

As previously suggested by NEM,⁵ an inadequate record has been developed to support the designation of the utility as the DSP rather than an independent entity. Moreover, after nearly two decades of experience with competitive retail markets, it is abundantly clear that the anti-competitive impacts of monopoly utility participation in competitive energy markets, be it for commodity supply or new energy-related value-added services as a DER provider, is poor public policy, is not in the public interest and deters and discourages the private capital investment and technology innovation that is necessary to truly realize the REV vision.

NEM recognizes and supports many of the measures identified in the Staff Proposal to increase consumer engagement by enhancing ESCOs ability to provide energy-related value-added services.⁶ Staff suggests that customer usage information be made available to DER providers on an opt-out basis through an electricity data information exchange. Staff also recommends that utilities revisit the current voluntary time-of-use rate structures for mass market customers, in which participation has been minimal, and restructure those rates so as to be more understandable. Finally, Staff recommends that utilities allow 1,000 characters of billing space on consolidated utility bills for ESCOs to provide messages related to DER or other energy-related value-added services. These initial changes will enhance ESCOs ability to provide DER products and services, and NEM has additional recommendations that should be considered in concert with these changes.

⁵ 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.

⁶ Straw Proposal at 26-29.

The crucial issue underlying the full realization of the REV vision is the participation of informed and engaged consumers in a competitive DER market. ESCOs want to provide DER products to mass market consumers, but have been effectively precluded from doing so because there is currently no mechanism available by which ESCOs can help these customers lower their capacity costs.⁷ NEM proposed in its initial comments in this proceeding the development and implementation of Retail Demand Response Load Profiles⁸ as a low cost way to address this problem. NEM encourages the Commission to require the utilities to develop Retail DR Load Profiles as a near-term “no regrets” REV implementation measure.

Permitting utilities to be competitive DER providers is antithetical to the REV vision. It presumes that utility-created products will be designed to meet a vast array of individual customer needs. It presumes that a utility price for a competitive product will ever resemble a competitive price. The distortions to the current retail commodity market created by a false, and often understated, utility “Price to Compare” have been well-documented. NEM urges the Commission to avoid creating the very same barriers to development of competitive DER markets that have persisted in preventing further development of the competitive commodity markets. Indeed, this REV docket is the perfect venue to identify and correct the data availability, technology and utility pricing barriers that have prevented ESCOs from making more robust energy-related value-added services available to date.

⁷ The capacity costs of mass market consumers are allocated based on the class average load profile for one hour of the year. By comparison, in Texas suppliers are widely offering Demand Response products to mass market consumers due to the suppliers’ ability to allocate hourly ISO costs to individual customers.

⁸ Available at: http://www.energymarketers.com/documents/NEMA_Mass_Market_Retail_DR_Policy.pdf

As required by the ALJs' Ruling pertaining to submission of party comments, NEM's comments set forth below are in conformance with the section numbering utilized in Staff's Straw Proposal for ease of reference.

II. Establishing REV: DSP Market Vision

The Staff Straw Proposal sets forth a definition of DSP as follows:

The DSP is an intelligent network platform that will provide safe, reliable and efficient electric services by integrating diverse resources to meet customers and society's evolving needs. The DSP fosters broad market activity that monetizes system and social values, by enabling active customer and third party engagement that is aligned with the wholesale market and bulk power system.⁹

Staff then defines the distribution functions that a DSP (regardless of a determination as to whether the DSP is an independent entity or utility) must perform to "provide reliable electricity service and to animate retail markets under the REV vision. These functions include: 1) market operations, 2) grid operations, and 3) integrated system planning, with modifications to enable the DSP market development."¹⁰ Staff appropriately identifies the need for a DSP to operate transparently, utilizing an interoperable operational platform that provides standardized access across utility service territories to the extent practicable. These distribution functions, as described, and subject to appropriate market power measures and protections, can be performed in a manner that facilitates DER market development.

However, the Straw Proposal then posits that, "The transactional platform established by the DSP will enable the offering of value-added services, some of which are directly enabled by the utility's monopoly status and others that can be provided by multiple entities on a competitive basis. Utilities, utility affiliates, and third parties should be able to provide competitive value-

⁹ Straw Proposal at 12.

