

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**In the Matter of Regulation and Oversight of)
Distributed Energy Resource Providers and Products)**

Case 15-M-0180

**COMMENTS OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION**

The National Energy Marketers Association (NEM)¹ hereby submits comments on the Staff Proposal dated July 28, 2015, in the above-referenced proceeding regarding standards for Commission oversight of Distributed Energy Resource Suppliers (DERS). Staff has also convened two stakeholder meetings for the purpose of receiving input on the issue of DERS oversight. NEM's interest in this proceeding is unique in that our membership includes ESCOs that will bundle distributed energy resource (DER) products with commodity product offerings, as well as entities that will participate in the market exclusively as DER providers, and thus fall within the scope of the proposed rules. As such, NEM offers a broad perspective on the impact of the proposed rules on the nascent DER marketplace and also the existing competitive retail energy marketplace.

NEM submits these comments to make the following recommendations:

- 1) Because the proposed definitions of DER and DERS are so broad, it is imperative that the Commission make clear that its oversight will be limited to those transactions that

¹ The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies.

constitute the sale of DER services into the Commission-jurisdictional Distributed System Platform (DSP) markets.

- 2) ESCOs should not be competitively disadvantaged through the imposition of a disproportionate regulatory compliance burden that increases costs of doing business and renders their DER product offerings less competitive.
- 3) The proposal to institute a marketing standard that requires DERS to use energy commodity forecasts based on multi-year averages of utility pricing in marketing materials will not provide consumers with meaningful or comparable data for evaluating offers.
- 4) To promote the goal of consumer understanding of DER product offerings without restricting innovation, the Commission should focus on the development of a DERS Customer Disclosure Statement, rather than the development of a standardized DERS contract.

I. Oversight Must Be Limited to DER Transactions on Commission-Jurisdictional DSP Markets

In the Commission's Track One Order in the REV proceeding, it set forth a vision for a reformed retail electric industry that will,

establish markets so that customers and third parties can be active participants, to achieve dynamic load management on a system-wide scale, resulting in a more efficient and secure electric system including better utilization of bulk generation and transmission resources. As a result of this market animation, *distributed energy resources will become integral tools in the planning, management and operation of the electric system*. The system values of distributed resources will be monetized in a market, placing DER on a competitive par with centralized options. Customers, by exercising choices within an improved electricity pricing structure and vibrant market, will create new value opportunities and at the same

time drive system efficiencies and help to create a more cost-effective and secure integrated grid. (REV Track One Order at 11). (Emphasis added).

As envisioned by the Commission, the integration of Distributed Energy Resources into the marketplace is essential to achieving increased system efficiencies and reliability as well as consumer animation and engagement. In the Commission's Track One Order it evinced its intent to develop rules for the oversight of DER providers. REV Track One Order at 102. It found that this was necessary in order to ensure consumer protection and fair competition. *Id.* Specifically, the Commission's creation of DSP markets created a commensurate obligation to ensure the marketplace participants act responsibly and ethically toward each other and consumers. The Commission stated that, "Where markets are created by order of the Commission, and managed by a DSP that is regulated by the Commission, the Commission has responsibility to ensure that customers and service providers can participate in those markets with confidence." (REV Track One Order at 102). Clearly, a market transformation of this magnitude, incorporating both DER providers as well as ESCOs offering DER products and services, to interact with the delivery system and consumers on a dynamic basis, requires thorough and deliberate planning and review on the part of the Commission to achieve its vision. The instant case is but one facet of this planning and review process.

The Staff Proposal on standards for Commission oversight of Distributed Energy Resource Suppliers (DERSs) includes a Definitions section of relevant terms. This includes very broad language defining a Distributed Energy Resource (DER) as well as a Distributed Energy Resource Supplier (DERS). Proposed Uniform Business Practices for Distributed Energy Resource Suppliers at Section 1, page 1.

The proposed definition of Distributed Energy Resource is as follows:

A broad category of resources including end-use energy efficiency, demand response, distributed storage, and distributed generation. DER will principally be located on customer premises, but may also be located on distribution system facilities.

The proposed definition of Distributed Energy Resources Supplier is as follows:

A supplier of one or more DERs. Suppliers may choose to provide DERs as stand-alone products or services, or may choose to bundle them with energy commodity. Entities which sell both DER and energy commodity are both DERS and ESCOs.

The proposed definition of Distributed Energy Resource could encompass a large range of products and services, and by extension Distributed Energy Resource Suppliers, which have not historically and should not prospectively, be Commission-regulated activities. For example, the sale of energy efficient lighting at a home improvement store could potentially be construed to fall within these definitions. There are many other similar scenarios that could likewise fall within these definitions and to which the Commission did not intend to attempt to extend its jurisdictional reach and oversight. Commission jurisdiction over DERS can only attach when entities engage in transactions for distributed energy resources on Commission-jurisdictional markets.

The Staff Proposal notes that DERS are not “electric corporations” under PSL Article 4 and therefore not subject to rate regulation or requirements of PSL Article 4. Staff Proposal at 3-4. However, DERS are construed by the Staff Proposal as entities that fall within PSL § 53 that, “sell[] or facilitate[] the sale or furnishing of . . . electricity to residential customers.” Id. The Staff Proposal then goes on to explain that Commission oversight of DERS would apply in two circumstances: “(1) when providers acquire customer data by any means established under the

Commission’s authority, and (2) when DER services are sold into the DSP markets.” Staff Proposal at 3. The first prong will not be triggered until the investigation into the Digital Marketplace has been concluded, and the Digital Marketplace or other means for DERS to acquire customer data, is implemented.

As to the second prong, Commission oversight and application of the UBP-DERS is proposed to apply to, “DERS participating in utility DER programs, including distribution-level demand response programs, for products and services sold to mass market customers associated with those programs.” Staff Proposal at 4. Staff provides additional detail on the application of this standard.

“[E]ntities selling demand response resources pursuant to utility distribution-level demand response tariffs would be subject to these requirements, including demand response providers, aggregators and ESCOs. Similarly, DERS providing Non-Wires-Alternatives (NWAs), such as participants in the Brooklyn/Queens Demand Management Program, would be subject to these requirements for DER products and services which are part of those projects. Staff also proposes that these requirements be applicable to the Commission’s Community Distributed Generation Program. . . . Staff Proposal at 5.

Staff then states that these oversight applicability criteria will be “revisited,” and presumably possibly expanded, as the DSP market expands and evolves. *Id.*

The criteria enunciated by Staff for the application of Commission oversight of DERS is appropriately founded on DER transactions that take place on Commission-jurisdictional markets. The issue is that the underlying definitions of DER and DERS are so broad as to encompass products, services, transactions and entities that are not Commission jurisdictional. This is combined with a stated intent to “revisit” the applicability criteria in the future and perhaps expand it to include additional products, services, transactions and entities. The

Commission itself identified the problems implicit with a broad definition of DER services in the REV Track One Order. The Commission stated,

“The definition of DER services is potentially broad enough to cover a wide range of home energy services that have not traditionally been subject to Commission oversight. This includes, for example, solar installers, home performance contractors, and building management operators. ***A clear criterion of applicability is needed, in order to avoid an overly broad and unworkable extension of regulatory authority over private transactions.*** We are also mindful of the risk of duplicative or overlapping regulation and oversight, and will restrict our oversight to avoid such risks.” (Emphasis added). REV Track One Order at 105.

NEM agrees with the Commission. It is imperative that marketplace actors have a clear understanding of the extent of Commission oversight of their activities that can be relied upon to inform their conduct. While the purpose of constructing a broad definition of DER and DERS may have been to err on the side of inclusiveness in order to fully capture the products, services, transactions and entities that will be developed and participating in the DSP markets, this broadness creates a high degree of regulatory uncertainty as to whether a product, service, transaction or entity is now, or may in the future, be deemed to be within the scope of the application of Commission oversight of DERS. The Staff proposal identifies the sale of DER into the DSP markets as the differentiation point for whether oversight will be exercised. Limiting oversight to those transactions that constitute the sale of DER services into the DSP markets appropriately limits jurisdiction to activities that take place on Commission-jurisdictional markets. Any efforts to apply and revisit the oversight criteria should comport with this standard. This will ensure that marketplace actors are provided with fair and adequate notice that their products, services, and transactions fall within the reach of Commission jurisdiction and will ensure that jurisdiction is not inappropriately expanded beyond the bounds established and permitted by the Public Service Law.

II. ESCOs Should Not Be Competitively Disadvantaged Through the Imposition of a Disproportionate Regulatory Burden

Staff developed proposed rules for Commission oversight of DERS in the form of a Uniform Business Practices for Distributed Energy Resource Suppliers (UBP-DERS). The UBP-DERS would be applicable to entities that exclusively supply DER. The UBP-DERS is also proposed to be applicable ESCOs that, “sell DER products, either bundled with energy commodity or as standalone products, would be subject to the UBP, and to the UBP-DERS for applicable DER products.” Staff Proposal at 5. Requirements applicable to ESCOs under the UBP-DERS were identified as application information, a marketing rule in Section 4.B, rules of conduct with the DSP, and reporting requirements. *Id.*

NEM is concerned that the application of the UBP-DERS in the manner proposed to ESCOs and DERS may have the effect of putting ESCOs at a competitive disadvantage by virtue of the disproportionate regulatory burden of compliance with an additional set of business rules. Moreover, the UBP-DERS appears to be significantly less burdensome to comply with than the UBP, also to the detriment of the ESCO community. Simply stated, DERS will be able to offer DER products *identical* to those offered by ESCOs, but ESCOs will be subject to a far greater regulatory compliance and reporting burden to do so. The higher compliance and reporting burden increases ESCOs costs of doing business, thereby increasing their costs to provide those identical products, rendering the ESCO offerings less price-competitive for consumers. This disparate treatment of ESCOs is unjustified. Indeed, the Commission has been looking for ways to incentivize ESCOs to offer increased value-added services offerings in the marketplace. Subjecting ESCOs to an unfair and disproportionately higher regulatory burden is contrary to that goal.

In the REV Track One Order the Commission noted its expectation of what the regulatory process for establishment of oversight of DERS would entail. The Commission stated that, “[a]pplying relevant portions of existing provisions of the Uniform Business Practices is the most likely course for accomplishing these goals; however we are not confined to existing provisions. Modification of the UBP to reflect needs of REV markets may also be considered.” REV Track One Order at 105. Consistent with the Commission’s expectation that the existing UBP would be the foundation for DERP oversight, it may be more appropriate to rely on this well-established set of rules as the basis for guiding the conduct of competitive entities selling DER in the Commission-jurisdictional marketplace. This would also minimize the risk of unfairly requiring one set of entities (ESCOs) to adhere to a duplicative regulatory reporting and compliance burden and not the other (DERSs) and thereby render ESCOs at a competitive disadvantage in providing DER to consumers.

III. The Marketing Standard Proposal on Use of Energy Commodity Forecasts Based on Multi-Year Averages of Utility Pricing Data Will Not Provide Consumers with Meaningful, Comparable Price Information

The proposed UBP-DERS also includes marketing standards. The marketing standards would adhere to DERS and their marketing representatives, “when marketing products and services associated with DER products and services sold to the DSP and/or which are identified on the Digital Marketplace or any other vehicle established under the Commission’s authority, to customers in New York.” Proposed UBP-DERS, Section 4.A., at page 15. Of particular note, the proposed marketing standards include a rule regarding DERS’ use of forecasts of energy commodity prices in marketing materials and information. According to the Staff Proposal, this is intended to address the concern that some DERS use inflated forecasts of energy commodity

prices in their marketing to end use customers. Staff Proposal at 12-13. To address this concern, it is proposed that,

To the extent used in marketing materials or information conveyed to customers or potential customers, DERS must use forecasts of energy commodity prices which reflect a multi-year average of actual historical prices or energy prices recently forecast by the applicable NYS utility. Proposed UBP-DERS, Section 4.B.10, at page 15-16.

