STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 15–M-0127 – In the Matter of Eligibility Criteria for Energy Services Companies

Case 98-M-1343 – In the Matter of Retail Access Business Rules

COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

The Retail Energy Supply Association (RESA)[1] submits these comments in accordance with the *Notice Seeking Comments on Proposed Changes to the Uniform Business Practices* issued in this proceeding on July 28, 2105.

II. PRELIMINARY STATEMENT

On July 28, 2015, the Department of Public Service Staff (Staff) submitted a *Staff Proposal* containing proposed amendments to the Uniform Business Practices (UBP) applicable to the requirements that energy service companies (ESCOs) must satisfy when providing services in New York.[2] RESA supports efforts to improve the efficient operation and integrity of the retail energy market. RESA fully shares the Commission's concerns with ensuring that retail marketing

[1]The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] Case 15–M-0127 – In the Matter of Eligibility Criteria for Energy Services Companies, *Staff Proposal* dated July 28, 2015 (hereafter cited as "SP, p. ___)

activity and practices are conducted in accordance with all applicable standards and that customers are fully informed of the specific offers made by each ESCO and the relevant terms and conditions. These comments are intended to aid the Commission in furthering these goals.

For ease of reference these comments follow the same order as the Staff Proposal.

III. Comments of RESA

The modifications to the UBP proposed by Staff need to be examined in the context of addressing a perceived need in the market without creating an undue interference with the efficient operation of the competitive retail market. As will be detailed below Staff, in our view, has drafted amendments that are generally reasonable in scope and intended to address a demonstrated concern or goal. To the extent a different approach is presented in these comments it does not express a fundamental disagreement but usually a matter of achieving the same results through a somewhat modified approach.

A. Industry Standards

Staff initially recommends that the Commission "move toward reliance on industry-developed eligibility requirements"[3] and indicates it would lead a "collaborative" with the industry to develop a Code of Conduct. In the interim, Staff recommends reliance upon and adoption of the proposed changes to the UBP.

The implementation of the contemplated Collaborative can be a useful tool to integrate industry knowledge with regulatory oversight. In this context it is worth noting that at the request of RESA an ongoing meeting and collaborative process was previously instituted with the cooperation and involvement of Staff. This was a very useful process that helped all parties to be aware of concerns and issues associated with the retail energy market. This can serve as a model for the

[3] SP, p. 3.

development of a Code of Conduct. It would be more efficient to commence the Collaborative prior to the issuance of an order by the Commission in this proceeding. The setting of effective standards of conduct should move ahead at an expeditious pace and build upon the activity and ideas developed to date. There does not appear any persuasive reason to delay such activity.

Staff should however be mindful that no organization has the authority or resources to monitor and enforce any standards that are adopted. For the foreseeable future that will remain the province of the Commission.

B. Application Requirements

To assist Staff in its review of applications for authority to operate as an ESCO, Staff recommends additional application requirements, including: disclosure of decisions or investigations in other states that affect its ability to operate; identification of methods by which the applicant intends to market to customers in New York; and the number of complaints on file with public utility commissions in other states.[4]

RESA generally concurs with these recommendations, but offers the following suggestions. Section 2.B.1.h. of the Staff proposal would require applicants to "identify all methods by which Applicant intends to market to customers." This appears too broad and it is recommended that the requirement be revised to state such that applicants would "describe the Applicant's primary methods of marketing to customers." ESCOs may employ many different marketing approaches ranging from direct mail, to online banner advertising, to partnerships with affinity groups and charitable organizations. It may be difficult for an ESCO to identify every possible marketing channel at the time of licensure. It is more reasonable to require the ESCO to generally describe its intended marketing efforts and, as required by Section 2.B.1.i., to specifically identify whether it will engage in telemarketing or door to door marketing.

[44] SP, p. 4

There is also concern with the proposed Section 2.B.1.t which requires disclosure of "any decisions of final regulatory actions in other states that affect the ESCO's ability to operate…" There is no objection to a requirement to disclose adverse regulatory rulings such as license revocation of suspension. However, the requirement to disclose regulatory actions that "affect the ESCO's ability to operate" is overly broad. Any regulatory decision imposing generally applicable rules, such as revised consumer protections or new compliance requirements would affect an ESCO's ability to operate. Instead, the disclosure requirement should be limited to identification of specific adverse regulatory rulings, such as findings of consumer protection violations, license revocation or suspension or other findings of misconduct by the Applicant. Similarly, Section 2.B.1.u, requires disclosure of any current investigations by regulatory agencies. It is recommended that this provision be limited to any current investigations "of the Applicant", rather than general investigations.

