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VIA ELECTRONIC

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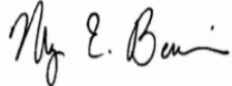
Hon. Michelle L. Phillips, Secretary
New York State Public Service Commission
Three Empire Plaza, 14th Floor
Albany, New York 12223-1350

Re: Case 20-E-0243 – Petition of UtiliSave, L.L.C. for a Declaratory Ruling Regarding ZECR Costs

Dear Secretary Phillips,

Enclosed for filing with the New York Public Service Commission, please find a response on behalf of Retail Energy Supply Association (“RESA”) in opposition to the May 26, 2020 Petition for Declaratory Ruling Pursuant to 16 NYCRR Part 8.1 (“Petition”) filed by UtiliSave, L.L.C. in the above-referenced proceedings.

Respectfully submitted,



Megan E. Baroni

MEB/sj

cc: Service List

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Petition of UtiliSave, LLC. for a	⋮	
Declaratory Ruling Concerning Regarding	⋮	Case 20-E-0243
ZECR Costs	⋮	

RETAIL ENERGY SUPPLY ASSOCIATION
RESPONSE IN OPPOSITION TO
PETITION FOR DECLARATORY RULING

Pursuant to Rule 8.2 of the Commission’s Rules of Procedure,¹ the Retail Energy Supply Association (“RESA”)² hereby files its response in opposition to the May 26, 2020 Petition for Declaratory Ruling Pursuant to 16 NYCRR Part 8.1 (“Petition”) filed by UtiliSave, L.L.C. (“UtiliSave”). For the reasons set forth more fully below, the Public Service Commission (“Commission”) should dismiss or deny the Petition.

I. STANDARD OF REVIEW

Pursuant to Rule 8.1 of the Commission’s Rules of Procedure,

Declaratory rulings may be issued with respect to: (1) the applicability to any person, property, or state of facts of any rule or statute enforceable by the Commission or the validity of any such rule; (2) whether any action by the Commission should be taken pursuant to a rule; and (3) whether a person’s compliance with a Federal requirement will be accepted as compliance with a similar State requirement applicable to that person.³

¹ 16 NYCRR § 8.2.

² The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

³ 16 NYCRR § 8.1(a).

Further, “[a] declaratory ruling may also be issued whenever the Commission determines it is warranted by the public interest.”⁴ However, the Commission’s issuance of declaratory rulings is subject to certain limitations.

First, declaratory rulings are not appropriate if they have no proper application to the petitioner or would be “academic rulings.”⁵ Moreover, declaratory rulings may not be used to create new rules.⁶ Additionally, “[d]eclaratory rulings by the Commission are not orders containing directives.”⁷ In fact, using a petition for a declaratory ruling to seek a directive is “procedurally improper.”⁸ Further, declaratory rulings are not appropriate to address changes in policy that could affect all customers and classes because they do not afford sufficient notice or

⁴ 16 NYCRR § 8.1(b).

⁵ See Case 08-C-0916, *Petition of Broadview Networks, Inc and Eureka Telecom, Inc. for a Declaratory Ruling that Reciprocal Compensation Applies to IntraLATA Traffic Exchanged by Full Service, Facilities-Based Local Exchange Carriers*, Ruling on Discovery (Dec. 17, 2008), at 8 (“I do not believe that the Commission should provide a declaratory ruling that may have no proper application to [the petitioners]. Nor should the Commission render any academic rulings covering a range of alternative scenarios that may or may not apply to the traffic presented here.”); see also Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Order on Petitions for Rehearing and Clarification (Jun. 22, 2005), at 3 n.7 (“we do not issue advisory opinions”); Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Order Denying Petition for Rehearing (Dec. 22, 2005), at 2 (same).

⁶ See Case 03-E-1015, *In re Natural Resources Defense Council*, Order Denying Petition (Sep. 23, 2003), at 2 (“The creation of a new rule is beyond the scope of a declaratory ruling proceeding.”).

