

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Case 14-M-0224 – Proceeding on Motion of the Commission to Enable
Community Choice Aggregation Programs.**

**COMMENTS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION**

I. PRELIMINARY STATEMENT

The Retail Energy Supply Association (RESA)¹ submits these comments in response to the questions identified in the “*Order Instituting Proceeding and Soliciting Comments*” issued on December 15, 2014 and pertaining to the use Community Choice Aggregation (“CCA”) in New York.²

II. RESA RESPONSE TO QUESTIONS

The following specific responses are provided to the questions posed by the Commission in the Order.

1. Should non-residential customers who are not served by ESCOs be included in CCA programs on an opt-out basis? If not, should they be included on an opt-in basis? Should any inclusion of small non-residential customers be based on the UBP definition of that phrase, or should

¹RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Dynegy Energy Services; GDF SUEZ Energy Resources NA, Inc.; IDT Energy, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; Nordic Energy Services, LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² Case 14-M-0224 - *Order Instituting Proceeding And Soliciting Comments* (and accompanying Staff White Paper), issued on December 15, 2014 (“Order”),

municipalities be able to include a differently-defined group of non-residential customers in CCA?

Response:

- At this time the CCA programs should only include residential customers.
- In the event Small non-residential customers are included, it should only be allowed on an opt-in basis, and the customer class would follow the UBP definition of small non-residential. .

The defining of Small Non-residential Customers (“SNR”) remains a vexing and amorphous task which the Commission has yet to resolve.³ Based upon LDC service classifications, the concern arises that potential definitions of SNR ensnares within its ambit large commercial customers throughout the State and may lead to the incongruous result of incorporating larger commercial gas and large-scale electric customers who cannot be viewed as falling into the small commercial class. The Commission has previously noted that “competitive retail energy markets are functioning well for large commercial and industrial customers, including providing these customers with a wide range of energy-related value-added services.”⁴

In addition, commercial customers on a daily basis review and analyze offers from vendors (including ESCOs) for the provision of goods and services. In addition, small business owners must assess and manage the costs of all their business inputs and costs, including energy. Therefore, commercial customers, even those of a smaller size, are capable of making individual affirmative energy purchasing decisions.

For these reasons, at this time CCA is properly limited to residential customers. In the event small non-residential customers are allowed to participate in CCA, such

³ 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, et al., *Order Granting Requests For Rehearing And Issuing A Stay*, issued April 25, 2014, pp. 5-6.

⁴ 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, et. al., *Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets*, issued February 25, 2014 Order, p. 2.

participation should only be allowed on an opt-in basis and follow the UBP definition of small non-residential customer.

2. Should customers already served by an ESCO be included in CCA programs? If so, how can they best be offered that opportunity? Some customers may be month-to-month under contracts with no termination fee or their contracts may be about to expire, and find the CCA contract offered attractive. Others may be willing to pay the early termination fee to obtain CCA benefits. What are the benefits and costs of allowing program participation of customers served by ESCOs?

Response:

- Customers served by ESCO should not be included in CCA.
- The data submitted to the Aggregator would exclude ESCO customers.
- All current ESCO customers should be scrubbed from any CCA mailing list.

The use of CCA as described in the Staff White Paper represents a potential tool to provide customers with an additional option to purchase commodity service. Nonetheless, there already exists with New York a strong retail access market that is responsible for the migration of millions of customers to retail access.⁵ This successful development arose through the dedication of significant resources and effort by ESCOs providing service to gas and electric customers throughout the State. ESCOs have entered into binding contracts with these customers consistent with the standards and procedures codified in the UBP, and have secured supply contracts to meet their contractual obligations to the customer. In addition, ESCOs have incurred significant marketing costs to inform consumers and obtain their affirmative choice to take service from an ESCO. In view of the existing binding contractual relationship between the ESCO and each of their customers, the Commission should direct that existing ESCO customers be excluded from CCA.