C. Required Expertise

It is proposed that an ESCO in its application demonstrate at least 3 years' experience in customer service and risk management. This recommendation is reasonable; however, the use of a 3 year requirement is arbitrary and may be too cumbersome. Instead Staff should consider allowing for a 1-2 year experience background. Additionally for risk management, the recommendation allows for the use of "contractor"[5], but the use of a "contractor" is not included for customer service.[6] This omission should be corrected and customer service experience should also be allowed to be met by use of a contractor.

[5] UBP Section 2.B.1.q.
[6] UBP Section 2.B.1. p

D. Application Fee

Staff proposes that utilities consider implementation of various fees for services they provide to ESCOs.[7] This proposal is troubling and warrants further review.

ESCOs already incur considerable expense through the application of billing service charges applied to all ESCOs that use utility consolidated billing. This covers all services associated with the issuance of a bill to the customer including access to the face of the bill. Thus ESCOs are already providing a considerable level of market based revenues to each utility.

In addition, the activities associated with the utility application process or even EDI --- which are already in place—are not of a large magnitude or of sufficient complexity to support any material level of fees.

The proposed Section 2.B.1.a, requires the applicant to submit "proof of payment" for utility charges. However, in New York, the ESCO first submits an application to Staff and after Staff approval is granted the ESCO then files with the utility. Therefore at the time of the submittal of the application to Staff, the ESCO would not have paid any utility fees.

Further proposed Section 2.B.1.w, requires the ESCO to disclose "any security breaches". This should be modified to read "any **known** security breaches." An ESCO should not be held liable where there no knowledge of a security breach.

E. Denial of Application

Staff proposes modifying the UBP to allow Staff to recommend that the Commission deny an entity's application, with good cause shown, such as decisions or regulatory action in other jurisdictions.[8] The process outlined by Staff, however, does not identify the specific

[7] SP, p. 5.
[8] SP, p. 6.

standards by which denial of an application will be determined. The proposed UBP[9] merely states that Staff will notify the applicant of the "reasons" for the denial. It is important for Staff to identify what standards will govern the review of an application and the basis for denial.

F. Process for Existing ESCOs

The adoption of the new standards will require existing ESCOs to provide additional information to Staff as part of their eligibility maintenance process. It is recommended both for efficiency and practical reasons that an existing ESCO would provide the additional eligibility information finally adopted by the Commission as part of their standard annual Retail Access Application update to the Commission that must be made by January 31 of each year. In this manner ESCOs would be able to utilize an existing filing structure that would allow for all application updates to be made to one source and at the same time.

G. Inactive ESCOS /Two-Year Eligibility Period

Staff proposes that ESCOs automatically lose their eligibility to operate if they do not begin serving customers within a two-year period. RESA would recommend that ESCOs be permitted to file explanatory notices as to why their license should be maintained. There are various reasons why an ESCO may desire to maintain its ESCO eligibility even if it is not actively marketing customers. For example, an ESCO may operate a separate brand that is not yet ready to begin operations in New York, but operates in other states. Rather than an automatic loss of eligibility after two years of inactivity, ESCOs should be allowed to keep their eligibility open as long as the ESCO updates the Commission as to its status and complies with the reporting requirements.

[9] UBP Section 2.C.2.a

H. Standardized Definition of "Fixed Price" and "Green Energy"

For the first time Staff proposes use of a standard definition for both Fixed Price and Green Energy. There are serious concerns with these proposals.

Fixed Price

In the UBP, Staff proposes that 'Fixed Price" be defined as "an all-inclusive price that will remain the same for the term of the contract," and limits use of that term to products strictly conforming to that definition.[10] As drafted, an ESCO would not be able to offer a product labelled as fixed price which even with proper notice allowed for a price modification during the effective term for certain prescribed and common reasons. This is too restrictive and at odds with common industry standards and practices.

To support a fixed price commodity product an ESCO will under common accepted practice acquire various hedges to ensure that the financial commitment can be met. A key element in this hedging process is to assess the volumes for which hedges will be acquired. Usually the ESCO will rely upon the customer's prior annual usage experience as the base upon which to acquire the requisite hedges. No ESCO or commodity trader will acquire hedges for an unlimited amount of commodity as this could be infinite and will make the product cost prohibitive.[11] Consequently fixed price products offered by some suppliers may be limited to a certain predesignated level of usage based upon the customer's prior history. The Commission should not restrict or encumber this accepted practice; instead to ensure an informed consumer the appropriate disclosure should be made to the customer.

