National Energy Marketers Association

To: **New York Public Service Commission**
Re: **Cases 15-M-0127, 12-M-0476 and 98-M-1343 - NEM Principles of ESCO Financial Assurance**
Date: **February 18, 2020**

In the December 12, 2019, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process, issued in the above-referenced proceedings, the Commission adopted an ESCO financial assurance requirement. A stakeholder meeting was scheduled for February 26, 2020, for Staff to consult with interested stakeholders "to discuss methodologies for assessing entry level and ongoing financial assurance requirements for ESCOs." The Commission said in the December 2019 Order that the financial assurance requirement is intended to,

> ensure that ESCOs that guarantee pricing, such as through savings guarantee or fixed-rate contract, are able to fulfill that guarantee. Such requirement will both deter bad-acting ESCOs from entering the market and ensure that ESCOs do not take on responsibilities they may not be able to fulfill. Likewise, it will help deter ESCOs from attempting to strategically exit the market in a manner that allows them to capture the value of their energy services contracts while evading their obligations to customers.
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> A financial assurance requirement would provide a means to ensure that customers who were wronged by an ESCO by overcharging or other financial injury can be made whole. Moreover, this requirement will help ensure that only ESCOs that are ready, willing, and able to compete in the retail access market in full compliance with the UBP will populate the market. (Order at 25).

The Commission also stated that, "a sufficient financial assurance must have a relationship to the amount of business a particular ESCO does in the state." (Id.).

In view of the objectives identified by the Commission for imposing an ESCO financial assurance requirement, below are NEM's[1] Principles of ESCO Financial Assurance for consideration at the February 26, 2020, stakeholder meeting.

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[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. This submission is not intended to serve as a waiver of any rights, arguments, claims or remedies, all of which NEM expressly reserves.

NEM Principles of ESCO Financial Assurance

A. Flexibility in Form of Financial Assurance – Forms of ESCO proof of financial assurance should include all of the following: surety bonds, collateral, letters of credit, cash, proof of demonstrable financial security (i.e., credit rating).

B. Fairness to ESCOs of Varying Sizes and New Market Entrants – The financial assurance requirement should not be an unreasonable barrier to entry to new market participants, and it should be calibrated to reflect the risks posed by ESCOs of varying sizes.

C. Focus on Variable Price Product Savings Guarantee – Financial assurance requirements should be targeted to an ESCO's ability to provide the variable price product savings guarantee only.

   a. Compliant fixed price product limited to a price no greater than the trailing 12-month average utility supply rate plus 5% - low risk of ESCO non-compliance; ESCO definitively knows at time of product offering that they have locked in supply to offer a compliant product.

   b. Renewable energy product – not subject to explicit limit or term implicating a potential for future customer refund.

D. Fairness in Calculation of Overcharge Risk – Risk components for a mass market variable price product customer include: 1) annual energy use in kWhs and/or therms (or CCFs); 2) the resultant monthly utility price per unit of energy use; and 3) the ESCO's price charged per unit of energy use. In addition, assuming each ESCO's variable priced customer is reconciled at 12-month intervals, security requirements will differ based on the tenure of each customer on an unreconciled variable price.

   For example, at any point in time it should be expected that $1/12^{th}$ of customers will be reconciled 12 months from the present time, $1/12^{th}$ 11 months from the present time, etc. The result would be that the security requirement should be based on 50% of any calculated estimate of amounts that may be subject to annual reconciliation refunds (the average customer refund amount due being for 6 months of usage at any point in time).

E. Ease of Computation of Financial Assurance - Such security determination can be based on the utility reported annual usage for all of an ESCO's variable priced product customers by utility, the 12-month historic utility rate now provided quarterly by all utilities (a somewhat reasonable proxy for the PTC), a risk factor based on a reasonably anticipated ESCO overcharge during a 12 month period and the 50% factor explained above in Paragraph D.

   Linking a financial assurance requirements to the number of customers served by an ESCO, the load served by an ESCO or to an ESCO's historic revenue[2] would create an

[2] See, e.g., Cases 15-M-0127, et. al., Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests, dated May 4, 2016, at 5-6.

unfair mismatch to any risk that is related only to potential amounts owed to variable priced product customers since each ESCO will have a different portion of their customers, load served or revenue related to the variable priced product.

The POR discount[3] should not be considered in establishing a fund to be used in a similar fashion that a performance bond or security instrument would be used. Such a proposal introduces complexity related to regulatory approval and monitoring, tax reporting, interest on amounts held, etc. Additionally, monitoring would be required as to when the discount has collected sufficient funds for the purposes of financial assurance, at which point the mechanism should stop.

F. Opportunity for ESCO Application for Reduction in Financial Assurance – ESCOs that demonstrate that they have properly reconciled customers should be eligible to apply for a reduction in the financial assurance requirement.

G. Clarity that PSC Receives the Financial Assurance – Since the financial assurance requirement is intended to ensure ESCO compliance with the UBP, the Commission should receive the financial security, not the utilities.

H. Due Process – Only after an ESCO has been afforded requisite due process (including notice of the alleged wrongdoing and an opportunity to respond and cure the problem) and a subsequent Commission finding that wrongdoing occurred and that the ESCO failed to pay, should the Commission draw on the financial instrument.

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[3] Id. at 6-7.