NRG Energy, Inc.
211 Carnegie Center
Princeton, NJ 08540

September 25, 2015

VIA ELECTRONIC FILING

Hon. Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12201-1350

Re: CASE 15-M-0180 - In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products

Dear Secretary Burgess:

NRG submits these comments in response to the Staff Proposal on DER Oversight. NRG supports Staff's intent to ensure that the market for DERs is enabled and protects consumers appropriately. However, Staff's Proposal appears to impose a "one-size-fits-all" approach to customer relationships that will discourage customers from participating in the new distributed market place created by the Reforming the Energy Vision ("REV") framework. In particular:

- NRG's experience is that sophisticated Distributed Energy Resource ("DER") customers routinely negotiate customer rates, terms and condition into their contracts. Artificially limiting customer choice by foreclosing the ability to depart from standardized language limits the appeal of DER investments to the very customers that will form the backbone of the REV market.

- Staff's proposed pre-approval and licensing requirements appear ill-suited to a fast-developing industry. NRG and other competitive suppliers expect to offer customers a full suite of alternatives to grid-sourced power, which may include any combination of DERs, demand response, storage, or energy conservation technologies, including technologies that may not be well developed at the time of licensing.

- Adoption of rigid protocols dictating how DER products and services should be offered (i.e. requiring standard language in the contracts under which all DER products and services must try to compete) is premature, particularly since rules governing DER interaction with the DSP have yet to be developed.

Instead, NRG urges the Commission to focus its consumer protection efforts on creating commercially reasonable eligibility standards for DER providers and guidelines for fair and ethical business practices to govern sales, marketing and customer care. At this early stage of

REV development, requiring standard contracts under which all DER products and services must be offered could do more to impede the growing market than help to foster its growth.

Background

In its initial Track 1 REV order, the Commission stated that "[s]ome degree of supervision over DER providers will be necessary, in order to ensure both consumer protection and fair competition."[1] However, the Commission also noted that it "has long recognized that not every action taken by every electric corporation is subject to its jurisdiction" and that the Commission "will not regulate all transactions involving DER providers."[2] The Commission went on to summarize the harm to the market that could occur if consumer protection rules are misapplied:[3]

> The definition of DER services is potentially broad enough to cover a wide range of home energy services that have not traditionally been subject to Commission oversight. This includes, for example, solar installers, home performance contractors, and building management system operators. A clear criterion of applicability is needed, in order to avoid an overly broad and unworkable extension of regulatory authority over private transactions. We are also mindful of the risk of duplicative or overlapping regulation and oversight, and will restrict our oversight to avoid such risks.

To balance those risks, the Commission stated that it intended to apply a "limited form of oversight," similar to the level of consumer protection oversight "that already adheres to ESCOs."[4] Additionally, the Commission stated that many of its consumer protection concerns stemmed from concerns around competitive DER suppliers accessing customer data through the REV-inspired marketplace.[5] The heart of Staff's Proposal is the ultimate creation of a formalized Code of Conduct that will govern the behavior of competitive DER suppliers participating in New York's distributed markets. In the shorter term, the Staff Proposal recommends the creation of Uniform Business Practices ("UBPs"), modeled off of the UBPs applicable to ESCOs today. The proposed DER-specific UBP would include requirements on a variety of issues, including (1) licensing requirements for sellers of DERs;[6] (2) standard contractual provisions applicable to various classes of DER customers; (3) guidelines for protecting consumer data;[7] (4) marketing standards;[8] (5) annual reporting requirements; and (6) standardized dispute resolution procedures.

Of greatest concern to NRG are the recommendations around standard contractual provisions. Specifically, the Staff Proposal suggests that the "proposed rules require DERS to use specific

---

[1] REV Track 1, at p. 102.

[2] REV Track 1, at p. 104.

[3] REV Track 1, at p. 105.

[4] REV Track 1, at p. 103-4.

[5] REV Track 1, at p. 105 ("Supervision of DER providers will, at a minimum, include certification of any provider that requests consumer data, or that furnishes services via DSP or other utility functions.")

[6] Staff Proposal, at pp. 9-11.

[7] Staff Proposal, at pp. 11-12.

[8] Staff Proposal, at pp. 12-13.

contracts or contract terms, including a Customer Disclosure Statement, to the extent developed," which could include features "to address key issues of importance to consumers" such as:

> … a mandatory Customer Disclosure Statement; the term of the contract; pricing and early termination fees; explanation of authorizations for DERS to obtain certain customer-specific information; consumer protections; procedures applicable to address disputes; and how the customer may contact the DERS.

Additionally, the Staff Proposal invites comments on "alternative approaches which achieve the goals articulated above."

NRG Comments:

NRG welcomes the opportunity to address the consumer protection issues presented in the Staff Proposal and supports the Commission's goals of ensuring consumer protection and promoting fair competition in the DER marketplace. However, NRG remains concerned that the type of licensing and standard contract provisions contemplated in the Staff Proposal may hamper the ability of innovative suppliers and consumers of DER technologies to deploy these exciting technologies.

i. Additional clarity is needed prior to full consideration of many of the Staff Proposal's ideas.

As a threshold matter, NRG is concerned that the Staff Proposal is overly broad in its identification of matters to which Commission regulation is appropriate. For example, the Commission clearly recognized that its jurisdiction over DER providers is limited to the times and places in which DER providers are acting as electric corporations. As the Commission noted in its Track 1 order, DER providers are electric corporations only insofar as they "furnish" electricity. In fact, the Commission clearly stated that it "will not regulate all transactions involving DER providers" and has "long recognized that not every action taken by every electric corporation is subject to its jurisdiction."

The Staff Proposal appears overly broad in its blanket assertions that every element of the DER sales process is subject to the Commission's jurisdiction, including the suggestion that certain terms of the Home Energy Fair Practices Act ("HEFPA") apply to DER suppliers. For example, the Staff Proposal posits that the mere fact that a roof top solar installation *qualifies* to be net metered means that all aspects of the solar sales process are subject to the Commission's jurisdiction under HEFPA. While NRG does not oppose the Commission asserting jurisdiction over elements such as the dispute resolution process (which seems cost effective and beneficial for all parties), the Commission should further explore these complicated jurisdictional issues and ensure that there is a concrete basis for Commission jurisdiction.

Additionally, NRG strongly recommends that the Commission hold off on fully considering many of the proposed elements of the Staff Proposal until we have further definition around what the Distribution System Platform ("DSP") is going to look like. The DER marketplace is just beginning to take off in New York. At this point, it is unclear exactly what kinds of products and services will be offered as REV develops and more DERs are attracted to invest and innovate in New York. Moreover, it is unclear *how* DER providers will offer their products and services. There could be a range of contract types offered. As REV continues, and the marketplace

envisioned for DERs develops, these system level needs will change, and the means of communicating those needs to customers and DER providers should likewise change. Setting up a regulatory structure that presupposes what these system needs will be, and assumes how DERs would offer products and services to meet those system needs, could do more to impede, rather than encourage, customer engagement in the growing DER marketplace.

ii. The suggestion in the Staff Proposal that DERs should utilize only standardized contractual terms unnecessarily limits customer choice.

At various places, the Staff Proposal suggests that standardized contractual terms would benefit consumers. While NRG does not oppose the development through the stakeholder process of a "Schumer Box" or other standardized disclosure sheet for mass-market customers, NRG is troubled by the suggestions in the Staff Proposal that DER providers utilize specific standardized contract language for the products and service offered. Rather than promote fair competition, poorly implemented standardized contracts will stifle an important mechanism for DER providers to differentiate their products and services from competitors and to adapt to new products, services or other innovations in DER delivery. Indeed, ease of contracting, through customer-friendly terms or simplified contracting procedures, can be a point of competition and differentiation between DER suppliers. NRG is deeply concerned that proscribing "standard" contract language would undercut its competitive advantage and could subject potential customers to contracts that are actually considerably *more* complicated than necessary. Further, NRG notes that many Commercial and Industrial ("C&I") segment customers, in particular, are aggressive participants in the contract drafting process, and often negotiate provisions tailored to their specific risk tolerance or other commercial needs. Indeed, it is easy to see how the contracting needs for a hospital client installing a highly reliable DER system could be very different than the needs of small manufacturing facility able to stop or start production with little additional cost.

iii. Several of the proposed licensing requirements appear overly proscriptive and open ended.

NRG has three major concerns with the licensing requirements proposed in the Staff Proposal.

First, NRG is concerned that the application process laid out in the Proposal contains no set timelines and appears to prevent DER suppliers from participating in the distributed marketplace while Staff consider their applications. Such uncertainty could be toxic in the fast-moving DER marketplace. Instead, NRG strongly recommends that any application be deemed granted, unless affirmatively denied by Staff within 10 business days.

Second, NRG is concerned that the requirement to "pre-certify" the products that a DER supplier can sell is unworkable. Over the next several years, DERs are likely to become increasingly complex and customized for individual customers. The requirement that customers notify Staff, and then receive approval, before bringing a new DER product, or suite of products, to market appears overly rigid and harmful to the very customers that the Proposal is purporting to protect. While providing staff with a generic list of potential offerings, such as "one or more of storage, demand response, thermal and inverter-based DERs" could potentially avoid the pre-approval problem, such an application would not appear to provide any benefits to either the Commission or to customers.

Third, NRG objects to Staff's proposal requiring DERs to submit sample sales agreements when applying for DER provider status. Staff appears to fundamentally misunderstand the nature of the DER sales process. The vast majority of DER installations involve customized solutions that take into account the customer's reliability needs, desire for green solutions, the trade-off between fixed and variable costs, etc. Additionally, the submission of such sample agreements should not be mandated because they may contain trade secrets or commercially sensitive information. If the Commission requires their submission, applicants should be permitted to submit sample agreements pursuant to a protective order that exempts their disclosure under New York's Freedom of Information Law and related public sunshine disclosure requirements.

NRG Recommendations:

While NRG has concerns over several of the specific proposals laid out in the Staff Proposal, we agree that maintaining the integrity of the DER marketplace is an important goal, and welcome Staff's invitation to suggest "alternative approaches which achieve the [Commission's consumer protection] goals[.]"

i. The Commission should adopt Eligibility Standards as a means of ensuring confidence in the market.

NRG recommends that the UBP include appropriate eligibility guidelines that would ensure that DERs have the commitment and capabilities to follow through on their customer offerings. Examples of appropriate eligibility standards/requirements could be that the provider be a company with some minimal level of capitalization; demonstrated competence and capabilities to perform the services being offered; and a demonstrated history of managerial experience. Such standards encourage strong and capable companies to take part in the REV markets, and restrict the ability of "fly-by-night" entities to promise consumers something they cannot ultimately deliver.

ii. The UBP-DER should contain a commercially-reasonable set of guidelines establishing expectations for fair and ethical behavior of DER providers.

NRG strongly supports moving forward with a Code of Conduct applicable to DER suppliers as soon as possible. While the Staff Proposal appears to suggest that a Code of Conduct should be developed over time, NRG instead suggests that pressing ahead with the development of a Code of Conduct is far preferable than adopting a 28-page "temporary" set of UBPs for DER resources. All customers and suppliers benefit by the establishment of clear guidelines describing how DERs should act in the commercial space, though such guidelines need to be broad and flexible enough to apply generally without imposing rigid and paralyzing restrictions on market actors.

iii. Simple disclosures may be appropriate in the mass-market consumer context.

For residential consumers, a standard set of disclosures, like those contained in the Customer Disclosure Statement[9] currently used by ESCOs providing retail electric service in New York, could be a way to provide a meaningful and helpful summary of what is contained in the contract

[9] Case 98-M-1343, *Uniform Business Practices*, revised February 2015, Section 5.B.4.b. and Attachment 4.

with the DER provider. For example, information on the prices, the length of the contract, or mechanisms for ending the contract could be highlighted on such a disclosure page. Standard disclosures could allow residential consumers to understand and compare various types of products and services without requiring that every word of each DER provider's contract matches the words in a competitor's contract. Such Schumer Box disclosures would be appropriate and should be in lieu of pre-approval of DER supplier contracts or standardized contracting terms.

Conclusion

NRG appreciates Staff's recommendations on how to ensure the integrity of the distribution market. However, we urge the Commission to avoid overly rigid or standardized requirements which could act as a disincentive for DER providers to enter the New York market. Proposals, such as several of those contained in the draft UBP appear to stifle innovation, while providing customers little in the way of consumer protection. Instead, NRG urges the Commission to focus on developing a Code of Conduct as quickly as possible to set clear and established guidelines for ethical behavior.

Any oversight should be broad enough and flexible enough to allow all types of products and services to be offered to all types and classes of customers, while providing reasonable requirements for establishing eligibility to offer DER products and services, as well as reasonable guidelines for appropriate sales, marketing, contracting and customer care behavior.

Respectfully submitted,

/s/

_____

Abraham Silverman
Attorney for the NRG Companies