

**STATE OF NEW YORK**

**PUBLIC SERVICE COMMISSION**

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In the Matter of Commission Registration of  
Energy Brokers and Energy Consultants Pursuant  
to Public Service Law Section 66-t

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Case 23-M-0106

**COMMENTS OF  
RETAIL ENERGY SUPPLY ASSOCIATION  
RE PETITIONS FOR REHEARING**

The Retail Energy Supply Association (“RESA”)<sup>1</sup> hereby submits its comments regarding the petitions for rehearing, reconsideration and/or clarification filed by Family Energy, Inc. (“Family”),<sup>2</sup> NRG Energy Inc./NRG Retail Companies (“NRG”),<sup>3</sup> and New York Retail Choice Coalition<sup>4</sup> (“NYRCC”) in connection with the above-captioned matter (collectively, the “Petitions”).

**INTRODUCTION**

On December 23, 2022, Governor Hochul signed a law adding section 66-t to the Public Service Law (“PSL”):

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<sup>1</sup> 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](http://www.resausa.org).

<sup>2</sup> Petition for Rehearing, Reconsideration and/or Clarification and Motion for Stay of Family Energy, Inc. (Jul. 24, 2023) (“Family Petition”).

<sup>3</sup> Request for Rehearing and Stay of the June 23, 2023 Order Adopting Energy Broker and Energy Consultant Registration Requirements by NRG Energy Inc. and NRG Retail Companies (Jul. 24, 2023) (“NRG Petition”).

<sup>4</sup> Petition of the New York Retail Choice Coalition for Rehearing, Reconsideration & Clarification of the Order Adopting Energy Broker and Energy Consultant Registration Requirements and Motion for Stay of Implementation (Jul. 24, 2023) (“NYRCC Petition”).

- requiring energy brokers and energy consultants to register with the Public Service Commission (“Commission”);
- requiring energy brokers and energy consultants to disclose the form and amount of compensation to their customers; and
- prohibiting the offering of rebates by energy brokers and energy consultants.<sup>5</sup>

On March 14, 2023, Department of Public Service staff (“Staff”) filed a proposal to implement the provisions of PSL section 66-t.<sup>6</sup>

After receiving comments regarding the Proposal from stakeholders, including RESA,<sup>7</sup> the Commission issued an Order Adopting Energy Broker and Energy Consultant Registration Requirements.<sup>8</sup> Subsequently, Family, NRG and NYRCC filed the Petitions. RESA now hereby submits its comments on the Petitions.

## COMMENTS

RESA supports the registration of energy brokers and energy consultants. This registration process will provide Staff and the Commission with direct oversight and enforcement authority over those entities. For the reasons set forth more fully below, however, RESA recommends that, consistent with the requests in the Petitions, the Commission: (a) exempt independent contactors that act as ESCO marketing representatives from the registration requirements; (b) not require the disclosure of payments made to ESCO marketing representatives; (c) clarify which entities are subject to the registration requirements; (d) clarify the roles and responsibilities of energy service companies (“ESCOs”), energy brokers and energy consultants; and (e) clarify certain ESCO compliance obligations.

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<sup>5</sup> See Chapter 787 of the Laws of 2022.

<sup>6</sup> Staff Proposal Regarding Registration of Energy Brokers and Energy Consultants (Mar. 14, 2023) (“Proposal”).

<sup>7</sup> Comments of Retail Energy Supply Association (May 22, 2023) (“RESA Comments”).

<sup>8</sup> Order Adopting Energy Broker and Energy Consultant Registration Requirements (Issued Jun. 23, 2023) (“Order”).

## I. THE COMMISSION ERRED IN ITS OVERLY BROAD APPLICATION OF THE REGISTRATION REQUIREMENTS

PSL section 66-t requires the registration of energy brokers and energy consultants<sup>9</sup> (which RESA generally supports). In the Order, the Commission concluded that members of an ESCO's in-house sales team do not need to register<sup>10</sup> but that independent contractors acting as ESCO marketing representatives do need to register.<sup>11</sup> However, the Commission erred in applying the registration requirement to independent contractors acting as ESCO marketing representatives.<sup>12</sup>

ESCO in-house sales teams and ESCO marketing representatives perform identical functions.<sup>13</sup> Hence, requiring the registration of one but not the other is incongruous. Moreover, ESCOs are equally responsible for the actions of both.<sup>14</sup> As a consequence, like employees, independent contractors acting as ESCO marketing representatives “would be covered under the ESCO's Retail Access Eligibility Application.”<sup>15</sup> Thus, the Commission already has the ability to regulate the activities of both employees and independent contractors acting as ESCO marketing representatives.