¹⁰ Straw Proposal at 12.

added services. With appropriate incentives, utilities are expected to be innovative in developing services, and the allocation of revenues from such services should depend upon whether or not the services are enabled by the utility's monopoly. This should be further addressed in Track Two."¹¹

NEM reiterates its opposition to the Proposal that utilities be permitted to offer competitive value-added services. Indeed, instituting the utility as a DER provider, in effect deciding the utility is the DER provider of last resort (in addition to the current distortionary effect to the market of retaining the utility as the commodity provider of last resort) would undermine the REV vision and thwart the technological innovation that the Commission is seeking because it will deter competitive entry and investment by other market participants, vest the utility with instant economies of scope and scale in the provision of competitive DER products and services, and require a regulatory "best guess" at an appropriate utility price for DER products that should only appropriately be determined as a function of competitive market forces, amongst other reasons.

NEM's Retail Demand Response Load Profile proposal should be required as a "no regrets" near-term implementation measure that the utilities take until every New York consumer has an individual load profile via a smart meter. It is critical to both achieving the goals of REV and controlling market power abuse and the extension of utility monopoly power over demand resources, to immediately implement Retail DR Load Profiles so that the market can create these new DR products and consumers can be educated in their use.

¹¹ Straw Proposal at 14.

Finally, the Straw Proposal discusses that the DSP provider will need to purchase certain products from customers and DER service providers, such as grid services and contingency and planning products. Conversely, the DSP will sell products and services to customers and DER service providers. The Straw Proposal suggested those products might include, “interconnection services, pricing and billing services, metering information services and data sharing and maintenance, operation, and financing.” It is important that the DSP products and services be made available in a non-discriminatory manner, that the price not pose an anti-competitive barrier to an ESCO or other DER provider utilizing the product or service, and that these services be provided in a timely fashion without unreasonable restrictions or requirements for their use.

III. Enabling New Roles for Key Participants

A. Identity of DSP Provider

While recognizing the “substantial arguments” in favor of an independent entity serving in the role of DSP, the Straw Proposal reaffirms the previous Staff recommendation that the utilities serve as DSPs. Staff recognizes many factors that support the institution of an independent DSP – higher degree of uniformity, avoidance of market power concerns, possible lower costs and greater propensity to promote technological innovation. Staff then concludes that the benefits of an independent DSP are not great enough to overcome the drawbacks, generally related to the utilities existing functions for reliability and system planning and not creating redundant costs in involving another entity in those processes.

Notwithstanding its recommendation that the utility serve as the DSP, Staff recognizes that it will entail significant attendant problems, including addressing the potential exercise of market power by the utility and also finding a way to ensure standardization of platforms, rules,

practices and procedures to encourage DER provider participation. NEM strongly agrees with this assessment. It is not clear how the Commission can adequately police and oversee the full range of utility activities if it is both the DSP and DER provider, in essence acting as market maker, market facilitator and market participant all while having superior access to customer data and knowledge of the distribution system. It would be a system ripe for market power abuse and create inherent conflicts of interest for the utility. If the Commission were to institute the utility as DSP, it is imperative that the utility be limited to its pure monopoly distribution and reliability functions, and not be permitted to engage in the DER market and offer competitive energy-related value-added services.

B. Customer Engagement

Drawing upon the work of the Customer Engagement Working Group, the Straw Proposal includes a number of recommendations aimed at removing barriers to customer engagement and animating DER product development. NEM submits that this issue, lack of customer engagement in DER, lies principally in the inability of ESCOs and their customers to obtain meaningful data about customer energy usage, the absence of individual or Retail DR Load Profiles, and the related restrictions posed by current utility consolidated billing of being able to design and then offer DER products. In the absence of detailed, timely customer usage data, ESCOs cannot develop innovative value-added products nor can customers be properly incented or rewarded to participate in the use of these products.

NEM strongly recommends that a principal goal of the REV proceeding should be ensuring the provision of detailed customer usage data to ESCOs in a readily usable format, by hour and by zip code, and that this should be included in the near-term “no regrets” implementation measures

of the utilities. Then, ESCOs can and will be the drivers of the technological innovation necessary to realize the REV vision. Utilities should not be viewed as stop gap providers of DER in the interim while the mechanisms needed for competitive providers are developed and put into place. Rather, utility resources should be focused on enabling the data access that ESCOs have requested for many years. This is how to jump start the REV technological revolution. Once this takes place, then competitive DER providers can put all of their private capital to work to create and offer innovative products to New York consumers.

