

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

CONSOLIDATED UTILITY BILLING SERVICE

AND

ASSIGNMENT AGREEMENT

April 22, 2011

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**CONSOLIDATED UTILITY BILLING SERVICE  
AND ASSIGNMENT AGREEMENT**

This Consolidated Utility Billing Service and Assignment Agreement (“Agreement”) made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between Consolidated Edison Company of New York, Inc., a New York corporation having its principal office at 4 Irving Place, New York, NY 10003 (“Con Edison” or the “Company”), and \_\_\_\_\_, a \_\_\_\_\_ corporation, having an office at \_\_\_\_\_ (“ESCO”), Con Edison and ESCO hereinafter sometimes referred to collectively as the “Parties” or individually as a “Party.”

**WITNESSETH:**

**WHEREAS**, Con Edison has implemented a retail access program (“Power *Your Way*”), as described in its Schedule for Retail Access, P.S.C. No. 2 – Retail Access (“Retail Access Schedule”), and Schedule for Gas Service, P.S.C. No. 9 – Gas (“Gas Service Schedule”), including the Uniform Business Practices (“UBP”) adopted by the Public Service Commission (“NYPSC”) and set forth in Addendum UBP thereto (collectively the “Tariff”), and in its Retail Access Implementation Plan and Operating Procedure and Gas Transportation Operation Procedures (together referred to as “Operating Procedures”), under which Con Edison’s customers may purchase natural gas and/or electricity commodities from an energy services company or gas marketer (either hereinafter referred to as an “energy services company”) and obtain from Con Edison firm transportation service for such natural gas commodity and/or delivery service for such electricity commodity;

**WHEREAS**, ESCO has been deemed approved by the New York State Department of Public Service (“NYDPS”) to act as an energy services company;

**WHEREAS**, ESCO has met all requirements established by Con Edison to sell natural gas and/or electricity to Con Edison's retail customers under Power *Your Way* as recognized by the execution of an ESCO Operating Agreement by and between the Parties and/or a service agreement under Service Classification No. 20 of the Gas Service Schedule (together referred to as the "ESCO Operating Agreement");

**WHEREAS**, ESCO has requested that Con Edison render to certain of ESCO's customers designated by ESCO (each, an "ESCO Customer" and collectively, the "ESCO Customers") consolidated utility bills for the charges for both the ESCO's supply of the commodity or commodities to ESCO Customers ("ESCO Charges") and Con Edison's transportation/delivery service to ESCO Customers with respect to the commodity or commodities;

**WHEREAS**, ESCO is prepared to undertake and complete or has completed all necessary consolidated billing testing, including EDI testing of billing transactions, to meet NYPSC requirements prior to the commencement of consolidated billing under this Agreement;

**WHEREAS**, Con Edison is willing to provide such consolidated utility billing service ("CUBS") on a rate ready basis on behalf of ESCO to customers receiving Con Edison electric delivery service and/or firm natural gas transportation service, subject to the terms and conditions of this Agreement, the ESCO Operating Agreement, the Operating Procedures and the Tariff;

**WHEREAS**, for ESCO Charges subject to CUBS, ESCO desires to sell to Con Edison, and for Con Edison to purchase, the accounts receivable for ESCO Charges ("ESCO Accounts Receivable"), which ESCO Accounts Receivable shall arise as and when the commodity or commodities supplied by ESCO flow through the applicable ESCO Customer's meter (or in the case of unmetered electric service, when the commodity first flows over the ESCO Customer's wiring) and ESCO desires that Con Edison pay for the ESCO Accounts Receivable that it

purchases by remitting to ESCO amounts equal to the ESCO Charges (net of certain discounts, and net of certain charges and fees due from ESCO to Con Edison and certain other adjustments as provided herein), regardless of whether the ESCO Charges are paid by ESCO Customers; and

**WHEREAS**, for ESCO Charges subject to CUBS, Con Edison, without recourse to ESCO for any non payment of ESCO Charges by any ESCO Customer, is willing to purchase the ESCO Accounts Receivable for such ESCO Customers as described above and to pay ESCO an amount equal to the ESCO Charges billed to the ESCO Customers by Con Edison net of a discount calculated at a discount rate established in accordance with the methodology set forth in Case 04-E-0572, Order Adopting Three-Year Rate Plan (March 24, 2005), for electric account receivables and in Case 06-G-1332, Order Adopting in Part the Terms and Conditions of the Parties' Joint Proposal (Sept. 25, 2007), for gas account receivables and net of charges and fees due from ESCO to Con Edison for services rendered by Con Edison and other adjustments described herein, provided that ESCO also grants to Con Edison a first priority security interest in the ESCO Accounts Receivable and the proceeds and products thereof, which security interest shall arise as and when the commodity or commodities supplied by ESCO flow through the applicable ESCO Customer's meter (or in the case of unmetered electric service, when the commodity first flows over the ESCO Customer's wiring);

**NOW, THEREFORE**, in consideration of the premises and mutual promises set forth below, Con Edison and ESCO, intending to be legally bound, hereby covenant, promise and agree as follows:

Effective Date

This Agreement shall be effective on execution of this Agreement, provided, however, that Con Edison shall have no obligation to commence issuing consolidated bills until the date

ESCO has completed consolidated billing testing to the satisfaction of Con Edison and has satisfied the undertakings stated below with respect to (1) Con Edison's first priority security interest in ESCO Accounts Receivable and the proceeds and products thereof and (2) non-residential customer notice set forth herein.

