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Via Electronic Filing

Hon. Kathleen H. Burgess
Secretary
Records Access Officer
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 112223

Re: Cases 15-M-0127, 12-M-0476, 98-M-1343: Petition for Rehearing, Reconsideration and Clarification of the Impacted ESCO Coalition

Dear Secretary Burgess:

Enclosed please find the Petition for Rehearing, Reconsideration and Clarification the Impacted ESCO Coalition ("Coalition") in the above referenced matters.

Should you have any questions or require any additional information, please contact me at (212) 590-0145 or via email at natarafeller@fellerenergylaw.com.

Respectfully Submitted,

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STATE OF NEW YORK PUBLIC SERVICE COMMISSION

In the Matter of Retail Access Business Rules	)	Case 98-M-1343
Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State	)))	Case 12-M-0476
In the Matter of Eligibility Criteria for Energy Service Companies	)	Case 15-M-0127

Petition of the Impacted ESCO Coalition for Rehearing, Reconsideration and Clarification

March 24, 2016

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In the Matter of Eligibility Criteria for Energy Service Companies	)	Case 15-M-0127

Petition of the Impacted ESCO Coalition for Rehearing, Reconsideration and Clarification

The Impacted Energy Coalition ("Coalition") petitions for rehearing, reconsideration and clarification ("Petition") in accordance with Public Service Law Section 23 and 16A NYCRR Section 3.7, of certain determinations and orders of the *Order Resetting Retail Energy Markets and Establishing Further Process,* issued by the New York Public Service Commission ("PSC" or "Commission") on February 23, 2016.[1]

[1] Case 15-M-0127, et al., *Order Resetting Retail Energy Markets and Establishing Further Process* (Issued February 23, 2016) (*hereinafter* "Resetting Order"), at 1.

I. BACKGROUND

A. Impacted ESCO Coalition

The Coalition, formed in 2015, represents the interests of small-to-medium sized energy service companies ("ESCOs"), many of whom have their primary business in New York. The Coalition seeks to strengthen New York's competitive energy markets, preserve customer choice and ensure an equal playing field for all ESCOs. The Coalition fully supports the Public Service Commission's ("Commission") objective to "address the unfair business practices currently found in the energy services industry and to ensure that residential and small non-residential commercial customers ("mass market customers") are receiving value from the retail energy markets."[2] To that end, the Coalition is eager to partake in efforts that promote transparency of price, contract term, and clear identification of risk. An educated customer enables retail market growth and a demand for innovation. The Coalition supports efforts by the Commission and ESCOs to enhance customer sophistication and awareness.

B. History of Proceeding

The Commission, with its historic Case 94-E-0952, opened the doors to competitive energy supply in the New York energy market.[3] In the almost twenty years since, the energy markets have developed and matured, and retail customers were provided with a choice of selecting their electric and natural gas supplier. Concurrently, in response to customer demand and technology developments, ESCOs built up their product offerings by coupling them with energy-related value-added services. In general, ESCOs have been well received by mass market customers and the competitive market has thrived.

As with any emerging industry, this progression has not been without growing pains. Existing technology has not always kept pace with the retail energy industry, and new sources of energy have

[2] Resetting Order, at 1.
[3] Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service.*

emerged. The Coalition agrees that "the development of market competition within regulated industries is an ongoing process" and that "retail markets have and will be an integral part of the regulatory framework…[which] should foster the innovation and economic investment required to continue to modernize New York's power system design and operation."[4]

II. PROCEDURAL ISSUES FOR REHEARING

A. The Commission Violated SAPA by Failing to Provide Notice of the Issues Presented in the February 23rd Order

The Commission failed to comply with the notice requirements of the New York State Administrative Procedures Act ("SAPA") in issuing the Resetting Order. SAPA "requires submission of notice of the proposed rule-making to the Secretary of State for publication in the state register, followed by a public comment period, a public hearing (where applicable), and the filing and publication of a notice of adoption of the rule."[5] Where an agency fails to follow the procedural requirements of SAPA, the rule does not become effective.[6]

In this case, the Commission issued the Resetting Order without complying with the prior publication notification requirements of SAPA Section 202.[7] The actions of the Commission also conflicted with its prior practice when addressing the initial adoption and subsequent amendments to the UBP. In previous instances, the Commission, prior to adoption of the final version of the UBP's, issued draft proposals for public review and comment.[8] However, in 2014 the Commission took a similar

[4] Case 14-M-0476, *Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets*, (Issued February 25, 2014), at 3.
[5] *Kahrmann v. Crime Victims Bd.*, 14 Misc. 3d 545, 550 (Sup. Ct. 2006); see SAPA §§ 202, 203).
[6] *Kahrmann*, at 550.
[7] See, *In the Matter of Home Care Association of New York State, Inc. v. Michael J. Dowling, as Commissioner of Social Services of the State of New York*, 218 A.D.2d 126 (3rd Dept. 1996).
[8] See, Case 98-M-1343, In the Matter of Retail Access Business Rules, *Order Implementing Chapter 416 of the Laws of 2010*, issued December 17, 2010 at p.3.

approach to the instant case and issued an order with sweeping changes to retail market rules, and subsequently stayed much of its original directives of that order.[9]

By failing to provide prior notice and input, the Commission adopted a course of action which threatens the very survival of numerous small-to-midsized ESCOs, many of which have received very few customer complaints. The Commission purports to base its Order on two Notices of Proposed Rulemaking published on August 12, 2015 (SAPA No. 15-M-0127SP1) (the "August 12 Notices"). However, the record in that proceeding *does not* support the conclusions reached and directives contained within the Resetting Order. Indeed, the requirements under Ordering Paragraphs 1 and 2 were not referenced in the record, underscoring the Commission's failure to comply with the notice obligation under SAPA.

The first of the two August 12 Notices is entitled "Recommendations to Accelerate Switching Between Utility Service and an ESCO," the purpose of which was "[t]o consider recommendations to accelerate switching between utility service and an ESCO" as outlined in a report filed by Department of Public Service Staff on July 24, 2015, in Case 12-M-0476 (the "Switching Report"). The Switching Report does not even discuss or outline in any way the substance of the Order in question; rather, it recommends that "[n]o changes be made at this time to require off-cycle switching" and that interested parties should submit a report by April 1, 2016. Such recommendations do not provide adequate notice of forthcoming price guarantees and an overhaul of the entire market.

The second notice from the August 12, 2015, New York State Register related to ESCOs is entitled "Amendments to the Uniform Business Practices of ESCOs," the purpose of which was "[t]o consider amendments to the Uniform Business Practices of ESCOs" as recommended in a report filed by Department of Public Service Staff on July 28, 2015 ("2015 UBP Report") in Case 15-M-0127. Although the 2015 UBP Report generally discusses issues of consumer protection, which are

[9] Case 12-M-0476 et al., *Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets* (Feb. 25, 2014), Stayed in Part by *Order Granting Requests for Rehearing and Issuing a Stay (April 25, 2014)*.

also addressed in the Resetting Order, it makes no mention of the industry-wide enrollment or renewal restrictions that were ultimately included in the Resetting Order. The 2015 UBP Report only contains recommendations concerning the applications that must be submitted by would-be and existing ESCOs, but does not address the possibility of a rate ceiling or substantial change in the way in which the Coalition and other ESCOs will have to conduct their business.

As stated in the August 12 Notices, the Commission's instruction under Cases 12-M-0476 and 15-M-0127 was only to consider certain recommendations or proposed amendments filed by Commission Staff; neither of the August 12 Notices, nor the underlying 2015 UBP Report or the Switching Report , put ESCOs on notice of the contents of the Resetting Order regarding the enrollment or renewal of "mass market customers" under terms that guarantee savings. Because the Resetting Order was substantially different from the August 12 Notices and exceeds the scope of SAPA § 102(2)(a)(ii), the Commission erred in failing to issue a proposed rule-making for notice and comment in accordance with SAPA prior to imposing any compliance obligations on Petitioners and other ESCOs.

The Commission further violated SAPA by issuing the notice seeking comment on the Resetting Order *after* releasing the Resetting Order. Specifically, on February 23, 2016, the Commission issued a Notice Seeking Comments on the Order (the "February 23 Notice"), requesting ongoing comments and collaboration on the Resetting Order's contents. The February 23 Notice includes requests for comments that directly address ambiguities in the Resetting Order, for example "[w]hether prospective ESCO sales to mass market customers, including renewal of expiring contracts, should be limited to products that guarantee savings."[10] Oddly, the February 23 Notice requested submission of initial comments by March 14, 2016 and reply comments by March 28, 2016, in the meantime the Resetting Order required that ESCO CEOs certify compliance with the Resetting Order by March 4, 2016. That the Commission is still

[10] Case 15-M-0127 et al., *Notice Seeking Comments on Resetting Retail Energy Markets for Mass Market Customers* (Feb. 23, 2016).

seeking comments on the Resetting Order further demonstrates that the Commission failed to follow the proper rule-making process here.