⁷ Case 17-M-0244, *Petition of UtiliSave, LLC for a Declaratory Ruling Concerning an Order Directing Consolidated Edison to Adopt and Utilize the Alternative Proposed Methodology of UtiliSave, LLC that is in Compliance with the Applicable Tariffs and the Public Service Law*, Order Denying Requests for Declaratory Ruling, an Alternative Nonresidential Bill Estimation Methodology, and an Evidentiary Hearing (Dec. 14, 2018) (“UtiliSave Order”), at 9.

⁸ *Id.* at 10.

opportunity for stakeholder participation.⁹ In addition, a declaratory ruling is not an appropriate mechanism for “belatedly seeking rehearing” of a prior order.¹⁰

II. THE REQUESTED RULINGS ARE NOT APPLICABLE TO UTILISAVE AND WOULD BE PURELY “ACADEMIC”

UtiliSave does not assert that it has been subjected to a pass-through from an ESCO of Zero Emissions Credit Requirement (“ZECR”) related costs under a change-in-law provision. Nor could it. As it acknowledges in its Petition, UtiliSave “is a utility auditor and rate-consultant, whose regular business includes auditing and consultation with ratepayer clients (‘ratepayers’) on utility bills, rates, and services.”¹¹ UtiliSave is not an energy service company (“ESCO”) customer, nor is it a trade association comprised of ESCO customers. It is simply a “consultant” to ratepayers who may or may not be served by ESCOs.¹² UtiliSave also does not allege that it

⁹ See Case 12-S-0147, *Petition for Declaratory Ruling by Vornado Realty Trust to Revise Consolidated Edison Company of New York, Inc.’s Steam Standby Tariff*, Order Denying Petition for Declaratory Ruling (Sep. 17, 2012) (“These issues are not suited at all to an ad hoc determination made by declaratory ruling such as Vornado would have us make here with such a limited record on the potential impact of the requested rate design change to all other customers and classes.”); Case 95-G-0882, *GCT Venture, Ltd. - Petition for a Declaratory Ruling as to Whether Gas Submetering is Permitted under Current Regulations, or, in the Alternative, for a Waiver of such Regulations*, Declaratory Ruling, Order Denying Petition Without Prejudice and Soliciting Comments (May 16, 1996), at 2 (“Since potentially interested parties should be afforded an opportunity to comment before a significant change in policy, such as easing the prohibition against gas submetering, is adopted, further notice to the public is a prerequisite to granting the waiver GCT requests.”).

¹⁰ See Case 09-E-0294, *Petition of Green Island Power Authority For a Declaratory Ruling And Hearing Concerning Erie Boulevard Hydropower LP*, Order Denying Petition (Oct. 19, 2009), at 7 (denying a request for a declaratory ruling when the petitioner was “belatedly seeking rehearing” of a prior order).

¹¹ Petition, at 1.

¹² *Id.* (“UtiliSave represents approximately 650 ratepayer accounts, all of which UtiliSave *believes* are or were serviced by an Energy Services Company (‘ESCO’)”) (emphasis added).

has been authorized to file this Petition on behalf of any of its clients. Thus, the Petition does not have proper application to UtiliSave and should be dismissed.¹³

Moreover, in its Petition, UtiliSave does not specifically indicate the basis on which it is seeking a declaratory ruling. From the Petition, it is clear that UtiliSave is not requesting a ruling about the validity of a rule, or a person's compliance with a federal requirement. Thus, UtiliSave must necessarily be seeking a declaratory ruling regarding "the applicability to any person, property, or state of facts of any rule or statute enforceable by the Commission"¹⁴ However, despite admitting that "the terms of the sales agreement and disclosure statements must be scrutinized,"¹⁵ UtiliSave did not present a single contract or Customer Disclosure Statement with its Petition.¹⁶ In fact, UtiliSave has not even alleged that any of its clients have actually been subjected to a pass-through from an ESCO of ZECR related costs under a change-in-law provision. Instead, UtiliSave baldly asserts that it "represents approximately 650 ratepayer accounts, all of which UtiliSave *believes* are or were serviced by an Energy Services Company ('ESCO'), and to whom ESCOs have passed-through charges related to the burden placed upon them by the Zero Emissions Credit Requirement ('ZECR'), despite being served under fixed rate contracts."¹⁷ UtiliSave does not assert that:

- any of those accounts are or were actually served by ESCOs;
- any of those accounts are or were served under fixed price contracts;

¹³ See Case 08-C-0916, *Petition of Broadview Networks, Inc and Eureka Telecom, Inc. for a Declaratory Ruling that Reciprocal Compensation Applies to IntraLATA Traffic Exchanged by Full Service, Facilities-Based Local Exchange Carriers*, Ruling on Discovery (Dec. 17, 2008), at 8 ("I do not believe that the Commission should provide a declaratory ruling that may have no proper application to [the petitioners].").

¹⁴ 16 NYCRR § 8.1(a).

¹⁵ Petition, at 7-8.

¹⁶ See, generally, Petition.

¹⁷ Petition, at 1 (emphasis added).

- any of those fixed-price contracts included change-in-law provisions; and/or
- any of the accounts were subjected to increased costs due to such change-in-law provisions.

Instead, UtiliSave asks the Commission to assume those facts based on what UtiliSave “believes.” Thus, any ruling on the Petition would be purely academic and, on this basis, the Petition should be dismissed as procedurally improper.¹⁸

III. UTILISAVE’S REQUESTS ARE NOT PROPERLY ADDRESSED THROUGH A DECLARATORY RULING

UtiliSave does not present any state of facts to which its requested rulings would apply. Instead, it has veiled its requests for new or modified rules, policies and/or directives and for rehearing as requests for declaratory rulings. This is simply improper. Thus, the Commission should deny the Petition.

UtiliSave’s first requested ruling is that

any ratepayer may utilize the [Commission’s] complaint review process set forth in 16 NYCRR Part 12 to challenge the basis upon which additional costs are passed through to them as a result of a change in law or regulation (pursuant to so called “change-in-law” agreement provisions) if such costs appear to violate Uniform Business Practices (“UBP”) requirements.¹⁹

This is not a request for a ruling about the applicability of a rule to any specified person, property, or state of facts. Indeed, UtiliSave does not even request that this ruling be limited to the purported factual basis for its Petition (e.g., the use of a change-in-law provision to pass-

¹⁸ See Case 08-C-0916, *Petition of Broadview Networks, Inc and Eureka Telecom, Inc. for a Declaratory Ruling that Reciprocal Compensation Applies to IntraLATA Traffic Exchanged by Full Service, Facilities-Based Local Exchange Carriers*, Ruling on Discovery (Dec. 17, 2008), at 8 (“Nor should the Commission render any academic rulings covering a range of alternative scenarios that may or may not apply to the traffic presented here.”); see also Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Order on Petitions for Rehearing and Clarification (Jun. 22, 2005), at 3 n.7 (“we do not issue advisory opinions”); Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Order Denying Petition for Rehearing (Dec. 22, 2005), at 2 (same).

¹⁹ See Petition, at 1 (emphasis added).

through ZECR related costs). Instead, UtiliSave effectively seeks a change the definition of the term “utility” in 16 NYCRR Part 12.0 to remove language limiting the applicability of its provisions to entities serving residential customers.²⁰ If granted, UtiliSave’s request would make 16 NYCRR Part 12 applicable to “all ratepayers”²¹ even though the current rule and, as UtiliSave itself admits, “the statute is applicable to ESCOs that sell commodity to *residential customers*”²² Thus, UtiliSave improperly seeks to use the declaratory ruling process to request that the Commission modify an existing rule (i.e., the Commission’s complaint procedures in 16 NYCRR Part 12).²³ Accordingly, the Commission should deny UtiliSave’s first requested ruling.

