STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In the Matter of Retail Access Business Rules — Case 98-M-1343

RETAIL ENERGY SUPPLY ASSOCIATION'S
COMMENTS IN RESPONSE TO THE COMMISSION'S
NOTICE OF PROPOSED RULEMAKING

Pursuant to Section 202 of the New York State Administrative Procedure Act ("SAPA")[1] and Sections 3.3 and 3.7 of the New York Public Service Commission's (the "Commission") Rules and Regulations,[2] the Retail Energy Supply Association ("RESA")[3] hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking ("NOPR")[4] regarding evaluation of the various Petitions for Rehearing and Requests for Clarification of the Commission's Order Adopting Revised Uniform Business Practices ("UBP")[5] submitted by several parties in this proceeding (individually "Petition" and collectively, "Petitions"), including RESA.[6]

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[1] SAPA, § 202.

[2] 16 NYCRR §§ 3.3, 3.7.

[3] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers.

[4] PSC-15-18-00008-P, *Amendments to the Uniform Business Practices*, Notice of Proposed Rulemaking (Apr. 11, 2018).

[5] Order Adopting Revised Uniform Business Practices (Issued January 19, 2018) ("Order").

[6] Petitions were filed by the following parties: RESA, Impacted ESCO Coalition ("IEC"), National Energy Marketers Association, Direct Energy Services, LLC, Infinite Energy, and Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, National Fuel Gas Distribution Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, KeySpan Gas East Corporation d/b/a National Grid, and The Brooklyn Union Gas Company d/b/a National Grid NY, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (collectively, the "Joint Utilities").

BACKGROUND

On March 8, 2017, the Commission issued a notice requesting comments on proposed changes to the UBP ("Notice").[7] Several parties, including RESA,[8] filed comments in response to the Notice. On January 19, 2018, the Commission issued the Order, which adopted numerous revisions to the UBP ("UBP Amendments") and required compliance with the revised UBP thirty (30) days following the issuance of the Order.[9] On February 2, 2018, RESA filed a Request for Extension of Time to comply with the Order.[10] On February 6, 2018, the Commission denied RESA's request.[11] In response to subsequent requests from other parties, however, the Commission ultimately granted energy service companies ("ESCOs") a forty-five (45) day extension of time until April 6, 2018 to comply with the Order.[12]

Subsequently, several parties, including RESA,[13] filed the Petitions. On March 28, 2018, the Commission issued a Notice Concerning Petitions for Rehearing, Reconsideration and/or Clarification, in which it explained that a possible grant of rehearing requested by the Petitions may alter a "rule" pursuant to SAPA, and, thus, the Commission was required to provide notice and an opportunity to comment.[14] On that same day, the Commission also issued a Notice Further Extending Deadlines extending the deadline for compliance with the Order to July 26, 2018.[15]

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[7] Notice Seeking Comments on Revisions to the Uniform Business Practices (Issued and Effective March 8, 2017).

[8] Comments of the Retail Energy Supply Association in Response to the Commission Notice Seeking Comments on Revisions to the Uniform Business Practices ("RESA Comments") (May 12, 2017).

[9] *See, generally,* Order.

[10] RESA Request for Extension of Time (Feb. 2, 2018).

[11] RESA Extension Request Ruling (Feb. 6, 2018).

[12] Notice Extending Deadlines (Feb. 16, 2018).

[13] RESA's Petition for Rehearing and Request for Clarification ("RESA Petition") (Feb. 20, 2018).

[14] Notice Concerning Petitions for Rehearing, Reconsideration and/or Clarification (Mar. 28, 2018).

[15] Notice Further Extending Deadlines (Mar. 28, 2018).

On April 11, 2018, the Commission issued the NOPR, requesting that comments be submitted by June 11, 2018.[16] RESA now hereby submits its Comments in response to the NOPR.

COMMENTS

As RESA noted in its Petition, the Commission committed procedural errors in adopting the revisions to the UBP.[17] The Commission also committed legal and factual errors in adopting revisions that: (a) subject ESCOs to disciplinary action due to a "failure to comply with Department [of Public Service] requests for any and all information related to an ESCOs marketing and sale of energy and/or value added services and products in New York State"; (b) impose certain requirements with respect to small nonresidential customers; (c) mandate that, before an ESCO can assign a customer, its service agreement must authorize such an assignment and that the ESCO must provide notice to the customer prior to the assignment; and (d) require that a third-party verification ("TPV") with a nonresidential customer inquire about the customer's low-income status.[18] Thus, for the reasons set forth more fully in RESA's Petition and below, the Commission should reconsider the UBP Amendments.

RESA hereby adopts the arguments from its Petition and will not repeat those arguments in these comments. Instead, these comments will focus only on issues raised by other parties in their Petitions.

