

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Case 15-M-0127 – In the Matter of Eligibility Criteria for Energy Service Companies.

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.

Case 98-M-1343 – In the Matter of Retail Access Business Rules.

**CONSOLIDATED EDISON SOLUTIONS, INC.’S
REPLY COMMENTS ON THE STAFF WHITEPAPERS**

I. INTRODUCTION

Consolidated Edison Solutions, Inc. (“ConEdison Solutions”) submits these reply comments in accordance with the *Notice Seeking Comments* issued in these proceedings on May 10, 2016.¹

II. PRELIMINARY STATEMENT

On May 4, 2016, Department of Public Service Staff (“Staff”) issued for comments several “Whitepapers” entitled as follows:

1. Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interest (hereafter “Performance Whitepaper”);
2. Staff Whitepaper on Express Consent (hereafter “Consent Whitepaper”);

¹ Cases 15-M-0127, *et al.*: *In the Matter of Eligibility Criteria for Energy Service Companies*, Notice Seeking Comments (issued May 10, 2016) (“hereafter “Notice”).

3. Staff Whitepaper on Benchmark Reference Prices (hereafter “Benchmark Whitepaper”).

ConEdison Solutions submits the following reply comments in response to comments submitted by other parties on the Consent Whitepaper. Specifically, ConEdison Solutions would like to address issues relating to Uniform Business Practice (“UBP”) rule changes that may be implemented to better inform customers of renewal terms, changes to contracted prices, and price adjustments driven by regulatory or legislative changes or other material changes to an ESCO contract.

ConEdison Solutions is not specifically commenting on the other issues raised in the above referenced Staff Whitepapers. ConEdison Solutions is a member of the Retail Energy Supply Association (“RESA”) and generally supports the comments filed by RESA on these other issues.²

III. STAFF WHITEPAPER ON EXPRESS CONSENT

In its Consent Whitepaper, Staff proposes certain modifications to the UBP to implement new rules regarding the type of notice and consent required from customers when there is a material change in an existing contract or when a contract is renewed. Specifically, in the Consent Whitepaper, Staff suggests that the UBP be revised to provide an alternative to express consent wherein an energy service company (“ESCO”) would provide three notices to customers for renewals and material changes to customer contracts. Staff proposes that customers receive the following notices:

- 1st Notice: Sent 45 to 60 days prior to the material change or contract expiration;

² Cases 15-M-0127, *et al.*: *In the Matter of Eligibility Criteria for Energy Service Companies*, Reply Comment of the Retail Energy Supply Association on the Staff Whitepapers (Filed June 20, 2016).

- 2nd Notice: Sent 30 days prior to the material change or contract expiration with additional details about the change and the customer's options;
- 3rd Notice: Sent two to three days after the second notice with a reminder to look at the 2nd notice.

RESA submitted comments in response to Staff's proposal to revise the UBP requirement for express consent. RESA recommends that Staff clarify the requirements around "regulatory change" provisions in ESCO contracts and the process that should be used to notify customers of regulatory changes that may affect their price or terms of service. ConEdison Solutions also supports clarification of this issue. Clarification around this issue is timely for several reasons.

First, the Consent Whitepaper provides a good opportunity to clarify and codify appropriate UBP changes to provide clear and unambiguous direction to the ESCO industry around the proper form of contract disclosures and notice requirements for regulatory changes that may impact an ESCO contract. Second, as Staff is aware, there are several significant pending regulatory changes that will have a material impact on ESCOs' cost of providing retail electric service to New York consumers. Recently, the New York Independent System Operator, Inc. implemented changes in cost allocation for transmission projects that result in significant new costs being allocated to ESCOs and other load serving entities. Whereas previously all transmission costs were allocated to transmission owners and recovered through regulated utility rates, these new transmission costs related to New York Transco transmission investments will be an ongoing new cost component applicable to ESCOs operating in New York. Additionally, the New York State Public Service Commission (the "Commission") is in the process of developing a new Clean Energy Standard ("CES") that will impose renewable energy

procurement obligations on ESCOs.³ These CES requirements will also increase operating costs on ESCOs. In light of these emerging regulatory developments, it is more likely that ESCOs will need to rely on “regulatory change,” “change in law,” or other similar contractual provisions in order to recover the newly imposed costs created by the NYISO’s and Commission’s regulatory requirements.

ConEdison Solutions recommends that Staff provide guidance to the ESCO industry, in the form of clear UBP revisions, as to what notice is required in order for an ESCO to adjust prices or pass-through additional costs driven by these types of regulatory developments or legislative changes. As Staff is aware, it is common for ESCOs to include provisions in contracts that reserve the right of the ESCO to pass-through new costs in certain circumstances. ConEdison Solutions supports the continued ability of ESCOs to utilize such provisions. However, ConEdison Solutions recommends that Staff clarify that such regulatory-driven cost adjustments are permissible with proper notice to customers in advance of the price adjustment or cost pass-through event.