As the Commission is well aware the provision of commodity supply service is subject to prospective changes in legislation, orders, rules, regulations or decisions of a duly constituted

[10] SP, p. 6.
[11] Utilities engage in the same process when acquiring supplies for ratepayers.

governmental authority having jurisdiction over the activities and services to be provided by the ESCO. The ESCO has no control over these potential developments and will usually have no knowledge that they will occur at the time the agreement with the customer is finalized. These are events that are unrelated to price increases or supply developments; they are solely limited to regulatory or governmental actions occurring after the contract has been executed. The definition of a fixed price should allow for this contingency so long as appropriate disclosure is made by the ESCO.

The definition also fails to accommodate applicable taxes that are applied after the usage occurs. There is no reason why the ESCO should be precluded from collecting taxes applicable to a fixed price commodity product.

Additionally, the proposed definition would tie the fixed price to the *contract* term instead of the *fixed price* term. An ESCO may market a product where the price is fixed for an initial term, such as 12 months, but then may renew to a new fixed price or a month-to-month product. In such a scenario the term of the contract continues past the initial 12 month period, but the fixed price may change in accordance with the clearly disclosed terms. Accordingly, RESA would recommend modifying the definition to require that a fixed price remain the same for "the identified *fixed price* term of the contract."

Green Price

Staff proposes that 'Green Energy" be defined as "electricity from technologies identified by the Commission as RPS eligible," and limits use of that term to products conforming to that definition.[12] It also requires that entities claiming to sell "green energy" must define to the customer in advance, the specific energy source fuel types of the electricity to be provided that

[12] SP, p. 6.

are claimed to constitute the "green energy." This approach is also too restrictive and inconsistent with market standards.

First, it is illogical to limit green energy to a fixed list established by the Commission. There are green type products that may not be on the RPS list but still provide green value to the consumer. A perfect example is a Green-E certified product. The Green-E program is a commonly used and highly respected certification program for marketing green energy products. However, a wide range of renewable energy attributes can be used for Green-E, including RECs sourced from facilities that would not be NY RPS eligible. The proposed green product required would invalidate one of the most respected green energy certification programs in the U.S. Moreover, market developments may outpace the compilation of a governmentally approved RPS list.

Second, the definition does not include a Renewable Energy Credit ("REC") or carbon offsets as eligible to be described as green energy. This is unreasonable. It is a fairly common and accepted business practice to allow consumers to obtain the benefits of green energy through acquisition a RECs or Carbon Offsets. Both of these products ensure that the customer's purchase of commodity is suffused with the benefits of green energy.

Third, the ESCO often does not know in advance the specific energy source fuel types of the electricity that will be provided to the consumer over the term of the agreement. ESCOs often market green products based on a specific resource type or geographic designation, such as national wind, or regional wind, but not based on a specific generating facility. RECs are often used to back-up the green content requirements. RECs can be procured more efficiently in bulk, so it would be impractical for an ESCO to procure a small number or even a fraction of a REC prior to enrolling the green energy customer. Rather the ESCO would assess the volume for its

green product customers at certain points (quarterly or annually, for example) in time and then procure and retire the needed RECs. Changing circumstances may allow or preclude the ESCO from accessing certain supply sources. As long as a green product is being provided there is no need to require the ESCO to know up front what all the fuel sources will be in the future. The requirement should be for the ESCO to procure renewable energy content in a manner consistent with how the product was marketed to the customer, rather than to identify all fuel sources in advance.

I. Standard Contract

Staff initially recommends that ESCOs be required to use a standard contract for energy commodity service for residential customers, and proposes that the "combined residential sales agreement," attached as Appendix B to the Staff Proposal be used as that standard contract. Further, Staff recommends development through the institution of a collaborative of specific standardized contract language for energy commodity services on key contract provisions for non-residential customers.[13]

The mandated use of a fixed standard contract for residential customers is far too restrictive and inconsistent with the competitive nature of the market in which ESCOs must operate.

This recommendation overlooks that contracts are part of the competitive market and the competitive position of an ESCO. The contract is the medium by which each ESCO responds to fluid market conditions and fashions a competitive offer as incorporated in the contract that is presented to the potential customer. To now put all ESCOs in one contract straightjacket basically conflicts with the competitive nature of the retail market, and forces every ESCO to act

[13] SP, p. 9. RESA does not oppose a collaborative on issues related to non-residential customers.

the same and offer the exact same terms, conditions and products. This may make sense in a fully regulated monopoly market but it is inconsistent with a competitive retail energy market.

Further, it ignores the fluidity and dynamism of retail markets in which conditions are always changing and ESCOs through their customer agreements must react to these changes. It is illogical to issue an order stating that no matter what happens in the competitive marketplace, ESCOs can only use one prescribed contract form and are precluded from making any changes or amendments thereto. The Commission wants ESCOs to innovate and expand their panoply of offerings and products to provide greater value to consumers. ESCOs share this goal and have and continue to innovate and expand the opportunities available to consumers. However, it is highly inconsistent to then prescriptively require all ESCOS to use only one standardized contract form.

The professed goals of transparency and clarity can be addressed without resorting to the extreme measure of imposing one standard contract on all ESCOs. A more measured solution which can build on the existing UBP structure is to adopt a standardized approach to the Customer Disclosure Statement ("CDS") that is required to be included on the first page of each contract.[14] The CDS provides clear placement of key terms governing the relationship between the ESCO and the customer, and the terms described by the text in the CDS constitutes the agreement with the customer notwithstanding a conflicting term expressed elsewhere in the agreement.[15] Set forth below is a proposed illustrative standard CDS that includes all the terms required for inclusion under the UBP. This is provided as in illustrative example. Any effort to adopt a standard CDS should be the product of a collaborative stakeholder process.

[14] UBP Section 5.A.4.b and UBP Section 5, Attachment 4.
[15] *Id.*

ILLUSTRATIVE RESIDENTIAL CUSTOMER DISCLOSURE STATEMENT

PRODUCT CHOSEN BY CUSTOMER

_____ Gas Variable Rate _____ Gas Fixed Rate _____ Other
_____Electric Variable Rate _____Electric Fixed Rate _____ Other

HOW PRICE IS DETERMINED

Gas Fixed Price _____ per Therm
Gas Variable Price shall reflect each month the ESCO's wholesale cost of natural gas (including commodity, capacity, storage and balancing), transportation to the Delivery Point, and other market-related factors, plus all applicable taxes, fees, charges or other assessments and ESCO's costs, expenses and margins.
Electric Fixed Price _____per/kWh
Electric Variable Price shall each month reflect the ESCO's cost of electricity obtained from all sources (including energy, capacity, settlement, ancillaries), related transmission and distribution charges and other market-related factors, plus all applicable taxes, fees, charges or other assessments and ESCO's costs, expenses and margins.
Electric Cap Price shall provide that the per kWh rate for the monthly billing cycle shall not exceed _____per kWh.
All Prices may be modified due to a subsequent change in a law, rule, regulation, tariff or regulatory structure.
The applicable taxes will be added to all the prices herein

LENGTH OF THE AGREEMENT AND END DATE

The Term shall be: [Check One]

- **30 days from the first meter reading after the enrollment is deemed effective by the LDC; or**
- **_____ months from the first meter reading after the enrollment is deemed effective by the LDC. For more details. See Section 2-Term.**

PROCESS CUSTOMER MAY USE TO RESCIND THE AGREEMENT WITHOUT PENALTY

A residential Customer may rescind by calling the toll free number within 3 business days of receipt of the sales agreement.

AMOUNT OF EARLY TERMINATION FEE ("ETF") AND METHOD OF CALCULATION
No early termination fee for any rate with a Term of 30 days. For all Rates with a Term in excess of 30 days the ETF will be no greater than $100 if the remaining term is less than 12 months and $200 if the remaining term is 12 months or more.

LATE PAYMENT FEE
1.5% per month on overdue balances

PROVISIONS FOR RENEWAL OF THE AGREEMENT
After Initial Term, unless otherwise agreed to in accordance with DPS rules, renews on a month to month basis at a variable rate methodology until terminated by either party.

As is easily discerned, standardization of the CDS ensures that all residential customers are consistently and properly apprised of the key elements governing their relationship with the ESCO. Consequently, there is no need to resort to a standard contract governing all terms and conditions of the contractual relationship.

The efficacy of the CDS can be augmented by requiring the application of a standard contract provision dealing with "Consumer Protections" which is an area where Staff in the past has required ESCOs to clearly spell out in the terms and conditions of the contract how this

subject would be addressed. Set forth below is a proposed illustrative contract provision dealing with this matter.