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<sup>9</sup> PSL § 66-t(3).

<sup>10</sup> Order, at 20.

<sup>11</sup> *Id.* at 23.

<sup>12</sup> *Cf.* Family Petition, at 15; NYRCC Petition, at 4-5.

<sup>13</sup> *Cf.* Uniform Business Practices (Sep. 2020) (“UBP”) § 1 (defining ESCO marketing representative as: “An entity that is either the ESCO or a contractor/vendor conducting, on behalf of the ESCO, any marketing activity that is designed to enroll customers with the ESCO.”).

<sup>14</sup> *See, e.g.,* Case 20-M-0446, *Proceeding on Motion of the Commission to Seek Consequences against Josco Energy Corp for Violations of the Uniform Business Practices*, Order Confirming Revocation Of Eligibility (Issued May 16, 2022), at 14 (“We emphasize today that [an ESCO] bears full responsibility for those entities marketing on its behalf . . .”).

<sup>15</sup> *Cf.* Order, at 20.

In addition, all ESCO marketing representatives are required as part of their interactions with customers to identify the ESCO that they represent.<sup>16</sup> Accordingly, requiring the registration of ESCO marketing representatives (whether they are employees or independent contractors) is not necessary to “increas[e] transparency and accountability in a formerly unregulated marketplace.”<sup>17</sup> Thus, the Commission erred in extending the registration requirement to independent contactors that act as ESCO marketing representatives.<sup>18</sup> Accordingly, it should reconsider this requirement.

## II. THE COMMISSION ERRED IN ITS OVERLY BROAD APPLICATION OF THE COMPENSATION DISCLOSURE REQUIREMENTS

PSL section 66-t provides, in pertinent part: “If an energy service company *collects* broker compensation *on behalf of* an energy broker or energy consultant, such broker compensation shall be added as a provision to the customer disclosure label and shall reflect the amount and method of broker compensation.”<sup>19</sup> Because the Order requires the registration of third-party contractors and vendors acting as ESCO marketing representatives<sup>20</sup> and requires that ESCOs disclose any form of compensation paid to energy brokers or consultants,<sup>21</sup> ESCOs are also required to disclose any payments made to third-party contractors acting as ESCO

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<sup>16</sup> UBP § 10(C)(1)(a); *see also* UBP § 10(C)(1)(d) (“An ESCO marketing representative must provide each prospective residential customer a business card or similar tangible object with the . . . ESCO’s name, address, and phone number . . . .”); UBP § 10(C)(2)(b) (requiring that ESCO marketing representatives contacting customers by telephone “[s]tate the name of the ESCO on whose behalf the call is being made.”).

<sup>17</sup> *Cf.* Order, at 1.

<sup>18</sup> *Cf.* Family Petition, at 15; NYRCC Petition, at 4-5.

<sup>19</sup> PSL § 66-t(4) (emphasis added).

<sup>20</sup> Order, at 23.

<sup>21</sup> *Id.* at 28-29.

marketing representatives. However, the Commission erred in its overly broad application of this requirement to payments made to ESCO marketing representatives.<sup>22</sup>

There are generally two types of third parties operating in the retail energy markets that may receive payments from ESCOs: (a) those whom the customer pays to evaluate and make recommendations regarding the customers' electric generation supply options and negotiate contracts for the provision of that supply,<sup>23</sup> and (b) those whom the ESCOs pay to solicit customers (i.e., ESCO marketing representatives).<sup>24</sup> The compensation structures for these two are very different. When an energy broker or consultant includes its fee in the price per kilowatt hour charged by an ESCO to a customer,<sup>25</sup> the ESCO "collects" that fee "on behalf of" the broker or consultant. However, ESCOs do not "collect[]" the payments made to their marketing representatives "on behalf of" those representatives. Instead, as part of the cost of doing business, ESCOs pay their marketing representatives for engaging in solicitations for the ESCO. Because PSL section 66-t only requires disclosure of compensation that an ESCO "collects . . .

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<sup>22</sup> See NRG Petition, at 8-11.

<sup>23</sup> These entities use different titles to identify themselves, including without limitation, aggregators, brokers, and consultants.