Any "rule" that the Commission purports to have promulgated is thus null and void based on its arbitrary and capricious rulemaking.[11] That is particularly true here, where the improperly noticed rules represent a sweeping set of changes that threaten to destroy hundreds of businesses and affect millions of New York residents.

1. The Commission Unreasonably and Unlawfully Erred by Imposing Limitations on Permissible ESCO Offerings Without Proper Notice

The Commission committed an error of law and violated SAPA because it never submitted notice of the rules that would require ESCOs to guarantee rates for all of their customers or provide 30% renewable energy packages, and never allowed for 45 days of comments on any such rule. The "notice" cited in the ESCO Resetting Order has no relation to the rule the Commission ultimately made in the Order.

a. The requirement that ESCOs offer price guarantees against the utility price was noticed only with respect to low-income customers under Case 12-M-0476, et al., and was never proposed as a requirement for mass market customers

The only possible notice that could have been given to ESCOs regarding price guarantees exists in the Low-Income Collaborative, which references price guarantees solely with respect to guaranteeing savings for low-income customers. The price guarantee creates a rate ceiling whereupon the ESCO cannot at any point charge more than the utility price for electric and natural gas service. In the Resetting Order, the Commission extended this new price guarantee rule to include not just low-income customers, but also to include mass market customers. Commission's decision to institute this guarantee for mass-market

[11] *Med. Soc. of State of N.Y., Inc. v. Levin*, 712 N.Y.S.2d 745, 753 (Sup. Ct. 2000) aff'd sub nom. *Med. Soc'y of State of New York, Inc. v. Levin*, 280 A.D.2d 309 (1st Dep't 2001) ("New Regulations are invalid, null and void and, as a matter of law, their promulgation by respondents was arbitrary, capricious and an abuse of discretion by reason of respondents' failure to substantially comply with the clear mandates of the State Administrative Procedure Act.")

customers after having only noticed this option for low-income customers is a violation of SAPA's requirements. Furthermore, the parties to the Low-Income Collaborative have not yet determined how the program may be implemented.

Similarly, the role of energy-related value-added services was addressed in the Low-Income Collaborative (though it remains undefined), and thus the Resetting Order is not the appropriate proceeding to determine the definition of and value to the customer of energy-related value-added services.

B. The Commission Committed an Error of Law by Indirectly Limiting ESCOs to Offering Products That Fall Under a Rate Ceiling

While electric suppliers are restricted to providing customers with either the price guarantee or the 30% renewable product service option, the price guarantee product offering is the only option for natural gas suppliers. Under the PSL, the Commission has no jurisdiction to rate-make for ESCOs, regardless of the services being provided to customers.

1. The Commission Lacks Jurisdiction to Rate-Make Under the PSL

The Commission lacks jurisdiction to regulate ESCO prices, and the portion of the Order that mandates price guarantees should therefore be considered *ultra vires*. The Commission's ratemaking authority exists pursuant to Article 4 of the Public Service Law ("PSL"), but the Commission has consistently ruled that ESCO's "are exempt from PSL Article 4 regulation." Since 1997, the Commission has held that ESCOs are not "electric corporations" and "gas corporations" under Article 1 of the PSL and thus the Commission's ability to regulate them under the PSL is limited.[12] However, in 2002 the New York legislature narrowly amended the PSL so as to make only Article 2 applicable to ESCOs, in addition to "electric corporations" and "gas corporations" as defined in Article 1.[13] The Commission's authority

[12] Case 94-E-0952, *Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services,* Opinion 97-5, May 19, 1997, at 19).
[13] Chapter 686 of the Laws of 2002, PSL § 53.

under Article 4 remained applicable only to "electric corporations" and "gas corporations." In the years subsequent, the Commission has repeatedly asserted that ESCOs are exempt from Article 4.[14] Therefore, the Commission's current attempt to regulate ESCO pricing is beyond the scope of their authority under the PSL and is therefore void.

III. REQUESTS FOR CLARIFICATION, OR IN THE ALTERNATIVE, REHEARING

The Commission has acknowledged that "[r]equiring ESCOs and Utilities to implement certain actions … with the possibility that their efforts may have to be repeated following subsequent orders, is not in the public interest. Furthermore, repeated changes to the orderly workings of the retail energy market may result in customer confusion and harm."[15] The Commission should continue this practice of serving the public through consistent, uniform action, and refrain from taking action under the Resetting Order until all necessary procedures have been followed.

A. The Issue of Utility Pricing Permeates the Compliance Obligations Established in this Order and Reconsideration is Critical the Order's Proper Implementation

The Commission's issuance of the Resetting Order violated lawful procedure and was arbitrary and capricious in that the Order failed to provide meaningful guidance as to how the requirements set forth therein will be implemented and/or applied, including how rate comparisons will be measured in order for ESCOs to satisfy the guaranteed savings conditions. Resolving the matter of how ESCOs can reasonably be expected to match utility prices, given the lack of transparency on utility pricing components, is essential to the implementation of the Resetting Order. Therefore, rehearing is requested on this issue.

The Resetting Order essentially asks ESCOs to anticipate in advance what utilities will charge and match that price. An already unfeasible task becomes even more difficult when so little is known about

[14] Case 06-M-0647, *Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms,* Nov. 8, 2006.
[15] Case 12-M-0476, et al., *Order Granting Requests for Rehearing and Issuing a Stay* (Issued and Effective April 25, 2014), at 4.

how utilities calculate their prices. It is in the best interest of mass market customers, the retail industry and the public at large for this ambiguity to be resolved *before* ESCOs are required to guarantee savings against the utility price.

One avenue of compliance under the Resetting Order is to guarantee that the customer will not pay a higher price that the utility. This poses many difficulties for the supplier. How can an ESCO guarantee savings when the utility price is not known in advance? Furthermore, utility pricing components are not known. There is no way for the ESCO to risk manage this critical exposure. The Commission has already broached the subject of raising the bar on ESCO personnel experience and in particular – risk management experience. How can the Commission in one hand support risk management yet in the other hand also support an action preventing risk management? This is contradictory, confusing to the market and potentially hazardous to all involved. Nor can they evaluate cost and potential rebates to the customer in advance, and it is more expensive for the ESCO to rebate the customer at the end of their term. Additionally, what happens if a customer drops before the end of the term? How will those rebates be handled? These questions must be answered if ESCOs are to comply with the Resetting Order.

The goal of pricing transparency and empowering customers to make informed decisions regarding their energy supply is ultimately untenable if the utility charges do not reflect current costs and are not themselves transparent and available to the ESCOs. As recently as November 2015, the Commission conceded this point, stating that "such an approach would be impractical, since participating ESCOs would be obliged to provide a … product with a price guarantee in comparison with prices that are unknown and unknowable at the time the … price is established."[16]

Utility commodity rates vary each month and often reflect one-time and out-of-period charges. They also incorporate both monthly and annual adjustments to true-up the recovery of related commodity

[16] Case 12-M-0476, et al., *Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies* (issued November 5, 2015) (hereinafter "Collaborative Report").

costs that were under/over recover in the previous month or calendar year, and from time-to-time will be adjusted to reflect recovery of refunds. Given the inevitable lag of the adjustments, ESCOs will not be able to match the utility price in advance of serving and billing the customer.

The Resetting Order also assumes that local utilities charge market rates. They do not. There is little or no correlation between what the local utility charges and market rates. The monthly utility rate itself is often a mixture of partial energy hedges, hourly index allocations, ancillary and capacity cost pass-throughs all combined into one monthly rate value. There is virtually no clarity or transparency of the local utility's actual cost of the electric and gas commodities they purchase, as the local utility can bury part of their costs in a host of line items that appear on customer bills, including the delivery portion of those bills, for which there is no itemization or explanation. Utility rates are riddled with complex variables and with numerous out-of-period adjustments, which make them nearly impossible to reconstruct and predict going forward.

The practical effect of the Order is to require Petitioners to immediately terminate agreements with customers because Petitioners will not be in a position to guarantee savings relative to the local utility supply rates. Once Petitioners and other ESCOs terminate customers, those customers will forcibly be migrated to local utilities. The Order will thus result in a transfer of tens of thousands of customers from Petitioners and other ESCOs to their competitors – the local utility companies – which these customers had previously elected to abandon. In short, the Resetting Order fails to fulfill its purported purpose of improving competition for the benefit of customers, and instead, undercuts the ability of Petitioners and other ESCOs to compete with the local utilities while depriving customers of the power to choose their energy supplier.

Furthermore, the price guarantee requirement imposes economically unreasonable terms that bear no relationship to the Resetting Order's purpose. For instance, the Resetting Order provides that the

Commission "requires utilities to flow through energy commodity to end-users at cost"[17] but, at the same time, it requires ESCOs to guarantee customers that they will meet or beat the rate charged by the local utility. By requiring ESCOs to sell energy at or less than the local utilities' cost, the Resetting Order requires ESCOs to operate at a loss. That is an absurd rule in any context, but even more so here, after the Commission itself invited and encouraged ESCOs and their shareholders to invest and participate in the New York energy market over the last two decades. Indeed, by the Resetting Order's terms, the Commission purports to "restructure" the New York energy market from one inviting competition via ESCO participation to one without competition, in only ten days.

In short, the Resetting Order fails to fulfill its purported purpose of improving competition for the benefit of customers and, instead, undercuts the ability of Petitioners and other ESCOs to compete with the local utilities. On that basis alone, the Resetting Order should be voided.[18]

B. The Definition of "Small Non-Residential Customer" Permeates the Compliance Obligations Established in the Order and Clarification of this Term is Critical to the Resetting Order's Proper Implementation

An important point of clarification that touches upon all aspects of ESCO compliance is the definition of "small non-residential customer." Without further clarity on to whom the obligations of the Resetting Order must be applied, ESCOs cannot reasonably or reliably certify compliance. It is in the best interest of both industry groups and the public that this ambiguity be resolved before ESCOs are required to take any action on this point. Repeated changes to the orderly workings of the retail energy market may

[17] *Resetting Order*, at 12.

[18] See *Long Island Lighting Co. v. Public Ser. Comm'n of State of N.Y.*, 199 A.D.2d 831, 833 (3d Dep't) (agency determination invalid where it would have subjected party to unreasonable economic conditions); *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364, 374 (N.Y. 1993) (agency decision invalid where the record shows no rational basis in support thereof); *Coates v. Planning Bd. Of Inc. Vill. Of Bayville*, 58 N.Y.2d 800 (1983) (agency determination invalid where "there [wa]s no evidence in the record showing that the [agency action] was necessary" to promote the action's stated purpose and in fact contradicted that purpose); *Castle Props. Co. v. Ackerson*, 163 A.D.2d 785, 786-87 (3d Dep't 1990) (agency action invalid as arbitrary where, beyond speculation, record did not show that means employed furthered action's purpose).

result in customer confusion and the very harm which the Commission sought to prevent in issuing the Resetting Order.

The Draft Guidance Documents issued subsequent to the Resetting Order re-defined "mass-market customers" according to meters and usage. The customer class definitions were provided specifically for the Resetting Order and were an after-the-fact attempt to shed light on the Resetting Order's product restriction requirements. As it stands, the Resetting Order broadens the definition of "mass-market customer" and brings within the Resetting Order's reach customers who would not previously have been considered "mass-market." Given the Commission's goal to protect customers, including sophisticated small business customers, the measures proposed by the PSC in the Resetting Order are ill-suited to that end. Instead, the Resetting Order hurts both customers and ESCOs by limiting the product offerings available to customers. As such, the Commission should reconsider the definition of "mass-market" customer.

C. The Definition of "Energy-Related Value-Added Service" Permeates the Compliance Obligations Established in the Resetting Order, and Clarification of this Term is Critical to the Order's Proper Implementation

Another important point of clarification, which is essential to compliance with the Resetting Order, is the definition of "energy-related value-added service." As the Resetting Order currently stands, many ESCOs will be reliant on these undefined services in order to remain in business, and thus it is an important component of any ESCO's ability to certify compliance. It is in the best interest of both industry groups and the public that this ambiguity be resolved before ESCOs are required to take any action on this point. Repeated changes to the orderly workings of the retail energy market may result in customer confusion and the very harm which the Commission sought to prevent in issuing the Resetting Order.

This is not the first time the Commission has grappled with this issue; in fact, this determination has been left to the Notice Seeking Comment proceeding.[19] By waiting to address this important point

[19] Initial comments are due by Monday, March 14, 2016 and reply comments by March 28, 2016.

after the Resetting Order was set to take effect,[20] the Commission has put the cart before the horse by implementing changes to "commodity only" services without first definitively stating what a "value-added service" would comprise. As recently as November 2015, the Commission sought to address a number of issues relating to low-income residents, including the potential benefits of offering such customers energy-related value-added services. Despite active participation from both consumer affairs groups and ESCOs, the Commission was unable to settle on a set definition of "energy-related value-added services" as it related to low-income customers or customers generally.[21] Without guidance from the Commission on what it will ultimately consider "energy-related value-added services," ESCOs that currently offer such services cannot attest to the compliance with the Resetting Order.

Furthermore, the changes to product offerings required under the Order are premised on a finding that residential and small non-residential customers were generally not being offered energy-related value-added services by ESCOs and/or were not realizing sufficient savings from ESCO offerings.[22] However, the Commission has failed to define what constitutes "energy-related value-added" services.

D. The Effective Date for Marketer Compliance with the Order Should Be Extended, or in the Alternative, a Safe Harbor for Marketer Good Faith Compliance Efforts Should Be Expressly Granted

We respectfully request that the Commission extend the effective date for marketer compliance with the provisions the Resetting Order to commence at least 90 days after Commission's issuance of a final Order on Rehearing in the instant case in order to permit all stakeholders with the requisite time and certainty to implement the new requirements. In the alternative, we suggest that the Commission expressly

[20] Case 12-M-0476, *et al., Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New Work State*; *supra* note 8, at 32-35. Case 12-M-0476, et al., *Report of the Collaborative Regarding Protections for Low Income Customers of Energy Services Companies* (issued November 5, 2015) (hereinafter "Collaborative Report").
[21] *Supra* note 8, at 32-35.
[22] Cases 15-M-0127 *et al.*, *Order Resetting Retail Energy Markets and Establishing Further Process* (Issued and Effective February 23, 2016), at 12.

adopt a safe harbor for marketers' good faith efforts to comply with the new rules. This safe harbor should remain in effect until at least 90 days after an Order on Rehearing is issued in this case.

An extension of the effective date for marketer compliance with the Resetting Order is appropriate in order to allow all of the stakeholders with an adequate amount of time to analyze and implement the myriad new requirements and to do so in a reasoned and efficient fashion. While the stakeholders were on notice that the Commission was considering certain changes to the retail market and ESCO compliance obligations, the final form of what was ultimately adopted and the extent of these far-reaching changes was not known until February 23, 2016. Moreover, requiring marketers to comply with all of the requirements, many of which require additional clarification on issues as broad and time-intensive as a clear delineation of how utility pricing is calculated, is not practically possible without further Commission guidance, notwithstanding ESCOs' good faith efforts and commitment to do so. ESCOs cannot reasonably have been expected to foresee the exact final determinations of this Commission, nor can they be expected to conform their operations to the Resetting Order without clear guidance. In asking for an extension of the effective date, we are asking for an opportunity to adhere to these standards in a reasonable and fully informed manner.

ESCOs and all stakeholders would benefit from the establishment of a compliance date that allows everyone to act on rules that have been finally reviewed and clarified by this Commission, as required by principles of due process. Otherwise, we are concerned that the Resetting Order will have exponentially increased the regulatory costs and risks of doing business in the State, without providing ESCOs with necessary guidance on how to fulfill all of their compliance obligations.

Notwithstanding the above, if the Commission declines to extend the effective date for marketer compliance with the Resetting Order, we alternatively suggest that the Commission expressly adopt a safe harbor for ESCOs' good faith efforts to comply. A safe harbor should be provided for a minimum of 90 days after the Commission adopts a final Order on Rehearing in this case. As noted above, given the

diversity and novelty of the issues covered by the new rules as well as the complexity involved in ensuring that all aspects of ESCO activities and utility activities encompassed by the rules have been implemented, we submit that a safe harbor for marketers' good faith efforts to comply is appropriate. There is a high degree of risk and regulatory uncertainty until the rules are finally settled. The Commission's express adoption of a safe harbor would appropriately mitigate this risk and concomitantly allow marketers to continue to make product offerings to New York consumers in a responsible fashion in the interim. We believe this approach will limit confusion and challenges to the Commission regarding the clear understanding and proper implementation with the critical provisions of the Resetting Order. The safe harbor would not indemnify ESCOs and marketers from compliance with proper conduct, but would enable them to make the best effort to comply.

IV. CONCLUSION

For the reasons set forth above, we respectfully request that the Commission rehear and/or clarify the issues discussed above associated with its Order of February 23, 2016.

Respectfully submitted,

By: /s/ *Natara G. Feller*

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