### **Term of Agreement**

This Agreement will remain in effect until terminated (i) in accordance with its terms, (ii) by an order of the NYPSC, or (iii) if the ESCO Operating Agreement(s) between the Parties is (are) terminated, whichever first occurs.

### **Billing Services**

Con Edison will provide ESCO with its consolidated utility billing service ("CUBS") beginning on a date agreed upon by the parties after ESCO has completed consolidated billing testing to the satisfaction of Con Edison. The procedures applicable to CUBS are specified in Appendix A attached hereto and made a part hereof.

ESCO shall provide Con Edison accurate and timely information for use in CUBS. To the fullest extent allowed by law, ESCO shall indemnify, defend and hold harmless Con Edison, its directors, officers, agents and employees from and against any and all actions, charges, complaints, proceedings, claims, liability, damages, penalties and fines it incurs to the extent resulting from bill errors caused by untimely or inaccurate information provided by ESCO.

ESCO is responsible for reconciling records of accounts billed under this agreement and notifying Con Edison in writing of any claim that Con Edison erred in billing ESCO Charges. If ESCO fails to provide notice of its claim within 180 days from the issuance date of the bill on which ESCO claims ESCO Charges were not billed in accordance with this agreement, ESCO is deemed to have waived all claims for loss, injury or damage resulting from such error, and Con

Edison shall have no liability resulting from such error, whether based in contract or tort (including negligence and strict liability).

Con Edison may, at its option, reject requests for consolidated billing or discontinue consolidated billing for any customers whose accounts are 38 or more calendar days past due, unless the past due amount is subject to a Deferred Payment Agreement and the customer is fulfilling its Deferred Payment Agreement obligations on a current basis.

### **Assignment of ESCO's Accounts Receivable**

On and after the effective date of this Agreement, whenever electricity or natural gas commodity flows through an ESCO Customer's meter (or in the case of unmetered electric service, when the commodity first flows over the ESCO Customer's wiring) ), ESCO hereby sells to Company and Company hereby purchases from ESCO, the ESCO Account Receivable associated with such commodity or commodities, as applicable, even though the ESCO Charges for such commodity or commodities may not yet be billed.. As part of and in consideration of Con Edison's purchase of ESCO Accounts Receivable and Con Edison's undertaking to pay ESCO for the same in accordance with the **Purchase of Receivables** section of this Agreement, ESCO hereby assigns to Con Edison all of ESCO's right, title and interest in such ESCO Accounts Receivable as and when the commodity or commodities supplied by ESCO flow through the applicable ESCO Customer's meter (or in the case of unmetered electric service, when the commodity first flows over the ESCO Customer's wiring), which right, title and interest include, without limitation, the right to bill to, and collect from, ESCO Customers the ESCO Charges associated with such commodity or commodities. .

### **Undertakings (Including Grant of First Priority Security Interest to Con Edison), Representations and Warranties**



In order to fully protect and preserve Con Edison's rights under this Agreement, ESCO hereby grants to Con Edison a first priority and senior security interest in all of the ESCO Accounts Receivable and the proceeds and products thereof, arising out of the ESCO Charges for the commodity or commodities supplied by ESCO to ESCO Customers as and when such commodity or commodities flow through the applicable ESCO Customer's meter (or in the case of unmetered electric service, when the commodity first flows over the ESCO Customer's wiring) and regardless of whether or not the ESCO Charges have been billed. ESCO hereby irrevocably authorizes Con Edison or Con Edison's representative, at any time and from time to time, to file financing statements, amendments thereto, and such other documents and instruments as may be necessary or advisable to perfect the security interest granted to Con Edison hereunder.

ESCO undertakes that contemporaneously with the execution of this Agreement, ESCO will furnish to Con Edison an affidavit in the form attached hereto (Appendix B) from a senior officer attesting to Con Edison's priority security interest in the ESCO Accounts Receivable and the proceeds thereof and a first right of access to such funds.

ESCO represents and warrants that, with the exception of any security interest in ESCO Accounts Receivable filed by a creditor of ESCO that the creditor has expressly subordinated to Con Edison's security interest in the ESCO Accounts Receivable, no third party has any right, title or interest to any ESCO Accounts Receivable or the proceeds or products thereof. ESCO further undertakes that, except for any security interest that expressly has been subordinated to Con Edison's security interest in the ESCO Accounts Receivable, it shall not grant to any third party any interest in or claim of right, title or interest in those Accounts Receivable.

