

ESCO OPERATING AGREEMENT

**ESCO OPERATING AGREEMENT
TABLE OF CONTENTS**

Item

ARTICLE I

- 1.1 Incorporation By Reference
- 1.2 Term.....

ARTICLE II

- 2.1 ESCO Obligations.....
- 2.2 Representations and Warranties
- 2.3 Con Edison Service.....
- 2.4 Resolution of Disputes.....
- 2.5 Suspension
- 2.6 Retail Access Customer Records.....
- 2.7 Billing and Payment
- 2.8 Notices
- 2.9 Customer Accounts.....
- 2.10 Taxes.....

ARTICLE III

- 3.1 Commencement of Service
- 3.2 Creditworthiness
- 3.3 Metering, Billing, and Payment.....
- 3.4 Dispute Resolution.....

ARTICLE IV

- 4.1 Complaint Procedure for Anti-Competitive Claims.....
- 4.2 Liability
- 4.3 Amendments.....
- 4.4 Assignment
- 4.5 Prior Agreements Superseded
- 4.6 Waiver and Modification
- 4.7 Applicable Law and Forum
- 4.8 Severability.....
- 4.9 Agency
- 4.10 Not for the Benefit of Third Parties.....

Appendix No. 1 ESCO INFORMATION FORM

ESCO OPERATING AGREEMENT

This agreement ("Agreement"), entered into by Consolidated Edison Company of New York, Inc., a New York corporation having an office for the transaction of business at 4 Irving Place, New York, New York 10003 ("Con Edison");

_____, a _____ corporation, having an office for the transaction of business at _____ ("Energy Service Company" or "ESCO"); and the Retail Access Customers ("Customers") who purchase electric energy from ESCO pursuant to Con Edison's Power Your Way Program;

WITNESSES

WHEREAS, Con Edison has established a retail access program (the "Power Your Way Program"), as described in its Schedule for Retail Access, P.S.C. No. 2 – Retail Access ("Retail Access Schedule") and its Retail Access Implementation Plan and Operating Procedure (the "Operating Procedure"), both of which are on file with the New York State Public Service Commission ("PSCNY") together with Con Edison's Schedule for Electricity Service, PSC No. 9 - Electricity ("Full Service Schedule");

WHEREAS, the Retail Access Program is subject to the Uniform Business Practices ("UBP") adopted by the PSCNY and incorporated as Addendum UBP in the Retail Access Schedule;

WHEREAS, ESCO is an eligible provider under the Power Your Way Program and desires to supply electric energy and capacity to Customers;

WHEREAS, Con Edison has agreed to render delivery service in conjunction with Customers' participation in the Power Your Way Program in accordance with the terms and conditions of this Agreement and the Retail Access Schedule; and

WHEREAS, each Customer has authorized ESCO, as Customer's agent, to execute this Agreement on Customer's behalf;

NOW, THEREFORE, in consideration of the premises and mutual promises contained herein, Con Edison and ESCO agree to the provisions of Articles I, II, and IV of this Agreement, and Con Edison and Customers agree to the provisions of Articles I, III and IV of this Agreement.

ARTICLE I

1.1 Incorporation By Reference

The rights and obligations of Con Edison, ESCO, and Customers under this

Agreement shall be governed by the provisions of Con Edison's Retail Access Schedule and the Operating Procedure, as the same may be amended, modified, or superseded from time to time. In the event of any conflict, the terms of this Agreement shall govern with respect to services provided hereunder.

1.2 Term.

As between Con Edison and ESCO, this Agreement is effective as of _____, and will remain in effect until terminated in accordance with its terms, the Operating Procedure, or an order of the PSCNY. This Agreement shall be effective between Con Edison and a Customer as of the date on which Customer commences the purchase of electric energy from ESCO and shall remain effective as to each Customer as long as Customer purchases energy from ESCO; provided that Con Edison may terminate delivery services under this Agreement as to particular Customers in accordance with General Rule III (15) of the Full Service Schedule and re-establish them in accordance with General Rules III (19) and III (20) of the Full Service Schedule and may suspend and re-establish delivery services under this Agreement as to certain customers in accordance with the Home Energy Fair Practices Act, N.Y. Public Service Law Article 2, and related orders and regulations of the PSCNY.

