

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on December 19, 2024

COMMISSIONERS PRESENT:

Rory M. Christian, Chair  
James S. Alesi  
John B. Maggiore  
Uchenna S. Bright  
Denise M. Sheehan  
Radina R. Valova

CASE 15-M-0127 - In the Matter of Eligibility Criteria for  
Energy Service Companies.

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.

ORDER DENYING SMARTENERGY HOLDINGS, LLC'S  
ELIGIBILITY APPLICATION

(Issued and Effective December 24, 2024)

BY THE COMMISSION:

INTRODUCTION

To operate in New York State, every energy service company (ESCO) must file an application for eligibility with the Department of Public Service (DPS). Only after DPS approves such an application may an ESCO operate in New York and market its energy products to consumers. In response to a Commission order revising market access and eligibility conditions, SmartEnergy Holdings, LLC (SmartEnergy or the Company) filed its application for eligibility with DPS Staff (Staff) on November 17, 2020. The Commission initially denied the application in

September 2021. SmartEnergy filed a petition for rehearing, and upon rehearing, the Commission remanded SmartEnergy's application to Staff for reconsideration in accordance with the Commission's remand order. Thereafter, Staff reconsidered SmartEnergy's application for eligibility and recommended that the Commission deny it. SmartEnergy opposed Staff's recommendation, arguing that its application for eligibility should be granted. As discussed in this Order, the Commission finds that Staff, following the Commission's earlier remand, has appropriately identified a concerning pattern in SmartEnergy's out-of-state conduct and that a review of the record warrants denial of the Company's application for eligibility to market electricity to mass market customers in New York.

#### PROCEDURAL BACKGROUND

Pursuant to the Uniform Business Practices (UBP), an ESCO seeking eligibility to sell natural gas or electricity is required to submit an application package to Staff, including a retail access application form (RAAF), containing all of the information listed in UBP Section 2.B. Staff reviews each of the documents in the application package for compliance with relevant Commission orders and the UBP.<sup>1</sup> On December 12, 2019, the Commission issued an order to amend the process by which ESCOs apply for eligibility to operate in New York (December 2019 Order). The December 2019 Order required that all ESCOs, including those already operating in New York, file an

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<sup>1</sup> UBP Section 2.C.1

application for eligibility in accordance with the modified UBP.<sup>2</sup> In its September 18, 2020 Order on Rehearing, Reconsideration, and Providing Clarification (the Rehearing Order), the Commission established a deadline of November 17, 2020, for submission of ESCO applications.<sup>3</sup>

In an ostensible effort to comply with the December 2019 Order and the Rehearing Order, SmartEnergy filed its application for eligibility on November 17, 2020. This initial application was approved by DPS Staff on January 25, 2021.<sup>4</sup> On May 28, 2021, however, SmartEnergy submitted an updated RAAF that disclosed regulatory sanctions imposed upon it in Maryland.<sup>5</sup> Further Staff investigation revealed previously undisclosed settlement agreements between SmartEnergy and regulatory authorities in Ohio and Illinois.<sup>6</sup> As a result of Staff's investigation into additional undisclosed enforcement actions, on September 9, 2021, the Commission issued an order directing SmartEnergy to show cause why the Commission should not deny its

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<sup>2</sup> Case 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (issued December 12, 2019), at 28-29.

<sup>3</sup> Case 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order on Rehearing, Reconsideration, and Providing Clarification (issued September 18, 2020), at 47.

<sup>4</sup> Case 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order to Show Cause Regarding Energy Service Company Application (issued September 9, 2021), at 6.

<sup>5</sup> Id., at 7-8.

<sup>6</sup> Id., at 8.

application for eligibility (OTSC).<sup>7</sup> SmartEnergy responded to the OTSC on October 22, 2021.<sup>8</sup>

On March 21, 2022, the Commission denied SmartEnergy's application for eligibility.<sup>9</sup> At that time, the Commission reasoned that SmartEnergy had knowingly failed to disclose sanctions assessed against it in other states on its application for eligibility as required by RAAF §1.C and, consequently, violated UBP §2.B.3.<sup>10</sup>

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<sup>7</sup> Id.

<sup>8</sup> Case 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, SmartEnergy Holdings, LLC's Response to Order to Show Cause (dated October 22, 2021).

<sup>9</sup> SmartEnergy suggests that Staff authorized SmartEnergy to continue operating as an ESCO in New York via letter on March 4, 2022, and that this letter contradicts the subsequent denial order and "showcase[es] the arbitrary and capricious handling of this case." SmartEnergy Letter in Opposition, at 2. The Commission has previously explained that the March 4, 2022 letter from Staff refers to the annual compliance filing that all ESCOs must make and bears no relation to the eligibility application at issue here. Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Granting Rehearing and Reconsideration of SmartEnergy Holdings, LLC's Eligibility Application (issued July 15, 2022), at 10-12. In any event, a decision by Staff would not control or bind the Commission, which is the final decision-making body for the Department. Pub. Serv. Law Section 5; Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 33 N.Y.3d 336, 343 (2019), rearg. denied 33 N.Y.3d 1130 (2019) (noting that it is the Commission that exercises oversight of the ESCO market).

<sup>10</sup> Case 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order to Deny SmartEnergy Holdings, LLC's Application for Eligibility (issued March 21, 2022), at 9.

On April 21, 2022, SmartEnergy filed a petition for rehearing.<sup>11</sup> After reviewing the petition for rehearing, the Commission granted rehearing, reconsidered its interpretation of RAAF §1.C, and remanded the matter to Staff for a recommendation as to whether SmartEnergy was likely to comply with the UBP if granted eligibility.<sup>12</sup>

Following the remand from the Commission, Staff reviewed the administrative record, including the Company's responses and regulatory proceedings in other states, and determined that the Company had not shown a likelihood of compliance with the UBP as a result of SmartEnergy's material pattern of complaints and violations in other states.<sup>13</sup> Accordingly, Staff recommended that the Commission deny SmartEnergy's application for eligibility.

