

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on March 14, 2019

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman, concurring
James S. Alesi

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

ORDER EXPANDING UNIFORM BUSINESS PRACTICES FOR DISTRIBUTED
ENERGY RESOURCE SUPPLIERS

(Issued and Effective March 14, 2019)

BY THE COMMISSION:

INTRODUCTION

On October 19, 2017, the Public Service Commission (Commission) issued an Order adopting rules, requirements, and business practices for distributed energy resource suppliers (DERS) to protect customers and ensure market fairness.¹ These rules were collected in the Uniform Business Practices for Distributed Energy Resource Suppliers (UBP-DERS). The DER Oversight Order explained that several issues still needed to be addressed to ensure that customers are sufficiently protected

¹ Case 15-M-0180, 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) (DER Oversight Order).

and sought comments on various questions. Specifically, the Commission requested comments on rules regarding early termination fees, production guarantees, and escalation clauses.²

This Order ensures that adequate customer protections are in place by adopting rules regarding early termination fees, production guarantees, and escalation clauses. With regard to early termination fees, the new rules limit early termination fees to \$200 for participants in Community Distributed Generation (CDG) projects and require that those fees be waived where immediate replacement of the cancelling customer is possible. Regarding production guarantees, the new rules require that purchase contracts, as well as other contracts where charges do not depend on generation, include production guarantees. With regard to escalation clauses, the new rules require clear disclosure of the escalation rate, methodology and or formula, including illustrative examples of the resulting rates. These rules will be effective for new contracts signed after May 1, 2019. This Order updates the UBP-DERS to reflect these new rules and directs the utilities to update their tariffs to include the new UBP-DERS. The revised sections of the UBP-DERS are attached to this Order as Appendix A.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on March 28, 2018 [SAPA No. 15-M-0180SP5]. The time for submission of comments pursuant to the Notice expired on May 29, 2018.

Comments were received from The New York Department of State's Utility Intervention Unit (UIU), the Solar Energy

² DER Oversight Order, Appendix D.

Industries Association (SEIA), the Coalition for Community Solar Access (CCSA), Sunrun, Inc. (Sunrun), and the City of New York (the City).

SUMMARY OF COMMENTS

Early Termination Fees

The DER Oversight Order inquired whether a limit should be applied to early termination fees charged to mass market customers and, if so, what that limit should be set at and to what types of DER contracts it should apply.

UIU recommended, as an overarching matter, that termination fees be waived for all low-income customers. For non-low-income customers, UIU stated that termination fee restrictions should be tailored to the type of DER contract the customer enters into and that termination fees should be pro-rated to reflect the amount of time left in the contract, with consideration given to the customer's average monthly bill for the DER product. For CDG subscribers, UIU recommends that termination fees not be charged if the customer provides one bill cycle of notice of intent to terminate. UIU opined that CDG project owners can maintain a waitlist to help them expeditiously fill any subsequent openings that arise due to customers switching. UIU also stated that if the Commission permits CDG subscription termination fees, then the fees should be subject to the same limitations imposed on energy services companies (ESCOs). UIU further noted that, without regulation, excessive termination fees may create an opportunity for unscrupulous actors to commit customer abuses.

SEIA stated that, because consumers have ample opportunity to terminate an agreement before a rooftop system is installed or a CDG project becomes operational, contracts involving the installation of DER equipment should be excluded

from any limit on early termination fees. SEIA also stated that for CDG, the absence of a meaningful termination fee could cause serious problems for the financing of a CDG project. SEIA argued that because a CDG project is a long-term asset that has been financed based on expected cash flows, the ease of customer contract exit could affect stability of cash flows and increase the riskiness of a project. SEIA also highlighted the application of federal tax credits for new installations of DER equipment and explained that because the 30% federal tax credit only applies to new equipment, a company would have to resell used equipment at a very substantial discount to make up for a new buyer's inability to claim the federal tax credit.

