

**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

**INITIAL COMMENTS OF THE JOINT UTILITIES
ON PROPOSED STANDARDS FOR
DISTRIBUTED ENERGY RESOURCE PROVIDERS AND PRODUCTS**

In its *Order Adopting Regulatory Policy Framework and Implementation Plan* (“Track One Order”) issued February 26, 2015 in the Reforming the Energy Vision (“REV”) Proceeding,¹ the New York State Public Service Commission (“Commission”) concluded that a degree of oversight over distributed energy resources (“DER”) suppliers (“DERS”) would be necessary “to ensure both consumer protection and fair competition,”² and stated that it would take “an active role in establishing and enforcing consumer protections related to DER providers.”³ To initiate the development of the DERS oversight process, the Commission directed Department of Public Service Staff (“Staff”) to develop standards in consultation with stakeholders.⁴ Staff issued proposed Uniform Business Practices (“UBP”) for DERS (“Original

¹ Case 14-M-0101, *Proceeding on the Motion of the Commission in Regard to Reforming the Energy Vision* (“REV Proceeding”), Order Adopting Regulatory Policy Framework and Implementation Plan (issued February 26, 2015) (“Track One Order”).

² REV Proceeding, Track One Order, p. 102.

³ *Id.*, p. 104.

⁴ *Id.*, p.105.

UBP-DERS”)⁵ for which the Commission requested public comments from interested parties.⁶

In response, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, National Fuel Gas Distribution Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, KeySpan Gas East Corporation d/b/a National Grid, The Brooklyn Union Gas Company d/b/a National Grid NY, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (“Initial Joint Utilities”) submitted Initial Comments on the Original UBP-DERS.⁷ Several other stakeholders also submitted comments.

In its March 9, 2017 *Order on Net Energy Metering Transition, Phase One of Value of Distributed Energy Resources, and Related Matters* (“VDER Order”),⁸ the Commission directed that Staff file an updated whitepaper on oversight of DERS. On April 11, 2017, Staff filed its Supplemental Staff Whitepaper on DER Oversight (“Updated UBP-DERS”).⁹ Pursuant to a notice issued on April 12,¹⁰ the Joint Utilities¹¹ provide these initial comments on the Updated UBP-DERS.

⁵ Case 15-M-0180, *In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products* (“DERS Proceeding”), Staff Proposal (issued July 28, 2015)(“Original UBP-DERS”).

⁶ DERS Proceeding, Notice Seeking Comments on Proposed Standards (issued July 28, 2015).

⁷ DERS Proceeding, Initial Comments of the Joint Utilities to the Notice Seeking Comments on Proposed Standards (filed September 25, 2015)(“Initial Joint Utilities Comments”).

⁸ Case 15-E-0751 *et al.*, *In the Matter of the Value of Distributed Energy Resources* (“VDER Proceeding”), Order on Net Energy Metering Transition, Phase One of Value of Distributed Energy Resources, and Related Matters (issued March 9, 2017) (“VDER Order”).

⁹ DERS Proceeding, Supplemental Staff Whitepaper on DER Oversight (filed April 11, 2017)(“Updated UBP-DERS”).

¹⁰ DERS Proceeding, Notice Seeking Comments on Proposed Standards (issued April 12, 2017), as amended by Notice of Technical Conference and Extension of Time to File Comments (issued May 26, 2017).

¹¹ The Joint Utilities are Central Hudson Gas & Electric Corporation (“Central Hudson”), Consolidated Edison Company of New York, Inc. (“Con Edison”), New York State Electric & Gas Corporation (“NYSEG”), Niagara Mohawk Power Corporation d/b/a National Grid, KeySpan Gas East Corporation d/b/a National Grid and The Brooklyn Union Gas Company d/b/a National Grid NY (collectively, “National Grid”), Orange and Rockland Utilities, Inc. (“O&R”), and Rochester Gas and Electric Corporation (“RG&E”).

I. INTRODUCTION

The Joint Utilities continue to support the development of a robust New York DER market that delivers innovative solutions for customers and for the energy system as a whole. Certain aspects of the DER market are just beginning to take shape. New DER opportunities, including utility solicitations for non-wires solutions (“NWA”), compensation under the VDER framework,¹² and REV demonstration projects continue to drive the development of new business models, technology solutions, and approaches to meeting customer energy needs. The Joint Utilities agree that this market innovation should be encouraged to continue.

A key element of this innovative solution building is customer engagement – from the most complex of microgrid projects to the simplest energy efficient lighting upgrade, customers are central to the REV objectives. Customer and system data in particular are important inputs into the solution building and innovation that REV is seeking to promote. Customers willing to become involved and participate in new programs deserve certain protections from the potential for poor business practices that could expose them to unanticipated risk. The Joint Utilities view the adoption of reasonable standards that protect customers and their data as foundational to future innovation and DER market development.

Staff’s recommendations that oversight of DERS is necessary and the establishment of requirements applicable to DERS as a set of UBP similar to those established for retail access purposes and applicable to energy services companies (“ESCOs”) are a good starting point. As REV-related markets and products evolve, it is critical for the Commission to establish UBP with requirements that reinforce the importance of customer protections, particularly so that customers have the appropriate information to make informed decisions and avenues to address

¹² VDER Proceeding, VDER Order.

disputes. Moreover, any UBP should protect customer privacy, including obtaining customer consent before sharing customer-specific information. Finally, the UBP should provide confidence in DER markets – putting in place appropriate rules now will lay the foundation for the growing DER market and in the long run will benefit customers, DERS, and utilities.

The question is how these rules should be structured to strike the appropriate balance between necessary customer protections and allowing innovation to thrive. Prescriptive requirements that apply a cookie-cutter mandate may unintentionally stifle innovation, while rules that do not capture certain key business activities may unnecessarily leave customers at risk. The Joint Utilities recommend that the applicability of the proposed rules and roles of various entities be clarified to capture the businesses and business activities that could place customers at risk. While supporting Staff’s proposal to expand application of a UBP to DERS, the Joint Utilities, as described below, urge that the UBP be applied to DERS broadly.

As suggested by the Joint Utilities in comments on the initial draft of the UBP-DERS,¹³ the Updated UBP-DERS includes a new Section 10 to address high level cyber security concerns.¹⁴ The Joint Utilities believe that adoption of cyber security protections is necessary for third parties that receive customer and/or system data from utilities, including ESCOs, DERS, utility vendors, and any other parties that have a demonstrated need to access customer or system data. Such protections would be outlined in data security agreements that will be executed as part of a third party’s agreement with individual utilities, as envisioned in the Updated UBP-DERS.¹⁵

¹³ DERS Proceeding, Initial Joint Utilities Comments, p. 5.

¹⁴ DERS Proceeding, Updated UBP-DERS, App. A, p. 31, Sec.10.

¹⁵ The Updated UBP-DERS states: “The details regarding protections and breach protocols shall be detailed in agreements between these entities and the DSP, and shall include at a minimum, requirements that entities conduct reviews of adherence to cyber security policies at least annually as well as terms for notifying the DSP and the

The UBP-DERS should also be considered for their alignment with the various agreements that govern the participation of DERS in utility programs and solicitations, including interconnection agreements, utility tariffs, existing business law, state and federal laws, and supplemental agreements among the utilities, participants in the Distributed System Platform (“DSP”),¹⁶ and DERS. As with current agreements between ESCOs and utilities (*e.g.*, the Business Services Agreement), these separate operating agreements governing various aspects of the DERS-utility/DSP relationship reflect the more detailed utility-specific requirements that pertain to the DER installation or program the DER participates in. Especially as DERS begin to play an increasingly important role in maintaining system reliability, DERS should appropriately comply with requirements to maintain their systems in ways that seek to protect information. These requirements will continue to evolve as the DSP takes shape.

As stated in their previous comments, the Joint Utilities recommend establishing a single consolidated set of UBP containing both the current requirements applicable to ESCOs and additional requirements to be applicable to ESCOs and/or DERS, as appropriate.¹⁷ A single combined document will clearly define roles, responsibilities, and applicability requirements for each subject area of the UBP. Because many provisions are the same for both ESCOs and DERS, consolidation would eliminate redundant requirements. Further, a single, combined document would identify different requirements applicable to ESCOs and DERS, *e.g.*, creditworthiness requirements. However, the Joint Utilities acknowledge that creating a document applicable to both ESCOs and DERS will be complex and, therefore, agree with

Commission immediately in event of a breach.” DERS Proceeding, Updated UBP-DERS, App. A., p. 31, Sec. 10(C).

¹⁶ The Commission determined that the Joint Utilities should operate their respective DSPs. REV Proceeding, Track One Order, pp. 48-53.

¹⁷ DERS Proceeding, Initial Joint Utilities Comments, p. 16.

Staff's approach in the Updated UBP-DERS to first develop DERS-specific UBP and then work to incorporate both UBPs into a combined ESCO/DERS UBP in a separate process.¹⁸ As with the existing UBP, the Updated UBP-DERS should be incorporated in the utilities' tariffs for alignment and accountability.

The Joint Utilities agree with Staff's initial proposal for UBP-DERS that DSP market-based fees and any proposed revenue streams associated with such fees require further consideration. The Joint Utilities recommend that such fees be evaluated in the context of the ongoing review of utility rates and revenues per the Track Two Order of the REV Proceeding,¹⁹ within individual utility rate proceedings, and within Phase 2 of the VDER Proceeding.²⁰

Consistent with the responsibility of the Commission and Staff to monitor and enforce rules for DERS, the Joint Utilities support Staff's proposal for the Commission to maintain a list of eligible DERS on the Commission's website that utilities, customers, and other stakeholders can rely on as meeting all of the Commission's requirements based on their function.²¹ Moreover, the Joint Utilities agree that utilities may, in certain circumstances, rely upon a DERS' representation that it is complying with the Commission's rules regarding the provision of DER services to the DSP and/or customers.²²

Finally, the Joint Utilities understand that DERS may choose to either participate in the DSP markets and/or the wholesale market operated by the New York Independent System Operator ("NYISO"). Regardless of whether a DERS participates in the DSP or NYISO market, there must be an explicit recognition that the DERS is using the utility's electric distribution

¹⁸ DERS Proceeding, Updated UBP-DERS, p. 12.

¹⁹ REV Proceeding, Order Adopting a Ratemaking and Utility Revenue Model Policy Framework (issued May 19, 2016)("Track Two Order"), pp. 32-40.

²⁰ See note 8, *supra*.

²¹ DERS Proceeding, Updated UBP-DERS, App. A, p. 5, Sec. 2(B)(2).

²² DERS Proceeding, Initial Joint Utilities Comments, p. 11.

system to facilitate such participation. Most importantly, as more DER are added to the system, it will become more important for the DSP to coordinate with the NYISO and have knowledge of a DERS' participation in the NYISO market in order to maintain distribution system reliability.

II. SECTION 1: DEFINITIONS AND SECTION 2: ELIGIBILITY REQUIREMENTS

In its Original UBP-DERS, Staff proposed that the UBP apply to DERS that acquire customer data by any means established under the Commission's authority and/or when DERS services are sold into the DSP markets.²³ The Updated UBP-DERS expands the Commission's oversight to all DERS participating in Commission-authorized and/or utility or DSP-operated programs or markets.²⁴ The Joint Utilities agree with the suggested expanded applicability of the UBP to DERS, but request additional clarification as follows.

A broad interpretation of when the UBP-DERS should apply is necessary because the UBP-DERS will provide important consumer protections, system reliability support, and establish initial guidelines for interactions between DERS and DSPs. The Joint Utilities believe the UBP-DERS are also equally applicable to DERS or in some circumstances other third parties, even if they are not participating in a utility program or DSP market. For example, to the extent a wholesale aggregator is using a utility's distribution assets to supply the wholesale market, and those assets have an impact on the safe and reliable operation and planning of the distribution system, that wholesale aggregator should be subject to the distribution system operator's planning and operational requirements/standards as well as comply with the UBP-DERS.

Additionally, the UBP-DERS should apply when a third party is acquiring customer data by any means established under the Commission's authority. The Commission should clarify

²³ DERS Proceeding, Original UBP-DERS, p. 3.

²⁴ *Id.*, p. 6.

that this includes rate consultants and other third parties that obtain data from the utility to assist customers, even when the third party has received consent from the customer. The Updated UBP-DERS expanded scope appears to capture such third parties,²⁵ but such applicability should be made clear.

The Joint Utilities agree that the specific DERS identified in the Updated UBP-DERS should be subject to the UBP-DERS,²⁶ including sponsors and hosts of community distributed generation (“CDG”) projects²⁷ and DERS assisting community choice aggregation (“CCA”) administrators,²⁸ participating in NWA solutions,²⁹ and demand response programs. The Joint Utilities agree that the UBP-DERS should be applied to future or expanded REV demonstration projects, as well as to DERS developing projects or providing services related to net energy metering (“NEM”), Phase One NEM, or the Value Stack tariff pursuant to the VDER Order. The Joint Utilities support Staff’s proposal for the Commission to maintain a list of all eligible DERS on its website that utilities can rely on as meeting all of the Commission’s requirements.

In the Updated UBP-DERS, Staff inquired whether energy efficiency (“EE”) providers that may not obtain customer data through means established under the Commission’s authority, or sell into the DSP markets, should nevertheless be subject to Commission oversight through the UBP-DERS.³⁰ As noted earlier, the Joint Utilities believe that, although certain providers may not be interacting with the DSP in any way, they should be subject to the UBP-DERS. For

²⁵ *Id.*, p. 11.

²⁶ *Id.*, pp. 6-10.

²⁷ Case 15-E-0082, *Proceeding on Motion of the Commission as to the Policies, Requirements and Conditions for Implementing a Community Net Metering Program*, Order Establishing a Community Distributed Generation Program and Making Other Findings (issued July 17, 2015).

²⁸ Case 14-M-0224, *Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs*, (“CCA Proceeding”), Order Authorizing Framework for Community Choice Aggregation Opt-Out Program (issued April 21, 2016).

²⁹ Case 14-M-0411 *et al.*, *In the Matter of Distributed System Implementation Plans*, Joint Utilities’ Supplemental Information on the Non-Wires Alternatives Identification and Sourcing Process and Notification Practices (filed May 9, 2017).

³⁰ DERS Proceeding, Updated UBP-DERS, p. 11.

example, an EE provider might offer customers an option to receive a bill for DER services that incorporates or reflects utility charges, in addition to the customer receiving the regular utility bill. In this circumstance, the UBP-DERS should apply. The Joint Utilities are mindful that there may be other instances where it is unrealistic or inappropriate for third-party providers to be subject to Commission oversight. Accordingly, the Joint Utilities welcome further discussion on how the UBP-DERS can appropriately apply to third parties where oversight is necessary, particularly as it relates to customer protections.

The Joint Utilities request clarification on the timing of the application requirements for DERS. For instance, the Updated UBP-DERS require the DERS to provide Staff with proof of payment to the DSP for application fee(s) and an attestation of compliance with applicable DSP requirements (*e.g.*, completion of data interface testing).³¹ However, Section 8 of the Updated UBP-DERS states that DERS are to notify the DSP of their eligibility after receipt of the Staff's letter approving participation, and intent to "complete the process to commence operation to sell to the DSP, including execution of any operating agreement that is required."³² The Joint Utilities recommend that the application requirements for DERS align with the current ESCO onboarding process, which requires ESCOs to obtain Commission approval before engaging with the utility to set up various functions (*e.g.*, acquiring customer information, selling services or products, testing systems).

Timing issues notwithstanding, the application requirements enumerated in the UBP-DERS should protect against the risk of bad actors simply forming new companies to avoid the UBP and the associated consequences. As such, the Joint Utilities recommend that the UBP-

³¹ *Id.*, App. A, pp. 4-5, Secs. 2(B)(1)(c) and 2(B)(2).

³² *Id.*, App. A, p. 26, Sec. 8(C).

DERS (and associated DERS application forms) require disclosure of affiliated companies, and that such information be updated regularly.

Regarding Staff's request for comments on performance bonds,³³ the Joint Utilities support a performance bond that is utilized for the protection of customers when a violation or breach of the UBP-DERS occurs. However, any performance bond imposed as part of the Commission's DERS application process must be separate and apart from any form of performance assurance or requirement that the DSP may require as part of the operating agreement, which might be utilized, for example, where a DERS fails to perform agreed-upon operations for system reliability.

The Commission, in considering a performance bond requirement, should consider the prior evaluation of performance bond requirements for ESCOs, which all stakeholders largely supported.³⁴ A performance bond for DERS would serve the same purpose of protecting customers, and therefore is appropriate to address in the UBP-DERS. If the Commission were to consider other alternatives, as the Joint Utilities stated in their prior comments on performance bonds for ESCOs,³⁵ whatever financial instrument is ultimately required, whether a bond, letter of credit, or other instrument, the amount required must be adequate to protect customers in the event of a DERS' failure to deliver promised products or services. Given the numerous complexities related to performance bonds previously addressed in the evaluation of such bond requirements for ESCOs, the Joint Utilities incorporate their prior comments herein as Exhibit A.

³³ *Id.*, p. 16.

³⁴ Cases 15-M-0127 *et al.*, *In the Matter of Eligibility Criteria for Energy Service Companies* ("ESCO Eligibility Proceeding"), Notice Seeking Comments (issued May 10, 2016).

³⁵ *E.g.*, ESCO Eligibility Proceeding, Reply Comments of the Joint Utilities on Staff Whitepapers (filed June 20, 2016), pp. 2-5.

As stated in Exhibit A, the Joint Utilities urge Staff to convene a technical conference on the implementation of performance bond requirements in the Updated UBP-DERS.

Specific comments of the Joint Utilities on Staff’s proposed language in Appendix A of the Updated UBP-DERS follow.

Section 1: Definitions³⁶

- **Digital Marketplace:** This definition includes adjectives that are subjective and aspirational. The UBP should be legally defensible and specific, particularly by avoiding the use of subjective or aspirational language. For this reason, the Joint Utilities recommend that the definition of digital marketplace be revised to end with the word “transact.” Further, the word “easily” in the following sentence should be deleted and the word “efficiently” should be removed from the last sentence in the definition.
- **Distributed System Platform:** The definition of the DSP should be more objective, *e.g.*, “[t]he DSP is the platform that facilitates DER markets, as described in the Commission’s REV proceeding.” In addition, the definition should include an explicit recognition that throughout the UBP-DERS, references to the DSP and utility are used interchangeably.
- **DSP Market:** The Joint Utilities recommend including a definition of what constitutes a DSP market.

Section 2: Eligibility Requirements

- Section 2 should be relabeled “Application and Eligibility Requirements.”

³⁶ The Commission last issued an order modifying the Standardized Interconnection Requirements in Case 15-E-0557, *In the Matter of Proposed Amendments to the New York State Standardized Interconnection Requirements (SIR) for Distributed Generators 5 MW or Less*, Order Modifying Standardized Interconnection Requirements (issued March 18, 2016). The most current SIR was posted in February 2017 on the Commission’s SIR/DG website. Definitions in the next revision of the SIR should be reconciled with the definitions in the UBP-DERS to ensure consistency and avoid confusion.

- B.1.c: The term “application fee” is too narrow, and should be changed to read “application or participation fee.” Moreover, there is a timing inconsistency with this provision. The Joint Utilities will not begin to interact with DERS until the Commission has determined that a DERS is eligible to receive customer data by means established under the Commission’s authority, or to sell DER into DSP markets. Therefore, the DERS will not be able to provide the proof of payment pursuant to the timing required in this section. The language should be modified to state that the DERS must attest to its commitment to pay all applicable fees pursuant to DSP-specific requirements.
- B.1.e-h: The Commission should require DERS to provide information concerning affiliates, including parent companies.
- B.1.l and n: DERS should provide a list of all products or services offered that fall under the Commission’s oversight, consistent with the expanded oversight identified in the Updated UBP-DERS.³⁷ As written, this section refers to the more limited oversight originally proposed by Staff in its initial UBP-DERS. It should therefore be adjusted to be consistent with the Updated UBP-DERS.
- B.1.o: This should be reworded as follows: “A list and description of any security breaches associated with customer or operational information in the last 24 months...”
- B.1.p: The Joint Utilities propose adding a requirement that these entities shall designate and provide contact information for a Senior Manager or executive with responsibility for adoption and compliance with cyber security best practices. The Senior Manager or executive would become the point of contact in the event of any cyber breach, event, or

³⁷ DERS Proceeding, Updated UBP-DERS, pp. 5-6.

warning identified by the Commission, the DSP, or the hosting party for the Digital Marketplace.

- B.2: Similar to B.1.c, a DERS will not be able to attest to its compliance with DSP procedures for data exchange in its application if it has not begun testing for data exchange. As noted above, the Joint Utilities believe such testing should take place after a DERS has been deemed eligible by the Commission. This item should be reworded to state that “applicants shall attest to their commitment to compliance with procedures, protocols, and practices required to exchange and secure information from the DSP or Digital Marketplace prior to offering products or services to consumers.”
- B.5: The application package should be signed by a senior officer of the company.
- C.1: The Staff should be notified of all changes in the application, not only “major” changes, which is vague.
- D.4: The UBP-DERS should make clear that DERS are required to comply with the requirements of the Home Energy Fair Practices Act (“HEFPA”) if the product or service they are providing falls under such requirements. The Commission should also explicitly include “failure to adhere to requirements or stipulations provided for in utility tariffs, interconnection agreements, or any other supplemental utility/DSP agreements.”
- D.5.a.4: This should be amended to read “opportunity to respond, except in the case of an imminent risk to public safety, reliability, or cyber security. In these cases, the DSP, utility, and/or host of the Digital Marketplace would be authorized to take immediate action to resolve such risk.”

- D.5.b.: This should reflect the Updated UBP-DERS expanded oversight,³⁸ *i.e.*, should not be limited to selling into the DSP or obtaining data through Commission-authorized means.
- D.5.b.4: This should be modified as follows: “Imposition of requirements to modify procedures regarding the protection of customer information and demonstrate compliance with cyber security best practices.”
- D.6: Language should reflect the Updated UBP-DERS expanded oversight,³⁹ *i.e.*, not limited to selling into the DSP or obtaining data through Commission-authorized means. Also, there should be a requirement that the DERS notify the Commission if the DERS abandons its eligibility status, along with a clear explanation of what is meant by “abandon.”
- D.7: Language should reflect the expanded oversight of the Updated UBP-DERS,⁴⁰ and not just selling into the DSP or obtaining data through Commission-authorized means.

III. SECTION 3: CUSTOMER INFORMATION

Staff’s Updated UBP-DERS requires the DSP to provide a broad array of customer data to DERS. As noted below, the Updated UBP-DERS then prohibit the Joint Utilities from imposing any charges for this broad data set, despite the fact that the data set goes far beyond the “basic data” – as defined by the Commission– that should be provided by utilities at no charge.⁴¹

The Commission should clarify that the UBP-DERS only require utilities to provide “basic data,”

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The Commission stated: “The basic level of customer data that is to be provided free of charge is defined as the usage for each applicable rate element, including usage bands specified in the applicable tariff.” REV Proceeding, Track Two Order, p. 142.

or clarify that utilities may charge fees for information beyond “basic data.”⁴² Moreover, not all of the data included in Section 3 of the Updated UBP-DERS can be provided by the Joint Utilities, as identified below.

As stated in previous comments, the Joint Utilities take customer privacy and data security very seriously and work diligently, through systems, policies and programs, to maintain security and customer privacy. It is vital that DERS have policies and procedures in place to properly protect and secure such information upon receipt. As discussed further below, the specific data security requirements for a DERS should be reflected in individual agreements with the DSP that are similar to the agreement submitted by the Joint Utilities in the Commission’s CCA Proceeding, appended here as Exhibit B.⁴³ The Joint Utilities believe these protections will reduce the risk of harm to customers resulting from a data breach and have included these provisions in contracts with their own vendors. To illustrate this risk, it is possible that a DERS system breach could reveal a customer’s service address and usage information, which could be used by a bad actor to determine when the customer is present at the premise. In addition to the public safety concerns that this scenario raises, there is potential for bad actors to use utility-supplied information in combination with other publicly-available data to commit identity fraud or financial theft against utility customers.

Specific comments of the Joint Utilities on Staff’s proposed language in Section 3 follow:

Section 3:

- A: Applicability should be modified because Electronic Data Interchange (“EDI”) standards will not be the only standards used to transmit information to DERS. The Joint

⁴² Should the Commission adopt the Joint Utilities’ suggestion, the ESCO UBP should be modified to extend the same requirements to utilities’ sharing of customer data with ESCOs.

⁴³ CCA Proceeding, Joint Utilities Draft Data Security Agreement (filed June 6, 2016).

Utilities recommend removal of the phrase “using EDI standards” from the second sentence and replacement with “by the DSP to DERS that have obtained the required customer authorization.”

- B.2: First, this language should be broadened to include DERS requesting customer information through any utility/DSP means. Second, the Joint Utilities question whether a six-month limitation on authorization may be too short, and note that utilities in many cases will not have information on the terms of a customer’s agreement, if any, with a DERS. Third, the term “sales agreement” is too limited, as many DERS may not have a sales agreement with customers. The Joint Utilities suggest modifying the term to include “or other service agreement.” Fourth, the Joint Utilities request clarification that a “valid authorization request” may vary among the utilities depending on the tools developed for the exchange of customer data.
- B.4: Similar to comment in B.2 above, the language should not be limited to “sales agreement.”
- B.5: The Joint Utilities seek clarification on whether blocking access to information by all DERS means the customer would also be removed from all consideration for opt-out CCA programs.
- C: The Joint Utilities note that not all of the data elements listed in the Updated UBP-DERS may be available immediately upon Commission adoption of such UBP-DERS. Additionally, timelines for such data to be provided through various platforms (*e.g.*, Green Button Connect My Data)⁴⁴ vary by utility.

⁴⁴ REV Proceeding, Ordering Adopting Distributed System Implementation Plan Guidance (issued April 20, 2016), pp. 61-62.

- C.2.a.5: The Joint Utilities seek clarification on whether all items listed need to be provided or if there is an “or” missing.
- C.2.a.6: “Customer’s” should be replaced with “Account’s”
- C.2.a.11: The Joint Utilities recommend clarifying this section to read “12 months, or the life of the account, whichever is less, of customer *usage information* and, upon separate request, an additional 12 months, or the life of the account, whichever is less, of customer *usage information*, and, where applicable, demand information; if the customer has more than one meter associated with an account, the DSP shall provide the applicable information, if available, for each meter...” Without such additions, the information addressed in this paragraph is unclear.
- C.2.a.12: The Joint Utilities request clarification on the meaning of “in summary form (billing determinants aggregated in the rating periods under a distribution utility’s tariffs).”
- D: The Joint Utilities find this section inconsistent with the Commission’s definition of basic data in the Track Two Order⁴⁵ and request clarification. Basic data definition notwithstanding, if utilities are not able to charge for the items identified in the Updated UBP-DERS, the UBP-DERS must be clear that the utilities are not foreclosed from charging DERS or other third parties for other forms of data.

IV. SECTION 5: CUSTOMER AGREEMENT

Customer agreements must include the appropriate level of detail and provisions to clearly and conspicuously inform customers of the product or service for which they enroll.

⁴⁵ REV Proceeding, Track Two Order, pp. 142-143.

Additionally, references to “sales agreement” should be expanded to include other agreements, as described throughout these comments.

One additional, specific comment on Section 5 follows.

Section 5

- C.3.a.2: The language “or a placeholder for the price” should be removed.

V. SECTION 8: REQUIREMENTS OF DERS CONCERNING THE DSP

In addition to the specific comments on Section 8 that follow, the Joint Utilities request clarification that the UBP-DERS requirements are applicable to both NYISO exports and exports to the DSP. In addition, projects over a certain capacity (“MW”)⁴⁶ or projects located in identified areas (*i.e.*, Locational System Relief Value zones) where the DER would provide system benefits should be required to provide prior notice of future retirement of a minimum time period established by the DSP to allow the DSP to plan for any potential procurement or replacement of such project as may be necessary for the safe and reliable operation of the distribution system as well as the bulk power system (as applicable to NYISO participation). The NYISO currently requires a 365-day retirement notice. It may be desirable to establish a consistent notice requirement for DSP markets.

Specific comments of the Joint Utilities on Staff’s proposed language in Section 8 follow:

- B.1: This language should be amended to include systems, processes, and protocols established by the DSP.

⁴⁶ The capacity threshold of a project will vary by location.

- B.2: This language should be amended to make clear that the electronic communications be in a format established by the DSP.
- B.3: This language should be amended to read “verify at the customer level that operational commitments are met within fourteen days.”
- B.4: The language “to ensure system efficiency and reliability” should be struck.
- B.5: DERS should be required to provide a security deposit when participating with the DSP. The DSP should retain and aggregate this security so that the DSP has the necessary funding to step in in the event of a default by a DERS.
- C: The language “Distribution Utility Requirements” should be replaced with “DER requirements” as these are actions DERS need to take with the DSP.
- D.1.g: This new section should be added to include: “Failure to appropriately secure customer or operational data, leading to any release of sensitive information.”

VI. SECTION 10: CYBER SECURITY REQUIREMENTS

Maintaining a defensive posture against cyber security attacks – which may result in loss of customer account information, personally identifiable information, and/or sensitive infrastructure information – is a paramount concern of the Commission and the Joint Utilities.⁴⁷ All third parties⁴⁸ need to demonstrate an appropriate level of information/communications system security before being permitted to receive customer-specific information or interconnect load to any utility system. For this reason, the Joint Utilities continue to support the

⁴⁷ See, e.g., Case 13-M-0178, *In the Matter of a Comprehensive Review of Security for the Protection of Personally Identifiable Customer Information*, Order Directing Creation of an Implementation Plan (issued August 19, 2013).

⁴⁸ This includes DERS, ESCOs, government agencies, utility vendors, and any other third parties with a demonstrated need to access customer or system data.

Commission’s efforts to address cyber security concerns and agree with Staff that “details regarding protections and breach protocols [should] be detailed in agreements between these entities and the DSP.”⁴⁹

By proposing requirements for DERS to meet the National Institute of Standards and Technologies (“NIST”) cyber security framework, Staff demonstrates its understanding of the potential issues that can result from improperly secured systems and data. In the face of myriad cyber-attacks reported on a near-weekly basis, cyber security protections have become all the more vital to the successful administration of any and all energy markets. Examples of necessary protections include (but are not limited to) confidentiality requirements, limitations on disclosure, risk assessments, data access controls, periodic reviews of security programs, cyber security insurance and indemnifications against legal action in the event of a breach. Many of the Joint Utilities already require vendors to sign agreements outlining such protections. Also, as noted previously, the Joint Utilities filed a sample data security agreement that addresses these issues, and intend to use the broad outlines of that agreement as a template for agreements with, DERS, ESCOs, and other third parties moving forward.

Additional cyber security measures may be required of DERS by the DSP for safe and reliable operation of projects on the distribution system. These may include confidentiality agreements that seek to ensure physical security of the system, as physical and cyber threats continue. DSPs may include other terms and conditions within operating agreements between DERS addressing protocols and processes in place for data and control systems.

⁴⁹ DERS Proceeding, Updated UBP-DERS, App. A, p. 31, Sec. 10(C).

VII. CONCLUSION

The Joint Utilities strongly agree with the Commission and Staff that oversight of DERS is necessary and that requirements applicable to DERS should be documented. The Joint Utilities respectfully request that the Commission act on the issue of DERS oversight in a manner that reflects the comments and concerns of the Joint Utilities.

Dated: June 9, 2017

Respectfully submitted,

**CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC. and ORANGE AND
ROCKLAND UTILITIES, INC.**

By: */s/ Kerri Ann Kirschbaum*

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**CENTRAL HUDSON GAS AND ELECTRIC
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**NIAGARA MOHAWK POWER
CORPORATION d/b/a NATIONAL GRID,
KEYSPAN GAS EAST CORPORATION d/b/a
NATIONAL GRID, and THE BROOKLYN
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**NEW YORK STATE ELECTRIC &
GAS CORPORATION and
ROCHESTER GAS AND ELECTRIC
CORPORATION**

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Appendix A

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

In the Matter of Eligibility Criteria for
Energy Service Companies

Case 15-M-0127

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 12-M-0476

In the Matter of Retail Access Business Rules

Case 98-M-1343

REPLY COMMENTS OF THE JOINT UTILITIES ON STAFF WHITEPAPERS

Consolidated Edison Company of New York, Inc. (“Con Edison”), Orange and Rockland Utilities, Inc. (“O&R”), Central Hudson Gas & Electric Corporation (“Central Hudson”), The Brooklyn Union Gas Company d/b/a National Grid NY (“KEDNY”), KeySpan Gas East Corporation d/b/a National Grid (“KEDLI”), and Niagara Mohawk Power Corporation d/b/a National Grid (together with KEDLI and KEDNY, “National Grid”), National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation (“NYSEG”) and Rochester Gas and Electric Corporation (“RG&E”)¹ (together, the “Joint Utilities”), hereby submit these reply comments in response to the Notice Seeking Comments² issued in the above-referenced proceedings and the initial comments filed by various parties. In the Notice, the State of New York Public Service Commission (“Commission”) seeks comments concerning the following New York State Department of Public Service Staff (“Staff”) whitepapers (the “Whitepaper” or “Whitepapers”) issued on May 4, 2016 in the above-referenced proceedings: (1)

¹ NYSEG and RG&E are subsidiaries of AVANGRID.

² Cases 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, Notice Seeking Comments (“Notice”) (issued May 10, 2016).

performance bonds or other security interests for energy services companies (“ESCOs”); (2) reference prices for ESCO products; and (3) express consent from ESCO customers.

The Notice invited interested parties to submit initial comments on the proposed standards by June 6, 2016 and reply comments by June 20, 2016. The Joint Utilities appreciate the opportunity to submit reply comments. The instant filing focuses on a limited number of key issues of particular importance to the matters being considered in these proceedings and those raised in the comments filed by other parties.

1. STAFF WHITEPAPER REGARDING ESCO PERFORMANCE BONDS OR OTHER SECURITY INTERESTS

The Joint Utilities observe that no party filing initial comments advocates that consumers do not deserve the added protection proposed in the Staff Whitepaper Regarding ESCO Performance Bonds or Other Security Interests. Put another way, all parties filing comments appear to support providing consumers with necessary protections. The New York State Energy Marketers Coalition correctly observes “There is strong consensus that some form of financial assurance makes sense to protect customers from ESCOs who may default on their obligations, as occurred in Western New York several years ago when an ESCO collected deposits from customers and failed to deliver natural gas to them.”³

There is less consensus when the comments delve into the details concerning how and what protections should be afforded consumers. For example, the parties take divergent positions concerning a variety of matters, including the amount of financial assurance required, the items/events subject to securitization and the party charged with holding the security. The Joint Utilities remain resolute with respect to the positions they advocated in their Initial

³ Cases 15-M-0127, et al., Comments of the New York State Energy Marketers Coalition on Staff Whitepapers Related to Performance Bonds, Reference Prices and Express Consent, p. 3.

Comments.⁴ The Commission should require ESCOs to provide financial assurance adequate to protect customers.