In this vein, Staff proposes that a bi-directional electricity data information exchange be developed. Customer participation would be on an opt-out basis. Registered DER providers that have access to the exchange would receive data pertaining to the customer's total electricity usage for the previous 12 months; monthly customer electricity consumption; an indicator of whether commodity service is being provided by an ESCO or utility; utility service classification; ICAP tag; number of meters associated with the customer; information about customer service location on the distribution system; and other relevant information. This list of data elements follows closely with that which is provided on customer lists that are made available in other jurisdictions.¹² NEM has supported the provision of this information for many

¹² See, e.g., Pennsylvania PUC Docket No. M-2010-2183412, Interim Guidelines For Eligible Customer Lists, Final Order on Reconsideration, issued November 15, 2011. Data elements of the Eligible Customer List made available by the utilities to competitive suppliers include:

Minimum Elements: ECL Revision Date; Customer Account Number; Customer Name; Service Address; Billing Address; Billing Country Code (if available); Tariff Rate Class and Schedule; Rate Subclass/Rate Subcode (if available); Meter Read Cycle; Load Profile Group per Tariff; Transmission/Capacity Obligation (PJM) (Current/Future); POLR/Shopping Status (Y or N); Monthly Consumption (each of 12 months)(KWH); On Peak/Off Peak Consumption (each of 12 months)(KWH) (if available); Monthly Peak Demand (each of 12 months) (KW) (if available); Interval Meter (Y or N); Net Metering (Y or N) (new) and Sales Tax Status (Y or N) (new).

EDC Specific Elements: Meter Flag (PECO); Loss Factor (First Energy) and Procurement Classification Indicator (certain EDCs).

Optional Elements: Revenue Code; Load Factor; Fixed Price Election and Reverse flow or generation.

years as it better enables ESCOs to formulate relevant, targeted offers to consumers on a cost-effective basis. However, the technology revolution that should accompany REV will demand more.

Staff opines that customer usage data that is more granular than total monthly usage should only be shared subject to a customer's affirmative consent. NEM disagrees with this recommendation. Without access to usage data and hourly market-based pricing, consumers and the ESCOs serving them are unable to reduce major cost drivers in their bills. Currently, consumer ICAP cost allocations are based on usage during one hour of the year, and the allocations of T&D capacity costs typically are based on customer usage during twenty-five hours of the year. By comparison, competitive providers in Texas have access to customer usage data set forth in fifteen minute intervals. It is the granularity of the usage data that is the *key* to facilitating innovation in the DER market. Consumer participation should be on an opt-out basis. Consumer privacy concerns can be addressed by aggregating the data by zip code and controlling and limiting access to the information exchange to licensed ESCOs and other appropriate entities identified by the Commission so that there is a clear line of accountability to anyone accessing the information. ESCO misuse of customer usage data should be subject to Commission oversight and the remedies proscribed in the Uniform Business Practices, which will further deter improper actions.

Related to the issue of access to customer usage data, the Straw Proposal recommends consumer shopping tools such as web-based and mobile applications be developed that provide information about different DER product offerings that are available and aid consumer comparison. The Straw Proposal does not provide adequate detail on this recommendation to provide extensive comment. However, it is not clear in general how these tools will be structured to provide

customer and DER provider access to the energy usage data. It is not clear whether these are intended to be Commission-developed applications. Indeed, competitive DER providers will find ways to harness customer usage data in numerous ways that should not be limited at the outset by the strictures of a regulatorily-predetermined web or mobile app. Moreover in the early stages of the DER market, the shopping tools may be a premature endeavor.

The Straw Proposal identifies limited utilization of time-of-use rates by mass market customers as an additional barrier to consumer acceptance of DER and third party market entry. The Straw Proposal recommends that the utilities revisit their time-of-use rates for mass market customers with a view toward making the rates easier for consumers to understand. However, the Straw Proposal suggests that rate revisions may not necessarily take the form of shorter rate intervals, and may instead be seasonally-adjusted. NEM is concerned that the suggestion to move to longer rate period intervals is contrary to the purpose of time-of-use rates. Time-of-use rates, by definition, should be more reflective of current “time-of-use” market conditions, and not less so. In the absence of improved market-based pricing signals, it is difficult to reward consumers for engaging in more demand responsive behavior.

An additional barrier to DER market animation identified in the Straw Proposal is the content and format of utility bills. Staff notes a number of potential enhancements to utility billing that it will evaluate in the Retail Access proceeding. Staff proposes as an initial step in this REV proceeding to require the utilities to make 1,000 characters available on consolidated utility bills for ESCO messages pertaining to DER or other energy-related value-added services, including customer-specific messages, which would be transmitted via EDI. NEM supports this recommendation as it would be a significant improvement to ESCOs’ ability to communicate

with their customers. In particular, customer-specific targeted messages would do much to facilitate DER offerings to current ESCO customers.

NEM additionally recommends that the Commission examine utility POR/on-bill financing mechanisms that can be employed in consolidated utility billing to foster ESCO offerings of energy-related value-added services. If an ESCO is precluded from including energy-related value-added services on consolidated utility bills, it will pose a substantial barrier to ESCO offerings of these products notwithstanding the other measures the Commission is considering to enhance ESCO DER offerings. This is because many DER-related products could entail a sizable cost and the on-bill repayment mechanism would make payment more economical by spreading the costs over time. Alternatively, the utility POR programs could be expanded to include ESCO energy-related value-added services in order that consumer credit status will become less of a barrier to offering these types of products to a diverse customer base across New York State. NEM also recommends that utility billing systems be modified to permit bill ready billing. Most of the New York utilities only offer rate ready billing systems, which effectively precluded the creation of time-of-use ESCO products. This is because the ESCO has to provide the utility with the rate before they know the customer's usage.

V. Building the DSP Market

A. Clean Energy

The Straw Proposal states that the Commission's objectives in REV are consistent with the State Energy Plan calling for a 50% reduction of carbon emissions by 2030 as well as EPA carbon regulations. To date, the Renewable Portfolio Standard (RPS) program has been administered by NYSERDA. NYSERDA and the utilities have implemented energy efficiency programs. The

Straw Proposal recommends a departure from the long-standing, competitively neutral, NYSERDA-administered RPS program in favor of utility renewable procurements via power purchase agreements.¹³ “With regard to renewables, Staff recommends that procurement of supply-side large scale renewable resources become the responsibility of the utilities. With regard to energy efficiency, [Staff] recommend[s] that the utilities prepare and submit energy efficiency transition implementation plans (ETIPs) no later than March 31, 2015.”¹⁴

NEM urges the Commission not to adopt the recommendations that would entrench the utilities in the competitive DER functions of renewables procurement and energy efficiency planning. The Straw Proposal repeatedly recognized that attracting private capital investments in technologies, not ratepayer funded programs, will be a prerequisite to achieving the market transformations envisioned in REV. Yet, adopting such regulatory mandate, would discourage private capital investments in these DER resources because of the utilities’ exclusive ability to receive guaranteed cost recovery at a guaranteed rate of return, unlike competitive investors. It will bestow an unfair competitive advantage on the utilities. And, it will revisit the same risky scenario the utilities and ratepayers endured with 6 cent PURPA contracts.¹⁵

Utility renewable resource procurement raises significant price issues as well. For example, if renewables form part of utility default service, then default service must be priced to reflect the full costs of procuring these resources. If the utility is allowed to subsidize the costs of a renewables procurement mandate by embedding the retail costs of providing renewable energy in its distribution rate or deferring those costs for later recovery, the default service price will be an artificially low, subsidized price. If the default service price does not reflect the true costs of

¹³ Straw Proposal at 52.

¹⁴ Straw Proposal at 51.

¹⁵ See NEM Initial Comments in this proceeding at note 16.

providing retail generation service including maintaining a portfolio with renewables, true competition on the basis of price and quality of service will not be possible. Under these circumstances fewer customers will choose competitive energy suppliers, the utilities market share will be maintained or increase, consumers will not benefit to the degree they should, and renewable energy will not be properly priced or supplied. Indeed, it will reward inefficient technology for years to come.