SmartEnergy filed a rebuttal to Staff's recommendation, opposing Staff's reasoning and conclusion.<sup>14</sup> SmartEnergy's opposition argued that Staff focused upon SmartEnergy's conduct in three states - Illinois, Ohio, and Maryland - but failed to give adequate weight to SmartEnergy's

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<sup>11</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Petition for Rehearing and Reconsideration of SmartEnergy Holdings LLC Regarding Denial of Application for Eligibility (dated April 21, 2022).

<sup>12</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Granting Rehearing and Reconsideration of SmartEnergy Holdings, LLC's Eligibility Application (issued July 15, 2022).

<sup>13</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, SmartEnergy Holdings, LLC Eligibility Review (dated September 13, 2022), at 1.

<sup>14</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, SmartEnergy Letter in Opposition to Staff Recommendation (dated October 14, 2022) (SmartEnergy Letter in Opposition).

record of compliance in New York.<sup>15</sup> Moreover, SmartEnergy argued that in Illinois and Ohio, SmartEnergy settled regulatory proceedings with no admission or finding of any wrongdoing by the regulatory authorities and that those matters do not demonstrate a material pattern of false and misleading conduct.<sup>16</sup> In its rebuttal filing, SmartEnergy acknowledged that the Maryland Public Service Commission (or MPSC) issued an order against the Company but argued that it appealed the decision of the Maryland Commission, that the MPSC determination was not final yet, and that the MPSC determination was not yet sustained by Maryland's courts. The company also contended that the alleged violations of Maryland rules had no relation to New York rules and regulations.<sup>17</sup> Finally, SmartEnergy argued that Staff cannot rely solely on its conduct outside of New York State<sup>18</sup> and that, under the circumstances, denial of eligibility is a disproportionate remedy.<sup>19</sup> In short, SmartEnergy contends that the Commission must find the Company eligible to operate in the retail energy market and service energy consumers.

#### STANDARD

Pursuant to the UBP and Commission orders, an ESCO that seeks to provide commodity service to customers in New York must submit an application for eligibility to Staff. Thereafter, Staff reviews the application and makes an initial determination as to the applicant's likelihood of compliance with the UBP if the ESCO were deemed eligible to operate in the

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<sup>15</sup> Id., at 3.

<sup>16</sup> Id., at 4-5.

<sup>17</sup> Id., at 5-7.

<sup>18</sup> Id., at 7-10.

<sup>19</sup> Id., at 10-11.

state.<sup>20</sup> In the event that Staff determines that the ESCO applicant is not likely to comply with the UBP if it were deemed eligible, Staff may recommend to the Commission that the ESCO's application be denied.<sup>21</sup> Where Staff recommends that an applicant be denied eligibility, the ESCO applicant is afforded an opportunity to provide the Commission with a rebuttal to Staff's recommendation, and in support of its application, before the Commission renders a final eligibility determination.<sup>22</sup>

The Commission has, for several years, taken concerted action to improve, strengthen, and police the retail energy market in which ESCOs operate and protect consumers from opaque, confusing, or deceptive practices by companies.<sup>23</sup> The Commission undertook these actions because the retail energy market "had not evolved as originally intended and, more importantly, was not providing sufficient energy-related benefits for customers."<sup>24</sup> In particular, the Commission had concerns regarding "reports of customer abuses in the retail access market, including 'overcharging,' and the 'unacceptably high' complaint rate for ESCOs, as well as the lack of innovation with respect to energy efficiency and energy management services."<sup>25</sup>

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<sup>20</sup> UBP Section 2.C.1.

<sup>21</sup> UBP Section 2.C.4.

<sup>22</sup> UBP Section 2.C.5.

<sup>23</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Resetting Retail Energy Markets and Establishing Further Process (issued February 23, 2016), at 2.

<sup>24</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (issued December 12, 2019), at 3.

<sup>25</sup> Id., at 3, 12.

The Commission issued the December 2019 Order to address these and other concerns.<sup>26</sup>

In its December 2019 Order, the Commission adopted several reforms to address deficiencies in the retail energy market. Among these reforms, the Commission adopted stricter eligibility requirements in order to “[e]nhanc[e] the quality and trustworthiness of market participants” and, “in turn, reduce the exposure to risk for customers and improve confidence in the marketplace.”<sup>27</sup> These stricter eligibility requirements directed ESCOs to disclose more information on their applications for eligibility.<sup>28</sup> The December 2019 Order also provided that “[t]he Commission will retain discretion to consider complaint history in other states as a basis for denying or withdrawing ESCO eligibility”<sup>29</sup> and directed and empowered Staff to recommend that the Commission deny an ESCO’s application for eligibility “when [Staff] believes an applicant is unqualified for eligibility.”<sup>30</sup> Finally, the December 2019 Order directed ESCOs then-operating in New York to resubmit applications for eligibility to be reviewed by Staff pursuant to the new eligibility criteria.<sup>31</sup>

#### DISCUSSION

##### GENERAL BUSINESS LAW Section 349-d(11)

SmartEnergy argues that the Commission must conduct a statutory analysis of General Business Law Section 349-d(11) before the Commission can consider an ESCO’s out-of-state

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<sup>26</sup> Id.

<sup>27</sup> Id., at 22.

<sup>28</sup> Id.

<sup>29</sup> Id., at 24.

<sup>30</sup> Id., at 28.

<sup>31</sup> Id., at 28-29.

conduct to deny its eligibility.<sup>32</sup> SmartEnergy further argues that General Business Law Section 349-d(11) limits the authority of the Commission to revoke or exclude ESCOs because of out-of-state conduct of the subject ESCO or its affiliates.<sup>33</sup>

Because SmartEnergy has raised General Business Law Section 349-d(11) as a limit to the Commission's authority to consider its out-of-state conduct, the Commission will analyze that statutory provision. As the Court of Appeals has explained, "when presented with a question of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the legislature."<sup>34</sup> The "clearest indicator of legislative intent is the statutory text" and so "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof."<sup>35</sup> Where a statute is ambiguous, recourse may be had to legislative history.<sup>36</sup> A statute is ambiguous if it lends itself to more than one reasonable interpretation.<sup>37</sup>

General Business Law Section 349-d(11) states:

"Nothing in this section shall be deemed to limit any authority of the public service commission or the Long Island power authority, which existed before the effective date of this section, to limit, suspend or revoke the eligibility of an energy services company to sell or offer for sale any energy services for violation of any provision of law, rule, regulation or

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<sup>32</sup> SmartEnergy Letter in Opposition, at 7.