In terms of designing an adequate financial assurance mechanism, comments from other parties are instructive. The Utility Intervention Unit (“UIU”) and the Attorney General (“AG”), collectively (“UIU/AG”)⁵, propose “initially, the security should be posted as an irrevocable letter of credit, in order to enact this customer protection in a timely and efficient manner” adding that “the security instrument must be designed foremost to protect consumers. Such a [performance] bond must be payable to ESCO customers.” To the extent utilities are required to provide credits to customers on utility issued bills, there should be no encumbrance on a utility’s ability to access funds from the performance device to offset the bill credits provided to customers. The Joint Utilities believe that directing payment to utilities would achieve the same end as desired by UIU/AG.⁶

The Joint Utilities assert that ambiguities or weakness in the rules defining the financial assurance mechanism will invite litigation and thus delay compensation to customers of ESCOs who default on their obligations. In its comments, the Public Utility Law Project (“PULP”) of New York states that “the security should be posted initially in the form of an irrevocable letter of credit (“LOC”) from each ESCO doing business in the State of New York.”⁷ Any delay in payment decreases the likelihood that the intended recipient will receive appropriate and adequate compensation. For example, within the same territory, a customer could close an

⁴ Cases 15-M-0127, et al., Initial Comments of the Joint Utilities on Staff Whitepapers, June 6, 2016.

⁵ Cases 15-M-0127, et al., Joint Comments of the Utility Intervention Unit and the Attorney General Of The State of New York on the SAPA Notices Published on May 4, 2016 and on the Staff Whitepapers On Express Consent, Performance Bonds Or Other Security Interests, And Benchmark Reference Prices, June 6, 2016, pp. 18-19.

⁶ While the Joint Utilities agree with the sentiment expressed by UIU/AG, it may not be feasible for any guarantor to provide for payment directly to ESCO Customers. It may be more appropriate to provide for payment to utilities or the Commission who would be responsible for delivering the credits to affected ESCO customers.

⁷ Cases 15-M-0127, et al., Comments on DPS Staff’s Whitepapers on Benchmark Reference Prices for ESCO Commodity Service, Express Customer Consent for ESCO Contract Changes, and Performance Bonds, June 6, 2016, p.14.

account and open a new account in a manner that provides no discernible link to the prior utility account.⁸

The liquidity of any performance mechanism is essential. The Joint Utilities agree with UIU, the AG and PULP that the preferred security device is an irrevocable letter of credit, but believe that other performance devices may be suitable provided that they function in a manner comparable to an irrevocable letter of credit. If the Commission determines that utilities should hold the financial security, it is critical that the Commission vest in the utilities the discretion to determine which financial security devices are acceptable. For example, surety bonds in particular have a poor performance record.

No matter which party holds the financial security, utilities should never be expected to issue credits to customers absent the provision of adequate funds from the ESCO or the financial security provided by the ESCO to ensure its obligations in cases of ESCO non-performance. Failure to provide for, and allow timely access to, adequate financial security would effectively place the utilities in the role of guaranteeing and subsidizing the ESCOs for their nonperformance, which is a risk that the utilities may avoid presuming ESCO security instruments are properly vetted. Utilities should never be placed in the position of guaranteeing or being financially responsible for ESCO performance.

In its comments, the City of New York submits that “it is also important that Staff develop a guidance document that sets forth transparent standards and enforcement mechanisms for how, and when, performance bonds and security instruments will be used to mitigate instances when an ESCO’s guaranteed performance of a contract has not been met.” The Joint Utilities agree and recommend that following issuance of an Order requiring a financial

⁸ Additionally, customers deserving credits could move outside a utility’s service territory without providing a forwarding address.

assurance mechanism by ESCOs, the Commission should direct Staff to convene a technical conference to design an appropriate guidance document.

Such a guidance document could specify the administrative process to be followed by utilities when it is necessary to draw from the security instruments to fund the credits issued to customers. Regardless of whether pre-approval by Staff or after-the-fact reporting is required, settled procedures in a guidance document should minimize concerns regarding utility actions necessary to deliver credits to customers.

2. STAFF WHITEPAPER ON BENCHMARK REFERENCE PRICES

Comments by Infinite Energy concerning LDC rate design⁹ are not relevant to the discussion because gas utilities in New York do not offer a 12-month fixed price product; they are simply off-point, unsupported in the instant proceeding, and should be dismissed.

3. CONCLUSION

For all the above stated reasons, the Joint Utilities urge the Commission to issue an Order requiring ESCOs to provide financial assurance adequate to protect customers and schedule technical conferences to develop a guidance document that sets forth transparent standards and enforcement mechanisms for how, and when, performance bonds and security instruments will be used to mitigate instances when an ESCO's guaranteed performance of a contract has not been met.

⁹ Cases 15-M-0127, et al., Response to the Commission's Notice Seeking Comments Issued May 10, 2016 by Infinite Energy, June 6, 2016, pp. 3-6.

Respectfully submitted,

/s/ Tinya A. Holt

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June 20, 2016

Appendix B



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June 6, 2016

By Email for Electronic Filing
Honorable Kathleen H. Burgess
Secretary
State of New York Public
Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

**RE: Case 14-M-0224 – Proceeding on Motion of the Commission to Enable
Community Choice Aggregation Programs**

Dear Secretary Burgess:

In accordance with Ordering Clause 5 of the April 21, 2016 *Order Authorizing Framework for Community Choice Aggregation Opt-out Program* in the above-referenced proceeding, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Central Hudson Gas & Electric Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY (“KEDNY”), KeySpan Gas East Corporation d/b/a National Grid (“KEDLI”), and Niagara Mohawk Power Corporation d/b/a National Grid (together with KEDLI and KEDNY, “National Grid”), National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation hereby submit this draft Data Security Agreement.

Please contact me if you have any questions.

Very truly yours,

/s/

Kerri Kirschbaum
Senior Attorney

DRAFT

**DATA SECURITY
AGREEMENT**

THIS DATA SECURITY AGREEMENT, including Exhibits attached hereto and made a part hereof (this “Agreement”) which are incorporated by reference herein, is made as of this _____ day of _____, 20____ by and between _____, a New York corporation with offices at _____ (“Utility”) and _____ a _____ with offices at _____ (“Aggregator”); and together with Utility, the “Parties” and each, individually, a “Party.”

RECITALS

WHEREAS, Aggregator desires to have access to certain utility customer information in order to administer a community choice aggregation program (the “CCA Program”) for the benefit of its members in accordance with the New York State Public Service Commission’s (“PSC” or the “Commission”) *Order Authorizing Framework for Community Choice Aggregation Opt-Out Program* (the “Order”) in Case 14- M-0224 (effective April 21, 2016); and

WHEREAS, (i) the Order directs Utility to provide to Aggregator certain aggregated and anonymized information of Utility’s residential and small commercial customers that do not currently take service from an energy services company (“ESCO”) and are located within Aggregator’s service area, including, without limitation, aggregated usage and capacity tag information as well as certain Authorized Customer-Specific Information—where Authorized Customer-Specific Information means that the Aggregator has received the customer’s written, oral and recorded, or electronic permission, which the Aggregator shall retain for as long as the customer is part of the aggregation so that permission may be verified, to receive customer specific data from the Utility—applicable to such customers, including, without limitation, all customer specific information such as, but not limited to, name, address and utility account number (or Point of Delivery Identifier) for the sole and limited purpose of facilitating the CCA Program and (ii) Utility may assess a reasonable fee in connection with its provision of such information as set forth in the Utility’s tariff or as otherwise approved by the Commission; and

WHEREAS, Utility and Aggregator also desire to enter into this Agreement to establish, among other things, the obligations of the Aggregator with respect to such Confidential Utility Information and the price at which the Aggregator may acquire access to the Confidential Utility Information; and

Whereas, Utility and Aggregator also desire to enter into this Agreement to establish, among other things, the full scope of Aggregator’s obligations of confidentiality with respect to the Confidential Utility Information in a manner consistent with the rules and regulations of the Commission; and

NOW, THEREFORE, in consideration of the premises and of the covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, hereby agree as follows:

1. Definitions.

- a. “Authorized Customer-Specific Information” shall have the meaning attributed to it in the Recitals.
- b. “CCA” shall have the meaning attributed to it in the Recitals.
- c. “Confidential Utility Information” means, collectively, information provided by Utility to Aggregator including, without limitation, all aggregated and anonymized information, Authorized Customer Specific Information, Personal Data and Utility Data.
- d. “Data Protection Requirements” means, collectively, (i) all national, state and local laws, regulations or other government standards relating to the protection of information that identifies or can be used to identify an individual that apply with respect to Aggregator or its Representative’s Processing of Confidential Utility Information; (ii) the Utility’s internal requirements and procedures relating to the protection of information that identifies or can be used to identify an individual that apply with respect to Aggregator or its Representative’s Processing of Confidential Utility Information; and (iii) the Order and Commission rules, regulations and guidelines relating to confidential data.
- e. “Data Security Incident” means a situation where Aggregator reasonably believes that there has been: (A) the loss or misuse (by any means) of Confidential Utility Information; (B) the inadvertent, unauthorized and/or unlawful Processing, corruption, modification, transfer, sale or rental of Confidential Utility Information; (C) any other act or omission that compromises the security, confidentiality, or integrity of Confidential Utility Information or (D) any breach of any Data Protection Requirements in relation to the Processing of Confidential Utility Information by Aggregator or any current or former Representatives.
- f. “Destroy” means (a) shredding; (b) permanently erasing and deleting; (c) degaussing; or (d) otherwise modifying Confidential Utility Information in paper, electronic or other means so as to make it unreadable, unreconstructible, and indecipherable. All Confidential Utility Information containing Personal Data and other information, as may be specifically requested by Utility, must be disposed of in a manner described in (a) through (c).
- g. “ESCO” shall have the meaning set forth in the Recitals.
- h. “Personal Data” means any information that can be used to identify, locate, or contact an individual, including an employee, customer, or potential customer of Utility, including, without limitation: (A) first and last name; (B) home or other physical address; (C) telephone number; (D) email address or online identifier associated with an individual; (E) “Sensitive Data” as defined below; (F) ZIP codes; (G) employment, financial or health information; or (H) any other information relating to an individual, including cookie information and usage and traffic data or profiles, that is combined with any of the foregoing.
- i. “PSC” or “Commission” shall have the meaning attributed to it in the Recitals.

- j. "Processing" (including its cognate, "process") means any operation, action, error, omission, negligent act, or set of operations, actions, errors, omissions, or negligent acts that is performed using or upon Personal Data or Utility Data, whether it be by physical, automatic or electronic means, including, without limitation, collection, recording, organization, storage, access, adaptation, alteration, retrieval, use, transfer, hosting, maintenance, handling, retrieval, consultation, use, disclosure, dissemination, exfiltration, taking, removing, copying, processing, making available, alignment, combination, blocking, deletion, erasure, or destruction.
- k. "Sensitive Data" is that subset of Personal Data, including Social Security number, passport number, driver's license number, Utility customer account number, or similar identifier.
- l. "Third Party Representatives" means those Representatives of Aggregator that are contractors or subcontractors, including without limitation, ESCOs.
- m. "Utility Data" means data held by Utility, whether produced in the normal course of business or at the request of Aggregator or a third party and whether or not it is provided to Aggregator.

2. Scope of the Agreement. This Agreement shall govern and apply to all Confidential Utility Information disclosed to Aggregator or to which Aggregator is given access by Utility in support of the CCA Program, including all archival or back-up copies of the Confidential Utility Information held or maintained by Aggregator (or its Representatives). All Confidential Utility Information, in whatever form, media or medium provided or held, and all extracts, compilations, studies or other documents based on, derived from or containing Confidential Utility Information, and all correspondence between or among the Parties or their respective Representatives pertaining to the same, shall constitute confidential information hereunder. No financial information is to be provided pursuant to this Agreement. If any information outside the scope of the Order is sent to Aggregator, the Aggregator will immediately notify the Utility and destroy any such information in the appropriate manner.

3. Provision of Information. Utility agrees to provide to Aggregator or its Representatives, certain Confidential Utility Information, as requested, provided that (i) Aggregator and its Representatives are in compliance with the term of this Agreement; (ii) Aggregator has provided and has caused its Representatives to provide, to the satisfaction of Utility any Vendor Product/Service Security Assessments, attached hereto as Exhibit A or such other risk assessment forms as Utility may require from time to time ("The Assessment") and Aggregator will comply with the utility _____ program; (iii) Aggregator (and its Representatives, as applicable) shall have and maintain throughout the term systems and processes in place and as detailed in the assessment acceptable to Utility to protect Confidential Utility Information; (iv) Aggregator complies and shall cause its third party representatives to comply with Utility's data protection programs; and (v) Utility receives written confirmation from New York State Department of Public Service Staff that certain prerequisites identified in the Order have been satisfied. Provided the foregoing prerequisites have been satisfied, Utility shall within twenty (20) days of receipt of

Aggregator's written request for such Confidential Utility Information, provide such Confidential Utility Information as required by the Order. Specifically, Utility shall provide, as requested by the Aggregator, aggregated data, including the number of customers by service class, the aggregated peak demand (kW) (for electricity) by month for the past 12 months, by service class to the extent possible, and the aggregated energy (kWh) for electricity or volumetric consumption for gas by month for the past 12 months by service class and customer-specific data, including the customer of record's name, mailing address, account number, and primary language and any customer-specific alternate billing name and address, to the extent available. Unless the Parties otherwise agree, the provision of Confidential Utility Information by Utility shall be effectuated electronically, as a file transfer made via encrypted FTP or other secure process acceptable to Utility.

4. Confidentiality.

Aggregator shall: (a) hold all Confidential Utility Information in strict confidence; (b) except as otherwise expressly permitted by Section 4 hereof, not disclose Confidential Utility Information to any other person or entity (including but not limited to ESCOs, subcontractors, affiliates or members of Aggregator); (c) not Process Confidential Utility Information outside of the United States; (d) not Process Confidential Utility Information other than in connection with the CCA Program or otherwise as authorized by this Agreement; (e) not Process Confidential Utility Information for any marketing purposes other than in connection with the CCA Program; (f) limit reproduction of Confidential Utility Information to the extent required for the CCA Program; (g) store Confidential Utility Information in a secure fashion at a secure location in the United States that is not accessible to any person or entity not authorized to receive the Confidential Utility Information under the provisions hereof; (h) otherwise use at least the same degree of care to avoid publication or dissemination of the Confidential Utility Information as Aggregator employs (or would employ) with respect to its own confidential information that it does not (or would not) desire to have published or disseminated, but in no event less than reasonable care; and (i) to the extent required by the utility, each person with a need to know the Confidential Information shall sign the Representative Agreement set forth as Exhibit B to this Agreement. At all times, Utility shall have the right to request further assurances that the foregoing restrictions and protections concerning Confidential Utility Information are being observed and Aggregator shall be obligated to promptly provide Utility with the requested assurances.

5. Exceptions Allowing Aggregator To Disclose Confidential Utility Information.

(a) **Disclosure to Representatives.** Notwithstanding the provisions of Section 4 hereof, Aggregator may disclose Confidential Utility Information to those of its municipal members and contractors, including without limitation, ESCOs as well as its and their respective officers, directors and employees (collectively, "Representatives") who have a legitimate need to know or use such Confidential Utility Information for the sole and limited purposes of administering and/or conducting the CCA Program, provided that each such Representative first (i) is advised by Aggregator of the sensitive and confidential nature of such Confidential Utility Information; (ii) agrees to comply with the provisions of this Agreement, provided that with respect to Third Party Representatives and this subsection (ii), such Third Party Representatives must agree in writing to be bound by and observe the provisions of this Agreement as though

such Third Party Representatives were Aggregator; and (iii) signs the Representative Agreement. All such written agreements with Third Party Representatives shall include direct liability for the Third Party Representatives towards Utility for breach thereof by the Third Party Representatives, and a copy of such agreement and each Representative Agreement and Aggregator agreement shall be made available to Utility upon request. Notwithstanding the foregoing, Aggregator shall be liable to Utility for any act or omission of a Representative, including without limitation, Third Party Representatives that would constitute a breach of this Agreement if committed by Aggregator.

(b) **Disclosure if Legally Compelled.** Notwithstanding anything herein, in the event that Aggregator or any of its Representatives receives notice that it has, will or may become compelled, pursuant to applicable law or regulation or legal process to disclose any Confidential Information (whether by receipt of oral questions, interrogatories, requests for information or documents in legal proceedings, subpoenas, civil investigative demands, other similar processes or otherwise), Aggregator shall, except to the extent prohibited by law, immediately notify Utility, orally and in writing, of the pending or threatened compulsion. To the extent lawfully allowable, Utility shall have the right to consult with Aggregator and the Parties will cooperate, in advance of any disclosure, to undertake any lawfully permissible steps to reduce and/or minimize the extent of Confidential Utility Information that must be disclosed. Utility shall also have the right to seek an appropriate protective order or other remedy reducing and/or minimizing the extent of Confidential Utility Information that must be disclosed. In any event, Aggregator and its Representatives shall disclose only such Confidential Utility Information which they are advised by legal counsel that they are legally required to disclose in order to comply with such applicable law or regulation or legal process (as such may be affected by any protective order or other remedy obtained by Utility) and Aggregator and its Representatives shall use all reasonable efforts to ensure that all Confidential Utility Information that is so disclosed will be accorded confidential treatment.

6. Return/Destruction of Information. Within ten (10) days after Utility's written demand, Aggregator shall (and shall cause its Representatives to) cease to Process Confidential Utility Information and shall at the Utility's option: (a) return such Confidential Utility Information to Utility in such manner, format and timeframe as reasonably requested by Utility or, if not so directed by Utility, (b) Destroy all copies of all Confidential Utility Information (including any and all extracts, compilations, studies or other documents based upon, derived from or containing Confidential Utility Information) that has come into Aggregator's or its Representatives' possession, including destroying Confidential Utility Information from all systems, records, archives and backups of Aggregator and its Representatives, and all subsequent use and Processing of the Confidential Utility Information by Aggregator and its Representatives shall cease. Notwithstanding the foregoing, Aggregator and its Representatives shall not be obligated to erase Confidential Utility Information contained in an archived computer system backup maintained in accordance with their respective security or disaster recovery procedures, provided that Aggregator and its Representatives shall (i) not have experienced a Data Security Incident, (ii) not permit access to or recovery of Confidential Utility Information from such computer backup system and (iii) keep all such Confidential Utility Information confidential in accordance with this Agreement. Aggregator shall, upon request, certify to Utility that the destruction by Aggregator and its Representatives required by this Section has occurred by (a) having a duly

authorized officer of Aggregator complete, execute and deliver to Utility a certification and (b) obtaining substantially similar certifications from its Representatives and maintaining them on file. Compliance with this Section 5 shall not relieve Aggregator from compliance with the other provisions of this Agreement. The obligations under this Section shall survive any expiration of termination of this Agreement.

7. Insurance. Aggregator shall procure and maintain and shall require its Third Party Representatives to procure and maintain for the Term hereof Cyber Liability Insurance covering third party financial losses including, but not limited to, defense costs, notification costs, data breach response costs, settlements, judgments and forensic expenses (including, without limitation, PCI DSS fines and claims expenses) incurred by an insured as a result of breach of privacy due to data theft from debit and credit cards or confidential information from an insured; or from transmission of a computer virus, Phishing attack or similar malicious code use that causes third-party loss including the failure of network systems that are essential to an insured or to third parties; with limits not less than \$10,000,000 per occurrence and annual aggregate.

8. Audit. Upon reasonable notice to Aggregator, Aggregator shall, and shall require its third-party representatives to, permit Utility, its auditors, designated audit representatives, and regulators to audit and inspect, at Utility's sole expense (except as otherwise provided in this Agreement), and no more often than once per year (unless otherwise required by Utility's regulators): (a) the facilities of Aggregator and Aggregator's Third Party Representatives where Confidential Utility Information containing Personal Data is Processed by, or on behalf of, Aggregator; (b) any computerized or paper systems used to Process Utility Confidential Information containing Personal Data; and (c) Aggregator's security practices and procedures, facilities, resources, plans, procedures and books and records relating to the privacy and security of Confidential Utility Information containing Personal Data. Such audit and inspection rights shall be, at a minimum, for the purpose of verifying Aggregator's compliance with this Agreement, including all applicable Data Protection Requirements. Notwithstanding anything herein, in the event of a Data Security Incident Aggregator shall and shall cause its Third Party Representatives to permit an audit hereunder more frequently than once per year, as may be requested by Utility. Aggregator shall immediately correct any deficiencies identified by Utility.

9. Investigation. Upon notice to Aggregator, Aggregator shall assist and support Utility in the event of an investigation by any regulator or similar authority, if and to the extent that such investigation relates to Confidential Utility Information containing Personal Data Processed by Aggregator on behalf of Utility. Such assistance shall be at Utility's sole expense, except where such investigation was required due to the acts or omissions of Aggregator or its Representatives, in which case such assistance shall be at Aggregator's sole expense.

10. Data Security Incidents. Aggregator is responsible for any and all Data Security Incidents involving Confidential Utility Information containing Personal Data that is Processed by, or on behalf of, Aggregator. Aggregator shall notify Utility in writing immediately (and in any event within twenty-four (24) hours) whenever Aggregator reasonably believes that there has been a Data Security Incident. After providing such notice, Aggregator will investigate the Data Security Incident, and immediately take all necessary steps to eliminate or contain any exposure of Confidential Utility Information containing Personal Data and keep Utility advised of the status of such Data Security Incident and all matters related thereto. Aggregator further agrees to

provide, at Aggregator's sole cost, reasonable assistance and cooperation requested by Utility and/or Utility's designated representatives, in the furtherance of any correction, remediation, or investigation of any such Data Security Incident and/or the mitigation of any damage, including any notification required by law or that Utility may determine appropriate to send to individuals impacted or potentially impacted by the Data Security Incident, and/or the provision of any credit reporting service required by law or that Utility deems appropriate to provide to such individuals. Unless required by law, Aggregator shall not notify any individual or any third party other than law enforcement of any potential Data Security Incident involving Confidential Utility Information containing Personal Data without first consulting with, and obtaining the permission of, Utility. In addition, within 30 days of identifying or being informed of a Data Security Incident, Aggregator shall develop and execute a plan, subject to Utility's approval, that reduces the likelihood of a recurrence of such Data Security Incident. Aggregator agrees that Utility may at its discretion and without penalty immediately suspend performance hereunder and/or terminate the Agreement if a Data Security Incident occurs.

11. No Intellectual Property Rights Granted. Nothing in this Agreement shall be construed as granting or conferring any rights, by license or otherwise, expressly, implicitly or otherwise, under any patents, copyrights, trade secrets or other intellectual property rights of Utility, and Aggregator shall acquire no ownership interest in the Confidential Utility Information (which, as between Aggregator and Utility, shall be and remain the proprietary and confidential information of Utility). No rights or obligations other than those expressly stated herein shall be implied from this Agreement.

12. Additional Obligations.

- a. Aggregator shall not create or maintain data which are derivative of Confidential Utility Information except for the purpose of performing its obligations under this Agreement or as authorized by Utility. Data collected by Aggregator from customers through its website or other interactions based on those customers' interest in receiving information from or otherwise engaging with Aggregator or its partners shall not be considered Confidential Utility Information or a derivative of Confidential Utility Information for the purpose of this Agreement. Aggregator shall not collect or retain customer account numbers through such interactions associated with its CCA Program.
- b. Aggregator shall comply with all applicable privacy and security laws to which it is subject, including without limitation all applicable Data Protection Requirements and not, by act or omission, place Utility in violation of any privacy or security law known by Aggregator to be applicable to Utility.
- c. Aggregator shall have in place appropriate and reasonable processes and systems, including an Information Security Program to protect the security of Confidential Utility Information containing Personal Data and prevent a Data Security Incident, including, without limitation, a breach resulting from or arising out of Aggregator's internal use, Processing or other transmission of Confidential Utility Information containing Personal Data, whether between or among Aggregator's Representatives,

subsidiaries and affiliates or any other person or entity acting on behalf of Aggregator, including without limitation Third Party Representatives.

- d. Aggregator shall safely secure or encrypt all Confidential Utility Information during storage or transmission.
- e. Aggregator shall establish policies and procedures to provide reasonable and prompt assistance to Utility in responding to any and all requests, complaints, or other communications received from any individual who is or may be the subject of a Data Security Incident involving Confidential Utility Information Processed by Aggregator to the extent such request, complaint or other communication relates to Aggregator's Processing of such individual's Personal Data.
- f. Aggregator shall establish policies and procedures to provide all reasonable and prompt assistance to Utility in responding to any and all requests, complaints, or other communications received from any individual, government, government agency, regulatory authority, or other entity that is or may have an interest in the Personal Data, data theft or other unauthorized release of Personal Data, disclosure of Personal Data, or misuse of Personal Data to the extent such request, complaint or other communication relates to Aggregator's Processing of such Personal Data.

13. Data Access Controls.

- a. Aggregator agrees that Aggregator shall and shall cause its Third Party Representatives to maintain: (i) a system map of the location of Confidential Utility Information; and (ii) a log file of all access to and Processing operations performed on Confidential Utility Information.
- b. Aggregator shall encrypt, using industry standard encryption tools, all records and files containing Confidential Utility Information containing Personal Data that Aggregator: (i) transmits or sends wirelessly or across public networks; (ii) stores on laptops, personal computers or storage media; and (iii) stores on any device that is transported outside of the physical or logical controls of Aggregator. Aggregator shall safeguard the security and confidentiality of all encryption keys associated with encrypted Personal Data.
- c. Notwithstanding anything herein, Aggregator shall not store or transport Confidential Utility Information on portable devices such as mobile phones, tablets, USB or flash drives, or other similar devices.

