

NY State Flexes Muscles With Energy Service Co. Restrictions

By Thomas Puchner and Kevin Blake

Law360 (January 16, 2020, 3:52 PM EST) -- The phrase “just and reasonable” — a standard used in most federal and state energy and telecommunications laws — was once described by the Federal Energy Regulatory Commission as “a mere vessel into which meaning must be poured.”[1] The U.S. Court of Appeals for the D.C. Circuit admonished FERC, clarifying that an agency may not simply “pour any meaning” it desires into a statute.[2]

On Dec. 12, 2019, the New York State Public Service Commission poured a new meaning into those words, as it adopted an unprecedented set of rules and standards to govern the retail energy markets in New York state.[3] Leaning on a recent interpretation from the New York State Court of Appeals in *Matter of National Energy Marketers Association v. New York State Public Service Commission*,[4] the commission’s Reset 2.0 order expressly conditions the eligibility of energy service companies, or ESCOs, to utilize utility-owned distribution systems on terms that are, in the commission’s view, “in all respects just and reasonable.”

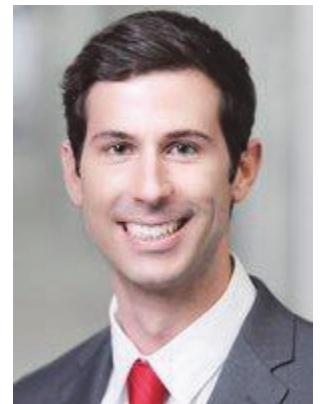
Using that phrase 15 times throughout the Reset 2.0 order, the commission leveraged its expansive interpretation to establish enhanced eligibility criteria, issue price caps on ESCO products, limit the value-added products and services ESCOs can provide to customers and mandate granular transparency of product information.

Permissible and Prohibited Energy Products

The most notable change is the commission’s narrowing of ESCO products and services that are permissible in the market. After Feb. 10 of this year, any product marketed by an ESCO must fit into at least one of three types: (1)



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guaranteed savings; (2) fixed-rate, price-capped; or (3) renewable energy. Each product type has specific nuances and conditions, as described below.

Guaranteed Savings

The first is a variable-rate, commodity-only service that guarantees savings over a 12-month period. The Reset 2.0 order states that an ESCO seeking to offer such a product must comply with the same key terms and conditions imposed upon ESCOs seeking to serve low-income customers, as set forth in the 2016 low-income proceeding.[5]

While a petition is still required for an ESCO to serve low-income customers under a guaranteed savings product, no formal petition would be required for an ESCO to offer a guaranteed savings product to other mass-market customers. Yet the requirements are identical – an ESCO must submit detailed information on the guaranteed savings product to Department of Public Service, or DPS, staff, and comply with annual reporting requirements.

As many ESCOs experienced in the low-income proceeding, DPS staff subjected each applicant to a rigorous review, and required detailed spreadsheet analysis to justify their product offerings to ensure that reconciliation can be performed on an annual basis, or sooner if the contract is terminated early. The Reset 2.0 order states that DPS staff will closely monitor any approved guaranteed savings products, and instruct utilities to withhold payments remitted to an ESCO through the purchase of receivables program if that ESCO fails to provide the required guaranteed savings refund.

Fixed-Rate

The second type of allowed product offering is a fixed-rate product, capped at a price no greater than the trailing 12-month average utility supply rate plus a premium of no more than 5%. In order to develop a product that meets this definition, the utilities are directed to publish their prior 12-month average supply rates within 15 days of the end of each quarter, so that ESCOs can implement any necessary modifications to their contracts every three months.

The first utility publication of those benchmark prices was scheduled for Dec. 16, 2019, setting the price for three months until being updated on March 16 of this year. Compliance with such requirements will require close coordination and enhanced billing management services for many ESCOs.

Renewable Energy

The third type of allowed product offering is a renewably sourced commodity that is comprised of at least 50% more renewable energy than is required by the Renewable Energy Standard for any given year.

