STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Service Companies	**)**	**Case 15-M-0127**
Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State	**)**	**Case 12-M-0476**
In the Matter of Retail Access Business Rules	**)**	**Case 98-M-1343**

PETITION FOR REHEARING AND CLARIFICATION OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)[1] hereby submits this Petition for Rehearing and Clarification of the Commission's, "Order Resetting Retail Energy Markets and Establishing Further Process," issued on February 23, 2016 [hereinafter "February Order"]. Contrary to well-established Commission policy and practice in support of the development of competitive retail markets, and without notice or meaningful opportunity to be heard, the February Order adopted requirements for ESCO service to mass market customers which would effectively shut down the market for the majority of ESCOs and their customers. The Order, which was to have become effective ten days from its issuance, required that ESCOs, "may only enroll mass market customers

[1] The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies. The responses set forth herein should not be construed as a waiver of any rights, issues, or claims being adjudicated by the Court in the pending litigation concerning the February Order, all of which are expressly reserved and incorporated herein by reference.

and renew expiring agreements with existing mass market customers based on contracts that guarantee savings in comparison to what the customer would have paid as a full service utility customer or provide at least 30% renewable electricity." (February Order at 2). The Order imposed sweeping and draconian changes on the industry that require the industry to totally revamp its operations, financial structure and business models with ten days' notice. This injury was compounded by the fact that, during the narrow ten day window, the Commission was issuing and then reissuing revised compliance guidelines that ESCOs would have been forced to rely on to conform their business practices, business models and product slate. The Commission also expressed its intention to engage in a sixty day review period to, "refine the retail energy markets for residential and small non-residential customers in New York State," during which time it would, "consider new requirements applicable to entities providing energy to mass market customers." (February Order at 2).

Compounding the business and financial impact of essentially forcing retail sales to be made below wholesale prices, the February Order also adopted changes to the Commission's enforcement procedures under the Uniform Business Practices (UBP). The changes pertain to the process under which ESCO eligibility can be revoked. (February Order at 18). No industry can operate or even reasonably anticipate such sweeping and improper mandates to its fundamental business model and economics.

Pursuant to the Commission's regulations at 16 NYCRR 3.7, rehearing, "may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different conclusion." A petition must, "separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing." In further support of this Petition, NEM hereby incorporates by reference and attaches hereto its Verified Article 78

Petition and Complaint and Memorandum of Law filed in National Energy Marketers Association, et al. v. New York State Public Service Commission (Alb. Co. Index No. 868-16). Essentially this Order violates both procedural and substantive due process as well as numerous other constitutional protections provided within SAPA and common law jurisprudence in New York, and both the U.S. and New York State Constitutions as well as the common law jurisprudence thereunder generally.

The February Order is affected by the following errors of law and/or fact:

1. **The Order and its Requirements Were Not Issued in Conformance with SAPA**

The new regime restricting ESCO service to mass market customers to a guaranteed savings product or a 30% renewable product, on ten days notice, was not issued in conformance with the processes set forth under New York State law in the State Administrative Procedures Act (SAPA). The Commission did not provide the industry the requisite notice and opportunity to comment on the new regime prior to its adoption. Indeed, the notices cited and relied upon by the Commission in the February Order could not give rise to even an inference that the Commission was considering a "reset" of the entire retail market that would eliminate all but two types of ESCO products - a guaranteed savings product or a 30% renewable product. This is belied by the Commission's post hoc, after-the-fact attempt to create a record for the February Order market restrictions during the sixty day review period.

2. **The Order is in Excess of the Commission's Statutory Authority**

The Public Service Law does not grant the Commission authority to set ESCO rates or prescribe ESCO products. Indeed, by definition, in a competitive marketplace, ESCO rates and products

should be determined as a function of competitive market forces, consumer preferences and technological innovation. The February Order, by adopting requirements about ESCO rates and products, attempts to impose a statutory, market power-based utility ratemaking regime on non-utilities. The Commission's ratemaking authority under Article 4 is expressly limited to utility monopolies. The Commission's authority over ESCOs under Article 2 does not pertain to rate setting. Nor does Article 1, Section 5 confer any authority on the Commission to set ESCO rates.

