STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

COMMENTS OF AMERICAN POWER & GAS LLC AND KIWI ENERGY NY LLC ON PROPOSED AMENDMENTS TO THE UNIFORM BUSINESS PRACTICES

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COMMENTS OF AMERICAN POWER & GAS LLC AND KIWI ENERGY NY LLC ON PROPOSED AMENDMENTS TO THE UNIFORM BUSINESS PRACTICES

Recently, New York amended General Business Law (GBL) § 349-d to require energy services companies (ESCOs) to (1) obtain a customer's express consent for "[a] change in price or a change to or from fixed or variable pricing,"[1] and (2) provide certain information to customers at the time of renewal.[2] In order to implement these changes to GBL § 349-d, Department of Public Service Staff (Staff) issued a proposal (the Staff Proposal)[3] to modify certain provisions in the Uniform Business Practices (UBP).[4]

Specifically, Staff proposes to revise UBP, Section 1 to define "material change" as affecting "rates, terms, and conditions of service contained in the customer agreement," which could include "commodity rate, product term, or product type."[5] Staff also proposes defining express consent to be "consent given directly and knowingly by the customer, either verbally, electronically, or in writing, which shall subsequently be maintained by the ESCO in a verifiable format."[6] The Staff Proposal further recommends modifying UBP, Section 2 to require ESCOs to

[1] GBL § 349-d (6).
[2] GBL § 349-d (7) (stating that "(i) the price charged for energy services; (ii) the price it proposes to charge upon renewal; (iii) the price that is charged by the customer's distribution utility; and (iv) information notifying the customer how they may compare past bills with what they would have been charged had they received energy services from their respective distribution utility, including, the internet address of any bill calculator offered by such customer's distribution utility's website").
[3] Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Staff Proposal for Implementing Stronger Price Transparency for Consumers (filed Mar. 26, 2024).
[4] Case 98-M-1343, *supra*, Uniform Business Practices (issued Sept. 18, 2020).
[5] Staff Proposal at 4.
[6] *Id.*

provide sample renewal notices as part of their ESCO applications and provides the revised standard renewal notice.[7] Finally, the Staff Proposal changes UBP, Section 5 to limit the ability to charge termination fees if a customer does not provide consent to a change in price, removes the exemption allowing ESCOs to switch customer's into guaranteed savings products without express consent, and modifies the renewal notice to include the information required by GBL § 349-d (7).

For the reasons noted below, American Power & Gas LLC and Kiwi Energy NY LLC (together, the Companies) respectfully submit these comments in response to the Staff Proposal, requesting that the Public Service Commission (the Commission) confirm that (1) no additional express consent is required for changes in price for which a customer has previously provided consent, (2) customers may enter into continuous variable rate contracts that do not expire or renew on a monthly basis but continue until canceled, and (3) ESCOs may modify the language in the standard renewal notice with review and approval by Staff and provide such notices to customers by electronic means.

I. COMMENTS

As long-term members of the energy retail community, the Companies appreciate the opportunity to submit comments concerning the implementation of GBL § 349-d. The Companies' unique perspectives may assist the Commission in proactively addressing and responding to the approaches and ambiguities presented by the Staff Proposal and, as such, respectfully request clarification and/or confirmation of several items below.

A. A Change In Variable Pricing Should Not Be Considered Material.

In relevant part, GBL §349-d (6) provides that "no material change shall be made in the terms or duration of any contract for the provision of energy services by an ESCO without the

[7] *Id.* at 4 and Attachment B.

express consent of the customer. A change in price or a change to or from fixed or variable pricing shall be deemed to be material." Different from the second sentence of this subsection, "Staff recommends that the definition of what constitutes a material change [in the UBP] be amended to include a change in price as a material change," obligating ESCOs to obtain express consent for changing product pricing *even under* a variable rate agreement.

Not only does the Staff Proposal expand the scope of the statute, but it also frustrates the function of variable rate contracts themselves. Variable rate contracts are specifically constructed to account for potential changes in product pricing, which is expressly conveyed and affirmatively agreed to by the customer at the time of contracting. As such, a change in price during the contract term cannot be "material" since the customer has expressly consented to such fluctuations in price upon engaging with the ESCO. As already contemplated by the Commission in a previous order, "the renewal of a variable rate product that guarantees savings … provides an exception to the affirmative consent requirement," meaning that the requirement to obtain customer consent for "any change to a customer's rate or product or service type" was limited to those contracts switching from *fixed* to variable rates.[8] The same concept should apply here, allowing the customer's consent to remain in effect for the entirety of the contract, for all category of variable customer products, including renewable and home warranty products, as agreed at the time of contracting; otherwise, the Commission would, practically, permit the customer—a signatory to an agreement—to breach the contract every month until termination. This instability could also significantly increase the costs of service and potentially eliminate guaranteed savings products from the market, which have previously been determined by the Commission to be a beneficial

[8] *See* Case 15-M-0127, *In the Matter of Eligibility Criteria for Energy Service Companies, Order On Rehearing, Reconsideration, And Providing Clarification* (issued Sept. 18, 2020), at 4.

product in the marketplace.[9] For these reasons, the Commission should reject Staff's assertion that affirmative consent is needed for price changes within variable rate contracts.

B. Additional Customer Consent Is Not Required Where A Customer Consents To A Rate Change At The Time Of Contracting.

Staff proposes to change the UBP definition of material change to encompass "any change in price, including a price change pursuant to a variable rate agreement or any changes in the terms used to determine such price."[10] The Staff Proposal, however, does not clearly identify that customers can provide consent for *future* rate changes at the time they enter into the contract.

Indeed, ESCOs should be permitted to disclose that customers will pay different prices for energy at different times of the year, such as during the shoulder months compared to the winter heating and summer cooling periods or at an escalating rate over the life of the contract, without needing to re-obtain customer consent at a later date. For example, an ESCO could disclose to the customer that they will pay $.10 for electricity for the first 6 months of the contract and $.12 for the remaining 6 months for an agreement with a 12-month term. Similarly, an ESCO should be permitted to disclose to a customer that they will be charged $.08 during the spring and fall and $.12 during the summer and winter months. In both situations, since the ESCO disclosed the price of electricity at the outset of the contract and obtained the customer's express consent via execution of the agreement and subsequent enrollment, no further consent should be required from the customer even though the rate change may occur at a later date. To be clear, any Commission determination confirming this point should not be limited to these two examples, but rather should apply to any consent that is obtained from the customer at the time of contracting wherein the price changes are previously disclosed to and agreed upon by the customer.

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[9] *See generally* Case 98-M-1343, *supra*, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process.
[10] Staff Proposal at 6.

A Commission determination along these lines is entirely consistent with GBL § 349-d, which merely provides that a customer must provide express consent for a change in price, and does not state that such consent must be provided at the time the rate changes. Indeed, obtaining a customer's consent in advance is analogous to the consent provided by a customer to enroll with an ESCO in the first place, wherein customers do not physically have their service switched until days or sometimes even months later.

Therefore, the Commission should find that changes in price that were previously agreed to by the customer should not require additional consent at the time the rate changes, instead allowing the customer's consent at the time of engagement to survive and serve for the entirety of the contract period.

For the reasons noted above, and pursuant to the clear intent of the New York Legislature and previous Commission precedent, the Commission should also clarify that existing contracts are not impacted by the changes in GBL § 349-d (6) and (7), until such time as those contracts either expire, renew, or are otherwise terminated.

In New York, statutes are presumed to apply prospectively and courts are reluctant to apply legislation retroactively without an express or implied intention in the language of the statute itself or within the legislative history.[11] This presumption against retroactivity is, as the Supreme Court

[11] *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Cmty. Renewal*, 35 NY3d 332, 370 (2020) (stating that "'[i]t takes a clear expression of the legislative purpose. . . to justify a retroactive application' of a statute, which 'assures that the legislative body itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits") (internal citations omitted). In determining how to interpret a statute, courts typically first ascertain the plain meaning of the statute. *Simmons v Trans Express*, 37 NY3d 107, 113-114 (2021) (stating that "'[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the [l]egislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used'"); *State of NY v Particia II*, 6 NY3d 160, 162 (2006 (stating that "[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. The starting point is always to look to the language itself and [w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning). Only if the language is ambiguous would a court look to the legislative history to determine the true "spirit and purpose" of the legislation. *Simmons*, 37 NY3d at 113-114; *Rochester Community Sav. Bank v Bd. of Assessors*, 248 AD2d 949 (4th Dept 1998) (stating that "[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the

noted in *Landgraf v. Usi Film Products*, 511 US 244 (1994), based on "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." According to the decision in *Landgraf*, a law has retroactive effect if "'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or *impose new duties with respect to transactions already completed*,' thus impacting 'substantive' rights."[12] Application of the changes in the GBL to existing contracts would clearly impair ESCOs contractual rights and expectations for cost recovery on contracts that have been previously hedged in the market.

As recognized by the Commission in a recent order,[13] there is generally a three-part test a court will consider to determine whether retroactive application of the law is reasonable under the circumstances, and in some cases, retroactive application may be warranted, but such is not the case here. While the amendment to GBL § 349-d is likely tied to a rational basis since it is seeking to protect consumers from unknown price increases, the law would impact private property rights by imposing requirements on parties that have previously agreed to certain contractual arrangements that are in existing terms and would likely reduce or eliminate the return on investment ESCOs expected when they hedged the energy necessary to execute such agreements. Here, there is also no stated intent in the language of the law or the legislative history that indicates the law should apply retroactively. As such, the changes to GBL § 349-d should not be applied retroactively given the plain language of the statute, the fact that the Legislature did not appear to consider the impact of retroactive application at all, and that such application would impair private

legislative intent, resort may not be had to other means of interpretation, and the intent of the Legislature must be discerned from the language of the statute without resort to extrinsic material such as legislative history or memoranda").

[12] *Landgraf* 511 US at 278-80 (emphasis added).

[13] Case 23-M-0106, *In the Matter of Commission Registration of Energy Brokers and Energy Consultants Pursuant to Public Service Law Section 66-t*, Declaratory Ruling and Order on Rehearing (issued Apr. 18, 2024) at 54-56.

property rights of individuals that had a reasonable expectation that they would not incur such costs when deciding to enter into an energy contract.[14] For this reason as well, the Commission should confirm that the changes to GBL § 349-d will not apply to current contracts until those contracts, terminate or renew.

C. ESCOs Should Not Be Required To Provide Monthly Renewal Notices For Continuous Contracts.

GBL § 349-d (7) provides that:

> *In any notice regarding contract renewability*, the provider shall disclose the following information as it exists at the time of such notice: (i) the price charged for energy services; (ii) the price it proposes to charge upon renewal; (iii) the price that is charged by the customer's distribution utility; and (iv) information notifying the customer how they may compare past bills with what they would have been charged had they received energy services from their respective distribution utility, including, the internet address of any bill calculator offered by such customer's distribution utility's website.

Staff proposes that this amended language of GBL § 349-d (7) apply to "all month-to-month agreements, which expire and are renewed each month."[15] It is unclear whether the Staff Proposal intends for this interpretation to include all variable rate agreements, or only those that have a monthly term. An over-inclusive interpretation would require ESCOs with variable rate, continuous contracts, to provide monthly notices to customers with all of the required notice

[14] *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Cmty. Renewal*, 35 NY3d 332, 370 (2020) (stating that "'[i]t takes a clear expression of the legislative purpose. . . to justify a retroactive application' of a statute, which 'assures that the legislative body itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits") (internal citations omitted). In determining how to interpret a statute, courts typically first ascertain the plain meaning of the statute. *Simmons v Trans Express*, 37 NY3d 107, 113-114 (2021) (stating that "'[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the [l]egislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used'"); *State of NY v Particia II*, 6 NY3d 160, 162 (2006 (stating that "[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. The starting point is always to look to the language itself and [w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning).
[15] Staff Proposal at 7.

disclosures.[16] Consistent with New York State contract law, however, these contracts should not be required to provide monthly notice to customers that the contract is "renewing." Specifically, GBL § 527 defines "continuous service" as "a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service."[17] The statute further states that parties are free to enter into continuous service arrangements so long as the offer is provided in a "clear and conspicuous manner," the customer provides "affirmative consent" to enter into the continuous service agreement, and the customer is provided with information on the terms for cancellation.[18] There is no point at which these contracts are considered "renewing." For this reason, the Commission should conclusively state that continuous contracts, even those with a variable rate, do not need to provide customers with a monthly renewable notice.

D. ESCOs Should Be Permitted To Modify Standard Renewal Notices And Send Notices Electronically

As part of the Staff Proposal, Staff included a revised version of the standard renewal notice that ESCOs must provide consistent with the revisions in GBL § 349-d (7). In the past, Staff has not permitted ESCOs to modify the language in the renewal notice. However, ESCOs should be permitted to modify the language in the notice, as long as all of the required information is included therein. Since the Staff Proposal suggests modifying the UBP to require ESCOs to include sample renewal notices as part of their ESCO applications going forward, any changes to the standard renewal notice would have to be provided to Staff for review as a regular course,[19] which will ensure that ESCOs are both including the required information and ensure any modifications meet Staff approval.

[16] *Id.*
[17] GBL § 527 (5).
[18] GBL §§ 527-a (1).
[19] UBP, Section 2 (D).

In addition, the UBP suggests that renewal notices must be sent via regular mail. Given the amount of notices that may be required to be sent to customers as a result of the GBL changes, however, the Commission should consider permitting ESCOs to send the notice to customers via email or other forms of communication. Many ESCOs already communicate with customers via electronic mail, which is also easier to track and confirm receipt, thereby providing an additional layer of consumer protection.

II. CONCLUSION

For the reasons stated above, the Companies respectfully request that the Commission confirm that (1) no additional express consent is required for changes in price for which a customer has previously provided consent, (2) customers may enter into continuous variable rate contracts that do not expire or renew on a monthly basis but continue until canceled, and (3) ESCOs may modify the language in the standard renewal notice with review and approval by Staff and provide such notices to customers by electronic means.

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