NEM is concerned about the proposal for a number of reasons. Of course, the Commission has a strong interest in ensuring that consumers do not receive inaccurate or misleading information in the marketing of DER products and services. However, the proposed reliance on a multi-year average of historical utility prices or prices forecast by the utility is not an appropriate or meaningful way of solving the perceived problem.

For instance, the utilities current use of the Electricity Supply Reconciliation Mechanism (ESRM), meant to reconcile a utility's electric supply revenues to its costs, does not accurately show historical prices. Rather, the ESRM masks true historical costs to consumers. If the utilities are not accurately depicting historical prices, then a multi-year average of such prices would not be meaningful. Relatedly, as a general matter, a reliance on historical prices will misstate the price to consumers. Prices have fallen a great deal over the past few years. Using historical prices and then extrapolating forward will not accurately depict possible future market conditions. In addition, the proposal provides no reference point as to which historical years should be included, which would inject an additional element of subjectivity and lack of comparability to any forecast that might be developed from the utility price data.

If such a requirement for price forecasts is incorporated into the rules, in order to accomplish the goals of price transparency, accuracy and comparability, it would better serve consumers to

require reliance on industry standard sources for pricing information that reflect real market conditions. These industry standards include Inside FERC for natural gas pricing data and ICE for electric prices. The data from these sources changes constantly. However, that is the nature of volatile wholesale energy markets. Consumers are not well-served by masking real market conditions and then subjecting them to the costs of true-ups after the fact. It distorts the true value of otherwise competitive products, and artificially understates utility pricing.

IV. Consumers Will Be Best Served Through the Development of a Customer Disclosure Statement Rather Than a Restrictive Standard Contract

Staff proposed that standardized contract language for retail DER products and services be developed and DERS be required to use the standard contracts and/or contract terms. Staff Proposal at 13; Proposed UBP-DERS at Section 5.B. The standardized provisions would include a Customer Disclosure Statement as well as contract term, pricing, early termination fees, authorizations for the DERS to obtain customer information, consumer protections, dispute resolution, and contact information. Staff explains that the reasoning for this proposal is that, “[e]nabling consumers to readily understand and compare *contracts* for retail DER products and services would substantially enhance consumer understanding, transparency, and consumer confidence in DER markets.” Staff Proposal at 13. Consumer understanding, transparency and confidence in DER markets are primary to achieving a well-functioning market.

There are certain salient terms and conditions that consumers reference as determinative of their decision of whether to enter into a transaction. The Commission recognized this when it adopted the Customer Disclosure Statement requirement in Section 5 of the UBP for ESCOs. NEM recommends that the best way to foster consumer understanding of DER products is the development of a Customer Disclosure Statement, utilizing plain language to the extent possible,

rather than the development of a standardized contract that will restrict innovation in the newly-formed DSP markets.

The Customer Disclosure Statement has been a valuable tool to enhance consumer understanding of ESCO retail energy products. Utilizing a one-page contract summary provides for standard disclosures to be made in a highly visible place on the contract, that is easy for the consumer to see and understand, but the unique competitive elements of DER pricing and terms of service would not be standardized or restricted. It allows consumers to quickly and easily reference the important contract terms when making a shopping decision. This approach will best serve consumers by simultaneously accomplishing the goals of promoting consumer understanding as well as promoting DER product innovation.

V. Conclusion

NEM appreciates this opportunity to offer its comments on the Staff Proposal on Commission oversight of DERPs.

Sincerely,

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