3. The Order Erroneously Concludes that ESCO Commodity-Only Service Cannot Provide Value to Consumers

The market restrictions adopted in the February Order are based on the Commission's erroneous and unsupported conclusion that, "[i]t is not in the public interest for ESCOs to provide commodity supply only products for mass market customers. An immediate transition away from a retail market focused on commodity resale, to a market in which competitive energy service providers provide guaranteed savings to consumers or further clean energy goals, is warranted." (February Order at 13). In adopting these two requirements, the Commission drastically undercut all of the various ways that consumers derive value from the competitive retail marketplace, and arbitrarily replaced it with a single metric – "lack of expected savings." (February Order at 10). The February Order completely fails to acknowledge that different ESCO products provide value to consumers in different ways. Some ESCO offerings are indeed designed to be price savings products. However, others offer price certainty. Some consumers place a premium on using green energy. Others want a commodity product bundled with home heating repair, so they have peace of mind during the winter months. Still others want energy efficiency products. Some customers want loyalty points and gift cards. In addition, the ESCO community has been actively engaged in meeting the call of the Commission's Reforming the Energy Vision proceeding to develop

Distributed Energy Resource products that actively engage consumers in their energy usage and purchasing decisions. Given the diversity of consumer opinion and preference as structured into ESCO products, it is entirely arbitrary and inapposite to judge the entire market on a "lack of expected savings."

Moreover, there has been a persistent lack of proper unbundling of utility delivery rates to separate out all of the costs associated with commodity and commodity-related services. In the absence of true utility delivery rate unbundling such that the utilities' costs of providing 24/7, no notice commodity service to consumers is transparently communicated to consumers as the utility "price to compare," there will be no basis upon which to accurately measure utility versus ESCO commodity pricing. The persistent retail market structure inequity perpetuated by a lack of utility rate unbundling is anti-competitive and favors the utilities. It has harmed consumers throughout the duration of retail choice and distorted the perceived value of competitive product options that are available from ESCOs. The conclusion that ESCO commodity-only service cannot provide value to consumers is fundamentally flawed and premised on faulty assumptions.

The Commission relies on ESCO complaint data as a basis for prohibiting ESCO commodity-only service, drawing the unsupported inference that the complaints reveal a lack of consumer value in this regard. The Order cited initial ESCO complaints of 5,044 and escalated complaints of 1,076 in 2015. (February Order at 12-13).[2] This data reveals that most complaints are resolved within 14 days. Additionally, for the vast majority of ESCOs, the number of complaints has actually decreased, and the development of new value added consumer products and services has steadily

[2] See The Verified Article 78 Petition and Complaint and Memorandum of Law filed in National Energy Marketers Association, et al. v. New York State Public Service Commission (Alb. Co. Index No. 868-16), attached hereto and incorporated herein for additional analysis of the complaint data relative to the actions taken in response thereto.

increased, and continues to do so. To put it into context, of the combined millions of electric and natural gas accounts served by ESCOs, and the number of additional consumers that are contacted by ESCOs in the sales and marketing process, there were only slightly more than 1,000 escalated complaints. The number of ESCO complaints completely fails to justify the restrictions adopted in the February Order.

4. The Order Restricts Consumer Choice

The February Order requires that renewing contracts must be enrolled into either of the two mandated products - guaranteed savings from the utility full service rate or 30% renewable energy. The Order seeks to require this notwithstanding the fact that it would be contrary to the terms of the original underlying contract and understanding reached with ESCO customers. Restricting or entirely eliminating product offerings that provide value, harms consumers by limiting their access to options that suit their individual preferences and budgets and for which they have specifically contracted for with their ESCO. For example, prohibiting consumers from entering into fixed rate contracts when the market is experiencing significantly lower prices forecloses the opportunity to lock in these historically low energy costs when market prices (and/ or utility prices) increase.

5. The Order Violates ESCO Due Process Rights

The February Order also violates ESCOs' rights to procedural as well as substantive due process by: (1) requiring them to forfeit their property interests, (2) without notice and an opportunity to be heard. By acting in excess of its statutory authority, and improperly and unjustifiably adopting these restrictions on ESCO rates and products, without compliance with SAPA requirements, the Commission deprived ESCOs of due process. ESCOs have made significant investments in New York to serve ESCO customers and established long-standing contractual relationships with

consumers. Prior to the February Order, the Commission had established decades of policy and regulations in furtherance of and encouraging the availability of retail choice. The February Order sought to completely dismantle this regime, and in so doing: (1) improperly deprive ESCOs of their property rights that had been acquired and accumulated in conformance with two decades of Commission guidance, and (2) on grossly inadequate notice.

