



July 30, 2012

Honor Kennedy
Office of Consumer Policy
NYS Public Service Commission
3 Empire State Plaza
Albany, New York 12223-1350

**Re: Strawman Proposals
Electronic Communications & Energy Broker and Representative**

Dear Honor:

The Retail Energy Supply Association (RESA)¹ submits these informal comments in response to the Strawman proposals with proposed suggestions and related questions prepared by Staff addressing (i) definitions and requirements for marketing representatives and energy brokers and (ii) the treatment of electronic communications in the competitive energy market. RESA supports the effort to improve the integrity of the retail energy market and market participants, and consideration of requiring certification from the Commission of brokers engaged in the retail energy market. These comments are intended to aid the Commission in furthering these goals.

¹ RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant; 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.

I. Marketing Representatives and Brokers

The Strawman is presented in three components. Initially the Strawman offers a revised definition of the term ESCO Marketing Representative, a new definition of the term Broker and for the first time imposition of licensing and regulation of Brokers. The Strawman then lists various types of entities that require further analysis and a determination whether they should be subject to the new licensing requirements. Finally, the Strawman identifies various items that require further discussion and consideration.

In some areas, RESA developed a consensus position among its members which is duly noted in the comments below. On other aspects of the Strawman, the complexity of the issues associated with the current proposal engendered differing views that bespoke sensitivity to a variety of relevant and cogent concerns. Even though a full consensus position was not obtained, in these comments the various approaches and concerns will be presented in an effort to aid Staff in its consideration and development of the final proposals for Commission adoption.

A. Definitions

With respect to the term “ESCO Marketing Representative”, the Strawman presents the following revised definition (the revisions are in bold type).

ESCO Marketing Representative – An individual or entity that is either the ESCO or a contractor/vendor under contract on behalf of a **single** energy services company (“ESCO”) in that market, conducting, on behalf of that ESCO, any marketing activity that is designed to enroll customers with ESCO.

- **All representatives must receive training consistent with Section 10(b) of the UBP**

There is full agreement among RESA members that ESCO Marketing Representative status would apply to a person or entity that has a direct contractual or other relationship with the ESCO in connection with the provision of marketing services on behalf of the ESCO, that brings the vendor in contact with the customer and is designed to induce customers to enroll with the ESCO. This link between the ESCO and the Representative is of critical importance to ensure that a relationship actually exists between the ESCO and the Representative, which thereby provides the ESCO with the ability to provide oversight and ensure proper training of the vendor. In this regard, it is recommended that ESCO employees and affiliates also be included within the definition as they are both linked to the ESCO in a definable manner.

The appearance of differing views centers on the proposed exclusivity of the relationship between the ESCO and the Representative arising from the proposed language that the vendor be “under contract on behalf of a single energy services company (“ESCO”) in that market (bold in original).” In view of the potential liability associated with activities undertaken by a Representative, some members support introduction of the exclusivity provision to ensure that the actions of the vendor for which the ESCO may incur liability, is acting only on behalf of one ESCO and not a multiplicity of other ESCOs. Where the vendor serves more than one ESCO it may be more difficult to trace which ESCO is liable for a particular defalcation by the vendor. With the use of the exclusivity requirement, the nexus between the ESCO and the vendor is clearly delineated.

As a further refinement of the use of an exclusive relationship, support for the application of agency law was also expressed. Following this approach, a vendor would need to be in an exclusive agency relationship with the ESCO in order to be considered a Marketing Representative. The body of agency law is well developed in New York and serves to highlight

a distinct relationship between two parties in which one party is specifically designated to act as an agent on behalf of another party within a prescribed ambit of authority. It thus establishes a distinct nexus between the agent and the party on whose behalf action is being taken. This could enable the ESCO and the Commission to properly assess the exact relationship of the contractor/vendor to the ESCO and perceive the clear lines of authority and responsibility.

A different view was expressed to the effect that the exclusivity limitation was unduly restrictive and impractical. The position is taken that an ESCO can direct, monitor, and control the actions of a vendor on its behalf to induce customers to enroll with that ESCO, even if the same vendor is not engaged exclusively with that ESCO. It becomes a function of the structure of the solicitation. Where the vendor's individual solicitation includes only one ESCO's products, the vendor can be adequately monitored by the ESCO, even if separate solicitations are undertaken by the vendor on behalf of another ESCO.

The additional concern is raised that mandating exclusivity may place reputable vendors in a difficult position of limiting their activities in New York due to the exclusivity requirement and thereby restrict options available to ESCOs, particularly new market entrants. Moreover, increasing the potential administrative and regulatory burden upon ESCOs and vendors would further act to constrain ESCOs and the available pool of reputable vendors.

In summary, many of the elements of the proposed definition of Marketing Representative are supported by RESA; however, it is the concept of exclusivity that requires further analysis and consideration by Staff.

For the term “Broker”, the Strawman provides the following definition (the revisions are in bold type).

Broker. An individual or entity, including an aggregator, which may or may not be under a contractual agreement with a customer, who represents that customer(s) interests and negotiates or facilitates the purchase and/or sale of natural gas or **electricity, or both, but does not take title to the supply**

The need to establish a usable working definition of a Broker is fully supported by RESA. It is agreed that the Broker include an entity and aggregator that negotiates or facilitates the sale of commodity without taking title to the product.

There are differing views on whether the Broker must be representing the interests of the customer. From one perspective, an entity that negotiates the purchase/sale of commodity should be classified as a Broker even where the entity does not have any agreement with the customer or acts on behalf of the customer. Thus, an entity may be fully independent from the ESCO and the customer and yet still attempt to secure the sale of commodity between these same parties. It is the brokering activity that requires oversight regardless of whether it is being performed specifically under agreement with a customer.

However, support remains for retaining the requirement that the vendor act on behalf of the customer. A Broker in a transaction will usually act on behalf of an interested party and that will usually be the customer. If the vendor is acting on behalf of the ESCO it would likely fall into the ESCO Marketing Representative category. It is thus important to clearly delineate the party on whose behalf the Broker is acting. In this regard, the view was expressed that that the broker be in an agency relationship with an individual customer or group of customers. The body of agency law is well established in New York and sets forth well-known criteria that serve to identify when an agency relationship ---- in which within a prescribed ambit of authority one party can act as agent for a principal --- exists between the customer and another person or entity.

This provides a more discernible link between the broker and the customer or customers, and will better enable all impacted parties --- customer, ESCO and Commission ---- to assess whether the rights and obligation of Broker status should be applied to any particular person or entity.

In summary, most of the components of the proposed Broker definition are supported by RESA; however, there are differing views expressed with the requirement that the Broker act on behalf of the customer.

Notwithstanding this important and on-going effort to develop concise and useful definitions of the relevant actors, there still remains a concern that certain individuals or entities may fall into a regulatory gap because their exact status may be somewhat ambiguous. In practice there are entities who may contact an ESCO or customers but not establish a formal relationship with either party or enter into a written contract; nonetheless, such an entity may still communicate with either or both parties and still play a role in the marketing process, or it may undertake activities on behalf of multiple ESCOs.² It is also possible that these types of entities can become a source of abuse as their actions may not fall within the sphere of Commission regulation. There is no easy, apparent solution to this concern; therefore RESA urges Staff to work with the interested parties to try and develop an approach to dealing with this concern. RESA recommends that a working group be established to address these issues and report back to Staff and the parties within 90 days.

² An example of this is the Telesales Broker identified by Staff.

B. Entities Covered by the Term Broker

Staff correctly observes that the term Broker can be read expansively to incorporate various entities for whom it may not be reasonable to apply the Broker licensing requirements. In that regard, RESA provides following comments on the specific entities delineated by Staff in the Strawman.

- **Consultant** - If an entity conducts activities only in the capacity of advisor to a customer or set of customers, without contact with ESCO specific to that customer or customer group?
- **RESA Response:** Persons or entities that are not engaged in directly negotiating, facilitating or marketing between the customer and the ESCO should be exempted from Broker status. This would reflect such entities as advertising or marketing firms hired by an ESCO to provide advice and consultation or energy consultants retained by the customer that are not engaged in negotiating with an ESCO.
- **Friends and Family programs** – If an ESCO has a friends and family referral program, does that customer act as a broker? There will not be a contract between customer and ESCO, but often the customer will receive gift card or discount on energy rate if their referrals enroll with ESCO.
- **RESA Response:** As a general principle referral type programs where individuals “refer” customers to an ESCO which then makes the sale should be exempted from the Broker definition, even where the person making the referral receives some form of compensation from the ESCO. Making a referral is a ubiquitous practice in many retail industries and can be particularly useful and cost effective in exposing consumers to retail access. There is no need to impose the burdens of licensing upon these types of persons that simply make referrals. Thus, Friends and Family referrals and industry associations or entities offering affinity marketing programs for their customers or members should be exempted.
- **Websites** - Websites that work with several ESCOs or perform auction type services or that provide products/offers for multiple suppliers may be considered as providing brokering services. Generally, internet sites that offer multiple suppliers’ products do not have a contractual relationship with the customers. Final rule will need clear guidance on

this issue. Unclear whether a website that runs site exclusive to ESCO is a broker if they also run exclusive sites exclusive for other suppliers in the same market.

RESA Response: If the website merely acts as neutral portal that allows the customer and an ESCO to communicate directly, exemption would be reasonable. Under this formulation, the ESCO can undertake to communicate, enroll, and verify enrollments electronically with the customer through the website. However, this interaction will be between the ESCO and the customer. The web site would only serve as the forum that will enable the communication to occur.

- **Telesales Broker** – Brokers that market multiple ESCOs products via outbound telephone solicitation in the market? How should they be classified and do they currently exist in the market?

RESA Response: See *supra* at Footnote 2.

- **Multi-Level Marketing (Network Marketing)** - A sales model that emphasizes recruiting its customers or other people to market the ESCO's products?

RESA Response: See Response above for Friends and Family Program

- **Industry Association** - Chamber of Commerce, industry association, etc. that submits referrals to ESCO(s) or that may offer exclusive ESCO products to their members as part of the membership benefits?

RESA Response: See Response above for Friends and Family program.

- **Third Party Verification companies (TPV)** - Independent party used in the enrolment process to ensure authenticity of sales.

RESA Response: Such entities should be exempt. They merely act to confirm the existence of agreement and are not involved in the marketing solicitation.

C. Items for Further Discussion/Consideration

In the Strawman, Staff identifies a series of issues for which additional consideration is deemed warranted. In connection therewith, RESA provides the responses noted below.

Broker Licensing or Registration Requirements

- Establish licensing or registration requirements for brokers in New York State to identify third parties either aggregating energy arrangements for a group of customers or on behalf of an individual customer. (TBA – Jurisdictional authority? NYS State Dept. of State, NYS PSC and/or by utility service territory.) **Licensing requirements should exist for arrangements classified as brokers. The licensing should be done by one entity preferably the New York State Public Service Commission or designated agency, as it is the agency with the expertise in retail energy markets.**

RESA Response: RESA concurs with this position.

- Should aggregators be included in the broker classification or they be treated separately in their own classification?

RESA Response: They can be included in the Broker classification

- Should the requirements be the same as for ESCOs as is in several states?

RESA Response: Yes.

- Set ESCO compliance parameters for using an unlicensed or unregistered broker or representative. **The final rules should be clear on the risks an ESCO may face if it coordinates with an unlicensed broker in the enrollment of that broker's customers. The ESCO should not be responsible for training brokers.**

- **RESA Response:** The obligation to comply with the applicable licensing requirements should rest upon the Broker not upon the ESCO. The ESCO's only obligation is to require the Broker to provide a copy of its license or if the entity asserts that it is not subject to the licensing requirements, the ESCO will be authorized to rely upon such representation without incurring any liability.

- Require mandatory participation in routine training sessions in each utility service territory where the broker intends to conduct business. (TBA – Training program criteria and who would conduct – NYS PSC, utilities, and/or industry organizations).

Determined that the broker licensing process will include a web-based universal training to be developed and administered by the New York Public Service Commission or a designated agency. In addition, additional utility overviews can be provided the brokers as part of the web-based training and offered during the calendar year.

RESA Response: RESA concurs with this position.

- Maintain the ESCO as the responsibility party for the enrollment process and final contractual agreement as identified in UBP Section 5 with both residential and nonresidential customers under the UBP. **Yes**

RESA Response: The ESCO will remain the responsible party for the enrollment process and finalizing the contractual agreement with the customer as is currently required under the UBP. However, this obligation should in no way be construed as exposing the ESCO for liability arising from representations made or actions taken by the Broker in the direct dealings between the Broker and the customer. If the Department of Public Service regulates Brokers, a process should be established for ESCOs to be relieved of any regulatory liability for the wrongful actions of a licensed broker which should include the opportunity for the ESCO to mitigate any potential impact to the customer.

- Suspension or revocation of license or registration – same compliance criteria under UBP 10, Marketing Standards and UBP 2, Eligibility Requirements as for ESCOs. **General consensus was penalty provisions were necessary to provide market structure and credibility.**

RESA Response: RESA concurs with this position.

Full Disclosure of Payment Terms

- Additional information should be provided on the terms and conditions of payments made to third parties for greater customer understanding (e.g., who is paying whom, inclusion of broker fees in kWh rate or per-therm basis, one-time finder's fee). **The general consensus is full transparency that the broker will receive some form of compensation is necessary.**

RESA Response: RESA agrees that pertinent information regarding Broker compensation should be provided to the customer. There are differing views presented with respect to the nature of scope of such disclosure.

A view that finds support is that customer be informed by the Broker if compensation will be provided and whether the compensation to the Broker will be provided by the ESCO or obtained from the customer directly. If the compensation is provided by the ESCO to the Broker, the exact amount of compensation need not be disclosed. This

approach provides for notification to the customer that the Broker will receive compensation. However, where the ESCO pays the compensation directly to the Broker, that is viewed as a private contract matter between the ESCO and the Broker and there is no need to disclose the amount of compensation. The ESCO will contract with the customer for a specific rate that is inclusive of all expenses including brokerage fees.

Another view is that if the compensation is paid by the customer directly to the Broker, the Broker should identify the exact level of compensation. This is viewed as reasonable as the customer is negotiating directly with the Broker and will be required to pay the commission to the Broker. Under these circumstances, the customer should be apprised by the Broker of the level of compensation. However, for the reasons noted above, if the compensation is provided by the ESCO to the Broker, the exact amount of compensation need not be disclosed.

A third view proposes that the level of compensation be provided regardless of whether the compensation is paid directly by the customer to the Broker or by the ESCO to the Broker. In this manner confusion regarding the level of compensation is minimized and an important cost element will be entirely transparent.

- Requirement to maintain updated information, after licensing or registration, sources of known or planned compensation.

RESA Response: Some form of reasonable updating would be appropriate.

II. Electronic Communications.

In the proposed “Section 5-Application of Electronic Enrollments and General Use of Social Media” and in the proposed language modification for UBP Section 5.B.1.d it is proposed that all enrollments initiated via electronic enrollments “...must be completed on the ESCO’s official website or through the ESCO’s official company e-mail address...”. This standard is overly restrictive and unnecessarily limits the ESCO’s use of the plethora of avenues proliferating in the electronic highway. With the expansion of the internet and numerous interactive portals, ESCOs have the opportunity to communicate with customers and complete enrollments in numerous forums that are not limited to their official company web site. There is no reasonable basis to

preclude ESCOs from maximizing their use of these varied and valuable electronic sources. Regardless of the portal employed by the ESCO, all enrollments would need to comply with all applicable UBP requirements and related privacy standards. In this manner the interest of all affected parties will be adequately protected. The language in this section should be changed to read “All enrollments initiated via electronic methods (other than telephone sales which meet the provisions of the UBP) must be completed on the ESCO’s official company website, *a third party vendor’s website that is under contract with the ESCO, an authorized agent’s website*, or through the ESCO’s official company e-mail address in accordance with requirements in Attachment 2- Electronic Agreement and Authorization.”

Under the “Consumer Privacy Issues and Protection” section, it is recommended that ESCOs be subject to standards and regulations that provide “guidance” with respect to customer privacy. This is an amorphous standard as “guidance” is very subjective and does not present a clear standard. Instead, ESCOs should be required to follow applicable laws, rules and regulations that deal with customer privacy issues.

The proposed Language Modifications make reference to “5-Attachment F.” Section 5 of the UBP does not contain an Attachment F. Additionally; the proposed language states “The ESCO shall maintain a record of the customer’s acceptance of verification e-mail...” Under the current UBP rules, a customer is not required to accept a verification e-mail. The verification e-mail is sent to confirm the customer’s intent to enroll and the customer is not required to respond, but may contact the ESCO if there is any type of error. This language should be revised to read “The ESCO shall maintain a record that a verification e-mail was sent to the customer...”

The proposed language for Section 10.C provides that the ESCO disclose “up front” that it is an independent supplier and not associated with the utility. The term up front is somewhat

colloquial and subjective. Instead, the ESCO should be obligated to make this disclosure at the beginning of the solicitation.

Section 10.C.3.b should be changed to conform to the changes suggested in Section 5.B.1.d above to include the use of a third party vendor's website. The language should read "the customer must be directed to the ESCO's official company website, *a third party vendor's website that is under contract with the ESCO, an authorized agent's website*, or official company e-mail address..." The next sentence also needs to be changed to state "If the ESCO intends to utilize electronic transactions to complete or renew a sale, the *website* must contain..."

Additionally, the proposed language for Section 10.C.3.b requires the ESCO to electronically contain "...any other documentation ...the consumer may need to complete the enrollment process." The phrase "may need" can be very subjective and mean different things to different people. Instead, the ESCO shall be obligated to contain the materials required under the UBP and any other ESCO related material the customer must complete to finalize the enrollment.

Section 10.C.3.a makes reference to a "non-automatic" renewal without explaining what this means.

In conclusion, RESA thanks Staff for the opportunity to comment on these important issues and looks forward to working with Staff to enhance the retail access environment.

Respectfully submitted,

Retail Energy Supply Association

By: John Holtz

John Holtz, NY Chair