

New York Public Service Commission Establishes Business Practices Framework for Distributed Energy Resource Providers – Registration Required by February 1, 2018

As New York's Reforming the Energy Vision ("REV") initiative continues to promote increased deployment of Distributed Energy Resources ("DER") and lays the groundwork for a Distributed System Platform ("DSP") market, the New York Public Service Commission ("PSC" or "Commission") has established the first set of Uniform Business Practices for DERs (referred to as the "UBP-DERS"). See Case 15-M-0180, *In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products, Order Establishing Oversight Framework and Uniform Business Practices for Distributed Energy Resource Suppliers* (issued October 19, 2017) ("UBP-DERS Order"). The Commission promulgated the UBP-DERS pursuant to its authority to regulate "electric plant[s]" which are broadly defined as "all real estate, fixtures and personal property operated, owned, [or] used . . . in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity." N.Y. Pub. Serv. Law § 2(12) (Westlaw through L. 2017, ch.1 to 334). Under the Commission's interpretation, electric plants could include, among other things, a wide range of products and services, such as Community Distributed Generation ("CDG"), electric vehicles, programmable thermostats, home energy management software, rooftop solar, energy storage, energy efficiency equipment and demand response. For now, the Commission has continued its determination to "forebear" from rate regulation under Article 4 of the Public Service Law ("PSL").

This rationale is closely linked to the Commission's highly controversial interpretation of the Public Service

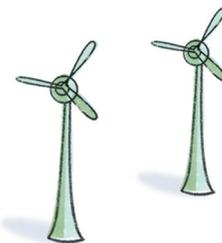
Law that it has recently relied upon – rejecting decades of the Commission's own practices and interpretations – to regulate prices and eligibility of Energy Service Companies ("ESCOs") selling deregulated electric and gas commodity in New York State. In July 2017, the New York Supreme Court, Appellate Division expressly rejected the Commission's interpretation of PSL§ 65(5) that it had "ratemaking" authority over ESCOs under Article 4 of the PSL as "electric corporations" and "gas corporations" because ESCOs do not own "electric plants" or "gas plants." The Court, however, upheld the agency's broad jurisdiction to "impose limitations on ESCO rates as a condition of continued access" under utility tariffs. See *In re Retail Energy Supply Ass'n. v. Pub. Serv. Comm'n*, 152 A.D.3d 1133, 1137-38 (3d Dep't 2017). In the ESCO marketplace, the scope of which the PSC may seek to extend this authority is a continuing source of uncertainty and litigation. Given the lack of express statutory authority, it is expected that jurisdictional questions will also arise with regulated entities under the UBP-DERS.

While the PSC's goal in establishing the UBP-DERS is to ensure customers participating in DER markets understand their investments and are protected from questionable marketing practices, a wide range of DER providers expressed concern during the notice and comment period about the potential that an overly burdensome regulatory regime could stifle a nascent and extraordinarily diverse market. Borrowing heavily from its experience and efforts aimed at regulating ESCOs, the Commission's UBP-DERS creates a detailed oversight regime for various types of DER providers.



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NOVEMBER 2017

The UBP-DERS applies to all DER providers that participate in PSC-authorized or utility-operated programs or markets, including CDG providers; providers of renewable generation compensated under net metering or the Value of Distributed Energy Resource (“VDER”) tariffs; companies participating in demand-response, non-wires alternatives or REV demonstration projects; energy efficiency companies and storage providers, among others. The UBP-DERS establishes three tiers of oversight based on the characteristics of DER market sectors, including:

- (1) “Limited” oversight of Commercial and Industrial (“C&I”) transactions;
- (2) “Passive” oversight of the general DER community; and
- (3) “Comprehensive” oversight of Community Distributed Generation (“CDG”) and on-site mass market distributed generation (“DG”) providers aimed primarily at the residential market.

While the Commission’s authority over C&I transactions is limited to ensuring contractual consent and prohibiting fraud, the primary focus of the UBP-DERS is on transactions involving mass-market customers. Mass-market customers generally include residential and small commercial service class customers that are not billed on peak demand, as well as those whose rate class is unknown to the DER provider at the time of sale.

With regard to most DER providers – excluding CDG and on-site DG – the UBP-DERS provides a minimum set of requirements to ensure all customers are protected from fraud, abuse and other forms of deceptive marketing. The Commission describes these as “passive” requirements that will ensure its Staff has the ability to address issues that may arise, without requiring DER providers to take affirmative actions or modify their

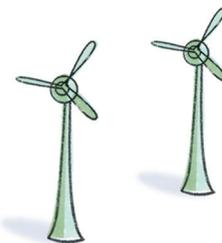
business practices. Nevertheless, DER providers that fall into this category are required to abide by certain requirements pertaining to sales agreement retention, marketing standards, and release and protection of customer data. DER providers in this category must also take responsibility for the actions of their contractors and third-party agents, retain complaint records for certain types of transactions and provide any and all information as requested by Commission Staff regarding business operations, financials and audits.

The UBP-DERS provides more comprehensive oversight of CDG providers serving the mass market because the Commission anticipates rapid growth in the CDG market – noting that over 100 CDG projects are expected to be placed in service over the next two years – and because, according to the Commission, CDG providers are similar to ESCOs in that they market directly to customers and involve commodity products that are less transparent to the customer than physical goods. Similarly, the UBP-DERS offers comprehensive oversight of on-site DG projects, which include installation of equipment, such as rooftop solar. For now, the UBP-DERS appears to exclude non-generation on-site equipment from the definition of on-site DG projects, which means that battery storage and other types of home energy management installations will be governed by the “passive” oversight regime of the general DER community. As a result, projects that involve a combination of DER products, such as solar plus storage, may be subject to multiple layers of oversight depending on the type of technology involved. The enhanced protection for on-site DG sales is intended to supplement, and ultimately replace, the oversight framework provided by the New York State Research and Development Authority (“NYSERDA”) through the NY-Sun program.



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NOVEMBER 2017

The heightened level of oversight on CDG and on-site DG providers includes, among other things, registration requirements, enhanced marketing and advertising standards, certain terms and conditions that must be included in sales agreements, standardized customer disclosure statements, customer complaint procedures and reporting requirements. It is important to note that the standardized customer disclosure statement overrides any conflicting terms in a DER provider's sales agreement, so it is crucial to review these materials to ensure consistent and functional application of the provider's terms and conditions. As part of this oversight transition, **all CDG and on-site mass-market DER providers must file a completed registration form, including sample contracts and sample bills, by February 1, 2018.** Providers that do not comply with the UBP-DERS registration requirements may face enforcement action from the Commission and could be denied an interconnection application from the utility without proof of registration.

While the Commission ultimately intends to merge the UBP's for ESCOs and the UBP-DERS into a single, comprehensive document, ESCOs that currently market DER products and services are required to simultaneously comply with both UBP frameworks.

Phillips Lytle DER Advocacy

Based on stakeholder advocacy, in part conducted by Phillips Lytle and a diverse group of DER providers, Commission Staff tailored the scope of the UBP-DERS and removed certain requirements, such as bonding and capitalization, and scaled back other proposals, such as replacing the requirement for standardized contracts with a requirement for a standard customer disclosure statement. Phillips Lytle's Energy attorneys also have years of experience with the shifting scope of PSC's regulatory interpretation-based assertion of jurisdiction

in New York's retail energy markets, which the Commission is now using to develop oversight of the DER markets.

Next Steps, Expected UBP-DERS Evolution and the Importance of Engagement

In the Order, the Commission noted that as the DER markets continue to evolve, the UBP-DERS will require ongoing review and modifications to strike the proper balance between consumer protection and market functionality. To this end, the Commission directed forward looking action, including:

- **Staff Report on Coordination Due March 1, 2018**
Staff was directed to consult with stakeholders, and other regulators, including industry groups engaged in self-regulation, to develop a report by March 1, 2018, to describe how DER oversight can be coordinated and streamlined with other entities and agencies.
- **Stakeholder Comments Due January 8, 2018**
The Commission included a series of additional questions for stakeholder comment, which are due by January 8, 2018, on the following topics: (1) whether limits or standards should be imposed on early termination fees for DER providers, (2) whether the UBP-DERS should establish production guarantee requirements within certain CDG or on-site DER contracts, and (3) whether CDG or on-site DER providers should be required to abide by an annual escalation limit.

The UBP-DERS allows the Commission to oversee and monitor the DER market as New York begins the implementation phase of REV. The Commission acknowledges that the degree and scope of oversight will evolve with the market through the addition and removal of certain provisions until the proper balance is struck. Throughout this transition, it is incumbent on the DER community to provide the necessary practical



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NOVEMBER 2017

and technical insight to assist the Commission in adequately protecting consumers while, at the same time, allowing the free market to operate.

Important Upcoming DER Deadlines

- **December 1, 2017** – DPS Staff Files Registration Form and Standard Customer Disclosure Statement for CDG and On-Site DER
- **February 1, 2018** – CDG and On-Site DER Registration (including sample contracts and bills)
- **30 days from issuance of UBP-DERS Order** – Filing of Petitions for Rehearing

Additional Assistance

For additional assistance regarding the PSC's business practices framework for DER providers, please contact Thomas F. Puchner at (518) 618-1214, tpuchner@phillipslytle.com; David P. Flynn at (716) 847-5473, dflynn@phillipslytle.com; or Kevin C. Blake at (716) 847-7082, kblake@phillipslytle.com.

For non-legal questions, please contact Dennis W. Elsenbeck, Head of Energy and Sustainability, Phillips Lytle Energy Consulting Services, at (716) 847-7083, delsenbeck@phillipslytle.com ■



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