ESCO undertakes that contemporaneously with the execution of this Agreement, an officer of ESCO will furnish to Con Edison an affidavit in the form attached hereto (Appendix C) representing that, with respect to non-residential ESCO Customers billed under CUBS, the ESCO has notified its current non-residential customers and will notify its future non-residential customers that Con Edison is permitted to disconnect service to a customer for non-payment of ESCO charges. To the fullest extent allowed by law, ESCO agrees to indemnify, defend, and hold harmless Con Edison from and against any liability, cost, expense, or penalty it incurs if the customer's service is discontinued for non-payment and the customer establishes that it did not receive such notification.

ESCO undertakes that, in the event new or revised electronic data interchange transaction sets are approved by the NYPSC and are applicable to information to be communicated hereunder, ESCO will promptly develop and test all such transaction sets.

### **Purchase of Receivables**

Upon commencement of consolidated billing under this Agreement, Con Edison will purchase and undertake an obligation to pay ESCO for the ESCO Account Receivable created on each ESCO Customer account net of amounts due from ESCO to Con Edison. Con Edison's payment obligation shall be effective as to any ESCO Charges as of the date on which the ESCO Charges are billed to the ESCO Customer. Beginning in the second calendar month following commencement of consolidated billing under this Agreement, Con Edison will pay ESCO, via ACH (Automated Clearing House) credit to a bank (or other mutually agreed to depository or payee) designated in writing by ESCO, on the 20<sup>th</sup> calendar day of the month (or the next following business day if the 20<sup>th</sup> falls on a Saturday, Sunday, or public holiday) (the "remittance date") an amount equal to all ESCO Charges billed to ESCO Customers, including sales taxes as

applied to such charges, in the previous calendar month net of (1) the discount described below applied to such billed amounts (inclusive of sales taxes) and (2) such other charges and fees of the types listed below, or as may later become applicable to the service provided to ESCO, and other adjustments.

ESCO will forward promptly to Con Edison, without set-off or deduction, any payment received by ESCO on an ESCO Customer Account and the cash equivalent of any credit to be applied to the ESCO Customer Account.

Con Edison will apply a discount rate (the "Purchase Discount") to the face value of the ESCO charges billed (including sales taxes) on behalf of ESCO to determine the consideration to be paid for the assignment of ESCO accounts receivable. The Purchase Discount(s) will be established and adjusted in accordance with the formula(s) approved by the NYPSC. An adjusted Purchase Discount will be effective on January 1 for the calendar year and on the first day of a new rate plan for each service, and the Company will notify ESCO of the new rate(s) as soon as practicable after the new rate(s) is(are) calculated.

### **Charges, fees and remittance adjustments**

Con Edison will net from any amount to be paid to ESCO for the purchase of ESCO receivables the amounts owed to Con Edison by ESCO for retail access program services and/or other charges in accordance with the applicable provisions of the Tariff or the ESCO Operating Agreements including but not limited to:

- Special meter reading fees
- Customer usage history fees
- Account separation fees
- Profile information fees
- Consolidated Billing Service fees
- Gas imbalance charges
- Capacity Release charges

Storage charges  
Charges assessed under Dispute Resolution Procedure  
Other PSC-approved Tariff fees and charges

In addition, Con Edison will net from remittances any difference between the amount billed and the amount paid by a Customer to reconnect service pursuant to Public Service Law § 32(5)(d) (“chargeback amount”), provided that, if and when the customer makes a payment that is applicable to the chargeback amount, the Company will remit the payment to ESCO in accordance with its routine remittance practices.

In the event of termination of this Agreement, should charges, fees or other adjustments due Con Edison remain outstanding, Con Edison shall not be obligated to remit any amounts otherwise due to ESCO for the purchase of receivables except in connection with reconciliation of all charges due as of the termination date.

### **Customer Care**

Con Edison will respond to general inquiries and complaints from ESCO Customers about the overall bill and its format. Customers will be referred to ESCO for inquiries and complaints related to ESCO rates, charges, and services.

### **Consolidated Billing Service Fee**

Con Edison will charge ESCO a Consolidated Billing Service fee per account per monthly billing cycle in accordance with the Tariff.

### **Discontinuance of commodity and delivery service for non-payment**

Con Edison may disconnect its delivery service and ESCO commodity service if the ESCO Customer fails to make full payment of all amounts on a consolidated bill when due in accordance with the NYPSC’s rules for residential and non-residential service, 16 NYCRR Part 11 (residential service) and Part 13 (non-residential service).

To the fullest extent allowed by law, ESCO agrees to indemnify, defend and hold harmless Con Edison from and against any liability, damages, claims, costs or expenses it incurs that are not the result of the sole negligence of Con Edison, if any such collection activity deemed to be subject to federal, state or local laws on collection is adjudged to be in violation thereof. To the fullest extent allowed by law, Con Edison agrees to indemnify, defend and hold harmless ESCO from and against any liability, damages, claims, costs or expenses resulting from Con Edison's actions to collect such amounts based on a claim that such actions violated the Home Energy Fair Practices Act or the Energy Consumer Protection Act of 2002.

**Customer-requested account close**

Con Edison will notify ESCO if a Customer voluntarily closes its Con Edison account.

**Taxes**

At or prior to the date of its execution of this Agreement, ESCO shall provide Con Edison with a copy of its State of New York Certificate of Authority as a sales tax vendor. At all times during the term of this Agreement, ESCO shall maintain current its Certificate of Authority. In its EDI notification to ESCO of bills issued, Con Edison shall provide ESCO the amount of sales taxes billed to Customers in connection with ESCO charges appearing on CUBS bills.

Nothing in this Agreement shall be construed as imposing upon Con Edison the obligation to pay or remit to any federal, state, or local taxing authority those taxes that are the payment or remittance responsibility of ESCO as the commodity vendor. ESCO shall be liable for and pay or remit all such taxes, and shall indemnify, defend, and save harmless Con Edison from and against any and all liability for such taxes, and any interest and penalties thereon.

Con Edison is not responsible for providing to customers statements of gross receipts taxes related to ESCO charges. ESCO is not responsible for providing to customers statements of gross receipts taxes related to Con Edison charges or gas import taxes.

### **Termination of Agreement**

This agreement may be terminated by ESCO on fifteen (15) days' prior written notice to Con Edison and to ESCO's customers.

If ESCO's authorization to sell natural gas and/or electricity to customers under Con Edison's retail access program is suspended or terminated or if ESCO terminates its retail business in Con Edison's service territory, consolidated billing shall be suspended or terminated, and, except with respect to the provisions below and in the section entitled "Charges, fees, and remittance adjustments," this agreement shall also be suspended or terminated effective the same day as the date of suspension or termination.

In the event of any suspension or termination, ESCO shall remain liable for charges for services rendered hereunder to the extent not paid before the date of suspension or termination. After ESCO's participation in Con Edison's Retail Access Program is voluntarily or involuntarily suspended or terminated, subject to the following conditions, Con Edison may credit or bill ESCO and ESCO shall reimburse Con Edison for adjustments in customer payments due to Con Edison's cancellation and rebilling of ESCO Customer Accounts originally billed during the period this Agreement was in full force and effect.

a) In the event ESCO ceases to participate in Con Edison's Retail Access program but remains in business, Con Edison may, within the six months following the cessation of ESCO's participation, cancel or rebill ESCO charges previously billed for commodity during the period this Agreement was in full force and effect.

b) In the event ESCO ceases business operations but assigns its receivables and liabilities to a third party in accordance with the provision of this Agreement entitled “Assignment,” Con Edison may, within the six months following the cessation of ESCO’s business, cancel or rebill ESCO charges previously billed for commodity and credit or bill ESCO’s assignee.

c) In the event ESCO ceases business operations but does not assign its receivables and liabilities to a third party, Con Edison shall have no obligation to cancel or rebill ESCO charges previously billed for commodity or to credit or bill ESCO or any party for any amounts arising from or related to cancellation or rebilling of Con Edison charges.

In the event that the NYPSC directs Con Edison to terminate this agreement and cease providing services hereunder or directs such changes in this arrangement as may be unacceptable to Con Edison whether by specific reference to Con Edison’s CUBS program or by reference generally to consolidated billing, this agreement shall be terminated on notice given by Con Edison to ESCO consistent with such NYPSC order or any applicable NYPSC rule, regulation or uniform business practice.

In the event that a court of competent jurisdiction stays the implementation of or overturns one or more orders of the NYPSC under which Con Edison is obligated to provide billing services to ESCO, Con Edison may terminate this Agreement immediately upon notice to ESCO.

Con Edison may terminate this Agreement (i) on one day’s prior written notice if the ESCO Operating Agreement(s) is terminated for any reason; or (ii) on not less than fifteen (15) days’ prior written notice if ESCO breaches any of the representations and warranties set forth above and does not cure said breach within the fifteen-day period. Con Edison may terminate its

purchase of receivables for ESCO electric service on the day before any period for which new rates are authorized in a major Con Edison rate case.

## **Notices**

Any notice to be provided pursuant to the terms of this Agreement will be deemed given, and any other document to be delivered hereunder will be deemed delivered, if in writing and (i) delivered by hand, (ii) deposited for next-business day delivery (fee prepaid) with a reputable overnight delivery service such as Federal Express, or (iii) mailed by certified mail (return receipt requested) postage prepaid, addressed to the recipient at the address set forth below for that Party (or at such other address as that Party may from time to time designate by giving notice thereof).