<sup>33</sup> Id.

<sup>34</sup> Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency, 34 N.Y.3d 184, 191 (2019) (internal brackets and quotation marks omitted).

<sup>35</sup> Id.

<sup>36</sup> Matter of DCH Auto v. Town of Mamaroneck, 38 N.Y.3d 278, 292 (2022).

<sup>37</sup> Id.

policy enforceable by such commission or authority.”

SmartEnergy contends that a plain reading of this section limits the authority of the Commission “to revoke an ESCO’s eligibility for violations of laws, rules, regulation or policies of another state - which the Commission cannot, itself, enforce.”<sup>38</sup> The key phrase, in SmartEnergy’s reading, is “enforceable by such commission or authority.”<sup>39</sup> In SmartEnergy’s reading of the statute, to read it as permitting the Commission to consider out-of-state conduct would amount to the Commission de facto regulating out-of-state conduct of ESCOs and their affiliates.<sup>40</sup>

The Commission does not share the view that a “plain reading” of General Business Law Section 349-d(11) limits the authority of the Commission to deny an ESCO’s application for eligibility for out-of-state conduct. The Legislature expressly provided that this section is not a limitation on the existing authority of the Commission.<sup>41</sup> SmartEnergy’s reading of this section to limit the Commission’s authority contradicts the express language of the section. Moreover, the Commission is not suspending or revoking SmartEnergy’s eligibility - rather, the Commission is declining to grant SmartEnergy’s eligibility application.

In addition, there is no indication that the Legislature addressed the Commission’s authority to consider out-of-state ESCO conduct in eligibility proceedings in General Business Law Section 349-d(11). By its own terms, General Business Law Section 349-d(11) addresses only the Commission’s

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<sup>38</sup> SmartEnergy Letter in Opposition, at 9.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Gen. Bus. Law Section 349-d(11).

power “to limit, suspend or revoke the eligibility of an [ESCO] to sell or offer for sale any energy services for violation of any provision of law, rule, regulation or policy enforceable by [the Commission].” The phrase “enforceable by [the Commission]” does not exclude consideration of out-of-state ESCO conduct. It means only what it says – that the Legislature sought to preserve existing Commission authority to limit, suspend, or revoke the eligibility of an ESCO to sell energy services for violation of Commission-enforceable rules. There is no indication that the Legislature sought to compel the Commission to admit all ESCO applicants to the New York market. Moreover, the Commission’s ability to ask ESCOs about out-of-state conduct, an ability acknowledged by SmartEnergy,<sup>42</sup> would be rendered useless without the power to act on that information.<sup>43</sup>

SmartEnergy’s argument that the Legislature’s reference to laws, rules, regulations, or polices enforceable by the Commission excludes out-of-state conduct is an argument from negative inference. Such arguments by negative inference are disfavored, “especially in the face of a broad delegation of appropriate discretion and authority designed to effect the stated legislative goals . . . .”<sup>44</sup> Here, the Commission possesses broad authority to regulate the ESCO market and the eligibility of ESCOs to access utility distribution infrastructure.<sup>45</sup> The

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<sup>42</sup> SmartEnergy Letter in Opposition, at 7.

<sup>43</sup> Id.; Matter of Howell v. Benson, 90 A.D.2d 903, 903-04 (3d Dept. 1982), appeal denied 58 N.Y.2d 611 (1983).

<sup>44</sup> Matter of Citizens for an Orderly Energy Policy, Inc. v. Cuomo, 78 N.Y.2d 398, 412 (1991), rearg. denied 79 N.Y.2d 851 (1992); Matter of City of New York v. State of N.Y. Commn. on Cable Tel., 47 N.Y.2d 89, 92-93 (1979).

<sup>45</sup> Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 33 N.Y.3d 336, 351 (2019), rearg. denied 33 N.Y.3d 1130 (2019).

Commission's authority to consider out-of-state ESCO conduct furthers the legislative objective of General Business Law Section 349-d to ensure that participants in the retail energy market will abide by consumer protection rules.<sup>46</sup> The Commission must be able to monitor, administer, and police the market for energy service companies and decide which are eligible to market to New York customers.<sup>47</sup> The plain language of General Business Law Section 349-(d) (11) does not limit this broad authority and the Legislature evinced no intent to do so in the plain language of the statutory text.<sup>48</sup>

Furthermore, an examination of the legislative history of General Business Law Section 349-d demonstrates that the Legislature intended to increase consumer protections in the ESCO market, not restrict the Commission's ability to protect consumers. The Assembly sponsor of this legislation stated that the purpose of adding this section to the General Business Law is "to protect consumers from deceptive practices in the marketing and sale of energy services."<sup>49</sup> The Sponsor Memo provided that the bill's purpose was to "establish[] important consumer safeguards in the marketing and offering of contracts for energy services to residential and small business

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<sup>46</sup> New York Bill Jacket, 2010 A.B. 1558, Ch. 416.

<sup>47</sup> Matter of Atlantic Power & Gas LLC v. New York State Pub. Serv. Commn., 203 A.D.3d 1352, 1355 (3d Dept. 2022) (acknowledging the Commission's "statutory authority to supervise all gas and electric companies operating in New York and overseeing said companies to ensure that they are in compliance with all regulations").

<sup>48</sup> Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency, 34 N.Y.3d 184, 191 (2019) ("[T]he clearest indicator of legislative intent is the statutory text ....") (internal quotation marks omitted).

<sup>49</sup> N.Y. Bill Jacket, 2010 A.B. 1558, Ch. 416.

customers.”<sup>50</sup> The Commission’s ability to exclude or revoke ESCO eligibility based upon out-of-state conduct furthers those consumer protection goals.

