STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on September 15, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman, dissenting

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 ON REHEARING AND PROVIDING CLARIFICATION

(Issued and Effective September 19, 2016)

BY THE COMMISSION:

INTRODUCTION

In the Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies (July Order) issued on July 15, 2016 in these proceedings, the New York State Public Service Commission (Commission) directed a moratorium on energy service company (ESCO) enrollments and renewals of customers who are participants in utility low-income assistance

programs (Assistance Program Participant, or APP).[1] The July Order took measures to protect APPs and prevent the diminution of financial assistance provided to those customers. Pursuant to Public Service Law (PSL) §22 and 16 NYCRR §3.7, three parties filed petitions in response to the July Order on August 10, 12, and 15, 2016 (collectively, the Petitions).[2]

The Retail Energy Supply Association (RESA) filed a Petition and Request for Clarification. National Fuel Gas Distribution Corporation (NFG) filed a Request for Clarification. The National Energy Marketers Association (NEM) filed a Petition for Rehearing and Clarification. In each Petition, the parties raise concerns with the resolution of certain issues addressed in the July Order, and with respect to implementation of the moratorium. Specifically, the issues raised in the Petitions and addressed in this Order are: (1) compliance with State Administrative Procedure Act (SAPA) requirements; (2) the Commission's statutory authority to direct a moratorium; (3) constitutional challenges under the equal protections clause and takings clause; (4) whether or not ESCOs are able or willing to provide a guaranteed savings product, and whether energy-related value-added services (ERVAS) have been developed that would satisfy the Commission's criteria; (5) customer choice and customer privacy; (6) distributed energy resource (DER) service to APPs; (7) conditions for lifting the moratorium; (8) compliance with the Uniform Business Practices (UBP); and, (9) technical and implementation issues. In this Order, the Commission provides relief, in part, in response to

[1] Case 12-M-0476, et al., Retail Access, Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies (issued July 15, 2016).

[2] These petitions will be treated as timely petitions for rehearing, as they were filed within the 30-day period prescribed in PSL §22 and 16 NYCRR §3.7(a).

the Petition for Rehearing filed by NEM, but otherwise denies the petition, and provides the clarification requested in all three petitions as appropriate.

Joint comments were received from The New York Department of State's Utility Intervention Unit (UIU) and the Office of the New York State Attorney General (NYAG) on August 30, 2016. UIU and NYAG comment that the Petition filed by NEM fails to satisfy the burden necessary to justify rehearing of the July Order and thus urge the Commission to deny the Petition. The comments of UIU and NYAG are further discussed below.

DISCUSSION

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. NEM's petition for rehearing alleges errors of law and fact, but as discussed below, no actual error was demonstrated. NEM's petition ultimately fails in light of the precedent governing Commission discretion to implement retail access to utility systems.

That precedent allows the Commission to effectuate access by unbundling utility rates into commodity and distribution components where the Commission can find that competitive access will reduce rates below those charged by utilities or otherwise provide energy-related benefits to customers. Inasmuch as those findings can no longer be made for APP customers, the Commission did not err in adopting the moratorium on new solicitations of resigning of such customers.

[3] 16 NYCRR §3.7(b).

Contrary to NEM's claims, moreover, the Commission did not commit an error of law in relying on the SAPA notice associated with the Collaborative Report in adopting the moratorium. The test for compliance with SAPA was whether the action was a "logical outgrowth" of the notice and the moratorium was the logical result of the noticed Collaborative Report. In order to avoid needless litigation over SAPA, however, the Commission will readopt the moratorium on an emergency basis and provide that the compliance deadlines commence with the issuance of the notice of emergency adoption.

Also, the Commission provides clarification with respect to the July Order as described herein. Notably, non-APP customers who voluntarily placed blocks on their account to prevent being switched away from their existing ESCO will not be affected by the moratorium. In addition, a variable rate agreement with a set term will only expire at the end of that term and customers served under gift-term agreements entered into prior to issuance of the July Order should be served until the end of the gift term. Further, the Commission provides clarification with respect to implementation issues in the NFG service territory.

State Administrative Procedure Act

NEM argues that the moratorium was issued without providing prior notice and opportunity to comment pursuant to SAPA. It claims that neither the December 16, 2015 notice of proposed rulemaking regarding the Report of the Collaborative Regarding Protections for Low Income Customers of Energy Service Companies (Collaborative Report),[4] nor the Collaborative Report

[4] Case 12-M-0476, supra, Report of the Collaborative Regarding Protections for Low Income Customers of Energy Service Companies (filed November 5, 2015).

itself, apprised the parties that the Commission might issue a moratorium on ESCO service to low-income customers.

In their joint comments, UIU and NYAG state that the July Order was issued in conformance with SAPA requirements. UIU and NYAG comment that that the SAPA Notice provided parties with ample time to submit comments on the findings in the Collaborative Report, including conclusions that the Collaborative could not identify any products that would satisfy the Commission's February 2015 Order. Thus, UIU and NYAG assert that the moratorium is a logical outcome of the SAPA Notice and the preceding Collaborative which NEM should have reasonably been aware of.

The Commission disagrees that it erred as a matter of law in complying with SAPA. Prior Commission action and implementation efforts, as well as the Collaborative discussions, both specifically referenced in the SAPA notice, reasonably apprised the parties of its contents, rendering a moratorium a logical result of the SAPA notice.