If to Con Edison:



Consolidated Edison Company of New York, Inc.  
4 Irving Place, 9<sup>th</sup> Floor – Box 18  
New York, NY 10003  
Attention: Section Manager, Retail Choice Operations  
Telephone: \_\_\_\_\_  
Fax: \_\_\_\_\_  
E-Mail: \_\_\_\_\_

and if to ESCO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Fax: \_\_\_\_\_  
E-Mail: \_\_\_\_\_

**Limitation of liability**

To the fullest extent allowed by law, Con Edison’s total cumulative liability to ESCO for all claims of any kind, whether based upon contract, tort (including negligence and strict liability) or otherwise for any loss, injury, or damage connected with, arising from or related to this Agreement or the performance or non-performance of services hereunder shall not exceed the sum of all Billing Services Fees billed to and paid by ESCO to Con Edison for services rendered hereunder for the three months immediately preceding the claim.

To the fullest extent allowed by law, in no event shall either party be liable for any consequential, incidental, indirect, special or punitive damages incurred by the other party and connected with, arising from or related to this Agreement or the performance or failure to perform services hereunder, including but not limited to loss of good will, cost of capital, claims of customers and lost profits or revenue, whether or not such loss or damages is based in contract, warranty, tort, negligence, strict liability, indemnity, or otherwise, even if a party has

been advised of the possibility of such damages.

### **Force Majeure**

Any delay in the performance of any of the duties or obligations of either Party hereto shall not be considered a breach of this Agreement and the time required for performance shall be extended for a period equal to the period of such delay, provided that such delay has been caused by or is the result of any occurrence beyond the reasonable control of a Party which causes such Party to be delayed in or prevented from performing or carrying out any of its obligations under this Agreement and which, by the exercise of due diligence, that Party is unable to prevent, avoid, mitigate, or overcome, including any of the following: any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, ice, explosion, order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities, provided that a Force Majeure Event shall not include lack of finances or change in market conditions. The Party so affected shall give prompt written notice to the other Party of such cause and shall take whatever reasonable steps are necessary to relieve the affect of such cause as rapidly as possible.

### **Dispute Resolution**

For the purpose of this procedure, a “dispute” is a customer claim related to an amount billed and purchased as of the date of billing by Con Edison for ESCO charges.

ESCO will examine, investigate, and seek to resolve all customer disputes. ESCO will acknowledge receipt of the dispute or respond to the customer within two days or, if only an acknowledgement is provided, will respond to the customer within 14 calendar days of receipt.

If the dispute was one brought to ESCO's attention by Con Edison, ESCO will report to the utility the outcome of the dispute and the reason for its determination with a copy of any close-out correspondence from ESCO to the customer.

In the event ESCO decides to reduce the ESCO charges for which the customer is liable, ESCO will promptly send Con Edison a check for the credit amount for application to the customer's open balance and promptly contact the customer to explain the account credit.

If the dispute is the basis of a proceeding before the Department of Public Service or any legal action initiated by the customer, ESCO will participate and/or cooperate with Con Edison in the proceeding even if not a named party.

If Con Edison determines, in its sole discretion to be reasonably exercised, that ESCO is not in compliance with this procedure, Con Edison will assess a charge on ESCO equal to the amount disputed by the customer.

### **Amendments**

Notwithstanding any provision of this Agreement, Con Edison may at any time propose and file with the NYPSC changes to the rates, terms, and conditions of the Tariff, and/or the Operating Procedures. ESCO is not precluded from opposing any such proposed change to the Tariff or the Operating Procedure. Such amendment or modification will become effective with respect to service pursuant to this Agreement on the date specified by the NYPSC.

On no less than five days' prior written notice to all energy services companies authorized to sell electricity or natural gas in its service territory, Con Edison may adopt, modify, or supersede procedures applicable to its operations under this Agreement to meet program and procedural requirements, including data exchange requirements and EDI standards or as operational needs arise.

## **Assignment**

Neither Party shall assign any of its rights or obligations under this Agreement without obtaining the prior written consent of the non-assigning Party, which consent shall not be unreasonably withheld, provided, however, that ESCO has an unconditional right to assign its right to payments to be made by Con Edison hereunder. ESCO shall provide Con Edison with a copy of the document in which the assignment is made or so much of the document as may be necessary to make clear the identity of the parties and the terms of the assignment. ESCO hereby waives any claim against Con Edison for making payment pursuant to such assignment and, to the fullest extent allowed by law, agrees to indemnify, defend, and save harmless Con Edison from and against any liability to any third party claiming any right, title or interest to any amount paid by Con Edison to ESCO's assignee. No assignment of this Agreement shall relieve the assigning Party of any of its obligations under this Agreement. Any assignment in violation of this Section shall be void.

## **Prior Agreements Superseded**

This Agreement constitutes the entire understanding between the Parties with respect to the subject matter hereof, supersedes any and all previous understandings between the Parties with respect to the subject matter hereof, and binds and inures to the benefit of the Parties, their successors and permitted assigns. If ESCO executed a Supplement for Retail Marketing (ESCO Referral) Program Participant prior to the date hereof, such supplement shall remain in full force and effect.

## **Waiver and Modification**

No modification or waiver of all or any part of this Agreement will be valid unless in writing and signed by the Parties or their agents. Any waiver will be effective only for the

particular event for which it is issued and will not be deemed a waiver with respect to any subsequent performance, default or matter.