ARTICLE II

2.1 ESCO Obligations.

- A. If the Company permits ESCOs to offer Billing Agency, ESCO may act as Customer's agent with respect to customer's account ("Billing Agent") pursuant to a separate Billing Services Agreement with Con Edison. The agency will be effective as to any customer participating in the Power Your Way Program upon notice to Con Edison and Con Edison's written confirmation to customer. ESCO shall obtain verifiable authorization from customer and make such authorization available to Con Edison upon reasonable request. Under any of the conditions and in accordance with the process described in the Operating Procedure, Con Edison may terminate an ESCO's status as Billing Agent.
- B. ESCO shall satisfy all other obligations detailed in Section 2.2 of the Operating Procedure and the UBP.

2.2 Representations and Warranties.

ESCO makes the following representations and warranties to Con Edison:

- A. ESCO is in compliance with all obligations detailed in Section 2.2 of the Operating Procedure and the UBP.
- B. The information in Appendix No. 1 (ESCO Information Form) is correct, and ESCO will promptly inform Con Edison of any changes in such information.
- C. ESCO is in compliance with all of the requirements set forth in the UBP, and will continue to be in compliance with such requirements and subsequently adopted regulatory requirements throughout the term of this Agreement.
- D. No material changes in the data contained in ESCO's initial eligibility application filing with the PSCNY have occurred or will occur, except such changes as have been or will be reported to the PSCNY.
- E. Throughout the term of this Agreement, ESCO will continually adhere to its own policies and procedures as set forth in its disclosure statement filed with the PSCNY from time to time.
- F. ESCO will not, either directly or indirectly, engage in, participate in or encourage or assist others to engage or participate in the practice of transferring customers without customer authorization, commonly referred to as "slamming."

2.3 Con Edison Service.

- A. Under the Retail Access Schedule, Customers served by ESCO designate ESCO as agent for scheduling transmission service on Con Edison's system.
- B. Con Edison will provide usage information for ESCO to the New York Independent System Operator ("NYISO") to enable the NYISO to reconcile energy and installed generating capacity.
- C. Con Edison will provide the following services to ESCO upon request, at the rates set forth in the Retail Access Schedule:
 - Special Meter Readings (for meters controlled by Con Edison)
 - Additional Customer Information (including more frequent access to Interval Information)
 - ESCO Customers' Information
 - Account Separation
 - Suspension and re-connection of delivery service to customers taking service subject to HEFPA

Calculation of bundled service bills in connection with termination of commodity service

- D. Upon request, Con Edison will provide Consolidated Utility Billing Service ("CUBS") under a separate Billing Services Agreement.
- E. Con Edison will provide ESCO acting as the customers' Billing Agent with copies of mandatory bill inserts, including the "Summary of Customer Rights Notice", "Annual Gas Safety Notice", bill messages and emergency utility service telephone numbers for distribution to customers.

2.4 Resolution of Disputes.

If a dispute arises regarding service under Article II of this Agreement (other than with respect to a violation of the standards of conduct established by the Order Authorizing Merger, in Case 98-M-0961 (April 2, 1999)), the dispute should be resolved in accordance with the UBP. Current invoices remain due. Interest will be paid on refunds at the interest rate of 1.5% per month.

2.5 Discontinuance.

Con Edison may discontinue service to ESCO under this Agreement for ESCO's failure to meet the requirements of this Agreement, the Operating Procedure, or any applicable rate schedule, or for any reason given in the UBP. Discontinuance will be in accordance with the UBP.

2.6 Retail Access Customer Records.

ESCO will obtain and retain authorization from each Customer to be served and make the authorization available for audit by a third party for at least a six-year period commencing with the creation or receipt of such record or one year after termination of service, whichever is longer.