Unlike other load-serving entities that are required to purchase renewable energy credits, or RECs, from Tier 1 eligible generation facilities to meet their Renewable Energy Standard obligations, ESCOs may meet this obligation by procuring such renewable energy from any generating facility (1) that satisfies the Climate Leadership and Community Protection Act definition of “renewable,” and (2) whose electrical output satisfies the locational and delivery requirements of the Renewable Energy Standard.

The Climate Leadership and Community Protection Act defines renewable energy as

systems that generate electricity or thermal energy through use of the following technologies: solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity.

The locational and delivery requirements imposed by the Reset 2.0 order will limit an ESCO's renewable energy procurement to:

- Purchasing RECs from eligible renewable generators through the New York Generation Attribute Tracking System;
- Purchasing Tier 1 RECs from the New York State Energy Research and Development Authority;
- Procuring RECs from eligible renewable generators through bilateral contracts;
- Making alternative compliance payments to the New York State Energy Research and Development Authority; or
- Entering into bundled energy and REC purchase agreements with eligible renewable generators.

ESCOs would not be allowed to satisfy the renewable energy requirement by procuring RECs from other states or markets, except under limited “hourly matching” circumstances outlined in the Clean Energy Standard. The price charged by an ESCO for such renewable commodity can be at a reasonable premium above the utility rate, so long as the premium is commensurate with the incremental cost incurred to provide the product.

Value-Added

The commission considered, but ultimately rejected, a fourth type of product offering that would have allowed products comprised of commodity plus a value-added product or service. These types of products broadly fall into two types, non-energy-related and energy-related. The commission decided that non-energy-related products, such as promotional offers, gift cards, rewards points and cash-back programs, are prohibited from being offered to prospective customers as inducements to sign a contract.

With respect to energy-related value-added services, the commission found that “no meaningful evidence” was provided to demonstrate that such products and services currently provide benefits to customers, other than Agway Energy Services' EnergyGuard program, which is described as a prepaid maintenance contract to cover the cost of air conditioning maintenance and electrical wiring repairs.[6]

This being the case, apart from Agway's EnergyGuard product, all ESCO products must fall within one of the three above-referenced standard product types until the commission further determines whether and to what extent energy-related value-added products can be offered during track II of the underlying ESCO evidentiary proceeding. ESCOs have a limited opportunity to petition the commission for approval to offer energy-related value-added

products in the interim period before final rules are adopted on value-added products, but only to the extent such products provide demonstrable value to customers.[7]

In stark contrast to its long-held position on home energy management products, the commission took a bold step in declaring that LED light bulbs and smart thermostats provide “little or no value.”[8] At the same time, the commission continues to encourage those same home energy management solutions as a key part of the state’s energy policy, most notably in encouraging ConEdison’s neighborhood sweep, whereby ConEdison removed less efficient bulbs and replaced them with 525,000 LED bulbs over 27,570 properties, achieving a peak load relief of 3.9 megawatts by the end of last year.[9]

Additionally, ConEdison’s Residential Direct Load Control and Bring Your Own Thermostat programs allowed customers to control HVAC systems using Wi-Fi enabled thermostats and enhanced customer data, providing over 192 kilowatts peak load relief.[10] Currently, however, the commission sees no value in ESCOs offering such products.

Meanwhile, distributed energy resource providers are expressly unrestricted from selling any and all of these otherwise prohibited value-added products. Track II of the ESCO proceeding will further evaluate and explore the extent to which energy-related products and services benefit customers and advance the state’s energy goals, and will perhaps give the commission a chance to refine its position on those key issues.

However, the vast majority of products and services that the commission desires from the market — demand-management programs or tools, voluntary dynamic pricing programs or tools, energy-efficiency measures, energy-management services, smart grid technologies, energy storage products and electric vehicle-related services — require, or would be greatly enhanced by, the rollout of advanced metering infrastructure and/or updated market participation rules that have yet to materialize. The products that do exist — LEDs, home energy management systems and smart thermostats, among others — have been strangely carved out, at least for now.

Enhanced Eligibility Requirements

All ESCOs are required to file revised eligibility applications by March 11. The revised eligibility application has not been released, but the Reset 2.0 order explains that it will include several new items, including:

- A statement identifying which of the above-referenced three product types it intends to offer;
- A checklist to identify which types of market methods will be used;
- Disclosure of complaint history in all states in which the ESCO has operated within the last two years;
- A list and description of any security breaches that occurred in any jurisdiction in which the ESCO has operated within the last two years;
- Specific policies and procedures addressing how the ESCO will secure customer data;
- Disclosure of bankruptcy history, dissolution, merger or acquisition activities of the company during the previous two years;

- Proof of financial assurance in the form of bonding, collateral or a letter of credit that is sufficiently sized compared to the amount of customers the ESCO serves; and
- Certification from a high-level officer of the ESCO stating that the company is willing and able to comply with all applicable laws and regulations.

DPS staff will substantively review the material submitted in the revised eligibility application and, where appropriate, recommend denial of an application. If an ESCO fails to submit a new eligibility application by March 11, it will be immediately and automatically suspended.

Granular Transparency

To enhance customer awareness and understanding of energy product offerings, the commission is requiring ESCO customer utility bills to include transparent and unbundled pricing data of commodity and value-added products offered by ESCOs.

This would include a conspicuous price comparison showing what the monthly charge would have been for the same time period had the customer received commodity from the utility. It will also include a chart showing the utility cost for the preceding 12-month period, and a comparison of the ESCO price for that same period.

Recognizing that differences in utility IT systems will alter the presentation, timeline and cost for developing the on-bill comparison tools, the Reset 2.0 order directs DPS staff to coordinate with the utilities to implement individualized implementation plans for each utility. Based on the language of the order, it does not appear that the commission contemplates that ESCO stakeholders will have a seat at the table for that collaborative effort.

Small Nonresidential Customers

The Reset 2.0 order also includes discussion of what type of customer is considered “mass-market” and thus subject to the above restrictions and requirements. Consistent with past orders (though not without confusion), mass-market customers encompass nondemand metered electric customers and gas customers that use less than or equal to 750 dekatherms per year.

These loose definitions may prove difficult to implement, as customers often do not know their usage or service classification at the point of sale, and usage may fluctuate annually depending on customer operating practices, market factors and technology improvements.

Broad Implications for Renewable and Distributed Energy Providers

The commission’s unprecedented interpretation that its authority to ensure third-party access to the utility’s distribution system is “in all respects, just and reasonable” raises concerns about how this authority could be used in the broader distributed energy resource markets in New York state.

A wide range of customer-oriented technologies and services have been, and continue to be, taking root throughout the state, from rooftop solar and residential battery backup systems, to electric vehicles and home energy management hardware and software, to name a few. All, in some fashion, rely upon and touch the integrated electric distribution system.

The lingering potential for the commission to impose similarly sweeping reforms to the distributed energy resource marketplace in the form of price caps, product restrictions and other out-of-market regulatory mechanisms could have a chilling effect on these nascent markets, which could stifle competition and innovation necessary to meet the state's climate goals. By way of example, the recently issued Community Distributed Generation Consolidated Billing Order^[11] requires community distributed generation sponsors to provide at least 5% savings in order to participate in consolidated billing. All participants in the New York state energy market should watch this docket closely.

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1. Williams Pipe Line Co., 21 FERC ¶ 61260, 61594 (Nov. 30, 1982).
 2. Farmers Union Cent. Exch. Inc. v. FERC, 734 F.2d 1486, 1504 (D.C. Cir. 1984).
 3. Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process ("Reset 2.0 order").
 4. Matter of National Energy Marketers Association v. New York State Pub. Serv. Commission, 33 N.Y.3d 336, 350 (2019).
 5. See Case 12-M-0476 et al., Order Adopting a Prohibition on Service to Low-Income Customers by Energy Service Companies (issued Dec. 16, 2016).
 6. Reset 2.0 order at 53.
 7. Phillips Lytle has successfully petitioned the commission for approval of guaranteed savings products on behalf of its ESCO clients.
 8. See Reset 2.0 order at 11.
 9. See ConEdison's Brooklyn Queens Demand Management Program, Implementation and Outreach Plan at 18 (issued Jan. 29, 2019).
 10. Id.
 11. <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A831AC29-3AD7-42E9-A72D-C34EE60BB1F9}>