STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In the Matter of Retail Access Business Rules — Case 98-M-1343

RETAIL ENERGY SUPPLY ASSOCIATION'S
PETITION FOR REHEARING AND REQUEST FOR CLARIFICATION

Pursuant to Section 22 of the New York Public Service Law[1] and Section 3.7 of the New York Public Service Commission's ("Commission") Rules and Regulations,[2] the Retail Energy Supply Association ("RESA")[3] hereby submits this Petition for Rehearing and Request for Clarification of the Commission's Order Adopting Revised Uniform Business Practices.[4] Because the Commission erred in adopting several of the Uniform Business Practices ("UBP") amendments set forth in the Order ("UBP Amendments"),[5] RESA hereby petitions the Commission to grant rehearing to reconsider those UBP Amendments. RESA also requests that, for the reasons discussed more fully below, the Commission clarify the levelized/budget billing requirements and Clean Energy Standard obligations.

BACKGROUND

On March 8, 2017, the Commission Secretary issued a notice requesting comments on proposed changes to the UBP that: (a) recognized the requirements of a new law preventing an ESCO from charging a contract termination or early cancellation fee in the event of a customer's

[1] NY PSL § 22.

[2] 16 NYCRR § 3.7.

[3] 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 more than twenty 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.

[4] Order Adopting Revised Uniform Business Practices (Issued January 19, 2018) ("Order").

[5] Order, Appendix A.

death ("ETF Revisions"); (b) included amendments requested by Green Mountain in a petition filed October 7, 2016 to eliminate the appearance of an ESCO representative's full name on the identification badge ("Identification Revisions"); and (c) purportedly addressed "other related matters and housekeeping items."[6] Interested parties were invited to submit comments on the proposed UBP modifications by May 8, 2017.[7] Eleven parties, including RESA, submitted comments.[8]

On January 19, 2018, the Commission issued the Order.[9] RESA now hereby submits its Petition for Reconsideration and Request for Clarification.

ARGUMENT

The Commission erred in adopting many of the UBP Amendments because those revisions were not properly noticed. The Commission also committed legal and factual errors in adopting UBP Amendments that: (a) subject ESCOs to disciplinary action due to a "failure to comply with Department [of Public Service] requests for any and all information related to an ESCOs marketing and sale of energy and/or value added services and products in New York State";[10] (b) impose certain requirements with respect to small nonresidential customers;[11] (c) mandate that, before an ESCO can assign a customer, its service agreement must authorize such an assignment and that the ESCO must provide notice to the customer prior to the assignment;[12] and (d) require that a third-party verification ("TPV") with a nonresidential customer inquire

[6] Notice Seeking Comments on Revisions to the Uniform Business Practices (Issued March 8, 2017) ("Notice"). On March 22, 2017, Notices of Proposed Rulemaking were published in the State Register.

[7] Notice, at 2.

[8] *See, e.g.*, Comments of the Retail Energy Supply Association in Response to the Commission Notice Seeking Comments on Revisions to the Uniform Business Practices ("RESA Comments").

[9] *See, generally*, Order.

[10] Order, Appendix A, § 2.D.5.

[11] *See, e.g.*, Order, Appendix A, § 5.B.2.

[12] *Id.* at § 5.J.1.

about the customer's low-income status.[13] Thus, for the reasons discussed more fully below, the Commission should grant a rehearing to reconsider these UBP Amendments. In addition, the Commission should clarify the levelized/budget billing requirements[14] and Clean Energy Standard obligations[15] as noted below.

I. THE COMMISSION ERRED BY FAILING TO PROVIDE PROPER NOTICE OF THE PROPOSED AMENDMENTS

The Commission erred in adopting the vast majority of the UBP Amendments because it failed to provide the notice required by the State Administrative Procedures Act ("SAPA"). SAPA requires that a Notice of Proposed Rulemaking ("NOPR"):

> contain the ***complete*** text of the proposed rule [or] if such text exceeds two thousand words, the notice shall contain only a description of the subject, purpose and substance of such rule in less than two thousand words and shall identify the address of the website on which the ***full*** text has been posted.[16]

In this case, neither of those requirements were satisfied.

First, neither the NOPRs nor the Notice contained the "complete text of the proposed rule." While the Notice included more information than the NOPRs, it only included the proposed changes, not the "full text" of the rule.[17] As a consequence, in order for stakeholders to understand the substance of the proposed changes, they were required to engage in a side-by-side reading of the Notice and the UBP.

