BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION

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

New York State Register Notice No. PSC-16-24-00007-P

COMMENTS OF NRG ENERGY, INC. REGARDING THE PROPOSED RULEMAKING TO MODIFY THE UNIFORM BUSINESS PRACTICES TO REFLECT CHANGES IN GENERAL BUSINESS LAW SECTION 349-d

I. INTRODUCTION AND SUMMARY OF POSITION ON PSC SAPA NOTICE

The New York State Public Service Commission ("Commission") is considering a proposal filed by Department of Public Service ("DPS") staff on March 26, 2024[1] to modify the Uniform Business Practices ("UBPs") for energy services companies ("ESCOs") to implement changes to the amended General Business Law ("GBL") section 349-d, effective March 18, 2024. The amendments to GBL § 349-d(6) adopted by the legislature provide that material changes to the terms or duration of an ESCO contract with a residential or door-to-door solicited customer include changes to the price or changes to or from fixed to variable pricing. The amendments also prohibit an ESCO from charging an early termination fee if the customer does not expressly consent to the material change, or if the customer does not receive an appropriate customer contract renewal notice. To complement this amendment, GBL § 349-d(7) was updated to include specific requirements for the required contract renewal notices.

NRG Energy Inc., and its affiliates[2] (collectively, the "NRG Retail Companies") are concerned about two key aspects of the Staff Proposal. First, a careful review of the language in

[1] Case 98-M-1343, *In the Matter of Retail Access Business Rules*, Staff Proposal for Implementing Stronger Price Transparency for Consumers (March 26, 2024) ("Staff Proposal").

[2] The NRG Retail Companies operating in New York include Reliant Energy Northeast LLC d/b/a NRG Home and d/b/a NRG Business Solutions, Green Mountain Energy Company, Energy Plus Holdings LLC, Energy Plus Natural

GBL § 349-d demonstrates that the statute allows an ESCO to renew a residential or door-to-door customer contract, or implement a material change to the contract, as long as the appropriate contract renewal or material change notice is sent to the customer. Under the statute, if the customer does not provide express consent to the material change or contract renewal, an early termination fee cannot be charged. While the statute allows the Commission to adopt additional guidelines and regulations governing the renewal process for residential and door-to-door customers, the Commission is not allowed to ignore the plain text of the statute and implement contradictory regulations. The Staff Proposal, however, seeks to do just that.

The second issue critical issue is that the Staff Proposal sets forth a restructured UBP that expands the applicability of GBL § 349-d to all customer classes, not just residential and door-to-door solicited customers. The proposed amendments to the UBP, coupled with the guidance contained in the Staff Proposal, require every ESCO serving a commercial customer on a product incorporating variable rate features to send a hard copy notice of material change regarding the commercial customer's contract every month. Such an action was not contemplated by the legislature and is entirely outside the scope of the Commission's authority.

The Staff Proposal is inconsistent with the Commission's previous directives and guidance regarding the application of GBL § 349-d. ESCOs warned the Commission over a decade ago that its interpretation of GBL§ 349-d includes requirements and limitations on renewal of ESCO contracts that exceed the scope of the legislation.[3] At the time, the Commission agreed that GBL § 349-d does not require affirmative consent to renew a residential or door-to-door customer

Gas LLC, Independence Energy Group LLC d/b/a Cirro Energy, XOOM Energy New York, LLC, Stream Energy New York, LLC, Direct Energy Business, LLC, Direct Energy Business Marketing, LLC, Direct Energy Services, LLC, and Gateway Energy Services Company.

[3] Case 98-M-1343, Comments of the Retail Energy Supply Association (November 4, 2010), pp. 2-3.

contract.[4] The Commission was also once careful to ensure that the amendments to the UBP implementing GBL § 349-d were only applicable to residential and door-to-door customers.[5]

Whether by design or error, the Staff Proposal and the proposed restructured amendments to the UBP far exceed the bounds of GBL § 349-d and will interfere with all ESCO contracts, even those executed by sophisticated business customers who were never intended by the legislature to be impacted by this statute. The end result of this continued distortion of GBL § 349-d is a Staff Proposal that is outside the scope of the legislation, inconsistent with prior Commission precedent, and improperly noticed under the State Administrative Procedures Act ("SAPA"). In addition, it is unlikely that the Commission can make the findings required by the Climate Leadership and Community Protection Act ("CLCPA"), as no analysis has been conducted of the practical application of requiring ESCOs to send hard copy mail to all of their customers every time there is a change to a variable price component, nor does the Staff Proposal include any alternatives to greenhouse gas mitigation or address the disproportionate impact to low-income customers.

While there are aspects of the Staff Proposal that are within the scope of GBL § 349-d, such as the proposed Modified Standard Renewal Notice (if applied only to residential and door-to-door customers, and if required, provided in a manner that does not interfere with the State's climate goals), or that are less objectionable, such as the inclusion of the phrase "renewal notices" in UBP §2.B.1.c, the NRG Retail Companies urge the Commission to reject the Staff Proposal in its entirety, as it is outside the authority of and contradictory to the amendments to GBL § 349-d, is inconsistent with other statutes, and would work an untold harm to New York's ESCO industry and all ESCO customers.

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[4] Case 98-M-1343, Order Implementing Chapter 416 of the Laws of 2010 (issued December 17, 2010) ("December 2010 Order"), p. 7.

[5] *See C*ase 98-M-1343, Order Concerning Petitions for Rehearing or Clarification of Order Implementing Chapter 416 of the Laws of 2010 (issued June 15, 2012) ("Transcanada Order"), p. 5.

II. AMENDMENTS TO THE GENERAL BUSINESS LAW

On September 20, 2023, the amendments to GBL §§ 349-d(6) and (7) were signed into law, effective March 18, 2024. The amendments attempt to clarify the types of changes to certain ESCO contracts that the legislature considers "material" (section 6), and provides requirements for customer contract renewal notices for any material changes (section 7). Notably GBL § 349-d, along with these amendments, applies to "customers," defined by the legislature in GBL § 349-d(1)(c) as "any person who is sold or offered an energy services contract by an ESCO (i) for residential utility service, or (ii) through door-to-door sales[.]" GBL § 349-d therefore does not regulate, and indeed, specifically excludes, all other customer classes. The recent amendments to GBL § 349-d(6) are underlined and bolded below within the text of the legislation:

> 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 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.** This shall not restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and of his or her option not to accept the renewal offer; provided, however, that no fee pursuant to subdivision five of this section[6] shall be charged to a customer **whose express consent has not been obtained to any change in material terms and conditions, or** who objects to such renewal not later than three business days after receiving the first billing statement from the ESCO under the terms of the contract as renewed. The public service commission and the Long Island power authority may adopt additional guidelines, practices, rules or regulations governing the renewal process.

Section 7 of GBL 349-d was amended to provide detailed requirements for the contents of the contract renewal notices for residential and door-to-door ESCO customers:

> In every contract for energy services and in all marketing materials provided to prospective purchasers of such contracts, all variable charges shall be clearly and conspicuously identified. **In any notice regarding contract renewability, the provider shall disclose the following information as it exists at the time of such**

[6] "Subdivision five of this section" refers to GBL 349-d(5), which prohibits the assessment of an early termination fee in certain circumstances. The complete text of GBL § 349-d is included in Attachment A to these Comments.

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.

The amendments to GBL §§ 349-d(6) and (7)[7] are simple and straightforward; section 6 clarifies that a change in price or a change to or from a fixed or variable rate product for a residential or door-to-door customer is a material change, and that such a change requires an ESCO to issue a renewal notice to the customer. The renewal notice must contain the information required by the amendments to section 7, and if express customer consent is not given to the material change (or the customer objects within three business days) then the ESCO cannot charge the customer an early termination fee. The statute, in its own words, imposes no limitation on the ability of an ESCO to renew a residential or door-to-door customer contract where the appropriate renewal notice is provided.

A. Staff Proposal and Implementation of GBL §§ 349-d(6) and (7)

The Staff Proposal was issued over a week after the effective date of the amendments to GBL §§ 349-d(6) and (7). The Staff Proposal includes a brief explanation of the legislative amendments to GBL §§ 349-d(6) and (7) and contains proposed amendments to the UBP, along with a proposed template customer renewal notice. The Staff Proposal is bereft of any indication that GBL §§ 349-d(6) and (7) apply only to residential and door-to-door customers, and that a new, more expansive application of existing provisions of the UBP is really under consideration. The Staff Proposal also provides additional guidance regarding how the new amendments are understood by Staff, and how certain ESCO contracts will be treated. The Staff Proposal lacks

[7] For ease of review, Exhibit A to this response contains the text of these sections of GBL 349-d, with the newly adopted language underlined as above.

information regarding the history of amendments to these sections of the UBP, and is insufficient to explain that the proposal reflects a significant departure from both the language of the statute, and the Commission's prior application of same.

i. New Proposed Definitions

The Staff Proposal includes two new definitions to be added to the UBP, "express customer consent" and "material changes." Neither term is defined in GBL § 349-d, and, upon review of the existing language in the UBP, it is not clear that either term is necessary or consistent with the UBP as a whole.

The proposed definition for "express customer consent" contained in the Staff Proposal provides that it is "consent given directly and knowingly by the customer, either verbally, electronically, or in writing, that shall be maintained by the ESCO in a verifiable format." The second definition, "material change," would mean "any change that affects the rates, terms, and conditions of service contained in the customer agreement. For example, this could include but not be limited to, the commodity service rate, product term, or product type."

These new definitions would apply to all ESCO customer contracts, not just residential and door-to-door customers, as otherwise proscribed by GBL § 349-d.

ii. Proposed Updated UBP §5.B.5

The Staff Proposal provides, in pertinent part, that the "amended GBL § 349-d(6) indicates that a change in price, or a chance to or from fixed or variable pricing, shall be deemed to be a material change. Staff proposes amending UBP §5.B.5.d to include this more precise language and to remove language that specifically excludes guaranteed savings products from requiring express customer consent."[8] However, a review of the proposed amendments to current UBP §5.B.5.d

[8] Staff Proposal, p. 4.

demonstrates that the representation contained in the Staff Proposal is not accurate. In fact, the new language regarding "material changes" adopted by the amendments to GBL § 349-d(6) is missing from the proposed amended UBP. The amended UBP also splits GBL § 349-d(7) into two provisions – one applicable to residential customers and door-to-door customers, another applicable to all customer classes.[9]

iii. Proposed New UBP §5.B.6

While the complete, proposed amended UBP provisions were not entirely included in the Staff Proposal, the document proposes to keep the "renewal" provisions of UBP §5.B.5[10] in that section, and moves "the remaining provisions" of UBP § 5.B.5[11] to a new UBP §5.B.6. In so doing, the Staff Proposal removes the language limiting the application of UBP §5.B.5 to residential and door-to-door solicited customers.[12] By removing this language, the Staff Proposal goes beyond the authority of GBL § 349-d and broadens the applicability of these sections of the UBP to all customers.[13] The Staff Proposal also inexplicably breaks up the specific sections of the UBP that were originally adopted as a result of GBL § 349-d, puts them into different sections of the UBP, and selectively construes two provisions of the law to apply to all customers.[14]

[9] *See* Attachment C, and *see* fn. 14, *infra*.

[10] Currently, UBP §§5.B.5.d, e, f, and g.

[11] Currently, UBP §§5.B.5.a, b, and c.

[12] Staff Proposal, p. 5; *and see* Staff Proposal, Attachment A: UBP Redlines.

[13] For ease of review, included with these comments is a complete comparison of all of the changes to UBP §5; s*ee* Attachment A to these Comments.

[14] *See* Attachments B and C, which provide section-by-section comparisons of the GBL and UBP before the recent amendments (Attachment B) as well as a section-by-section comparison of the GBL (as amended) with the proposed amendments to the UBP (Attachment C).

iv. Staff Proposal Guidance

Finally, the Staff Proposal makes a point of addressing variable rate, month-to-month contracts, and leaves no doubt that Staff intends for ESCOs to send notices every month to customers of any change in a variable price. First, the Staff Proposal provides:

> To implement the amendments to subdivisions 6 and 7 of GBL §349-d, Staff recommends that the definition of what constitutes a material change be amended to include a change in price as a material change. This new requirement in GBL §349-d(6) would require an ESCO to obtain a customer's express consent for 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.[15]

The Staff Proposal is quite clear, and goes on to provide that if an ESCO is serving a customer on a variable rate, month-to-month product,

> Absent the customer's express consent to the price change, the ESCO would be required to provide monthly notices that included all required notice disclosures in order to continue service to a customer on a month-to-month agreement in a compliant manner. Additionally, if the renewal includes a material change, including a change in the price the customer pays, express consent would be required for that change.[16]

The NRG Retail Companies submit that this guidance is both unauthorized by GBL § 349-d, and is directly at odds with the text of the statute.

B. SAPA Notice

Notice of the Staff Proposal was published in the New York State Register on April 17, 2024. The SAPA Notice indicates the Commission is considering a proposal to adopt amendments to GBL § 349-d. The SAPA Notice is void of any indication that the Staff Proposal would expand the scope of GBL § 349-d and apply portions of the statute to all ESCO customers, not just residential and door-to-door customers. The SAPA Notice, like the Staff Proposal, misstates the

[15] Staff Proposal, p. 6.

[16] Staff Proposal, pp. 6-7.

effect of GBL § 349-d and opines that the legislation requires express customer consent after a contract renewal notice is issued due to a "material change" in the contract term. It does not state that the legislation requires an ESCO serving a residential or door-to-door solicited customer to provide a detailed contract renewal notice or receive express customer consent if there is a material change in the terms of the customer's contract, or the ESCO is prohibited from assessing an early termination fee with respect to that customer.

III. THE STAFF PROPOSAL EXCEEDS THE SCOPE OF AUTHORITY GRANTED BY THE LEGISLATURE IN GBL § 349-D AND SHOULD BE REJECTED IN ITS ENTIRETY

In New York, when an agency's regulations conflict with the statute under which they are promulgated, the regulations are invalid.[17] "It is a fundamental principle of administrative law that an agency cannot promulgate rules or regulations that contravene the will of the Legislature."[18] When an agency enacts rules and regulations beyond the scope of the enabling statute, the agency "usurps the legislative role and violates the doctrine of separation of powers."[19] While an agency has latitude in applying its special expertise to statutory language, when the language of the statute is clear and unambiguous, "a determination by the agency that runs counter to the clear wording of a statutory provision is given little weight."[20]

Similarly, guidance issued by an agency, while not codified, is still subject to judicial scrutiny. While agency guidance is not typically subject to the requirements of SAPA,[21] an agency may not issue guidance that exceeds its statutory grant of authority. "[A]n agency, by law, is not

[17] *Matter of Juarez v. New York State Off. of Victim Servs.*, 36 N.Y.3d 485, 503 (2021).

[18] *Weiss v. City of N.Y.*, 95 N.Y.2d 1, 4-5 (2000) (internal references omitted).

[19] *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018) (internal references omitted).

[20] *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 102-103 (internal references and citations omitted).

[21] *See* SAPA §§ 102(14), 202.

allowed to legislate by adding guidance requirements not expressly authorized by statute."[22] When an agency attempts to legislate through guidance and impose a requirement without complying with SAPA, the agency's action will be invalidated in its entirety.[23]

The UBP and the Staff Proposal, as regulatory enactments, are subject to the same canons of construction as statutes.[24] As a general tenet, regulations "should be construed to avoid objectionable results."[25] New York courts typically uphold the legitimacy of construing statues to avoid absurd results. "Consequences cannot alter statutes but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided."[26] While "courts normally accord statutes their plain meaning, [courts] will not blindly apply the words of a statute to arrive at an unreasonable or absurd result."[27]

The Commission is obligated to follow plain statutory language, or risk "violating the fundamental canon of construction that, when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used."[28] The Commission also may not adopt a statute in a manner that would render it meaningless, as New York courts will not "disregard the accepted rule that all parts of a statute are intended to be given effect and that a statutory construction that renders one part meaningless should be avoided."[29] Lastly, an

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[22] *Household & Commercial Prods. Assn v. New York State Dept of Envtl Conservation*, 65 Misc. 3d 832, 841 (internal references omitted) (holding that disclosure program created by DEC was "null and void" because it constituted a "rule" that was not implemented in compliance with SAPA).

[23] *See id.* at 841-843.

[24] *See ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 477 (2004), *referencing* 2 NY Jur 2d, Administrative Law § 184 ("administrative regulations generally subject to the same canons of construction as statutes").

[25] *Id.*

[26] *In re Rouss*, 221 N.Y. 81, 90 (1917).

[27] *People v. Santi*, 3 N.Y.3d 234, 242 (2004).

[28] *Matter of National Energy Marketers Assn. v. New York State Public Service Commn.*, 33 N.Y.3d 366, 348 (2019) (internal citations and references omitted).

[29] *Id*. (internal references and citations omitted).

agency must "[rely] on the standard canon of construction of *expressio unius est exclusio alterius*, [and] infer that the expression of [specific] exemptions in the statute indicates an exclusion of others."[30] "Where . . . the statute describes the particular situations in which it is to apply, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.'"[31] Unfortunately, the Staff Proposal violates these fundamental principles of separation of powers and canons of construction in a multitude of manners, and should not be adopted.

A. The Staff Proposal Is Premised on a Fundamentally Flawed Interpretation of GBL § 349-d(6)

The interpretation of GBL § 349-d(6) by the Commission has evolved since the law was implemented over a decade ago. Originally, it appears the Commission understood, correctly, that the legislature meant to create an exception to the requirement for express consent to a material change in a residential or door-to-door customer contract.[32] The statute includes language allowing an ESCO to renew a contract, without express consent, if a renewal notice with certain information is sent to the customer. Under the original text of GBL § 349-d, if no renewal notice was issued, an early termination fee could not be charged; there is no statutory requirement for a customer's "express consent" to renew a contract.[33]

The Commission made clear findings regarding this very issue when it implemented amendments to the UBP to reflect GBL § 349-d, and stated, "in the event of a variable rate agreement, which renews on a monthly basis and without termination fees, neither express consent

[30] *Biggs v. Zoning Board of Appeals of the Town of Pierrepont, New York*, 52 Misc. 3d. 694, 698 (St. Lawrence Cty., 2016) (internal citations omitted).

[31] *Eaton v. New York City Conciliation & Appeals Board*, 56 N.Y.2d 340, 345 (1982) (citations omitted).

[32] *See* 2010 Order, p. 8.

[33] *See* Case 98-M-1343, Comments of the Retail Energy Supply Association (November 4, 2010), pp. 2-3.

nor a renewal notice is necessary."[34] In other words, the Commission acknowledged that, at the time, an ESCO only had to provide a contract renewal notice if an early termination fee would be charged under the new agreement. If no early termination fee would be charged, neither consent nor a renewal notice was required.

The Commission also directly acknowledged that "the language of GBL § 349-d(6) does not specifically require that an ESCO obtain a customer's express consent for any contract renewal . . ." but relied on the language in the GBL allowing the Commission to adopt additional guidelines governing renewal to add more restrictive language to the UBP.[35] While the GBL certainly allows Commission to adopt additional rules on renewal, it does not permit the Commission to adopt regulations and guidance that are contrary to the clear language of the statute.

The current amendments to the GBL, and the mechanism proposed by Staff for implementation, contemplate a result that would read the contract renewal notice exception out of the statute entirely. While the Commission has the authority to implement regulations surrounding renewal, the statute very clearly allows ESCOs to send a renewal notice, and if affirmative consent is not received, then no early termination fee can be charged. The statute does not allow the Commission to ignore this plain language and require affirmative consent regardless of the statutory text – much less apply this expansive reading to commercial customers.

Regardless, the Staff Proposal explains,

> To implement the amendments to subdivisions 6 and 7 of GBL §349-d, Staff recommends that the definition of what constitutes a material change be amended to include a change in price as a material change. This new requirement in GBL §349-d(6) would require an ESCO to obtain a customer's express consent for 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. Absent the customer's express consent to the price change, the ESCO would be required to provide monthly notices

[34] 2010 Order, p. 7.

[35] 2010 Order, p 8.