<sup>24</sup> UBP § 1 (defining ESCO marketing representative as: "An entity that is either the ESCO or a contractor/vendor conducting, on behalf of the ESCO, any marketing activity that is designed to enroll customers with the ESCO.").

<sup>25</sup> Energy broker and energy consultant fee structures vary. For instance, some brokers and consultants charge customers a fee that is paid by the customer directly to the broker or consultant. Others collect their fees through a fee that is added to the price charged to the customer by an ESCO. See RESA Comments, at 8. In the latter circumstances, an ESCO "collects" the fee "on behalf of" the broker or consultant.

on behalf of an energy broker or energy consultant,” the Commission erred in requiring the disclosure of payments made to ESCO marketing representatives.<sup>26</sup>

Moreover, requiring the disclosure of payments made to ESCO marketing representatives does not further the goal of such disclosures. “The purpose of compensation disclosure is not only to make customers aware of what they are paying for, such as the brokering or consulting service, but to disclose any third parties that may be influencing the broker or consultant’s decisions, or otherwise influencing the marketplace.”<sup>27</sup> When customers engage traditional energy brokers or energy consultants, there is a direct correlation between the fee paid by the customers and the service that the customers are “paying for.” Conversely, when customers are enrolled with an ESCO through a marketing representative, there is no such correlation; rather, the payments made by ESCOs to those representatives are included among a myriad of other expenses in the ESCO’s cost of doing business. Thus, requiring disclosure of compensation paid to ESCO marketing representatives will not “make customers aware of what they are paying for.”

Disclosure of payments made to ESCO marketing representatives also will not provide customers further information about “any third parties that may be influencing” those representatives. ESCO marketing representatives, by definition, are conducting marketing

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<sup>26</sup> Cf. *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595 (1982) (finding that an agency may not “promulgate a rule out of harmony with or inconsistent with the plain meaning of the statutory language.”) (citations omitted); *BMW Pizza v. Urbach*, 235 A.D.2d 146, 148 (3d Dept 1997) (“[R]egulations which are inconsistent with a statute or which alter statutory language to include situations not embraced within its terms must be struck down”); *Vink v. N.Y. State Div. of Hous. & Cmty. Renewal*, 285 A.D.2d 203, 209 (1st Dept 2001) (“Under standard canons of statutory construction, the plain meaning of the statutory phrasing must be honored by the agency. . . .”).

<sup>27</sup> Order, at 29.

activity “on behalf of ESCOs.”<sup>28</sup> Customers are made aware of this through disclosures that the ESCO marketing representatives are required to make during their interactions with customers.<sup>29</sup> As a consequence, requiring the disclosure of payments made to ESCO marketing representatives will not provide any further transparency to customers. Accordingly, the Commission should reconsider this requirement.

### **III. THE COMMISSION SHOULD CLARIFY WHICH ENTITIES ARE SUBJECT TO THE REGISTRATION REQUIREMENTS**

Although the Order specifically identifies certain individuals/entities that are and are not subject to the registration requirements,<sup>30</sup> it does not provide sufficient guidance to determine if an individual/entity not explicitly identified in the Order must register.<sup>31</sup> Thus, the Commission should clarify which entities are subject to the registration requirements.<sup>32</sup>

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<sup>28</sup> UBP § 1 (defining ESCO marketing representative as: “An entity that is either the ESCO or a contractor/vendor conducting, on behalf of the ESCO, any marketing activity that is designed to enroll customers with the ESCO.”).

<sup>29</sup> UBP § 10(C)(1)(a) (requiring ESCO marketing representatives engaging with customers in person to “[i]ntroduce him or herself with an opening statement that identifies the ESCO which he or she represents as an Energy Services Company, [and] identifies him or herself as a representative of that specific ESCO . . . .”); UBP § 10(C)(1)(d) (“An ESCO marketing representative must provide each prospective residential customer a business card or similar tangible object with the . . . ESCO’s name, address, and phone number . . . .”); UBP § 10(C)(2)(b) (requiring that ESCO marketing representatives contacting customers by telephone “[s]tate the name of the ESCO on whose behalf the call is being made.”).

<sup>30</sup> *See generally*, Order, at 12-26.