Second, neither the NOPRs nor the Notice accurately described the "purpose and substance" of the proposed revisions. While the Notice and NOPRs properly described the ETF Revisions and Identification Revisions, they failed to accurately describe the "purpose and

[13] Order, Appendix A, § 5, Attachment 1.A.
[14] Order, Appendix A, § 5.L.2.
[15] *Id.* at § 2.G.1.
[16] SAPA § 202(f)(v) (emphasis added).
[17] *See, generally,* Notice, Attachment 1.

substance" of the other changes; noting only that they addressed "other related matters and housekeeping items."[18] However, as RESA and others observed in their comments in response to the Notice, many of the proposed changes were neither "related matters" nor "housekeeping items."[19] For instance, a requirement that ESCOs be subject to disciplinary action due to a "failure to comply with Department requests for any and all information related to an ESCOs marketing and sale of energy and/or value added services and products in New York State"[20] is not in any way related to early termination fees or marketing representative identification requirements. Moreover, housekeeping rules are procedural, not substantive.[21] However, many of the UBP revisions make substantive changes that "alter the essence" of ESCO obligations. For example, the revisions subject ESCOs to disciplinary action due to a "failure to comply with Department requests for any and all information related to an ESCOs marketing and sale of energy and/or value added services and products in New York State."[22] Prior to the UBP Amendments, ESCOs were not subject to this requirement.[23] Thus, the amendment modifies the substance of ESCO obligations in New York. Consequently, it does not qualify as "housekeeping."[24] Because the Commission erred by failing to provide proper notice under the SAPA, the Commission should grant RESA's request for rehearing and reconsider all of the substantive UBP Amendments except the ETF Revisions and Identification Revisions.

[18] *Id.* at 2.

[19] *See, e.g.*, RESA Comments, at 5-7. Notably, although the Order recognized that RESA identified this issue in its comments (Order, at 4), the Commission did not address the merits of these claims. *See, generally*, Order.

[20] Order, Appendix A, § 2.D.5.

[21] *See Martin v. Adler*, 135 Misc.2d 383, 388 (1987) ("Such variations are mere 'housekeeping rules' . . . they do not themselves alter the essence of those rights . . . ."); *Id.* ("These decisions relate to the 'housekeeping' rules that govern procedure . . . .").

[22] Order, Appendix A, § 2.D.5.

[23] *See* Uniform Business Practices (February 2016).

[24] *See Martin*, 135 Misc.2d at 388.

II. THE COMMISSION ERRED IN AMENDING THE UBP TO SUBJECT ESCOS TO DISCIPLINARY ACTION FOR FAILURE TO RESPOND TO DEPARTMENT REQUESTS FOR CERTAIN INFORMATION

Pursuant to the UBP Amendments, ESCOs are now subject to various consequences, including negative licensure action, for "failure to comply with Department requests for any and all information related to an ESCOs marketing and sale of energy and/or value added services and products in New York State."[25] However, the Commission erred in adopting this provision because it failed to provide proper notice of the proposed change and the requirement is unconstitutionally vague.

As discussed above, the Commission failed to provide adequate notice of the "purpose and substance" of this particular change because it is not any way "related" to the ETF Revisions or the Identification Revisions and it does not constitute a "housekeeping" change.[26] Moreover, this provision is unconstitutionally vague.

A regulation is unconstitutionally vague if it fails to provide sufficient warning of the required conduct[27] and is "written in a manner that encourages arbitrary or discriminatory enforcement."[28] There is no definition of "value added services and products" in the Order or the UBP Amendments.[29] Furthermore, as the Commission is aware, what constitutes "value added services and products" is being considered in the ongoing evidentiary proceeding[30] and is the

[25] Order, Appendix A, § 2.D.5.

[26] *See* Section I *supra*.

[27] *See People v. Prof'l Truck Leasing Sys.*, 190 Misc.2d 806, 808 (1st Dep't 2002).

[28] *See id*; *People v. New York Trap Rock Corp.*, 57 N.Y.2d 371, 378-79 (1982).

[29] *See, generally,* Order.

[30] *See* Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits (Issued December 2, 2016).

subject of significant debate among the parties.[31] As a consequence, ESCOs do not know what information they must make available in order to comply with this requirement and the Commission has "virtually unfettered discretion" in determining whether an ESCO has complied with the requirement. Thus, this provision is unconstitutionally vague.[32] Accordingly, the Commission should grant RESA's request for rehearing and reconsider this requirement.