2.7 Billing and Payment.

- A. Con Edison will bill ESCO and ESCO will pay all charges billed in accordance with the Retail Access Schedule, including charges for miscellaneous services.
- B. ESCO shall pay the full amount stated in any invoice from Con Edison to ESCO, without deduction, set-off or counterclaim, within twenty (20) days ("grace period") from the date of electronic transmittal or postmark. On the first day following the

grace period, late payment charges at the rate of 1.5% per month will be applicable to all overdue billed amounts, including arrears and unpaid late payment charges. Upon failure of the ESCO to make any payment when due, the Company may apply any security that may be available in accordance with the UBP. Claims that any invoice is not correct must be made no more than ninety (90) days after the date of electronic transmittal or postmark.

2.8 Notices.

Except with respect to information exchanged by Electronic Data Interchange (“EDI”), any notice to be given by ESCO or Con Edison to each other hereunder 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).

To Con Edison: Consolidated Edison Company of New York, Inc.

Retail Choice Operations
4 Irving Place, 9th Floor
New York, New York 10003
Attention: Section Manager

To ESCO:

Attention: _____
Phone No.: _____

2.9 Customer Accounts.

Con Edison will provide ESCO with the applicable billing determinants of ESCO’s Customers and such other information as detailed in the Operating Procedure. Such information will be provided in accordance with the procedures set forth in the Operating Procedure and may not be used by ESCO for unrelated purposes.

2.10 Taxes.

Each party hereto will be liable to the appropriate tax authorities for sales, use, gross receipts or other similar or different taxes imposed upon the revenues derived or services rendered by such party.

ARTICLE III

3.1 Commencement of Service.

Each Customer must qualify as an eligible Retail Access Customer under the Retail Access Plan in order to receive service under this Agreement. Customers shall obtain service under this Agreement by contracting with ESCO for the purchase of energy and by causing ESCO to enroll Customer in the Power Your Way Program in accordance with Section 4 of the Operating Procedure.

3.2 Creditworthiness.

Customers shall not be obligated to provide a security deposit solely in connection with service under this Agreement, but shall comply with the requirements set forth in General Rule III (1) of Con Edison's Full Service Schedule for creditworthiness and security deposits in conjunction with delivery services.

3.3 Metering, Billing, and Payment.

Retail delivery service will be metered at the point of service termination in accordance with General Rule III (8) of the Full Service Schedule and Sections 7.1 and 7.2 of the Operating Procedure. Unless ESCO is acting as Customer's Billing Agent or Con Edison is providing a consolidated bill combining commodity and delivery service charges, Con Edison will render to each Customer a bill that includes charges for distribution and transmission services, pursuant to Section 5 of the Operating Procedure. The provisions of General Rules III(11) and (15) of the Full Service Schedule are also applicable with respect to payment matters such as backbills, estimated bills, plural-meter billing, tampered equipment, inability to gain access, deferred payment agreements, late payment charges, the calculation of service in excess of that served under a program listed in General Rule III(11)(W), and interest on overpayments.

3.4 Dispute Resolution.

Any dispute arising with respect to Article III of this Agreement will be resolved pursuant to the informal complaint procedures of the PSCNY at 16 NYCRR Part 12.

ARTICLE IV

4.1 Complaint Procedure for Anti-Competitive Claims.

ESCO or Customer or any competitor of Con Edison that believes that Con Edison has violated the standards of conduct established in the Agreement and Settlement may file a complaint in writing with Con Edison. The Company will respond to the complaint within

twenty (20) business days after receipt of the complaint. Within fifteen (15) business days after filing of such response, Con Edison and the complaining party will meet in an attempt to resolve the matter informally. If Con Edison and the complaining party are not able to resolve the matter informally, the matter will be referred promptly to the PSCNY for disposition.