<sup>31</sup> NYRCC Petition, at 5-6 (“Apart from the categories of entities explicitly required to register as an energy consultant or broker (such as contractors, vendors, and agents of an ESCO, such as: telemarketers, door-to-door marketers, etc.), or conversely explicitly excluded from the registration requirements (such as attorneys, CCAs and employees of registered ESCOs) the limited guidance provided by the Commission fails to provide a bright line that clearly identifies which entities [a]re required to comply with rules applicable to energy consultants.”).

<sup>32</sup> *Accord id.* at 5-7.

**A. The Commission Should Clarify Who Qualifies As Part Of An “In-House Sales Team”**

As noted above, the Commission declined to require the registration of an ESCO’s “in-house sales team.”<sup>33</sup> However, the Commission did not define that term or recognize the various entities/individuals that could fall within the scope of an “in-house sales team.”<sup>34</sup> For example, similar to the utilities, ESCOs may share services among affiliates and the employees providing those services may be employed by an affiliate (e.g., services company or operating company), and not the individual ESCO. The Commission should clarify that, in these circumstances, employees of an ESCO affiliate (but not of the licensed ESCO itself) are exempt from the registration requirements under the “in-house sales team” exemption.<sup>35</sup>

The Commission should also confirm that entities/individuals performing customer service and sales functions for an ESCO that directly facilitate a sale are exempt under the “in-house sales team” designation, regardless of their employment/compensation structure. For example, an ESCO may use either its direct employees, affiliate employees, or independent contractors (i.e., individuals/entities that receive 1099 forms) of the ESCO or its affiliate to perform customer service functions. Thus, RESA requests that the Commission confirm that the following activities would not trigger the registration requirements:<sup>36</sup>

- An existing customer calls the ESCO’s 800 number for customer service and decides to make a switch to a different ESCO electricity/gas product
- A prospective customer sees an offer on the NY Power to Choose site and calls an ESCO to enroll

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<sup>33</sup> Order, at 20.

<sup>34</sup> *Id.*

<sup>35</sup> *Cf.* NYRCC Petition, at 5-7.

<sup>36</sup> *Cf. id.*



- An ESCO calls its existing customer regarding an upcoming renewal and the customer chooses to execute a new contract
- An ESCO calls its customer to alert them to a cancellation of their account, early termination fee, etc. and the customer chooses to execute a new contract
- A prospective customer sees an offer on the NY Power to Choose site, visits the ESCO’s website, and sends a request to the ESCO to call the consumer regarding current product offers. A person acting on behalf of the ESCO (i.e., the same individuals performing the types of customer service and sales functions outlined above) calls the consumer and the consumer chooses to enroll

**B. The Commission Should Clarify What “Other Services” Would Trigger The Registration Requirement**

An Energy Broker is defined as:

A non-utility entity that performs energy management or procurement functions on behalf of customers or ESCOs, and (1) that assumes the contractual and legal responsibility for the sale of electric supply service, transmission *or other services to end-use retail customers*, but does not take title to any of the electricity sold, and does not make retail energy sales to customers, or (2) that assumes the contractual and legal obligation to provide for the sale of natural gas supply service, transportation *or other services to end-use retail customers*, but does not take title to any of the natural gas sold, and does not make retail energy sales to customers.<sup>37</sup>

The Order further states: “[T]he Commission finds that the term ‘other services’ applies to energy-related, value-added services *bundled with* electric and/or gas commodity supply services provided by ESCOs.”<sup>38</sup> The Order also provides, in pertinent part:

The definition of “energy consultant” applies to actions taken in relation to an “electric or natural gas contract.” The Commission will thus apply this requirement *only to contracts for commodity service*. Consequently, CDG sponsors *would not fit* within the definition of “energy consultant” as CDG sponsors provide bill credits to customers *and do not provide commodity service*.<sup>39</sup>

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<sup>37</sup> Order, Appendix A, Section 1 (emphasis added).

<sup>38</sup> Order, at 15 (emphasis added).

<sup>39</sup> Order, at 20 (emphasis added).