UtiliSave’s second requested ruling is that “pursuant to the UBP §2(D)(6) the PSC may order an ESCO to refund charges wrongfully passed to ratepayers, inclusive of interest, as a result of UBP violations.”²⁴ Similarly, this is not a request for a ruling about the applicability of a rule to any specified person, property, or state of facts. Once again, UtiliSave does not even request that this ruling be limited to the purported factual basis for its Petition (e.g., the use a change-in-law provision to pass-through of ZECR related costs). Instead, UtiliSave improperly requests that the Commission adopt a broad-based policy. However, a declaratory ruling is not

²⁰ 16 NYCRR § 12.0 (“When used in this §, the term utility includes any such gas corporation, electric corporation, gas and electric corporation, steam corporation, municipality, or any entity that, in any manner, sells or facilitates the sale, furnishing or provision of gas or electric commodity *to residential customers*, including energy services companies”) (emphasis added).

²¹ See Petition, at 4 (arguing that the Commission complaint procedures should be available to “all ratepayers”).

²² *Id.* n.4 (emphasis added).

²³ See Case 03-E-1015, *In re Natural Resources Defense Council*, Order Denying Petition (Sep. 23, 2003), at 2 (“The creation of a new rule is beyond the scope of a declaratory ruling proceeding.”).

²⁴ Petition, at 2.

the proper procedure for requesting such a change.²⁵ Accordingly, the Commission should deny UtiliSave's second requested ruling.

Next, UtiliSave requests a ruling that "ESCOs were not obligated to pass through costs related to their ZECR obligations to their ratepayer customers."²⁶ In support of this position, UtiliSave argues that, by its August 1, 2016 Order Adopting a Clean Energy Standard in Cases 15-E-0302 and 16-E-0270 ("CES Order"), the Commission intended for the burden of ZECR costs to fall on load-serving entities ("LSEs").²⁷ However, this is not a request for a ruling about the applicability of a rule to any specified person, property, or state of facts. It is an improper request for rehearing. The CES Order expressly provides:

the Commission *directs* each LSE that serves end-use customers in New York, beginning April 1, 2017, for the benefit of the electric system, its customers and the environment, *to purchase* the percentage of *ZECs* purchased by NYSERDA in a year that represents the portion of the electric energy load served by the LSE in relation to the total electric energy load served by all such LSEs. *LSEs* will make ZEC purchases by contract with NYSERDA and *will recover costs from ratepayers* through commodity charges on customer bills.²⁸

By the plain language of the CES Order, ESCOs are required to purchase ZECs and to pass through the ZEC charges to their customers. Despite this, UtiliSave asserts that the CES Order required LSEs "to bear the costs of the program."²⁹ By doing so, UtiliSave is essentially

²⁵ See Case 12-S-0147, *Petition for Declaratory Ruling by Vornado Realty Trust to Revise Consolidated Edison Company of New York, Inc.'s Steam Standby Tariff*, Order Denying Petition for Declaratory Ruling (Sep. 17, 2012); Case 95-G-0882, *GCT Venture, Ltd. - Petition for a Declaratory Ruling as to Whether Gas Submetering is Permitted under Current Regulations, or, in the Alternative, for a Waiver of such Regulations*, Declaratory Ruling, Order Denying Petition Without Prejudice and Soliciting Comments (May 16, 1996).

²⁶ Petition, at 2.

²⁷ See *id.* at 6.

²⁸ CES Order, at 149-50 (emphasis added).

²⁹ Petition, at 6.

requesting (a) rehearing of the CES nearly four (4) years after the deadline for doing so;³⁰ and/or (b) a broad-based policy change. However, a declaratory ruling is not an appropriate mechanism for doing either.³¹ Accordingly, the Commission should deny UtiliSave's third requested ruling.

UtiliSave's last requested ruling is that "where ESCOs chose to pass through the costs of ZECR obligations to their ratepayer customers, such pass-through charges are void unless they complied with existing UBP provisions, including any disclosure requirements then in effect."³²

In support of this position, UtiliSave asserts

if an ESCO failed to disclose, in at least a general way, to a customer in the Disclosure Statement that they could face additional fees or charges if there was a change-in-law or regulation, whether that warning appeared later in the sales agreement or not, that ESCO was not permitted to pass through those costs on fixed rate contracts.³³

UtiliSave once again has failed to seek application of a ruling to a particular set of facts. Instead, UtiliSave is improperly seeking to change the requirements of the UBP through the declaratory ruling process.

The UBP expressly provides what must be included in the Customer Disclosure Statement.³⁴ Despite UtiliSave's bald assertions to the contrary, the UBP does not explicitly require the Disclosure Statement to include "the existence of any other fee or charge." The

³⁰ See 16 NYCRR § 3.7(a) ("Any person interested in an order of the commission may request rehearing within 30 days of service of the order.").

³¹ See Case 09-E-0294, *Petition of Green Island Power Authority For a Declaratory Ruling And Hearing Concerning Erie Boulevard Hydropower LP*, Order Denying Petition (Oct. 19, 2009), at 7 (denying a request for a declaratory ruling when the petitioner was "belatedly seeking rehearing" of a prior order); Case 12-S-0147, *Petition for Declaratory Ruling by Vornado Realty Trust to Revise Consolidated Edison Company of New York, Inc.'s Steam Standby Tariff*, Order Denying Petition for Declaratory Ruling (Sep. 17, 2012); Case 95-G-0882, *GCT Venture, Ltd. - Petition for a Declaratory Ruling as to Whether Gas Submetering is Permitted under Current Regulations, or, in the Alternative, for a Waiver of such Regulations*, Declaratory Ruling, Order Denying Petition Without Prejudice and Soliciting Comments (May 16, 1996).

³² Petition, at 2.

³³ *Id.* at 7.

³⁴ UBP, § 5(B)(4)(b) and Attachment 4 - Sample Customer Disclosure Statement.

Customer Disclosure Statement was adopted to provide “a customer with the key terms and conditions of his or her agreement with an ESCO”;³⁵ not every term and condition. Moreover, the UBP expressly identifies the “key terms and conditions,” including the specific fees and charges (i.e., termination fee, late payment fee), to be included on the Disclosure Statement.³⁶ Since the UBP does not require the disclosure “of any other fee or charge,” UtiliSave’s requested change would fundamentally alter the purpose of the Disclosure Statement. Thus, what UtiliSave seeks, in effect, is to change the requirements of the UBP through the declaratory ruling process. As a consequence, UtiliSave’s fourth requested ruling amounts to a request for: (a) an extremely belated rehearing of the Commission’s 2008 order adopting the Disclosure Statement;³⁷ (b) a new rule; (c) a broad-based policy; and/or (d) a directive to ESCOs. However, the declaratory ruling process is not the appropriate mechanism for any of these requests.³⁸ Accordingly, the Commission should deny UtiliSave’s fourth requested ruling.

IV. CONCLUSION

For the reasons discussed more fully above, the Petition is procedurally infirm and seeks to improperly use the declaratory ruling process to create a new rule, broad-based policy and/or

³⁵ Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation’s Tariff Filing (Oct. 15, 2008), at 19.

³⁶ UBP, § 5(B)(4)(b) and Attachment 4 - Sample Customer Disclosure Statement.

³⁷ See 16 NYCRR § 3.7(a) (“Any person interested in an order of the commission may request rehearing within 30 days of service of the order.”).

³⁸ See Case 09-E-0294, *Petition of Green Island Power Authority For a Declaratory Ruling And Hearing Concerning Erie Boulevard Hydropower LP*, Order Denying Petition (Oct. 19, 2009), at 7; Case 03-E-1015, *In re Natural Resources Defense Council*, Order Denying Petition (Sep. 23, 2003), at 2; UtiliSave Order, at 9; Case 12-S-0147, *Petition for Declaratory Ruling by Vornado Realty Trust to Revise Consolidated Edison Company of New York, Inc.’s Steam Standby Tariff*, Order Denying Petition for Declaratory Ruling (Sep. 17, 2012); Case 95-G-0882, *GCT Venture, Ltd. - Petition for a Declaratory Ruling as to Whether Gas Submetering is Permitted under Current Regulations, or, in the Alternative, for a Waiver of such Regulations*, Declaratory Ruling, Order Denying Petition Without Prejudice and Soliciting Comments (May 16, 1996).

directive or to achieve a belated rehearing of long-standing Commission orders. Thus, it should be dismissed or denied.

Respectfully submitted,

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