E. Demand Response Tariffs

The Straw Proposal discussed the regulatory uncertainty created by the D.C. Circuit's decision on FERC Order 745 on demand response participation in wholesale energy markets. The Straw Proposal posits that prolonged regulatory uncertainty regarding demand response programs will cause aggregators to conduct their operations in jurisdictions that offer greater stability and profit opportunity. As a result, Staff urges that expanded demand response programs should be expeditiously pursued. First, Staff recommends that, "the Commission should direct a process in which stakeholders work with distribution utilities, Staff and the NYISO to immediately develop programs that allow demand response providers, interfacing with the distribution utilities, to respond to bulk power system needs currently addressed by the NYISO's Special Case Resource (SCR) and Emergency Demand Response Programs."¹⁶ Second, the Straw Proposal recommends that demand response tariffs be developed for all utility service territories, "in order to give customers more opportunities to benefit from participation in programs that offer reservation and performance incentives for load reductions." Staff recommended that utility reliability-related DR programs be reformed such that DR is used as an economic resource and component of the utilities' supply portfolios.

¹⁶ Straw Proposal at 63.

In response, NEM reiterates its position that traditional utility monopoly functions should not be expanded to include competitively available products, services, information and technologies, including Demand Response products. The retail competitive marketplace should be relied upon to furnish demand response products to consumers. NEM identified barriers to ESCO provision of DER products in its prior comments in this docket and the Retail Access proceeding. The appropriate transitional path to achieving greater consumer engagement in DR products is to provide ESCOs with enhanced access to consumer energy data, aggregated DR load profiles until individual load profiles are provided by smart meters, and improved billing functionality as soon as is practicable.

We have far too much experience with the barriers to entry and participation that were created by retaining the utility as the commodity merchant default service provider. We should avoid the creation of a new utility demand response monopoly, particularly while this industry is in its earliest stages of development. To do so, would create another barrier to competitive entry and product innovation, and New York consumers stand to lose the most by adopting such a model. NEM recommends that the utilities be required to develop and implement a Retail Demand Response Load Profile to facilitate ESCO offerings of demand response products to mass market consumers.

VI. Mitigating Market Power

The Straw Proposal identifies a number of serious market power issues implicated by the utility's performance of the DSP role and potential ownership of DER resources. Despite the significant risks, Staff does not recommend "an absolute prohibition against utility engagement in DER,"

instead favoring the adoption of mitigation measures.¹⁷ With respect to direct activities of utilities, Staff suggests that utility sponsorship and management of energy efficiency programs and generation or storage located on utility distribution property be permitted.¹⁸ Other direct utility activities would be generally prohibited unless the utility demonstrated the satisfaction of conditions of meeting a substantial system need; benefits of the utility activity are shown to outweigh market power concerns; and in the case of ownership, includes a competitive solicitation for construction and operation.¹⁹ With respect to the activities of the utility's unregulated affiliate within the utility's service territory, Staff proposes that those activities be subject to code of conduct rules and heightened regulatory scrutiny.²⁰ Additionally, caps on total market share of the affiliate within the service territory and on the market share of the affiliate within distribution circuits are proposed to apply.

Utilities should not be relied upon to be the jump-start to the DER markets. The market power concerns associated with utility DER ownership that were delineated by Staff are numerous and could be pervasive, bringing with it a high level of required regulatory oversight to maintain adequate controls over a new utility demand monopoly. The Commission should promote private investments to meet the demand for competitive DER products and services. The Commission should give clear signals that it does not intend to rely on a regulatory backstop to perform the role of DER provider. This regulatory direction will incent the type of competitive activity and investment that is needed to transform the market and to develop DER innovations that meet consumer needs. This could begin by requiring NYSERDA to issue rebates to

¹⁷ Straw Proposal at 70.

¹⁸ Straw Proposal at 72.

¹⁹ Straw Proposal at 73.

²⁰ Straw Proposal at 73.

consumers that purchase smart thermostats in order to enroll in competitive demand response programs.

It is also unclear how these proposed market power restrictions are meant to apply in the context of the rest of Staff's recommendations. Staff recommended that utilities be permitted to engage in large-scale renewables procurement. Staff also recommended expansion of utility energy efficiency programs and the implementation of utility demand response tariffs. It would appear Staff has tacitly made a determination on the market power implications of these utility DER activities. In NEM's view, all of these activities implicate market power concerns vis a vis other DER providers that want to offer these competitive products but without the commensurate ability to affect control of the distribution system and without commensurate access to system data and customer data of the utility.

Conclusion

NEM appreciates this opportunity to offer its comments on the Staff Straw Proposal in Track One. We look forward to continued participation in the REV proceeding.

Sincerely,

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