### **Applicable Law and Forum**

Interpretation and performance of this Agreement will be in accordance with, and will be controlled by, the laws of the State of New York except its conflict of laws provisions to the extent they would require the application of the laws of any other jurisdiction. ESCO irrevocably consents that any legal action or proceeding arising under or relating to this Agreement will be brought in a court of the State of New York or a federal court of the United States of America located in the State of New York, County of New York. ESCO irrevocably waives any objection that it may now or in the future have to the State of New York, County of New York as the proper and exclusive forum for any legal action or proceeding arising under or relating to this Agreement.

### **Severability**

If one or more provisions herein are held to be invalid, illegal or unenforceable in any respect it will be given effect to the extent permitted by applicable law, and such invalidity, illegality or unenforceability will not affect the validity of the other provisions of this Agreement.

### **Agency**

This Agreement is not intended, and will not be construed, to create any association, joint venture, agency relationship or partnership between Con Edison and ESCO or any other parties or to impose any such obligation or liability upon Con Edison.

**Not for the Benefit of Third Parties**

This Agreement is for the benefit of the Parties hereto and not for the benefit of any third parties.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed, as of the date first above written.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

By \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

(ESCO)

By \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

## Appendix A - Consolidated Utility Billing Service

### Consolidated Utility Billing Service

1. Consolidated billing will be produced using the Rate Ready method.
2. Consolidated bills incorporating both ESCO and utility charges will be issued in accordance with the Company's meter reading and billing cycle schedule. ESCO charges (commodity supply charges and customer charges) may not include penalty charges, early termination charges, cancellation fees, or similar charges however denominated or charges for unconsumed energy or non-utility services provided by ESCO or a third party. ESCO may separately bill such charges to and collect payment for such charges from its customers.
3. Consolidated billing is not available for charges billed by ESCO to ESCO Customer before the initiation of consolidated billing service for that customer. Prior balances owed to the ESCO on bills issued by the ESCO should not be incorporated in any commodity rates or customer charges that the ESCO requests Con Edison to use to calculate a consolidated bill. Consolidated billing is also not available for commodity charges for unmetered service determined to have occurred on a metered account.
4. Con Edison will provide ESCO, within two business days of issuing bills to ESCO's Customers, a statement containing the commodity usage and billed amount for each of ESCO's Customers.
5. The consolidated bill will display ESCO's name, the amount and price of the electricity or gas commodity or commodities sold by ESCO for the period in which consumption

- occurred, a non-volumetric charge (“CUBS Customer Charge”), if any, established by ESCO, and any applicable sales tax.
6. ESCO shall provide rate information (“ESCO rates”) and tax rate information to Con Edison upon enrollment of customers in the utility consolidated bill option and promptly in the event of any change in such information. ESCO may provide different rates by notice to Con Edison no less than four (4) calendar days prior to scheduled meter read dates.
  7. Rates may differ from customer to customer. Commodity rates must be in cents per kilowatt-hour or cents per therm and submitted on an account basis. Any CUBS Customer Charge will be provided as a daily rate.
  8. The rate provided by ESCO will be used by Con Edison for calculating the commodity charges on the next bill issued and every bill thereafter until changed by ESCO.
  9. Rates must include any applicable gross receipts taxes or other taxes imposed on ESCO and not required by law to be separately stated.
  10. Con Edison will calculate the ESCO charges by multiplying ESCO rates by consumption determined from actual or estimated meter readings, adjusted for meter constant, such readings having been made and validated in accordance with Con Edison practices or NYPSC-approved practices if the reading was made and validated by a Meter Data Services Provider. Con Edison will add (i) the CUBS Customer Charge, if requested by ESCO, calculated by multiplying the daily rate by the number of days in the billing period, and (ii) sales or use tax calculated at the rate provided by ESCO.



11. Con Edison will calculate and identify on the consolidated bill the sales or use tax associated with ESCO's charges and will provide such calculations to ESCO in accordance with UBP requirements for communicating consolidated billing data.
12. For any CUBS bill that includes periods during which two different ESCO rates were in effect, the ESCO rates will be prorated based on the number of days of service rendered before the effective date and on and after the effective date related to the total number of days in the billing period. Con Edison will also include on the CUBS bill any ESCO charges previously billed by Con Edison but unpaid.
13. Con Edison will offer budget billing to ESCO Customers for consolidated ESCO and Con Edison charges using Con Edison's budget billing protocol for full-service customers.
14. Con Edison will offer deferred payment agreements ("DPAs") to ESCO Customers for consolidated ESCO and Con Edison charges using Con Edison's DPA protocol for full-service customers.
15. Con Edison shall print ESCO bill messages on CUBS bills in accordance with the UBP. ESCO shall provide bill messages to be applicable uniformly to all ESCO customers taking electric service or gas service or both services in an electronic format acceptable to Con Edison at least fifteen (15) calendar days before the date such messages must begin to appear on bills and shall specify the bill production period (first and last dates) during which such messages are to be included on the bill. Bill messages may not exceed 480 characters in aggregate, and must make at least one reference to the name of the ESCO. Con Edison reserves the right to refuse to print bill messages not directly related to ESCO service or that are false or misleading. Bills will carry only current messages; if Con