[16] NOPR, at 20.
[17] RESA Petition, at 3-4.
[18] *Id.* at 5-12.

I. THE COMMISSION ERRED IN FAILING TO PROVIDE PROPER NOTICE OF THE SAPA AMENDMENTS AND IN FAILING TO PREPARE A REGULATORY IMPACT STATEMENT

As RESA noted in its Petition, the Commission erred in adopting the vast majority of the UBP Amendments because it failed to provide the notice required by the SAPA.[19] The Commission also erred by failing to prepare a regulatory impact statement.

SAPA Section 202-a requires agencies adopting a code of general applicability that implements or applies law to prepare a regulatory impact statement in order to "consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons . . . directly or indirectly affected by it."[20] The regulatory impact statement must contain, among other things, statements analyzing the statutory authority, the needs and benefits of the rule, and the projected costs of the proposed rule.[21] However, when an agency fails to comply with these requirements, the rule in question will be found to be invalid as a matter of law and the Commission's actions in adopting that rule will be found to be unlawful, arbitrary, capricious and an abuse of discretion.[22]

A "rule" is defined, in pertinent part, as: "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law . . . including the amendment, suspension or repeal thereof . . . ."[23] RESA acknowledges that the Commission has previously distinguished between "hard rules" and "soft rules" for purposes of differentiating between regulations codified in the New York Code of Rules and Regulations ("NYCRR") and

[19] RESA Petition, at 3-4.
[20] SAPA, § 202-a(1).
[21] SAPA, § 202-a(3).
[22] *Med. Soc'y of N.Y., Inc. v. Levin*, 185 Misc.2d 536 (2000), *aff'd*, 723 N.Y.S.2d (2001).
[23] SAPA, § 102(2)(a)(i).

all of the Commission's other rulemaking activities.[24] However, SAPA § 202-a applies well beyond rules codified in the NYCRR to "***each*** agency statement, regulation or code of general applicability that implements or applies law."[25]

The Order adopted a comprehensive set of revisions to the UBP that implements and applies laws that are generally applicable to all ESCOs.[26] While there are several activities are that are specifically exempted from the definition of a "rule," none are applicable here.[27] For instance, the UBP Amendments do not constitute "forms and instructions, interpretive statements and statements of general policy which in themselves have ***no legal effect*** but are merely explanatory"[28] because ESCOs that fail to comply with the UBP Amendments are subject to, *inter alia*, suspension, release of customers, and/or revocation of ESCO eligibility.[29]

Because the UBP codifies uniform requirements applicable to all licensed New York ESCOs and their corresponding customers and utilities,[30] the UBP is unquestionably a "statement . . . or code of general applicability that implements or applies law,"[31] which requires the preparation of a regulatory impact statement ("RIS").[32] "The importance that the Legislature placed on the RIS may be found in the requirement that an agency must publish a revised RIS

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[24] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order on Petitions for Rehearing (Issued and Effective December 15, 2016), at 33-34.

[25] SAPA, § 102(2)(a)(i) (emphasis added).

[26] *See, e.g.*, Order, at 1 ("The Commission is now modifying the UBP to, among other things, incorporate a new law that provides additional protections for families of deceased account holders of energy service contracts.").

[27] SAPA, §102(2)(b).

[28] SAPA, § 102(2)(b)(iv) (emphasis added).

[29] Order, Appendix A, §2.D.5.f ("An ESCO may be subject to the consequences listed in UBP Section 2.D.6.b for reasons, including, but not limited to . . . (f) failure to comply with the UBP terms and conditions, including discontinuance requirements . . . ."); Order, Appendix A, § 2.D.6.b (listing consequences for failure to comply with UBP).

[30] *See, generally*, Order, Appendix A.

[31] SAPA, § 102(2)(a)(i).

[32] SAPA, § 202-a.

when the 'information in the statement is inadequate or incomplete.'"[33] Because the Commission failed to perform the required analysis, the UBP Amendments are legally invalid and the Commission's actions in promulgating the Order are unlawful.[34]

II. THE COMMISSION ERRED IN FAILING TO ADDRESS IEC'S COMMENTS REGARDING REVISIONS TO THE UBP VOICE-RECORDED VERIFICATION REQUIREMENTS

In response to the Notice, the IEC submitted comments regarding its concerns with the Commission's revisions to UBP Section 5, Attachment 1.A. In particular, IEC commented that requiring a verification agent to ask a prospective customer whether (s)he participates in their local utility's low-income assistance program is an invasion of privacy and should not be adopted.[35] The Commission, however, not only failed to provide reasoning as to why it adopted the requirement but also failed to address IEC's comments in the Order or otherwise, as it is required to do pursuant to the SAPA.[36]

SAPA Section 202(5)(b) requires, in relevant part, that "each agency . . . publish and make available to the public an assessment of public comment for a rule adopted . . . ."[37] The assessment must include, among other things:

> (i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments, (ii) a statement of the reasons why any significant alternatives were not incorporated into the rule and (iii) a description of any changes made in the rule as a result of such comments.[38]

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[33] *Med. Soc'y*, 185 Misc.2d at 546 (*quoting* SAPA, §202-a(6)(a)).

[34] *Accord Med. Soc'y*, 185 Misc.2d at 545-46 (finding that SAPA was violated because regulatory impact statement did not address or assess the required information).

[35] Comments of the Impacted ESCO Coalition on the Notice Seeking Comments on Revisions to the Uniform Business Practices (May 15, 2017), at 9.

[36] SAPA, § 202(5)(b).

[37] *Id*.

[38] *Id.*

However, nowhere in the Order did the Commission address IEC's comments regarding the significant privacy concerns associated with a TPV question regarding a customer's low-income status.[39]

As noted above, because the UBP codifies uniform requirements applicable to all licensed New York ESCOs and their corresponding customers and utilities,[40] the UBP is unquestionably a "statement . . . or code of general applicability that implements or applies law."[41] Thus, the Commission was required to address IEC's comments in the Order and explain why the Commission did not incorporate changes based on those comments.[42] Because the Commission failed to do so, the requirement that a verification agent ask a prospective customer whether (s)he participates in their local utility's low-income assistance program is invalid.[43]

III. THE COMMISSION SHOULD REJECT THE JOINT UTILITIES' PROPOSED DEFINITION OF SLAMMING IN THE COMMUNITY CHOICE AGGREGATION ("CCA") CONTEXT

The UBP Amendments "include an exception to the definition of slamming as it relates to customer enrollment in a Community Choice Aggregation (CCA) program, where it does not apply."[44] In support of this change, the Order finds that "the municipal approval is considered a reasonable proxy for the customer's consent to participate in the CCA, unless the customer affirmatively opts out."[45] In their Petition, the Joint Utilities request that the Commission clarify that, within a CCA, "a customer complaint that an initial opt-out request or timely request to

[39] *See, generally,* Order.
[40] *See, generally,* Order, Appendix A.
[41] SAPA, § 102(2)(a)(i).
[42] SAPA, § 202-a.
[43] *Cf. Med. Soc'y*, 185 Misc.2d 536.
[44] Order, at 11.
[45] *Id.*

return to utility service was not properly honored would be classified as a slam."[46] The Joint Utilities request for clarification, however, goes too far.

Slamming is defined as: "***Enrollment*** of a customer by an ESCO without authorization."[47] The Commission has specifically authorized CCA programs "to enroll eligible customers on an opt-out basis."[48] Under this process, a customer is enrolled when the opt out period has passed and the customer has not opted out.[49] Thus, once the opt out period has passed, a customer's request to return to utility service is a request to cancel service; not an enrollment. Accordingly, the Commission should reject the Joint Utilities' request to treat it as such.

IV. THE COMMISSION SHOULD MODIFY THE BUDGET BILLING REQUIREMENTS AND ASSOCIATED PROVISIONS

The UBP Amendments include the following new language:

> Every ESCO shall offer residential customers a voluntary budget billing or levelized payment plan for the payment of charges. The ESCO is responsible for determining the budget bill amount and must evaluate each budget billed account on a quarterly basis for conformity with actual billings. Each such plan shall provide that bills clearly identify consumption and state the amounts that would be due without levelized or budget billing.[50]

In its Petition, RESA requested that the Commission clarify this requirement by replacing "The ESCO" with "The billing party" in the second sentence.[51] In their Petition, the Joint Utilities request that the Commission clarify this provision by adding the phrase "that renders a bill directly to the customer" after "Every ESCO" in the first sentence. For all of the reasons set forth in the Joint Utilities' Petition, RESA supports this clarification.

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[46] *Id.*, at 2-3.
[47] Order, Appendix A, § 1 (emphasis added).
[48] CCA Order, at 20.
[49] *Id.*
[50] Order, Appendix A, § 5.L.2.
[51] RESA Petition, at 11-12.

The Joint Utilities also request that the Commission modify the existing UBP requirement that provides: "The ***non-billing party*** may offer special billing features, such as budget billing or average payment plans."[52] Specifically, the Joint Utilities request that the Commission eliminate the optionality currently available to the non-billing party in offering these special pricing arrangements.[53] However, given the changes to section 5.L.2, the entirety of Section 9.D.8 is unnecessary since budget billing obligations are the responsibility of the billing party and non-billing parties do not have a separate means by which to offer such arrangements. Accordingly, RESA requests that the Commission not just remove "may" as the Joint Utilities suggest but, instead, that it remove the entire provision.

V. THE COMMISSION SHOULD CLARIFY THAT A "VERIFICATION AGENT" CAN VERIFY AGREEMENTS RESULTING FROM SCHEDULED APPOINTMENTS

The UBP Amendments provide:

> In addition to the requirements in UBP Section 5.B.1., for any sale to a residential and small nonresidential customer resulting from: 1) door-to-door solicitation; 2) telephonic marketing; ***or 3) scheduled appointment***, each enrollment is only valid with ***an independent third party verification***.[54]

As RESA noted in its Petition, the Commission erred in adopting changes to this provision.[55] However, if despite that, the Commission retains this provision, in order to avoid confusion, it should make other conforming revisions. For instance, "Verification Agent" is defined, in pertinent part, as:

[52] Order, Appendix A, § 9.D.8 (emphasis added).
[53] JU Petition, at 4.
[54] Order, Appendix A, § 5.B.2 (emphasis added).
[55] RESA Petition, at 6-8.

> An entity that is an independent vendor/contractor conducting, on behalf of the ESCO, verification of an agreement, resulting from telephonic or door-to-door marketing, with a customer to initiate service and begin enrollment . . .[56]

This definition does not include the new requirement within Section 5.B.2 that requires verification of an agreement resulting from a scheduled appointment.[57] Accordingly, if the Commission continues to maintain the requirement that verifications be conducted for scheduled appointments, in order to avoid confusion over who can conduct such verifications, it should modify the definition of "Verification Agent" to capture this change.

In addition, the use of the phrase "independent third party verification" in some instances in the UBP and the use of the phrase "voice-recorded verification" in other instances in the UBP has the potential to create confusion because it is not clear if the two words are intended to have the same or different meanings. According to Section 5, Attachment 1, a "voice-recorded verification is required to enter into a telephonic agreement, or a door to door agreement, or agreement that resulted from an appointment with a residential and small nonresidential customer to initiate service and begin enrollment."[58] Further, "[u]se of either an Independent Third Party ***or*** an Integrated Voice Response system to obtain customer authorization is required for any telephone solicitation or sales resulting from door-to-door marketing or appointment."[59] However, in other sections of the UBP, there is only a reference to "an independent third party verification."[60] Thus, it is unclear whether the use of an Independent Third Party and IVR are

[56] Order, Appendix A, § 1.

[57] Order, Appendix A, § 5.B.2.

[58] Order, Appendix A, § 5, Attachment 1

[59] *Id.* (emphasis added).

[60] *See, e.g.*, Order, Appendix A, § 1 (defining Door-to-door sales as "The sale of energy services in which the ESCO or the ESCO's marketing representative personally solicits the sale, and the buyer's agreement or offer to purchase is made by customer signing the ESCO's sales agreement and completing ***an independent third party verification***, at a place other than the places of business of the seller . . . .") (emphasis added).

both acceptable methods of obtaining verification in all instances. Accordingly, RESA requests that the Commission clarify this issue by modifying the UBP to use consistent terminology throughout.

VI. THE COMMISSION SHOULD CLARIFY THAT AN ESCO MARKETING REPRESENTATIVE'S BUSINESS CARDS AND ID BADGE MUST DISPLAY ONLY THE REPRESENTATIVE'S FIRST NAME

The UBP Amendments provide:

> An ESCO marketing representative must provide each prospective residential customer a business card or similar tangible object with the ESCO marketing representative's first name and employee identification number; ESCO's name, address, and phone number; date and time of visit and website information for inquires, verification and complaints.[61]

Consistent with Green Mountain Energy's request, in order to protect marketing representatives, this modification removes the representative's last name from the badge.[62] However, the Order incorrectly states that the Commission will adopt Green Mountain Energy's recommendation to eliminate the display of the representative's ***first*** name.[63] As a result, the UBP Amendments and the Order are in conflict. In order to avoid confusion and potential non-compliance as a result of these inconsistencies, the Commission should clarify that the language in the Order is incorrect and that the UBP Amendments eliminate the display of the representative's ***last*** name.

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[61] Order, Appendix A, § 10.C.1.d; *see also id.* § 10.C.1.b.1 ("ESCO marketing representatives who contact customers in person at a location other than the ESCO's place of business for the purpose of selling any product or service offered by the ESCO shall, before making any other statements or representations to the customer: . . . Produce identification, to be visible at all times thereafter, which: . . . Prominently displays in reasonable size type face the first full name and employee identification number of the marketing representative.
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[62] Order, at 2.

[63] *Id.* at 16.

CONCLUSION

For all the foregoing reasons and those set forth in RESA's Petition, the Commission should reconsider the UBP Amendments.

Respectfully submitted,
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