STATE OF NEW YORK PUBLIC SERVICE COMMISSION

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

INITIAL COMMENTS OF CONSUMER POWER ADVOCATES REGARDING SUPPLEMETAL STAFF WHITEPAPER ON DER OVERSIGHT

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Introduction

Consumer Power Advocates (CPA) is a coalition of not-for-profit commercial health care and educational customers in the Consolidated Edison service territory that advocates on behalf of consumer interests before the Commission, NYISO and elsewhere. CPA's members have been at the forefront of employing distributed energy resources (DERs,) including demand response (DR,) combined heat and power (CHP,) and solar systems. CPA members routinely interact with DER suppliers (DERS,) and may, depending on the definitions ultimately arrived at, actually be DERS themselves.

The primary purpose of New York's Reforming the Energy Vision (REV) initiative is to bring greater innovation and competition to the manner in which customers receive services from and interact with the electric power system, the state's utilities and other participants. Ultimately the goal, as we see it, is to lower costs to consumers, expand opportunities, all while maintaining safe and adequate service, protecting consumer interests, and promoting fair competition. This is most likely to happen through innovation.

CPA's members have a strong interest in seeing REV succeed and support the majority of the Commission's efforts to date. We see the purpose of the current investigation as striking a balance between the need to protect consumers (especially those least able to protect themselves) and encouraging the development of a vibrant ecosystem of DERS. Unfortunately, we believe that the Supplemental Staff Whitepaper (the Whitepaper) fails to strike such a balance.

With no substantive explanation given, the Whitepaper marks a major departure from the

status quo, in place since before the initial Staff Whitepaper was issued in 2015. From limiting Commission oversight to circumstances in which providers acquire customer data through means established by the Commission and when DER services are sold into the DSP markets, Staff now proposes that the Commission exercise virtually ubiquitous oversight over all DERS, including those that have operated without notable incident for more than a decade.

The Staff proposal represents a broad, intrusive and heavy-handed solution in search of a problem.

CPA appreciates the efforts that Staff has put into developing a mechanism for oversight of DERs, but we are concerned that the Staff Proposal could impede the REV goal of developing DER markets. Specifically, (1) CPA supports a much narrower applicability of the UBP-DERS; (2) believes that the proposed creditworthiness requirements are onerous; and (3) opposes the harsh penalties that are proposed. Finally, CPA believes that the UBP-DERS and oversight requirements generally should be revisited on a periodic basis.

Innovation is the Key to REV's Success

Much has been written on the topic of innovation, but one of the most salient facts is that while innovation does occur within and between large businesses, much of that progress is incremental. The truly revolutionary changes, the ones that are changing the way business is conducted and lives are lived, have most frequently sprung from small beginnings, from talented individuals working on their own or through small businesses responding to competitive pressures.

One entrepreneur explained it particularly well a few years ago: "Small businesses and startups are the breeding grounds for innovation. Unhindered by the same tethers that hold down big businesses, these companies are able to innovate in ways that their larger counterparts cannot. In fact, innovation is a necessity for small business. They don't have the financial means to accomplish many of their goals, and thus they have to find creative means to an end."

Founder of Virgin, Sir Richard Branson has stated that "(s)mall businesses are nimble and bold and can often teach much larger companies a thing or two about innovations that can change entire industries."[1] One reason is speed of execution, something that is only hampered by the need to adhere to overly burdensome compliance requirements. Small businesses can make quick decisions, beating their competitors to market with innovative ideas. Instead of spending years

[1] / https://www.virgin.com/entrepreneur/start-ups-join-richard-branson-30-year-brainstorm

evaluating new ideas and vetting them with multiple departments, a small business can make quick decisions regarding whether or not to pursue a new approach. When a valuable idea is discovered, it can be developed quickly and launched to customers.

It is worth noting that between 1998 and 2012, 65% of net new jobs were created by small businesses and 13-14 times more patents are created per small business employee than by Fortune 1000 employees. According to a study by the U.S. Small Business Administration, small businesses particularly stand out when it comes to innovation in "green power."[2] The study's findings are very relevant to New York's current efforts.

- Small innovative firms are 16 times more productive than large innovative firms in terms of patents per employee. Small innovative firms with fewer than 500 employees produced 27 patents per 100 employees, compared with 1.6 patents per 100 employees in large firms with 500 or more employees.

- Patents of the small firms in the study were cited 79 percent more by recent patents than is typical for other patents of the same age and patent classification. Patents of the large firms were cited just slightly above average. The small firms in the study also outperformed the large firms in patent originality, generality, and growth.

- Green patents form a higher percentage of the portfolios of small firms with at least one green patent (20 percent on average) than of the large firms' portfolios (1.5 percent).

- Green patents from small firms are cited 2.5 times as frequently as green patents from large firms.

- While small firms account for about 8 percent of all U.S. patents in the U.S. innovative firm database, they account for 14 percent of green technology patents. Small firms account for more than 32 percent of the patents in both smart grids and solar energy, and 15 percent of patents in batteries and fuel cells.