III. THE COMMISSION ERRED IN IMPOSING CERTAIN REQUIREMENTS WITH RESPECT TO SMALL NONRESIDENTIAL CUSTOMERS

The UBP Amendments provide:

> In addition to the requirements in UBP Section 5.B.1., for any sale to a residential and ***small nonresidential*** customer resulting from: 1) door-to-door solicitation; 2) telephonic marketing; or 3) scheduled appointment, each enrollment is only valid with an independent third party verification.[33]

However, the Commission erred in adopting this provision because it failed to provide proper notice of the proposed change and the requirement is unconstitutionally vague.

First, neither the NOPRs nor the Notice provide adequate notice of the "purpose and substance" of this particular change. The Notice does not include ***any*** reference to "small nonresidential" customers nor does it include any proposed definition for what would constitute a "small nonresidential" customer.[34] There is also no relationship between this requirement and the ETF Revisions or the Identification Revisions. Thus, it is not in any way "related" to those changes. It also does not constitute a "housekeeping" change because it imposes a substantive

[31] *Compare* Prepared Testimony of the Staff Panel (Sep. 15, 2017) ("Staff Panel Testimony"), at 21 (seeking to define value added as guaranteed savings or 100% renewable) *with* Direct Testimony of Frank Lacey on Behalf of the Retail Energy Supply Association (Sep. 15, 2017), at 45 (explaining that value is determined based on individual preferences).

[32] *New York Trap Rock*, 57 N.Y.2d at 378-79; *see also Prof'l Truck Leasing*, 190 Misc.2d at 808.

[33] Order, Appendix A, § 5.B.2 (emphasis added).

[34] *See, generally,* Notice.

obligation on ESCOs.[35] Accordingly, the Commission failed to provide proper notice of this amendment to the UBP.

Moreover, this provision is unconstitutionally vague because the Commission has failed to include a valid definition for the term "small nonresidential customer." The UBP does not include a definition of this term.[36] The Order also does not define the term.[37] Instead, in the Order, the Commission refers to a prior order for the definition.[38] However, the definition in the 2014 Order was subject to Petitions for Rehearing or Clarification,[39] stayed by the Commission[40] and then ultimately withdrawn from the UBP in 2015.[41] Thus, there is no currently operative definition for "small nonresidential customer."[42] In fact, the scope of ESCO obligations to small nonresidential customers is being considered in the ongoing evidentiary proceeding[43] and is the subject of significant debate among the parties.[44] As a consequence, ESCOs do not know what customers are the subject of this requirement and the Commission has "virtually unfettered discretion" in determining whether an ESCO has complied with the requirement. Thus, the

[35] *See Martin*, 135 Misc.2d at 388.

[36] *See, generally*¸ Order, Appendix A.

[37] *See, generally,* Order.

[38] Order, at 9 n. 4 (indicating that small nonresidential is defined in Case 12-M-0476 *et al.*, Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets (Issued February 25, 2014) ("2014 Order")).

[39] Case 12-M-0476 *et.al.*, Petition for Clarification and/or Rehearing of National Energy Marketers Association (Mar. 27, 2014), at 6-8.

[40] Case 12-M-0476 *et. al.*, Order Granting Requests for Rehearing and Issuing a Stay (Issued April 25, 2014), at 6.

[41] Case 12-M-0476, Order Granting and Denying Petitions for Rehearing in Part (Issued February 6, 2015), at 2 n. 3.

[42] Although the Order Resetting Retail Energy Markets and Establishing Further Process (Issued February 23, 2016) included a definition of "small nonresidential customer," that order was subsequently vacated and remitted to the Commission for further proceedings. *See National Energy Marketers Association v. New York Public Service Commission*, Alb. Co. Index No. 868-16, Decision/Order (Jul. 22, 2016).

[43] *See* Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits (Issued December 2, 2016).

[44] *Compare* Staff Panel Testimony, at 76-77 (seeking to include small nonresidential customers within its recommendations regarding future product offerings) *with* Rebuttal Testimony of Guy Sharman on Behalf of Direct Energy Services, LLC, Direct Energy Business, LLC, Direct Energy Business Marketing, LLC and Gateway Energy, LLC (Collectively "Direct Energy") (Oct. 27, 2017), at 14 (establishing that Staff's analysis of the value of ESCO product offerings was improperly applied to nonresidential customers).

requirement is unconstitutionally vague.[45] Accordingly, the Commission should grant RESA's request for rehearing and reconsider this requirement in its entirety or, at a minimum, limit its applicability to residential customers only.

IV. THE COMMISSION ERRED IN REQUIRING BOTH CONTRACTUAL AUTHORIZATION AND PRIOR NOTICE FOR ASSIGNMENTS

Through the Order, the Commission requires that, before an ESCO can assign a customer, its service agreement must authorize such an assignment and the ESCO must provide notice to the customer prior to the assignment that informs the customer of the opportunity to choose another ESCO or return to utility service.[46] However, the Commission erred in adopting this provision because it failed to provide proper notice of the proposed change and the provision is arbitrary and capricious.