This approach is equitable and reasonable as it recognizes that customers make an affirmative decision to sign with an ESCO and ESCOs have in good faith undertaken

⁵ Migration data for electric and gas customers can be found on the PSC's web site at:
[http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/441d4686df065c5585257687006f396d/\\$FILE/Electric%20Migration_6.2014.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/441d4686df065c5585257687006f396d/$FILE/Electric%20Migration_6.2014.pdf);
[http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/4759ecee7586f24b85257687006f396e/\\$FILE/Gas%20Migration%20Report%204.12.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/4759ecee7586f24b85257687006f396e/$FILE/Gas%20Migration%20Report%204.12.pdf)

the obligation to serve these customers. Further, inclusion of such customers in CCA raises serious legal concerns as essentially the CCA would be used to vitiate the existing contractual relationship existing between the customer and the ESCO and thereby constitute an impermissible impairment of a private contract.⁶

3. Should customers who participate in a low-income energy assistance program administered by a utility or receive Home Energy Assistance Program (HEAP) benefits be included in CCA on an opt-out basis? If not, should they be included on an opt-in basis?

Response:

- Low income customers should be allowed to participate consistent with the eligibility of residential customers and the application of the various UBP requirements applicable to low income customers.

4. What provisions, if any, should be made to allow customers who move into the region served by a CCA after it has commenced, to participate in the CCA? Similarly, what provisions should be made to allow customers who are served by an ESCO at the time the CCA has commenced, to participate in the CCA at a later time, or to allow customers who initially opted out to later opt in?

Response: RESA chooses not to respond to this question.

5. Should the program include a requirement that the primary price contained in a CCA contract begin below a certain benchmark? What are the benefits and costs of such a requirement? If so, what benchmark is appropriate? For example, New Jersey sets a benchmark based on the distribution utility supply rate.

Response:

- This should be left to negotiations between the Municipality and the ESCOs.

In view of the unique and differing goals sought to be achieved by individual communities that may choose a CCA approach, it would reasonable for the terms applicable to pricing and the use a benchmark be left to the negotiations between the municipality and the participating bidders.

⁶ See, U. S. Constitution, Article I, Section 10, Clause 1.

6. *Should the Commission require that CCA contracts contain a fixed price for at least a certain minimum period? A fixed price for their entire term? If prices are permitted to vary during the contract period, should any benchmark apply to these prices? What are the benefits and costs of such requirements?*

Response:

- This should be left to negotiations between the municipality and the ESCOs.

In view of the unique and differing goals sought to be achieved by individual communities that may choose a CCA approach, it would reasonable for the use of fixed or variable pricing and applicable periods be left to the negotiations between the municipality and the participating bidders.

7. *Is twenty days an adequate period within which a customer can opt out to avoid automatic enrollment in CCA? If not, what is an adequate opt-out period? Are the opt-out provisions described above appropriate and sufficient? If not, what specific additional requirements are appropriate? Is one notification sufficient or should multiple notifications be required?*

Response:

- At this time, the exact terms, parameters and conditions applicable to any particular CCA program are largely unknown. Issues relating to enrollment periods, eligible customers and many others are yet to be determined. With this limitation stated, the use of a 20 day opt out period appears reasonable.

8. *Should the Commission permit the presence in CCA contracts of cancellation fees for customers who do not opt out during the opt-out period and later wish to leave the CCA program? If so, should these cancellation fees be subject to any additional requirements beyond the generally applicable rules, including the General Business Law? For example, customers might be permitted to leave CCA programs without charge for a certain period of time after the program starts or during a certain period each year. What are the benefits and costs of requirements of this nature?*

Response:

- There should be no cancellation fees for customers who do not opt out during the opt-out period and later wish to leave the CCA program.

The CCA model envisioned in the Staff White Paper has as its central feature the use of an opt-out procedure by which a customer does not make an affirmative choice to participate in CCA but merely is included unless an opt out procedure is exercised. This process under the UBP is not available if a customer takes service directly from an ESCO or the LDC.⁷ In view of the lack of sophistication and knowledge of mass market customers, their full understanding and immersion in the CCA process in New York remains unknown. In view of these considerations customers should not face obstacles if they decide to opt out from the CCA program at any time. Consequently, CCA contracts should not contain any cancellation fees for customers who do not opt out during the opt-out period and later wish to leave the CCA program

9. Should municipalities be required to allocate a portion of the CCA customer payments to a clean energy or public benefit fund? For what purposes should municipalities be permitted to use these funds? Examples from other states or proposed programs include municipal-owned renewable generation, as well as energy efficiency projects.