4.2 Liability.

Con Edison will endeavor at all times to provide regular and uninterrupted delivery services, but in case such services shall be interrupted or irregular or defective or fail from causes beyond its control or through ordinary negligence of employees, servants, or agents, Con Edison shall not be liable therefor. In accordance with operating policies established by the Company or the New York Independent System Operator, conditions on the electric transmission or distribution system could require remedial actions, including voltage reduction or load shedding, in the interests of preserving system safety and reliability. Such actions shall constitute a circumstance beyond the control of the Company for which the Company shall not be liable.

4.3 Amendments.

Notwithstanding any provision of this Agreement, Con Edison may at any time propose and file with the PSCNY changes to the rates, terms, and conditions of its Retail Access Schedule and/or major changes to the Operating Procedure. Such amendment or modification will become effective with respect to service pursuant to this Agreement on the date specified by the PSCNY.

4.4 Assignment.

- A.** No Customer may assign its rights or obligations under this Agreement.
- B.** Except as provided in the UBP with respect to assignment of customer contracts, ESCO may assign, transfer, or otherwise dispose of this Agreement or any of its rights, duties or obligations hereunder to a party that is an ESCO eligible to provide service under the Power Your Way Program (hereafter referred to as the "assignee") upon prior written notice to Con Edison of the assignment that includes the assignee's acceptance of the rights, duties and obligations hereunder. Upon Con Edison's receipt from the assignee of adequate financial security as required by the Billing Services Agreement and permitted by the UBP, Con Edison will release ESCO from the duties and obligations hereunder. For the purposes of this

Agreement, an assignment, transfer or other disposition will include, but not be limited to, (i) any restructuring of the assets of ESCO, (ii) any acquisition, consolidation, merger or other form of combination of ESCO by, into, or with any person or entity, or (iii) any change in ownership interest of 25 percent or more.

- C. Any assignment, transfer or other disposition of this Agreement, or any rights, duties or obligations hereunder, by ESCO, except as specifically permitted herein, will be null and void.

4.5 Prior Agreements Superseded.

This Agreement constitutes the entire understanding between the parties hereto 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.

4.6 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 hereto 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.

4.7 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 and Customers irrevocably consent 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 and Customer irrevocably waive any objection that they 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.

4.8 Severability.

If one or more provisions herein will 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.

4.9 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 the other parties or to impose any such obligation or liability upon Con Edison.

4.10 Not for the Benefit of Non-Parties.

This Agreement is for the benefit of the parties hereto and not for the benefit of non-parties.

IN WITNESS WHEREOF, Con Edison, ESCO, and the Customers have executed this Agreement.

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

By: _____

Name:

Title:

Date:

[ESCO]

By: _____

Name:

Title:

Date:

APPENDIX NO. 1

ESCO INFORMATION FORM

ESCO INFORMATION

1. Name: _____
DBA Name: _____
Street Address: _____
Town/City: _____
State: _____ Zip Code + 4: _____ Room: _____

2. Mailing Address, if different from above:
DBA Name: _____
Street Address: _____
Town/City: _____
State: _____ Zip Code + 4: _____ Room: _____
Telephone Number: _____ Fax No.: _____

3. ESCO Contact Personnel (Name and Telephone Number)

4. Internet Address _____@_____

5. Provide Names and Titles of Officers or names of all partners on a separate sheet include mailing address and telephone number if different from above.

6. Attach a copy of the determination of eligibility issued by the New York State Department of Public Service.

7. Do you have an established ongoing business relationship with Con Edison, either as a seller, purchaser, or both? If so, provide details on a separate sheet.

8. What is the sales tax status of your business? Check one:
 Taxable Non-taxable Partially tax exempt

If you claim tax exemption, attach a copy of the appropriate exempt certificate to this form.

9. Tax Identification Number (Required): _____

10. Provide two (2) bank references.

11. Billing Agent Address, if different from above:

Name: _____
Street Address: _____
Town/City: _____
State: _____ Zip Code + 4: _____ Room: _____

[ESCO]

By: _____

Name:

Title: