

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on March 15, 2018

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman, dissenting
James S. Alesi

CASE 12-M-0476 - 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 98-M-1343 - In the Matter of Retail Access Business Rules.

CASE 06-M-0647 - In the Matter of Energy Service Company Price Reporting Requirements.

CASE 98-M-0667 - In the Matter of Electronic Data Interchange.

ORDER DENYING DRIFT MARKETPLACE INC.'S PETITION FOR
REHEARING AND CLARIFICATION

(Issued and Effective March 16, 2018)

BY THE COMMISSION:

INTRODUCTION

In the Order Adopting a Prohibition on Service to Low-Income Customers by Energy Service Companies, issued on December 16, 2016 in these proceedings, the New York State Public Service Commission (Commission) directed a prohibition on energy service company (ESCO) enrollments and renewals of customers who are participants in utility low-income assistance programs, referred to as an Assistance Program Participant

(APP).¹ Further, the December 2016 Order provided that any ESCO that could provide guaranteed savings to APP customers could petition the Commission for a waiver by demonstrating: (a) an ability to calculate what the customer would have paid to the utility; (b) an assurance that the customer will be paying no more than what they would have paid to the utility; and, (c) proper reporting and verification to ensure compliance.

Following the issuance of the December Order, Drift Marketplace Inc. (Drift) filed a Petition for Waiver of the December Order on January 30, 2017, and an amended request for waiver petition was filed on January 31, 2017 (Waiver Petition). The Commission denied Drift's petition on September 15, 2017, based on, among other things, Drift's failure to provide the level of detailed information necessary to definitively establish that Drift could provide and report on its guaranteed savings product proposal to APP customers.² On October 16, 2017, Drift filed a Petition for Rehearing and Clarification of the September Order (Rehearing Petition). For the reasons that follow, and by this Order, the Commission denies Drift's Petition for Rehearing and Clarification of the Order Denying Drift Marketplace Inc.'s Petition for Waiver of the Prohibition on Service to Low-Income Customers by Energy Service Companies.

PETITION FOR REHEARING

Petitioner asserts that the Commission committed both an error of law and an error of fact in the September Order.

¹ Case 12-M-0476, et al., Retail Access, Order Adopting a Prohibition on Service to Low-Income Customers by Energy Service Companies (issued December 16, 2016) (December Prohibition Order).

² Case 12-M-0476 et al., supra, Order Denying Drift Marketplace Inc.'s Petition for Waiver of the Prohibition on Service Low-Income Customers by Energy Service Companies, (issued September 15, 2017) (September Order).

With respect to the alleged error of law, Petitioner avers that the Commission erred in failing to set a uniform standard by which to evaluate whether an ESCO could provide a guaranteed savings product and should be afforded a waiver of the December Prohibition Order. Petitioner claims that the Commission had no basis for denying the Waiver Petition due to the lack of a uniform standard. Finally, Petitioner asserts that it was inappropriate for the Commission to decide the various petitions requesting waivers submitted by different companies individually instead of addressing them together in one order.

Turning to the alleged error of fact, Petitioner avows that the Commission failed to consider data and information provided by Drift in the Waiver Petition and supplemental filings. The September Order, Petitioner continues, improperly denies the Waiver Petition because of a lack of details regarding rate calculations and inclusion as part of its guaranteed savings product both subscription fees and weekly invoicing. Instead, Petitioner claims that sufficient information was provided with respect to the information requested, and that the Commission's additional reasons for denial are unjustified. For the forgoing reasons, Petitioner requests rehearing of the September Order.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on November 15, 2017 [SAPA No. 12-M-0476SP28]. The time for submission of comments pursuant to the SAPA Notice expired on January 16, 2018. No comments were received.

LEGAL AUTHORITY

Rehearing may be sought only on the grounds that the Commission committed an error of law or fact, or that new circumstances warrant a different determination.³ A petition for rehearing must separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing. The Commission has broad legal authority to oversee ESCOs, pursuant to its jurisdiction in Articles 1 and 2 of the Public Service Law (PSL).⁴ In addition, the Commission has authority over the tariffed rules and regulations of electric and gas distribution utilities, and has placed conditions on when the distribution utilities may allow ESCOs to use utility infrastructure to distribute electricity and natural gas to ESCO customers.⁵ Therefore, the Commission has jurisdiction and authority to establish and modify the conditions under which ESCOs may offer electric and gas commodity service to customers, and to impose consequences when ESCOs fail to abide by those conditions.

DISCUSSION AND CONCLUSION

Petitioner alleges errors of law and fact, but as discussed below, no actual error was demonstrated. Additionally, Petitioner does not allege any new circumstances

³ 16 NYCRR §3.7(b).

⁴ See PSL §5 (Commission's broad statutory grant of authority over the sale of natural gas and electricity); PSL §53 (stating Article 2 of the PSL applies to "any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers").

⁵ Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services (issued May 19, 1997) (Opinion 97-5); Opinion and Order Deciding Petitions for Clarification and Rehearing (issued November 18, 1997) (Opinion 97-17).

that warrant rehearing. Drift's petition ultimately fails in light of the precedent governing Commission discretion to implement retail access.

Alleged Error of Law

To the extent Petitioner asserts that the standard applied by the Commission in determining whether or not to grant a waiver of the December Prohibition Order is unknown or is not applied uniformly, that argument fails upon a simple reading of the December Prohibition Order. There, the Commission clearly established the demonstration that must be made by an ESCO seeking a waiver:

ESCOs seeking such a waiver must be able to demonstrate their willingness to develop a program that ensures delivery of the claimed savings. These assurances should include at a minimum the following: (a) an ability to calculate what the customer would have paid to the utility; (b) a willingness and ability to ensure that the customer will be paying no more than what they would have been paid to the utility; and (c) appropriate reporting and ability to verify compliance with these assurances. In the event an ESCO requests such a waiver the Commission will review it and, in addition to the above elements, will consider other conditions it determines are necessary to protect consumers.⁶

Petitioner's assertion that these "broad mechanisms" lack "concrete standards, benchmarks, or other targets"⁷ is misguided. The December Prohibition Order clearly and unambiguously set forth the necessary demonstration an ESCO must make in order to receive a waiver.

Each of the numerous ESCOs operating in New York State have varying business practices, accounting methodologies, and business models, as well as other characteristics that make each company unique. When adopting consumer protections, for

⁶ December Prohibition Order at 25.

⁷ Rehearing Petition at 4.

example, in the retail market, the Commission sets generally applicable standards and requirements with which all ESCOs participating in the market must comply. In this instance, the fact that the Commission did not detail how each ESCO may design a guaranteed savings product or calculate what the customer would have otherwise paid with the utility, does not make the standard for a waiver vague or unachievable. Instead, the Commission established the minimum standards by which an ESCO can demonstrate it can provide a guaranteed saving product, when measured against the default utility, should be applied.

Moreover, to the extent Petitioner attempts to assert that the standard for what constitutes a "guaranteed savings" is without a benchmark or otherwise vague, this argument likewise fails. The concept of a guaranteed savings product is not a new one. The Commission first ordered the ESCOs provide APPs a guaranteed savings product in 2014,⁸ and affirmed this requirement again in 2015.⁹ The Commission has consistently defined a guaranteed savings product as one where the ESCO guarantees the customer will pay no more, on a total bill to total bill basis, than the customer would pay if they received

⁸ Case 12-M-0476, et al., supra, Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets (issued February 25, 2014) (February 2014 Order).

⁹ Case 12-M-0476, et al., supra, Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015) (February 2015 Order).

full utility service.¹⁰ This standard was again articulated in February 2016,¹¹ and most recently in both the December Prohibition Order and the September Order on which Petitioner seeks rehearing. Thus, Petitioners claim that "there is still no definition or standard of 'guaranteed savings' for ESCOs to follow"¹² is misguided and without merit.

Alleged Error of Fact

Petitioner's claim that the Commission committed an error of fact by not considering certain information and data submitted by Petitioner is likewise without merit. First, Petitioner argues that the Commission improperly denied the Waiver Petition based on the billing model used by Petitioner. This argument is inaccurate and fails to account for the list of other reasons that, when considered together with Petitioner's billing model, led to the denial of the Waiver Petition. A billing model whereby the distribution portion of the bill is delivered to the customer monthly, and the commodity portion of the bill is delivered weekly very well may cause confusion even amongst those customers who understand the difference between the two parts of their utility bill. Moreover, as described in the Waiver Petition, this service also requires the customer to have access to the internet as well as a device to connect to

¹⁰ See February 2014 Order at 24; "Specifically, we require that ESCOs serving customers participating in utility low income assistance programs must do so with products that guarantee savings over what the customer would otherwise pay to the utility. To comply with this guarantee, an ESCO must be able to compare actual customer bills to what the customer would have been billed at the utility's rates and, on at least an annual basis, provide any required refund as a credit on the customer's bill."

¹¹ Case 15-M-0127, et al., Eligibility Criteria for Energy Service Companies, Order Resetting Retail Energy Markets and Establishing Further Process (issued February 23, 2016).

¹² Rehearing Petition at 4.

the internet and monitor their account weekly. For these reasons the Commission determined that Petitioner's model would not satisfy the requirements of the December Prohibition Order for an ESCO seeking a waiver. More importantly, and as discussed below, Petitioner failed to provide any of the supporting calculations to validate the savings claims made in the Waiver Petition.

Second, contrary to Petitioners assertion,¹³ it did not provide information demonstrating its "ability to calculate what the customer would have paid to the utility."¹⁴ In its Waiver Petition, Petitioner indicated that its platform utility benchmark pricing uses a proprietary technology that allows for the real-time generation of utility billing from service level tariffs for any chosen time period.¹⁵ Petitioner stated that it will be able to provide customers initial quotes that will compare its rates to the utility rates and to generate utility bills on a daily, weekly or monthly basis.

In Staff's May 12, 2017 letter requesting additional information, Staff specifically asked for spreadsheet analysis with supporting calculations. While Petitioner provided a spreadsheet that reflected prices for its current customers and the alleged guaranteed savings, it did not provide the calculations used to validate those numbers. Stating that Petitioner can accurately calculate a discounted rate, without providing the formulas and calculations used to determine the discounted rate, does not demonstrate that it can comply with the requirements of the December Prohibition Order. Petitioner failed to provide a spreadsheet with supporting analysis showing the formulas and calculations used to prove that its prices

¹³ Rehearing Petition at 6.

¹⁴ December Prohibition Order at 25.

¹⁵ Waiver Petition at 9.

provides a guaranteed savings. Thus, Petitioner's claim that the Commission failed to consider certain information and data submitted by Petitioner is without merit.

The Commission orders:

1. The Petition for Rehearing of Drift Marketplace Inc. is denied, for the reasons discussed in the body of this Order.
2. These proceedings are continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary