



March 2, 2016

Case 15-M-0127 – In the Matter of Eligibility Criteria for Energy Service Companies.

Case 12-M-0476 – 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 98-M-1343 – In the Matter of Retail Access Business Rules.

**DEPARTMENT OF PUBLIC SERVICE STAFF GUIDANCE DOCUMENT FOR  
COMPLIANCE WITH THE FEBRUARY 23, 2016 ORDER RESETTING RETAIL ENERGY  
MARKETS AND ESTABLISHING FURTHER PROCESS**

This document is designed to provide Staff's guidance to ESCOs seeking to comply with the February 23, 2016 Order Resetting Retail Energy Markets and Establishing Further Process (the Order) and the Uniform Business Practices (UBP). Nothing in this guidance document should be viewed as either supplementing or altering the terms of either the Order or the UBP. Rather this guidance document is being provided as a resource to ESCOs for compliance with the Order and the UBP.

The following requirements shall be effective after March 4, 2016:

1. ESCOs shall only enroll new mass market customers or renew existing mass market customers in gas or electric service if:
  - a. The sales agreement guarantees that the customer will pay no more than if the customer were a full-service customer of the utility. This requirement can be met with sales agreements that guarantee savings on an annual basis or for a shorter period. This requirement can be achieved through customer credits to be applied to the customer's energy bill at the end of the period specified in the sales agreement, or at the end of each year if no period is specified, for amounts in excess of what the customer would have paid under full utility service. If a customer credit cannot be applied because of utility billing system constraints,

this payment can be made through another means, such as a check or an Electronic Funds Transfer. If a customer leaves ESCO service before the term specified in the sales agreement ends or before the end of the year if the sales agreement does not include a specific term, a credit should be applied to the customer bill, or a payment made through other means, at that time as necessary to ensure that the customer did not pay more than he or she would have paid as a full-service customer of the utility during the period when he or she was served by the ESCO under the sales agreement. In order to calculate what the customer would have paid as a full service utility customer ESCOs should consider the following:

- i. Some ESCOs that currently guarantee savings have created systems for calculating the utility rate by using rate information from the utility tariffs.
- ii. Each of the utilities has a calculator whereby the customer can calculate what he or she would have paid if he or she were a full service customer of the utility.
- iii. Some utilities offer the ESCOs the capability of billing the customer at the utility rate.
- iv. Finally, an EDI transaction which will provide data on what the customer would have paid if he or she received bundled service from the utility is being developed.

-OR-

- b. The sales agreement is for an electricity product derived from at least 30% renewable sources. For a new product that the ESCO starts offering after February 23, 2016, such renewable sources must be eligible under the Commission's Environmental Disclosure Labeling Program (EDP) rules, under which energy labels are based on the environmental attributes of the energy purchased and which are not affected by the separate purchase of Renewable Energy Certificates (RECs) unless those RECs are eligible for conversion transactions. ESCOs that offered, on the Power To Choose website, green electric products including at least 30% renewable energy prior to the Order may continue to offer and enroll mass market customers in that product.
  - i. EDP rules are available on the Department's website. The two methods by which an ESCO may acquire eligible renewable energy are briefly summarized here:
    1. The ESCO enters into a bundled contract for energy and attributes (including RECs) with a renewable generator in New York or in an adjacent control area with a compatible tracking system (PJM or ISO-NE); or



-OR-

- c. A non-residential gas customer with annual gas consumption that does not exceed 750 dekatherms or MCFs per year (small non-residential gas customer). For customers with multiple meters, this threshold shall be calculated using the sum of all meters in the customer's name within a utility service territory.
3. An ESCO may determine whether a customer is a mass market customer by:
  - a. For electric customers, determining the customer's service class. Each electric utility will provide information on which service classes are demand metered and which are non-demand metered.
  - b. For gas customers, either requesting historic usage information from the customer or, with customer authorization, obtaining that information from the utility through an EDI transaction or another agreed upon method.
4. ESCOs cannot offer value-added services as part of their supply service to mass market customers at this time unless the service is part of an electric product including at least 30% renewable or a gas or electric product that guarantees savings over the utility rate (compliant product) where savings are guaranteed with the entire cost billed by the ESCO to the customer through the utility bill taken into consideration.
5. ESCOs cannot offer fixed-rate supply products to mass market customers at this time unless the product is a compliant product consistent with the above requirements. An ESCO may only renew a fixed-rate sales agreement if that agreement is a compliant product, as discussed below, and must provide the customer with notice consistent with subsection 5.B.5.g of the UBP.<sup>1</sup>
6. Enrollment of new mass market customers in non-compliant products must be completed on or before March 4, 2016. For purposes of the Order, an enrollment includes both execution of the customer agreement and the submission of an EDI transaction to the utility. Unless both steps are completed on or before March 4, 2016, the ESCO may only enroll the customer in a compliant product as described above.

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<sup>1</sup> UBP 5.B.5.g states "When a fixed-price agreement is renewed as a fixed-price agreement, the ESCO shall provide the customer with an additional notice before the issuance of the first billing statement under the terms of the contract as renewed, but not more than 10 days prior to the date of the issuance of that bill. This notice shall inform the customer of the new rate and of his or her opportunity to object to the renewal, without the imposition of any early termination fees, within three days of receiving the first billing statement under the terms of the contract as renewed."

7. A mass market customer served through a contract with a fixed term, whether with a fixed or variable rate, is not affected until that term ends.
8. ESCOs that currently serve mass market customers through compliant sales agreements may continue to do so.
  - a. ESCOs that currently serve mass market customers through compliant guaranteed savings sales agreements that intend to enroll that customer in a compliant renewable energy product that does not guarantee savings must receive affirmative customer consent, as required by the Order, prior to doing so. A notification requesting consent must be provided to the customer at least 30 days in advance of a material change in sales agreement terms. The ESCO should enroll the customer in that product, if consent is received, or return the customer to utility supply service, if consent is not received, at the end of the billing cycle during which the 30 day period ends. In order to demonstrate that affirmative consent has been received, ESCOs must either (a) receive verbal consent in a recorded telephone conversation or independent third party verification after explaining the following, (b) receive a signature on a document that explains the following or c) receive electronic consent consistent with the requirements consistent with UBP Section 5, Attachment 2:
    - i. The renewed contract does not guarantee the customer savings as compared to the utility price;
    - ii. The renewed contract does not include a fixed rate;
      1. (This point should be omitted if the renewed contract contains a fixed rate in addition to renewable energy)
    - iii. The customer is free to return to utility service without penalty rather than renewing and may pay a lower price for energy if they do so.
9. For customers currently served under non-compliant month-to-month variable rate agreements:
  - a. ESCOs that currently serve mass market customers through non-compliant month-to-month variable rate agreements that intend to return those customers to utility supply service must provide notice to each of those customers by March 7, 2016 that they will be returned to utility supply service at the end of the billing cycle during which the notice period expires.<sup>2</sup> Pursuant to the UBP, at least 15 days' notice must be provided before returning the customer to utility supply service. If the sales agreement prescribes a longer notice requirement, the ESCO shall abide by the requirement in the sales agreement.

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<sup>2</sup> A sample drop notice that ESCOs may use is available at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/A6FFDA3D233FF24185257F68006F6D78?OpenDocument>.