- Edison cancels and rebills a customer for Con Edison charges, the reissued bill will carry only the messages applicable to bills produced at the time the bill is reissued.
16. Con Edison will include in bill envelopes ESCO bill inserts that are required by law, regulation or NYPSC order (“required inserts”). Such inserts must be supplied in bulk to Con Edison in accordance with the then current version of “Consolidated Edison Company of New York, Inc. (Con Edison) Bill Insert Production and Delivery Guidelines” (Appendix D). The insert may not exceed one-half ounce. If practical limitations preclude Con Edison’s using its mailing equipment and billing envelope for mailing, because mailing equipment is incapable of handling the bill inserts for a particular mailing, Con Edison will mail the required inserts separately for a fee. Upon request, Con Edison will consider arrangements to mail non-required inserts for a fee.
  17. ESCO will notify Con Edison of any dispute relating to amounts billed and the settlement of any dispute for a different amount than billed.
  18. Con Edison reserves the right to cancel bills previously issued and rebill or backbill customers based on actual meter readings or estimated usage and demand under Con Edison billing procedures.
  19. Con Edison will apply late payment charges (“LPCs”) to unpaid ESCO charges billed at the same rate and in the same manner as it applies LPCs to unpaid Con Edison charges.
  20. Con Edison will not provide billing services for charges for goods or services other than electricity or natural gas provided by ESCO to its customers during the billing period. Any ESCO addition of unauthorized charges to customer bills (“cramming”) is strictly prohibited. All instances of cramming that come to Con Edison’s attention will be reported to the Department of Public Service.

Appendix B – Affidavit of Security Interest

**AFFIDAVIT OF SECURITY INTEREST**

(To be executed by ESCO Officer)

STATE OF

CITY OF

I, \_\_\_\_\_ [name of officer], the \_\_\_\_\_ [title of officer] of \_\_\_\_\_ [name of ESCO], hereby swear [or affirm under penalty of perjury] that:

(a) Pursuant to the Consolidated Utility Billing Service and Assignment Agreement, dated \_\_\_\_\_, 200\_ (“Agreement”), ESCO has assigned to Consolidated Edison Company of New York, Inc. (“Con Edison” or the “Company”) its rights in all amounts originally billed to its Retail Access Customers, as defined in the Agreement, on consolidated bills issued on and after the date agreed upon by Con Edison and ESCO for the commencement of consolidated utility billing by Con Edison (“Customers’ Accounts”).

(b) No third party has any right, title or interest to or in any Customers’ Accounts that have been assigned by ESCO to Con Edison under the Agreement, except any security interest in ESCO’s customer receivables filed by a creditor of ESCO that the secured creditor has subordinated to Con Edison.

(c) Pursuant to the Agreement, ESCO grants Con Edison a security interest in said Customers’ Accounts and authorizes Con Edison to file, on behalf of ESCO, all financing statements and other documents necessary to perfect said security interest. ESCO shall take no action that is detrimental to the maintenance of Con Edison’s priority security interest with right of first access to such Customers’ Accounts.

(d) I understand that in addition to any and all other remedies Con Edison may have in law and/or equity for breach of the statements herein, Con Edison may terminate the Agreement for misrepresentations in this Affidavit.

\_\_\_\_\_  
Officer's Signature

Date

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_

\_\_\_\_\_  
Notary Public

Appendix C – Affidavit regarding disconnection

AFFIDAVIT REGARDING DISCONNECTION OF NON-RESIDENTIAL CUSTOMERS FOR NON-PAYMENT (to be executed by ESCO Officer)

I, \_\_\_\_\_ [name of officer], the \_\_\_\_\_ [title of officer] of \_\_\_\_\_ [name of ESCO], hereby swear [or affirm under penalty of perjury] that all current non-residential ESCO Customers that will be billed under CUBS have been notified that failure to make full payment of ESCO charges due on any CUBS bill will be grounds for disconnection in accordance with Public Service NYPSC rules on the termination of service to non-residential customers, 16 NYCRR §13.3. In addition, ESCO will notify each new non-residential ESCO Customer that failure to make full payment of ESCO charges when due on any CUBS bill will be grounds for disconnection in accordance with NYPSC rules on the termination of service to non-residential customers, 16 NYCRR §13.3.

\_\_\_\_\_  
Officer's Signature  
Date

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 200\_\_

\_\_\_\_\_  
Notary Public

## Appendix D – Bill Insert Production and Delivery Guidelines

### Bill Insert Production and Delivery Guidelines

In order to support efficient processing of Con Edison bills, paper stock, weight and size, and packing and delivery requirements of bill inserts supplied from outside sources must conform to the following criteria.