SmartEnergy also contends that because General Business Law Section 349-d(11) does not expressly allow for consideration of out-of-state conduct, the Commission is not permitted to consider out-of-state conduct in this proceeding.<sup>51</sup> While SmartEnergy cites to statutory provisions that expressly allow for New York agencies to consider out of state conduct, that is not the end of the inquiry.<sup>52</sup> In the somewhat analogous context of licensing, “the general, long-settled law is that a licensing official has implicit discretion to pass upon the fitness of an applicant . . . . Prior violations of law have often been viewed as relevant on the issue of a license applicant’s fitness.”<sup>53</sup> Moving to the ESCO context, the Commission seeks to protect the retail market, which includes policing which ESCOs may enter that market, access utility-owned distribution infrastructure, and interact with energy customers.<sup>54</sup> In other words, the Commission may consider such circumstances as are not forbidden to it by law in deciding whether to grant an

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<sup>50</sup> Id.

<sup>51</sup> SmartEnergy Letter in Opposition, at 9.

<sup>52</sup> Id.

<sup>53</sup> Matter of Olsen v. Town Bd. of Town of Saugerties, 161 A.D.2d 1077, 1078 (3d Dept. 1990).

<sup>54</sup> A determination that an ESCO is eligible to access privately owned utility distribution systems and thereby participate in the New York retail energy market is not equivalent to the grant of a property right or license. Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 33 N.Y.3d 336, 351 (2019), rearg. denied 33 N.Y.3d 1130 (2019); Matter of Atlantic Power & Gas LLC v. New York State Pub. Serv. Commn., 203 A.D.3d 1352, 1354-55 (3d Dept. 2022); In the Matter of SunSea Energy LLC v. New York State Pub. Serv. Commn., 229 A.D.3d 1021 (3d Dept. 2024).

application for eligibility, including the applicant's record of compliance in other states.<sup>55</sup>

This is not to say that there are no limits to the Commission's consideration of out-of-state conduct by an ESCO applicant. To be sure, courts have placed some limitations the discretion an agency may exercise in application proceedings.<sup>56</sup> However, where "far-reaching control has been delegated to a commission charged with implementing a pervasive regulatory program" and the agency has acted within that broad power to regulate in the public interest, courts have upheld a commission's action.<sup>57</sup>

To the extent that SmartEnergy cites the Commission's *Empire Exploration* decision as recognition of a limit upon the Commission's ability to consider out-of-state conduct, such reliance is misplaced.<sup>58</sup> That decision is narrowly focused upon the interpretation of the Public Service Law for the purpose of deciding whether Empire Exploration's out-of-state natural gas activity placed it within a statutory exemption to regulation by the Commission, a situation quite dissimilar from the instant proceeding where the Commission must determine whether to

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<sup>55</sup> Anastasio v. Waterfront Commn. of New York Harbor, 49 N.Y.2d 973, 974 (1980); Matter of Bologna v. O'Connell, 7 N.Y.2d 155, 159-60 (1959); Matter of Barton Trucking Corp. v. O'Connell, 7 N.Y.2d 299, 307 (1959).

<sup>56</sup> Matter of Svenningsen v. Passidomo, 62 N.Y.2d 967, 969 (1984); Matter of Bologna v. O'Connell, 7 N.Y.2d 155, 159-60 (1959); Matter of While You Wait Photo Corp. v. Department of Consumer Affairs of City of N.Y., 87 A.D.2d 46, 51-52 (1st Dept. 1982), appeal dismissed 57 N.Y.2d 957.

<sup>57</sup> Matter of City of New York v. State of N.Y. Commn. on Cable Tel., 47 N.Y.2d 89, 92 (1979); Greater New York Taxi Ass'n v. New York City Taxi and Limousine Commn., 121 A.D.3d 21, 28 (1st Dept. 2014), affd. 25 N.Y.3d 600 (2015).

<sup>58</sup> SmartEnergy Letter in Opposition, at 8-9.

approve an application for eligibility to operate in New York.<sup>59</sup> There is no analogous statutory or regulatory exemption for ESCO applications. Indeed, this Commission has previously examined out-of-state conduct in other ESCO eligibility applications.<sup>60</sup>

Although the Commission does not rely on the Ohio and Illinois stipulations of settlement, it rejects SmartEnergy's argument that Staff could not consider them. Staff appropriately looked for and considered complaints in other states, including those that gave rise to settlement agreements between SmartEnergy and regulatory authorities in those states, when it recommended that the Commission deny SmartEnergy's application for eligibility because of a material pattern of complaints in other jurisdictions.<sup>61</sup> SmartEnergy contends that the stipulations of settlement cannot be the basis of a decision to deny SmartEnergy's application for eligibility to operate in New York.<sup>62</sup> Again, the Commission does not rely on these two settlement agreements as the basis of this Order, finding that the Maryland Public Service Commission order and subsequent

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<sup>59</sup> Case 91-G-0937, In re Empire Exploration, Inc., Order Concerning Exemptions (issued Nov. 3, 1993) 1993 WL 597480, \*3.

<sup>60</sup> See, e.g., Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Confirming Denial of Josco Energy Corporation's Eligibility Application (issued June 21, 2022), at 17-18.

<sup>61</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, SmartEnergy Holdings, LLC Eligibility Review (dated September 13, 2022); Case 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Confirming Denial of Josco Energy Corporation's Eligibility Application (issued June 21, 2022), at 17-18; Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (issued December 12, 2019), at 24.

<sup>62</sup> SmartEnergy Letter in Opposition, at 4-5.

Maryland court orders provide a sufficient basis for denial of SmartEnergy's application for eligibility. As the weight that can be given to stipulations of settlement has been raised by Staff and disputed by SmartEnergy, the Commission will address it for future cases.

Illinois and Ohio

Staff noted and considered the stipulations of settlement entered into between SmartEnergy and regulatory authorities in Ohio and Illinois. We appreciate and acknowledge Staff's thoroughness in identifying the Ohio and Illinois regulatory actions. Contrary to SmartEnergy's arguments, this was proper. Here, as stated above, the Commission does not rely upon those two stipulations, finding instead that the Maryland regulatory action and subsequent court orders are sufficient for a determination to deny SmartEnergy's application for eligibility.

SmartEnergy argues that res judicata and collateral estoppel preclude Staff and Commission consideration of the underlying complaints in the Ohio and Illinois stipulations of settlement.<sup>63</sup>

Res judicata stands for the proposition that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy."<sup>64</sup> For purposes of res judicata, "[a] stipulation of settlement, which discontinues a claim with prejudice, is subject to the doctrine of res judicata."<sup>65</sup>

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<sup>63</sup> Id.