Response:

- This should be left to negotiations between the municipality and the ESCOs.

In view of the unique and differing goals sought to be achieved by individual communities that may choose a CCA approach, it would reasonable for the terms applicable to clean energy or public benefit funds be left to the negotiations between the municipality and the participating bidders.

10. Is ten days an adequate period in which a distribution utility must transfer initial, aggregated customer data to municipalities after a request has been submitted by a municipality that has adopted a program? Is five days an adequate period in which a distribution utility should transfer customer data to municipalities to support the mailing of opt-out notices after a request has been submitted by a municipality that has entered into a CCA contract? What data should each transfer include?

Response:

- At this time, the exact terms, parameters and conditions applicable to any particular CCA program are largely unknown. Issues relating to enrollment periods, eligible customers and many others are yet to be determined. With this limitation stated, the use of a 10 day period appears reasonable.
- The data provided by the LDC should at a minimum include the following:

⁷ See, UBP, Section 5; General Business Law, Section 349-d.

The number of residents by class served, that do not receive electric and/or gas supply from an ESCO or the Power Authority of the State of New York;

The aggregate gas and electric usage of residents, by class served, for the 12-month period preceding the request; the system peak hour or hours that determines capacity buying requirements, and to the degree that it is available the aggregated load factor by class served for the 12-month period preceding the request;

The average monthly per kilowatt-hour (kWh) and per British thermal unit (Btu) supply rates by class served charged by the distribution utility for the previous 12 months;

Information about the availability of interval meter data and the install of distributed generation

11. Should municipalities receiving personally identifiable information be required to abide by the same policies for protecting and use of that information that are currently applicable to utilities and ESCOs? If not, why not?

Response:

- The UBP (Section 4) applicable to ESCOs and regulations applicable to the LDC contain reasonable and prudent standards governing the protection and privacy of customer data. The same standards should be made applicable to each municipality receiving personally identifiable customer information.

12. Should municipalities considering CCA be required to conduct public forums or other public engagement at certain points during the process of establishing a CCA program?

Response:

The CCA approach presents a new medium to capture customer engagement. In this environment, it is important that customers be informed of the elements associated with CCA including the specific terms and conditions, and of any potential risks and benefits. Accordingly, reasonable customer education would entail advising customers of all available options, including a retail access purchase from an ESCO, public disclosure in a timely and clear manner of the terms and conditions of the CCA offer, and opportunity for customers to comment on any CCA proposal or program.

In addition, a municipality seeking opt-out community aggregation should have to receive and obtain all required approvals. Opt-out letters should also be filed at the

Commission. Also, the Commission should establish a certification process for communities that wish to participate in community aggregation

13. Should municipalities be required or requested to provide to Staff for approval or review copies of communications that would be distributed to customers regarding the CCA program and the contract selected, in addition to Staff's continued review of ESCO communications to customers?

Response:

- The PSC should conduct the same level of review for CCA as it currently applies to ESCOs.

As noted in our Response to Question No. 8, the use of opt-out aggregation represents a departure from established customer enrollment protections and procedures. It therefore is especially important for the Commission to ensure that copies of communications that would be distributed to customers regarding the CCA program and the contract selected are consistent with the standards codified in the UBP. Accordingly, all such documents and communication should be subject to prior review and approval by Staff consistent with the process applied to ESCOs.

14. Are any revisions to the Uniform Business Practices other than those described above necessary or helpful for CCA?

Response:

- At this time, the exact terms, parameters and conditions applicable to any particular CCA program are largely unknown; therefore, the Commission should ensure that all provisions of the UBP applicable to a particular CCA are carefully vetted to reflect the CCA program.
- Further, except for the limited exception for the use of the opt-out process, the Commission must apply all UBP provisions in a non-discriminatory manner to CCA as it does to ESCOs.