First, neither the NOPRs nor the Notice provide adequate notice of the "purpose and substance" of this particular change. The Notice does not include this revision.[47] There is also no relationship between this requirement and the ETF Revisions or the Identification Revisions. Thus, it is not in any way "related" to those changes. It also does not constitute a "housekeeping" change because it imposes a substantive obligation on ESCOs.[48] Accordingly, the Commission failed to provide proper notice of this amendment to the UBP.

Moreover, the provision is arbitrary and capricious. As a general matter, contracts are ***freely*** assignable unless prohibited by contract, statute or public policy.[49] Whether or not a contract prohibits assignment is a matter between the contracting parties. In addition, there is no statute that prohibits the assignment of ESCO contracts. Thus, in order for the Commission to

[45] *New York Trap Rock*, 57 N.Y.2d at 378-79; *see also Prof'l Truck Leasing*, 190 Misc.2d at 808.

[46] *Id.* at § 5.J.1.

[47] *See, generally*, Notice, Attachment 1.

[48] *See Martin*, 135 Misc.2d at 388.

[49] *Samaroo v. Patmos Fifth Real Estate, Inc.*, 102 A.D.3d 944, 945 (2d Dep't 2013); *see also* NY GOL § 13-101(3)(c).

restrict this well settled principle of contract law, it must establish a public policy basis,[50] which it has failed to do. Notably, when it is issued the Notice, the Commission had proposed removing from the UBP the requirement that an ESCO service agreement authorize an assignment.[51] However, without explanation or support, the Commission then fully reversed its position.[52] While the Order contains a reference to the Commission's belief that "this provision will further protect the consumer,"[53] it does not include any basis for that belief nor does it indicate how the change will further protect consumers. Nor does the Commission explain how, despite numerous comments to the contrary,[54] the requirement that the notice inform customers of the ability to choose another ESCO or return to utility service will not interfere with the contractual relationship between ESCOs and their customers.[55] As a consequence, "the amendment was adopted in an arbitrary and capricious manner [because] the explanation given the public about the reason for the change appears inconsistent with the record and is, in any event, inadequate to allow meaningful public comment."[56] Accordingly, the Commission should grant RESA's request for rehearing and reconsider this revision in its entirety or, at a minimum, strike the language "and an opportunity for each customer to choose another ESCO or return to full utility service" from this provision.

[50] *See GE Capital Corp. v. State Div. of Tax Appeals*, 2 N.Y.3d 249 (2004); *Med. Soc'y v. Serio*, 100 N.Y.2d 854 (2003).

[51] Order, at 10.

[52] *Id.* at 10-11.

[53] *Id.* at 11.

[54] *Id.* at 10-11 (outlining comments received about this provision).

[55] Although RESA acknowledges that the requirement that the notice inform customers of the ability to choose another ESCO or return to utility service existed prior to the UBP Amendments, because notice was only required ***if*** the agreement did not authorize an assignment, ESCOs could avoid the issue presented by this language by including an assignment provision in their agreements. With the UBP Amendments, however, ESCOs can no longer do so. *Compare* Uniform Business Practices (February 2016), § 5.J.1 *with* Order, Appendix A, § 5.J.1 (changing "or" to "and").

[56] *Goodwin v. Gleidman*, 119 Misc.2d 538, 554 (1983).

V. THE COMMISSION ERRED IN REQUIRING ESCOS TO INQUIRE ABOUT A NONRESIDENTIAL CUSTOMER'S PARTICIPATION IN LOW-INCOME ASSISTANCE PROGRAMS

The UBP Amendments require a verification to, *inter alia*, enter into "an agreement that resulted from an appointment with a . . . small nonresidential customer . . . .."[57] However, the Commission erred in adopting this provision because it failed to provide proper notice of the proposed change and the requirement is unconstitutionally vague.

First, neither the NOPRs nor the Notice provide adequate notice of the "purpose and substance" of this particular change. The Notice does not include ***any*** reference to "small nonresidential" customers nor does it include any proposed definition for what would constitute a "small nonresidential" customer.[58] There is also no relationship between this requirement and the ETF Revisions or the Identification Revisions. Thus, it is not in any way "related" to those changes. It also does not constitute a "housekeeping" change because it imposes a substantive obligation on ESCOs.[59] Thus, the Commission failed to provide proper notice of this amendment to the UBP. In addition, as discussed more fully above, this provision is unconstitutionally vague because the Commission has failed to include a valid definition for the term "small nonresidential customer."[60] Accordingly, the Commission should grant RESA's request for rehearing and reconsider this requirement in its entirety or, at a minimum, limit its applicability to residential customers only.