14. Information Security Program. Aggregator shall, and shall cause its Third Party Representatives to:

- a. develop, implement, maintain, and monitor a comprehensive, written information security program that contains administrative, technical and physical safeguards to

protect against anticipated threats or hazards to the security, confidentiality or integrity of, the unauthorized or accidental destruction, loss, alteration or use of, and the unauthorized access to, acquisition of or Processing of Confidential Utility Information containing Personal Data (“Information Security Program”);

- b. conduct a risk assessment to identify and assess reasonably foreseeable internal and external risks to the security, confidentiality and integrity of electronic, paper and other records containing Confidential Utility Information containing Personal Data and evaluate and improve, where necessary, the effectiveness of its safeguards for limiting those internal and external risks;
- c. notify Utility within twenty-four (24) hours if its Information Security Program no longer satisfies any of the requirements of Section 14.a above;
- d. review and, as appropriate, revise its Information Security Program: (i) at least annually or whenever there is a material change in its business practices that may reasonably affect the security or integrity of Confidential Utility Information; (ii) in accordance with prevailing industry practices and applicable law; and (iii) as reasonably requested by Utility. If Aggregator or a Third Party Representative, as the case may be, modifies its Information Security Program following such a review, Aggregator shall promptly notify Utility of the modifications and shall provide the modifications to Utility in writing upon Utility’s request. The Information Security Program may not be altered or modified in such a way that will weaken or compromise the confidentiality, security and integrity of Confidential Utility Information;
- e. maintain and enforce its Information Security Program at each location from which Confidential Utility Information is Processed by Aggregator or on Aggregator’s behalf;
- f. ensure that its Information Security Program covers all, networks, systems, servers, computers, notebooks, laptops, PDAs, mobile phones, and other devices and media that Processes Confidential Utility Information or that provides access to Utility networks, systems or information;
- g. ensure that its Information Security Program includes industry standard password protections, firewalls and anti-virus and malware protections to protect Confidential Utility Information stored on computer systems;
- h. conduct security testing using a third party to provide monitoring penetration and intrusion testing with respect to Third Party Representative’s systems and promptly provide a copy of the results to Utility, provided that the Third Party Representative may redact IP addresses and other client names and information;
- i. shall provide annual security awareness training to all individual who has access to Confidential Utility Information, Personal Data or Utility Data. Upon Utility’s request, Aggregator shall promptly provide to Utility evidence that individuals with access to any Confidential Utility Information, Personal

- Data or Utility Data have received such training;
- j. maintain inventory of utility data repositories including unstructured content; and
 - k. implement a standard process for identifying, assessing, and mitigating security risks introduced through the supply chain.

15. Payment. In consideration of Utility's agreement to provide Confidential Utility Information in accordance with Section 2, Aggregator shall pay to Utility fees pursuant to its tariffs.

16. Specific Performance. The Parties acknowledge that disclosure or misuse of Confidential Utility Information in violation of this Agreement may result in irreparable harm to Utility, the amount of which may be difficult to ascertain and which may not be adequately compensated by monetary damages, and that therefore Utility shall be entitled to specific performance and/or injunctive relief to enforce compliance with the provisions of this Agreement. Utility's right to such relief shall be in addition to and not to the exclusion of any remedies otherwise available under this Agreement, at law or in equity, including monetary damages, the right to terminate this Agreement for breach and the right to suspend the provision or Processing of Confidential Utility Information hereunder. Aggregator agrees to waive any requirement for the securing or posting of any bond or other security in connection with Utility obtaining any such injunctive or other equitable relief and hereby authorizes, to the extent lawfully possible, any court of competent jurisdiction to dispense with any requirement for such bond or other security which might otherwise be judicially imposed.

17. Indemnification. To the fullest extent permitted by law, Aggregator shall indemnify and hold Utility, its affiliates and their respective officers, directors, trustees, shareholders, employees and agents, harmless from and against any and all loss, cost, damage or expense of every kind and nature (including, without limitation, penalties imposed by the Commission or other regulatory authority or under any Data Protection Requirements, court costs, expenses and reasonable attorneys' fees) arising out of, relating to, or resulting from, in whole or in part, the breach or non-compliance with this Agreement by Aggregator or any of its Representatives.

18. Notices. With the exception of notices or correspondence relating to potential or pending disclosure under legal compulsion, all notices and other correspondence hereunder shall be sent by first class mail, by personal delivery, or by a nationally recognized courier service. Notices or correspondences relating to potential or pending disclosure under legal compulsion shall be sent by means of Express Mail through the U.S. Postal service or other nationally recognized courier service which provides for scheduled delivery no later than the business day following the transmittal of the notice or correspondence and which provides for confirmation of delivery. All notices and correspondence shall be in writing and addressed as follows:

If to Aggregator, to:

Aggregator Name:

Name of Contact:

Address:

Phone:

Email:

If to Utility, to:

Utility Name:
Name of Contact:
Address:
Phone:
Email:

A Party may change the address or addressee for notices and other correspondence to it hereunder by notifying the other Party by written notice given pursuant hereto.

19. Term. This Agreement shall be effective as of the date first set forth above and shall remain in effect until terminated by Utility upon not less than 10 days' prior written notice specifying the effective date of termination, or on _____, 20__, whichever occurs first; provided, however, that any expiration or termination shall not affect the respective obligations or rights of the Parties arising under this Agreement prior to the effective date of termination; and provided, further, that Utility may terminate this Agreement immediately upon notice to Aggregator in the event of a material breach hereof by Aggregator or its Representatives. For the purpose of clarity, a breach of Sections 4-10, 12-14, 17, and 25 shall be a material breach hereof. Upon the expiration or termination hereof, neither Aggregator nor its Representatives shall have any further right to Process Confidential Utility Information and shall immediately comply with its obligations under Section 6.

20. Consent to Jurisdiction; Selection of Forum. Aggregator irrevocably submits to the jurisdiction of the courts located within the State of New York with regard to any dispute or controversy arising out of or relating to this Agreement. Aggregator agrees that service of process on it in relation to such jurisdiction may be made by certified or registered mail addressed to Aggregator at the address for Aggregator pursuant to Section 10 hereof and that such service shall be deemed sufficient even under circumstances where, apart from this Section, there would be no jurisdictional basis for such service. Aggregator agrees that service of process on it may also be made in any manner permitted by law. Aggregator consents to the selection of the New York State and United States courts within _____ County, New York as the exclusive forums for any legal or equitable action or proceeding arising out of or relating to this Agreement.

21. Governing Law. This Agreement shall be interpreted and the rights and obligations of the Parties determined in accordance with the laws of the State of New York, without recourse to such state's choice of law rules.

22. Survival. The obligations of Aggregator under this Agreement shall continue for so long as Aggregator and/or Aggregator's Representatives continue to have access to, are in possession of or acquire Confidential Utility Information even if all agreements between Aggregator and Utility have expired or been terminated.

23. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one and the same instrument. Copies of this Agreement and copies of signatures on this Agreement, including any such copies delivered electronically as a .pdf file, shall be treated for all purposes as originals.

24. Amendments; Waivers. This Agreement may not be amended or modified except if set forth in writing signed by the Party against whom enforcement is sought to be effective. No forbearance by any Party to require performance of any provisions of this Agreement shall constitute or be deemed a waiver of such provision or the right thereafter to enforce it. Any waiver shall be effective only if in writing and signed by an authorized representative of the Party making such waiver and only with respect to the particular event to which it specifically refers.

25. Assignment. This Agreement (and Aggregator's obligations hereunder) may not be assigned by Aggregator or Representatives without the prior written consent of Utility, and any purported assignment without such consent shall be void.

26. Severability. Any provision of this Agreement which is determined by any court or regulatory body having jurisdiction over this Agreement to be invalid or unenforceable will be ineffective to the extent of such determination without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such remaining provisions.

27. Entire Agreement. This Agreement (including any Exhibits hereto) constitutes the entire agreement between the Parties with respect to the subject matter hereof and any prior or contemporaneous oral or written agreements or understandings with respect to such subject matter are merged herein. This Agreement may not be amended without the written agreement of the Parties.

28. No Third Party Beneficiaries. This Agreement is solely for the benefit of, and shall be binding solely upon, the Parties and their respective agents, successors and permitted assigns. This Agreement is not intended to benefit and shall not be for the benefit of any party other than the Parties and the indemnified parties named herein, and no other party shall have any right, claim or action as a result of this Agreement.

29. Force Majeure. No Party shall be liable for any failure to perform its obligations in connection with this Agreement, where such failure results from any act of God or other cause beyond such Party's reasonable control (including, without limitation, any mechanical, electronic or communications failure) which prevents such Party from performing under this Agreement and which such Party is unable to prevent or overcome after the exercise of reasonable diligence.

30. Relationship of the Parties. Utility and Aggregator expressly agree they are acting as independent contractors and under no circumstances shall any of the employees of one Party be deemed the employees of the other for any purpose. Except as expressly authorized herein, this Agreement shall not be construed as authority for either Party to act for the other Party in any agency or other capacity, or to make commitments of any kind for the account of or on behalf of the other.

31. Construction. This Agreement shall be construed as to its fair meaning and not strictly for or against any party.

32. Binding Effect. No portion of this Agreement is binding upon a Party until it is executed on behalf of that Party in the space provided below and delivered to the other Party. Prior to such execution and delivery, neither the submission, exchange, return, discussion, nor the negotiation of this document, whether or not this document is then designated as a “draft” document, shall have any binding effect on a Party.

[signature page follows]

DRAFT

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first above written.

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: _____

DRAFT