> that included all required notice disclosures in order to continue service to a customer on a month-to-month agreement in a compliant manner. *Additionally, if the renewal includes a material change, including a change in the price the customer pays, express consent would be required for that change.*[36]

This declaration is squarely at odds with the text of GBL § 349-d(6), which allows an ESCO to renew a residential or door-to-door agreement by sending a renewal notice to the customer, and specifically exempts the requirement for obtaining express customer consent. Moreover, nothing in GBL § 349-d, or any other part of the General Business Law, addresses the ability of, or even allows, the Commission to make blanket determinations regarding contractual arrangements for all classes of ESCO customers.

At worst, the statute compels that a notice be sent to the residential or door-to-door customer if there is a material change to the customer's contract, including a change to a variable rate, and if the customer does not provide express consent, then no early termination fee can be charged. The Staff Proposal, however, would impermissibly interfere with every single ESCO contract with a variable rate component, regardless of the customer class or terms of the customer contract.

B. The Staff Proposal is Not Consistent with GBL § 349-d and Should Not Apply to All Customers

The proposed amendments and restructured UBP, as well as the guidance contained in the Staff Proposal as a whole, exceed the scope and authority of GBL § 349-d. The restructured UBP reflects a significant departure from previous amendments to the UBP based on the GBL, includes two completely new definitions, and is couched in agency guidance that is directly inapposite to the enabling legislation. The Staff Proposal should not be adopted.

[36] Staff Proposal, pp. 6-7 (emphasis added).

a. The Proposed Amendments to the UBP are Not Consistent with the Statute

By omitting one of the two new sentences included in the amendments to GBL § 349-d(6) from the corresponding language in the UBP, the Staff Proposal and proposed new UBP §5.B.5.a create the blueprint for a flawed and misleading interpretation of the intent and effect of the statute. The Staff Proposal boasts that it amends UBP §5.B.5.d to include the "more precise language" from amended GBL § 349-d. If the Staff Proposal included the "more precise language" of GBL § 349-d(6) as it claims, then the new proposed UBP §5.B.5.d would not be moved to a new section, and would include the below additional highlighted language:

> 5. Additional terms and conditions applicable to residential customers and customers solicited via door-to-door sales include:
> d. Material changes and renewals – no material changes shall be made in the terms or duration of any contract for the provision of energy by an ESCO without the express consent of the customer obtained under the methods authorized in the UBP. A change in price or a change from fixed or variable pricing shall be deemed to be material. This shall not restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and the customer's option to reject the renewal terms. A customer shall not be charged a termination fee as set forth in Section 5.B.3.1.a herein, whose express consent has not been obtained to any change in material terms, or if the customer objects to such renewal within three business days of receipt of the first billing statement under the agreement as renewed. Regarding contract renewals or an initial sales agreement that specifies that the agreement automatically renews, all changes to the terms of the contract, including changes to the commodity rate, product or service type, will be considered material and will require that the ESCO obtain the customer's express consent for renewal. Notwithstanding the forgoing, when an agreement renews as part of a month-to-month product which guaranteed savings compared to the distribution utility price, or renews to a new product which guaranteed savings compared to the distribution utility price, the customer's express consent for renewal is not required.

Instead, the Staff Proposal actually changes UBP §5.B.5.d to UBP §5.B.5.a, amends the prefatory clause to UBP 5.B.5 (expanding the applicability of the section to all customers, not just residential

and door-to-door customers), adds the below, bolded and underlined language, and eliminates other language as indicated:

> 5. ~~Additional terms and conditions applicable to residential customers and customers solicited via door-to-door sales include:~~[37] Material changes **to** and renewals **of customer agreements**
> a. ~~Material changes and renewals –~~ no material changes shall be made in the terms or duration of any contract for the provision of energy by an ESCO without the express consent of the customer obtained under the methods authorized in the UBP. This shall not restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and the customer's option to reject the renewal terms. A customer shall not be charged a termination fee as set forth in Section 5.B.3.1.a herein, if the customer**'s express consent has not been obtained to any change in material terms and conditions, or if the customer** objects to such renewal within three business days of receipt of the first billing statement under the agreement as renewed. Regarding contract renewals or an initial sales agreement that specifies that the agreement automatically renews, all changes to the terms of the contract, including changes to the commodity rate, product or service type, will be considered material and will require that the ESCO obtain the customer's express consent for renewal. ~~Notwithstanding the forgoing, when an agreement renews as part of a month-to-month product which guaranteed savings compared to the distribution utility price, or renews to a new product which guaranteed savings compared to the distribution utility price, the customer's express consent for renewal is not required.~~

Despite representations to the contrary, the "more precise" language of GBL § 349-d(6) related to material changes is nowhere to be found in new proposed UBP §5.B.5.a.[38] In fact, the "more precise" language regarding "material changes" adopted by the amendments to GBL § 349-d(6) is completely missing from the amended UBP.

Omission of this critical language distorts the meaning of the GBL, and is also inconsistent with prior implementations of this law. In particular, on rehearing over a decade ago, the

[37] The NRG Retail Companies note that while the prefatory language to UBP §5.B.5 is stricken here for ease of review and to assist in understanding how these changes are proposed as compared to the current UBP, the Staff Proposal instead does not strike this language and simply relocates it to the "new" UBP §5.B.6, which is then not included in the Staff Proposal. A complete comparison of the amended UBP §5.B.5 and new UBP §5.B.6 is included in Attachment A.

[38] For the avoidance of doubt, Attachment A contains all of the proposed changes to the UBP; the "material change" language from GBL § 349-d(6) is also not included in "new" UBP §5.B.5.d.

Commission took great care to ensure that a single word ("such") was included in the text of the UBP §5.B.5.d to ensure that "unintended consequences," such as allowing a customer to provide express consent to a contract renewal and still avoid an early termination fee, did not result.[39] By departing from the plain text of the statute and selectively omitting the new amended language from GBL § 349-d from the corresponding section of the UBP, the Staff Proposal betrays prior implementations of GBL § 349-d, exceeds the scope of authority granted to it by the legislature, and should not be adopted.

b. The Proposal to Restructure the UBP to Impact All Customers Is Beyond the Scope of GBL § 349-d

A review of some of the history of GBL § 349-d demonstrates how the proposed rearrangement of UBP §5.B.5 and creation of UBP §5.B.6, supports the concerns of the NRG Retail Companies regarding the broad overreach of the Staff Proposal. When the Commission adopted provisions into the UBP to implement GBL § 349-d, it was clear that the protections were focused on residential and door-to-door customers.[40] On rehearing, the Commission affirmed that "the definition of 'residential customer' and 'current residential customer' as defined by [the Home Energy Fair Practices Act], should be used in the application of GBL § 349-d . . ."[41]

Despite this decade-long understanding and application, the amended UBP included in the Staff Proposal, read plainly, applies GBL § 349-d(6) to all customer classes.[42] This broad overreach is not contemplated by the statute, and is inconsistent with the Commission's prior Orders implementing GBL § 349-d. In fact, if the Staff Proposal is adopted as written, the Commission

[39] Transcanada Order, p. 5.

[40] *See*, *e.g.*, 2010 Order, p. 5.

[41] Transcanada Order, p. 5.

[42] The NRG Retail Companies acknowledge the similar and alarming concerns raised by Joule Energy in their June 14, 2024 comments, and agree that CCA customers should also not be subject to the provisions of GBL § 349-d.

will create the "unintended consequences" it has tried to avoid since adopting amendments to the UBP to implement GBL § 349-d.

The NRG Retail Companies note that the Staff Proposal departs from other recent amendments to the UBP adopted as a result of legislation. Just a few months ago. the Commission affirmed its decision to adopt into the UBP the statutory definitions of "energy broker" and "energy consultant," provided in PSL § 66-t, new legislation requiring the registration of these entities. In so doing, the Commission defended the decision to adopt "activity-based definitions [that] are taken directly from PSL § 66-t," and held that the definitions are "consistent with the plain language [of the statute]."[43] It is unfortunate that this Staff Proposal does not similarly implement the identical language of GBL § 349-d into the UBP, because doing so would affect the intent of the legislature, and avoid the absurd result facing the ESCO industry today.[44]

c. The Proposed New Definitions are Not Consistent with GBL § 349-d

Despite the lack of new definitions proposed in the amendments to GBL § 349-d, the Staff Proposal introduces two new definitions to the UBP for the Commission's consideration. The proposed new definition of "express customer consent" provides that it is "consent given directly and knowingly by the customer, either verbally, electronically or in writing, that shall be maintained by the ESCO in a verifiable format."[45] By including the underlined word "directly" in the definition, the plain language of the statute is subverted. The amendments to GBL § 349-d simply do not require affirmative, direct customer consent to renew all customer contracts, or even the contract of a residential or door-to-door customer. Express customer consent, *or* a contract renewal notice,

[43] 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 and effective April 18, 2024), p. 34.

[44] *See* discussion, *infra*, at Section III.C.

[45] Staff Proposal, Attachment A (emphasis added).

must be sent, in order to charge an early termination fee. While the proposed new definition seems reasonable at first blush, the definitions perpetuate the continued misapplication of GBL § 349-d and undermine the goals of the legislation.

In addition, the new definition of "express customer consent" is simply unnecessary. "Express consent" was part of GBL § 349-d when the law was passed over a decade ago, and there is no need to introduce a new definition at this time. Moreover, UBP §5.B.1 refers to existing avenues through which a customer can expressly consent to enter into an ESCO agreement, and detailed attachments to UBP §5 provide steps for an ESCO to obtain express customer consent and require the ESCO to retain the authorization for two years. The perceived drafting inconsistency created by this definition leads to confusion and uncertainty for ESCOs, forcing them to cross check different sections of the UBP to ensure they are in compliance with applicable requirements. The new proposed definition of "express customer consent," while not outwardly objectionable on its face, is not part of GBL § 349-d, is not necessary to the UBP, and will just introduce confusion instead of providing clarity.

The second proposed new definition, for "material change," is also concerning, and would mean "any change that affects the rates, terms, and conditions of service contained in the customer agreement. For example, this could include but not be limited to, the commodity service rate, product term, or product type." Ostensibly, this definition is proposed to account for the new language adopted in GBL § 349-d(6), "a change in price or a change to or from fixed or variable pricing shall be deemed to be material," that is missing from the proposed new "more precise" UBP §5.B.5.a.[46] This proposed new definition contains language that is outside the scope of the statute and should not be adopted.

[46] Staff Proposal, p. 4.

C. The Staff Proposal, if Implemented, Would Create an Absurd Result for ESCOs and All of Their Customers

The Staff Proposal directly undermines the intent of the legislature to allow for an ESCO to provided notice of a material change to a residential or door-to-door customer through the use of a customer renewal notice. If the customer does not affirmatively consent to the material change indicated in the renewal notice, the remedy provided in GBL § 349-d(6) is to prohibit the ESCO from charging an early termination fee to that residential or door-to-door customer, not to adopt a wholesale prohibition on contract renewal for all customer classes.

The requirement for ESCOs to obtain express customer consent for any change to a variable price product is outside the scope of GBL § 349-d and creates the type of absurd result that courts strive to avoid. Requiring ESCOs to obtain express consent from customers on a monthly basis would lead to a constant barrage of overlapping paper renewal notices and requests for consent that is likely impossible, to comply with, and would also engender customer confusion and frustration. This is an undesirable process and result for all parties involved, was not contemplated by the statute, and is not based on a reasonable interpretation of GBL § 349-d.

The UBP currently requires residential and door-to-door customers to receive renewal notices enclosed in an envelope which states in bold lettering: "IMPORTANT: YOUR [ESCO NAME] CONTRACT RENEWAL OFFER IS ENCLOSED. THIS MAY AFFECT THE PRICE YOU PAY FOR ENERGY SUPPLY."[47] If the Staff Proposal is implemented, ESCOs will have to send hard copy, paper renewal notices to all of their customers – even commercial and industrial customers – every time a component of their variable rate changes.

An explanation of how the renewal notice scheme would work, if implemented as proposed by Staff, demonstrates just how far the Staff Proposal strays from the plain text and intent of the

[47] UBP 5.B.5.e-f.

amendments to GBL § 349-d. Assume a residential customer was on a variable-rate product with a billing period starting on the first of each month, expiring on January 31, and renewing thereafter on a month-to-month basis with guaranteed savings over the default utility rate, with no expiration date. Under Staff's interpretation, and assuming the customer did not respond to the renewal notices that are already required at the end of the one-year contract term, the ESCO would still have to obtain the customer's express consent to renew for February 1, and given that notice to the customer must be made "not less than thirty days nor more than sixty days prior to the renewal date," the notice seeking the customer's express consent for renewal for February must be sent no later than January 2, and no earlier than December 3 (of the prior year). An ESCO may have to send the notice at least 45 days (mid-December) before the February renewal. Under this scenario, the customer will likely receive from the ESCO a request for consent for renewal for the February period *before* the consent process for the January period is completed (and likely while still contemplating a current renewal offer).

Moving on, the written request for customer consent for the March period can begin no sooner than January 1 (60 days) and no later than January 31 (30 days). Since the ESCO has to send the renewal notice more than 30 days in advance of the March renewal, to give the customer sufficient time to receive, review, and act upon the notice, the request pertaining to the March renewal must go out closer to 45 days before March 1, which is mid-January—before the consent process for the February period likely is concluded. And so on for each monthly period.

The process required by the Staff Proposal and the proposed amendments to UBP §5.B.5 would result in a constant stream of overlapping and confusing renewal notices with respect to a contractual relationship in which the customer already has an existing right to terminate the

contract, unilaterally and without penalty. In sum, the Staff Proposal compels the type of absurd result dreaded and rejected by New York courts, and should not be implemented.

D. The Staff Proposal is Inconsistent with Other Sections of the General Business Law

Further undermining the Staff Proposal's declaration that month-to-month contracts expire and are renewed every month, other sections of the General Business Law contemplate and allow for businesses to offer contracts that renew every month and are continuous in nature. Section 527-a of the General Business Law sets out the conditions under which a business may offer contracts in New York that automatically renew or are continuous in nature. Section 527-a neither explicitly provides nor implicitly suggests that each successive term of an automatically renewing contract is a new contract, as indicated in the Staff Proposal. In fact, the opposite is true; because an automatically renewing or continuous contract is just that—a single contract—there is no need under GBL § 527-a for a business to bombard the consumer with a monthly stream of notices and requests for express consent. The Staff Proposal is incompatible with the statutorily-recognized right of companies to offer, and consumers to accept, automatically renewing and continuous contracts. Moreover, the Staff Proposal's application of GBL § 349-d renders GBL § 527-a meaningless.

E. The SAPA Notice Does Not Provide Adequate Notice of the Proposed Amendments to the UBP

The SAPA Notice does not provide an adequate description of the proposed rulemaking, and the Staff Proposal does not include the complete proposed amendments to the UBP. Even where an agency operates under the broadest statutory mandate, it "may not use its authority as a license to correct whatever societal evils it perceives," or to suddenly draft new law "embodying

its own assessment of what public policy ought to be."[48] It is for this very reason that SAPA sets forth notice and comment procedures applicable where an agency "implements or applies law . . . or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof."[49]

Pursuant to SAPA, prior to the adoption of a rule, the PSC must "submit a notice of proposed rulemaking to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule."[50] A proper SAPA notice must comply with various strict requirements, which are outlined in SAPA § 202(1)(f). Among other requirements, section 202(1)(f) mandates that the notice of proposed rulemaking "contain the complete text of the proposed rule," unless the text exceeds two thousand words, in which case "the notice shall contain only a description of the subject, purpose and substance of such rule."[51] *Id.* at § 202(1)(f)(v). An agency cannot issue rules that do not comport with the formal procedural requirements of the SAPA.[52]

Where, as here, an agency attempts to adopt an entirely new rule in order to pursue some public policy goals, the action is *ultra vires* if done in circumvention of mandatory rulemaking procedures including the right of the public to participate in same.[53] Thus, neither Staff nor the

[48] *Boreali v. Axelrod*, 523 N.Y.S.2d 464, 468 (1987); *see Rent Stabilization Ass'n v. Higgins*, 608 N.Y.S.2d 930, 935 (1993) (addressing agency overreach).

[49] SAPA § 102(2)(a).

[50] SAPA § 202(1)(a).

[51] *Id.* at § 202(1)(f)(vi); *see* SAPA § 202-a.

[52] *See Id.* at § 202(5) ("an agency may not file a rule with, or submit a notice of adoption to, the secretary of state unless the agency has previously submitted a notice of proposed rulemaking and complied with the provisions of this section"); *see, e.g., Matter of Homestead Funding Corp. v. State of N.Y. Banking Dep't*, 95 A.D.3d 1410, 1412-13 (3d Dep't 2012) (holding that respondent agency's rule must be annulled because it was not properly promulgated pursuant to SAPA); *Cordero v. Corbisiero*, 80 N.Y.2d 771, 772-73 (1992).

[53] *See Matter of N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 992 N.Y.S.2d 480, 487-88 (2014) (citing *Boreali* at 470).

Commission may enforce a novel position changing the scope of certain provisions of the UBP, without providing notice and receiving comment.

To be clear, nothing in the Staff Proposal or the SAPA Notice makes clear that the scope of amendments to GBL § 349-d would apply to all customers, beyond the expressed language of the statute, nor does the SAPA Notice make clear that the rearrangements to the UBP create new requirements for all ESCO customer contracts, not just residential and door-to-door customers. The Staff Proposal, the basis for the SAPA Notice, omits nearly a third of the proposed changes to the UBP.[54] Thus, the newly contemplated action would unquestionably violate SAPA.

As explained above, the proposed amendments to UBP §5.B.5, if adopted, would broadly expand the applicability of the section to apply to all ESCO customer contracts, rather than just residential and door-to-door customer contracts, which is completely inconsistent with the General Business Law and its previous implementation and incorporation into the UBP. The Staff Proposal rearranges UBP §5.B.5 and eliminates the existing language tying it to GBL § 349-d and limiting the section to residential and door-to-door customers. Elimination of this language is not explained in the SAPA Notice. The proposed rearrangement of UBP §5.B.5 exceeds the scope of authority granted under GBL § 349-d(6) and impacts all ESCO customer contracts without appropriate notice under SAPA that these changes would take place. Given the glaring omissions of both the Staff Proposal and the SAPA Notice, the Commission should feel compelled to reject the Staff Proposal in its entirety.

F. The Staff Proposal is Inconsistent with the CLCPA

Last, but certainly not least, the NRG Retail Companies believe the Commission cannot make any finding that the Staff Proposal is consistent with the statewide greenhouse gas emissions

[54] *See* Attachment A (language in green was not included in the Staff Proposal).

limits. CLCPA §7(2) requires the Commission to consider whether its decision is "inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law." No analysis has been made with respect to the requirement to send, via regular mail, contract renewal notices to all customers, regardless of customer class, for any change to price, including under an agreed to, variable rate product. Such an action cannot pass muster under CLCPA §7(2). Moreover, since the Staff Proposal likely will interfere with the statewide attainment of greenhouse gas emissions by increasing the amount of mail that ESCOs must send every month, alternatives to greenhouse gas mitigation are required. The Staff Proposal does not suggest even the most simple means of addressing mitigation, such as allowing ESCOs to send the notice via electronic mail. Under the circumstances, the Staff Proposal should be rejected since the Commission cannot make a finding that it is consistent with the CLCPA §7(2).

The Staff Proposal also likely cannot meet the standard of CLCPA §7(3), requiring the Commission to ensure its decision will not disproportionately burden disadvantaged communities. Under the Staff Proposal, low-income customers – who can only purchase an ESCO product that is a variable rate product with guaranteed savings – would assuredly be the hardest-hit customer class, as any ESCO serving these customers is required to provide a variable rate product, and there is no exemption for renewal notices for products that guarantee savings. While low-income customers are in communities across the State, there are undoubtedly larger concentrations of low-income customers in disadvantaged communities, meaning the Staff Proposal will have a disproportionate impact on these customers and communities, contrary to CLCPA §7(3).

IV. CONCLUSION

For all of the foregoing reasons, the NRG Retail Companies respectfully request that the PSC reject the Staff Proposal implementing GBL § 349-d, and instead adopt language consistent with the expressed language and intent of the legislature.

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Respectfully submitted,

Yvonne Hennessey
Barclay Damon, LLP
80 State Street
Albany, New York 12207
Phone: (518) 429-4293
Email: yhennessey@barclaydamon.com

Gabrielle A. Figueroa
Barclay Damon, LLP
1270 Avenue of the Americas, Suite 501
New York, new York, 10020
Phone: (212) 784-5831
Email: gfigueroa@barclaydamon.com