NAESCO National Association of Energy Service Companies

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May 29, 2012

U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue SW.,
Room 6A245
Washington, DC 20585

Re: Regulatory Burden RFI

Dear Sir or Madam:

The National Association of Energy Service Companies (NAESCO) appreciates the opportunity to submit these comments in response to the Request for Information (RFI) entitled, "Reducing Regulatory Burden," published in the *Federal Register* on May 15, 2012.

NAESCO Background

NAESCO is a national trade association whose mission is to promote efficiency as the first priority in a portfolio of economic and environmentally sustainable energy resources and to encourage customers and public officials to think energy efficiency first when they are making energy resource procurement or energy policy choices.

NAESCO numbers among its members some of the world's leading energy services companies, including: AECOM Energy, Aireko Energy Solutions, Ameresco, Burns & McDonnell, CM3 Building Solutions, Chevron Energy Solutions, Clark Energy Group, Clear Energy Contracting, Climatec, CM3 Building Solutions, Comfort Systems USA Energy Services, ConEdison *Solutions*, Constellation New Energy, Control Technologies and Solutions, Eaton Corporation, Energy Solutions Professionals, Energy Systems Group, Excel Energy, Next Era Energy Services, Green Campus Partners, Honeywell, Johnson Controls, M360, McClure Energy, Navitas, NORESCO, NXEGEN, Onsite Energy, Pepco Energy Services, Schneider Electric, Siemens Industry, Synergy Companies, Trane, UCONS, Wendel Energy Services, Willdan Energy Services, and Wipro. Its members also include many of the largest utilities in the United States: Duke Energy, the New York Power Authority, Pacific Gas & Electric, and Southern California Edison.

During the last twenty years, NAESCO member companies have delivered thousands of Guaranteed Energy Savings Projects across the US as well as across the globe. NAESCO member projects have produced:

- $40B in projects paid from savings

- $50B in savings – guaranteed and verified
- 380,000 person-years of direct employment
- $25 billion of infrastructure improvements in public facilities
- 420 million tons of CO_2 savings at no additional cost

NAESCO member companies have delivered virtually all of the projects in the federal Energy Savings Performance Contract (ESPC) program. Several NAESCO member companies that are qualified as Super ESCOs in the federal ESPC program are also members of the Federal Performance Contracting Coalition (FPCC), an organization that works exclusively on the federal ESPC program. FPCC is also submitting comments in response to this RFI. NAESCO intends its comments to be complementary to those submitted by the FPCC.

Subject of NAESCO Comments

NAESCO's comments are offered in response to Question 7 in the RFI,

> *"(7) Are there regulations, reporting requirements, or regulatory processes that are unnecessarily complicated or could be streamlined to achieve regulatory objectives in more efficient ways?"*

Summary of NAESCO Comments

NAESCO believes that the Department of Energy (DOE) often makes regulatory processes unnecessarily complicated by appearing to make rules in isolation from, and sometimes in conflict with, activities and programs that the DOE currently has underway that are designed to accomplish the purpose of the new regulation being proposed. We offer as an example of the problem of competing policies the current rulemaking at the DOE for the enforcement of Section 433 of the Energy Independence and Security Act of 2007 (Section 433). Section 433 mandates that in new buildings or buildings undergoing major renovations of at least $2.5 million, fossil fuels' use is to be reduced against the baseline of a similar building's use in FY 2003 as per the following schedule: 55 percent beginning in fiscal year 2010, 65 percent beginning in fiscal year 2015, 80 percent beginning in fiscal year 2020, 90 percent beginning in fiscal year 2025, and 100 percent beginning in fiscal year 2030 (42 U.S.C. 6834(a)(3)(D)(i)(I)).

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NAESCO supports the goals of EISA 2007 Section 433, and we commend the DOE for issuing the proposed rule. We believe that the proposed rule could, however, be substantially improved by addressing the ongoing efforts of the DOE to pioneer a process for actually accomplishing the goals of Section 433, and by addressing the failure of federal agencies to take the first step toward accomplishing the goals of Section 433. Thee improvements would remove complications that will hinder the accomplishment of the regulatory objectives of the rule.

Discussion

In a 2009, GAO report entitled "Agencies Are Taking Steps to Meet High-Performance Federal Building Requirements, but Face Challenges" EPA, GSA, DOD. and DOE management are quoted as stated that meeting the long-term requirements of this provision would be very challenging and impractical and would require significant capital investments and technological advancements by 2030. (at p.28-29) The report raises the specter that energy efficiency may not be sufficient to meet the high intensity energy goals and that renewable energy generation will be needed. DOE, in recognition of the challenges in meeting the Section 433 goals, has already embarked on a program to pioneer the process for developing and implementing Section 433 of EISA, a fact that is not recognized in the proposed rule. This process is under development by the DOE (specifically the Federal Energy Management Program or FEMP) in conjunction with the Army and the General Services Administration (GSA). The development of the process is in its early stages and appears to involve a sequence of steps that must be taken in order to deliver the Section 433 goals. These steps are:

- Minimizing the thermal load and maximizing the potential for day-lighting of a building with super-insulation and advanced air sealing techniques as well as the replacement of doors and windows;
- Replacing the lighting, heating, cooling and other energy-using systems in the building with the most efficient equipment available, as determined by life cycle cost analyses;
- Developing an advanced information infrastructure, which includes building metering and control systems that are integrated with micro-grids that control a government campus or army base and/or a discrete section of the utility distribution system;
- Utilizing district energy and/or CHP systems fueled with natural gas or renewables to meet the reduced needs of the buildings and further reduce energy use; and,
- Supplying the remaining energy needs of the buildings with Renewable Energy.

A simple way to think about the requirement that the steps be taken in order is that the JFK Building in downtown Boston cannot afford to substitute electricity from the Cape Wind project at $.20/kWh for its current (primarily gas) $.07/kWh electricity unless either the GSA is able to lower the building energy use by two thirds or the Congress triples the building's utility budget.

These steps, according to experts in the government, in the ESCO industry, and in outside think tanks (*e.g.*, Amory Lovin's Rocky Mountain Institute) are technically feasible, but are not being implemented in existing buildings today, primarily because they require resources that have not been available to date in federal energy efficiency or ESPC projects, including:

- Virtually unprecedented levels of building re-design that incorporate a thorough re-examination of the use of a building (e.g., space consolidation) with advanced building energy modeling techniques that are not in widespread commercial use;

- Recognition by the government of all of the savings produced by a retrofit project, including energy savings, operations and maintenance savings, savings from space consolidation, avoided capital costs (e.g., purchasing a smaller heating or cooling system to serve a reduced thermal load), savings from increased tenant productivity and lower absenteeism, etc.
- Capital appropriations that cover the differential between the project cost that can be financed through the allowable maximum term of an ESPC and the expected life of the improvements and that monetize the project benefits that do not produce immediate cash savings, such as improvements in building occupant productivity.
- Willingness of the government to share the technical and business risks of at least the initial round of projects designed to meet goals of Section 433.

All of the parties that are participating in this effort – the ESCOs, FEMP, GSA and the Army – recognize that it may take several years to develop and test this new process and to educate government contracting officers about the new elements in the process, including building modeling, savings estimation and verification, new contract provisions and financing methods. The failure of the proposed rule to address this development effort and to direct federal agencies to support, or, at least observe the effort, will make the accomplishment of the regulatory objectives much more difficult as each federal agency tries on its own to figure out how to meet the regulatory objectives.

In the meantime, the President has announced an ambitious acceleration of the federal ESPC program: implementing $2 billion of projects in 2012-2013. Between the period of 1998 - 2012, 272 energy savings performance contracts have been awarded under the DOE IDIQ energy performance contracting program resulting in a $2.55 billion investment that generated $6.87 billion in cumulative energy savings for federal facilities. Essentially, the President has challenged federal agencies to up the project development and implementation tempo to do in two years what was accomplished over more than a decade.

In the absence of the proposed rule addressing directly how this $2 billion initiative can support the accomplishment of the goals of Section 433, NAESCO believes that federal contracting officers may well try to limit the investment size of ESPC projects to less than the $2.5 million threshold under Section 433. Instead, NAESCO believes that the regulation would be more effective if it instructed federal agencies that the first step toward accomplishing the Section 433 goals is to maximize the energy savings from ESPC projects, rather than engage in the relatively common practice in which many federal agencies "de-scope projects or cut from the ESPC projects many of the longer term and more ambitious measures like the inclusion of renewable energy technologies that are required to meet the overall savings goals.

The widespread practice of "de-scoping" is often justified by facility contracting officers as resulting in shorter payback periods, which they deem to be desirable because it reduces the overall financing costs of an ESPC. De-scoping, however, is directly counter to the primary policy objective behind the establishment of the ESPC program, which is the achievement of the maximum amount of energy and dollar savings at federal facilities. Moreover, the

maximum contracting terms permitted in the authorizing legislation is 25 years so the push for shorter paybacks is not policy but preference of individual contracting officers whose well meaning "informal practices" undermine the successful achievement of the legislative mandate of Section 433 and the regulatory objective of fulfilling that mandate.

Conclusion

NAESCO appreciates the opportunity to submit these comments and urges the DOE to revise its process for developing regulations to ensure that proposed or final rules are not written in isolation, but take advantage of the work that the DOE and other federal agencies have underway to accomplish the goals of the regulation.

Respectfully submitted by,

Donald Gilligan
President