STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

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 Retail Access Business Rules	)	**Case 98-M-1343**
In the Matter of Energy Service Company Price Reporting Requirements	)	**Case 06-M-0647**
In the Matter of Electronic Data Interchange	)	**Case 98-M-0667**

PETITION FOR REHEARING AND CLARIFICATION OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)[1] hereby submits this Petition for Rehearing and Clarification of the Commission's, "Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies," issued on July 15, 2016 [hereinafter "July Order"]. Without notice or a meaningful opportunity for stakeholder comment, and based upon erroneous and unsupported conclusions about ESCO service to low income customers, the July Order directed, "a moratorium on ESCO enrollments of new APP customers and on renewals of existing

[1] The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies. This Petition is not intended to serve as a waiver of any rights, arguments, claims or remedies, all of which NEM expressly reserves.

customers, effective 60 days after the effective date of this Order, which shall remain in effect until lifted by the Commission." (July Order at 17-18).

Utilities were directed to place a block on all APP accounts to prevent future ESCO enrollments within sixty days of the effective date of the Order. (Ordering paragraph 1). The Order proscribes a process to effectuate the moratorium as follows: 1) within sixty days of the effective date of the Order, the utilities will communicate to ESCOs the accounts they are no longer eligible to serve; 2) no later than fourteen days following the notice to ESCOs, the utility will send a letter to the ESCO customer regarding its enrollment in the low income program, the existence of the moratorium and that they will be returned to utility service at the end of their agreement with the ESCO; 3) after receiving the utility communication, the ESCO must de-enroll identified accounts at the expiration of the existing agreement. (July Order at 15-16). For variable, month-to-month contracts, the expiration of the contract is at the end of the current billing period. (Id. at 16).

The July Order determined that, "ESCOs will not be provided with customers' APP status." (July Order at 11). Rather, during the course of new customer enrollments, ESCOs can ask a prospective customer if s/he is enrolled in an income assistance program. If the customer indicates s/he is in an income assistance program, marketing should cease. If the customer erroneously indicates that s/he is not, the enrollment will be rejected by the utility. If an APP customer is enrolled with an ESCO after the time the moratorium takes effect, the enrollment is void. The customer will be returned to utility default service when the error is discovered. (Id at 11-12). The moratorium on ESCO service to low income customers does not apply to APPs participating in a Community Choice Aggregation program. (Id. at 18, note 23).

Pursuant to the Commission's regulations at 16 NYCRR 3.7, 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 conclusion." A petition must, "separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing."

The July Order is affected by the following errors of law and/or fact:

1. **The Order and its Requirements Were Not Issued in Conformance with SAPA**

The moratorium on ESCO service to low income customers, subject to a sixty-day implementation timeframe, was not issued in conformance with the processes set forth under New York State law in the State Administrative Procedures Act (SAPA). The Commission did not provide the industry the requisite notice and opportunity to comment on the new regime prior to its adoption. As was recently held in the Decision/Order rendered in the Albany Supreme Court vacating provisions of the Commission's Reset Order, "the PSC must provide an opportunity to be heard in a meaningful manner and at a meaningful time." The procedural due process to which stakeholders are entitled was not afforded here.

The Commission's reliance on the December 16, 2015, SAPA notice for the low income collaborative report is an improper basis upon which to adopt the moratorium. The options presented in the report did not apprise the parties of the possibility of the Commission's adoption of a complete moratorium on ESCO service to low income customers. Also cited as a basis for the Order is Direct Energy's Reply Comment proposal in what the Commission concedes is a different proceeding, which was filed months after the Low Income Collaborative Report and party comments to that report were due. No parties to the Low Income Collaborative were provided notice or an opportunity to respond to the proposal made in the different proceeding. The

Commission did not apprise the stakeholders to the Low Income Collaborative that it was considering a proposal that was filed subsequent to the conclusion of the Collaborative's work. At a minimum, the Commission should have reconvened the Low Income Collaborative to consider the new moratorium proposal after which the Commission should have at least issued a notice of the new moratorium proposal soliciting industry input. The failure to do so denied stakeholders with necessary procedural due process.

2. <u>The Order is in Excess of the Commission's Statutory Authority</u>

The Public Service Law does not grant the Commission authority to institute a moratorium on ESCO service to low income customers. The Commission cites Articles 1 and 2 of the Public Service Law as well as its authority to place conditions on the use of utility infrastructure as the basis for its action. As the Commission is aware, the legislature amended HEFPA in 2002 to include ESCOs. It is longstanding precedent that ESCOs do not have an obligation to serve any customer. However, the extension of HEFPA protections to ESCO service to residential customers evinces a clear legislative intent that ESCOs must be permitted to serve all residential customers, regardless of economic status, subject to the delineated consumer protections set forth in the law.