Reforming the Energy Vision as has been envisioned by the Commission requires all of the existing stakeholders to think outside the box and to be open to new approaches. If we all continue to do what we have been doing, we will all continue to get what we have been getting. Thinking in new ways for the Commission means allowing innovation to occur. That, in turn, means fostering small, emerging firms, and allowing them the freedom to innovate, free of burdensome regulation to the extent consistent with protecting consumers.

[2] / Breitzman, Anthony and Thomas, Patrick, Analysis of Small Business Innovation in Green Technologies, 1790 Analytics, 2011 (https://www.sba.gov/content/analysis-small-business-innovation-green-technologies)

In the past, NYSERDA and NYPA have been particularly good at fostering innovation, in part through a policy of encouraging and supporting smaller providers. As programs have transitioned away, we have seen a marked tendency toward supporting larger and more established players in the DER space. This is a trend that needs to be reversed for REV to succeed.

Comments

Application of the Proposed DER Oversight Rules Would Discourage New Markets and REV Goals

CPA strongly supports consumer protections and fair competition, and there is little question that what Staff proposes would do much to advance both of those goals. But CPA also strongly supports innovation, and it appears that the application requirements, creditworthiness requirements and UBP-DERS advanced by Staff would do much to discourage innovation.

The Staff Proposal, "recommends the expansion of oversight to all DERS that participate in Commission- authorized and/or utility or DSP-operated programs or markets."[3] The Whitepaper goes on to specifically enumerate that oversight would be extended to DERS that: participate in Community Distributed Generation (CDG) programs, partner with a Community Choice Aggregation (CCA), provide a Non-Wires Alternative (NWA) to a utility, provide demand response (DR) to a utility, develop or participate in providing services related to Net Energy Metering (NEM) or Remote Net Metering (RNM), and, possibly, provide energy efficiency services. The only entities that Staff would appear not to include would be DERS participating in existing demonstration projects[4].

The most compelling argument that Staff makes in favor of casting this net so broadly appears to be that applying oversight and the UBP-DERS to everyone is easy to understand[5]. While we concede that such a simple rule will indisputably minimize customer and DER confusion, it seems a poor reason to ignore cogent reasons to be more discriminating.

Other commenters will doubtless go into great detail as to why the proposed requirements constitute an unreasonable burden on DERS. It is sufficient for CPA to point out that every

[3] / Supplemental Staff Whitepaper at 5.

[4] / It is not clear, but it appears at least possible that even customers owning or operating DERS on their own behalf, receiving services from DSPs, might be considered DERS subject to the UBP-DERS. Such was suggested by the Joint Utilities (2015 Initial Comments at 8). CPA would strongly object to any such interpretation.

[5] / id at 6

additional requirement imposed upon a new or existing DER represents an increase in its cost of doing business, costs that will be passed on to consumers. In some cases, this additional cost will be outweighed by the associated benefit, but in other cases the costs are likely to exceed the benefits. We submit that the costs are likely to exceed the benefits if the Staff proposal is adopted as-is.

Since the primary purpose of the UBPs is to protect consumers, CPA recommends that the UBP-DERS be applied first to those customers least capable of protecting themselves, specifically mass market customers. DERS that seek to serve mass market consumers would be subject to all of the requirements outlined in the Staff Whitepaper, including the submission of applications, posting of credit (revised as noted below), and the requirements of the UBP-DERS. Those DERS that would serve only the larger commercial and industrial segments would continue to be regulated (or not) as they have been.

This approach strikes an appropriate balance between protecting vulnerable consumers and limiting the imposition of burdensome regulations to those for whom the benefits are most likely to outweigh the costs. It also recognizes the fact that larger DER projects tend to be less susceptible to standardized technical and commercial approaches.

Every large commercial DER installation is a project unique unto itself with technical requirements that differ based on technology, local host characteristics, as well as utility network needs and interconnection requirements. It will be nearly impossible for any set of generic requirements or UBPs to adequately address the differing circumstances of each project.

A standard contract that might work well for most residential consumers is unlikely to serve the needs of even one, let alone many, or most large customers. In many cases, commercial customers are national accounts that negotiate their own contracts and often insist on the use of their own contract language. Attempting to force-fit a standard contract is more likely to result in no contract at all than a contract that fits a consistent mold.

This approach also addresses another significant concern, namely the application of the proposed rules to new and existing DR providers. Numerous parties have previously commented on the inadvisability of imposing new regulations on a class of DER providers that have been doing business in the state for almost two decades without any significant problems of which CPA is aware[6]. Particularly in New York City, we believe it likely that most of the DERs will be developed to serve commercial customers, just as virtually all DR is provided by commercial customers. Not

[6] / See, for example, comments of AEE, NYC, AEMA and EDF in their comments on the first Staff Whitepaper in 2015.

only are most such customers capable of protecting their own commercial interests, many are already doing so through DR programs. Burdening their providers with new regulatory requirements is unlikely to help them, but is likely to increase costs and possibly reduce megawatts provided.