<sup>64</sup> Matter of State v. Seaport Manor A.C.F., 19 A.D.3d 609, 610 (2d Dept. 2005).

<sup>65</sup> Id.

Collateral estoppel is "a narrower species of res judicata, [which] precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same."<sup>66</sup> Generally, "the doctrines of res judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law."<sup>67</sup>

For purposes of identifying those in privity with the parties to a prior action, courts have examined several relationships. "[T]he term privity ... denominates a rule ... to the effect that under the circumstances, and for the purposes of the case at hand, a person may be bound by a prior judgment to which he was not a party of record. It includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action."<sup>68</sup>

Here, it is undisputed that neither Staff nor the Commission were parties to the Illinois or Ohio settlements. SmartEnergy also does not argue that either Staff or the Commission are in privity with the Illinois Attorney General,

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<sup>66</sup> Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984).

<sup>67</sup> Id., at 499 (internal citations and italics omitted).

<sup>68</sup> Bay Shore Family Partners v. Foundation of Jewish Philanthropies of Jewish Fedn. of Greater Fort Lauderdale, 270 A.D.2d 374, 375 (2d Dept. 2000) citing Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 277 (1970).

Public Utilities Commission of Ohio, or SmartEnergy itself. SmartEnergy states only that "Staff has not explained why it should be allowed to disregard a stipulation agreement that was entered into to the satisfaction of another state regulatory agency. Simply put, the PUCO stipulation should be given preclusive effect in this matter."<sup>69</sup>

It is the Commission's view that Staff's consideration of the stipulations of settlement, and the circumstances that gave rise to them, is acceptable under current law. Staff's only purpose in considering the allegations in those states was to determine whether a material pattern of complaints is apparent. Although relatively few authorities have dealt with a question of whether the existence of consent orders or stipulations of settlement, and the allegations that gave rise to them, are sufficient for an agency to deny an application, an Administrative Law Judge in the Department of Environmental Conservation, when faced with similar consent orders that did not represent adjudications, stated that "[t]here is no impediment to recognizing consent orders for what they are - agreements which normally embody a compromise."<sup>70</sup> The Department of Environmental Conservation ruling continued: "The existence of a number of consent orders, and multiple consent orders at certain facilities, establishes the likelihood of similar agency engagement in the future. It would not appear to be an abuse of discretion (or arbitrary and capricious) for the commissioner, after assessing his agency's capabilities (as executive as opposed to legislative or judicial function), to conclude that

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<sup>69</sup> SmartEnergy Letter in Opposition, at 4.

<sup>70</sup> In the Matter of the Application of Laidlaw Environ. Services, Inc., and BDT, Inc. for a Modification of existing Hazardous Waste Facility and Air Permits, etc., Rulings, Interim Hearing Report, and Order of Referral, 1994 WL 1735245, \*15 (March 21, 1994).

the risks and burdens are too great for DEC to assume, and deny approval of the transfer on that basis.”<sup>71</sup> Indeed, the Commission itself has considered debarments in other jurisdictions in the context of nuclear decommissioning.<sup>72</sup> Nor would the Commission be the sole regulatory authority to consider an ESCO’s out-of-state settlements, enforcement orders, or complaints in its decision on eligibility.<sup>73</sup>

Similarly, New York courts permit the consideration of consent orders and settlement agreements in limited circumstances. The rules of evidence prohibit the use of compromise agreements to prove the underlying facts of liability or the value of claims, but permit the use of consent orders and

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<sup>71</sup> Id.

<sup>72</sup> Case 19-E-0730, Joint Petition of Entergy Nuclear Indian Point 2, LLC; Entergy Nuclear Indian Point 3, LLC; and Nuclear Asset Management Company, LLC for a Declaratory Ruling Disclaiming Jurisdiction over or Abstaining from Review of the Proposed Transfers or, in the Alternative, an Order approving the Proposed Transfers Pursuant to Section 70 of the New York Public Service Law, Order Asserting Jurisdiction and Approving and Adopting Joint Proposal (issued May 19, 2021), at 33-37.

<sup>73</sup> D.P.U. Docket 23-CS-01, Re: Tomorrow Energy Corp., Letter Order on Application (issued December 8, 2023, by the Massachusetts Department of Public Utilities), 2023 WL 8622278; Docket 19-08-21, Application of Residents Energy, LLC for a Connecticut Electric Supplier License, Decision Granting Electric Supplier License (issued February 26, 2020, by the Connecticut Public Utilities Regulatory Authority), 2020 WL 11027621, \*1; Case 18-1837, Application for Certificate of Service Authority Under Section 16-115 of the Public Utilities Act, In the Matter of Astral Energy LLC (issued March 6, 2019, by the Illinois Commerce Commission), 2019 WL 1150588, \*5; Docket A-2017-2635016, Application of Interactive Energy Group LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Broker/Marketer, Order (issued March 1, 2018, by the Pennsylvania Public Utility Commission), 2018 WL 1183163, \*2.

settlement agreements for other purposes.<sup>74</sup> Staff did not err by identifying and considering the settlement agreements in Ohio and Illinois as evidence that SmartEnergy has been the subject of regulatory investigations and allegations in other states, and the Commission acknowledges that SmartEnergy admitted no wrongdoing in those settlement agreements, nor was any adjudication on the merits ever made.<sup>75</sup>

### Maryland

The Commission now turns to the Maryland Public Service Commission proceeding against SmartEnergy, which forms the basis of this decision. SmartEnergy argues that "Staff's suggestion that SmartEnergy's alleged misconduct in Maryland has been subject to an 'affirmance' on judicial review is misleading" because "this case is currently pending on appeal before the Maryland Court of Special Appeals."<sup>76</sup> SmartEnergy next argues that the Maryland proceeding involves a novel interpretation of the Maryland Telephone Solicitations Act (MTSA).<sup>77</sup> In addition, SmartEnergy argues that the actions at issue in Maryland would not be violations of the UBP were they to occur in New York.<sup>78</sup> Finally, SmartEnergy argues that the

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<sup>74</sup> Fed.R.Evid. 408; CPLR Section 4547; 82 Retail LLC v. Eighty Two Condominium, 117 A.D.3d 587, 589 (1st Dept. 2014); U.S. v. Gilbert, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied 456 U.S. 946 (1982).