CCSA argued that the Commission should not impose a limit on early termination fees that DER suppliers may charge mass-market customers. Rather than setting an arbitrary limit, CCSA suggested that the Commission ensure that any fees, penalties, or conditions associated with early termination are clearly disclosed in the standard disclosure form. CCSA also stated that the ESCO model for early termination fees is inappropriate for DER suppliers because agreements for CDG or on-site solar may involve a contract with a term of 20 to 25 years, while ESCO contracts are generally much shorter.

Sunrun urged the Commission not to apply a limitation to early termination fees for on-site residential solar installations. Sunrun argued that, because the provider has made a large investment in equipment and labor once a system has been installed, any limitations on a termination fee for a customer prematurely choosing to terminate a contract would likely prevent the provider from recouping the initial installation cost or the full value of the equipment. Sunrun also pointed out that its business model is far different from an ESCO in that it acts as a facilitator for customers to

generate their own energy for their homes, so the ESCO model of termination fees should not be applied.

Production Guarantees

The Commission also sought comments on whether contracts for CDG or on-site mass market distributed generation (DG) should be required to include a production guarantee. This contract term guarantees a certain level of monthly or annual generation by the generation system, in kilowatt-hours (kWh), and provides for a remedy if that level is not met.

UIU stated that the Commission should carefully evaluate the merits of requiring production guarantees for certain DER products in the next annual review of the UBP-DERs. UIU further noted that some of the contracts filed with the Department of Public Service (DPS) thus far do not include production guarantees.

SEIA explained that it is unclear why a production guarantee requirement would be necessary, as the various business models for DERS typically already include provisions in the contract to satisfy this. SEIA also noted that the Order already requires providers to disclose whether they are providing a production guarantee and how they compensate the consumer in case of underproduction. Additionally, SEIA stated that mandating production guarantees would favor certain business models over others. For these reasons, SEIA requested that the Commission reject a production guarantee requirement and instead ensure the terms of the contracts are clear.

CCSA stated that production guarantees should not be required as on-site equipment typically has its own production guarantee, which would be detailed in the agreements. Additionally, CCSA noted that contracts using the power purchase agreement (PPA) models bill a customer an amount directly

proportional to the systems' generation, such that there is no potential for customer harm in the case of underperformance.

Sunrun similarly stated that production guarantees should not be required, because typical on-site equipment contracts already include express production reviews. Further, Sunrun claims that because the PPA model is designed so that the consumer pays a price proportionate to production, customers are protected from financial harm due to underperformance.

Escalation Rates

The DER Oversight Order sought further comments on whether limits should be imposed on provisions in CDG or mass market DG contracts that escalate the price of energy or other charges over the term of the contract.

While UIU stated that it is unclear if a limitation on escalation rates is necessary, SEIA explained that limits on escalation rates could affect how a company may structure its fees and pricing. SEIA further argued that implementation of escalation guidelines would effectively result in rate regulation, which the Commission stated in the DER Oversight Order would not be applied.

CCSA argued that the Commission should not impose a limit on escalation provisions. CCSA stated that because CDG providers rely on a number of unique business models, it is important to allow for a measure of flexibility with regard to contract provision, including pricing. CCSA concluded by stating that any escalators that may apply to the contract should be clearly disclosed.

LEGAL AUTHORITY

As explained in the DER Oversight Order, the Commission's authority to impose rules and requirements on DERS stems from both its authority over electric corporations, as

defined in Public Service Law (PSL) §§ 2(13) and 53, as well as its responsibility to ensure that participants in Commission-directed or -authorized programs, tariffs, or markets receive appropriate protections.

DISCUSSION

As illustrated by the comments, each of the three areas presents unique issues. In addition to the comments, the filing of contracts by DERS, pursuant to the UBP-DERS registration process, was useful in considering those issues because they demonstrated how the terms at issue are currently addressed by the DERS operating in New York. The Commission finds that each of the three areas - early termination fees, production guarantees, and escalation clauses - contains the potential for unreasonable or confusing terms such that Commission oversight is necessary to protect customers and ensure market fairness. For that reason, the Commission adopts new requirements in each area, as described below. These requirements are consistent with most contracts currently in use by DERS, such that they will require minimal or no changes to contracts and sales practices.