Finally, regardless of whether the proposed UBP-DERS are intended to apply to DERS that serve C&I customers, Staff's proposal that they apply to they apply to utility or NYSERDA contractors should be rejected. Being approved as a contractor is a time consuming, expensive and arduous process. It should not be dismissed as irrelevant to the degree to which consumers will be protected. There are a host of standards and requirement that contractors must abide by to ensure that they provide high-quality service. These commitments should at least be considered when deciding what additional regulatory burdens the Commission may impose. It certainly appears that they have not been by Staff.

The Proposed Creditworthiness Standards are Unreasonable

The creditworthiness requirements that Staff would impose upon a DERS to provide services are patently unreasonable. For example, a DR provider wishing to offer 10 MW to ConEd would be required to have either (1) minimum assets of $100 million, (2) tangible net worth of $10 million, or (3) make an escrow payment of $2 million. The net worth and minimum asset requirements likely exceed those of all but the largest DR providers, while the escrow payment exceeds the entire annual value of the ConEd DR programs (and exceeds by a factor of five to ten, the value of other utility DR programs.)

CPA agrees that small, new entrants to the DER marketplace are likely to be the engines of innovation that drive REV to success. Such companies will probably never meet the first or second security requirements. Requiring them to post multiple years' worth of gross revenue as "table stakes" to enter the REV game is probably the best way possible of preventing them from doing so, short of banning their participation outright.

CPA supports the comments of AEMA on this issue and endorses their recommendation that if the UBP-DERS are applied to DERS serving C&I customers that the security requirements be limited to those proposed by Con Edison is Case 15-E-0573: (1) $10 million or more in net asset value, (2) tangible net worth of at least $1 million, (3) a BB credit rating, or (4) a Letter of Credit or Cash posting equal to a penalty rate times enrolled/provided capacity.

The Proposed Penalties are Unreasonable

Staff proposes that a single violation of any part of the UBP-DERS, without any apparent materiality threshold, will be sufficient basis for the Commission to institute an enforcement proceeding to revoke a DERS' eligibility to sell services in the DER markets. CPA does not endorse rule violations of any sort, and in some extreme cases such swift and severe action may well be warranted. However, subjecting all participants, no matter how new or inexperienced, to a "one strike and you may be out" rule is certain to discourage participation. Providing a cure period, as previously proposed, should be tried before it is found inadequate.

Staff bases its inclination to harshness on "recent development (sic) with respect to Commission oversight of the retail market."[7] However, there is no basis to assume that because there were some bad actors in the retail electric commodity space that the same will be true for DERS not yet doing business in New York. Energy commodity is a very intangible product and retail commodity service is characterized by razor-thin margins and cutthroat competition. DERs generally involve very tangible parts and DERS compete on more than just price. ESCOs and DERS are not at all the same, and DERS should not be presumed guilty of, or even susceptible to, the same pressures as ESCOs.

Even in the absence of UBP-DERS, the Commission has ample enforcement arrows in its quiver to act against significant violations that imperil markets or consumers. It need not make the penalties for even minor violations so severe that the risks outweigh the rewards.

DER Oversight Issues Should Be Periodically Revisited

Although some DERS, such as CHP, DR and solar net metering, have a fairly long history in New York, the REV initiative and DER industry are both still in their infancy. As the industry evolves, so too must the extent and manner in which the Commission regulates it. CPA supports an evolutionary, rather than revolutionary approach to regulation of DER providers so that innovation is not stifled.

Innovation means taking risks and that includes the risk that subsequent events may require more heavy handed regulation, but for now, the Commission should not try to prevent every possible risk to consumers lest doing so should forestall the very benefits we are trying to achieve.

To the extent that the Commission believes that the imposition of a comprehensive

[7] / Supplemental Staff Whitepaper at 19.

regulatory regime is now required, it should impose one gradually, starting, as recommended above, with the mass market. On a regular basis thereafter, the Commission should revisit the DER regulatory regime in light of recent experience to make required "course corrections."

CPA recommends that a three year cadence for such regular reconsideration is appropriate. Shorter than that and DERS will have no sense of security and the examination will be effectively continuous, consuming resources better used elsewhere. Longer is likely to be too long to keep pace with what is hoped to be a very dynamic process. Of course, the Commission will always have the ability to step in and take remedial action outside the regular cycle if exigent circumstances should arise that justify doing so.

Conclusion

CPA comments Staff's effort in developing the Supplemental Whitepaper and the commitment to furthering the Reformed Energy Vision. However, CPA does not support a one-size-fits-all approach to DER regulation, especially when the different conditions and circumstances merit different treatment. CPA respectfully urges the Commission to favorably consider and adopt the recommendations set forth herein.

Dated: June 9, 2017
Albany, New York

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