<sup>75</sup> SmartEnergy Letter in Opposition, at 4-5.

<sup>76</sup> Id., at 5; A 2022 ballot initiative in the state of Maryland changed the name of this court from the "Court of Special Appeals of Maryland" to the "Appellate Court of Maryland." This Order will use the new name to refer to the court that issued this decision.

<sup>77</sup> SmartEnergy Letter in Opposition, at 6.

<sup>78</sup> Id.

relatively small number of complaints at issue in Maryland should not form a basis to deny eligibility in New York.<sup>79</sup>

SmartEnergy's appeal from the decision of the MPSC has since been resolved. SmartEnergy appealed from the MPSC Order to the Circuit Court for Montgomery County, which affirmed the MPSC Order.<sup>80</sup> SmartEnergy then appealed from the Circuit Court's decision to the Appellate Court of Maryland, which affirmed both the Circuit Court and the MPSC.<sup>81</sup> SmartEnergy sought a writ of certiorari from the Supreme Court of Maryland, which granted SmartEnergy's petition for certiorari to consider: (1) whether the Appellate Court of Maryland erred in finding that the MPSC had jurisdiction to interpret and enforce the MTSA; (2) whether the MPSC erred in determining that the MTSA applied to SmartEnergy's electricity marketing and sales practices; (3) whether the MPSC's decision was supported by substantial evidence; and (4) whether the MPSC's remedies against SmartEnergy were arbitrary or capricious.<sup>82</sup>

Of particular interest to the Commission, the Supreme Court of Maryland, that state's highest court, rejected SmartEnergy's contentions that the record lacked substantial evidence to support the MPSC's findings.<sup>83</sup> With regard to the postcards SmartEnergy sent to prospective customers, the Supreme Court of Maryland found that the record contained substantial evidence to support the MPSC's finding that "SmartEnergy

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<sup>79</sup> Id., at 7.

<sup>80</sup> Matter of Smart Energy Holdings, LLC, 486 Md. 502, 544-45 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>81</sup> Id.

<sup>82</sup> Id., at 546-47.

<sup>83</sup> Following the Company's October 14, 2022 submission, the record does not appear to reflect updates by the Company about the subsequent rulings by the Maryland Appellate Court and Supreme Court.

designed [its] postcards to misleadingly appear to have been sent by the customers' utility."<sup>84</sup> The record also contained substantial evidence to support the MPSC's finding that "the postcards failed to explain the basic facts that SmartEnergy is a third-party energy supplier selling electricity, and SmartEnergy was soliciting the consumer to switch energy suppliers from the consumer's existing utility to SmartEnergy."<sup>85</sup> Finally, the Supreme Court of Maryland also held that the record contained substantial evidence to support the MPSC's finding that "the postcards failed to provide any limitations or restrictions on SmartEnergy's offer of 'free electricity,' as required to satisfy [Maryland regulations]" and "that the postcards failed to provide the length of service required to qualify or how the 'free month' would be calculated and provided."<sup>86</sup>

The Supreme Court of Maryland upheld the MPSC's finding that SmartEnergy's sales script had the tendency or capacity to mislead or deceive customers. In particular, the Supreme Court of Maryland held that "there is substantial evidence in the record to support the Commission's finding that this portion of the script had the capacity or tendency to mislead customers into believing that the purpose of the recording was solely for quality or training purposes, rather than for purposes of verifying the caller's 'yes' or 'no' response to SmartEnergy's two-question confirmation questionnaire."<sup>87</sup> The Supreme Court of Maryland also found substantial evidence in the record to support the MPSC's finding

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<sup>84</sup> Id., at 566.

<sup>85</sup> Id., at 566-67.

<sup>86</sup> Id., at 567.

<sup>87</sup> Id., at 568.

that the sales script and postcard had the tendency to mislead customers into believing they would remain with their utility company, that the language in the script tended to mislead customers into believing that their electricity rates would not increase from the current rate, and that SmartEnergy's sales agents "failed to always disclose that the restriction on the free month was based upon the customer's seventh month of SmartEnergy's retail supply, which the [MPSC] determined to be a material term."<sup>88</sup>

The Supreme Court of Maryland upheld the remainder of the MPSC's findings, which had also been upheld by both the Circuit and Appellate Courts. These included holding that the record contained substantial evidence for the MPSC's findings that SmartEnergy failed to monitor its sales calls and that "it attempted to thwart customers' efforts to cancel their service."<sup>89</sup>

These findings appear to go beyond a simple difference of interpretation in the MTSA, as SmartEnergy seeks to suggest here.<sup>90</sup> Several of the violations found by the MPSC would be violations of the UBP were they to occur in New York.

SmartEnergy had multiple issues with its contracts in Maryland, as detailed by the MPSC and affirmed by three separate judicial decisions in Maryland courts. First, the MPSC found, and the court affirmed, that SmartEnergy "neither sent its customers a written contract to sign and return, nor provided the customers with a contract summary on the form provided by

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<sup>88</sup> Id., at 570.

<sup>89</sup> Id., at 571.

<sup>90</sup> SmartEnergy Letter in Opposition, at 5-6.

the Commission” in the context of telephone solicitations.<sup>91</sup> According to the Maryland trial court, “SmartEnergy failed to provide its 32,000 enrolled customers with contracts or contract summaries as required by [Maryland laws and regulations].”<sup>92</sup> This is similar to the New York UBP requirement that agreements reached as a result of telephone solicitation must be provided to the customers in written form with a Customer Disclosure Statement, which must “state in plain language the terms and conditions” of the sales agreement.<sup>93</sup> The apparent failure to provide any contract summaries, as noted by the Maryland courts, presents concerns for the Commission regarding SmartEnergy’s ability to abide by New York’s similar UBP requirements. The Commission acknowledges that SmartEnergy and the MPSC disputed whether this requirement applied to SmartEnergy, but this was not the only violation found by the MPSC.

The allegations made in Maryland regarding the activity of SmartEnergy’s sales agents are also troubling. The MPSC detailed instances where sales agents obfuscated the relationship between the consumer’s utility and SmartEnergy. As the Appellate Court of Maryland wrote: “[D]uring the sales calls, the representatives did not inform customers that SmartEnergy was not affiliated with their then-current utility

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<sup>91</sup> In the Matter of SmartEnergy Holdings, LLC, 256 Md.App. 20, 51 (Md.App. 2022), affd 486 Md. 502 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>92</sup> In the Matter of SmartEnergy Holdings, LLC d/b/a SmartEnergy, Civil Action No. 485338 Circuit Court, slip op. (Montgomery County, dated November 29, 2021), at 7, affd 256 Md.App. 20 (Md.App. 2022), affd 486 Md. 502 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>93</sup> UBP Section 5.B.4.b; UBP Section 5 Att. 1(B).

provider.”<sup>94</sup> In response to customer confusion regarding the relationship between SmartEnergy and the customer’s utility, “SmartEnergy representatives did not provide any distinction, but instead dodged the questions.”<sup>95</sup> The Appellate Court of Maryland also noted that SmartEnergy sales agents failed to clarify any distinction between SmartEnergy and a similarly named program from Baltimore Gas and Electric, a local utility; failed to affirmatively disclose that the customer would be required to leave the utility; failed to disclose the restrictions to qualify for the free month of electricity, specifically that the free month was only after six months of SmartEnergy’s service; and misled customers with the suggestion that, by opting into the six months of price protection, the price would not increase from their current rate.<sup>96</sup> The Supreme Court of Maryland agreed with the Appellate Court of Maryland, finding substantial evidence in the record to support the MPSC’s findings that SmartEnergy’s sales scripts and sales agents engaged in deceptive and misleading conduct.<sup>97</sup>

These activities of SmartEnergy’s sales agents would constitute violations of the UBP were they to occur in New York. The UBP prohibits ESCOs from “engag[ing] in misleading or deceptive conduct as defined by State or federal law, or by Commission rule, regulation, or Order.”<sup>98</sup> The UBP also prohibits ESCOs from “represent[ing] that the ESCO marketing

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<sup>94</sup> In the Matter of SmartEnergy Holdings, LLC, 256 Md.App. 20, 53-54 (Md.App. 2022) affd 486 Md. 502 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>95</sup> Id., at 53.

<sup>96</sup> Id., at 51-57.

<sup>97</sup> Matter of Smart Energy Holdings, LLC, 486 Md. 502, 567-571 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>98</sup> UBP Section 10.C.4.a.

representative is an employee or representative or acting on behalf of a distribution utility.”<sup>99</sup> The Supreme Court of Maryland specifically noted that substantial evidence in the record supported the conclusion that SmartEnergy’s postcards could and, in some cases, did lead customers to believe that the offer came from the utility and that SmartEnergy’s sales representatives further obscured the relationship between SmartEnergy and the local utility.<sup>100</sup> That would be a clear violation of the UBP provisions forbidding such conduct were they to occur in New York and such conduct has given rise to Commission orders against other ESCOs.<sup>101</sup>

SmartEnergy sales representatives engaged in other misleading conduct that would, in New York, violate the UBP’s prohibition on false and misleading conduct. The UBP prohibits ESCOs from “mak[ing] false or misleading representations including misrepresenting rates or savings offered by ESCOs.”<sup>102</sup> The Supreme Court of Maryland found substantial evidence to support the findings that SmartEnergy’s sales script “had the tendency to mislead customers into thinking that the price they

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<sup>99</sup> UBP Section 10.C.2.c.

<sup>100</sup> Matter of Smart Energy Holdings, LLC, 486 Md. 502, 569-70 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>101</sup> See, e.g., Case 17-M-0552, Proceeding on Motion of the Commission to Seek Consequences against MPower Energy LLC for Violations of the Uniform Business Practices, Order Instituting Proceeding and to Show Cause (issued October 20, 2017), at 7-8; Case 16-M-0434, Proceeding on Motion of the Commission to Seek Consequences against Marathon Energy Corporation for Violations of the Uniform Business Practices, Order Instituting Proceeding and to Show Cause (issued September 16, 2016), at 12; Case 13-E-0062, Proceeding on Motion of the Commission to Investigate the Marketing Practices of Liberty Power Holdings LLC, Order Instituting Proceeding and to Show Cause (issued March 14, 2013), at 9.

<sup>102</sup> UBP Section 10.C.4.b.

were paying for electricity would not increase from the *current rate*,"<sup>103</sup> "failed to always disclose that the restriction on the free month [of electricity] was based upon the customer's seventh month of SmartEnergy's retail supply",<sup>104</sup> and misled customers into believing that the call was being recorded for training purposes instead of compliance with the law.<sup>105</sup> The New York UBP prohibits such conduct, which has been the source of Commission orders in the past.<sup>106</sup>

ESCOs must honor customer's cancellation requests in New York. The UBP specifically requires "[a]n ESCO contacted by the customer shall, within one business day, process the customer's request to return to full utility service."<sup>107</sup> In Maryland, SmartEnergy sales representatives "frequently made it difficult for customers to cancel" SmartEnergy service.<sup>108</sup> Sales representatives "told customers that their reasons for cancelling were insufficient, customers often had to go through numerous sales representatives to process cancellations, and many expressed confusion throughout the cancellation process."<sup>109</sup>

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<sup>103</sup> Matter of Smart Energy Holdings, LLC, 486 Md. 502, 570 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>104</sup> Id.

<sup>105</sup> Id.

<sup>106</sup> Case 20-M-0446, Proceeding on Motion of the Commission to Seek Consequences against Josco Energy Corp. for Violations of the Uniform Business Practices, Order Revoking Josco Energy Corp.'s Eligibility to Serve Customers in New York (issued May 18, 2021), at 6; Case 13-M-0139, Proceeding on Motion of the Commission to Investigate the Marketing Practices of Family Energy, Inc., Order Instituting Proceeding and to Show Cause (issued April 22, 2013), 10-12.

<sup>107</sup> UBP Section 5.H.1.

<sup>108</sup> In the Matter of SmartEnergy Holdings, LLC, 256 Md.App. 20, 56 (Md.App. 2022) affd 486 Md. 502 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>109</sup> Id.