This Order does not apply to contracts already signed and therefore does not require the modification of existing contracts. To allow time for any necessary updates to contracts and marketing practices, the requirements of this Order become effective on May 1, 2019 and apply to all contracts signed on or after that date. As with other requirements regarding contracts, these requirements apply only to contracts with mass

market customers.³ Large non-residential customers⁴ are generally sophisticated energy market participants and may negotiate individualized contract terms.

Early Termination Fees - UBP-DERS § 3C.D

The impact of a customer's decision to terminate a contract early differs between CDG contracts and mass market on-site contracts. In the case of mass market on-site contracts, the DERS have spent substantial resources installing the generation resource on the customer's property and a cancellation requires them to remove the resource. It also, as noted in the comments, results in their recovery of a generation resource whose value is substantially less than it was at the time of installation. On the other hand, in the case of CDG contracts, the DERS may replace the cancelling subscriber with another subscriber simply by submitting the relevant information to the interconnecting utility. As such, where a new customer is immediately available, doing so imposes no significant cost on the DERS.

Furthermore, DERS acting as CDG sponsors generally anticipate some level of customer turnover during the project's lifetime, while DERS installing on-site mass market resources generally expect those resources to remain in place and serve the customer for the life of the resource. It should also be noted that early termination fees are only applicable in cases where an ongoing contract exists; where the customer purchased a system and no ongoing contract exists, the availability of any sort of return or rescission process is based on the contract

³ Defined as customers in a distribution electric utility's residential or small commercial service class and not billed based on peak demand.

⁴ Defined as customers in non-residential service classes billed based on peak demand.

and the requirements discussed in this section are not applicable.

For an on-site mass market customer's contract, the costs associated with removing the resource, as well as the devaluation of the resource and other associated costs to the DERS, will generally be significant and are likely to vary widely between DERS and between contracts. For those reasons, and because it is reasonable to expect customers installing a large resource on their property to consider the cost and difficulty of removing that resource, no limit or requirement is imposed on early termination fees or similar charges for on-site mass market contracts. DERS are already required to clearly disclose such terms in the standard disclosure form provided to on-site solar installation mass market customers.

In the case of CDG contracts, cancellation has minimal costs to the DERS other than the minor administrative work of changing customers and the costs associated with finding a new customer. In many cases, CDG providers already maintain waiting lists, and the Commission encourages all to begin to do so, such that a new customer can be immediately swapped in for a cancelling customer with no new marketing costs. Early termination provisions in existing CDG agreements filed with the Commission generally reflect this: most require between thirty- and ninety-days' notice and include either no cancellation fee, a cancellation fee that is waived if sufficient notice is given, or a cancellation fee that is waived if the cancelling customer finds their own replacement. Where a cancellation fee is charged to a CDG customer in some cases, that fee is generally between \$50 and \$250. As noted in the DER Oversight Order, termination fees for ESCO service are generally limited to either \$100 or \$200, depending on contract details.

Given these facts, limiting termination fees in mass market CDG contracts in a manner generally consistent with current practice in the retail markets is appropriate to ensure that customers are not subject to excessive or unreasonable charges. The Commission therefore determines that a CDG contract may include a notice requirement of no more than 90 days and a termination fee of no more than \$200. Furthermore, where the cancelling customer fulfills the notice requirement and finds their own replacement, subject to the customer eligibility requirements set by the DERS, the termination fee must be waived. Companies are encouraged, but not required, to also waive the termination fee in other situations, such as where the company is able to immediately replace the cancelling customer from a waiting list.⁵

Production Guarantees - UBP-DERS § 3C.E

The commenters are correct that in many current contracts for CDG and mass market on-site DG, including most or all PPAs and many lease contracts, underperformance creates no meaningful risk or cost to the customer because the customer makes payments based only on actual generation. However, some contracts exist where the customer does potentially bear the cost of underperformance, such as purchase contracts and lease contracts with fixed monthly payments. In those cases, a production guarantee is necessary to protect the customer from the risk of system defects or installation errors. As commenters note, such contracts already include production guarantees, both because it is standard industry practice and because the inclusion of a production guarantee for on-site mass

