

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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| <i>In the Matter of Eligibility Criteria for Energy Service Companies.</i> | Case 15-M-0127 |
| <i>Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State.</i> | Case 12-M-0476 |
| <i>In the Matter of Retail Access Business Rules.</i> | Case 98-M-1343 |

COMMENTS OF THE JOINT UTILITIES REGARDING ENERGY SERVICE COMPANIES FINANCIAL ASSURANCE SUBSEQUENT TO THE FEBRUARY 26, 2020 TECHNICAL CONFERENCE AND STAKEHOLDER MEETING

April 15, 2020

INTRODUCTION

Consolidated Edison Company of New York, Inc. (“Con Edison”), Orange and Rockland Utilities, Inc. (“O&R”), Central Hudson Gas & Electric Corporation (“Central Hudson”), The Brooklyn Union Gas Company d/b/a National Grid NY (“KEDNY”), KeySpan Gas East Corporation d/b/a National Grid (“KEDLI”), and Niagara Mohawk Power Corporation d/b/a National Grid (together with KEDLI and KEDNY, “National Grid”), National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation (“NYSEG”) and Rochester Gas and Electric Corporation (“RG&E”) (together, the “Joint Utilities”), hereby submit these comments following the February 26, 2020 stakeholder meeting on Energy Service Companies (“ESCO”) financial assurance in the above-referenced proceedings. In its Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process,¹ the New York State Public Service Commission (“Commission”) directed the New York State Department of Public Service Staff (“Staff”) to consult with stakeholders and propose a form of financial assurance and method for calculating the required amount. At the conclusion of the February 26, 2020 Stakeholder meeting in these proceedings, Staff sought comments from stakeholders. The Joint Utilities appreciate the opportunity to submit additional comments reaffirming the Joint Utilities’ positions regarding ESCO financial assurances following the stakeholder meeting.

¹ Cases 98-M-1343, 12-M-0476 and 15-M-0127 - *In the Matter of Retail Access Business Rules; Proceeding on Motion of the Commission to Case Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State; In the Matter of Eligibility Criteria for Energy Service Companies, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process* (December 12, 2020).

COMMENTS

I. STAKEHOLDER MEETING DISCUSSION REGARDING UTILITIES' ROLE IN THE MANAGEMENT OF ESCO FINANCIAL ASSURANCE

There was general consensus during the stakeholder meeting, as advocated by the Joint Utilities, ESCOs, and Consumer Advocates, that utilities should not be required to manage any additional financial security obtained from ESCOs solely for the benefit of customers should the ESCOs fail to meet pricing requirements imposed by the Commission.²

The Joint Utilities should not be responsible for managing ESCO financial security instruments because they have no way to determine whether an ESCO has met the Commission's pricing requirements, are not in a position to determine when financial security should be forfeited, and cannot determine the proper amount to credit each customer for ESCO overcharges. The Commission and Staff are in the best position to determine and enforce ESCO compliance with obligations ordered by the Commission. The Commission and Staff are also exclusively able to provide ESCOs with due process regarding the circumstances under which a financial security forfeiture may be necessary. Finally, the Commission should investigate and direct the transfer of forfeited security to the applicable utility(s) and determine how the utility(s) should reasonably apportion credits to customers.

² The Joint Utilities advocated a similar position previously in Cases 98-M-1343, 12-M-0476 and 15-M-0127 - *In the Matter of Retail Access Business Rules; Proceeding on Motion of the Commission to Case Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State; In the Matter of Eligibility Criteria for Energy Service Companies* (Initial Comments of the Joint Utilities on Staff Whitepapers) (June 6, 2016); (Reply Comments of the Joint Utilities on Staff Whitepapers) (June 20, 2016); (NEM Principles of ESCO Financial Assurance) (February 18, 2020).

The stakeholder meeting presented Staff with a rare moment of agreement among the Joint Utilities, ESCOs and consumer advocates that the Commission or New York State, and not utilities, should administer ESCO financial security. All agreed that the Commission should determine who holds the financial security, what triggers the use of the financial security, the due process afforded to the financial security provider, the transfer of the financial security to the utility(s) for distribution and the allocation of the credits to be distributed. The Joint Utilities urge the Commission to accept the agreement of the stakeholders and adopt the suggested financial security model.