#### 1. ESCO Responsibilities:

- 1) ESCO will prearrange an insert schedule with Con Edison to allow enough time to program the bills to pull the required inserts.
- 2) ESCO will deliver inserts to the mail facility provider 15 calendar days prior to the scheduled mailing date of each insert.
- 3) ESCO will ensure that inserts are manufactured in accordance with the specifications in this document.
- 4) ESCO will arrange for the manufacturing and delivery of the inserts.
- 5) ESCO will provide Con Edison with specific direction for the disposition of unused inserts. If no direction is given when the insert is scheduled, unused inserts will be destroyed.

#### 2. Insert Physical Specifications:

##### A. Size Requirements:

	<u>Minimum</u>	<u>Maximum</u>
Height	7.00 in.	8.25in.
Width	3.25 in.	3.75 in.

##### B. Fold Requirements: Bill inserts must conform to the following fold requirements:

- 1) Acceptable insert folds:
  - No fold
  - Half fold — folded insert must conform to size requirements noted above
  - “C” fold — folded insert must conform to size requirements noted above
- 2) Unacceptable insert folds:
  - Accordion folds
  - “Z” folds
- 3) Folds must be even, square, crisp, and uniform.
- 4) Fold must be along the 7” edge

##### C. Paper Stock: Inserts that are single cards are to be a minimum of 80 lb text weight and a maximum of 65 lb cover weight. Folded inserts are to be printed on 50 or 60 lb matt offset paper stock. Glossy finish or gloss coated paper inserts are not acceptable. 50 lb stock may be used only when folded. Recycled paper stock (carrying the recycled symbol on the printed piece) is preferable but not mandatory.

##### D. Miscellaneous Production Notes:

- 1) Inserts must not have cutouts.
- 2) Con Edison must secure prior approval from the mail facility to include insert features that deviate from the insert specifications set forth in this document. The supplier may be required to provide the mail facility with a minimum of 250 test inserts to be used for production testing. Requests for inserts that deviate from the specifications will be handled on an individual case basis, and must be reviewed each time a deviation is requested. Acceptance of a deviation by Con Edison must not be

interpreted as on-going approval of any deviation to the specifications herein established.

3) The following guidelines must be followed regarding pull off labels or stickers on inserts:

- Label or sticker must be on the inside fold and cannot be in the fold.
- If there is one label it must be centered. Note this Packaging Requirement: The packaged stock of inserts with labels must have a firm piece of cardboard on the top and bottom before being paper banded.
- If there are two labels they must be centered to the degree possible, and one label must not overlap the other.

**3. Insert Packaging Specifications:**

A. Banding:

- 1) Paper banding only.
- 2) Single panel inserts—band using minimum of 60 lb paper in minimum 4 inch to maximum 4.5-inch bundles.
- 3) Multi-panel folded inserts:
  - Band using minimum of 70 lb paper in 3 inch bundles
  - Folded edges must face in the same direction
  - Chip board must be placed at the top and bottom of each insert bundle.

B. Bundle Packing in Cartons:

- 1) Bundles must all face the same direction.
- 2) Bundles must be placed flat in cartons.
- 3) Bundles must not be placed on sides or ends.

C. Carton Weight and Size:

- Maximum carton weight is 35 lb.
- Cartons must be the same size for any given insert

D. Carton Markings:

- 1) The exterior of the carton must be clearly marked with:
  - The words “Con Edison of New York, Inc.”
  - The amount of inserts banded per pack
  - The number of packs contained in the carton
  - The number of cartons per shipment (1 of 5, 2 of 5, etc.)
- 2) Sample of the insert must be affixed to the outside of each carton.

E. Pallet Requirements:

- 1) No pallets are to be double stacked.
- 2) Size 48” x 36”
- 3) Maximum pallet height is four (4) feet
- 4) Shrink wrapping of pallets is preferable

**4. Insert Delivery Requirements:**

- A. Delivery Date:
  - The outsourcing provider must deliver inserts a minimum of 15 days in advance of scheduled mailing date.
- B. Receiving Days/Hours:
  - Monday through Friday, 9:00 a.m. to 3:00 p.m.
- C. Truck Size:
  - No larger than 24 feet in length
- D. Delivery Address:
  - 1) Con Edison, 4 Irving Place, New York, NY 10003  
Room Office D  
Attn. Facilities Mail Operations Manager 212-460-4161 or 4162
  - 2) Actual bays are located on 3<sup>rd</sup> Avenue between 14<sup>th</sup> St and 15<sup>th</sup> Streets
- E. Delivery Documentation:
  - Insert vendor delivery bill of lading must include the number of cartons delivered, and must clearly identify the type of stock and paper weight used for inserts (e.g., 60 lb offset matt).

**5. Contingency for Damage:**

- Additional Inserts Requirement: Additional inserts as a contingency for damaged inserts should be included in the delivery based on the following schedule:

<u>Quantity Shipped</u>	<u>% Extra Inserts Required</u>
0-100	25%
101-5,000	15%
5,001-10,000	10%
10,001-50,000	7%
50,001-1,000,000	6%
1,000,001 or more	5%