3. <u>The Order Erroneously Concluded that ESCOs are Unable or Unwilling to Serve Low Income Consumers</u>

The moratorium on ESCO service to low income consumers was based on the Commission's erroneous conclusion that, "ESCOs are unable or unwilling to serve these customers by way of offering a guaranteed savings product, and because energy related value added products designed to reduce the customer bill have not been developed." (July Order at 17). The Commission is wrong on both of these scores.

Over the years, multiple requests have been made for the utilities to fully and properly unbundle the costs of competitive functions from their delivery rates so that those costs may properly be reflected in the utilities' Price to Compare. This includes directives from the Commission itself in Case 00-M-0504 for the utilities to do so. The absence of meaningful utility delivery rate unbundling, so that the utility Price to Compare reflects the full retail costs of providing default service, prevents ESCOs from providing a "guaranteed savings product" in competition with an artificially low utility default rate. The solution to this issue is not the blunt instrument of barring an entire class of consumers from shopping. Rather, instituting greater comparability and transparency in utility rates such that consumers have a more informed and accurate basis to shop is the appropriate outcome.

The Commission also erroneously concludes that there is no evidence of energy-related value-added services that "preserve the value of financial assistance programs" on the record. (July Order at 9). To the contrary, the Report and the Order failed to acknowledge that by definition value-added services provide value to consumers in different ways. Some ESCO offerings are indeed designed to offer quantifiable price savings. However, other ESCOs offerings include a commodity product bundled with home heating equipment and repair and energy efficiency products. ESCO value-added service offerings of these types of products allow low income consumers to have access to this equipment where they otherwise would not. The Report and Order failed to acknowledge the existence of these, and other, value-added services that are currently being offered to consumers.

The Commission also failed to consider the low income aggregation option presented in the report. This is remarkable in view of its decision to approve Community Choice Aggregation (CCA) for customers, which would operate in a similar manner to a low income aggregation program. In

fact, utilizing the work that has already been done, a low income aggregation program could be implemented building upon the CCA model that was previously adopted. This seems particularly appropriate since the July Order allows low income customers to participate in CCAs.

4. <u>The Order Violates the State and Federal Equal Protection Clause</u>

The July Order, that requires the denial of service based on a consumer's economic status, violates Article 1, Section 11 of the New York State Constitution and the Fourteenth Amendment to the U.S. Constitution that restrict the state from denying any person "equal protection of the laws." The moratorium on low income consumer shopping adopted by the Commission is not reasonably related to a legitimate government interest. There are far less draconian measures to ensure the protection of low income consumers than a ban on energy shopping. For example, the Commission is considering changes to the UBP and ESCO eligibility requirements to enhance consumer protections.

The July Order is, in effect, requiring ESCOs to engage in redlining, a practice that has been declared illegal in many forms of commerce. Since ESCOs will not be provided with information about customers' APP status, it is likely that many communities that should have the benefit of energy choice, will not be provided with many competitive offers simply because of the administrative inefficiencies and marketing costs that cannot be recovered in mounting a marketing campaign to an unknown customer base that the ESCO will be unable to ascertain if it is permitted serve.

There is also the situation where a low income consumer will contact an ESCO to enroll in an offering that they have seen on the Commission's Power to Choose website, or an advertisement or referred by another customer or other similar circumstance. When the ESCO receives that call,

they will have no option but to discriminate and deny competitive service to that customer based solely on their income status. The Commission's paternalistic judgment about low income consumers' ability to shop is an unjustified basis upon which to require this distinction in service.

5. The Order Erroneously Concludes that Low Income Consumers Should Not Make Their Own Energy Purchasing Decisions

The July Order erroneously concludes that low income consumers should not be permitted to make their own energy purchasing decisions. This unfounded and paternalistic view of low income consumers' ability to make energy shopping decisions will have real economic consequences. Prohibiting low income consumers from entering into fixed rate contracts with ESCOs when the market is experiencing significantly lower prices forecloses the opportunity to lock in these historically low energy costs to protect against market price (and/or utility price) increases. Low income consumers will lose their ability to budget effectively when they are forced to receive service under the utility variable rate.

