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 these Comments pursuant to the Notice Seeking Comments on Proposed Standards issued April 12, 2017, in the above-referenced proceeding. Comments were requested on Staff's initial White Paper of July 28, 2015, Staff's supplemental White Paper on Distributed Energy Resources Oversight dated April 11, 2017, as well as a revised proposed Uniform Business Practices for Distributed Energy Resource Suppliers (UBP-DERS). Given the passage of time and evolution of the Commission's REV proceeding since the initial White Paper was submitted, Staff prepared the supplemental White Paper and revised proposed UBP-DERS.

NEM files these comments to note that the foundation upon which the initial and supplemental White Paper relies, namely Public Service Law Article 2, Section 53, does not give the Commission statutory authority over entities supplying Distributed Energy Resources (DER). This is revealed through an examination of the statutory language, legislative history and practical

[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. These Comments are not intended to serve as a waiver of any rights, arguments, claims or remedies, all of which NEM expressly reserves.

constraints of applying HEFPA provisions to entities supply of DER. Notwithstanding this objection, NEM also offers comment on the UBP-DERS provisions. NEM urges that a consolidated UBP under which the provisions apply uniformly to ESCOs and non-ESCO suppliers of DER should be developed and implemented from the outset to avoid creating an unfair competitive advantage in favor of non-ESCO Distributed Energy Resource Suppliers (DERS). NEM agrees with Staff that the UBP-DERS should only apply to the sale of DER products and services to mass market customers. NEM opposes the revised proposal pertaining to references to utility pricing in DER marketing materials and sales agreements. With regard to proposed reporting requirements, Staff information requests to DERS must be reasonable and germane to the entities DER-related business in New York State. NEM also recommends that a duplicative security requirement should not be imposed on ESCOs supplying DER.

I. Article 2, Section 53 of the Public Service Law Does Not Apply to Suppliers of Distributed Energy Resources

The Staff initial and supplemental White Papers reliance on Article 2, Section 53 of the Public Service Law as the basis for Commission jurisdiction over entities supplying Distributed Energy Resources (DER) is misplaced. First, as the Commission is well-aware Section 53 was added to Article 2, the Home Energy Fair Practices Act, by the Energy Consumer Protection Act of 2002.[2] This change was made in recognition of the fact that then current law only applied HEFPA protections to regulated utilities. As the legislative history makes clear, the legislature added Section 53 to apply HEFPA protections to ESCOs providing commodity supply.[3] The

[2] Chapter 686 of the Laws of 2002.

[3] See Chapter 686 of the Laws of 2002, New York State Senate Introducer's Memorandum in Support, describing the justification to the amendments to HEFPA,

> With the restructured electric market, customers are now allowed to purchase their electricity supply from retail suppliers known as energy service companies (ESCOs). These private companies are not required by state law to provide the same consumer protections to its customers that regulated

incorporation of ESCOs within the reference to "a gas corporation, an electric corporation, a utility company, or a utility corporation" was expressly limited "for purposes of this article" - namely only Article 2. The legislative history makes no reference to the inclusion of entities providing distributed energy resources within Article 2. Indeed, in 2002 legislators were only focused on the nascent market for retail commodity offerings. The technological innovations that have been (and remain to be) realized in the form of distributed energy resources were not the subject of the 2002 law amending HEFPA – to the extent DER technologies existed, it was not generally economically feasible to market such technologies to customers on a large scale. Nor does HEFPA contemplate the very different business models employed by entities supplying DER. That degree of foresight cannot reasonably be imputed to the legislators at that time. The legislature took deliberate and specific action to include ESCO commodity sales within HEFPA. The Commission cannot extend the applicability of HEFPA to entities supply of DER without authorizing legislation.

The legislature never intended Article 53 to apply to the supply of distributed energy resources, and the language included therein makes that clear. Article 53 provides that "For purposes of this article, a reference to a gas corporation, an electric corporation . . . shall include, but is not limited to, any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers." The initial White Paper rests its entire jurisdictional foundation on this quoted language without any analysis of whether it, in fact, is applicable to the supply of distributed energy resources. If you analyze the statutory language with specific reference to the supply of

utilities must provide. As we encourage customers to "shop" for their gas and electric needs, we should also ensure that customers receive the same protections they have become accustomed to under the traditional system. This legislation will give customers the comfort to switch suppliers and "shop" for a cheaper rate. In addition, applying these standards to ESCOs will provide a level playing field between ESCOs and the regulated utilities.