No matter which party holds the financial security, utilities should not be expected to issue credits to customers absent the provision of adequate funds from the ESCO or the financial security provided by the ESCO to fund its obligations in cases of ESCO non-performance. Failure to provide for, and allow timely access to, adequate financial security would effectively place the utilities in the role of guaranteeing and subsidizing the ESCOs for their nonperformance. This is a risk that the utilities may avoid, so long as ESCO security instruments are properly vetted. Utilities should not be placed in the position of guaranteeing or being financially responsible for ESCO performance.

II. TYPE OF FINANCIAL SECURITY

The stakeholders discussed options for the type of financial security the ESCOs should provide. Options included cash held in an escrow account, a parental guarantee if the parent has an acceptable credit rating, an irrevocable letter of credit or a surety bond. Regardless of who obtains and manages the financial security, the Joint Utilities continue to maintain an aversion to surety bonds, given their enhanced risk as compared to other types of financial security. Of particular concern is that sureties are often

insurance companies, who historically have been reluctant to pay claims. At the stakeholder meeting, Central Hudson and National Grid recounted recent experiences where sureties refused to pay claims that they were contractually bound to pay.

In addition, sureties go bankrupt, which allows the bankruptcy court to discharge their obligation to pay. Attached is a list of sureties that have gone bankrupt in recent years. Each surety bond is similar to a general agreement of indemnity where the surety guarantees the obligations of a third party for a fee. If too many third parties default due to poor financial condition or performance, the surety is put at financial risk because it has to pay the obligations of the failing third parties. When a surety defaults due to insolvency, it likely defaults on all of the surety bonds it holds, not just a single surety bond.

For these reasons, cash and an irrevocable letter of credit are the preferred forms of financial security. Cash, held in an escrow account, and an irrevocable letter of credit, held at a New York bank, may be accessed at any time and used at the discretion of the security holder based upon conditions agreed to by the parties as part of the escrow or irrevocable letter of credit agreement. The escrow or bank, often independent entities, must permit the security holder to access the security on demand, which is why they are the preferred forms of security.

A parental guarantee is also acceptable where the guarantor has an investment grade credit rating or its equivalent. An investment grade credit rating means BBB- and above for Standard and Poors and above Baa3 for Moodys. If a guarantor fails to pay, it may suffer severe consequences triggering a call on its debt held by others. This consequence makes a parental guarantee relatively secure, though not as secure as cash or an irrevocable letter of credit. A parental guarantee also is inferior to cash or an

irrevocable letter of credit because the security holder must collect the security. Although the parent normally complies, some risk remains.

If an entity does not have a publicly available investment grade credit rating, it may submit audited financial statements to the security holder for the security holder to determine whether the parent's financial strength provides an acceptable level of assurance. Allowing the security holder to determine whether an entity has an acceptable level of financial strength by reviewing audited financial statements introduces more subjectivity and risk into the process and is to be avoided.

III. THE AMOUNT OF FINANCIAL SECURITY

The financial security provided by ESCOs should be sufficient to cover any forfeiture that the Commission may order. Under no circumstance should any utility(s) pay any amount that ESCOs owe to customers. The Commission should establish the amount of each ESCO's financial security such that the Commission is satisfied that it has sufficient funds upon which it may draw to protect customers.

It is also important to remember that the provision of financial security has a cost. In this case, an ESCO must post the cash into an escrow account and cannot use the cash for other purposes; banks charge an annual minimum fee of approximately \$500 or more, plus a commission by arrangement, for an irrevocable line of credit; a parent providing a guarantee must maintain liquidity sufficient to pay the guarantee; and a surety charges a fee for a bond. The financial security provider does not need to pay the financial security absent a default of its obligations, but there is a cost. The cost of financial security is a cost of doing business that an ESCO must bear.

IV. PROCESS TO ACCESS FINANCIAL SECURITY

The Joint Utilities believe that the Commission must establish a process by which it determines the amount of financial security each ESCO must provide, the notice of default that triggers due process, a due process that affords the ESCO an opportunity to cure the default or explain why no default occurred and, once a default is determined, a process to assign the financial forfeiture to the applicable utility and allocate credits equaling the forfeiture and the utility's costs, to the utility for credit distribution to customers.

V. UNIFORM BUSINESS PRACTICES FINANCIAL SECURITY

In recent years, it has become clear that the existing financial security that the Joint Utilities are permitted to collect from ESCOs under the Uniform Business Practices is not adequate to protect the utilities and customers from financial risk. Therefore, the Joint Utilities urge the Commission to establish a collaborative involving Staff, the Joint Utilities, ESCOs, Direct Customers and other interested parties to review the Uniform Business Practices' financial security requirements. The financial security inadequacy is particularly significant in regard to Natural Gas Imbalance Risks. The Uniform Business Practices should be amended to provide for adequate financial security based on the outcome of the discussion and Staff's findings that result therefrom.

