proceeding should be held in abeyance.

If, despite the foregoing arguments, the Commission determines to further explore the options set forth in the Report, NEM offers the following recommendations and observations. The Report details the technical conference participants' best efforts to develop mechanisms for complying with the Commission's directive. NEM submits that the practical problems, set forth below and also memorialized in the Report, which are associated with the February 2014 Order argue against its final implementation.

I. ESCO Identification of APP Customers

A fundamental issue that must be resolved if discriminatory restrictions on ESCO service to APP customers are finally adopted is the meaningful identification of APP customers to ESCOs. An ESCO needs to be able to identify both potential customers as well as those in the ESCO's existing customer base that are APP-qualified. Such a mechanism is an absolute prerequisite to

ESCOs offering and developing compliant products. If an ESCO is not provided with an APP customer identifier, the ESCO will be limited in its ability to effectively communicate and administer compliant products to them. Moreover, a simplistic APP identifier may not do enough to adequately identify the individual needs of APP customers. Within the “APP” customer designation there exists differences in customer segments, representative of the customers’ geographic location, type of housing, and other factors. A single “APP” designation does not differentiate these factors nor does it provide the ESCO with the information it needs to offer a customer with a product that best fits its specific needs.

Relatedly, with respect to existing ESCO customers that are also APP customers, it is imperative that ESCOs be given ample time to identify these customers and transition to any new compliance paradigm. ESCOs will need time to develop appropriate and targeted communications that convey the value of their products to these customers, within the requirements that are ultimately adopted by the Commission.

II. ESCO Offerings of Compliant Products to APP Customers

The two prong approach to service to APP customers in the February 2014 Order is for ESCOs to: 1) offer a product with a price guarantee relative to the utility price; or 2) offer customers energy-related value-added services designed to reduce customers’ overall energy bills. With respect to the second type of compliant product, offerings with energy-related value-added services, the Report includes two non-consensus options, “which are complex and raise questions which require further exploration.” The first option involves the establishment of a “forward-looking reference price” as well as the calculation of an adder for pre-approved energy-related value-added services. The second option would utilize a competitive bidding aggregation

process to establish a price to serve APP customers and the selection of energy-related value-added services.

A. “Price Guarantee” Product

With respect to the first type of compliant product, the ESCO price guarantee relative to the utility price, the Report details some of the practical difficulties ESCOs would face in making such offers available, which would result in few ESCOs offering these products. NEM agrees. The variability of the utility default rate coupled with the lack of transparency as to its calculation poses a significant barrier to ESCOs being able to offer such a price guarantee. In addition, the utility price can and does diverge from market prices, further hindering ESCO efforts to try to offer a price guarantee. To be clear, ESCOs can and do offer prices below the utility default rate. However, as with any rate subject to changing market conditions, those prices will rise and fall over time. The regulatory costs and risks attendant with making a “price guarantee” product available will likely prove prohibitive for many ESCOs. Effectively limiting the market to fixed price offers would eliminate the ability of consumers to take advantage of lower-priced competitive products when market conditions allow and would not be in the public interest. It will result in fewer competitive options for consumers and less robust competition in general.

B. Energy-Related Value-Added Service Offerings

i. Forward Looking Reference Price for Fixed Price Products

Staff developed an option intended to be compliant with the second prong of the Commission’s approach to ESCO service to APP customers through the provision of energy-related value-added services. This option would entail the development of a forward-looking reference price

that would serve as a price cap for ESCO service to APP customers. Forward prices for energy and capacity, subject to historical pricing adjustments would be utilized. ESCOs would be able to sell one-year fixed price products to APPs at or below the reference price. NEM submits that the establishment of a Commission-mandated price cap for APP customers is antithetical to choice and the operation of competitive markets. In a competitive market, a cap on price in one product will generally force the seller to increase another price, if the seller is to recover its overall costs. In this case, setting a cap on ESCO service to APP customers would likely result in a shifting of costs to the rest of the ESCO's customer base. This is an inefficient and inequitable result. Price caps also limit market entry and/or cause market exit, because of ESCOs inability to fully recover their costs, thereby making markets less competitive.

A secondary problem associated with the reference price approach is the potential to misstate future market conditions. Regulatory attempts to derive "market based" prices require a significant amount of market intervention and oversight. Notwithstanding those efforts, there is a serious commensurate risk that the regulatory estimate of a "market based" price will be wrong, acting to artificially skew the perceived value of competitive offerings. As a general matter, a reliance on historical prices will misstate the price to consumers. Prices have fallen a great deal over the past few years. Using historical prices and then extrapolating forward will not accurately depict possible future market conditions. The impact of a reference price misstatement is amplified because it will form the basis of a price cap for APP service and ESCOs overall ability to offer compliant and competitive products.

ii. Adder for Pre-Approved Energy-Related Value-Added Services

An additional component of the Staff-developed option on offerings of energy-related value-added services was the development of an adder. Under this option, representative prices of

energy-related value-added services would be developed and then amortized over a year to determine an adder. The adder would be available for pre-approved energy-related value-added services that ESCOs bundle with fixed or variable price products to APP customers. NEM is very concerned that this proposal for establishing an adder for pre-approved energy-related value-added services is more akin to utility monopoly regulation. ESCOs should not be expected to reveal, no less publicly vet, the company-specific and proprietary cost information underlying their value-added service offerings in order to develop a “pre-approved” regulatory list and pricing of value-added services. The costs of value-added services may also be dependent on secondary markets, such as the renewable energy credit markets, and setting adder prices could have negative effects on the development of these markets. This form of price and product regulation will not incent innovation. To the contrary, it would appear to constrain ESCOs to only offer the narrow category of pre-approved products to APP customers.

As was accurately noted in the Report, “it would be difficult to identify all forms of value-added products and their associated values.” NEM submits that competitive energy-related value-added services include, for example, commodity procurement, hedging and risk management, underlying the pricing and product structures of variable, fixed, and hybrid rate structures. Energy-related value-added services include time-differentiated rates that encourage consumers to modify their usage into lower-priced periods. They also include renewable products that allow a consumer to satisfy a desire to use green energy, including solar installations and storage devices. Energy efficiency products, such as appliances and windows as well as home control devices, beginning with the smart thermostat are also energy-related value-added services. Another example is the conversion of fuel oil customers to natural gas. And, there will be future innovations in energy-related value-added services that cannot be anticipated or foreseen.

ESCOs should be encouraged to pursue these innovations. NEM submits that the adder mechanism proposal for pre-approved value-added services will have the opposite result.

If the Commission were to consider establishing an adder for value-added services, it must ensure that there is an on-going mechanism for ESCOs to continuously update the “pre-approved” list so that there is some means to capture innovation going forward and make adjustments to the adder price based on significant price fluctuations in adder-dependent secondary markets.

C. Competitive Bidding Process

Another option presented in the Report for offering compliant products is the utilization of a competitive bidding aggregation process to establish a price to serve APP customers and the selection of energy-related value-added services. The competitive bidding model principally advanced for Commission consideration entails the use of an opt-out mechanism for customer enrollment. The introduction of a competitive bidding aggregation program into a well-developed retail market must be accomplished in a way that coordinates with the existing retail choice programs.³ It is important that aggregation programs be designed in a manner that do not interfere with existing ESCO contracts with consumers or include existing customers in the aggregation. NEM is also concerned that smaller ESCOs continue to be able to effectively compete in the marketplace. Small ESCOs likely will not have the financial wherewithal to compete in and win the RFPs, thereby diminishing the number of competitive entities in the

³ See NEM’s Comments in the generic Community Choice Aggregation proceeding on the introduction of aggregation programs into a well-developed retail market. Case 14-M-0224, Comments of the National Energy Marketers Association, dated February 20, 2015.

marketplace. If a competitive bidding approach were to be adopted, it should be structured to encourage participation by multiple qualified ESCO bidders.

The competitive bidding proposal does not specifically address the mechanisms under which APP customers that choose not to participate in the aggregation will be allowed to shop for a competitive supplier. APP consumers should have the continued ability to shop for and switch suppliers, notwithstanding the availability of an aggregation program.

III. Consumer Advocates Proposal to Extend the Low Income Customer Service Requirements to All Residential ESCO Customers

The Consumer Advocates argue that the requirements for ESCO service to APP customers should be extended to all residential ESCO customers.⁴ NEM urges the Commission to reject this proposal. The proposal is clearly outside of the scope of this proceeding and does not aid or contribute to the Commission's consideration of the proposals proffered regarding ESCO service to APP customers.

IV. NFG Proposal to Limit ESCO Service to APP Customers to a Commodity Price Guarantee

NFG proposed that APP customers be limited to receiving utility commodity service or ESCO commodity service subject to the price guarantee. Under this proposal, the energy-related value-added service option for compliant products to APP customers would not be permitted. This is in contravention of the February 2014 Order that expressly envisioned a process whereby ESCOs

⁴ The Consumer Advocates point to the Connecticut legislature as a basis for their suggestion. Noteworthy in this regard is the Connecticut PURA's recent report to the Connecticut legislature arguing that, "If the legislature seeks a competitive market with dynamic pricing options, continued innovation, and the maximum possible savings to consumers, then some form of month-to-month rates should be considered. A more dynamic pricing structure will likely yield wider price swings but also greater product and rate innovation." Public Utilities Regulatory Authority, Report on Electric Supplier Residential Rate Structure pursuant to Connecticut General Statutes § 16-245o(o), dated December 31, 2015.

would bundle commodity service and energy-related value-added services for APP customers. NFG maintains that APP customers could still purchase energy-related value-added services as separate, stand-alone products. NEM urges that this proposal be rejected. Barring ESCOs from offering bundled products to APP customers would confer an unfair competitive advantage to the utility, which is not subject to a corresponding prohibition. It bears noting that Chair Zibelman has repeatedly made reference in the REV proceeding to the innovation that has been realized in the telecommunications industry as demonstrated through the bundling of value-added services options.

Creative product bundling is the essence of competitive markets. It allows the ESCO to optimize the mix of products that are offered to consumers at the most competitive price. It also allows the ESCO to offer a consumer a variety of products from which to select the offering that best fits an individual consumer's needs. Proffering such a prohibition of energy-related value-added services to APP consumers would institutionalize a bias against providing all New Yorkers with choice options, undermine the ultimate goals of REV, and would drastically limit the ability of APP customers to access solutions which, over time, promote increased energy efficiency, renewables growth and long-term energy consumption reduction goals. Reducing the ability of APP customers to manage their energy consumption and/or their bills is neither aligned with the goals of this proceeding nor the goals of the reform of the New York energy markets under REV.

V. Transitional Path to Compliance

If, despite the foregoing recommendations, the Commission adopts and implements final requirements for ESCO service to APP customers, NEM strongly recommends that the Commission allow an adequate transitional period for stakeholders to comply with the new

requirements. The Commission may want to consider a phased rollout beginning in one utility service territory to assist in managing and controlling unanticipated issues or problems.

Whatever requirements may be adopted will entail operational and logistical changes for ESCOs and utilities. ESCO customer information systems will need to be modified. ESCOs will need time to develop compliant products and corresponding sales and marketing materials. Changes in requirements for serving APP customers will require new training for representatives. It is in the best interest of APP customers that the industry be given adequate time to properly respond to and implement these changes.

Conclusion

NEM appreciates this opportunity to offer comments on the Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies (ESCOs). NEM continues to caution the Commission against the implementation of unwarranted, discriminatory restrictions on the ability of low income consumers to exercise choice for energy commodity or energy-related value-added services.

Sincerely,

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