6. The Order Requirements are an Unlawful Taking of ESCO Property

The February Order is an unconstitutional taking of ESCO property without just compensation under the U.S. Constitution. ESCOs acquired property interests by virtue of operating in New York, making investments, developing brand recognition and goodwill, incurring costs to acquire customers, and entering into contractual relationships with customers for two decades. All of these actions were taken in reliance on Commission policy and precedent in favor of retail market competition and ESCO participation in the retail market. The February Order impairs ESCO property rights without just compensation by forcing ESCOs to comply by offering a "guaranteed loss" commodity product, a 30% renewable product, or to terminate their contractual relationships with customers that they will effectively be required to return to the competing utility. All of the ESCO investments and resources expended and employed in offering other products, to serve existing and prospective customers, that were suddenly and unjustifiably deemed non-compliant by the February Order, will be lost.

7. The Order Arbitrarily Prohibits ESCOs from Offering Rates and Products in Relation to Other Similarly Situated Entities

The February Order prohibits ESCOs from offering rates and products in relation to other similarly situated entities in violation of New York State and federal equal protection guarantees as follows:

A. Regulated Utilities

The February Order arbitrarily and drastically limits permissible ESCO offerings to a guaranteed savings product or a 30% renewable product, which severely limits ESCOs ability to compete with utility monopolies. In fact, by adopting these restrictions, the February Order nearly eliminates all of the pricing and product innovation that competitive entities excel at providing, in comparison with regulated utility monopolies that are intended to deliver commodity, and when allowed to participate in the commodity market they provide a "plain vanilla" commodity offering, if at all. All of the ESCOs that cannot comply with the Order will be forced to give their hard-won customers, which the ESCOs incurred significant costs to acquire, to the competing monopoly utility. The utilities will unfairly acquire these ESCO customers for free.

B. Distributed Energy Resource Providers

The February Order arbitrarily prohibits ESCOs from offering energy-related value-added services. ESCOs may only offer a "guaranteed loss" product or a 30% renewable product. Other Distributed Energy Resource Providers (DERPs) are not subject to any such prohibition. Indeed, there is no basis upon which the Commission could validly make such a distinction. And, currently DERPs are not subject to any Commission oversight. It is also directly contrary to the Commission's repeated statements in the REV proceeding that ESCOs are pivotal to achieving its goals of increased consumer engagement in the marketplace with an innovative array of energy-related value-added services.

C. Aggregation Programs

The Order also arbitrarily restricts ESCOs from offering any commodity-only service other than a guaranteed savings product but imposes no such restriction on entities serving Community Choice

Aggregations or government aggregation programs. (February Order at note 22). The Commission attempts to rationalize this by characterizing these programs as more, "closely aligned with industrial and large commercial customers." (Id.) Given all of the Commission's consumer protection Orders and rules that clearly distinguish these types of consumers, this is not an apt comparison. In fact, there is and can be no justification for making this distinction as it effectively eliminates the availability of energy choice for some mass market consumers and not others, based solely on whether they live in an aggregation area or not.

8. <u>The Commission Should Clarify that the New Enforcement Procedures Will Not Be Retroactively Applied to ESCO Complaints Arising Before the February Order</u>

For all of the reasons stated herein and in the attachments, the Commission should withdraw this rulemaking immediately. At a minimum, the Commission should clarify the revision to the UBP pertaining to the application of the new enforcement provisions whereby the Commission will proceed directly to the issuance of an Order to Show Cause without previously providing an ESCO with a cure period. (February Order at 18). The new enforcement procedure represents a significant departure from Commission practice, in which significant consequences such as eligibility revocation, could be imposed on a newly expedited (and potentially no notice) basis. The new enforcement procedure should not be applied retroactively to complaints arising before the February Order. Clearly, the changes to the enforcement procedures are intended as a behavioral deterrent. The effect of deterring conduct can only occur on a going forward basis. It would be inequitable to apply the procedures retroactively to ESCO conduct that took place before ESCOs were on notice that the procedures were adopted.

Conclusion

For the reasons set forth above and in the attachments hereto, NEM respectfully requests that the Commission withdraw the instant Order. Absent its withdrawal, NEM urges the Commission to grant rehearing and/or clarification in this proceeding.

Sincerely,

Craig G. Goodman, Esq.
President
Stacey L. Rantala
Director, Regulatory Services
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007
Tel: (202) 333-3288
Email: cgoodman@energymarketers.com;
srantala@energymarketers.com
Website-www.energymarketers.com

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