If despite the foregoing, the Commission retains the requirement, RESA requests that it clarify that the question about a customer's participation in the utility's low-income assistance program is only applicable to residential customer TPVs. The UBP Amendments require that a

[57] Order, Appendix A, § 5, Attachment 1.A.
[58] *See, generally,* Notice.
[59] *See Martin*, 135 Misc.2d at 388.
[60] *See* Section III *supra*.

verification include the following question: "Do you participate in your utility's low-income assistance program?"[61] However, because this question is inapplicable to nonresidential customers,[62] it could cause unnecessary termination of otherwise valid enrollments. The UBP Amendments provide that "[t]he verification call should be terminated if the customer asks ***any*** questions with respect to the agreement during the process."[63] If a nonresidential customer asks "if I am participating in the utility's low-income assistance program, will that change the terms of the agreement?," the customer has asked a question about the agreement that could cause the verification to be discontinued even though the customer understood the ESCO offer and the verification question itself caused the confusion. To avoid these potential terminations of otherwise valid verifications, if the Commission continues to apply the verification requirements to "an agreement that resulted from an appointment with a . . . small nonresidential customer," RESA requests that the Commission clarify that the verification question about a customer's participation in the utility's low-income assistance program only applies to residential customer TPVs.

VI. THE COMMISSION SHOULD CLARIFY THE LEVELIZED/BUDGET BILLING PAYMENT PLAN REQUIREMENTS

The UBP Amendments include revisions to the levelized and budget billing payment plan requirements.[64] The Order states: "The modifications merely memorializes (sic) the existing requirements in the" the Commission's Home Energy Fair Practices Act ("HEFPA") rules.[65] However, the revisions to the UBP go beyond the HEFPA rules. In particular, the HEFPA rules

[61] Order, Appendix A, § 5, Attachment 1.A.

[62] *See, e.g.*, Consolidated Edison Company of New York, Inc., Schedule for Electricity Service, P.S.C. No. 10-Electricity, Leaf 255, 387-88 (Effective January 1, 2018).

[63] Order, Appendix A, § 5, Attachment 1.A (emphasis added).

[64] Order, Appendix A, § 5.L.2.

[65] Order, at 13. The Order refers to existing requirements in the UBP. However, modifications to the UBP would not be needed if the requirements already existed. RESA believes the Commission meant to refer to its HEFPA's rules.

do not include the following provision: "The ESCO is responsible for determining the budget bill amount and must evaluate each budget billed account on a quarterly basis for conformity with actual billings."[66]

At this time, compliance with this requirement is not possible in utility service territories with Rate Ready billing. There are currently no EDI transaction sets for Rate Ready billing that would support this quarterly requirement. In other words, ESCOs are not provided with the requisite data from the utilities to perform this newly-required quarterly evaluation. Moreover, "[b]y offering budget billing options for utility consolidated bills, the HEFPA budget billing obligations are already being met when utilities are the billing party."[67] Thus, RESA requests that the Commission clarify this requirement by replacing "The ESCO" with "The billing party."

VII. THE COMMISSION SHOULD CLARIFY THE CLEAN ENERGY STANDARD OBLIGATIONS

The UBP Amendments also include a provision regarding compliance with the Clean Energy Standard by all ESCOs.[68] However, as noted in the JU Request: "The obligation to purchase renewable energy credits (RECs) in the Clean Energy Standard applies to Load Serving Entities in the ***electric*** market."[69] Thus, the obligation to purchase RECs should appropriately only apply to entities in the electric market.[70] Accordingly, RESA supports the Joint Utilities request that the Commission clarify that this obligation does not apply to ESCOs serving retail gas customers.[71]

[66] *Compare* 16 NYCRR Art. 11 *with* Order, Appendix A, § 5.L.2.
[67] Joint Utilities' Request for Clarification and Extension of Time (filed February 13, 2018) ("JU Request"), at 3.
[68] Order, Appendix A, § 2.G.1.
[69] JU Request, at 2 (emphasis added).
[70] *Id.*
[71] *Id.*

CONCLUSION

For all the foregoing reasons, the Commission should grant rehearing to reconsider the UBP Amendments as discussed above and clarify the levelized/budget billing requirements and Clean Energy Standard obligations.

Respectfully Submitted,
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