- b. ESCOs that currently serve mass market customers through non-compliant month-to-month variable rate agreements that intend to enroll that customer in a compliant variable rate guaranteed savings product should provide notice to each of those customers by March 7, 2016 that they intend to enroll that customer in a guaranteed savings product at the end of the billing cycle during which the notice period expires. Pursuant to the UBP, at least 30 days' notice must be provided for a change in sales agreement terms. If the sales agreement prescribes a longer notice requirement, the ESCO shall abide by the requirement in the sales agreement.
    - i. Customer consent is not required in this circumstance because this is a "rate change" and therefore not material, pursuant to UBP subsection 5.B.5.d.
  - c. ESCOs that currently serve mass market customers through non-compliant month-to-month variable rate agreements that intend to enroll that customer in a compliant renewable energy product must receive affirmative customer consent consistent with UBP renewal requirements, specifically subsection 5.B.5.d, because this constitutes a material change to the terms of the sales agreement. Pursuant to the UBP, a notification requesting consent must be provided to the customer at least 30 days in advance of a material change in sales agreement terms. If the sales agreement prescribes a longer period, the ESCO shall abide by the requirement in the sales agreement. The ESCO should enroll the customer in that product, if consent is received, or return the customer to utility supply service, if consent is not received, at the end of the billing cycle during which the 30 day period ends.
10. For customers currently served under non-compliant fixed-rate agreements:
- a. ESCOs that currently serve mass market customers through a non-compliant fixed-rate agreement that intend to return those customers to utility supply service at the end of that term must provide notice to each of those customers prior to the end of the last billing cycle in the term that it intends to return that customer to utility supply service at the end of the contract term. Pursuant to the UBP, at least 15 days' notice must be provided before returning the customer to utility supply service. If the sales agreement prescribes a longer notice requirement, the ESCO shall abide by the requirement in the sales agreement.
  - b. ESCOs that currently serve mass market customers through a non-compliant fixed-rate agreement that intend to enroll that customer in a compliant guaranteed savings product should provide notice to each of those customers that they intend to enroll that customer in a guaranteed savings product at the end of the last billing cycle in the contract term. Pursuant to the UBP, at least 30 days' notice must be provided for a change in sales agreement terms. If the sales agreement prescribes a longer notice requirement, the ESCO shall abide by the requirement in the sales agreement.

- i. Customer consent is not required in this circumstance because this is a “rate change” and therefore not material, pursuant to UBP subsection 5.B.5.d.
    - c. ESCOs that currently serve mass market customers through a non-compliant fixed-rate agreement that intend to enroll that customer in a compliant renewable energy product that does not guarantee savings must receive affirmative customer consent, as required by the Order, prior to the end of the last billing cycle in the term. A notification requesting consent must be provided to the customer at least 30 days in advance of a material change in sales agreement terms. If the sales agreement prescribes a longer period, the ESCO shall abide by the requirement in the sales agreement. The ESCO should enroll the customer in that product, if consent is received, or return the customer to utility supply service, if consent is not received, at the end of the last billing cycle in the term. In order to demonstrate that affirmative consent has been received, ESCOs must either (a) receive verbal consent in a recorded telephone conversation or independent third party verification after explaining the following, (b) receive a signature on a document that explains the following or c) receive electronic consent consistent with the requirements consistent with UBP Section 5, Attachment 2:
      - i. The renewed contract does not guarantee the customer savings as compared to the utility price;
      - ii. The renewed contract does not include a fixed rate;
        - 1. (This point should be omitted if the renewed contract contains a fixed rate in addition to renewable energy)
      - iii. The customer is free to return to utility service without penalty rather than renewing and may pay a lower price for energy if they do so.
11. For customers currently served under non-compliant fixed-term, variable rate agreements:
- a. ESCOs that currently serve mass market customers through a non-compliant fixed-term, variable rate agreement that intend to return those customers to utility supply service at the end of that term must provide notice to each of those customers prior to the end of the last billing cycle in the term that it intends to return that customer to utility supply service at the end of the contract term. Pursuant to the UBP, at least 15 days’ notice must be provided before returning the customer to utility supply service. If the sales agreement prescribes a longer notice requirement, the ESCO shall abide by the requirement in the sales agreement.
  - b. ESCOs that currently serve mass market customers through a non-compliant fixed-term, variable rate agreement that intend to enroll that customer in a compliant guaranteed savings product should provide notice to each of those

customers that they intend to enroll that customer in a guaranteed savings product at the end of the last billing cycle in the contract term. Pursuant to the UBP, at least 30 days' notice must be provided for a change in sales agreement terms. If the sales agreement prescribes a longer notice requirement, the ESCO shall abide by the requirement in the sales agreement.