⁵ If the company chooses not to offer the cancelling customer the option to find their own replacement, such as because the company prefers to enroll customers only from the waiting list, the termination fee must be waived as long as the customer provides the required notice.

market contracts is a precondition for the receipt of an incentive from the New York State Energy Research and Development Authority (NYSERDA) NY-Sun program. For that reason, adding such a requirement to the UBP-DERS, which will apply to all mass market on-site DER contracts, NY-Sun or otherwise, will ensure customer protection without requiring any change in existing contracts or business models.

Therefore, for all purchase contracts or other contracts where bills are not based on actual system production, a production guarantee must be included in the contract. To the extent the production guarantee differs from estimated electricity production or includes a factor reflecting system degradation, that must be clearly explained in both the contract and the standard disclosure form. Where the contract bases charges only on actual system production, no production guarantee is required, but the standard disclosure form will continue to indicate whether or not a production guarantee is included in the contract.

Escalation of Pricing - UBP-DERS § 3C.B.2.A.7

The use and nature of escalation clauses may vary significantly between contracts. While the Commission believes that, where used, such clauses should reflect actual energy price expectations and should not materially exceed the general rate of inflation, to place a specific limit on those clauses would, as commenters note, represent a significant limit on pricing decisions. For that reason, no new requirements or limitations on escalation clauses are adopted.

However, the Commission is mindful that the importance of such clauses is sometimes overlooked by customers. For that reason, the Commission directs DPS Staff (Staff) to update the standard disclosure forms to require that, where the contract includes an escalation clause, the escalation rate, calculation

methodology, and applicable formulae are clearly identified and illustrative examples of the prices resulting from the escalation clause are included. Specifically, for any prices that escalate over the term of the contract, the standard disclosure form must include the resulting potential price at the halfway point of the contract and in the final year of the contract; additional examples may also be included if the DERS chooses. Staff is also directed to continue to monitor contracts filed to ensure that escalation clauses are reasonably related to inflation and energy rate expectations.

Cleanup - UBP-DERS §§ 3A.B.1.a; 3D.A; 3F.C

The current version of the UBP-DERS provides outdated information on the availability and location of the registration form, the standard disclosure forms, and the annual report. The revised version of the UBP-DERS provides updated information.

Utility Filing

Pursuant to the DER Oversight Order, each of the large investor-owned gas and electric utilities in New York added the UBP-DERS to its tariffs as an addendum. Those utilities shall make filings updating those addenda to match the revised UBP-DERS. As substantial notice has already been provided in this proceeding, newspaper publication of these tariff updates is waived.

CONCLUSION

The refinements and additions to the UBP-DERS in this Order will benefit DERS, distribution utilities, and most importantly, DER customers. They will ensure that customers participating in DER markets and programs are protected from unreasonable or confusing terms and that DER markets are fair.

The Commission orders:

1. The amendments to the Uniform Business Practices for Distributed Energy Resource Suppliers (UBP-DERS), attached to this Order as Appendix A, are adopted with an effective date of May 1, 2019.

2. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., KeySpan Gas East Corporation, The Brooklyn Union Gas Company, National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation are directed to make filings updating the UBP-DERS included in their tariffs as addenda on not less than fifteen days' notice to become effective on May 1, 2019.

3. The requirements of §66(12)(b) of the Public Service Law and 16 NYCRR §720-8.1 concerning newspaper publication of the tariff amendments described in Ordering Clause No. 2 are waived.

4. In the Secretary's sole discretion, the deadlines set forth in this order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the affected deadline.

5. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary

Amendments to the Uniform Business Practices for Distributed Energy Resource Suppliers (UBP-DERS)

This Appendix includes only the modified sections, with modifications shown. Removals are struck through and in red while additions are underlined and in blue. A full version of the UBP-DERS as revised is available on the Department's website at

<http://www3.dps.ny.gov/W/PSCWeb.nsf/All/EAB5A735E908B9FE8525822F0050A299>.

SECTION 3A: REGISTRATION REQUIREMENTS
(CDG and On-Site Mass Market DG Providers)

. . .

- B. Registration Package.
 - 1. Registrants planning to become CDG or On-Site Mass Market DG Providers are required to submit to the Department a registration package containing the following information and attachments:
 - a. A completed Registration Form. The registration form ~~will be~~ is available on the Department's website at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/EAB5A735E908B9FE8525822F0050A299>, ~~www.dps.ny.gov, no later than October 30, 2017 and will be included in this document as Attachment 2.~~ Information that must be provided on or attached to the registration form includes:

. . .

SECTION 3C: MINIMUM STANDARDS FOR SALES AGREEMENTS
(CDG and On-Site Mass Market DG Providers)

. . .

- B. A Provider, or its agent, may solicit and enter into a sales agreement with a customer subject to the following requirements.
 - 1. The DER supplier shall obtain a customer agreement to purchase the product or service and customer authorization to release information to the DER supplier, and retain verifiable proof of such authorization for at least two years or the length of the agreement, whichever is longer.
 - 2. Sales agreements shall include the following information written in plain language in the same language that the Provider has used to market to the customer:
 - A. Terms and conditions applicable to the business relationship between the Provider and the customer which includes:
 - 1. Provisions governing the process for rescinding or

terminating an agreement by the Provider or the customer including provisions stating that a residential customer may rescind the agreement within three business days after its receipt without charge or penalty;

2. The price, the terms and conditions of the agreement, including the term and end date, if any, of the agreement, the amount of the termination fee and the method of calculating the termination fee, if any, the amount of late payment fees, if applicable, and the provisions, if any, for the renewal of the agreement;
3. A clear description of the conditions, if any, that must be present in order for savings to be provided to the customer, if savings are guaranteed.
4. Information for residential customers of their rights under HEFPA; and
5. Information regarding contacting the Department for dispute resolution.
6. DER supplier contact information, including a local or toll-free number from the customer's service location.
7. A clear description of any escalation of pricing over term of the contract, including the full details of any methodology used for determining that escalation.

. . .

D. Early Termination Fees

1. In addition to the requirements of subsection B, CDG contracts that contain an early termination fee:
 - A. Must contain an early termination fee of \$200 or less;
 - B. Must include a notification period of 90 days or less;
 - C. Must include waiver of the early termination fee if the notification requirement is fulfilled and the customer finds their own replacement, subject to the customer eligibility requirements set by the DERS; or, where the customer is not offered the option to find their own replacement, must include waiver of the early termination fee if the notification requirement is fulfilled.

. . .

E. Production Guarantees

1. In addition to the requirements of subsection B and, where applicable, subsection C, all purchase contracts or other contracts where bills are not based on actual system production must include a production guarantee.

SECTION 3D: STANDARD CUSTOMER DISCLOSURE STATEMENTS
(CDG and On-Site Mass Market DG Providers)

- A. A completed Standard Customer Disclosure Statement shall be provided to all customers of CDG or On-Site Mass Market DG Providers as part of the sales agreement. Standard Customer Disclosure Statements ~~will be~~ are available on the Department's website at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/EAB5A735E908B9FE8525822F0050A299>, ~~www.dps.ny.gov, no later than October 30, 2017 and will be included in this document as Attachment 1.~~

. . .

SECTION 3F: REPORTING REQUIREMENTS
(CDG and On-Site Mass Market DG Providers)

. . .

- C. Each CDG Sponsor shall send an annual report for each calendar year to each of its subscribers by March 31 of the following year. The annual report must include the amount of credits that the member has received, expressed both in kWh and dollars, as well as the total amount the customer has paid in subscription fees and any other payments to the Sponsor. The report shall follow the standard format available on the Department's website at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/EAB5A735E908B9FE8525822F0050A299> ~~provided by Department Staff in Case 15-M-0180.~~

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