The Supreme Court of Maryland upheld these findings.<sup>110</sup> Again, the Commission has issued orders regarding ESCO attempts to thwart customer cancellations in the past.<sup>111</sup>

Finally, the Supreme Court of Maryland found substantial evidence to support the Commission's findings that SmartEnergy failed to monitor its sales calls as required.<sup>112</sup> While this does not appear to have a direct analogue in the UBP, it does present concerns that SmartEnergy may not act to "ensure that the training of [its] marketing representatives" is up to standard and, thereby, maintained.<sup>113</sup>

As mentioned previously, the total number of complaints in Maryland is not necessarily the relevant inquiry for approval of an ESCO application. Rather, the key inquiry is whether the complaints constitute a "material pattern," which is defined as "a continuing volume of the same category of complaints, such as slamming or deceptive marketing" in the states in which SmartEnergy operates.<sup>114</sup> Moreover, while 34 complaints from Maryland consumers formed the beginning of the MPSC investigation, the finding of that investigation was that SmartEnergy engaged in a pattern and practice of violating

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<sup>110</sup> Matter of Smart Energy Holdings, LLC, 486 Md. 502, 571 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>111</sup> See, e.g., Case 16-M-0433, Proceeding on Motion of the Commission to Seek Consequences against ABC Energy, LLC for Violations of the Uniform Business Practices, Order Instituting Proceeding and to Show Cause (issued September 16, 2016), at 13.

<sup>112</sup> Matter of Smart Energy Holdings, LLC, 486 Md. 502, 571 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>113</sup> UBP Section 10.B.1.

<sup>114</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, et al., Order Resetting Retail Energy Markets and Establishing Further Process (issued February 23, 2016), at 10-11.

numerous Maryland regulations.<sup>115</sup> At the same time, and in addition to a material pattern of complaints, the Commission also notes that the MPSC and Maryland courts determined that SmartEnergy did not comply with applicable Maryland rules on numerous occasions.<sup>116</sup>

The Commission acknowledges that Staff has received no complaints from SmartEnergy's customers in New York.<sup>117</sup> The Commission must balance this consideration with SmartEnergy's conduct in Maryland that has given rise to regulatory investigations and actions against it there. In light of the findings that prompted the December 2019 Order, the Commission finds that SmartEnergy's pattern of conduct in Maryland, is concerning enough to warrant denial of SmartEnergy's application for eligibility.<sup>118</sup> The Commission's authority to make this finding is explicitly contemplated in the UBP and in the December 2019 Order that prompted this proceeding.<sup>119</sup>

#### CONCLUSION

The Commission has long sought to protect consumers. The Commission implemented the review of ESCO eligibility in

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<sup>115</sup> In the Matter of SmartEnergy Holdings, LLC, 256 Md.App. 20, 33-34, 54-55 (Md.App. 2022), affd 486 Md. 502 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>116</sup> See, e.g., In the Matter of SmartEnergy Holdings, LLC, 486 Md. 502, 524-541, 559-573 (Md. 2024), reconsideration denied (April 18, 2024).

<sup>117</sup> SmartEnergy Letter in Opposition, at 3.

<sup>118</sup> The Maryland incidents would also provide a sufficient quantum of complaints or violations to inform our review -- and to support the denial of eligibility.

<sup>119</sup> UBP Section 2.C.4; Case 15-M-0127, et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (issued December 12, 2019), at 24.

2019.<sup>120</sup> The review is the result of a process that began in 2016 to take a hard look at the retail electricity markets serving mass-market customers.<sup>121</sup> The Commission responded to “specific concerns about reports of customer abuses in the retail access market, including overcharging, as well as the lack of innovation with respect to energy efficiency and energy management services.”<sup>122</sup> In requiring every ESCO to reapply for eligibility, the Commission sought to “ensure that only the ESCOs that are prepared to comply with rules and regulations and uphold policy goals and expectations are participating in the retail access market.”<sup>123</sup> In this way, the Commission intended to “[e]nhanc[e] the quality and trustworthiness of market participants” and “in turn, reduce the exposure to risk for customers and improve confidence in the marketplace.”<sup>124</sup> The Commission stated that it would “retain discretion to consider complaint history in other states as a basis for denying or withdrawing ESCO eligibility.”<sup>125</sup> Based upon the regulatory and judicial determinations concerning SmartEnergy’s conduct in Maryland, the Commission is convinced that SmartEnergy would be unlikely to comply with the UBP were it granted eligibility to operate in New York. Accordingly, for the reasons contained in this ruling, the Commission denies the eligibility application.

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<sup>120</sup> Case 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Service Companies, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (issued December 12, 2019).

<sup>121</sup> Id., at 2.

<sup>122</sup> Id., at 3.

<sup>123</sup> Id., at 22.

<sup>124</sup> Id.

<sup>125</sup> Id., at 24.

The Commission orders:

1. SmartEnergy Holdings, LLC's application for eligibility to serve mass-market customers in New York State is denied consistent with the discussion in the body of this Order and with the obligations described in Ordering Clause 2.

2. SmartEnergy Holdings, LLC shall, within 60 days from the effective date of this Order, return each of its mass-market customers to full distribution utility service in the utility service territories it operates, with transfers occurring on the customers' regularly scheduled meter readings dates.

3. SmartEnergy Holdings, LLC shall, at least 15 calendar days before the effective date of the transfer, notify each customer in writing of the planned return to full utility service, as required by Section 5.H.4 of the Uniform Business Practices.

4. To further facilitate compliance, the distribution utilities in whose service territories SmartEnergy Holdings, LLC operates - Consolidated Edison Company of New York, Inc., KeySpan Gas East Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corporation, New York State Electric & Gas Corporation, Central Hudson Gas & Electric Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, and Long Island Power Authority - shall, as of 60 days from the effective date of this Order, switch any mass-market customers who remain with SmartEnergy Holdings, LLC to full distribution utility service.

5. The Secretary is directed to provide notification of this Order to each distribution utility included within the scope of Ordering Clause 4, above.

6. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an

extension must be in writing, must include a justification for the extension, and must be filed at least five days prior to the affected deadline.

7. These proceedings are continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS  
Secretary