ConEdison Solutions recommends providing ESCOs with flexibility as to the form and vehicle for this notice. Specifically, ConEdison Solutions recommends that ESCOs be allowed to provide the required notice for a regulatory change adjustment through a bill message notification instead of a separate letter. For ESCOs who provide their own billing to customers, which is typically limited to larger commercial and industrial customers, providing notice via bill message would be a more cost effective means of notification.⁴ A bill message is also more

³ See generally Case 15-E-0302: *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*.

⁴ ConEdison Solutions would also support the ability to provide the required customer notice via a bill message on utility consolidated bills issued by the utility. However, current utility billing systems may not provide sufficient space to include the required information. If the utility does not offer a bill message option for the ESCO or if there is insufficient space, then the ESCO would be required to issue a separate notice.

likely to be clearly noticed by a customer. Given the prevalence of junk mail, a separate, stand-alone notice is very likely to go unnoticed. However, customers are much more likely to pay attention to their bill.

On a related issue, ConEdison Solutions also recommends that the Commission modify the UBP to clearly specify the contract disclosure requirements for contracts containing “regulatory change,” “change in law,” or other similar provisions that permit the ESCO to adjust prices or pass-through costs in various circumstances. As the Commission is aware, the current UBP requires an ESCO to include a Customer Disclosure Statement (“CDS”) in all contracts, including for residential and commercial customers. The CDS summarizes in a table format certain key terms of the ESCO contract including, for example, the price, agreement length, the presence of early termination fees, and renewal provisions. During its recent triennial compliance review, ConEdison Solutions was requested by Staff to update its CDS to include in the “Price” box a description of the “regulatory change” provision in the contract. Specifically, ConEdison Solutions was asked to modify its CDS as follows (the underlined sentence reflects the requested modification:

Price	\$X.XX per kWh. <u>All prices may be modified due to a subsequent change in a law, rule, regulation, tariff or regulatory structure. See Section 12 of the Agreement.</u>
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ConEdison Solutions supports full disclosure of important contract terms to customers. ConEdison Solutions, after discussion with Staff, agreed to make the requested change to its contracts. However, ConEdison Solutions remains concerned that there is not uniform compliance with or awareness of this issue within the ESCO industry. Staff recently issued an

email to remind ESCOs of this requirement.⁵ ConEdison Solutions appreciates Staff's efforts to inform ESCOs of Staff's interpretation of the UBP as to this disclosure requirement. However, there is no specific provision in the UBP that speaks directly to the issue of disclosure around regulatory change adjustments or other pricing adjustments. In light of this, new ESCOs entering the market may not be aware of Staff's guidance as outlined in the email. Even more concerning, an ESCO may take a different interpretation of the UBP than Staff and purposefully choose not to disclose its regulatory change or price adjustment provision in the CDS. ConEdison Solutions is concerned about the potential competitive disparity that could occur as a result of inconsistent compliance with this disclosure requirement. An ESCO that clearly highlights its regulatory change or other price adjustment provision in its CDS may lose a customer to another ESCO that excludes this provision from the prominent CDS.

This concern is not purely theoretical. At the time of this writing, ConEdison Solutions is aware of several ESCOs that are marketing services under contracts that include regulatory change or other price adjustment provisions but who are not including disclosure of such provisions in the CDS. The examples below are excerpts from actual New York ESCO contracts that are publicly posted to various ESCO marketing websites. In the ESCO's corresponding CDS summary box for each of these examples, there is no statement in the Price section or elsewhere that references the price adjustment provision.

Example 1:

The amount you pay may change for reason allowed for by law, including, without limitation: (a) a change in charges, or new charges imposed by your LDU, NYPSC, or other government agency; or (b) determine that the service plan originally designated is incorrect.

⁵ See email from DPS Staff dated June 2, 2016 which is also attached to these comments.

Example 2:

Change in Law. This Agreement is subject to any future legislation, orders, rules, regulations or my Utility tariff or policy changes (Change in Law). In addition to SUPPLIER's right to revise the terms and conditions of this Agreement as provided in the Section above, this Agreement may be revised at any time by SUPPLIER upon the occurrence of a Change in Law. If SUPPLIER requests such a change, they will provide me written notice of the changed prices and/or terms and conditions and I will have an opportunity to terminate this Agreement without any further obligation by notifying SUPPLIER within 30 days after the date of the notice of the new prices and/or terms and conditions, in which case my power and energy service will terminate effective as of the next meter read date after expiration of the required notice period. I will remain responsible for any unpaid balance as of the termination date but SUPPLIER will not assess a termination payment. If there is a Change in Law including but not limited to a change in Capacity charges in New York which results in SUPPLIER being prevented, prohibited or frustrated from carrying out the terms of this Agreement, SUPPLIER may terminate this Agreement with no further liability.