As the Commission is aware, some ESCOs offer warranty products bundled with commodity.<sup>40</sup> Although the ESCOs provide the commodity themselves, a third-party typically performs the warranty service. Like CDG sponsors, the entities/individuals that provide the actual service under energy-related, value-added warranty products do not provide commodity service. Thus, RESA requests that the Commission confirm that entities/individuals that provide the actual service under energy-related, value-added warranty products bundled with commodity sold by ESCOs would not have to register as an energy broker or energy consultant.<sup>41</sup> Similarly, RESA requests that the Commission confirm that ESCOs that would not otherwise need to register as an energy broker or energy consultant also would not need to register as such simply because they are offering value added services provided by a third-party bundled with commodity service provided by the ESCO.<sup>42</sup>

### **C. The Commission Should Clarify The Meaning Of “Directly Facilitating”**

The Order states: “Only those entities that accept consideration *for directly facilitating* an energy contract by advising a customer on whether to accept a contract or advocating for any particular entity as an energy source would be required to register as an energy consultant.”<sup>43</sup> Although the Order indicates that certain individuals/entities are excluded from the registration requirements because they do not directly facilitate energy contracts,<sup>44</sup> it does not define “directly facilitating.” To provide further “regulatory certainty,”<sup>45</sup> RESA requests that the

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<sup>40</sup> See, e.g., Case 15-M-0127, *In the Matter of Eligibility Criteria for Energy Service Companies*, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (Issued Dec. 12, 2019), at 52 (recognizing Agway “EnergyGuard” as an energy-related, value added service).

<sup>41</sup> Cf. NYRCC Petition, at 5-7.

<sup>42</sup> Cf. *id.*

<sup>43</sup> Order, at 24 (emphasis added)

<sup>44</sup> See, e.g., *id.* at 3 (specifically excluding “application to entities like community choice aggregation (CCA) administrators, utility rate consultants, and private attorneys.”).

<sup>45</sup> Cf. *id.* at 16.

Commission clarify that the following entities/individuals would not have to register as an energy broker or energy consultant because they are not “directly facilitating an energy contract”:<sup>46</sup>

- Current, former or potential customers that refer other potential customers to an ESCO
- Entities (such as associations) with relationships with ESCOs where the ESCO is “endorsed by” or the “preferred supplier of” the entity but customers have no obligation to buy from the endorsed/preferred ESCO
- Entities/individuals handling inbound customer service and/or sales calls, and/or outbound calls related to topics such as customer service and inquiries, courtesy notifications, account status updates, and similar activities

#### **IV. THE COMMISSION SHOULD CLARIFY ROLES AND RESPONSIBILITIES**

The Order authorizes revisions to section 5 of the UBP that, among other things, insert the terms “Energy Broker” and “Energy Consultant.”<sup>47</sup> However, when an ESCO and a broker or consultant are both involved in a transaction, the UBP does not clarify who has the responsibility to meet the various requirements. For example, the revisions to the UBP require that ESCOs, energy consultants and energy brokers obtain voice recorded verifications from customers to initiate service and begin enrollment.<sup>48</sup> This provision could be read to require that each of these entities perform a verification. However, such a requirement will only serve to inconvenience and confuse customers who will then be contacted by multiple parties seeking to perform the exact same activity. Thus, RESA requests that the Commission clarify that, if an energy broker or energy consultant has already performed an obligation in connection with a transaction with customers, the ESCO is not also obligated to perform that exact same function. For instance, if

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<sup>46</sup> *Cf.* NYRCC Petition, at 6-7 (noting the use of “directly facilitating” in certain parts of the Order but not others in delineating who falls within the scope of the definition of energy consultant).

<sup>47</sup> *See* Family Petition, at 3; Order, Appendix A, § 5.

<sup>48</sup> *See* Order, Appendix A, § 5.

the energy broker or energy consultant verifies a customer's agreement to initiate service with an ESCO, then the ESCO is not also required to conduct a verification.

## **V. THE COMMISSION SHOULD CLARIFY ESCO COMPLIANCE REQUIREMENTS**

In addition to the requirements specifically applicable to energy brokers and energy consultants, the Order imposes obligations on ESCOs.<sup>49</sup> In order to provide regulatory certainty, RESA supports the various requests for clarification in the Petitions.

### **A. The Commission Should Clarify The Phrase "Time of Enrollment"**

The Order provides, in relevant part: "[F]ollowing the effective date of these new registration requirements, agreements entered into between the customer and the ESCO or DER supplier that are facilitated by an energy broker or consultant that is unregistered at the *time of enrollment* shall be invalid."<sup>50</sup> Because contracts can be executed months prior to customer enrollment, a registered broker/consultant could facilitate a contract between an ESCO and end-use customer and later retire prior to the actual enrollment being processed by the utility. To provide regulatory certainty, RESA requests that the Commission clarify that the intent of this provision is that agreements entered between the customer and the ESCO that are facilitated by an energy broker or consultant that is unregistered at the time of contract execution (not actual customer enrollment) shall be invalid.<sup>51</sup> Otherwise, there could be significant adverse consequences for customers. For example, a customer may enter into a contract with the assistance of a registered energy consultant. However, if the enrollment is not effective until some future date and the consultant is no longer registered on that date, the price that the

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<sup>49</sup> See generally, Order.

<sup>50</sup> *Id.* at 44 (emphasis added).

<sup>51</sup> See Family Petition, at 25-26.

customer was expecting may no longer be available from the ESCO or any other entity. As a consequence, the customer could end up paying significantly more. In addition, at times, customers retain energy consultants/brokers to assist them in multiple states. If the contract is invalidated because the broker/consultant is no longer registered in New York, it will affect customer accounts in multiple states (not just New York).

**B. The Commission Should Clarify That The Order Is Not Applicable To Existing Agreements**

The Order states:

Regarding *any contract* between a customer and an ESCO or DER supplier that was facilitated by an energy broker or consultant and *entered into prior to the effective date* of these energy broker and consultant registration requirements, such contract *shall not be impacted* by an energy broker or consultant's subsequent failure to register or loss of registered status. In such a situation, the ESCO or DER supplier will no longer be able to utilize the services of the energy broker or consultant and *would no longer be able to compensate them for their services*, but the underlying contract between the customer and the ESCO or DER supplier would continue pursuant to the terms of that agreement.<sup>52</sup>

However, the Order also provides:

In any situation where an energy broker or consultant has had its registration denied or revoked or has allowed its registration to lapse, accepting any compensation for brokering or consulting services would be in violation of PSL §66-t(2)(c). This also *applies to any contract* with an unregistered energy broker or consultant that was *entered into before* August 31, 2023.<sup>53</sup>

There is a presumption against the retroactive application of a new law when it impacts substantive rights.<sup>54</sup> A new law affects substantive rights “if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or

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<sup>52</sup> Order, at 44 (emphasis added).

<sup>53</sup> *Id.* at 43.

<sup>54</sup> *Regina Metropolitan Co. v. New York State Div. of Housing and Community Renewal*, 35 N.Y.3d 332, 370 (2020).

impose new duties with respect to transactions already completed.”<sup>55</sup> If PSL section 66-t is applied to pre-existing contracts pursuant to which the energy broker/consultant would be contractually entitled to a fee, it will impair the rights of brokers/consultants to fees that were permitted at the time the contracts were entered. Thus, absent a “clear expression” from the legislature to the contrary, PSL section 66-t cannot be applied to pre-existing agreements.<sup>56</sup>

Although the legislature is not required to use specific words, “the expression of intent must be sufficient to show that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result.”<sup>57</sup> PSL section 66-t does not contain such an expression of intent. Thus, it cannot be applied to pre-existing agreements. Accordingly, RESA requests that the Commission clarify that ESCOs are only prohibited from compensating energy brokers/consultants who fail to register or whose registration is denied for contracts entered into after the effective date of the Order.<sup>58</sup> Otherwise, if a customer and/or ESCO are already contractually obligated to pay a fee to an energy broker/consultant under a pre-existing agreement, the customer and ESCO could both be exposed to breach of contract claims if customers are prevented from paying brokers/consultants their required fee or ESCOs are no longer allowed to remit payments to brokers/consultants.

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<sup>55</sup> *Regina Metropolitan*, 35 N.Y.3d at 365 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278-80 (1994)) (internal quotations omitted).

<sup>56</sup> *See id.* at 370.

<sup>57</sup> *Id.* at 370-71.

<sup>58</sup> Family Petition, at 26.

### C. The Commission Should Clarify ESCO Compensation Disclosure Compliance Requirements

The Order provides: “Energy Service Companies and Distributed Energy Resource Suppliers shall update their customer sales agreements . . . to include required disclosures regarding Energy Broker or Energy Consultant compensation, and shall be required to *demonstrate compliance* with this requirement at the time of each individual company’s annual compliance filing.”<sup>59</sup> However, the Commission has not explained how ESCOs will be required to “demonstrate compliance.” As a consequence, ESCOs do not know what will be expected of them. Thus, RESA requests that the Commission clarify how ESCOs will be required to demonstrate compliance.<sup>60</sup>

