

**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

**REPLY COMMENTS OF THE ASSOCIATION FOR ENERGY AFFORDABILITY
October 19, 2015**

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Reply Comments of the Association for Energy Affordability, Inc.

I. Introduction: Additional Collaborative Discussions are Necessary

The Association for Energy Affordability (AEA) respectfully submits these reply comments on the staff straw proposal for regulation and oversight of distributed energy resource providers. As a non-profit, mission-driven organization that is both a consumer advocate and a DER provider, we have a special concern that the oversight and regulation imposed on DER providers protect consumers and, at the same time, enable innovation and greater reliance on market-driven achievement of the State's clean energy goals. The staff proposal in its present form fails to satisfy these needs in a manner that can be implemented without adverse impacts and great confusion.

Our initial comments suggested that the proposal be redrafted based upon the comments received and then be the subject of another round of collaborative discussions. Other parties, including New York City and the Joint Utilities also made that or similar suggestions. Furthermore, many of the initial comments pose significant and important questions and offer diametrically opposed solutions to one another; in the interest of building the general consensus needed for successful implementation of REV, we continue to believe *the staff proposal merits further collaborative discussion* among the parties rather than unilateral decision making by staff and the Commission. Another iteration of collaborative discussion could also then include additional insights into the Commission's vision from a careful reading and discussion of Track 2 issues and the staff guidance for DSIPs.

In our initial comments we noted that: the applicability of the rules was unclear and potentially too far-reaching; the rules should not be prematurely applied to contractors and

subcontractors to utility-run programs or already in place programs; the proposed rules were overly burdensome and costly for non-profit organizations and small businesses; and that standardized contracts seemed inappropriate. Upon review of the comments submitted by others, we find support for our positions and other significant meritorious concerns including jurisdictional questions and calls for a single set of rules for ESCOs and DER providers (with some provisions only applying to one or the other).

II. Comments

It is important to note that the comments from active parties are not in opposition to Commission oversight of DER providers. In fact, AEA and others acknowledge that experience with ESCOs in New York has shown clear need for strong oversight and regulation of marketing energy services to mass market customers. The comments of AEA and others are offered to ensure sound and workable regulations are put in place; regulations where it is clear to whom and when they apply and that also encourage rather than stifle the market.

A. Additional Clarity is Necessary

Many parties joined us in arguing additional clarity is necessary on exactly which providers, and which of their products and services, would be covered by the proposed rules. The Commission must clarify its jurisdictional authority and the criteria used for distinguishing between covered and not covered entities and markets. The conflicting opinions and interpretations of the Commission's criteria for identifying when regulations apply and the staff's extrapolation from the Commission's stated intent make further discussion and clarification essential.

Parties with otherwise opposite views of the staff proposal (some believing it is too lenient and others too stringent) argue for further clarification of the Commission's jurisdiction.

For example, PULP argues for broader jurisdiction, suggesting collaboration with the Attorney General and the legislature where necessary,¹ while AEE/ACE NY argues for a narrower interpretation of the Commission’s jurisdiction as it believes was described in the Track 1 Order.

AEE/ACE NY notes:

The Track 1 Order stated that jurisdiction over DER providers for purposes of imposing oversight would not apply to companies to the extent they do not “furnish electricity.” The Commission made clear that while many DER providers would be subject to this standard, “the Commission will not regulate all transactions involving DER providers,”.... Making this distinction is vitally important to the success of REV. Many types of DER providers will not be furnishing electricity or providing core DSP services.²

The comments also note different interpretations of the applicability of the proposal to products and services in existing DER markets and, themselves, offer confusing and contradictory suggestions for changes, all of which illustrates the insufficient clarity of the staff proposal. The Joint Utilities propose adding “...DERS that are part of other DSP markets, including, *inter alia*, net metering, remote net metering, energy efficiency, community choice aggregation, microgrids, and services provided in the digital marketplace.”³ to the (already contentious) staff list of distribution level demand response, non-wire alternatives and community distributed generation projects. However, the JU’s position is nuanced and confusing. They argue that the regulations should not apply to a provider in the sale or installation of a solar array “with no ongoing operation, ownership, or other involvement with the customer or DSP” but should apply to a provider who “leases a solar array to a customer or provides management, ongoing maintenance or operation of the equipment” and also should apply *to the customer* who net meters a solar array under the DSP’s tariff.”⁴ They qualify the last proposal by suggesting a tiered approach and an exemption for smaller systems where all but “an

¹ *Comments of the Public Utility Law project of New York* at 6

² *Comments of AEE/ACE NY* at 6

³ *Comments of the Joint Utilities* at 7

⁴ *Comments of the Joint Utilities* at 7

incidental amount of power will be used onsite.”⁵ It appears the JU are asking for customers (well beyond the Commission’s vision of “prosumers”) to be subject to the Commission’s DER regulatory oversight rules. AEE/ACE NY, on the other hand, argue “DER providers that supply end-use customers with distributed generation products and services that use net metering should not be subject to UBP-DERS”⁶ because it does not satisfy the Commission’s two part criteria for application of DER oversight. Rather, AEE/ACE NY suggests the Commission should regulate the interactions between DERs and the DSP by focusing on contracts and contract terms.

As parties also note, it remains an open question if the staff proposal is arguing that every retail outlet selling DER products and services (i.e., energy efficiency, smart thermostats, etc.) must comply with the proposed regulations. In the absence of a clear understanding of REV markets and to which products and services the rules will apply, the resulting confusion will result in fewer options for consumers rather than more.

A collaborative discussion among parties could increase everyone’s understanding of Commission jurisdiction, appropriate application of regulatory oversight, and specific products and services subject to regulations, or perhaps to those contracts subject to regulation, rather than providers or products and services, as AEE/ACE NY suggest.⁷

B. Requirements as Proposed Present Barriers for to a Fully Developed Market

We reiterate our concern that the proposed regulations appear in several instances to disregard the variety of entities that provide DER products and services or that we hope will do so in the future, including non-profit organizations and communities that own assets. The credit requirements and the 50 kW minimum for sales to the DSP should be reviewed and adjusted to

⁵ *Comments of the Joint Utilities* at 10

⁶ *Comments of AEE/ACE NY* at 9

⁷ *Comments of AEE/ACE NY* at 8

ensure a variety of players can participate in REV markets. In addition, it isn't clear the regulations will encourage innovation and market entry by newer and smaller companies, which could undermine the goals of REV and local economic development opportunities, as well as innovative business models.

The lack of clarity described above presents barriers to development of the marketplace since, as AEE/ACE NY point out, specific eligibility requirements may be too burdensome, e.g., identifying every product and service and the customer segment to which it will be marketed and its price and continually updating these offerings.⁸ For a vision that depends on constant innovation and consumer engagement, forcing providers to provide continual updating of specific product and service information to maintain eligibility may not be possible. Most DERs, in this sense, are distinct from “energy” offered solely as a commodity as is the case now with ESCOs and may merit different disclosure requirements. Or, alternatively, if the staff proposal meant “products and services” more generally defined as in type of product (solar system, battery storage, etc.) then that should be made clear. While a digital marketplace could potentially be used for disclosure of the terms of sale, there is no such marketplace at this time, and therefore a regulatory regime based on the marketplace is not possible.

C. The Commission Should Use Alternatives to Standard Contracts

There appears to be fairly widespread opposition to mandatory standardized contracts, at least for some providers, with many suggesting instead that standardized language be available and encouraged.⁹ Standardized contract language can be offered alongside required terminology without confining innovative offerings tailored to specific customer needs and responsive to changes in the marketplace. Standard contracts do not appear useful where products and services

⁸ *Comments of AEE/ACE NY* at 11

⁹ Including AEE/ACE NY, RESA, SEIA, AEA

need to address site-specific conditions, unlike bulk power energy purchases then sold at retail (as in most ESCO offerings). Requirements for the use of standard terminology, disclosure statements and a code of conduct are more appropriate

D. The Commission Should Consider a Single Regulatory Framework

The concept of separate regulatory regimes for ESCOs and DER providers appears reasonable at first given the history of ESCO activity and regulation in New York and the different products and services expected from DER providers. However, a number of commenters, including the Joint Utilities and New York City, make convincing arguments in favor of a single Uniform Business Practices (UBP) regulatory regime for both ESCOs and DER providers. A single UBP need not require exactly the same actions by ESCOs and DER providers nor the applicability of every provision to both. However, a single framework would provide a more user-friendly interface. As the Joint Utilities point out: “(f)urther, to the extent sections might necessarily be different (e.g., creditworthiness requirements), it would force clear resolution within a single document readily available to all interested parties (i.e., whether they be a customer, utility, ESCO, DERs, or combined ESCO-DERs).”¹⁰ If the regulations are to be useful to consumers as well as regulators and service providers, using a single framework/document is sensible and appropriate. Specific provisions could apply or not depending on the market players. Regulations for DERs providing service necessary for reliability, for example, could have specific and stricter provisions than those offering non-essential services.

¹⁰ *Comments of the Joint Utilities* at 4

III. Conclusion

We appreciate the opportunity to submit brief reply comments and hope to have the opportunity to engage in the collaborative discussion necessary to finalize sound and workable regulations for DER oversight. We continue to believe the staff proposal merits further collaborative discussion among the parties prior to Commission adoption.

Respectfully submitted,



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