ILLUSTRATIVE CONTRACT TERM

Consumer Protections. ***The services provided by ESCO to Customer are governed by the terms and conditions of this Agreement and HEFPA for residential customers. ESCO will provide at least 15 days' notice prior to the cancellation of service to Customer. In the event of non-payment of any charges owed to ESCO, a residential Customer may be subject to termination of commodity service and the suspension of distribution service under procedures approved by the DPS. Customer may obtain additional information by contacting ESCO at 1.8XX.XXX.XXXX or the DPS at 1-800-342-3377, or by writing to the DPS at: New York State Department of Public Service, Office of Consumer Services, Three Empire State Plaza, Albany, New York 12223, or through its website at: http://www.dps.state.ny.us. You may also contact the Department for inquiries regarding the competitive retail energy market at 1.888.697.7728.***

In summary, the Commission should not mandate that all ESCOs adhere to a single standardized contract. This is an extreme recommendation that is antithetical to the development and maintenance of a competitive market. In the alternative, the Commission should, to extent it determines that some level of standardization is to be employed, adopt the more reasonable approach suggested here which entails use of a standardized CDS combined with set contract provision governing "Consumer Protections".

J. Material Level of Complaints

Staff proposes to detail the Commission's authority to impose consequences on ESCOs which have a material pattern of consumer complaints regarding matters under the ESCO's control, such as marketing practices.[16]

[16] SP, p.8

RESA generally concurs with this recommendation. There are however certain additional factors that need to be considered.

The proposed UBP changes do not specify or detail what is meant by a "material" pattern of customer complaints. Thus, ESCOs have no idea what standard will be applied in the event this provision is invoked. By way of an example, if an ESCO institutes a large scale marketing campaign that reaches 10,000 customers over 3 months and Staff receives 15 complaints each month. Would this constitute a "material" pattern of complaints?

The proposal also does not clearly indicate whether invocation of the corrective action will be based simply on complaints or whether it would only be invoked where there is a "material" pattern of "valid" complaints. It is reasonable to expect that ESCOs should only be subject to the identified corrective remedies where the complaints filed by customers are in fact valid and the ESCO did not meet its UBP obligations.

K. Cure Period

Staff proposes to modify the UBP to forego the notice and cure period process in situations where an ESCO has multiple UBP violations within a specified time period and in situations where the ESCO has committed certain egregious acts specified in the proposed UBP.[17]

This is generally a reasonable approach. Nonetheless, the proposed UBP language does require clarification. The proposed UBP amendment reads as follows:

> A cure period need not be provided in situations in which the ESCO has had multiple failures or non-compliance of one or more categories identified in UBP Section 2.D.5 within a three-year period….[18]

[17] SP, p. 9
[18] UBP Section 2.D.6.a.2.

The UBP does not identify how it is determined if a prior failure or non-compliance has occurred. The language seems to imply that it is it invoked only after there has been a formal determination by Staff of prior violations or non-compliance. This would mean that there were prior enforcement proceedings brought against the ESCO. However, the language remains vague. Staff should therefore clarify what is meant by these terms.

In addition, the language does not specify how or from what point the "three-year" period is measured.

L. Dispute Resolution Process ("DRP")

Staff proposes to modify the UBP dispute resolution process so that it coincides with the process being proposed in 15-M-0180.[19] RESA generally concurs with this recommendation.

M. Energy Brokers

Staff proposes for the first time to modify the UBP to require ESCOs to identify and provide contact information for entities, including energy brokers, which market to customers on behalf of the ESCO, or sell lists of potential customers to the ESCO.[20]

This proposal is inadequate and fails to address a key problem associated with "energy brokers."

There are entities that are engaged by ESCOs to directly market to customers on their behalf to sell products and services. However, there is also another ubiquitous group of companies that essentially act as Customer Representatives. They solicit customers to act as their representative to solicit bids from ESCOs. In this situation, the ESCO has no control or agency relationship with such Customer Representatives or independent intermediaries. Nonetheless,

[19] SP, p. 9.
[20] SP, p. 10. Energy brokers are defined as non-utility entities that perform energy management or procurement functions on behalf of customers or ESCOs but do not make retail energy sales to customers, and entities that sell lists of potential customers to ESCOs.

much complaint activity emanates from the activities of these entities. The Staff proposal does not address this problem at all.

Moreover, while Staff apparently recognizes the problems emanating from brokers that essentially act as middlemen, the proposed solution of simply adding an additional reporting requirement upon ESCOs does little to incentivize these entities to operate in a correct and proper manner. At a minimum it would seem reasonable that any entity that engages as an Energy Broker should be required to register with the Commission.

It is also difficult to fathom why ESCOs should be obligated to report the entities from which they purchase customer lists. These entities do not engage in any customer marketing activity on behalf of an ESCO or on their own. They simply provide a listing of customer telephone numbers.

IV. CONCLUSION

RESA appreciates the opportunity to submit these comments and assist the Commission in its efforts to address the needs and concerns of ratepayers.

Respectfully submitted,

Retail Energy Supply Association

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