Indeed, over two years ago, the Commission clearly expressed its concern "about the use of ratepayer and taxpayer funds intended to assist low-income customers instead paying ESCOs for higher priced commodity without a corresponding value to the customer."[5] The Commission thus directed ESCOs, as a condition of serving APPs, to either guarantee that the customer will pay less than he or she would pay the utility, or to offer ERVAS that would reduce the customer's overall energy bills. Since 2014, efforts to implement this directive have proven fruitless. While participating in the effort to reach a collaborative solution, several ESCOs frankly acknowledged that

[5] Case 12-M-0476, supra, Order Taking Actions To Improve the Residential and Small Non-Residential Retail Access Markets (issued February 25, 2014) pp. 22-23.

they have neither the ability nor the desire to guarantee prices equal to or less than utility commodity prices.[6] Meanwhile, evidence has been accumulating demonstrating that ESCOs are charging mass market customers, including APPs, significantly more money for electricity and gas than they would have paid had they remained customers of the utilities.

It is well understood that the Commission is under a statutory mandate to ensure just and reasonable rates; indeed, this was a key premise underlying the creation of the ESCO marketplace. Therefore, given the established inability or unwillingness of ESCOs to comply with the Commission's directives designed to protect low-income customers, the decision to impose a moratorium to stop the dissipation of ratepayer and taxpayer dollars should have come as no surprise. The moratorium is a logical outgrowth of the Commission's stated objectives and the facts established in this proceeding. The current state of affairs has persisted for too long; there was a need for a remedy and the moratorium was the appropriate solution.

Nevertheless, we reconsider and modify our handling of SAPA in response to NEM's SAPA contention. While we find the SAPA notice sufficient, we are disinclined to take any action that would risk significant delay in the steps the Commission has taken to protect low-income customers. Unfortunately, there are entities that will continue to employ litigation as a means of frustrating the Commission's efforts to reform retail energy markets in the public interest. Therefore, out of an abundance of caution, we hereby re-adopt the moratorium on an emergency basis pursuant to SAPA §202(6). We find that a general welfare

[6] See Case 12-M-0476, supra, Comments of New York State Energy Marketers Coalition at 8-9 (filed January 28, 2016); and Comments of NEM at 6 (filed January 29, 2016); and Comments of Direct Energy at 2-3 (filed January 29, 2016).

emergency exists. The moratorium will be structured exactly as set forth in Ordering Clauses 1 through 7 of the July Order, and as repeated in ordering clauses below. It will become effective upon publication of a Notice of Emergency Adoption and Proposed Rulemaking in the State Register. In accordance with SAPA §202(6)(b), it will initially remain in effect for no longer than 90 days thereafter. Pursuant to the Notice, public comments will be sought on whether to continue the moratorium, terminate it, or continue it with modifications beyond 90 days. This process also addresses NEM's concerns about the terms for lifting the moratorium.[7]

Furthermore, we reject NEM's claim that it was not afforded procedural due process. The ESCOs were afforded ample opportunity to comment on the "new regime" for service to APPs.[8] They are now being afforded yet another opportunity. In a notice and comment proceeding such as this one, the requirements of procedural due process have thereby been satisfied.[9] In any event, our resolution of procedural issues on rehearing obviates NEM's due process claim.[10]

Statutory Authority

NEM argues that the PSL does not grant the Commission the authority to institute a moratorium on ESCO service to low-income customers. UIU and NYAG comment that the Commission has clear statutory authority to take the actions in the July Order, including regulating what products ESCOs may offer APPs. NEM's claims are without merit and do not provide a basis for granting rehearing. The Commission has jurisdiction over the retail

[7] NEM Petition at 9.

[8] Id. at 3.

[9] Matter of Finger Lakes Racing Ass'n, Inc. v. Racing and Wagering Bd., 34 A.D.3d 895, 897-98 (3d Dept. 2006).

[10] Matter of Higgins v. Selsky, 27 A.D.3d 913 (3d Dept. 2006).

energy market to prevent the imposition upon the public of unfair rates.[11] In fact, the Commission created the retail market place through the exercise of its discretionary powers under PSL Articles 1 and 4.[12]

To introduce competition in the marketplace, the Commission, among other things, granted ESCOs access to utility distribution systems if they meet certain requirements, which the Commission has the discretion to amend.[13] The Commission thus has the power to restructure the retail market, including issuing a moratorium on participation in any segment thereof, to achieve its goal of using competition to create just and reasonable rates. Moreover, to the extent rates are not just and reasonable, the Commission is obliged to intervene to prevent overcharges to customers.[14]

NEM ignores the fact that the Commission's implementation of retail access relies on its ability to find

---

[11] Matter of New York State Electric & Gas Corp. v Public Service Commission, 245 AD 131, 134 [3d Dept. 1935]); see also PSL §§5(2) (PSL applies to "any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers"); and 4(1)(providing that the Commission shall exercise "all powers necessary or proper to enable it to carry out the purposes" of the PSL).

[12] Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion 97-5 (issued May 19, 1997), pp. 27-45; Case 94-E-0952, supra, Opinion No. 97-17 (issued November 18, 1997), pp. 30-34.

[13] Case 94-E-0952, supra, Opinion No. 97-5, pp. 30-33.

[14] See PSL §4(1); Multiple Intervenors v Public Service Commission, 166 A.D.2d 140, 144 (3d Dept. 1991); see also National Energy Marketers Assn. v New York State Pub. Serv. Commn., 2016 N.Y. Misc. LEXIS 2739, 14-15 (N.Y. Sup. Ct. July 22, 2016)(finding that "it is counterintuitive to claim that the PSC lacks jurisdiction over the retail energy market," and observing that "[t]o say that once it was established by the PSC, . . . that the PSC cannot [limit ESCOs' participation in the retail market] surely defies logic.").

that market forces have brought just and reasonable rates to consumers, including APPs, because of the existence of a workably competitive retail market.[15] If the Commission determines that customers are being charged prices higher than utility rates and/or other factors suggest that the market is no longer workably competitive, it must intervene, and may, among other things, end or limit retail access, control ESCO solicitations by capping ESCO prices or determining which value added services give rise to just and reasonable rates, or decide how to otherwise address flaws in a retail market that is not workably competitive.[16]

Contrary to NEM's claim, the Legislature's amendment of PSL Article 2 (the Home Energy Fair Practices Act [HEFPA]), to apply the same consumer rights and protections to residential electric and natural gas customers of ESCOs as those afforded to utility consumers, did not curtail the Commission's jurisdiction over the retail market. The Article 2 amendments did not alter the need for the Commission to find that prices arising from retail access are just and reasonable in order to allow such access to continue, nor constrain the Commission's ability to impose limitations on access to utility systems, including controls on ESCO pricing. Nor did the amendments to Article 2 change the Commission's broad powers under PSL Articles 1 and 4.

---

[15] Energy Ass'n v. PSC, 169 Misc. 2d 924, 936-937 (N.Y. Sup. Ct. 1996) (PSC decision to rely on market rates to set prices for electric commodity upheld based on PSC oversight to ensure that market rates are "just and reasonable"); see also Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870 (D.C. Cir. 1993).

[16] See PSL §5(2); see also Cal. ex rel. Lockyer v. FERC, 383 F.3d 1006, 1014 (9th Cir. 2004)(holding that market-based tariffs are valid so long as they are "coupled with enforceable . . . reporting that would enable FERC to determine whether the rates [are] 'just and reasonable' and whether market forces were truly determining the price."

To the extent there was any doubt that the Commission retains authority over the retail market after the 2002 amendment to HEFPA, it was resolved by Chapter 416 of the Laws of 2010, which added General Business Law § 349-d(11-12), preserving Commission authority over ESCO eligibility and marketing practices.

Equal Protection

NEM argues that the July Order violates the Equal Protection Clauses of the United States and New York State Constitutions. It argues that the July Order improperly discriminates against low-income customers by effectively banning them from energy shopping.

UIU and NYAG comment that NEM's equal protection claim lacks merit because NEM presents no evidence of other, less draconian measures that would achieve the same level on protections sought by the Commission. Moreover, UIU and NYAG continue, had NEM provided such evidence, the argument would still fail "because the applicable rational-basis review test gives the Commission extremely broad discretion in designing and implementing customer-protection measures."[17]

NEM articulates the correct legal standard for governmental action, such as the July Order, which neither interferes with a fundamental constitutional right nor discriminates against a suspect class; the action need only be rationally related to a legitimate governmental purpose.[18] Beyond that, however, its argument rings hollow and does not provide a basis for rehearing. NEM incorrectly characterizes the July Order's protections as being based upon a consumer's economic status. Rather, the application of the July Order is based upon whether the customer is an APP, and not upon any

[17] UIU and NYAG Joint Comments at 8.

[18] Petition at 6; Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58 (1988).

income or economic threshold. The assistance programs are administered by utilities (under Commission supervision) and governmental social services agencies. They are funded by ratepayers and taxpayers. There is clearly a legitimate governmental interest in practicing good stewardship of such monies. As the Commission previously stated, "conditions on ESCO provision of service to Assistance Program Participants are critical to ensuring that financial assistance provided to such customers is spent most efficiently."[19] Ascertaining the cost-effectiveness of assistance program-funded energy purchases, therefore, is a legitimate purpose.

ESCOs have conceded that they cannot, or will not match the utilities' prices for residential retail energy. Further, they have not demonstrated, on the record before the Commission, that the additional services they offer are of equal or greater value to APPs than the amount that their prices exceed those charged by the utilities. As such, there is a reasonable distinction between utilities and ESCOs based upon the cost-effectiveness of their retail energy products to APPs. Precluding ESCO sales to APPs, therefore, is rationally related to a legitimate governmental purpose.

Takings Clause

NEM argues that the July Order effects a taking of ESCOs' property without just compensation because it forces ESCOs to terminate their contractual relationships with low-income customers, and it would cause them to lose investments ESCOs made in reliance on Commission policy and precedent.[20] UIU and NYAG comment that the July Order does not violate the

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

[20] NEM Petition at 8.

takings clause because it only affects new and renewing contracts, and does not affect any existing property rights.

The July Order does not take property within the meaning of the Fifth Amendment, and hence NEM has not provided a basis for granting rehearing. Initially, the July Order applies only to future contracts and does not interfere with any existing agreements. Moreover, ESCOs do not have a protectable property interest in potential APPs, the proceeds from these customers, future business opportunities,[21] or in continuing to do business as they did prior to the Commission's issuance of the moratorium on ESCO service to APPs.[22] In particular, ESCOs have no property rights to access and use utility-owned facilities.[23] Access occurs pursuant to a Commission decision to use competitive forces to achieve "just and reasonable" rates. To the extent rates are not just and reasonable, then the Commission is obliged to intervene through, for instance, the moratorium on continued new service to APPs.[24] NEM's taking claims are, therefore, rejected as unavailing.