DER that the White Paper proposes to make Commission jurisdictional, it becomes clear that foundation does not exist. For example, with respect to demand response, this is typified by customers reduction in energy usage from their normal consumption patterns in response to pricing signals or incentive payments. A *reduction* in energy usage does not constitute a "sale of electricity." In fact, it is just the opposite. Likewise, energy efficiency suppliers provide technologies, such as lighting or insulation, that enable consumers to reduce the amount of energy they need. Again, the *reduction* in energy usage from EE does not constitute a "sale of electricity." As for DER suppliers of Community Distributed Generation or energy resources related to net energy metering, these also do not involve the type of "sale of electricity" transactions that the statutory scheme under the Public Service Law and implementing Commission regulations were intended to control. The Commission should distinguish between the rules it has adopted that are applicable to traditional full requirements sales of commodity over the utility distribution system and the purposes for which those rules were adopted versus the new behind-the-meter DER business models such as Community DG and net energy-metered products and services, which are sold, generated and distributed in a very different manner.[4]

The inapplicability of Section 53 to suppliers of Distributed Energy Resources is made more evident by the fact that the initial White Paper proposes to parse the provisions of HEFPA that

[4] See New Hampshire Public Utilities Commission, Docket DE 15-303, Vivint Solar, Inc., Order No. 25,859, issued January 15, 2016. The NHPUC found that an entity offering solar power purchase agreements and solar leases to customers was not a "competitive electric power supplier" (the equivalent of an ESCO) under established Commission rules. The NHPUC found that,

> The Puc 2000 rules seem designed to cover a business model in which a CEPS sells full requirements electricity service to retail customers that is delivered through the utility transmission and distribution system to the customers' retail electric meters, for which service the customers are usually invoiced through utility billing systems. In essence, the overall design and many specific provisions of the rules appear to have little or no relevance to the business model of Vivint and other third party System owners. The rules seem intended to regulate a set of relationships and related transactions that is quite different from those undertaken in the context of customer-sited, behind-the-meter, distributed generation development involving sales of electricity directly to the host customers pursuant to the terms and conditions of PPAs. (Order at 20-21).

would be applied to those entities. The core purposes of HEFPA consumer protections are to delineate processes for termination of commodity service, suspension of delivery service and consumer complaint processes. However, the initial White Paper states, "HEFPA complaint resolution processes would apply, while those related to termination or suspension of electric to a customer would not adhere because the termination of a customer's agreement with the DERS for reasons of non-payment or otherwise, will not affect their ability to receive service from an electric distribution utility." (Initial White Paper at 5). This "explanation" very disingenuously removes core provisions of HEFPA from applying to entities supplying DER. The necessity of this HEFPA "retrofit" reveals that it is ill-advised and just plain wrong to apply HEFPA to entities supplying DER at all. Moreover, Article 53 also explicitly prohibits the Commission from waiving the applicability of HEFPA requirements to required entities stating, "No provision of this article or of this chapter authorizes or permits the provision of gas or electricity service by any such corporation or other entity in any manner other than in full compliance with the provisions of this article or to authorize the commission to waive compliance with any requirement of this article for any such corporation or other entity." The proposed revised UBP-DERS at Section 4.B.1.d. would require DERS marketing representatives to have "[k]knowledge of the applicable provisions of the Home Energy Fair Practices Act that pertains to residential customers." It is entirely unclear what constitute the "applicable provisions of HEFPA" for DERS compliance, aside from a consumer complaint process.

Even if Section 53 were applicable to suppliers of distributed energy resources, which it is not, the language of Section 53 makes clear that the more expansive definition of "a gas corporation, an electric corporation" was to be utilized only for the purposes of Article 2. Section 53 begins by explicitly stating, "*For purposes of this article*, a reference to a gas corporation, an electric

corporation . . . shall include, but is not limited to, any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers." (emphasis added). Contrary to the assertion in the initial White Paper, this definition in Section 53 does not subject an entity to Article 1 jurisdiction. The Commission itself affirmatively made that determination when implementing the ECPA.[5] In this regard, NEM incorporates herein all prior pleadings submitted in connection with the Commission's proceedings and orders concerning this subject matter as filed in National Energy Marketers Association et. al. v. New York Public Service Commission, Alb. Co. Index No. 868-16 and National Energy Marketers Association et. al. v. New York Public Service Commission, Alb. Co. Index No. 5680-16. The initial White Paper did correctly note that suppliers of DER are not subject to Commission rate regulation under Article 4.

As the Commission well knows, a very complicated and lengthy rulemaking process was required to implement the extension of HEFPA requirements to ESCOs sale of commodity. After much review and study, many of the issues were solved by the stakeholders' cooperative proposal that utilities purchase ESCO receivables and combine the procedures for termination of ESCO commodity service and utility delivery service.[6] If substantive HEFPA requirements were extended to suppliers of DER, through an appropriate grant of statutory authority by the legislature, similar mechanisms for customer payment for DER products and services should be explored and incorporated. Such mechanisms should include the expansion of utility purchase of receivables programs and/or on-bill financing mechanisms.

[5] "The June 20 Order addresses the inclusion of ESCOs within the definition of utility only for the purpose of implementing and adhering to the provisions of PSL Article 2." Cases 98-M-1343, 99-M-0631 and 03-M-0117, Order on Petitions for Rehearing and Clarification, issues December 5, 2003, at page 44.

[6] The Commission found that "a utility that purchases an ESCO's accounts receivable may combine the procedures for termination of the ESCO commodity service and utility delivery service. The combination of the processes, however, should not result in any diminishing of the customer's HEFPA rights." Cases 98-M-1343, 99-M-0631 and 03-M-0117, Order on Petitions for Rehearing and Clarification, issues December 5, 2003, at page 38.

II. Proposed Revised UBP-DERS

Notwithstanding the foregoing objections and arguments, and without waiving any rights, arguments, claims, or remedies, NEM offers the following comments on the proposed revised UBP-DERS.

A. Uniform Application of UBP Provisions to ESCOs and Non-ESCO DERS

Staff's supplemental White Paper includes a revised proposed version of a UBP-DERS to be applicable to DERS. The revisions include expanding the marketing standards to include requirements for the training of marketing representatives, in-person contact with customers, and telephone contact with customers. NEM submits that the Commission should not grant non-ESCO DERS an unfair competitive advantage through the application of lower, less costly compliance obligations than are imposed on ESCOs through the existing UBP. ESCOs operating under the UBP must conform to extensive requirements for door-to-door, telephonic and internet enrollments, contract renewals, notice requirements and third party verification requirements, to name but a few. An ESCO selling commodity bundled with a DER product or service, or selling DER as a stand-alone product, would be at a significant competitive disadvantage in having to conform with the current UBP requirements coupled with UBP-DERS requirements. Creating this imbalanced compliance obligation, will cause ESCOs to incur higher costs to provide the *same* DER products and services as non-ESCO DER suppliers, thereby rendering ESCOs provision of these value-added services less economic and undermining ESCOs competitive value proposition to consumers. Neither the initial or supplemental White Papers offer any quantitative, substantive or rational basis to distinguish the compliance obligations imposed on these entities. Indeed, requiring ESCOs to conform to the regulatory compliance burden of the current UBP plus the

UBP-DERS, while non-ESCO DERS would only have to comply with the UBP-DERS, to provide the same DER products and services is a distinction that cannot be justified.

Staff does propose that a "consolidated UBP" be developed in the future. (Supplemental White Paper at 12). After a legally proper record has been created and vetted, NEM submits that a consolidated UBP under which the provisions apply uniformly to ESCOs and suppliers of DER should be developed and implemented from the outset. Starting off with a bifurcated approach to ESCO and non-ESCO DERS compliance will unfairly institutionalize the disparity in treatment between these entities, to the detriment of ESCOs and their customers.

If a UBP-DERS is adopted separate and apart from the current UBP, the Commission should take care to ensure that the standards set forth in the different documents are coincident with, and not contradictory to, each other. For example, the proposed UBP-DERS at Section 3.B.4. addresses document retention requirements, providing that "[a] DERS shall retain, for a minimum of two years or for the length of the sales agreement, whichever is longer, verifiable proof, including but not limited to a recording or signed writing, of authorization for each customer." ESCO document retention requirements under the UBP are currently under review by the Commission.[7] NEM urges consistent treatment and resolution of these issues to ensure thorough compliance and consistent equal protection.

B. Applicability to Mass Market Customers

Staff proposes in the initial White Paper that the UBP-DERS, "be applicable to DERS participating in utility DER programs, including distribution-level demand response programs, for products and

[7] Cases 15-M-0127, 12-M-0476 and 98-M-1343.

services sold to mass market customers associated with those utility programs." (Initial White Paper at 6). The supplemental White Paper offers no change to this position. NEM agrees that a UBP-DERS should be limited in its application to DER products and services sold to mass market customers. Customized sales and marketing to sophisticated commercial and industrial customers of individually tailored DER products and services does not require the imposition of a UBP-DERS.

C. Reference to Utility Pricing in DER Marketing Materials and Sales Agreements

The supplemental White Paper and proposed revised UBP-DERS make a change to the prior proposal regarding DER marketing materials and sales agreements that include a reference to an estimate of future utility supply charges. Staff originally proposed that DERS marketing materials that make reference to utility supply charges "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." Staff has revised that proposal such that, "estimates of future utility supply charges must be calculated based on actual utility supply charges over at least the past twelve months, as well as those actual utility charges plus and minus five percent." NEM opposed the original proposal and opposes the revised proposal as well and for the same reason. It is inaccurate and misleading to institute the utility supply charge as the comparison point for any competitive products, services, information or technologies, including DER products and services. While Staff claims it "will assist consumers in assessing the savings that can be expected from DER purchases," this very metric undermines and misstates the potential perceived value of DER products and services. Indeed, many consumers are willing to pay a premium for environmentally responsible products and services, a decision that drives them to switch away from plain vanilla utility commodity service.

From a practical perspective, it is unclear how the determination of twelve months of utility supply charges will be made. Utility supply charges are subject to after-the-fact adjustments and reconciliations, and it is unclear how DERS will be able to factor those adjustments into the computation. These utility pricing adjustments prevent consumers from seeing real market conditions and distort the value of otherwise competitive products. For these reasons, NEM recommends that consumers would be better served by the reliance on industry standard sources for pricing information that reflect real market conditions, such as ICE and Inside FERC.

D. Staff Requests for Information to DERS

Proposed UBP-DERS Section 9.B.3. has been modified from the initial proposal to require entities selling DER products and services to "[p]rovide other information as requested by the Department, *whether through informal requests or interrogatories, including but not limited to, information regarding the DERS business operations and financials*." (new language in italics). NEM submits that the proposed scope of reporting is overbroad. Any information requests from Staff must be reasonable and germane to the entities DER-related business in New York State. It is also important to distinguish between the Commission's statutory oversight of utilities and their books and records that was granted to prevent the exercise of utility monopoly market power and to ensure just and reasonable utility rates. Competitive entities, such as non-ESCO DERS and ESCOs, do not have the ability to exercise monopoly market power in the sale and supply of DER, and their prices are subject to the discipline of competitive market forces rather than a regulatorily-determined process.

E. Performance Bond or Other Security Requirement

In the supplemental White Paper, Staff states that it is considering whether a performance bond or other security requirement should be imposed as part of a DERS application process.

(Supplemental White Paper at 16). It is unclear from Staff's discussion whether this security requirement would be applicable only to non-ESCO DERS or also to ESCOs supplying DER. NEM urges that a duplicative security requirement should not be imposed on ESCOs supplying DER. No justification has been proffered for an imposition of an additional collateral requirement to ESCOs. ESCOs currently post a credit requirement with the NYISO that covers electricity supply costs in the event of non-payment. Section 3.B. of the UBP delineates how an ESCO must satisfy utility credit requirements. Utilities are also in possession of receivables from all of the ESCOs participating in utility purchase of receivables programs. As a result, these entities are adequately protected from financial risk.

III. Conclusion

NEM appreciates this opportunity to offer its comments on the Staff's initial and supplemental White Papers on Distributed Energy Resources and proposed UBP-DERS.

Sincerely,

s/Craig G. Goodman

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