6. The Implementation of the Order Will Violate the Very Consumer Privacy Issues it Portends to Protect

The July Order concludes that federal and state law prohibit social service agencies and utilities from sharing information about consumer public assistance status with ESCOs unless prior authorization is obtained. (July Order at 10). As a result, the Commission determined that ESCOs will not be provided with customers' APP status. (Id. at 11). Rather, the July Order adopts a mechanism whereby utilities will place a block on APP accounts from ESCO enrollments. The Order requires the utilities to notify ESCOs in sixty days which accounts they may no longer serve, and, "the ESCO will not be informed that the customer is an APP, but instead will only be informed that a block has been placed on the account." (Id. at 15). Despite the intent expressed in the Order

to protect consumer privacy regarding APP status, the mechanism when put into practice will have the opposite effect. When the utilities send ESCOs the block information about their customers en masse in sixty days, the customers' low income status will be revealed. The Collaborative examined different methodologies by which ESCOs could be provided with customers APP status in a manner that respected consumer privacy. The Order failed to properly consider those alternatives that would have appropriately accomplished the objective.

7. <u>The Order Requirements are an Unlawful Taking of ESCO Property</u>

The July Order is an unconstitutional taking of ESCO property without just compensation under the U.S. Constitution. ESCOs acquired property interests by virtue of operating in New York, making investments, developing brand recognition and goodwill, incurring costs to acquire customers, and entering into contractual relationships with customers for two decades. All of these actions were taken in reliance on Commission policy and precedent in favor of retail market competition and ESCO participation in the retail market. The July Order impairs ESCO property rights without just compensation by forcing ESCOs to terminate their contractual relationships with low income customers that they will effectively be required to return to the competing utility. ESCO investments and resources expended and employed in offering other products, to serve existing and prospective customers, that included low income customers, will be unlawfully taken.

8. <u>The Order Arbitrarily Prohibits ESCOs from Serving APP Customers With No Such Restriction on Service By Other Competitive Entities</u>

The July Order arbitrarily prohibits ESCOs from serving low income consumers but imposes no such restriction of service on Distributed Energy Resource Providers (DERPs). Indeed, there is no basis upon which the Commission could validly make such a distinction. DERPs will still be

able to offer energy products to low income consumers. And, in contrast with ESCOs, DERPs are not subject to any Commission oversight. It is also directly contrary to the Commission's repeated statements in the REV proceeding that ESCOs are pivotal to achieving its goals of increased consumer engagement in the marketplace with an innovative array of energy-related value-added services.

9. The Order Fails to Address the Terms for Lifting the Moratorium

The Commission, "order[ed] a moratorium on APP enrollments and renewals, effective 60 days after the effective date of this Order, which shall remain in effect until lifted by the Commission." (July Order at 10). Despite the intention expressed that the moratorium be temporary in nature, the Order itself provides no detail of the circumstances or timeline under which it will be lifted. NEM recognizes that the resolution of other related proceedings potentially impacts the duration of any moratorium. However, ESCOs should be provided with some guidance and regulatory certainty about the potential duration of the moratorium in order to properly inform their decisions about serving New York state customers.

10. Clarification of Technical Implementation Issues is Necessary Before a Moratorium Could Be Carried Out

If, notwithstanding the foregoing arguments, the moratorium on ESCO service to low income consumers is instituted, there are a number of technical implementation issues that must be resolved before the moratorium could be effected. The technical implementation issues include the following:

a) NEM members are not aware of any existing EDI transaction that will allow the utilities to transmit the switch block information to ESCOs along with the requirement that the customers have to be returned to the utility.

b) The "blind" communication of the block information by the utilities to ESCOs is likely to lead to difficulties. For instance, account numbers may not match. In addition, a customer may mistakenly be included in the block, and ESCOs will have no means to verify the accuracy of the customers included in the block.

c) The Order does not address how current ESCO APP customers (as identified by the utilities in accordance with the Order) that are currently under a fixed term contract and that subsequently do not participate in the APP program while still on a fixed term contract will be permitted to shop, with the block removed from their account.

d) When an enrollment is rejected, the reason for the rejection will not be known by the ESCO. If there was a mistake in the enrollment information that is unrelated to a customer's low income status, the ESCO will not have any means to identify the correctable error and will not be able to remedy the situation.

The Commission's resolution of these technical implementation issues, subject to stakeholder input, is critical to achieving the service moratorium in a manner that protects the interests of all consumers and facilitates meaningful, informed ESCO compliance.

Conclusion

For the reasons set forth above, NEM respectfully requests that the Commission grant rehearing and/or clarification in this proceeding consistent with the recommendations set forth herein.

Sincerely,

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