

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

**JOINT STATEMENT OF THE
UTILITY INTERVENTION UNIT AND THE
ATTORNEY GENERAL OF THE STATE OF NEW YORK
ON PETITION FOR REHEARING ON ORDER REGARDING THE
PROVISION OF SERVICE TO LOW-INCOME CUSTOMERS BY
ENERGY SERVICE COMPANIES**

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INTRODUCTION

The New York Department of State’s Utility Intervention Unit (“UIU”) and the Office of the New York State Attorney General (“NYAG”) respectfully submit the following statement under 16 NYCRR § 3.7(c) in response to the National Energy Marketers Association’s (“NEM”) Petition for Rehearing and Clarification of the Public Service Commission’s (“Commission” or “PSC”) Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies, issued July 15, 2016 in the above-captioned proceedings (“July Order”).

UIU is an office within the New York Department of State’s Division of Consumer Protection statutorily authorized to “represent the interests of consumers of the state before federal, state and local administrative and regulatory agencies engaged in the regulation of

energy services.”¹ UIU focuses particularly on the interests of New York’s residential and small commercial customers.

The NYAG is the chief law enforcement officer in the State and is both obligated and empowered to protect the interests of the people and businesses of New York. The NYAG enforces consumer protection laws, including laws that prohibit fraudulent or deceptive business practices. The NYAG has participated in numerous Commission proceedings advocating for residential and small business customers. In particular, the NYAG has long advocated for the Commission to remedy flaws in New York’s retail energy markets in order to protect New York consumers.

The Commission’s July Order established “a moratorium on ESCO enrollments of new APP [Assistance Program Participant] customers and on renewals of existing customers, effective 60 days after the effective date of this Order” (July Order at 17-18.) This moratorium represents a timely and appropriate protection for low-income customers, and reflects a result of extensive investigations, reports, and public comment in several Commission proceedings.

On August 15, NEM filed a Petition for Rehearing and Clarification of the July Order,² alleging that the July Order is impaired by several errors of law and/or fact. As discussed below, NEM’s Petition fails to satisfy the burden required to justify rehearing of the July Order. Each of NEM’s arguments is meritless, moot, or both, and UIU and the NYAG therefore urge the Commission to deny its Petition in its entirety.

DISCUSSION

NEM has not demonstrated that rehearing and clarification is warranted. The grounds for rehearing are limited to where the Commission committed an error of law or fact, or where new circumstances have arisen that warrant a different determination.³ Petitions for rehearing must “specifically explain and support each alleged error or new circumstance said to warrant

¹ N.Y. Exec. L. § 94-a.

² Case 12-M-0476 *et. al.*, Petition for Rehearing and Clarification of the National Energy Marketers Association (filed August 15, 2016) (“NEM Petition”). Several parties have also filed comments and/or requests for clarification of the Order. UIU and the NYAG do not here comment on those filings.

³ 16 NYCRR § 3.7(b).

rehearing.”⁴ Policy-based disagreements are not grounds for rehearing,⁵ and neither are arguments, unmitigated by new circumstances, which the Commission has already considered and rejected.⁶ Requests for rehearing present a high threshold that NEM has failed to satisfy. Several of NEM’s claims have already been rejected by the Commission, the New York State Supreme Court, or both. The remaining few novel issues NEM raises in its petition do not present grounds for rehearing.

I. The Commission Has the Statutory Authority to Issue the Order.

The July Order fits squarely within the Commission’s authority under Articles 1, 2 and 4 of the Public Service Law (“PSL”). The Commission has had broad powers with respect to regulating the ESCO market ever since the Commission created this market by Order in 1996.⁷ The Albany County Supreme Court recently explicitly reaffirmed such broad powers,⁸ concluding that Article 2 of the PSL grants the Commission authority to regulate ESCOs as “entit[ies] that, in any manner sell[] or facilitate[] the sale or furnishing of gas or electricity to residential customers.”⁹ The Commission has clear statutory authority to ensure that the rates charged by ESCOs are just and reasonable,¹⁰ including by regulating which products ESCOs may market to APP customers.¹¹

⁴ *Id.*

⁵ *See* *Entergy Nuclear Power Mktg., LLC v. New York State Pub. Serv. Comm’n*, 122 A.D.3d 1024, 995 N.Y.S.2d 830 (2014).

⁶ *See* Case 10-T-0139, *Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City*, Order Denying Petition for Rehearing 2 (issued September 24, 2013).

⁷ *See* July Order at 5-6; *see also* Case 94-E-0952, Order 96-12 (issued May 20, 1996).

⁸ *See* *Nat’l Energy Marketers Assn. v. New York State Pub. Serv. Comm’n*, Albany County Sup. Ct., Index No. 868-16; *Retail Energy Supply Assn. v. New York State Pub. Serv. Comm’n*, Albany County Sup. Ct., Index No. 870-16; *Family Energy, Inc. v. New York State Pub. Serv. Comm’n*, Albany County Sup. Ct., Index No. 874-16, 13-15 (July 22, 2016) (hereinafter, *Nat’l Energy Marketers Assn. et al.*).

⁹ *Nat’l Energy Marketers Assn. et al.* at 13 (Court further notes, “(t)o say that once it was established by the PSC, with a set of guidelines for its regulation and connectivity to public utilities — the UBP which allows the Commission to oversee virtually every aspect of the market, from eligibility, to marketing and contracts, and policing abuses as they affect its customers — that the PSC cannot regulate these entities with consumer pricing requirements surely defies logic”).

¹⁰ *Nat’l Energy Marketers Assn. et al.* at 15.

¹¹ Further, NEM’s argument that the extension of HEFPA protections to residential customers served by ESCOs evinces a legislative intent that ESCOs serve all residential customers, regardless of economic status, must be rejected. The extension of HEFPA protections to ESCO customers in 2002 merely shows the legislative intent of

II. The Order Correctly Concluded ESCOs are Unable or Unwilling to Serve APP Customers.

The record established in these proceedings provides a wealth of evidence that ESCOs are currently unable or unwilling to effectively serve low-income customers. The Commission made it clear in its Order Granting and Denying Petitions for Rehearing in Part (issued February 6, 2015 in these proceedings) (“February 2015 Order”) that ESCOs may only market products to APP customers that either (1) offer APPs a price savings guarantee, or (2) provide an energy-related value added services (“ERVAS”) product in a manner that does not dilute the effectiveness of the financial assistance programs.¹² The Department of Public Service Staff (“DPS Staff”) convened a collaborative among DPS Staff, ESCOs, utilities, the Public Utility Law Project of New York (“PULP”), UIU, the City of New York, and other parties (collectively, the “Collaborative”) to refine and implement the February 2015 Order. Following seven months and five large group meetings, Collaborative participants could not identify one ESCO that intended to offer APP customers a price savings guarantee product.¹³ Nor could ESCOs identify any viable ERVAS product that would not dilute the effectiveness of financial assistance programs.¹⁴

protecting residential customers from potential abuses in the ESCO market. The Commission reaffirmed in the February 2015 Order its concern that financial assistance provided to APP customers is provided in a cost-effective manner. *See* February 2015 Order at 6. The Record established in these proceedings has illustrated that the ESCO market is not workably competitive for mass market customers, and APP customers are especially vulnerable to ESCO abuses. *See, e.g.*, Affidavit of Luann Scherer in Support of Undertaking, Albany County Index No. 868-16 (March 8, 2016) at 18 (noting that in January 2016 alone, residential ESCO customers in the National Grid territory paid \$15.9 million more for service than they would if they remained full service utility customers). Thus, the Commission took action pursuant to its authority under the PSL to place the moratorium on ESCOs serving low-income customers.

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

¹³ *See* Collaborative Report at 32. While the ESCOs cited several reasons for this such as “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,” ESCOs also have advantages that public utilities do not, such as the ability to “tailor their energy purchases to fit the needs of their customers’ unique consumption patterns.” *See* Memorandum of Law of Amici Curiae Office of the Attorney General and Utility Intervention Unit of the New York State Department of State, Albany County Index No. 868-16 et al. (March 31, 2016) at 8.

¹⁴ *See* Collaborative Report at 33-42. The Collaborative had extensive discussions on whether a fixed price product could be offered that does not dilute effectiveness of financial assistance programs and parties were unable to come to an agreement other than the complexity of establishing a fair reference price. Further, as the Consumer Advocates

Several parties, including NEM, commented on the Collaborative Report. The Joint Comments of the New York City Public Advocate and PULP pointed out that the Collaborative participants were at an impasse:

[T]he Collaborative has not arrived at an objective or agreed-upon definition of value-added products or services that would satisfy the conditions set forth in the Commission's order. Nor, for that matter, did the Collaborative develop a method of identifying compliant products, in the absence of a comprehensive, definitive list being agreed upon as part of the collaborative process.

...

The November 2015 Report and the initial Party Comments, taken together, indicate that these problems may be intractable. Collaborative participants have invested a great deal of time and resources to identify ways for ESCOs to legally market to APP customers, yet despite their best efforts, workable strategies that meet the Commission Order's requirements **Indeed, some ESCO participants have apparently reached the same conclusion as PULP and the NYC Public Advocate that ESCOs are simply not able to sell products to APP customers in a manner that complies with the Commission's Order.**

Given the Collaborative's dim prospects of resolving these issues in the future, combined with the continuing harms to APP customers of non-compliant ESCO products, PULP and the NYC Public Advocate respectfully request that the Commission issue an order suspending this proceeding and barring ESCOs from charging low-income program participants prices in excess of the utility's prices.¹⁵

The NYAG similarly proposed in its comments on the Collaborative Report that "a price guarantee is the only acceptable low income consumer protection on the table."¹⁶

noted determining the worth of ERVAS such as home heating equipment repair to APP customers is difficult when there is not data on how many low-income customers have the ability to benefit from such a service, or how the value would flow through to customers that do not own or control furnaces. *See id.* at 42.

¹⁵ Cases 12-M-0476 *et al.*, Joint Comments of New York City Public Advocate Letitia James and the Public Utility Law Project of New York 2-3 (filed February 11, 2016) (emphasis added) (internal citations omitted).

¹⁶ *See* Cases 12-M-0476, *et al.*, Comments of Attorney General Eric T. Schneiderman 4 (filed January 29, 2016) . ("Given the ESCOs' history of failing to provide consumer savings, and because there is no quantifiable showing that any of the ERVAs discussed would save low income consumers money over what they would pay to utilities, ESCOs should not be permitted to offer them.")

Given the inability of ESCOs to offer a price guarantee product in compliance with the February 2015 Order, the July Order’s moratorium was a rational, proportional response to the persistent failure of the ESCO market to serve APP customers.

III. The July Order Was Issued in Conformance With SAPA.

The July Order was issued in full conformance with the State Administrative Procedures Act (“SAPA”) in accordance with a Notice of Proposed Rulemaking issued on December 16, 2015 (“SAPA Notice”).¹⁷ That SAPA Notice advised parties that the Commission intended to consider “a Collaborative Report filed on November 5, 2015 [by the Collaborative discussed in Part II *supra*] that addresses proposed consumer protections for the low income customers of energy services companies (ESCOs) The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.”¹⁸ The deadline to comment on the SAPA Notice expired February 1, 2016, and eighteen parties, including NEM,¹⁹ filed comments which the Commission carefully considered before issuing the July Order.²⁰

The July Order’s moratorium followed directly from this SAPA Notice and the Collaborative process that preceded it. As discussed in Part II *supra*, the Collaborative could not identify any products that would satisfy the Commission’s February 2015 Order.²¹ In the intervening six months since parties commented on the Collaborative Report, UIU and the NYAG are not aware of any ESCOs that have begun offering compliant products. The July Order’s moratorium thus represents a logical outcome – and one which NEM should reasonably have foreseen – of the SAPA Notice and the preceding Collaborative.

IV. NEM’s Alleged “Errors” of Constitutional Law Are Meritless.

¹⁷ 12-M-0476SP13 N.Y. Reg. p. 20 (December 16, 2015).

¹⁸ *Id.*

¹⁹ See Cases 12-M-0476, *et al.*, Comments of the National Energy Marketers Association 10-11 (January 29, 2016) (acknowledging National Fuel Gas’s proposal “that APP customers be limited to receiving utility commodity service or ESCO commodity service subject to the price guarantee” and urging the Commission to reject it).

²⁰ See July Order at 4.

²¹ See, e.g., Collaborative Report at 33 (Consumer Advocates noting that “any value-added service needs to guarantee APP customers either a lower bill or a reduction in energy usage.”); *id.* at 41 (Consumer Advocates concluding that “none of the products presented so far throughout the Collaborative provide value to customers, and justify charging customers more than the utility rate”).

NEM's allegations that the July Order violates constitutional equal protection rights²² and effects an unconstitutional taking²³ do not represent cognizable legal claims. With respect to its equal protection claim, NEM presents no evidence that other "far less draconian" protective measures would achieve the level of customer protections the Commission seeks to achieve through the July Order. Even if NEM had provided such evidence, its equal protection argument would still fail, because the applicable rational-basis review test gives the Commission extremely broad discretion in designing and implementing customer-protection measures. NEM's takings claim is similarly unsupportable. The July Order only affects new and renewing contracts and therefore could not affect any existing property rights.

V. NEM's Policy-Based Arguments Do Not Support Rehearing.

NEM's fifth, sixth, and eighth claims²⁴ represent policy-based disputes with the Commission, and as noted above, therefore do not support its petition for rehearing of the July Order.²⁵ NEM is free to disagree with the Commission's policy decisions as embodied in the July Order, but such disagreement is not grounds for a rehearing of the Order.

VI. NEM's Remaining Process Questions Do Not Support Rehearing.

NEM's last two claims²⁶ concern questions and hypothetical scenarios that might arise during the implementation of the July Order. These questions, to the extent they are legitimate, would nonetheless not support a rehearing of the July Order. Rather, such questions can and should be addressed through the ordinary course of implementing the Order or, in exceptional circumstances, through a Request for Clarification.

²² NEM Petition at 6-7.

²³ *Id.* at 8.

²⁴ Respectively, NEM's assertions that "The Order Erroneously Concludes that Low Income Consumers Should Not Make Their Own Energy Purchasing Decisions," NEM Petition at 7; "The Implementation of the Order Will Violate the Very Consumer Privacy Issues it Portends to Protect," *id.* at 7-8; and "The Order Arbitrarily Prohibits ESCOs from Serving APP Customers With No Such Restriction on Service By Other Competitive Entities," *id.* at 8-9.

²⁵ *See* Energy Nuclear Power Mktg., LLC v. New York State Pub. Serv. Comm'n, 122 A.D.3d 1024, 995 N.Y.S.2d 830 (2014).

²⁶ Respectively, NEM's assertions that "The Order Fails to Address the Terms for Lifting the Moratorium," NEM Petition at 9; and "Clarification of Technical Implementation Issues is Necessary Before a Moratorium Could Be Carried Out," *id.* at 9-10.

CONCLUSION

For the foregoing reasons, UIU and the NYAG respectfully urge the Commission to deny NEM's Petition for Rehearing, as it does not present a basis for rehearing of the July Order.

Respectfully Submitted,

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