15. Should any specific modifications be made to the structure of CCA, as described above, that are not covered by the above questions?

Response:

- There should be no limitations placed on ESCOs marketing in a CCA area
- A municipality sponsoring CCA should not restrict ESCO marketing.

There already exists with New York a strong retail access market that is responsible for the migration of millions of customers to retail access. This existing affirmative choice market must be allowed to operate in concert with and not be hampered by any CCA program. Customers need to be provided with panoply of choices. Consequently, ESCOs should be allowed to market in an unrestricted manner in areas where CCA is implemented, and no CCA program should, in any way, be authorized or allowed to restrict or encumber ESCO marketing activities.

16. Are there any reasons CCA programs should not be adopted, including issues with opt-out aggregation generally, not covered by the above questions?

Response: RESA chooses not to respond to this question.

17. Are there any reasons supporting implementation of CCA, including descriptions of positive experiences in other states, not covered by the above questions?

Response: RESA chooses not to respond to this question.

18. Are there matters, including concerns regarding policy and legal issues, not fully addressed in the above questions? If so, please provide comments on those matters.

Response:

- The goal is still to move customers to affirmatively choose to take service from competitive vendors
- The Commission should continue to implement measures to ensure that the utility commodity rates are reflective of current costs
- The Commission should continue to support and improve the existing retail access structure and the ESCO community.

The focus in this proceeding and all retail access matters needs to remain on encouraging customers to migrate from LDC service to commodity service provided by competitive ESCOs. This was the original goal of retail access and it remains equally valid today.

It is important for the Commission to address in any meaningful manner the lack of transparency and relevance of utility commodity pricing.

The goal of pricing transparency and presenting the customer with a clear picture of the impact of taking ESCO service as compared to utility service becomes muddled and incoherent if the utility charges do not reflect current costs and are cloaked in veils of mystery.

Utility commodity rates vary each month and often reflect one-time and out of period charges. They also incorporate both monthly and annual adjustments to true-up the recovery of related commodity costs that were under/over recovered in the previous month or calendar year, and from time to time will be adjusted to reflect recovery of refunds. Given the inevitable lag of the adjustments, the utility rates become a perpetual snapshot reporting of applicable utility charges, and it is likely that customers will only look at the current charges and overlook subsequent adjustments to previously published rates.⁸

Additionally, the monthly utility rate itself is often a mixture of partial energy hedges, hourly index allocations, ancillary, capacity cost pass-throughs, and out of period cost reconciliations, all combined into one monthly rate value. Thus, utility rates are riddled with complex variables and with numerous out of period adjustments which make them difficult to reconstruct and nearly impossible to predict on a going-forward basis. This renders them ill-suited to provide an accurate comparison to either a vendor or the customer.

In view of the foregoing, it is imperative that the Commission in an expeditious manner examine and address the accuracy and relevance of utility commodity rates. This is a matter of vital importance to ensure that consumers are indeed provided with clear pricing transparency of ESCO and utility rates. While RESA understands that the Commission has opened this docket in order to consider the possible use of CCA as a

⁸ For example, NYSEG's electric rates are adjusted on a 3-month lag and Niagara Mohawk's on a 2-month lag.

mechanism to increase customer engagement, we believe that the current complexity and opacity of utility rates is a material barrier to customer engagement that hinders a customer's ability to effectively weigh his or her options regardless of whether a CCA program is one of those options, and we encourage the Commission to address this barrier as quickly as possible.

As the Commission is aware there exists a robust retail access market in New York that has brought competitive choice to migration of millions of customers. To support this market ESCOs have dedicated significant resources and have significantly contributed to the economic development in the State. It is therefore vitally important for the Commission should continue to support the existing retail access structure and the ESCO community.

III. CONCLUSION

RESA appreciates the opportunity to submit these comments and assist the Commission in its efforts to enhance and improve the competitive retail market

Respectfully submitted,

Retail Energy Supply Association

By: Christopher Wentlent, NY Chair
RESA NY Chair

Dated: February 17, 2015