VI. USING PURCHASE OF RECEIVABLE AS FINANCIAL SECURITY

During the stakeholder meeting, stakeholders discussed whether the existing purchase of receivable ("POR") programs could be modified to require utilities to use portions of money owed to ESCOs to provide credits to customers where the ESCO fails to meet its price requirements. This suggestion poses a number of concerns and should

not be adopted. Increasing the POR discount to include a component related to guaranteed savings poses a myriad of accounting issues, and the possibility of conflicts over security interests in receivables. Further, there is no mechanism to segregate amounts that would be used for security and regular POR discount revenue. Increasing the existing POR discount would increase utility revenue associated with the POR program, thereby increasing tax liability, upsetting the utility's rate structure and balance sheet, and producing other accounting complexities. Administering the security through the POR mechanism would also shift the price guarantee burden to the utility by making it responsible for reimbursing customers for amounts owed by ESCOs. For these reasons, the Joint Utilities do not believe the POR is an appropriate means to raise or manage funds to secure ESCO price guarantee obligations.

CONCLUSION

For the reasons described above, the Joint Utilities urge the Commission to issue an Order requiring ESCOs to provide financial assurance to the Commission adequate to protect customers and to develop a guidance document that sets forth transparent standards and enforcement mechanisms for how, and when, security instruments will be used to mitigate instances when an ESCO has failed to meet its guaranteed performance of a customer contract. Utilities should not hold financial security or determine when security should be forfeited. Upon the Commission's determination that an ESCO should forfeit financial security, the Commission should direct the financial security to be transferred to the applicable utility(s), along with reasonable methods for the utility to disperse the same amount of credits to customers. Finally, the Commission should establish a collaborative to evaluate modifications to the Uniform Business Practices to

allow the Joint Utilities to collect adequate financial security from ESCOs. The Joint Utilities appreciate the opportunity to submit comments and look forward to further discussion and deliberation with Staff, stakeholders, and customers on these important issues.

Respectfully submitted,

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List of major bankruptcies of insurance companies in USA

| Wind-up date | Date of creation | Company | Class of business | Headquarters |
|----------------|------------------|---|--------------------------------|-------------------------|
| March 2017 | 1954 | Penn Treaty Network America Insurance Company and its subsidiaries among which American Network Insurance Company | Life | Pennsylvania |
| December 2016 | 1964 | American Medical and Life Insurance Company | Health, life and accident | New York |
| February 2015 | 2012 | Coportunity Health | Life and health | Iowa |
| January 2015 | 2008 | SeeChange Health Insurance Company | Health | California |
| August 2013 | - | Executive Life Insurance Company of New York | Life | New York |
| May 2013 | 1912 | Lumbermens Mutual Casualty Company | Health | Illinois |
| April 2013 | 2006 | Universal Health Care Insurance Company, Inc. | Accident and Health | Florida |
| July 2012 | 1934 | Standard Life Insurance Company of Indiana | Life | Indiana |
| January 2011 | 1925 | Golden State Mutual Life Insurance Company | Life, accident and health | California |
| November 2010 | 1964 | National States Insurance Company | Accident and health | Missouri |
| May 2010 | 1923 | Booker T. Washington Insurance Company | Life, accident and health | Alabama |
| June 2006 | 1996 | Southern Family Insurance Company | Non life | Florida |
| July 2003 | - | Legion Insurance Company | Non life, health | Philadelphia |
| February 2002 | - | PHICO Insurance Company | Health, workmen's compensation | Harrisburg |
| October 2001 | 1817 | Reliance Insurance Company | Life and non life | Philadelphia |
| July 2003 | 1978 | Fremont Indemnity Insurance Company | Health, workmen's compensation | Los Angeles, California |
| September 2000 | 1914 | California Compensation Insurance Company | Non life | San Francisco |

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| February 1987 | 1985 | Mission Insurance Company | Non life | San Francisco |
| March 1989 | - | American Mutual Liability Insurance Company | Non life | Framingham |
| August 1986 | - | Midland Insurance Company | Non life | New York |
| December 1985 | - | Transit Casualty Insurance Company | Non life | Jefferson City |