---

[21] Verizon New England, Inc. v. Transcom Enhanced Servs., Inc., 21 N.Y.3d 66, 72 (N.Y. 2013); Westover Car Rental, LLC v. Niagara Frontier Transp. Auth., 133 A.D.3d 1321, 1322 (4th Dep't 2015); see also College Sav. Bank v Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999); Hunter v. SEC, 879 F. Supp. 494, 497 (E.D. Pa. 1995) (lost profits from potential business opportunities are not protectable property interests)

[22] See Verizon New England, Inc., 21 N.Y.3d at 72; cf. FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.").

[23] See General Motors Corp. v. Public Service Com., 95 A.D.2d 876, 877 (3d Dep't 1983); Campo Corp. v. Feinberg, 279 A.D. 302, 306-307 (3d Dep't 1952).

[24] Energy Ass'n v. PSC, 169 Misc. 2d at 936-937; Cal. ex rel. Lockyer v. FERC, 383 F.3d at 1014.

Conclusion That ESCOs are Unwilling or Unable to Provide a Guaranteed Savings Product and the Lack of Compliant ERVAS

NEM challenges the conclusion drawn in the July Order that: (1) ESCOs are unwilling or unable to serve APPs by way of offering a guaranteed savings product; and (2) ERVA products and services that would satisfy the Commission's directive have not been developed.[25] Conversely, UIU and NYAG comment that the July Order correctly concluded that, based on the record and the efforts of the Collaborative, ESCOs are currently unable or unwilling to effectively serve APPs.

With respect to the first point, NEM cites the absence of utility delivery rate unbundling, so that the utility "price to compare" reflects the full retail costs of providing default service, as the reason ESCOs are unable to provide a guaranteed savings product.[26] These claimed factual errors do not require a grant of rehearing. In reaching the conclusion that guaranteed savings will not be offered in the near future by ESCOs, the Commission acknowledged this concern but nevertheless relied on the broader findings of the Collaborative Report that:

> The consensus of the collaborative is that few, if any, ESCOs intend to offer a product which guarantees that the customer will pay no more than would have been paid had energy been purchased from the utility. ESCOs cited several reasons for this result, including the practical difficulties of providing a price guarantee while commodity prices offered by the utility are unknown in advance and are subject to out-of-period adjustments, the desire for ESCOs to recover marketing and other costs that utilities do not incur, and the utilities' ability to purchase energy in volumes that many ESCOs cannot.[27]

[25] July Order at 17.

[26] NEM Petition at 5.

[27] Collaborative Report at 32.

ESCOs and other stakeholders had an opportunity to challenge this conclusion but did not do so.[28] The Commission finds this record evidence sufficient to support our conclusion that a price guarantee to protect low-income customers would not be forthcoming anytime in the near future.

Once it was understood that ESCOs were not interested in offering a price guarantee, the discussion in the Collaborative turned primarily to identifying the ERVAS that an ESCO could offer APPs as an alternative to providing a price guarantee. On this point, the Commission finds persuasive the comments presented by numerous stakeholders that the ERVAS identified in the Collaborative Report would not meet the Commission's directive.[29] NEM asserts that ERVA products and services provide value to consumers in different ways, and that the Collaborative Report and July Order failed to acknowledge the existence of such ERVAS.[30] Examples of such products provided by NEM include home heating equipment and repair and energy efficiency products. NEM also avers that the Commission failed to consider the low-income aggregation option presented in the Collaborative Report.[31]

The Commission recognizes and agrees that different ERVAS provide value to consumers in different ways. However, although the example products offered by NEM might fit the mold of an ERVAS, the ERVAS that can be provided to the customer body

[28] Instead, multiple ESCOs commented that given the difficulties cited in the Collaborative Report, it is unlikely that ESCOs will offer a guaranteed savings product. See, Comments of Direct Energy and Comments of NEM.

[29] See, Comments of New York State Attorney General, Comment of the City of New York, Comments of the Utility Intervention Unit, and Comments of the Public Utility Law Project.

[30] NEM Petition at 5.

[31] Id.

in general and the ERVAS that were required for APPs are different. When serving an APP, the ERVAS must be designed to reduce a customer's overall energy bill and not diminish the value of the financial assistance programs provided to the APP. Therefore, if an ERVAS is bundled with a more expensive commodity price, and the bundled product results in a higher bill for the APP, it would not satisfy the Commission's directive. The comments on this issue persuade us that no such APP-appropriate ERVAS were identified.

Finally, the contention that the Commission failed to consider the low-income aggregation program proposed in the Collaborative Report is unfounded. The Commission considered that option, but recognized that the proposal would require extensive development and would be administratively challenging. Therefore, the Commission found this proposal to be insufficiently developed to be a viable option for service to APPs. However, the Commission did not reject this proposal, but instead issued a moratorium until compliant products are developed. This aggregation program could be an option that, once fully developed and upon demonstration of the value to be provided to APPs, could lead to lifting the moratorium.

Therefore, contrary to NEM's assertion, the Commission considered the ERVAS proposed in the Collaborative Report, as well as the assertions regarding the unlikeliness of ESCOs offering a guaranteed savings product, and reasonably concluded that options for service to APPs that would satisfy the Commission's directive had not been identified. As a result, the Commission adopted the moratorium on service to APPs until a specific group of ERVAS that will guarantee reduced customer bills are identified.

Customer Choice

NEM contends that the July Order improperly prevents APPs from making their own energy purchasing decisions.[32] Particularly, NEM claims that the Commission erred in preventing customers from entering into fixed price contracts and locking-in their energy rate to avoid price volatility. NEM also claims that APPs will lose their ability to budget their energy costs if they must take full utility service. UIU and NYAG comment this this policy based claim is not grounds for a rehearing of the July Order.

NEM's contentions on this point fail to prove errors of fact requiring rehearing. NEM does not recognize that the moratorium was instituted not only for the protection and benefit of APPs, but for the benefit of ratepayers and taxpayers as a whole. Financial assistance programs that benefit utility customers such as HEAP are funded by all taxpayers. Moreover, those programs are augmented by low-income assistance programs administered by the utilities, which are funded by all ratepayers. These significant ratepayer and taxpayer funds are merely passed through to ESCOs for comparatively higher-priced gas and electricity, without any corresponding value for APPs. Allowing the purpose of assistance programs to be thwarted by ESCO service to APPs is not in the public interest. Thus, any reduction in customer choice resulting from the moratorium is outweighed by the overall benefit to all ratepayers and taxpayers, including APPs. Further, NEM need not be concerned that APPs will lose their ability to budget their energy costs if they must take full utility service. A condition of the recent Commission Order in the low-income proceeding is that

[32] NEM Petition at 7.

APPs be automatically enrolled in the utilities' budget billing programs.[33]

RESA requests clarification on whether or not an ESCO can serve a customer who requests ESCO service in light of the moratorium.[34] RESA notes that some customers may be interested in taking ESCO service that offers products such as an appliance repair offering, renewable energy, and fixed-price products.

RESA appears to be requesting clarification on whether an APP can "opt-out" of the moratorium. An APP may not do so. While the Commission is sensitive to the issues surrounding customer choice, ensuring that the ratepayer and taxpayer dollars which fund low-income assistance programs achieve their intended purpose of making low-income customers' energy bills affordable, and are not merely passed through to ESCOs, is a prevailing consideration. The moratorium is intended to protect all customers, not just APPs, and allowing APPs to "opt-out" of the moratorium would frustrate the purpose of this policy decision. Further, given the lengthy record of ESCO slamming and deceptive marketing, it would be very difficult to oversee an opt-out process. In particular, such a process could not rely on the ESCO's assurance that a customer was provided reliable information upon which to make a decision about opting-out and ESCOs validation of a customer's authorization to opt-out.

Customer Privacy

Both NEM and RESA opine that customers' APP status will be revealed when utilities communicate to the ESCO those

[33] Case 14-M-0565, Energy Affordability for Low Income Utility Customers, Order Adopting Low Income Program Modifications and Directing Utility Filings (issued May 20, 2016).

[34] RESA Petition at 10-11.

accounts the ESCO is no longer eligible to serve.[35] Additionally, NEM claims that the Commission failed to consider the methodologies proposed in the Collaborative Report by which ESCOs could be provided with customers' APP status. The UIU and NYAG comments state that this policy-based claim is not grounds for a rehearing of the July Order.

A customer's APP status will not definitively be revealed to the ESCO as a result of implementing the moratorium. With respect to new enrollments, an enrollment of an APP will simply be rejected with a reason that does not identify the customer as APP.[36] For existing ESCO customers, when the utility communicates to the ESCO what customers the ESCO is no longer eligible to serve, the identified group of customers will not only include APPs, but will include those utility customers who already had a placed a block on their account so as to avoid being enrolled with an ESCO. The Commission carefully weighed the privacy interests of APP customers against customer protections and the proper administration of assistance programs and found this solution to strike the most appropriate balance.

Additionally, with respect to the methodologies proposed in the Collaborative Report, the Commission did consider those options and concluded that they would not be a worthwhile endeavor. As discussed in the July Order, development of expensive and time-consuming utility portals by which an ESCO would be able to verify a customer's APP status would not make sense given evidence that few, if any, ESCOs plan

[35] NEM Petition at 7-8; RESA Petition at 8.

[36] The rejection code would vary by utility, but would generally say that the enrollment was rejected because there is a block on the customer account. A customer could have a block on their account for a number of reasons other than for APP status, including a desire to remain under full utility service permanently.

to offer compliant products to APPs. Moreover, even if the methodologies proposed in the Collaborative Report could provide ESCOs with a customer's APP status without infringing on the customer's privacy, the fundamental issue regarding the diminution of assistance program funding is not resolved.

DER Service to APPs

The NEM Petition claims that the July Order improperly discriminates by prohibiting ESCOs from serving APPs, while directing no such restriction of service by distributed energy resource suppliers (DERS).[37] Similar to their comments with respect to NEM's claims regarding customer choice and privacy, UIU and NYAG comment that this policy based claim is not grounds for a rehearing of the July Order.

Contrary to NEM's assertion, there is a basis on which to distinguish between DER service and ESCO service and hence the Commission did not make an error of fact requiring rehearing. Most significantly, ESCOs are providing essential commodity service and DERS are not. DERS offer voluntary services that are in addition to the customer's utility service, and failure to pay for DER services will not result in termination of utility service, as it will for failure to pay for ESCO commodity service.

Additionally, assistance program dollars are directed at reducing a customer's energy bill. When the bill is increased by ESCO service, that goal is frustrated. DER services are not billed on the utility bill and are a separate agreement entered into by the customer. Thus, assistance program dollars provided to APPs are not passed through to the DERS. For these reasons, the Commission distinguishes between DER service and ESCO service. Consequently, the moratorium on

[37] NEM Petition at 8-9.

ESCO service to APPs was not, and is not now, extended to preclude DER service to those customers.

UBP Compliance

RESA claims that potential inconsistencies exist between the requirements on the July Order and the requirements of the UBP.[38] RESA correctly points out that, per the UBP, an ESCO is obligated to provide customers 15 days' notice of a drop back to utility service.[39] However, this requirement does not conflict with the requirements of the July Order, and ESCOs must still comply with this notice provision. In compliance with the July Order, utilities will place a block on APP accounts and notify the ESCO regarding those accounts the ESCO is no longer eligible to serve. The ESCO will then identify the expiration date of those accounts and continue service to those customers until the expiration of the agreement, at which time the ESCO will effectuate the drop back to utility service. Throughout these transitions, ESCOs will still be required to comply with the notice requirements of the UBP. Therefore, the ESCO will need to provide notice to the customer of the upcoming drop to utility service at least 15 days prior to the expiration of the agreement. Given the 30-day extension granted by the Secretary on August 15, 2016,[40] the ESCO should have no trouble providing notice to customers whose agreements expire shortly after the ESCO is provided with the list of ineligible accounts, such as those on month-to-month contracts.

Additionally, as RESA explains, the UBP requires an ESCO dropping 5,000 or more accounts during a billing cycle to provide the utility with 60 days advance notice. However,

[38] RESA Petition at 3.

[39] UBP Section 5.H.4.a.

[40] Case 12-M-0476, supra, Ruling on Extension Request (issued August 15, 2016).

because it is the utility identifying the accounts to be dropped, the utility will already be on notice. Therefore, we clarify that no additional notice will be required by the ESCO.

Technical and Implementation Issues

The specific technical and implementation issues raised by all three Petitions are addressed individually below. With respect to the process questions raised in the NEM Petition, UIU and NYAG comment that the questions and hypothetical scenarios presented by NEM do not support a rehearing of the July Order.

1. Method of Communication

NEM notes that it is not aware of any existing Electronic Data Interchange (EDI) transaction that will allow the utilities to transmit the switch block information to ESCOs.[41] NEM is correct and for that reason, the July Order did not designate EDI as the mechanism by which the utility would communicate to the ESCO what accounts the ESCO is no longer eligible to serve. Instead, the July Order directed that "[t]his communication should be transmitted in a secure format of the utility's choosing. An example would be a secure spreadsheet or flat file."[42] Therefore, an EDI transaction to effectuate this communication is not necessary.

2. Communication from Utility to ESCOs

In its Petition, RESA states that it believes the utilities will send each individual ESCO a file that includes all ESCO customers who had blocks on their accounts and it would be the ESCO's responsibility to determine which of those customers are low-income.[43] According to RESA this would include non-APP ESCO customers who have placed a block on their account

[41] NEM Petition at 10.

[42] July Order at 15, note 20.

[43] RESA Petition at 4.

in order to prevent being switched away from their existing ESCO. That is not the case. The list of customers the ESCO is no longer eligible to serve will be comprised of APP customer accounts upon which the utility placed blocks on the account in compliance with the July Order, as well as customers who affirmatively placed blocks on their account in order to remain with the utility. The list will not include non-APP customers who voluntarily placed blocks on their account to prevent being switched away from their existing ESCO.

Additionally, NEM expresses concern with the accuracy of the utility records and the inability for the ESCO to verify the accuracy of the customer accounts included in the list of ineligible accounts.[44] However, the issues presented, such as a situation where account numbers may not match, are not common, and the Commission is confident in the utilities' ability to flag the appropriate accounts. Moreover, these types of technical issues are not specific to the directive in the July Order, and are outweighed by the necessity of the moratorium.

3. Reason for Rejected Enrollment

When an enrollment is rejected, NEM contends, the reason for the rejection will not be known by the ESCO. Therefore, according to NEM, if there was a mistake in the enrollment process that is unrelated to APP status, the ESCO will not have any means of identifying and remedying the otherwise correctable error.[45] NEM's concern is unfounded as ESCOs are provided with a reason for the rejection. When an enrollment is rejected due to a block on the account, the code "CAB" is provided to the ESCO in the EDI transaction; which equates to "Customer Account Blocked." Thus, ESCOs will be able

[44] NEM Petition at 10.

[45] Id.

to distinguish between enrollment rejections that were the result of a block on the account, and those that were the result of some other discrepancy during the enrollment process.

4. Continued Service Until the Expiration of Contracts

The July Order directed that existing ESCO contracts must be honored before the customer is switched back to full utility service.[46] RESA suggests that ESCOs will need more time to comply with the requirement to drop customers after ESCOs receive the list of accounts from the utility.[47] Additionally, RESA argues that placing the block on the accounts on September 15, 2016 may preclude the ESCO from serving the customer until the expiration of the existing agreement.

On August 15, 2016, the Secretary granted a 30-day extension of the requirements of Ordering Clause 7 which directed de-enrollment of ineligible accounts.[48] This extension, combined with the fact that ESCOs will continue service until the expiration of the agreement, will provide additional time for compliance in many instances, and should provide ESCOs sufficient time to parse the month-to-month and term accounts, identify the expiration date, and send the EDI drop transaction.

Nor will placing the block on the account on September 15, 2016 preclude the ESCO from serving the customer until the expiration of the existing agreement. The utility will not de-enroll the customer when it places the block on the account. The block will simply prevent the customer from re-enrolling or switching to another ESCO both during the existing contract and after its expiration. De-enrollment will be the responsibility of the ESCO once the agreement expires.

---

[46] July Order at 13 and 17.

[47] RESA Petition at 4-5.

[48] Case 12-M-0476, supra, Ruling on Extension Request (issued August 15, 2016).

Next, RESA requests clarification with respect to month-to-month and variable rate agreements. Specifically, RESA asks that the Commission recognize that monthly variable rate contracts can also have a set contract term, and thus, the expiration should reflect the actual term of the contract.[49] The July Order discussed month-to-month, variable rate agreements as expiring at the end of the existing billing cycle. It is the month-to-month nature of those agreements that result in expiration at the end of the existing billing cycle, not the variable rate component. Therefore, a variable rate agreement with a set term would expire at the end of that term, and the variable rate nature of the agreement would not cause the contract to be canceled earlier.

Finally, RESA contends that there are certain products where the term is month-to-month but the customer receives a gift, such as two months of free service, if the customer remains with the ESCO for a designated period, such as six or 12 months.[50] RESA requests clarification on whether, in such a situation, the ESCO is allowed to retain the customer until the gift-term period is concluded and the customer receives the gift. With respect to gift-term agreements entered into prior to issuance of the July Order, the ESCO should continue to serve the customer until the end of the gift term even though those agreements are month-to-month. This would also be true for agreements that guarantee savings with respect to the utility rate, and which effectuate the guaranteed savings through a true-up at the end of a specified time period. With respect to these types of products, the agreement, although month-to-month, will be deemed to expire at the end of the billing period on

[49] RESA Petition at 6-7.

[50] RESA Petition at 7.

which the guaranteed savings true-up is provided to the customer. To do otherwise would deny the customer of a potentially significant benefit that was a consideration in entering into the agreement. However, this is not to be construed as creating an ERVA that is an exception to the moratorium on APP service. Therefore, only those gift-term agreements that were in effect prior to the implementation of the moratorium on September 13, 2016 will be permitted to continue until expiration of the gift term.

5. Removal of Block When Customer Comes Off of Assistance

Both RESA and NEM request clarification as to the procedure when a customer, who originally had a block placed on their account because of their APP status, comes off of the assistance program.[51] In such an instance, the utility will remove the block from the account when the customer is rolled off the utility's low-income program, and that account will be removed from the updated list of ineligible accounts provided to the ESCO on a periodic basis. With respect to the hypothetical posed by NEM where an APP is currently under a fixed-term contract and subsequently comes off the assistance program while still on a fixed-term contract, that customer would not need to be de-enrolled at the expiration of the agreement.

6. Definition of APP Status

In its Petition, RESA offers five questions regarding what qualifies a customer as APP and how that status is maintained.[52] First, RESA asks how the customer blocks are put into place; by name, address, account number, or meter number. The utility blocks will be tied to the customer account number. Second, RESA asks how the utilities will "unlock" accounts. Assuming RESA is asking how the utility will remove the block,

[51] NEM Petition at 10; RESA Petition at 7-8.

[52] RESA Petition at 10.

the utility list of blocked accounts will be updated periodically, as discussed below, as customers come off the low-income program. Third, RESA asks how often the block list will be updated. This will vary by utility, with some able to update the list on a weekly basis, and others able to do so only on a monthly basis. In any event, the list of customer accounts that the ESCO will no longer be eligible to serve will be updated no less than once every month.

Fourth, RESA asks how often customers apply for assistance, and whether they need to re-apply every year. It is unclear what RESA is referring to when it says "assistance." Customers must generally apply for assistance programs like HEAP on an annual basis, while some customers are automatically enrolled. However, for the purpose of determining APP status under the July Order, the only "assistance" that would designate a customer as APP would be enrollment in a utility low-income program. For upstate utilities, if the utility receives a HEAP benefit on behalf of the customer, the customer is automatically enrolled in the utility's low-income program. For some downstate utilities, participation in a number of programs, in addition, to HEAP results in the customer being enrolled in the utility's low-income program. Regardless of which utility serves the customers, the enrollment in the low-income program is automatic and updated as customers come off of assistance. Finally, RESA asks which programs fall under the APP designation. RESA appears to be confusing the utility low-income program with other assistance programs like HEAP. As noted previously, enrollment in the utility low-income program determines APP status.

7. Implementation Issues in NFG Service Territory

According to NFG, there are approximately 20,000 ESCO customers in NFG's service territory who receive their monthly

natural gas bills under the ESCO Combined Billing (ECB) Model, where ESCOs render single bills including commodity and delivery charges directly to customers, and for whom NFG has no billing relationship with the customer.[53] Consequently, NFG does not know which customers are low-income and cannot comply with Ordering Clauses 1-6. Under the ECB model, the ESCO is essentially the utility with respect to all billing practices, and it is the ESCO which knows whether or not the customer receives a HEAP payment.

Accordingly, the Commission offers the following clarification. ESCOs that participate in the ECB model in NFG's service territory will be treated as "utilities" for the purpose of implementation of and compliance with the moratorium, except that those ESCOs will not place blocks on customer accounts. The ESCO must notify NFG which accounts are low-income and NFG would then be able to place a block on APP accounts to prevent those accounts from being enrolled with an ESCO. NFG and the ESCOs operating in its service territory under the ECB Model are afforded an additional 60 days to comply with the requirements of the July Order, as clarified in the present Order.

Additionally, NFG states that, in NFG's territory, direct voucher customers in Chautauqua, Erie, and Niagara Counties receive commodity service under an aggregation program operated by each county's Department of Social Services (DSS Aggregation Programs).[54] Under these programs, NFG continues, the counties arrange for gas supplies from an ESCO on an annual basis. NFG requests clarification with respect to the application of the July Order to these programs. By this Order, the Commission clarifies that the exemption provided in the July

[53] NFG Petition at 1-2.

[54] Id. at 2-3.

Order to Community Choice Aggregation programs includes the DSS Aggregation Programs in NFG's service territory. Parties with additional, but different, aggregation programs are required to petition the Commission for clarification as to the application of the July Order to their aggregation programs.

Other Issues Raised in the Petitions

RESA expresses concern that, in implementing the moratorium, the customer interactions and reshuffling will cause confusion and incite customers to file complaints against the ESCO.[55] RESA requests that the Commission and Staff recognize that ESCOs should not be faulted in the complaint process for carrying out the directives of the July Order. The Commission recognizes that the directives of the July Order have the potential to cause confusion for some customers which could result in complaints against the utility or the ESCO. Staff tasked with handling consumer complaints is directed to take these issues into consideration when handling complaints that result from implementation of the moratorium.

RESA also requests the opportunity for ESCOs to review and comment on the letter being sent by utilities informing customers on the moratorium, noting that this letter will impact the relationship between the ESCO and the customer in the future.[56] Additionally, RESA requests that these letters be consistent across utilities. While allowing for a full comment process would unduly delay the implementation of the moratorium, Staff is working with utilities to ensure fairness in these letters, and ESCO comments will be considered. In fact, RESA has already commented on two letters filed by Central Hudson Gas and Electric Corporation and NFG. Finally, in approving the letters, Staff has sought consistency across utilities.

[55] RESA Petition at 11.

[56] Id. at 9.

The Commission orders:

1. The Petition for Rehearing of the National Energy Marketers Association is partially granted, to the extent that the New York State Public Service Commission (Commission) will consider further public comment on the moratorium imposed by the Commission's July 15, 2016 Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies (July Order), but otherwise denied.

2. The July Order is clarified to the extent discussed in the body of this Order.

3. The moratorium directed in the July Order and implemented by the following Ordering Clauses 4 through 16 is adopted on an emergency basis under §202(6) of the State Administrative Procedure Act in order to protect the general welfare.

4. To the extent not already completed, electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, upon the effective date of this Order, place a block on all assistance program participant accounts, preventing those accounts from being enrolled with an energy service company.

5. To the extent not already completed, electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, upon the effective date of this Order, communicate to each energy service company serving assistance program participants which accounts the ESCO is not eligible to serve.

6. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to, within 60 days of the effective date of this Order, communicate to National

Fuel Distribution Corporation which accounts the ESCO is receiving a HEAP payment on the customer's behalf.

7. To the extent not already completed, electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to file with the Secretary, for Department of Public Service Staff review, drafts of the letters to be sent to energy service company customers that are assistance program participants informing the customer: (1) that they are enrolled in the utility's low-income program; (2) of the moratorium described in the July Order and re-adopted in this Order; (3) the reason for and protections provided under the moratorium; and, (4) that they will be returned to utility service at the expiration of their existing ESCO agreement.

8. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to, within 30 days of the effective date of this Order, file with the Secretary, for Department of Public Service Staff review, drafts of the letters to be sent to energy service company customers that are assistance program participants informing the customer: (1) that they are enrolled in the utility's low-income program; (2) of the moratorium described in the July Order and re-adopted in this Order; (3) the reason for and protections provided under the moratorium; and, (4) that they will be returned to utility service at the expiration of their existing ESCO agreement.

9. To the extent not already completed, electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, upon the effective date of this Order, send the letters developed pursuant to Ordering Clause 7 to energy service company customers that are assistance program participants.

10. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to, within 60 days of the effective date of this Order, send the letters developed pursuant to Ordering Clause 8 to customers that are assistance program participants.

11. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to, on a rolling basis, communicate to each energy service company serving customers who subsequently become assistance program participants which accounts the ESCO is not eligible to serve.

12. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to, on a rolling basis, communicate to National Fuel Distribution Corporation which accounts the ESCO is receiving a HEAP payment on the customer's behalf.

13. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to on a rolling basis, notify energy service company customers that subsequently become assistance program participants by sending such customers the letters developed pursuant to Ordering Clause 7.

14. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory are directed to on a rolling basis, notify customers that subsequently become assistance program participants by sending such customers the letters developed pursuant to Ordering Clause 8.

15. Energy service companies eligible to serve customers in New York State shall, on or before October 13, 2016, de-enroll any customer accounts identified by the electric

and gas distribution utilities pursuant to Ordering Clauses 5 and 11 of this Order, provided that existing contracts will continue until their expiration.

16. Energy service companies that participate in the ESCO Consolidated Billing Model in National Fuel Distribution Corporation's service territory shall, within 60 days of the effective date of this Order, de-enroll any customer accounts on whose behalf the Energy service company receives a HEAP benefit, provided that existing contracts will continue until their expiration.

17. The Secretary in her sole discretion may extend the deadline set forth in this Order. Any requests for an extension must be in writing, must include a justification for the extension and must be filed at least one day prior to the deadline.

18. This proceeding is continued.

By the Commission,

(SIGNED) KATHLEEN H. BURGESS
Secretary

Commissioner Diane X. Burman, dissenting:

As reflected in my comments made at the September 15, 2016 session, I dissent on this item.