

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**Case 15-M-0180 - In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products.**

**COMMENTS OF  
THE RETAIL ENERGY SUPPLY ASSOCIATION**

**I. INTRODUCTION**

The Retail Energy Supply Association (RESA)<sup>1</sup> submits these comments in accordance with the *Notice Seeking Comments on Proposed Standards* 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* seeking to develop and implement guidelines and standards governing the activities of Distributed Energy Resource Providers (“DERS”). The proposals are explained in the Staff Proposal and incorporated in an attachment entitled “*Uniform Business Practices For Distributed Energy Resource Suppliers Case 15-M-0180 July 2015*”.<sup>2</sup>

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<sup>1</sup>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](http://www.resausa.org).

<sup>2</sup> Case 15–M-0180 – In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products, *Staff Proposal* dated July 28, 2015 (hereafter cited as “SP, p. \_\_\_)

RESA supports efforts to ensure the integrity of the DERS market and fully shares the Commission's concerns with ensuring that DERS retail marketing activity and practices are conducted in accordance with all applicable standards that ensure 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.

It is important to recognize that the marketing at retail of DER products will rely on similar marketing channels (D2D, telephonic, kiosks, etc) that are currently used for the sale of commodity. Further, the customer purchasing DER products faces greater risk. A consumer is expending substantial capital and covering a long term horizon. The Commission needs to direct this market in the proper direction at the outset. Further, these investments also include reliability related aspects due to direct interconnections to the grid. Accordingly, oversight must be thorough and comprehensive and set properly at this initial point.

For ease of reference these comments follow the same order as the Staff Proposal.<sup>3</sup>

### **III. Comments of RESA**

The UBP DERS oversight standards proposed by Staff are properly intended “to ensure both consumer protection and fair competition”.<sup>4</sup> The proposed regulatory structure must also recognize that DERS providers are essentially retail marketers that will operate within the context of a competitive retail market. This requires that an even playing field be maintained between all retail marketers and any similar activities undertaken by the distribution utility and that the oversight mechanisms and standards adopted in this proceeding do not hinder the efficient operation of the retail market.

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<sup>3</sup> Our comments only address those areas where a different position is advocated than the one presented in the Staff Proposal or where additional clarification is needed.

<sup>4</sup> SP, p. 1.

As will be detailed below the Staff Proposal is generally reasonable in scope and moves in a positive direction. 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. Applicability of UBP-DERS

Staff recommends that the “UBP-DERS” be applicable to products and services sold or provided by DERS vendors to “mass market” customers as part of a utility distribution-level demand response program, the Commission’s Community Distributed Generation Program, and Non- Wires-Alternative programs.<sup>5</sup> There are several concerns raised by this recommendation.

Although the standards are purportedly applicable to “mass market” customers, the UBP-DERS does not include a definition for “mass market” customers. Thus, the applicable class is not defined with any detail. Moreover, if this term includes small commercial customers (as indicated at the Technical Conference) the Commission has yet to determine or define this specific class of customers. As Staff is well aware, the Commission specifically refrained from applying recent ESCO marketing standards to small commercial customers due to the difficulties associated with identifying this class of customers.<sup>6</sup>

In summary, at this point, the parties do not know the classes of customers included in the term “mass market”, and with respect to small commercial customers, the Commission has yet to define what customers are included in this class.

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<sup>5</sup> SP, pp. 4-5, 12 FN. 16.

<sup>6</sup> 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, *Order Granting Requests For Rehearing And Issuing A Stay* (issued April 24, 2014).

As currently proposed the new standards would **not** apply to DERS vendors selling products and services outside the context of a utility distribution-level demand response program, the Commission’s Community Distributed Generation Program, or Non- Wires-Alternative programs. However, as the Commission is well aware there is already an active retail market in DERS products being offered on an independent basis outside of any utility demand response program. One has only to see the numerous television ads for solar installations and other devices to realize that an existing market is already in place.<sup>7</sup>

Consequently, there will be no oversight or standards in place for a considerable portion of the DERS market, and there will be one set of DERS providers operating under the UBP-DERS while another group of DERS vendors will be selling the same products and services that will be exempt from the UBP-DERS. This is inherently contradictory and can produce an inefficient and inequitable retail market.

A. Industry Standards and Code of Conduct

Staff initially observes that it will work with the DER industry to develop a Code of Conduct of general applicability to the industry. Until such a Code has been developed, Staff’s recommends reliance upon and adoption of the proposed UBP-DERS.<sup>8</sup>

The implementation of the contemplated Collaborative can be a useful tool to integrate industry knowledge with regulatory oversight.

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.

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<sup>7</sup> This is confirmed by Staff’s observation that “... markets for distributed energy resources currently exist and are growing.” SP, p. 4.

<sup>8</sup> SP, p. 9

B. Application Requirements

RESA generally concurs with the application process proposed by Staff.<sup>9</sup>

Staff proposes that utilities consider implementation of various fees for value added services and an initial application fee.<sup>10</sup> This proposal is troubling and warrants further review.

At this point it is difficult to assess the reasonableness or propriety of any fee or charge in the abstract without specific information of the nature of charge, the exact service being provided and the incremental nature of costs incurred by the utility as DSP. To simply allow the utility as the DSP to exact fees and charges is inappropriate.

C. Marketing Standards

The Staff proposed rules applicable to DERS describe marketing standards that DERS and their marketing representatives must follow when marketing products and services which are associated with DER products and services sold to the DSP.<sup>11</sup> However, a review of Section 4 of the UBP-DERS reveals that the standards especially for telemarketing and door sales are much more lenient than the same marketing standards applied to ESCOs.<sup>12</sup> This is an unreasonable and illogical position. ESCOS and DERS providers should be subject to the same and equivalent marketing standards.

The marketing of DERS products and services at retail will likely use the same marketing protocols that are currently used by ESCOs to market commodity. Thus, DERS vendors will engage in telemarketing, D2D, in-person and electronic solicitations. And many, if not all, of these marketing avenues are already used by vendors marketing DERS type products. The only difference from an ESCO marketing effort is the type of product being offered. But this does not

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<sup>9</sup> SP, p. 10

<sup>10</sup> SP, p. 10.

<sup>11</sup> SP, p. 12.

<sup>12</sup> For example, an ESCO must conduct a TPV for a D2D or telemarketing sale (UBP Section 5, Attachment 1.A). This requirement is not included in the UBP-DERS.

diminish the need to apply appropriate marketing standards to these forms of marketing solicitations. In essence, the particular product being marketed should not be the determinative factor with respect to the specific marketing standards that will be applied. All retail marketing conducted under specific marketing approaches should be subject to the same level of oversight and regulation.

Further, the concerns with the marketing of DERS products are heightened. Many DERS products that will be the subject of solicitations involve products that require material capital outlays and will be in place for a long time period. Thus, the decision of the consumer can involve greater cost and permanence than is the case with the sale of commodity. Under these circumstances, the importance of applying appropriate marketing standards cannot be underestimated, and warrant at a minimum the same level of protection that is applied to ESCO sales of commodity.

The differing and weaker standard codified in the UBP-DERS also creates a highly confused and conflicted marketing oversight structure. As Staff recognizes ESCOs will also sell DER products in addition to the sale of commodity and these products will likely be bundled together.<sup>13</sup> In such a situation the regulatory standard will be highly inconsistent or clouded in doubt. With respect to the sale of commodity the ESCO will need to follow the marketing standards codified in the UBP, but for the DERS product or portion of the bundled sale the ESCO will be subject to the weaker standard proposed in the UBP-DERS. This is a highly illogical outcome.

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<sup>13</sup> SP, p. 5.

#### D. Customer Agreements

Staff suggest that to achieve better transparency, the parties should consider development of “...specific standardized contract language for retail DER products and services to address key issues of importance to consumers, such as: a mandatory Customer Disclosure Statement; the term of the contract; pricing and early termination fees; explanation of authorizations for DERS to obtain certain customer-specific information; consumer protections; procedures applicable to address disputes; and how the customer may contact the DERS.”<sup>14</sup> This general proposal raises a number of questions and concerns.

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

This approach overlooks that contracts are part of the competitive market and the competitive position of an ESCO. The contract is the medium by which each DERS vendor responds to fluid market conditions and fashions a competitive offer as incorporated in the contract that is presented to the potential customer. To require all DERS vendors to use the same contract conflicts with the competitive nature of the retail market, and forces every DERS vendor to act 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 DERS vendors 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, DERS vendors can only use one prescribed contract form and are precluded from making any changes or amendments thereto. The Commission wants vendors to innovate and

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<sup>14</sup> SP, 13.

expand their panoply of offerings and products to provide greater value to consumers. However, it is inconsistent to then prescriptively require all ESCOS to use only one standardized contract form.

The 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 a Customer Disclosure Statement (“CDS”) that would be included in a DERS contract similar in format that is currently used for ESCO contracts.<sup>15</sup> The CDS could provide a clear placement of key terms governing the relationship between the vendor and the customer. The various terms to be included in a CDS would be developed in the collaborative recommended by Staff.

In summary, the Commission should not mandate that all DERS vendors adhere to a single standardized contract. This approach 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 should be employed, adopt the more reasonable approach suggested here which entails use of a standardized CDS.

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<sup>15</sup> UBP Section 5.A.4.b and UBP Section 5, Attachment 4.

**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

By: *Usher Fogel, Counsel*

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