i. Customer consent is not required in this circumstance because this is a “rate change” and therefore not material, pursuant to UBP subsection 5.B.5.d.

c. ESCOs that currently serve mass market customers through non-compliant fixed-term, variable rate agreements that intend to enroll that customer in a compliant renewable energy product that does not guarantee savings must receive affirmative customer consent consistent with UBP renewal requirements, specifically subsection 5.B.5.d, because this constitutes a material change to the terms of the sales agreement. Pursuant to the UBP, a notification requesting consent must be provided to the customer at least 30 days in advance of a material change in sales agreement terms. If the sales agreement prescribes a longer period, the ESCO shall abide by the requirement in the sales agreement. The ESCO should enroll the customer in that product, if consent is received, or return the customer to utility supply service, if consent is not received, at the end of the last billing cycle in the contract term.

12. An ESCO that intends to enroll new mass market customers or renew existing mass market customers while the requirements described above are in effect must make a compliance filing to the Secretary, under Matter Number 15-M-0127, certifying that any enrollments will comply with the conditions of the Order. Filings must be made by the Chief Executive Officer (CEO) or equivalent corporate officer of the ESCO.<sup>3</sup> Filings must be submitted electronically to the Secretary at [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov) by 4:00pm on the tenth calendar day following the issuance of the Order, Friday, March 4, 2016. In addition to the CEO or equivalent certification, ESCOs must file new or revised sales agreements or any other documentation required by the UBP for new or revised products. New sales agreements must be approved by DPS Staff before marketing those products. A sample sales agreement that may be used for marketing prior to Staff's approval of individual sale agreements is available.<sup>4</sup> If the ESCO chooses to use the sample sales agreement they can begin marketing upon submission of the CEO certification.

13. Department of Public Service Staff will conduct audits to ensure that ESCOs are complying with these requirements. As part of those audits, Staff may request documents

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<sup>3</sup> An example of a CEO certification filed by a distribution utility is available at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/A6FFDA3D233FF24185257F68006F6D78?OpenDocument>.

<sup>4</sup> The sample sales agreement is available at <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/A6FFDA3D233FF24185257F68006F6D78?OpenDocument>.

including: details on the number of customers enrolled under a guaranteed savings product and the number of customers enrolled under a renewable product; records of the prices charged to customers enrolled in a guaranteed savings product; information on whether customers enrolled in a guaranteed savings product have saved money and, if not, how the ESCO intends to ensure they will save money over the term of the contract; contracts or other documentation regarding the purchase of renewable energy; and records of affirmative consent for customers renewed from a guaranteed savings or fixed rate product into a renewable energy product.

The Following Enhancements to Commission Enforcement Are Effective As of February 23, 2016:

1. The Commission, in its discretion, may forgo the notice and cure period process and proceed directly with an Order to Show Cause for eligibility revocation, or any less severe action it determines is appropriate, against any ESCO that has a single violation of the Uniform Business Practices (UBP).
  - a. As is already true, Orders to Show Cause will provide the ESCO with the opportunity to respond by denying that it committed the alleged violation or by arguing that the alleged violation does not justify eligibility revocation.
2. The UBP is revised to include the Commission's authority to impose consequences on ESCOs where there is a material pattern of consumer complaints regarding matters under the ESCO's control, even where those complaints do not reveal any violations of the UBP.
3. The UBP is revised to include the Commission's authority to impose consequences on ESCOs that violate any state, federal, or local law, rule, or regulation regarding sale and marketing practices. Consequences may also be imposed on ESCOs that proceeded with marketing at the door of an establishment that has posted a "no solicitation" or similar sign, even where there is not a companion federal, state or local law, rule or regulation prohibiting such marketing.