Example 3:

Change in Law/Third Party Charges. This Agreement is subject to any federal, state, local, or utility changes in law, which includes changes in legislation, orders, rules, tariffs, regulations, policies, riders, fees, pricing structures, capacity charges, and changes in customer load profiles (each, a "Change in Law"). If there is a Change in Law which results in an increased cost to the Company, Company may terminate this Agreement with notice to you, or adjust your rate based upon such Change in Law. This provision applies to all rate plans, whether fixed, index or variable. Company will provide you with 30 days written notice prior to modifying your Agreement as outlined in this section, except as otherwise permissible by law.

These examples were taken from the New York contracts of well-known ESCOs active in the New York market. ConEdison Solutions is not listing the names of these specific ESCOs as it is not our objective to call out any particular ESCO for any actual or perceived non-compliance with Staff's recent guidance on this disclosure issue. However, these examples are provided to illustrate that there is indeed a range of interpretations among ESCOs as to the requirements of the UBP and a very real competitive disparity for those ESCOs who have already updated their CDS consistent with Staff's guidance. To prevent continuation of this competitive disparity, which essentially penalizes those ESCOs with a more transparent CDS, ConEdison Solutions recommends that the following provision be added to the UBP:

“If an ESCO includes a contractual provision that allows for a price adjustment or the pass-through of additional costs due to changes in laws, regulations or other events, the ESCO shall include a clear statement disclosing this price adjustment or pass-through provision in the Price section of the Customer Disclosure Statement.”

In addition to this explicit revision to the UBP, ConEdison Solutions recommends that the Commission clarify that this CDS disclosure is required for any type of price adjustment or cost pass-through contemplated in an ESCO contract, not just regulatory change-driven adjustments. Some ESCOs include provisions that allow for an adjustment to the price for factors such as:

- Changes to certain identified wholesale cost components such as transmission, ancillary services, capacity, balancing and operating reserves, etc;
- Changes to a customer’s usage characteristics, such as consumption falling above or below a usage bandwidth provision, or changes to the customer’s capacity tag or load factor;
- General provisions that preserve the right to adjust prices for factors beyond the ESCO’s control.

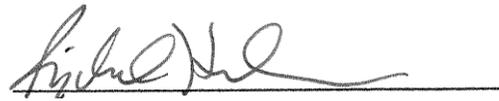
Further, some ESCOs may structure a product that may be marketed as fixed or partially fixed. In these situations, the ESCO may present a single price to the customer, such as 9 cents per kWh, but this price does not include certain components that are specified in the contract as a pass-through item. This may include components such as capacity, ancillary services, renewable energy compliance requirements, etc. Under the recommended UBP change suggested above, an ESCO would be required to also fully disclose these pass-through items in the CDS. ConEdison Solutions recommends that, regardless of the event driving the change or the specific wording of the contract, the ESCO should disclose the potential for the price adjustment or pricing pass-through in the CDS. This will help to foster uniform disclosure among ESCOs, fair and

equitable application of disclosure rules for all market participants, and greater contract transparency for customers.

IV. CONCLUSION

ConEdison Solutions appreciates the opportunity to submit these comments and assist the Commission in its efforts to address the needs and concerns of customers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard Hudson Jr.", is written over a solid horizontal line.

Richard J. Hudson Jr.
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Dated: June 20, 2016

From: Bosy, Christine (DPS) [<mailto:Christine.Bosy@dps.ny.gov>]

Sent: Thursday, June 02, 2016 3:19 PM

Cc: Scherer, LuAnn (DPS); Taylor, Robin (DPS); Dwyer, Francis (DPS); Ewing, Kirsten (DPS); Nati, Maureen (DPS)

Subject: UBP Customer Disclosure Requirements for contract prices affected by pass-through charges

All ESCOs are bcc'd.

Please be advised, any ESCO currently using sales agreements that have any terms within the body of the agreement that effect the price of commodity (such as language that allows for pass-through of certain costs) must disclose such costs or potential costs in the customer disclosure statement. **Section 5.B.4.b of the UBP States: the Customer Disclosure Statement shall also contain the price term of the agreement. In the event that the text in the Statement differs from or is in conflict with a term stated elsewhere in the agreement, the term described by the text in the Statement shall constitute the agreement with the customer notwithstanding a conflicting term expressed elsewhere in the agreement.**

This provision applies to both Residential and Non-Residential agreements. If you currently have contracts with this type of language and have not revised them, please do so immediately and send in for staff review. We have currently been reviewing contracts and dealing with revisions on a case by case basis, but you are required per UBP Section 5.B.4.b. to disclose the price of the agreement in the customer disclosure statement: If costs that are not included in the disclosure statement are imposed on a customer, we will insist that the customer be rerated.

If you have any questions or concerns, please contact me at the number listed below. Thank you.

Christine Bosy

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