The Order also states: “ESCOs and DER Suppliers are required to update the Customer Disclosure Statement in all future agreements with customers to include a field titled ‘Third Party Compensation Disclosure’” and that, to prevent “an influx of contract approvals received contemporaneously with the energy broker and consultant registration filings that may overwhelm Staff resources,” ESCOs and DER suppliers will wait to file updated sample contracts with Staff until their next annual filing.<sup>61</sup> However, this provision exposes ESCOs to potential sanctions after the fact if Staff determines that the disclosure was not sufficient (which is especially problematic because the Commission has not clarified how ESCOs will be expected to “demonstrate compliance” with this requirement). Thus, RESA requests that the Commission clarify that ESCOs that add the compensation disclosure and make a good faith effort to comply with the requirements outlined in the Order will not face disciplinary action if Staff determines

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<sup>59</sup> Order, at 49 (emphasis added).

<sup>60</sup> Cf. Family Petition, at 20-21.

<sup>61</sup> Order, at 42-43.

that the disclosure was deficient in some way for any period between the effective date of the obligation and when Staff reviews the materials.<sup>62</sup>

**D. The Commission Should Ensure That ESCOs Can Easily Determine The Status Of An Energy Broker or Energy Consultant Registration**

The Order states:

While Staff will post a list of registered energy brokers and energy consultants on the Department website, such a list will *not* be available *prior* to Staff completing its review of the initial application received later this year. However, ESCOs and DER Suppliers will be able to view the submitted registration packages in Matter 23-01227 - In the Matter of Registration for Energy Brokers and Energy Consultants.<sup>63</sup>

Given the broad definitions of energy consultant and energy broker, it is possible that hundreds of energy consultants and energy brokers will file registration applications. As a consequence, it will be untenable for ESCOs to monitor the status of each individual application through a docket. However, if ESCOs accept transactions from brokers/consultants who have failed to timely file an application or whose applications are denied, they could be subject to enforcement actions.<sup>64</sup> Thus, RESA requests that the Commission clarify that ESCOs will not be subject to enforcement if they enter into transactions with brokers/consultants whose applications have been denied before Staff posts the list of registered energy brokers and energy consultants.<sup>65</sup> Alternatively, RESA requests that the Commission reconsider its prior

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<sup>62</sup> *Accord* Family Petition, at 20-21.

<sup>63</sup> Order, at 42.

<sup>64</sup> UBP § 2(D)(5)(n) (“An ESCO may be subject to the consequences listed in UBP Section 2.D.6.b for reasons, including, but not limited to . . . failure to comply with any of the Marketing Standards set forth in Section 10 of the UBP.”); Order, Appendix A, Section 11(H)(2)(b)(4) (“As stated in UBP Section 10, ESCOs are prohibited from doing business with unregistered Energy Brokers and Energy Consultants.”); Order, at 33 (“During the Staff review period, any entity that has submitted a registration package shall be treated as in compliance with Commission registration requirements, unless they receive a letter rejecting their application.”).

<sup>65</sup> *Cf.* Family Petition, at 23-25; NRG Petition, at 21.

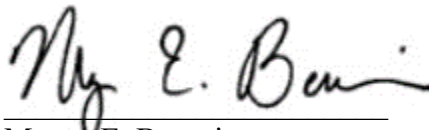


determination and require Staff to post and update an exportable list of energy broker and energy consultant applications that have been approved *as they are approved*.<sup>66</sup>

### CONCLUSION

For all the foregoing reasons, RESA recommends that, consistent with the requests in the Petitions, the Commission: (a) exempt independent contactors that act as ESCO marketing representatives from the registration requirements; (b) not require the disclosure of payments made to ESCO marketing representatives; (c) clarify which entities are subject to the registration requirements; (d) clarify the roles and responsibilities of ESCOs, energy brokers and energy consultants; and (e) clarify certain ESCO compliance obligations.

Respectfully submitted,  
RETAIL ENERGY SUPPLY ASSOCIATION

By: 

Megan E. Baroni  
Robinson & Cole LLP  
1055 Washington Boulevard  
Stamford, CT 06901  
Phone: (203) 462-7528  
Fax: (203) 462-7599  
E-Mail: [mbaroni@rc.com](mailto:mbaroni@rc.com)

*Attorney for Retail Energy Supply Association*

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<sup>66</sup> Cf. Family Petition, at 23-25; NRG Petition, at 21.