

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 23-M-0106 - In the Matter of Commission Registration of Energy Brokers and Energy Consultants Pursuant to Public Service Law Section 66-t.

Case 15-M-0180 - In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products.

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

ORDER ADOPTING ENERGY BROKER AND ENERGY
CONSULTANT REGISTRATION REQUIREMENTS

Issued and Effective: June 23, 2023

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 22, 2023

COMMISSIONERS PRESENT:

Rory M. Christian, Chair
Diane X. Burman, dissenting
James S. Alesi
Tracey A. Edwards
John B. Howard
David J. Valesky
John B. Maggiore

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BY THE COMMISSION:

INTRODUCTION

Chapter 787 of the Laws of 2022 enacted a new Public Service Law (PSL) §66-t that requires energy brokers and energy consultants to register with the Public Service Commission (Commission), with the goal of increasing transparency and accountability in a formerly unregulated marketplace. PSL §66-t addresses this goal by requiring energy brokers and consultants to disclose their form and amount of compensation to customers

and prohibiting brokers and consultants from offering rebates to the energy ratepayer and any agent of the ratepayer as an inducement for enrollment in an energy supply product or energy-related business. These disclosures are intended to eliminate undisclosed rebates and fee-splitting, and other transfers of valuable consideration that could undermine the unfettered function of the marketplace.

Staff of the Department of Public Service (Staff) filed proposed regulations on March 14, 2023, to establish requirements for a registration process, compensation disclosure, and enforcement procedures. As discussed below, Staff proposes to adopt the requirements of PSL §66-t through amendments of the heretofore existing version of the Uniform Business Practices (UBP) for energy service companies (ESCOs) and the Uniform Business Practices for Distributed Energy Resource Suppliers (UBP-DERS). The UBP and UBP-DERS are the mechanisms by which the Commission provides for consistent business procedures for both the ESCOs and the State's electric and natural gas utilities, as well as distributed energy resources (DER) suppliers. The Commission finds this approach to be reasonable and consistent with ensuring regulatory certainty.

The Staff proposal also identifies the specific entities that would be covered under the statutory definitions of "energy broker" and "energy consultant" and thus subject to the statute's new registration and annual fee requirements, and enforcement provisions. Through this Order, the Commission adopts, with modifications, the Staff proposal to establish a registration process and the necessary procedures for implementation of PSL §66-t. With respect to those entities that Staff recommends as being subject to coverage, the Commission mostly approves the Staff proposal, though the

Commission provides additional clarification as to the activities that would subject entities to regulations, and specifically precludes application to entities like community choice aggregation (CCA) administrators, utility rate consultants, and private attorneys. The Staff proposal otherwise addresses issues related to compensation disclosure, the timing of registration, the use of customer data, the method of financial accountability, ESCO and DER supplier responsibilities, and other related matters. With respect to these issues, the Commission generally adopts each of these aspects of the proposal.

BACKGROUND

Public Service Law §66-t

PSL §66-t provides consumer protections to protect customers from deceptive marketing practices, undisclosed fee splitting, and rebates between energy brokers and third parties. To this end, the new statutory PSL §66-t(2) prohibits an entity from acting or identifying itself as an energy broker or consultant without first registering with the Commission and prohibits any person from accepting a commission, service fee, brokerage, or other valuable consideration for selling, soliciting, or negotiating an energy contract in New York if the person is required to be registered under PSL §66-t and is not so registered. Section 66-t(3) authorizes the Commission to prescribe requirements concerning the manner in which "energy brokers" and "energy consultants" interact with potential customers. The statute broadly defines "energy broker" and "energy consultant" - the entities covered under the statute as follows:

- The term "energy broker" is defined to mean "an entity that assumes the contractual and legal responsibility for the sale of electric supply service, transmission or

other services to end-use retail customers, but does not take title to any of the electricity sold, or an entity that assumes the contractual and legal obligation to provide for the sale of natural gas supply service, transportation or other services to end-use retail customers, but does not take title to any of the natural gas sold"; and

- The term "energy consultant" is defined to mean "any person, firm, association or corporation who acts as broker in soliciting, negotiating or advising any electric or natural gas contract, or acts as an agent in accepting any electric or natural gas contract on behalf of an ESCO."¹

Section 66-t(3)(b) empowers the Commission to refuse or revoke registrations if, in its judgment, the broker or consultant has given cause for the revocation or suspension of operations. Acting as an energy broker or consultant without registering with the Commission constitutes a violation of PSL §66-t and authorizes the Commission to impose a penalty of up to \$5,000 for each violation.² Section 66-t(3)(a) specifies that, as part of the registration process, energy brokers must demonstrate financial accountability as evidenced by a bond or other method of financial accountability in an amount not less than \$100,000, while energy consultants must demonstrate financial accountability in an amount not less than \$50,000. The statute specifies that each broker or consultant is required to annually pay the Commission a \$500 registration fee, and requires each broker or consultant to notify the Commission upon changing its name.³

Section 66-t(4)(a) requires brokers and consultants to disclose their form and amount of compensation to customers via a conspicuous statement on any contract or agreement between the

¹ PSL §66-t(1)(c) & (d).

² PSL §66-t(2)(a)(ii).

³ PSL §66-t(3)(c) & (d).

energy agent, consultant, broker, or intermediary and its customer. In this respect, section 66-t(1)(a) defines broker compensation to mean "any payment made to an energy broker or energy consultant for the purposes of securing or procuring of energy for the end-use customer, or advising on the securing or procuring of energy for the end-use consumer." Section 66-t(4)(b) requires an ESCO that collects compensation on behalf of a broker or consultant to add a provision to the Customer Disclosure Label that reflects the amount and method of broker compensation.

Finally, PSL §66-t(5)(a) prohibits brokers and consultants, or any person acting on their behalf, from offering or making, directly or indirectly, any rebate of any portion of the fee, premium or charge made, or paying or giving to any applicant, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the energy ratepayer or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any energy supply or energy-related business. The same provision also prohibits any applicant, or any person, firm, or corporation acting as agent, representative, attorney, or employee of the energy ratepayer or of the prospective energy ratepayer or anyone having any interest in the real property from knowingly receiving, directly or indirectly, any such rebate or other consideration or

valuable thing.⁴ However, §66-t(5)(b) states that nothing "shall prohibit any energy supplier corporation, energy broker, or energy consultant, or any other person acting for or on behalf of the energy service company, energy broker or energy consultant from undertaking any usual and customary marketing activity aimed at acquainting present and prospective customers with the advantages of using a particular energy supplier, energy broker, or energy consultant that are not intended for the purpose of a reward for the future placement of, or the past placement of, a particular piece of energy supply business."

Staff Proposal

On March 14, 2023, Staff filed a proposal to implement the requirements of PSL §66-t. The Staff proposal sets forth an implementation plan for the provisions of PSL §66-t through amendments to the UBP and the UBP-DERS.

Staff's proposal adds regulatory definitions for the terms "energy broker" and "energy consultant" as follows:

- Energy Broker: A "non-utility entity that performs energy management or procurement functions on behalf of customers or ESCOs, and (1) that assumes the contractual and legal responsibility for the sale of electric supply service, transmission or other services to end-use retail customers, but does not take title to any of the electricity sold, and does not make retail energy sales to customers, or (2) that assumes the contractual and legal obligation to provide for the sale of natural gas supply service, transportation or other services to end-use retail customers, but does not take title to any of

⁴ See also PSL §66-t(5)(b) ("an inducement for, or as compensation for, any energy supply business" is defined to mean "a benefit given with the intention to compensate or offer compensation, directly or indirectly, for any past or present placement for a particular piece of energy supply or energy-related business to any applicant, or person, firm, or corporation acting as agent, representative, attorney, or employee of the energy ratepayer, lessee, mortgagee or the prospective energy ratepayer, or any interest therein".)

the natural gas sold, and but does not make retail energy sales to customers.”

- Energy Consultant: “[A]ny person, firm, association or corporation who acts as broker in soliciting, negotiating or advising any electric or natural gas contract, or acts as an agent in accepting any electric or natural gas contract on behalf of an ESCO.”

Notably, the Staff proposal incorporates the identical definitions of both terms that are included in the statute.⁵ To maintain consistency with the existing definition of “energy broker” in the UBP, Staff merged the statutory definition into the existing definition of that term in the UBP. By contrast, Staff adopted in its proposal the identical definition of the term “energy consultant” - a new term - specified in the statute. Additionally, in accord with the broad statutory definitions of these terms, Staff recommends that the statute cover a range of entities, including CCA administrators, DER suppliers, ESCOs, and entities that provide rate consulting services. In sum, the amendments to the UBP and UBP-DERS appended to the Staff proposal would apply to any entity that performs actions that would qualify them as an “energy broker” or “energy consultant.” Staff recommends that any entity that performs services in a manner that triggers the definitions of both “energy broker” and “energy consultant” only be required to register once as both entities and follow the process to register as an energy broker.

Staff’s proposal would establish a registration process for brokers and consultants consisting of a registration form, an annual \$500 registration fee, and an irrevocable standby letter of credit in the amount of \$100,000 for brokers and \$50,000 for consultants. Staff proposes an annual program

⁵ See PSL §66-t(1)(c) & (d).

year running from September 1 through August 31, with compliance due on August 31 each year.

The proposed registration form would require that brokers and consultants submit (1) a sample standard Sales Agreement; (2) sample forms of the notices sent upon assignment of sales agreements, discontinuance of service, or transfer of customers to other providers; (3) procedures used to obtain customer authorization for access to a customers' historic usage or credit information; (4) information on the methods by which the applicant intends to market energy products and services; (5) sample copies of informational and promotional materials that the applicant uses for mass marketing purposes; (6) sample disclosures of compensation; (7) proof of registration with the New York State Department of State; (8) proof of registration to act as a marketer in any municipality where such registration is required; and (9) a completed Service Provider Contact Form, identifying employees responsible for resolving consumer complaints received by the Department of Public Service (Department).

The Staff proposal recommends that the Commission consider an applicant's record of compliance with laws and regulations of New York and other states in determining whether to exercise the authority granted by PSL §66-t(3)(b) to revoke or refuse registrations. Staff would provide a written communication to an applicant when its registration has been approved that states the applicant is authorized to operate in New York.

Under the Staff proposal, any agreements that the broker or consultant has with the customer would require disclosure of compensation on the first page. ESCOs and DER suppliers would be obligated to disclose any compensation collected on behalf of a broker or consultant on Customer

Disclosure Statements. Staff recommends that all disclosures of compensation to customers include any dollar amount paid to the broker or consultant, the form in which the compensation was given to the broker or consultant, the entity that made the payment, and any broker fee or margin that was added to the energy supplier's rate. Staff also recommends that this disclosure include anything of value given as compensation to the broker or consultant for its work, including commissions, bonuses, and non-financial compensation.

The Staff proposal adopts the prohibition on rebates included in PSL §66-t(5). Staff interprets the prohibition on rebates to include anything of value offered as an inducement or compensation for exclusive access to the rate payer or the dwelling unit or multiple-dwelling unit structure in which the rate payer resides.

Staff recommends that enforcement of the statute's requirements for registration and compensation disclosure and its prohibition on rebates follow the enforcement process currently established in the UBP.⁶ A broker or consultant would be subject to an enforcement action for a violation of any law, rule, or regulation, including PSL §66-t and the UBP and UBP-DERS, and would be provided with notice and an opportunity to respond before the imposition of penalties and/or other sanctions.

The Staff proposal amends the definition of an "ESCO marketing representative" in the UBP and the definition of a "CDG marketing representative" in the UBP-DERS to recognize that entities that may need to register as brokers or consultants may still be considered marketing representatives of ESCOs or community distributed generation (CDG) providers. The Staff

⁶ UBP §2.D.6.

proposal would also require energy brokers and consultants to adhere to certain UBP and UBP-DERS provisions regarding registration, marketing, recordkeeping, and procedures to resolve customer inquiries and protect customer data.

Under the Staff proposal, ESCOs and DER suppliers would be prohibited from doing business with brokers and consultants that are not registered with the Commission. ESCOs and DER suppliers would be required to verify registration of brokers and consultants by checking a list of registered entities on the Department's website.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rule Making was published in the State Register on March 22, 2023 [SAPA No. 23-M-0106SP1] (SAPA Notice). The time for submission of comments pursuant to the SAPA Notice expired on May 22, 2023. For ease of reference the public comments received are discussed below, with a full comment summary attached as Appendix C.

LEGAL AUTHORITY

The Commission's authority to regulate ESCOs and DER suppliers stems from its authority over electric corporations, as defined in PSL §§2(13) and 53, as well as its authority over entities participating in Commission-authorized programs, tariffs, or markets. Pursuant to the PSL, the Commission has "authority to condition ESCOs' eligibility to access utility [distribution systems] on such terms and conditions that the

[Commission] determines to be just and reasonable.”⁷ Consistent with this authority, the Commission adopted the Uniform Business Practices, which set forth various regulatory eligibility requirements for ESCOs to begin accessing, and to continue accessing, utility distribution systems for the purpose of selling energy services to customers. The Commission’s authority to impose rules and requirements on DER suppliers stems from both its authority over electric corporations, as defined in PSL §§2(13) and 53, as well as its responsibility to ensure that participants in Commission directed or authorized programs, tariffs, or markets receive appropriate protections.

PSL §66-t provides that energy brokers and consultants shall register with the Commission and provides that such registration authorizes brokers and consultants to act in a manner prescribed by the Commission. The statute also authorizes the Commission to refuse to register a broker, marketer or consultant, or revoke a registration if, in the Commission’s judgement, there is cause for revocation or suspension of operations.

DISCUSSION

In this Order, the Commission adopts most of Staff’s proposal to amend the UBP and UBP-DERS to establish a registration process for energy brokers and consultants and procedures to enforce the provisions of PSL §66-t with modifications as discussed within the body of this Order. As noted in Appendix C, the record contains numerous comments regarding the Staff proposal and PSL §66-t. For ease of review,

⁷ Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn., 33 N.Y.3d 336, 351 (2019); see PSL §§5(1)(b), 65(1), 66(5), 66-d(2); see generally GBL §349-d(11).

the Commission's ensuing discussion below summarizes pertinent elements included in Staff's proposal, summarizes public comments addressing Staff's proposed new and amended provisions, and examines the rational basis for the provisions in the context of making a final determination.

Definitions of "Energy Broker" and "Energy Consultant"

As noted above, Staff took the position in its proposal that PSL §66-t(1) provides broad definitions of "energy broker" and "energy consultant" that would cover entities performing a multitude of activities related to contracts for energy services and defined these terms in a manner that the proposal asserts is reasonable for regulatory coverage of such a dynamic and rapidly developing market. Staff recommends that the Commission fully adopt the definitions of "energy broker" and "energy consultant" that appear in PSL §66-t(1).⁸ Importantly, Staff recommends interpreting the term "energy broker" broadly to apply to CCA administrators and to any ESCOs, DER suppliers and other entities that perform actions that would otherwise fall under the definition of "energy broker." While also recommending adoption of the statutory definition of "energy consultant," the Staff proposal asserts that this definition should apply to entities that provide consulting services to customers related to soliciting, negotiating, advising a contract for electric or natural gas service, which logically would include within the Commission's regulatory

⁸ Notably, Staff's proposed definition of "energy broker" included language from the prior UBP definition for the purpose of providing sufficient clarity to its application. Specifically, Staff recommends including the phrases "non utility entity that performs energy management or procurement functions on behalf of customer or [ESCOs/DER Suppliers]" and "that does not make retail energy sales to customers."

jurisdiction utility rate consultants, ESCOs, DER suppliers, and other entities that counsel customers regarding electric, natural gas, or DER contracts.

A. General Application

Several commenters have requested that the Commission specify the types of entities that would be subject to registration under the Staff proposal as either an energy broker or an energy consultant. For example, The Energy Professionals Association (TEPA), NRG Energy, Inc. (NRG), and Mirabito Power & Gas, LLC (MPG) encourage the adoption of definitions that describe energy brokers and consultants in the way that they claim is broadly understood by many in the industry currently. According to TEPA, a broker would be compensated by an ESCO but may take payments from retail customers in some circumstances, and a consultant would be compensated directly by retail customers but may take payments from an ESCO in some circumstances.

In contrast, NRG states that it is very uncommon for the types of entities that industry participants traditionally consider to be brokers to take legal responsibility for the sale of energy supply, as described in PSL §66-t's definition of "energy broker", and any such entity would be considered by the industry to be an ESCO. Consequently, NRG's position is that there are few entities that meet the definition of "energy broker" in PSL §66-t(1)(c). MPG made a similar point in its comments. Finally, both commenters state that the entities that industry participants traditionally consider to be brokers would instead be considered consultants under PSL §66-t(1)(d).

Energy Technology Savings, Inc. DBA Logical Buildings (Logical Buildings) believes Staff's interpretation of "energy consultant" to be overly broad and argues that because "energy consultant" is defined as "any person, firm, association or

corporation who acts as a broker in soliciting, negotiating or advising any electric or natural gas contract, or acts as an agent in accepting any electric or natural gas contract on behalf of an ESCO", an energy consultant must either (1) meet the definition of "energy broker" in PSL §66-t(1)(c) by assuming contractual and legal responsibility for the sale of electric or natural gas supply service or (2) act as an agent for an ESCO. Logical Buildings further argues, without defining its terms, that entities that provide consulting services but do not act as a broker or agent should not be subject to registration requirements, and that "under Staff's extreme interpretation, an attorney advising a client on an energy contract would be required to register with the Commission as an energy consultant."

Determination

The Commission disagrees that the language of PSL §66-t, and Staff's proposed adoption of the plain language thereof, is extreme. The Commission finds that Staff's proposed adoption of the statutory definitions of "energy broker" and "energy consultant," as well as its proposed applicability of those definitions to the entities and individuals noted above, is reasonable, and includes certain modifications noted below. In particular, the Commission finds the proposal's reading of the statutory terms to apply to ESCOs, DER suppliers, and third-party vendors working on behalf of ESCOs follows logically from the broad terms used in those definitions. For example, CCA administrators fit within the statutory definition of "energy broker" because they assume the contractual and legal responsibility for the sale of electric supply service to the communities they serve. Further, an ESCO may operate as an "energy consultant" when it performs marketing activities for other ESCOs or DER suppliers because it would be acting as a

broker in soliciting, negotiating, or advising energy contracts. Similarly, third party vendors for ESCOs undertake marketing activity designed to enroll customers with that ESCO through soliciting, negotiating, and advising on the ESCOs energy contracts.

The Commission agrees with this broad reading of the statute, but also sees a need at this time, to narrow the interpretation of the term "other services" as used in both the statutory and regulatory definition of "energy broker" to provide more regulatory certainty and consistency with existing Commission policies. As noted above, both the statutory and regulatory definition of term "energy broker" reference a non-utility entity that assumes the contractual and legal responsibility for the sale of electric or gas supply service. To ensure regulatory certainty and narrow the focus to current services that may be offered by ESCOs under the Commission's existing orders, and for which there is a well-developed record over time, the Commission finds that the term "other services" applies to energy-related, value-added services bundled with electric and/or gas commodity supply services provided by ESCOs.

The Commission also clarifies here the definition of "energy consultant" based on public comments in the record that address this precise issue. As noted, some commenters argued that Staff applied too broad of an interpretation to the phrase "advising any electric or natural gas contract" within the definition of "energy consultant." The Commission agrees with this line of argument to a certain extent. To provide necessary predictability and regulatory certainty, at this time the Commission limits the applicability of the term "energy consultant" so that it applies to (1) those entities that receive valuable consideration for acting as agents of a third party or an end-use retail customer, or as intermediaries

between an end-use retail customer and a third party, in the soliciting, negotiating, or advising of energy contracts, with the purpose of facilitating such contracts, or (2) those acting as an agent in accepting an energy contract on behalf of an ESCO or DER Provider. With these modifications, the Commission balances the inclusive language of the statute with the need to provide regulatory certainty to those entities and individuals covered under the statute.

The Commission does not agree with Logical Buildings' contention that the inclusion of the word "broker" in the definition of "energy consultant" means that only an entity that qualifies as an "energy broker" under PSL §66-t(1)(c) or that acts as an agent for an ESCO would qualify as an "energy consultant." If the legislature intended the statute to be interpreted as Logical Buildings suggests, then it would have included the full term "energy broker" within the definition of "energy consultant."

The Commission interprets the inclusion of the word "broker" in the definition of "energy consultant" to mean that an entity qualifies as an "energy consultant" when it is acting as an agent or intermediary, for consideration, with the purpose of facilitating an electric or natural gas contract through soliciting, negotiating, or advising the contract. This interpretation is echoed in the second part of the definition of "energy consultant," which applies the definition to an entity that acts as an agent of an ESCO in accepting an electric or natural gas contract.⁹ The characteristics that define an entity as an energy consultant are that it acts as an agent to facilitate an energy contract. Using Logical Buildings' example, this interpretation would not require an attorney

⁹ See PSL §66-t(1)(d).

advising a client on an energy contract to register as an "energy consultant" as an attorney's advice would not be for the purpose of facilitating, or moving forward, the agreement, but would, presumably, be limited to advising the client on what is in their best interests.

For the avoidance of doubt, the Commission specifically exempts attorneys providing legal services pursuant to an existing attorney-client relationship from the requirements of PSL §66-t, even if those legal services may fall within the definitions of energy broker or consultant. The fiduciary duty attorneys have towards their clients mitigates concerns regarding the need for consumer protections in these energy transactions. Additionally, attorneys are licensed by the Appellate Division of the New York State Supreme Court, which retains authority over attorney licensing, conduct, and disciplinary actions.¹⁰ Requiring attorneys, who have a legally imposed fiduciary relationship towards their clients, and are already comprehensively regulated in the public interest, would impose an unnecessary and duplicative burden on such individuals and would not advance the intent of PSL §66-t.

Both TEPA and NRG state that energy brokers and consultants typically work on behalf of a customer; however, the definitions provided in PSL §66-t do not make any such distinction. The Commission is charged with implementing PSL §66-t and following the statutory definitions, not the industry's understandings of the meanings of "energy broker" and "energy consultant", and therefore rejects that suggestion.

The applicability of energy broker and energy consultant registration requirements ultimately depend on whether an entity's actions meet the definition of "energy

¹⁰ N.Y. Judiciary Law, Article 15.

broker" and "energy consultant" provided in PSL §66-t. The Commission will not at this time make a blanket judgement on whether certain types of actors in the retail energy market need to register because one type of actor may take on various roles. The test for the applicability of the registration requirement will examine the business model or models followed by the energy broker and energy consultant, whether such models provide greater transparency and accountability for the marketplace, and whether such entities have direct contact with customers.

B. Applicability of Definitions to ESCOs and DER Suppliers

The Retail Energy Supply Association (RESA), Family Energy, Inc. (Family), and the New York Retail Choice Coalition (NYRCC) suggest that the Commission exclude ESCOs and DER suppliers from having to register as energy brokers or consultants. According to these commenters, ESCOs and DER suppliers are already subject to registration with the Commission and the provisions of the UBP and UBP-DERS. These commenters state that requiring ESCOs and DER suppliers to register as energy brokers or consultants would not further protect consumers, would lead to regulatory confusion and impose an additional administrative burden on Staff.

Family supports Staff's recommendation to exclude individual employees of a registered energy broker or consultant from having to also register, and states that members of an ESCO's in-house sales team acting on behalf of the ESCO should not be considered energy brokers or consultants as they are not acting as intermediaries to the transaction but as employees of the ESCO. NRG and MPG also request clarification on whether employees of ESCOs would be required to register as energy brokers or consultants.

New York Solar Energy Industries Association (NYSEIA) and Coalition for Community Solar Access (CCSA), along with Ampion, PBC (Ampion) request clarification on whether the registration requirements are applicable to CDG providers and DER suppliers. These parties also recommend that, instead of amending the UBP and UBP-DERS to address the requirements of PSL §66-t, separate business practices should be established for energy brokers and consultants.

Determination

The Commission disagrees with those commenters that request that ESCOs and/or DER suppliers be exempted from the provisions of PSL §66-t or the requirement to register if their actions fall under those described in the definitions of "energy broker" or "energy consultant" in the UBP and UBP-DERS. An ESCO's potential qualification as an "energy broker" is not tied to its purchase of energy for the purpose of resale to end-use customers or its taking title to the electricity or natural gas sold or to entities that make retail sales of energy commodity to end-use customers, but instead arises out of other potential activities conducted by the ESCO. For example, many ESCOs may conduct marketing activities on behalf of third parties, essentially taking on a role that would require registration as an "energy consultant." It is these types of activities, which would be scrutinized in the business model test enunciated above, that would qualify ESCOs as an entity covered under PSL §66-t.

The Commission acknowledges that ESCOs and DER suppliers are already regulated through specifically provided registration/eligibility requirements under the UBP and UBP-DERS. However, these regulatory constructs do not comprehensively regulate ESCOs or DER suppliers that broker deals between a customer and a third-party supplier of the

energy commodity or DER product for compensation. Such actions are more akin to the definition and business practices of an energy broker and require additional oversight not previously provided by the UBP or UBP-DERS, and therefore ESCOs and DERS carrying out such business models shall be subject to regulation as energy brokers.

To address the comments from Family, NRG, and MPG regarding an ESCO's in-house sales team, these individuals would not be "energy brokers" as they are employees of the ESCO that are exempt for the same reasons as the ESCO itself. That said, these individuals would fall under the definition of "energy consultant" as they act as a broker in soliciting, negotiating, or advising electric or natural gas contracts. However, the Commission declines at this time to apply this definition to an ESCO's in-house sales team, since these individuals are an ESCO's employees and would be covered under the ESCO's Retail Access Eligibility Application.

The term "DER supplier" encompasses a broad array of entities that may provide stand-alone DER products and services and also those that bundle such products and services with energy commodity. Regarding the comments from NYSEIA, CCSA, and Ampion, registration requirements will apply to DER suppliers that perform actions that fall under the definitions of "energy broker" or "energy consultant." The definition of "energy consultant" applies to actions taken in relation to an "electric or natural gas contract." The Commission will thus apply this requirement only to contracts for commodity service. Consequently, CDG sponsors would not fit within the definition of "energy consultant" as CDG sponsors provide bill credits to customers and do not provide commodity service. Nevertheless, the provisions of PSL §66-t provide that registration requirements are logically applicable to CDG providers and DER

suppliers that broker commodity transactions between a customer and an energy commodity supplier. In other words, while a CDG provider would not be subject to these registration requirements based on their CDG activities alone, it might engage in additional activities that would necessitate registration under PSL §66-t.

While CCA Administrators technically may fall under the broad definition of "energy broker" because they assume the contractual and legal responsibility for the sale of electric supply service for the communities they serve, without taking title to the electricity sold, applying these registration requirements under PSL §66-t to CCA Administrators would create administrative inefficiencies and impose requirements that are unnecessary in light of the more robust application process undertaken by CCA Administrators currently. In order to become an authorized CCA Administrator in New York, the applicant must petition the Commission and receive specific approval of its envisioned CCA program, which must include numerous consumer protections tailored to CCA programs. This approval process reflects a comprehensive and more robust oversight regime than that imposed by PSL §66-t, and application of these requirements to CCA Administrators would be redundant. For these reasons, the Commission declines to apply the requirements of PSL §66-t to CCA Administrators at this time.

C. Applicability to Third-Party Vendors of ESCOs

Family requests clarification in its comments as to whether entities considered marketing representatives under the UBP, such as door-to-door sales vendors, telemarketing vendors, and retail kiosk sales vendors, will be required to register as "energy consultants." In its comments, RESA asserts that, since ESCOs and DER suppliers are registered with the Commission and are responsible for the actions of their marketing

representatives, such marketing representatives should not have to register as energy brokers or consultants.

In contrast, NYRCC and Energo Power and Gas, LLC (Energo) assert in their comments that independent door-to-door marketers, telemarketers, kiosk marketing companies, and other similar third-party vendors that solicit on behalf of ESCOs meet the definition of "energy consultant" and should be required to register. The NYRCC asserts that it is essential that these entities are held responsible for their actions directly by the Commission as they directly interact with customers and the intent of the legislation is to increase protections for customers against nefarious marketing tactics. Energo asserts that if these entities are exempted, it would result in entities that should be registered as brokers or consultants recharacterizing themselves as exempted categories.

NRG and MPG request clarification that vendors of an ESCO, including the ESCO's marketing representatives, would not be considered energy brokers or consultants. NRG does not agree with Staff's definition of an "ESCO marketing representative" in the UBP amendments and asserts that marketing representatives that work for an ESCO do not qualify as energy brokers or consultants. NRG notes that these entities already abide by the UBP and ESCOs are held responsible for their actions. NRG further states that providing a definition of "ESCO marketing representative" that includes energy brokers and consultants muddies the differences between representatives trained by and working on behalf of ESCOs, and brokers or consultants working on behalf of the customer.

Determination

While the Commission agrees with Staff's proposal that individual employees of a registered broker or consultant need not register because these entities will be covered under their

employer's registration, the Commission does not adopt Staff's proposal that contractors, vendors, and agents of an ESCO do not need to register. The Commission must ensure that it has direct regulatory authority over any contractors and agents of an ESCO if the contractor or agent's business activities fit the definitions of "energy broker" or "energy consultant."

Any third parties that market on behalf of ESCOs, including telemarketers, door-to-door marketers, kiosk marketers, and any other vendors, fall under PSL §66-t's definition of an "energy consultant." These third-party vendors meet both parts of the energy consultant definition by (1) receiving valuable consideration for acting as agents or intermediaries to solicit, negotiate, or advise energy contracts for the purpose of facilitating the contract and (2) by accepting energy contracts on behalf of ESCOs. By contrast to the ESCO in-house marketers discussed above, these entities are not employees of the ESCO and are not otherwise required to register/apply with the Commission in order to do business in New York. Thus, ESCO third-party marketers will be required to register with the Commission pursuant to PSL §66-t.

D. Applicability to Other Entities

The New York Utilities request clarification on whether distribution utilities and utility rate consultants are considered "energy consultants."¹¹ The NYRCC also seeks confirmation that the definitions of "energy broker" and "energy consultant" include entities that represent customers in

¹¹ The New York Utilities include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY, KeySpan Gas East Corporation d/b/a National Grid, Niagara Mohawk Power Corporation d/b/a National Grid, Orange & Rockland Utilities, Inc., Rochester Gas and Electric Corporation, and National Fuel Gas Distribution Corporation.

renegotiating supply rate or terms and conditions between the customer and the ESCO, and entities that submit inquiries or complaints to DPS on behalf of customers against ESCOs.

Public Utility Law Project of New York (PULP) asserts that Staff's expansive reading of the definition of "energy consultant" would include entities providing free advice and counsel to utility customers, like legal service providers, regional clean energy hubs, and PULP itself. For its part, Aurora Energy Advisors, LLC (Aurora) requests clarification on fee splitting arrangements and whether a company not acting as an energy broker or consultant but receiving a portion of a fee from an energy broker or consultant, would need to register as an energy broker or consultant.

Determination

As stated above, an entity is considered an "energy consultant" when it acts as a broker in soliciting, negotiating, or advising an energy contract, meaning that the entity is acting as an agent or intermediary. Those providing legal advice or guidance on energy options would not be required to register as energy consultants. Only those entities that accept consideration for directly facilitating an energy contract by advising a customer on whether to accept a contract or advocating for any particular entity as an energy source would be required to register as an energy consultant.

The legislative intent of PSL §66-t is to create greater transparency of and accountability for entities that do not have a fiduciary duty to the energy commodity customer, and where certain business models and forms of payment could create a misalignment of interests between an energy broker or consultant and an energy commodity customer. For civil legal services entities like PULP or legal services firms, for non-profit government funded entities like the regional energy hubs

funded by NYSERDA, and for for-profit law firms, each of these entities has a strong and mandated fiduciary duty to the customer, and to the public interest in the case of the regional energy hubs. Such entities will thus not be regulated by the Commission as energy consultants or energy brokers.

The Commission also agrees with Logical Buildings' comments that the Legislature did not intend to include all utility rate consultants in the definition of "energy consultants." As noted above, an energy consultant in an entity who "acts as a broker in soliciting, negotiating or advising any electric or natural gas contract,"¹² and the Commission is interpreting this phrase to apply to an energy consultant when acting as an agent or as an intermediary in relation to an energy contract. Utility rate consultants represent customers in disputes with utilities and advise customers on their rights under utility tariffs. A utility rate consultant is not acting as an agent or intermediary in an attempt to influence the customer's purchasing decisions on energy supply, transmission, transportation, or other services. Likewise, entities that represent customers in renegotiating supply rates, or terms and conditions between customers and ESCOs, or entities that submit complaints to DPS on behalf of customers against ESCOs, will not be considered "energy consultants" as such entities are not acting as agents or brokers in negotiating or advising on energy contracts.

The Commission agrees with the New York Utilities that distribution utilities are not included within the definition of "energy consultant" as they do not act as agents or brokers in the provision of information on energy supply options to consumers. Simply providing information on energy supply

¹² PSL §66-t(1)(d).

options in an unbiased manner does not qualify an entity as an energy consultant. Moreover, utilities are comprehensively regulated by the Commission in a manner designed to create transparency into their business activities, and accountability for their setting of rates and collection of revenues.

Regarding the comment by Aurora, a company will not be required to register with the Commission if it receives a fee, as part of a fee-splitting arrangement, from an energy broker or consultant when such company does not provide brokering or consulting services itself. However, such fee splitting arrangements must be disclosed to the customer by the energy broker or energy consultant as discussed elsewhere in this Order.

Compensation Disclosure

Staff proposes that, to the extent an energy broker or consultant has a direct contractual relationship with customers, the form and amount of compensation must be disclosed on the first page of a contract. ESCOs and DER suppliers would be obligated to disclose any compensation collected on behalf of a broker or consultant on Customer Disclosure Statements. Staff recommends that disclosures of compensation include any dollar amount paid to the broker or consultant, the form in which the compensation was given to the broker or consultant, the entity that made the payment, and any broker's fee or margin that was added to the energy supplier's rate. This financial disclosure would include anything of value that was given as compensation to the energy broker or consultant for its work, including commissions, bonuses, and any non-financial compensation.

Several commenters, including Energo, NRG, Power Management, and NYRCC, request that the Commission provide a standard procedure for compensation disclosure. For example,

NYRCC seeks confirmation that no disclosure of compensation is required when an ESCO directly compensates an energy broker or consultant for a customer enrollment and does not collect compensation from the customer on behalf of the broker or consultant. NYRCC also requests that any fee splitting arrangements be disclosed on the Customer Disclosure Statement. TEPA, L5E, LLC (L5E), NRG, and EMEX, LLC DBA Mantis Energy (Mantis) assert that the form of disclosure should be the compensation price per unit of energy, as the total cost of a contract may not be known at the time the agreement is made.

NRG states that incentives provided to energy brokers and consultants that are not tied to enrolling a specific customer, such as taking a broker to a sporting event or dinner to discuss future business prospects or show appreciation for a prior deal, or special bonuses or prizes not tied to a particular customer, should not be reportable to customers because it is not billed to a particular customer. NRG highlights that, in certain transactions, larger commercial and industrial customers may want the ability to hedge some of their costs up front and hedge the rest later when market prices change. NRG states that, when hedges are locked in, energy brokers or consultants may charge another fee included in the newly locked in price. NRG suggests including an amendment to the UBP, requiring a transaction confirmation to be sent to the customer listing the locked in volumes and prices and the broker fee separately.

Energio questions whether brokers will be subject to document retention requirements for compensation disclosures. Energio suggests the addition of a question whereby the customer acknowledges that the broker or consultant compensation was disclosed to the voice-recorded verification required for telephonic or door-to-door agreements pursuant to UBP Section 5,

Attachment 1. Energo also asks whether an ESCO may post collateral on behalf of a broker to assist the broker in obtaining a letter of credit and whether such an arrangement needs to be disclosed as compensation to customers.

Determination

The Commission finds that disclosing the broker or consultant compensation as a fee-per-unit of energy, a recurring fee, or a flat fee are all adequate methods of disclosing compensation. Because of the wide range of business models that may be impacted by the provisions of PSL §66-t, the Commission declines to adopt one standard method of or procedure for disclosing compensation. The energy broker or consultant shall disclose their method of compensation as it is known at the time of contracting, whether it be a flat fee, a recurring fee, or a fee per unit of energy, provided however that delaying compensation until after the time of contracting will not vacate the requirement for disclosure of method(s) of compensation. Regarding NRG's comment highlighting that additional fees may be charged in some arrangements after hedges are locked in, the Commission will not require additional disclosures to be sent, although the original contract must state that additional fees may be applied.

The Commission agrees with Staff's proposal that any other compensation given for brokering or consulting services, including any commissions, bonuses, or non-financial compensation, must be disclosed to the customer. However, if the details of such compensation are unknown at the time of contracting it is sufficient to include a statement that the broker or consultant may receive additional compensation, bonuses, commissions, or incentives in addition to the fee listed. Disclosures must also name the source of such compensation.

In response to NRG's comment, mandated disclosures are not limited to the compensation paid by a particular customer or in connection with a particular contract. The purpose of compensation disclosure is not only to make customers aware of what they are paying for, such as the brokering or consulting service, but to disclose any third parties that may be influencing the broker or consultant's decisions, or otherwise influencing the marketplace. Therefore, any compensation, including but not limited to, prizes, bonuses, or tickets to events, that is given for brokering or consulting services must be disclosed to customers, regardless of whether such compensation is provided directly by customer payments. As noted above, such compensation may be disclosed in a general manner but must include the source of such compensation.

PSL §66-t(4)(b) requires an ESCO to add broker compensation to the Customer Disclosure Statement if the ESCO is collecting compensation on behalf of the broker or consultant. To address NYRCC's comment, the Commission will require ESCOs and DER suppliers to include on the Customer Disclosure Statement any other compensation that the ESCO or DER supplier provides to the broker or consultant, including direct payments, commissions, bonuses, and non-financial compensation, as discussed further below.

In response to Energo's question, energy brokers and consultants will be subject to retention of compensation disclosure records as outlined in the amendments to the UBP and UBP-DERs. Specifically, if the energy broker or consultant has an agreement directly with the customer such documentation should be retained for two years, and such an agreement would contain the compensation disclosure on the first page. Additionally, energy brokers and consultants must retain records of independent third-party verification of telephonic and door-

to-door sales agreements for two years, which shall contain a customer acknowledgement of compensation disclosure.

Regarding Energo's suggestion, the Commission finds the addition of a question requiring customer acknowledgement of broker or consultant compensation to be an appropriate addition to the voice-recorded verification required for telephonic and door-to-door sales agreements, as disclosure of compensation is a consumer protection measure meant to ensure that a customer is aware of all the charges that may be imposed upon them through the agreement. Modifications are made to the UBP in Appendix A to add this question.

As noted above, energy brokers and consultants would demonstrate financial accountability through an irrevocable standby letter of credit in the amount of \$100,000 for energy brokers and \$50,000 for energy consultants. While issues related to appropriate financial accountability are addressed below, the Commission notes here that the purpose of a letter of credit is to provide funds that may be used to redress harm suffered by customers and caused by the actions of a broker or consultant. As such, in response to Energo's inquiry, the Commission finds no reason for prohibiting other businesses from assisting a broker or consultant in obtaining a letter of credit, provided however that such assistance shall not impede the Department's ability to draw on a letter of credit to address harms occasioned by an energy broker's or energy consultant's violation of the UBP, UBP-DERS, or PSL §66-t generally. Additionally, any financial or professional assistance provided to a broker or consultant to obtain a letter of credit presumptively qualifies as compensation that must be disclosed to the customer. PSL §66-t defines "broker compensation" as "any payment made to an energy broker or energy consultant for the purposes of securing or procuring of energy

for the end-use customer or advising on the securing or procuring of energy for the end-use consumer.” Because such assistance is being provided to the broker or consultant in exchange for the performance of brokering or consulting services such an arrangement between an ESCO and a broker or consultant must be disclosed.

To address comments from Aurora and NYRCC regarding fee splitting arrangements, this Order requires disclosure of fee splitting arrangements where an entity acting as an energy broker or consultant splits the fee received for brokering or consulting services with any other entity. It should be noted that such a disclosure will not be required on the Customer Disclosure Statement as ESCOs and DER suppliers are unlikely to be aware of fee splitting arrangements. A fee splitting arrangement must be disclosed by the energy broker or consultant to the customer on the first page of any contract or agreement with the customer if the broker or consultant has a direct contract or agreement with the customer. In situations where there is no direct contract or agreement with the customer, a separate, written communication must be sent to the customer by the energy broker or energy consultant for the express purpose of disclosing such fee splitting arrangement.

Annual Registration

Staff proposes that energy brokers and consultants submit the full registration package annually and clearly identify any changes made since the initial registration package upon renewal. In its comments, Mantis notes that, although PSL §66-t requires an annual \$500 registration fee, it does not require annual registration. Mantis thus suggests that the registration form be submitted on a biennial basis to promote administrative efficiency. NYRCC suggests that instead of

submitting the registration package annually, energy brokers and consultants should be permitted to submit a notification letter stating that there are no changes to the registration materials on file along with an officer certification, similar to the process currently allowed for ESCOs to submit an annual report.

Determination

For purposes of administrative efficiency, energy brokers and consultants will not be required to submit a full registration package each year. A broker or consultant may submit either a statement that the information and attachments in its registration package are current or provide a description and/or copy of revised portions of its registration package to renew its registration. These registration updates must be accompanied by an officer certification document and the annual \$500 registration fee. Establishing such a process will allow Staff to more easily identify any changes to registration materials and prevent lengthy duplicative filings where no changes are identified.

Annual Compliance Date

The Staff proposal recommends that the Commission establish an annual compliance year running from September 1 to August 31, with annual compliance due on August 31 each year. Brokers and consultants would be expected to submit their first annual registration package by August 31, 2023, to continue operation in New York State.

Commenters, including Energo, NRG, and L5E, raised the need for a stay of implementation of the provisions of PSL §66-t, as registration is unlikely to be possible before the June 21, 2023, effective date. L5E, Aurora, and NRG request that the Commission clarify that brokers and consultants that have timely filed for registration should be permitted to

continue to operate in the State pending approval or rejection of its application by the Commission, as Staff may not have sufficient time to process all the applications before August 31, 2023. NRG also requests that parties be provided 90 days from the date of this Order for ESCOs to implement contract changes.

Determination

The Commission sees no reason for a stay of the regulatory requirements mandated under PSL §66-t because of the two-plus months that covered entities would have to comply with the requirements. For this reason, the Commission will require all energy brokers and consultants to submit a registration package by August 31, 2023, as proposed by Staff, to continue operating in New York State. The registration package shall include all documentation identified in UBP §11.B and UBP-DERS §4.J. Staff will be required to complete review of registration packages and issue letters notifying applicants of approval or denial by December 1, 2023. During the Staff review period, any entity that has submitted a registration package shall be treated as in compliance with Commission registration requirements, unless they receive a letter rejecting their application.

Customer Data

The Staff proposal requires energy brokers and consultants that obtain customer information from the distribution utility to comply with any data security requirements imposed by the Commission.

The New York Utilities request that the Commission clarify that the obligation to comply with "data security requirements" includes compliance with utility requirements before receiving customer data, including entering into a data

security agreement (DSA) with utilities and completing self-attestations. The New York Utilities also suggest that (1) energy brokers and consultants must renew authorization from customers to access customer data at least every two years, (2) energy brokers and consultants be required to provide the utility with a copy of the written customer authorization, if requested, and (3) energy brokers and consultants would be prohibited from requesting customer data from a utility if the customer authorization has not been renewed within two years, the relationship between the broker/consultant and the customer has terminated, customer authorization has been revoked, or representation of the customer by the broker/consultant in connection with a particular matter has terminated.

Family believes Staff's proposal is contrary to the Commission's Order Establishing Minimum Cybersecurity and Privacy Protections and Making other Findings in Case 18-M-0376.¹³ Family states that the Commission rejected a proposal that third-party representatives of ESCOs be required to execute a DSA. According to Family, brokers and consultants do not engage in electronic data interchange (EDI) transactions with the utility and, at most, obtain customer information in emails.

Determination

Energy brokers and consultants that obtain customer information from the distribution utility will be required to comply with the Commission's data security requirements, including entering into a DSA and completing self-attestations, before being granted access to customer data. In response to the New York Utilities' comments, the Commission declines to

¹³ Case 18-M-0376, Proceeding on Motion of the Commission Regarding Cyber Security Protocols and Protections in the Energy Market Place, Order Establishing Minimum Cybersecurity and Privacy Protections and Making other Findings (Cybersecurity Order) (issued October 17, 2019).

adopt any requirements for customers to repeatedly renew authorizations for access to customer data as such a requirement would be unnecessary, burdensome, and may result in a customer inadvertently revoking authorization by failing to renew.

In the Commission's Cybersecurity Order, it found that execution of a DSA by energy service entities (ESEs) who electronically exchange data directly with the distribution utility is appropriate and necessary; however, requiring third party representatives of ESEs with no direct link to the utility to execute a DSA would be burdensome and unnecessary.¹⁴ To address Family's comment, the Commission determines Staff's proposal to be in accordance with the Cybersecurity Order, as only those energy brokers or consultants that obtain customer data from the distribution utility are required to comply with Commission data security requirements.

Financial Accountability

PSL §66-t(3) (a) requires energy brokers and consultants to demonstrate financial accountability as evidenced by a bond or other method of financial accountability. Staff proposed that the public interest in providing an ability for financial redress for customers that may have suffered financial harm requires that such requirement be met through an irrevocable standby letter of credit in the amount of \$100,000 for energy brokers and \$50,000 for energy consultants.

Many commenters raised concerns about Staff's proposal that the statutorily required demonstration of financial accountability be satisfied through an irrevocable standby letter of credit and recommend that brokers or consultants be allowed to satisfy this requirement through a bond. According

¹⁴ Id., pp. 27–28.

to TEPA, such a requirement may hinder the participation of the ability of brokers and consultants to do business in New York State because letters of credit can be expensive and difficult to obtain. Evolution Energy Partners states that requiring an irrevocable standby letter of credit would reduce the available credit and borrowing capacity of energy brokers and consultants. Several commenters, including Mantis, Aurora, and NYRCC, suggest that applicants be able to demonstrate financial accountability through a bond and highlight that the statute specifically allows the satisfaction of this requirement through a bond.

Commenters also stated that, if a letter of credit is required, details of the requirements and a template for the letter of credit should be provided so that entities can share such with their financial institution.

Determination

PSL §66-t(3)(a) requires, as a component of registration with the Commission, a demonstration of financial accountability "as evidenced by a bond or other method of financial accountability." This language obviously authorizes a demonstration of other methods of financial accountability; i.e., not solely by a surety bond. The Legislature thus provided the Commission with discretion to authorize other forms of financial accountability that would be permissible. Indeed, the Commission reads Section 66-t(3)(a) as authorizing alternatives to surety bonds as a method for financial accountability.

In practice, surety bonds are the types of bonds used as a method for financial accountability. In this respect, the Commission notes that surety bonds are difficult to collect on as a surety company's objective is to not payout on a claim. Additionally, surety companies can go bankrupt, allowing bankruptcy courts to dismiss their obligation to pay. By

contrast, an irrevocable standby letter of credit would allow the Department, as beneficiary, to access funds according to the terms of the letter. Because of the risk associated with collecting on a surety bond, in addition to the time and resources that would be needed to demonstrate the viability of a claim or compel compliance from a surety seeking to avoid payment, the Commission will not authorize surety bonds to satisfy the financial accountability requirement of PSL §66-t.

PSL §66-t was enacted to protect consumers from unscrupulous brokers and consultants, and the financial accountability component of this law ensures that customers can be made whole after suffering harm resulting from violations of customer agreements, the UBP or UBP-DERS, State statutes, or Commission orders, rules, and regulations. Before drawing upon any letter of credit, the Commission would first issue an order describing a broker or consultant's violation and directing a refund to customers. In the event a broker or consultant is unwilling or unable to provide the ordered refund, the Commission would draw upon the letter of credit to provide refunds to customers. A template for a letter of credit will be provided on the Department's website.

Registration Form

The Staff proposal includes a registration form, which requires applicants to submit several other documents, including: (1) proof of registration with the New York State Department of State; (2) an assumed name certificate, if applicable; (3) proof of compliance with local laws requiring approval to conduct door-to-door solicitations for any applicant engaged in such practices; (4) samples of any sales contract between the applicant and the customer and a compensation disclosure statement; (5) sample forms of notice sent to

customers upon assignment, discontinuance, or transfer of customers; (6) procedures used to obtain customer authorization for access to a customer's historic usage or credit information; (7) sample informational and promotional materials used for mass marketing purposes; (8) a completed Service Provider Contact Form; and (9) an Officer Certification document.

EnergO requests the registration form be amended to clarify that the sample standard sales agreement is between the broker and customer, not the ESCO and customer. RESA also notes that the UBP and UBP-DERS define a "sales agreement" as an agreement between a customer and an ESCO or DER supplier. RESA recommends that the Commission add a new definition entitled "service agreement" to distinguish broker and consultant agreements with customers from ESCO and DER supplier agreements with customers, as most brokers and consultants are unlikely to consider their contracts to be sales agreements. RESA states that inclusion of this term would avoid confusion about the agreements brokers and consultants are required to provide during registration and those that are subject to enforcement applicable to energy brokers and consultants.

In its comments, PULP states that, to the extent information included on registration forms would not violate an entity's privacy or divulge trade practices or other proprietary information, such information should be made publicly available on the Department's website to allow consumers to compare who is operating in the marketplace, their credentials, and any changes in their practices from year to year.

Determination

Registration packages will be submitted through the Department's Document and Matter Management (DMM) System and will be available to the public on the Department's website. All registration packages shall be filed in Matter Number 23-

01227 - In the Matter of Registration for Energy Brokers and Energy Consultants. Applicants will be able to request that certain documents be filed confidentially through the Department's records access officer (RAO) in accordance with Public Officers Law §87(2) and 16 NYCRR §6-1.3. Additionally, to address comments from Energo and RESA, the registration form, UBP, and UBP-DERS will be modified to clarify that the registration package requires a sample of the contract or agreement between the broker or consultant and the customer, not the sales agreement between an ESCO or DER Supplier and a customer.

The Commission rejects the recommendation of RESA to include a definition of the term "service agreement" in the final amended version of the UBP and UBP-DERS subject to this Order. Additionally, this definition is unnecessary, and given the broad nature of the type of agreements that would be covered by such a definition, including a definition of "service agreement" in the UBP and UBP-DERS would not serve to promote clarity and transparency.

ESCO & DER Supplier Responsibilities

The Staff proposal requires ESCOs and DER Suppliers to verify that any energy brokers and energy consultants they do business with are registered with the Commission by checking a list on the website of the Department and performing regular reviews to ensure that such registrations remain valid. The Staff proposal would also require ESCOs and DER suppliers to include on the Customer Disclosure Statement any other compensation that the ESCO or DER supplier provides to the broker or consultant, including direct payments, commissions, bonuses, and non-financial compensation. Staff's proposal also specifies that, despite the changes proposed to the UBP and UBP-

DERs, ESCOs and DER suppliers remain responsible for the actions of their agents, including any broker or consultant enrolling customers for the benefit of an ESCO or DER supplier.

In their comments, RESA and NRG ask for clarification regarding circumstances under which a broker or consultant would be considered an agent of an ESCO or DER supplier. In determining whether a broker or consultant would be considered an agent of an ESCO or DER supplier, RESA suggests the Commission examine whether the ESCO or DER supplier has the ability to require the third party to bring it customers or direct the action of the third party regarding sale or offer for sale of electric generation services, whether the third party is obligated to take such actions when requested by the ESCO or DER supplier, and whether the broker/consultant only markets the products or services of a single ESCO or DER supplier to a customer. Additionally, RESA suggests that, in circumstances where the answer to the above questions is unclear, the Commission should examine whether the third party is acting as an agent of the customer, whether the third party has the authority to act on behalf of or bind the ESCO or DER supplier, whether the third party has an obligation to offer or sell the ESCO or DER supplier's product, and whether the third party's compensation is paid by the customer.

RESA further asserts that ESCO or DER suppliers should only be responsible for disclosing broker or consultant compensation when such compensation is included in the prices charged by ESCOs and DER suppliers to customers and such disclosure is limited to the amount and form of compensation. RESA also requests that the Commission clarify that ESCOs and DER suppliers only disclose amounts paid to energy brokers or consultants for a particular customer's deal that is included in the price charged by the ESCO or DER supplier to the customer.

RESA states that Staff's proposal would necessitate disclosure of holiday gifts, event tickets, and similar items given to brokers or consultants even if such items are not connected to a particular transaction or customer.

Family believes that PSL §66-t gives the Commission direct statutory authority over energy brokers and consultants and thus obviates the need to continue to hold ESCOs responsible for the actions of these entities. Additionally, Family notes that ESCOs should not be responsible for the actions of brokers that are acting on behalf of the customer by procuring energy supply for the customer. Family requests that the Commission affirmatively declare that ESCOs remain responsible for the actions of their agents only.

Additionally, Family and NRG suggest that there should be a grace period between when the initial registrations are filed and when ESCOs are required to verify registration to allow ESCOs to continue using brokers that have submitted a registration package but have not yet received a determination from the Commission. Family believes that pre-existing customer contracts entered into before the registration regime should be grandfathered and exempted from the registration verification requirement. Additionally, Family believes that the ESCO verification responsibility should be limited to the broker or consultant's registration status at the time of customer contracting.

NRG also suggests that ESCOs should only be required to verify the registration of an energy broker or consultant at the time of contracting and requests clarification that an invalid registration will not impact previous properly vetted transactions. NRG states that ESCOs are contractually obligated to serve their customers for the terms of existing agreements, including making payments to brokers on behalf of customers.

Determination

This Order makes no changes to the entities that have been considered agents of ESCOs for purposes of compliance with the UBP. To respond to comments from NRG and RESA requesting clarity, some agents of ESCOs may have to register as energy brokers or consultants and this will not change the ESCO's responsibilities in relation to that agent under the UBP.

The Commission is retaining Staff's proposal that all compensation paid to brokers and consultants, including commissions, bonuses, and non-financial compensation, be disclosed. However, as noted above, if the specific details of any such compensation are unknown at the time of contracting, a general statement including the types of compensation the broker or consultant may receive is sufficient. ESCOs and DER suppliers are required to disclose compensation that they collect on behalf of the broker or consultant on the Customer Disclosure Statement and also any other compensation the ESCO or DER supplier pays to the broker or consultant directly. There is no obligation for ESCOs or DER suppliers to disclose broker or consultant compensation when the compensation is being paid by a third party. ESCOs and DER suppliers will be required to disclose any flat fees, commissions, bonuses, or non-financial compensation, including but not limited to prizes or event tickets, on the Customer Disclosure Statement when such compensation is being paid by the ESCO or DER supplier to the broker or consultant. Again, general terms will suffice if the specific details of such compensation are unknown at the time of contracting.

To satisfy this requirement, ESCOs and DER suppliers are required to update the Customer Disclosure Statement in all future agreements with customers to include a field titled "Third Party Compensation Disclosure" which includes the

required disclosure discussed above or indicates that such field is inapplicable to the present agreement. ESCOs and DER suppliers are further required to update the sample contracts provided to Staff but will be required to do so at the time of their next annual filing. This should prevent an influx of contract approvals received contemporaneously with the energy broker and consultant registration filings that may overwhelm Staff resources. However, ESCOs and DER suppliers must immediately update the contract furnished to customers as of the effective date of these new registration requirements.

To address concerns from Family and NRG, for the initial registration period, the obligation for ESCOs and DER suppliers to verify the registration of energy brokers and consultants will begin after the Staff review period closes; however, ESCOs and DER suppliers must verify that any energy broker or consultant they are doing business with has submitted a registration package by August 31, 2023. While Staff will post a list of registered energy brokers and energy consultants on the Department website, such a list will not be available prior to Staff completing its review of the initial application received later this year. However, ESCOs and DER Suppliers will be able to view the submitted registration packages in Matter 23-01227 - In the Matter of Registration for Energy Brokers and Energy Consultants.

In any situation where an energy broker or consultant has had its registration denied or revoked or has allowed its registration to lapse, accepting any compensation for brokering or consulting services would be in violation of PSL §66-t(2)(c). This also applies to any contract with an unregistered energy broker or consultant that was entered into before August 31, 2023. ESCOs and DER suppliers shall not provide payments to unregistered energy brokers or consultants, even if the broker

or consultant was registered at the time the contract was signed. ESCOs and DER suppliers should establish their own internal review process to ensure that they are doing business only with energy brokers and consultants registered with the Commission.

Regarding any contract between a customer and an ESCO or DER supplier that was facilitated by an energy broker or consultant and entered into prior to the effective date of these energy broker and consultant registration requirements, such contract shall not be impacted by an energy broker or consultant's subsequent failure to register or loss of registered status. In such a situation, the ESCO or DER supplier will no longer be able to utilize the services of the energy broker or consultant and would no longer be able to compensate them for their services, but the underlying contract between the customer and the ESCO or DER supplier would continue pursuant to the terms of that agreement. However, following the effective date of these new registration requirements, agreements entered into between the customer and the ESCO or DER supplier that are facilitated by an energy broker or consultant that is unregistered at the time of enrollment shall be invalid.

Prohibition on Rebates

In accordance with PSL §66-t(5), the Staff proposal prohibits any energy broker, energy consultant, or any person acting on behalf of the broker or consultant from offering or making, directly or indirectly, any rebate of any portion of the fee, premium, or charge made, or from paying or giving to any applicant, or any entity acting as a representative of the energy ratepayer, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement or compensation for any energy

supply or energy-related business. Additionally, PSL §66-t(5) prohibits any applicant, any entity acting as a representative of the energy ratepayer or of the prospective energy ratepayer or anyone having any interest in the real property from knowingly receiving, directly or indirectly, any such rebate or other consideration or valuable thing. Staff interprets this language to include anything of value offered as an inducement or compensation for exclusive access to the ratepayer or the dwelling unit or multiple-dwelling unit structure in which the ratepayer resides.

Mantis requests that the Commission clarify that the prohibition on rebates does not apply where there is no explicit "representative" relationship between an organization and the broker, to the extent that they do not provide for exclusive access to the customer. Mantis provides examples of practices that it believes should be excluded from the prohibition on rebates in PSL §66-t(5): brokers may enter into referral or affinity programs with trade associations, non-profit organizations, or other membership organizations that provide incentives to member entities to work with brokers; and existing clients of brokers are often encouraged to refer clients to brokers in exchange for a fee.

Determination

According to PSL §66-t(5) (b), to offer anything of value "as an inducement for, or as compensation for, any energy supply business" means that there is a benefit given with the intention to compensate or offer compensation for any past or present placement for a particular piece of energy supply or energy-related business to any applicant, representative or agent of the energy ratepayer, lessee, mortgagee, or prospective energy ratepayer. PSL §66-t(5) (b) exempts usual and customary marketing activity aimed at acquainting present and prospective

customers with the advantages of using a particular energy supplier, energy broker, or energy consultant that are not intended for the purpose of a reward for the future placement of, or the past placement of, a particular piece of energy supply business.

The Commission disagrees with Mantis that this prohibition is only applicable in instances where there exists a "representative" relationship with an energy broker or consultant. The Commission is also not limiting the prohibition on rebates to those situations where the entity receiving a rebate from the broker or consultant offers exclusive access to the ratepayer, as the prohibition also applies to rebates given to the ratepayer itself, as well as, lessees or mortgagees of the property, among others. The statutory language provides a broad prohibition on the provision of any valuable thing by brokers or consultants to applicants or agents or representatives of the energy ratepayer as inducement for or compensation for any energy-related business. The Commission will apply this prohibition to any incentives, sign-up bonuses, prizes, or gifts given by the energy broker or consultant to induce a customer or the customer's representative to sign an energy supply contract. Referral fees paid to any agent, representative, attorney, or employee of the energy ratepayer would also be prohibited. A landlord that receives a rebate from a broker or consultant for signing an energy supply agreement for all the units in the landlord's building would be in violation of this prohibition. However, introductory rates for new customers that are fully disclosed as such, and authorized energy-related value-added services fall under the exemption for usual and customary marketing activity aimed at acquainting present and prospective customers with the advantages of using a particular energy supplier.

CONCLUSION

By this Order the Commission adopts a registration process for energy brokers and energy consultants and enforcement procedures to effectuate the provisions of PSL §66-t. Redlines to the UBP and UBP-DERS are included with this order as Appendix A and Appendix B, respectively. Additionally, distribution utility tariffs shall be updated to reflect the modifications made to the UBP and UBP-DERS. As these tariff revisions will be filed in compliance with this Order and stakeholders have been provided an opportunity to provide comment, the newspaper publication requirements of PSL §66(12)(b) and 16 NYCRR §720-8.1 are waived with respect to these tariff filings.

Applicants for energy broker or energy consultant registration should submit their full registration package to the Department by August 31, 2023 and may continue operating as an energy broker or consultant until receipt of approval or denial of their initial registration package by Department Staff.

The Commission recognizes the expeditious work undertaken by Staff in preparing its proposal for Commission consideration, which was necessitated by the short implementation period contained in the legislation creating the new PSL §66-t. With an effective date in the legislation of June 21, 2023, it was imperative that the Commission adopt the required regulations and provide associated guidance by its June 2023 session. Nevertheless, to ensure that the regulatory requirements adopted here are fully understood, the Commission directs Staff to, within 60 days of the effective date of this Order, convene a technical conference to provide a forum for stakeholders to raise any questions regarding the nature and extent of the requirements.

Furthermore, in keeping with the purposes of the modifications made to the UBP and UBP-DERS in this Order, which are to increase transparency of fees and accountability of energy brokers and energy consultants, the Commission directs Staff to consider additional modifications to these business practices, including to the changes adopted herein, with the goal of identifying improvements to the UBP and UBP-DERS' overall consistency and clarity, promoting transparency and accountability for customers, and creating more streamlined and less burdensome enforcement processes. Staff shall file a proposal for Commission consideration, including such proposed modifications, within 120 days of the effective date of this Order. Such modifications shall consider removal of superfluous or outdated language, streamlining of required processes, strengthening of consumer protections, clarification of any ambiguous language, as well as feedback received during the technical conference discussed above.

The Commission orders:

1. The Department of Public Service Staff proposal to establish a registration process for energy brokers and consultants and enforcement procedures for the provisions of PSL §66-t is adopted with modifications as described in the body of this Order.

2. Revisions to the Uniform Business Practices and Uniform Business Practices for Distributed Energy Resource Suppliers are adopted in accordance with the discussion of the body of this Order and Appendices A and B to this Order. These revisions shall be effective on August 31, 2023.

3. Electric and gas distribution utilities that have tariffed provisions providing for retail access are directed to file tariff amendments or addenda to incorporate or reflect in

their tariffs the revisions to the Uniform Business Practices and Uniform Business Practices for Distributed Energy Resource Suppliers directed in this Order. The tariff revisions shall be filed, on not less than one day's notice, to become effective on or before August 31, 2023.

4. The requirements of Public Service Law Section 66(12)(b) as to newspaper publication of the tariff revisions filed in accordance with Ordering Clause No. 3 are waived because the process in this proceeding and this Order give adequate notice of the changes.

5. Energy Brokers and Energy Consultants shall comply with the requirements of the Uniform Business Practices and Uniform Business Practices for Distributed Energy Resource Suppliers, as applicable, commencing August 31, 2023, consistent with the discussion in the body of this Order and the Appendices thereto.

6. Energy Brokers and Energy Consultants shall register with the Public Service Commission by filing a completed registration package in Matter Number 23-01227 by August 31, 2023, consistent with the discussion in the body of this Order.

7. Department of Public Service Staff shall, by December 1, 2023, review the registration packages received by August 31, 2023, consistent with the discussion in the body of this Order.

8. Energy Service Companies and Distributed Energy Resource Suppliers shall update their customer sales agreements by August 31, 2023 to include required disclosures regarding Energy Broker or Energy Consultant compensation, and shall be required to demonstrate compliance with this requirement at the time of each individual company's annual compliance filing.

9. Department of Public Service Staff shall review the Uniform Business Practices and Uniform Business Practices for Distributed Energy Resource Suppliers and identify modifications intended to improve the overall consistency and clarity of the documents and provide a proposal for Commission consideration within 120 days of the effective date of this Order, consistent with the discussion in the body of this Order.

10. Department of Public Service Staff shall, within 60 days of the effective date of this Order, convene a technical conference to discuss the requirements Public Service Law §66-t.

11. 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 three days prior to the affected deadline.

12. These proceedings are continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

APPENDIX A:
ESCO UBP REDLINES

SECTION 1: DEFINITIONS

Energy broker – A non-utility entity that performs energy management or procurement functions on behalf of customers or ESCOs, and (1) that assumes the contractual and legal responsibility for the sale of electric supply service, transmission or other services to end-use retail customers, but does not take title to any of the electricity sold, and does not make retail energy sales to customers, or (2) that assumes the contractual and legal obligation to provide for the sale of natural gas supply service, transportation or other services to end-use retail customers, but does not take title to any of the natural gas sold, and ~~but~~ does not make retail energy sales to customers.

Energy consultant – any person, firm, association or corporation who acts as broker in soliciting, negotiating or advising any electric or natural gas contract, or acts as an agent in accepting any electric or natural gas contract on behalf of an ESCO.

ESCO marketing representative – An entity that is either the ESCO, ~~or~~ a contractor/vendor, **an Energy Broker, or Energy Consultant** conducting, on behalf of the ESCO, any marketing activity that is designed to enroll customers with the ESCO.

SECTION 5: CHANGES IN SERVICE PROVIDERS

UBP Section 5.B.:

B. Customer Agreement

An ESCO, ~~or~~ its agent, **an Energy Broker, or an Energy Consultant** may solicit and enter into a sales agreement with a customer subject to the following requirements.

1. The ESCO, **Energy Broker, or Energy Consultant** shall obtain a customer agreement to initiate service and enroll a customer and customer authorization to release information to the ESCO by means of one of the following methods.

New UBP Section 5.B.4.k.:

4. The standard Sales Agreements for each customer class shall include the following information written in plain language: . . .
 - A. **A disclosure of the form and amount of compensation provided to an Energy Broker or Energy Consultant if such compensation is collected through the ESCO customer agreement.**

Addition to Sample Customer Disclosure Statement in UBP Section 5, Attachment 4:

Compensation Disclosure	
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UBP Section 5.I.:

I. New Delivery Customers

1. A customer may initiate distribution utility delivery service and subsequently enter into a customer agreement with an ESCO for commodity supply or arrange for both services at the same time.
2. A customer may authorize an ESCO, Energy Broker, or Energy Consultant to act as the customer's agent (~~ESCO agent~~) in establishing distribution utility service. The ~~ESCO~~ agent shall retain, and produce upon request, documentation that the customer authorized the ESCO, Energy Broker, or Energy Consultant to act as the customer's agent.
3. An ESCO, Energy Broker, or Energy Consultant acting as a customer's agent shall establish a new delivery account on behalf of the customer and enroll the customer with the distribution utility so that ESCO commodity service commences when distribution utility delivery service begins. The ESCO, Energy Broker, or Energy Consultant shall retain, and produce upon request, documentation that the customer authorized the ESCO, Energy Broker, or Energy Consultant to act as the customer's agent. An ESCO, Energy Broker, or Energy Consultant that is a customer's agent is authorized to submit the customer's application for new delivery service, in compliance with requirements for such applications stated in the law, rules and distribution utility tariffs. An ESCO, Energy Broker, or Energy Consultant shall provide the customer's name, service address and, if different, mailing address, telephone number, customer's requested service date for initiation of delivery service, and information about any special need customers, including any need for life support equipment. An ESCO, Energy Broker, or Energy Consultant shall refer a customer directly to a distribution utility for arrangement of distribution related matters, such as contribution-in-aid of construction and construction of facilities necessary to provide delivery service and settling of arrears and posting security.
4. Upon a customer's application for service, the distribution utility shall provide an ESCO, Energy Broker, or Energy Consultant with the effective date for initiation of delivery service and any other customer information provided to an ESCO, Energy Broker, or Energy Consultant in an acceptance of an enrollment request. The distribution utility may notify the customer of the acceptance.

UBP Section 5, Attachment 1:

Telephonic Agreement and Authorization/Third Party Verification Requirements

- A. A voice-recorded verification is required to enter into a telephonic agreement or a door to door agreement, with a customer to initiate service and begin enrollment. Use of either an Independent Third Party or an Integrated Voice Response system to obtain customer authorization is required for any telephone solicitation or sales resulting from door-to-door marketing. Verification by an Independent Third Party or an Integrated Voice Response system shall be recorded and conducted without the ESCO marketing representative, Energy Broker, or Energy Consultant's presence, either on the telephone or in person. A voice-recorded verification shall verify the following information to substantiate the customer's agreement or authorization:

17. If the sale was facilitated by an Energy Broker or Energy Consultant: Did the Energy Broker or Energy Consultant disclose their compensation?

- B. The ESCO, ~~or~~ its agent, **an Energy Broker, or an Energy Consultant** shall provide a copy of any Customer Disclosure Statement and sales agreement to the customer by mail, e-mail or fax within three business days after the telephone agreement and independent third-party verification occurs. The sales agreement shall set forth the customer's rights and responsibilities and describe the offer in detail, including the specific prices, terms, and conditions of ESCO service. Such agreement shall be substantially the same, in form and content, as the sample contract submitted to the Department pursuant to Section 2.B.1.b.
- D. An ESCO, **Energy Broker, or Energy Consultant** shall retain independent third-party verification records for two years from the effective date of the agreement and/or authorization or for the length of the sales agreement whichever is longer. In the event of any dispute involving agreement, authorization and/or the independent third-party verification, the ESCO, **Energy Broker, or Energy Consultant** shall make available the audio recording of the customer's agreement and/or authorization, including the independent third-party verification within five business days after a request from the Department.

UBP Section 5, Attachment 2:

Electronic Agreement and Authorization Requirements

- A. To enter into an electronic agreement with a customer to initiate service and begin enrollment or to obtain customer authorization for release of information, an ESCO, ~~or~~ its agent, **an Energy Broker, or an Energy Consultant** shall electronically record communications with the potential customer. As required in Section 5, the Electronic Agreement and authorization may also require an independent third-party verification call, which must include the information in Attachment 1. An ESCO, **Energy Broker, or Energy Consultant** shall provide the following electronic information, as applicable, to substantiate the customer's agreement and/or authorization:
- B. The ESCO, **Energy Broker, or Energy Consultant** shall, within three business days of any final agreement to initiate service to a customer, send an electronic confirmation notice to the customer at the customer's e-mail address.
- C. The ESCO, **Energy Broker, or Energy Consultant** shall use an encryption standard that ensures the privacy of electronically transferred customer information, including information relating to enrollment, renewal, re-negotiation, and cancellation.
- D. Upon request of a customer, the ESCO, **Energy Broker, or Energy Consultant** shall make available additional copies of the sales agreement throughout its duration. An ESCO, **Energy Broker, or Energy Consultant** shall provide a toll-free telephone number and e-mail address for a customer to request a copy of the sales agreement.
- E. ~~An~~ ESCOs, **Energy Brokers, and Energy Consultants** shall retain documentation of a customer's agreement in a retrievable format for two years from the effective date of the customer's acceptance and/or authorization or for the length of the sales agreement

whichever is longer. In the event of any dispute involving an electronic agreement or authorization, the ESCO, **Energy Broker, or Energy Consultant** shall provide a copy of the customer's acceptance of the sales agreement and/or authorization for release of information or provide on-line access to the acceptance and/or authorization within five calendar days after a request from the Department.

UBP Section 5, Attachment 3:

Written Agreement and Authorization Requirements

- A. An ESCO, **Energy Broker, or Energy Consultant** may enter into a written agreement (original or fax copy of a signed document) with a customer to initiate service and begin enrollment or to obtain customer authorization for release of information. As required in Section 5, the Electronic Agreement and authorization may also require an independent third-party verification call, which must include the information in Attachment 1. A sales agreement shall contain, in addition to the Customer Disclosure Statement discussed in UBP Section 2.B.1.b.2, the following information, as applicable:
- B. ESCOs, **Energy Brokers, or Energy Consultants** shall retain written agreements and/or authorizations for two years from the effective date of the agreement and/or authorization or for the length of the agreement whichever is longer. In the event of any dispute involving a sales agreement or authorization, the ESCO, **Energy Broker, or Energy Consultant** shall provide a copy of the sales agreement and/or authorization within five business days after a request from the Department.

**SECTION 8: DISPUTES INVOLVING DISTRIBUTION UTILITIES,
ESCOs, **ENERGY BROKERS/CONSULTANTS**, OR DIRECT
CUSTOMERS**

UBP Section 8.A.:

A. Applicability

This Section describes the dispute resolution processes available at the Department to resolve disputes relating to competitive energy markets involving utilities, ESCOs and/or Direct Customers, including disputes alleging anti-competitive practices. **This process shall also be utilized to resolve disputes between a distribution utility and an Energy Broker or Energy Consultant.** The processes are not available to resolve disputes between retail customers and ESCOs or distribution utilities. They are also not applicable to matters that, in the opinion of the Department Staff, should be submitted by formal petition to the Public Service Commission for its determination or are pending before a court, state or federal agency. The availability of the processes does not limit the rights of a distribution utility, ESCO, **Energy Broker, Energy Consultant**, or Direct Customer to submit any dispute to another body for resolution.

UBP Section 8.B.1.:

1. Standard Process

The parties shall use a method to send documents described in this paragraph that will verify the date of receipt.

Any distribution utility, ESCO, **Energy Broker, Energy Consultant**, or Direct Customer may initiate a formal dispute resolution process by providing written notice to the opposing party and Department Staff. Such notice shall include a statement that the UBP dispute resolution process is initiated, a description of the dispute, and a proposed resolution with supporting rationale. Department Staff may participate in the process at this or any later point to facilitate the parties' discussions and to assist the parties in reaching a mutually acceptable resolution.

SECTION 10: MARKETING STANDARDS

UBP Section 10.C.4.:

4. Conduct

ESCOs shall:

- h. Not contract with or otherwise do business with Energy Brokers and Energy Consultants that are not registered with the Commission pursuant to UBP Section 11. Customer enrollments facilitated by an unregistered Energy Broker or Energy Consultant shall be invalid.**

New UBP Section 11:

SECTION 11: ENERGY BROKERS AND ENERGY CONSULTANTS

A. Applicability

This Section sets forth the process that an Energy Broker or Energy Consultant is required to follow in order to register with the Department of Public Service (Department) to provide services as an Energy Broker or Energy Consultant in New York State.

B. Registration Requirements

- 1. Applicants seeking to act as an Energy Broker or Energy Consultant in New York State are required to register with the Department by submitting a registration package containing the following information and attachments:

 - a. A completed Energy Broker/Consultant Registration Form (Registration Form), available on the Department website (www.dps.ny.gov). The Registration Form shall require the applicant to:

 - i. identify the name, postal and e-mail addresses, and telephone and fax numbers for the applicant's main office;**
 - ii. identify the names and addresses of any entities that hold ownership interests of 10% or more in the Energy Broker or Energy Consultant, including a contact name for corporate entities and partnerships;**
 - iii. identify the methods by which it intends to market energy products and services to customers;******

- iv. identify the category/categories of energy products it intends to market to customers (e.g. commodity service, distributed solar, or demand response);
 - v. disclose each state in which the applicant operates, or has operated, as an Energy Broker or Energy Consultant and provide any data in its possession regarding complaint history;
 - vi. disclose any criminal or regulatory sanctions imposed during the previous 36 months against the applicant, any senior officers of the applicant, or any entities holding ownership interests of 10% or more in the applicant;
 - vii. disclose any other trade names used by the applicant and the state in which the trade name was/is used;
 - viii. disclose and describe any data breaches associated with customer proprietary information that occurred in any jurisdiction within the 36 months preceding the date of registration, as well as any actions taken by the applicant in response to the incident(s);
 - ix. disclose and describe specific policies and procedures established by the applicant to secure customer data; and
 - x. disclose any history of bankruptcy, dissolution, merger, or acquisition activities in the 36 months preceding the date of registration, including data for affiliates of the Energy Broker or Energy Consultant applicant and upstream owners and subsidiaries.
- b. A sample standard agreement between the Energy Broker or Energy Consultant and the customer;
 - c. Sample forms of the notices sent upon assignment of sales agreements, discontinuance of service, or transfer of customers to other providers;
 - d. Procedures used to obtain customer authorization for access to a customers' historic usage or credit information;
 - e. Sample copies of informational and promotional materials that the applicant uses for mass marketing purposes;
 - f. Sample disclosures of compensation;
 - g. Proof of registration with the New York State Department of State or proof of an assumed name certificate (DBA) filed with the county clerk;
 - h. Proof of registration to act as a marketer in any municipality where such registration is required;
 - i. An annual \$500 registration fee;
 - j. An irrevocable standby letter of credit issued by a reputable financial institution in the amount of \$100,000 for registering Energy Brokers; and \$50,000 for registering Energy Consultants, that meet the following conditions:
 - i. The New York State Department of Public Service shall be named as beneficiary and the letter of credit applicant shall be clearly named;
 - ii. Any number of partial drawings shall be permitted from time to time;

- iii. The process for making a drawing, including any required forms and communications or delivery instructions shall be stated;
 - iv. If a drawing is made, payment shall be made to the beneficiary within 5 business days;
 - v. Any expiration date shall be specified and options for renewal, including automatic renewal, shall be stated.
 - vi. The applicant's filing for bankruptcy, receivership, or any other debt-relief petition shall in no way affect the issuer's liability to the beneficiary under the letter of credit.
 - vii. All commissions, fees, and other charges with respect to the letter of credit shall be paid by the applicant;
 - viii. Except for increases to the amount, the letter of credit shall not be amended, changed, or modified without express written consent of the beneficiary;
 - ix. The beneficiary shall not be deemed to have waived any rights under the letter of credit unless an authorized representative thereof has signed a dated written waiver. No such waiver, unless expressly stated therein, shall be effective as to any subsequent transaction, nor to any continuance of a breach; and
 - x. If the beneficiary should require a replacement of the letter of credit due to loss or destruction of the original, the issuer will provide one upon request.
- k. A completed Service Provider Contact Form, which can be found on the Department's website <http://www.dps.ny.gov>, identifying the Energy Broker or Energy Consultant's employee(s) responsible for resolving consumer complaints received by the Department and referred to the Energy Broker or Energy Consultant; and
 - l. An Officer Certification document sworn to by a high-level officer of the applicant, such as the Chief Executive Officer, President, or the equivalent, in which the officer affirms that the information contained in the registration package is accurate and truthful, and that the applicant is willing and able to comply with all applicable laws and regulations, including these UBPs.
2. An applicant that knowingly makes false statements in its registration package is subject to denial or revocation of approval.
 3. If the registration package contains information that is a trade secret or sensitive for security reasons, the applicant may request that the Department withhold disclosure of the information, pursuant to the Freedom of Information Law (Public Officers Law Article 6) and Public Service Commission regulations (16 NYCRR §6-1.3).
- C. Department Review Process
1. The Department shall review the Registration Form information and documentation submitted by each applicant and make a determination as to the applicant's likelihood of compliance with the Uniform Business Practices (UBP) if the applicant's registration was approved. To enable the Department to make a thorough assessment

- of a registration, an applicant shall notify the Department of any major changes in the information submitted in the Registration Form and/or registration package that occurs during the Department review process.
2. Following its review of the registration information and documentation, the Department shall advise the applicant, in writing, if the registration package is approved and the applicant is registered to operate in the State.
 3. If following its review of the registration package information and documentation the Department determines that the applicant is not likely to comply with the UBP if the applicant were deemed eligible, the Department may recommend to the Commission that, for good cause shown, the Commission deny the applicant's registration.
 4. In any instance that the Department recommends to the Commission that an applicant's registration be denied, the applicant shall be afforded an opportunity to provide the Commission with a response in rebuttal to the Department's recommendation and in support of its registration before the Commission renders a final determination.
 5. The Department shall periodically review the registration packages of each Energy Broker and Energy Consultant operating in New York State and make a recommendation to the Commission if the Department finds that the Energy Broker or Energy Consultant should not be permitted to continue operating in New York State.

D. Maintaining and Updating Registration

1. An Energy Broker or Energy Consultant shall submit by August 31st each year:
 - a. a statement that the information and attachments in its Registration Form and registration package are current; or
 - b. a description of revisions to the Registration Form and registration package and a copy of the revised portions or, at the Energy Broker or Energy Consultant's option, a copy of the revised portions identifying the revisions by highlighting or other means;
 - c. An Officer Certification document, as required by Sub-section B.1.1 of this Section; and
 - d. The required annual registration fee.
2. An Energy Broker or Energy Consultant shall submit at other times during the year:
 - a. A description of any major change in the Registration Form and/or application package and a copy of the revised portions or, at the Energy Broker or Energy Consultant's option, a copy of the revised portions identifying the revisions by highlighting or other means. For purposes of this Section, the term, "major change," means a revision in the terms and conditions applicable to the business relationship between the Energy Broker or Energy Consultant and its customers.
 - b. Changes in marketing plans, including changes to the list required in sub-section B.1.a.iii of this Section.
 - c. Changes in the Energy Broker or Energy Consultant's business and customer service information displayed on the Department's Website.

- d. Changes in personnel responsible for resolving consumer complaints received by the Department and referred to the Energy Broker or Energy Consultant.

E. Marketing

1. This sub-section describes the standards that Energy Brokers and Energy Consultants must follow when marketing to customers in New York State. Nothing in this Section shall be read to modify or remove the marketing standards contained in UBP Section 10.
 - a. Energy Brokers and Energy Consultants shall ensure that the training of their employees and/or marketing representatives includes:
 - i. Knowledge of this Section and awareness of the other Sections of the UBP;
 - ii. Knowledge of the products and services for which the Energy Broker or Energy Consultant is marketing;
 - iii. Knowledge of product rates/cost, payment options and the customers' right to cancel, including the applicability of an early termination fee;
 - iv. Knowledge of the applicable provisions of the Home Energy Fair Practices Act that pertains to residential customers; and,
 - v. The ability to provide the customer with a toll-free number from which the customer may obtain information about the Energy Broker or Energy Consultant's mechanisms for handling billing questions, disputes, and complaints.
 - b. In-Person Contact with Customers: Energy Brokers or Energy Consultants who contact customers in person at a location other than the Energy Broker or Energy Consultant's place of business, or the place of business of the third party on whose behalf the Energy Broker or Energy Consultant is marketing, for the purpose of selling any product or service offered by the Energy Broker or Energy Consultant, or offered by the third party on whose behalf the Energy Broker or Energy Consultant is marketing, shall, before making any other statements or representations to the customer:
 - i. Introduce him or herself with an opening statement that identifies the entity which he or she represents, identifies him or herself as a representative of that specific entity; explains that he or she does not represent the distribution utility; and, explains the purpose of the solicitation.
 - ii. Produce identification, to be visible at all times thereafter, which: (1) prominently displays in reasonable size type face the first name and employee identification number of the marketing representative; (2) displays a photograph of the marketing representative and depicts the legitimate trade name and logo of the entity they are representing; (3) provides the Energy Broker or Energy Consultant telephone number, or the telephone number of the third party on whose behalf

- the Energy Broker or Energy Consultant is marketing, for inquires, verification, and complaints.
- iii. An Energy Broker or Energy Consultant must provide each prospective residential customer a business card or similar tangible object with the marketing representative's first name and employee identification number; Energy Broker or Energy Consultant's name, address, and phone number, or the name, address, and phone number of the third party on whose behalf the Energy Broker or Energy Consultant is marketing; date and time of visit, and website information for inquires, verification and complaints.
 - iv. An Energy Broker or Energy Consultant must provide the customer with written information regarding the marketed products and services immediately upon request which must include the name and telephone number of the third party on whose behalf the Energy Broker or Energy Consultant is marketing for inquires, verification, and complaints. Any written materials, including but not limited to contracts, sales agreements, and marketing materials, must be provided to the customer in the same language utilized to solicit the customer.
 - v. Where it is apparent that the customer's English language skills are insufficient to allow the customer to understand and respond to the information conveyed by the Energy Broker or Energy Consultant or where the customer or another third party informs the Energy Broker or Energy Consultant of this circumstance, the Energy Broker or Energy Consultant shall either find a representative in the area who is fluent in the customer's language to continue the marketing activity in his/her stead, or terminate the in-person contact with the customer. The use of translation services and language identification cards is permitted.
 - vi. An Energy Broker or Energy Consultant must leave the premises of a customer when requested to do so by the customer or the owner/occupant of the premises.
 - vii. All Energy Brokers or Energy Consultants conducting door-to-door marketing must maintain a daily record, by zip code, of the territories in which the Energy Broker or Energy Consultant has conducted door-to-door marketing. This information should be in a form that can be reported to Staff upon request and should be retained by the Energy Broker or Energy Consultant for a minimum of six months.
 - viii. Specifically, when an Energy Broker or Energy Consultant markets on behalf of an ESCO:
 1. An Energy Broker or Energy Consultant must provide each prospective residential customer or customer that is marketed

- to via door-to-door marketing, with a copy of the ESCO Consumers Bill of Rights, before the Energy Broker or Energy Consultant makes his or her sales presentation.
2. During the sales presentation, the marketing representative must also state that if customer purchases natural gas and/or electricity from the ESCO, that the customer's utility will continue to deliver their energy and will respond to any leaks or emergencies. This requirement may be fulfilled either (a) by an oral statement by the Energy Broker or Energy Consultant, or (b) written material left by the Energy Broker or Energy Consultant.
 3. For any sale resulting from door-to-door marketing, each enrollment is only valid with an independent third-party verification in conformance with UBP Section 5, Attachment 1. The verification must occur after the Energy Broker or Energy Consultant has left the customer's premises and must be completed before the ESCO may enroll a customer.
- c. Telephone Contact with Customers: Energy Brokers and Energy Consultants who contact customers by telephone for the purpose of selling any product or service shall:
- i. Provide the Energy Broker or Energy Consultant's first name and, on request, the identification number;
 - ii. State the name of the third party on whose behalf the call is being made, if applicable;
 - iii. State the purpose of the telephone call;
 - iv. Explain that he or she does not represent the distribution utility.
 - v. Where it is apparent that the customer's English language skills are insufficient to allow the customer to understand and respond to the information conveyed by the Energy Broker or Energy Consultant or where the customer or another third party informs the Energy Broker or Energy Consultant of this circumstance, the Energy Broker or Energy Consultant will immediately transfer the customer to a representative who speaks the customer's language, if such a representative is available, or terminate the call;
 - vi. Remove Customers' names from the marketing database upon Customers' request.
 - vii. Provide any written materials, including but not limited to contracts, sales agreements, and marketing materials to the customer in the same language utilized to solicit the customer.
 - viii. Specifically, when an Energy Broker or Energy Consultant markets on behalf of an ESCO:
 1. the Energy Broker or Energy Consultant must clearly indicate that taking service from an ESCO will not affect the customer's

- distribution service and such service will continue to be provided by the customer's distribution utility;
 2. the Energy Broker or Energy Consultant must notify each prospective residential customer of the ESCO Consumer Bill of Rights, where they can find it, and also provide a copy of the ESCO Consumer Bill of Rights with any written material sent to the customer including the sales agreement;
 3. For any sale resulting from telephonic marketing, each enrollment is only valid with an independent third-party verification in conformance with Section 5, Attachment 1. The verification must be completed before the ESCO may enroll a customer.
- d. Electronic Enrollments
- i. When marketing to residential customers on behalf of an ESCO, the ESCO Consumer Bill of Rights should be provided to prospective customers as a non-avoidable screen, which a customer must affirmatively acknowledge to verify they have seen the document, prior to effecting an enrollment.
- e. Conduct when Marketing: Energy Brokers and Energy Consultants shall:
- i. Not engage in misleading or deceptive conduct as defined by State or federal law, or by Commission rule, regulation, or Order;
 - ii. Not make false or misleading representations including misrepresenting rates or savings of certain energy products and services;
 - iii. Provide the customer with written information, upon request, or with a website address at which information can be obtained, if the customer requests such information via the internet;
 - iv. Use reasonable efforts to provide accurate and timely information about services and products. Such information will include information about rates, contract terms, early termination fees, and right of cancellation consistent with this Section, UBP Section 2, and any other relevant Section;
 - v. Ensure that any product or service offerings marketed by an Energy Broker or Energy Consultant contain information written in plain language that is designed to be understood by the customer. This shall include providing any written information to the customer in a language in which the Energy Broker or Energy Consultant has substantive discussions with the customer or in which a contract is negotiated;
 - vi. Investigate customer inquiries and complaints concerning marketing practices within five days of receipt of the complaint; and,
 - vii. Cooperate with the Department and Commission regarding marketing practices proscribed by the UBP and with local law

enforcement in investigations concerning deceptive marketing practices.

- f. Dispute Resolution: Energy Brokers and Energy Consultants shall maintain an internal process for handling customer complaints and resolving disputes arising from marketing activities and shall respond promptly to complaints forwarded by the Department.

2. Disclosure of compensation

- a. Energy Brokers and Energy Consultants shall disclose to customers the form and amount of compensation via a conspicuous statement on any contract or agreement between the energy agent, consultant, broker, or intermediary and its customer.
- b. All such disclosures shall include any dollar amount paid, the form in which the compensation was given to the Energy Broker or Energy Consultant, the entity which made the payment, and any broker fee or margin which was added to the energy product or service the customer enrolled in. This disclosure must include anything of value that was given as compensation to the Energy Broker or Energy Consultant for their work, including commissions, bonuses, and any non-financial compensation.
- c. In instances where the Energy Broker or Energy Consultant has a direct contractual relationship with the customer, this disclosure shall be included on the first page of the customer agreement, must be in plain language, and appear in 12-point font size or larger.
- d. In instances where the Energy Broker or Energy Consultant does not have a direct contractual relationship with the customer, an Energy Broker or Energy Consultant shall disclose to the customer in a separate, written communication any fee splitting arrangement, including the third party receiving the fee and the amount or percentage of fee that the third party will receive.
- e. If a third party, such as an ESCO or DERS, collects compensation on behalf of the Energy Broker or Energy Consultant, such compensation shall be added to the Customer Disclosure Statement in the third party's customer agreement and reflect the amount and method. In this instance, the Energy Broker or Energy Consultant shall still disclose this information at the time of marketing to the customer.

3. Prohibition on Rebates

- a. No Energy Broker, Energy Consultant or any other person acting for or on behalf of the Energy Broker or Energy Consultant shall offer or make, directly or indirectly, any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the energy ratepayer or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any energy supply or energy-related business.

- i. An applicant; any person, firm, or corporation acting as agent, representative, attorney, or employee of the energy ratepayer or of the prospective energy ratepayer; or anyone having any interest in the real property shall not knowingly receive, directly or indirectly, any such rebate or other consideration or valuable thing.
- ii. Any person or entity who violates these prohibitions is subject to a penalty equal to the greater of \$5,000 or up to ten times the amount of compensation or rebate received or paid.

F. Customer Inquires

1. This sub-section establishes requirements for responses by an Energy Broker or Energy Consultant to retail access customer inquiries. An Energy Broker or Energy Consultant shall respond to customer inquiries sent by means of electronic mail, telecommunication services, mail, or in meetings. The subjects raised in inquiries may result in the filing of complaints.
2. General Requirements:
 - a. Energy Brokers and Energy Consultants shall provide consistent and fair treatment to customers.
 - b. Energy Brokers and Energy Consultants shall maintain processes and procedures to resolve customer inquiries without undue discrimination and in an efficient manner and provide an acknowledgement or response to a customer inquiry within 2 days and, if only an acknowledgement is provided, a response within 14 days.
 - c. Energy Brokers and Energy Consultants shall provide local or toll-free telephone access from the customer's service area to customer service representatives (CSRs) responsible for responding to customer inquiries and complaints. This shall either be the local or toll-free telephone number of the Energy Broker or Energy Consultant or the local or toll-free telephone number of the third-party on whose behalf of the Energy Broker or Energy Consultant is marketing.
 - d. CSRs shall obtain information from the customer to access and verify the account or premises information. Once verification is made, the CSR shall determine the nature of the inquiry, and, based on this determination, decide whether the distribution utility, the ESCO, or the Energy Broker/Consultant is responsible for assisting the customer.
 - e. The CSR shall follow normal procedures for responding to inquiries. If the inquiry is specific to another provider's service, the CSR shall take one of the following actions:
 - i. Forward/transfer the inquiry to the responsible party;
 - ii. Direct the customer to contact the responsible party; or,
 - iii. Contact the responsible party to resolve the matter and provide a response to the customer.
 - f. Energy Brokers and Energy Consultants may provide a teletypewriter (TTY) system or access to TTY number, consistent with distribution utility tariffs.

3. Specific Requests for Information
 - a. An Energy Broker or Energy Consultant shall respond directly to customer inquiries for any information that is related to commodity supply and/or delivery service, to the extent it has the necessary information to respond.
 - b. The entity responsible for the accuracy of meter readings shall respond to customer inquiries related to usage.
 - c. The distribution utility and ESCO shall respond to customer inquiries about billing and payment processing, in accordance with UBP Section 9, Billing and Payment Processing.
 4. Emergency Contacts
 - a. An emergency call means any communication from a customer concerning an emergency situation relating to the distribution system, including, but not limited to, reports of gas odor, natural disaster, downed wires, electrical contact, or fire.
 - b. If contacted with an emergency telephone call, the Energy Broker or Energy Consultant CSR shall transfer emergency telephone calls directly to the distribution utility or provide the distribution utility's emergency number for direct contact to the distribution utility. If no Energy Broker or Energy Consultant CSR is available, the Energy Broker or Energy Consultant shall provide for after-hours emergency contacts, including transfer of emergency calls directly to a distribution utility or an answering machine message that includes an emergency number for direct contact to the distribution utility.
- G. Customer Data
1. Energy Brokers and Energy consultants must protect against the unauthorized disclosure of confidential customer information.
 2. Energy Brokers and Energy Consultants are prohibited from selling, disclosing or providing any customer information obtained from a distribution utility or from the customer themselves to others, including their affiliates, unless such sale, disclosure or provision is required to facilitate or maintain service to the customer, or is specifically authorized by the customer, or required by legal authority. If such authorization is requested from the customer, the Energy Broker and Energy Consultant shall, prior to authorization, describe to the customer the information it intends to release and the recipient of the information.
 3. NIST Cybersecurity Framework. Energy Brokers and Energy Consultants that obtain customer information from the distribution utility must have processes and procedures in place regarding cybersecurity consistent with the National Institute of Standards and Technology Cybersecurity Framework.
 4. Data Security. Energy Brokers and Energy Consultants that obtain customer information from the distribution utility must comply with any data security requirements imposed by Commission rules.
- H. Enforcement
1. An Energy Broker or Energy Consultant may be subject to consequences for reasons, including, but not limited to:

- a. false or misleading information in the registration package;
 - b. failure to adhere to the policies and procedures described in any contract with customers;
 - c. failure to comply with required customer protections;
 - d. failure to comply with applicable New York Independent System Operator (NYISO) requirements, reporting requirements, or Department oversight requirements;
 - e. failure to provide notice to the Department of any material changes in the information contained in the Registration Form or registration package;
 - f. failure to comply with the UBP terms and conditions, including discontinuance requirements;
 - g. failure to comply with the Commission's Environmental Disclosure Requirements or failure to comply with other Commission Orders, Rules, or Regulations;
 - h. failure to reply to a complaint filed with the Department and referred to the Energy Broker or Energy Consultant within the timeframe established by the Department's Office of Consumer Services which is not less than five days;
 - i. a material pattern of consumer complaints on matters within the Energy Broker or Energy Consultant's control;
 - j. failure to comply with any federal, state, or local laws, rules, or regulations related to sales or marketing; or 'No Solicitation' signage on the premises; or
 - k. failure to comply with any of the Marketing Standards set forth in Section 10 of the UBP.
2. In determining the appropriate consequence for a failure or non-compliance in one or more of the categories set forth in this Section, the Commission or Department may take into account the nature, the circumstances, including the scope of harm to individual customers, and the gravity of the failure or non-compliance, as well as the Energy Broker or Energy Consultant's history of previous violations.
- a. Enforcement Procedures:
 - i. The Commission or Department shall either: (a) notify the Energy Broker or Energy Consultant in writing of its failure to comply and request that the Energy Broker or Energy Consultant take appropriate corrective action or provide remedies within the directed cure period, which will be based on a reasonable amount of time given the nature of the issue to be cured; or (b) order that the Energy Broker or Energy Consultant show cause why a consequence should not be imposed.
 - ii. The Commission may impose the consequences listed in UBP Sub-section H.2.b. of this Section if (a) Energy Broker or Energy Consultant fails to take corrective actions or provide remedies within the cure period; or (b) the Commission determines that the incident or incidents of non-compliance are substantiated and the consequence is appropriate.

- iii. Consequences shall not be imposed until after the Energy Broker or Energy Consultant is provided notice and an opportunity to respond.
 - iv. Notwithstanding the requirements of Sub-sections i., ii., and iii. of this paragraph, an Energy Broker or Energy Consultant is subject to revocation of its registration if it fails to provide the required annual registration fee.
 - v. The notice of consequences imposed by the Commission will be published on the Department's website.
 - b. Consequences for non-compliance in one or more of the categories set forth in this Section may include one or more of the following restrictions on an Energy Broker or Energy Consultant's opportunity to do business as an Energy Broker or Energy Consultant in New York State:
 - i. Suspension from a specific Commission approved program in either a specific service territory or all territories in New York State;
 - ii. Suspension of the ability to enroll new customers in either a specific service territory or all service territories in New York State;
 - iii. Imposition of a requirement to record all telephonic and door-to-door marketing presentations, which shall be made available to the Department for review;
 - iv. Reimbursements to customers who did not receive savings promised in the Energy Broker or Energy Consultant's sales agreement/Customer Disclosure Statement or included in the Energy Broker or Energy Consultant's marketing presentation, or to customers who incurred costs as a result of the Energy Broker or Energy Consultant's failure to comply with the marketing standards set forth in UBP Section 10;
 - v. Release of customers from sales agreements without imposition of early termination fees;
 - vi. Revocation of an Energy Broker or Energy Consultant's registration and ability to operate in New York State; and,
 - vii. Any other measures that the Commission may deem appropriate.
 - c. In addition to the consequences identified at UBP Section 11.H.2.b., any person, firm, association, or corporation who or which acts in violation of Public Service Law §66-t(2), and codified in this Section, will be subject to a penalty not to exceed \$5,000 for each violation.
3. An Energy Broker or Energy Consultant's registration is valid unless: the Energy Broker or Energy Consultant fails to pay its annual registration fee; the Energy Broker or Energy Consultant abandons its registration; or such registration is revoked by the Commission through a final order. Additionally, any person or entity who violates this Section's prohibitions on rebates is subject to a penalty equal to the greater of \$5,000 or up to ten times the amount of compensation or rebate received or paid.

4. The Department shall maintain a list of registered Energy Brokers and Energy Consultants for the benefit of third parties who do business with such Energy Brokers and Energy Consultants. As stated in UBP Section 10, ESCOs are prohibited from doing business with unregistered Energy Brokers and Energy Consultants.

APPENDIX B:
UBP-DERS REDLINES

SECTION 1: DEFINITIONS

CDG Marketing Representative - An entity that is either a CDG Provider, **Energy Broker, Energy Consultant or agent** conducting, on behalf of the CDG Provider, any marketing activity that is designed to result in the enrollment of customers with the CDG Provider.

Energy broker – A non-utility entity that performs energy management or procurement functions on behalf of customers, ESCOs or DER Suppliers, and (1) that assumes the contractual and legal responsibility for the sale of electric supply service, transmission or other services to end-use retail customers, but does not take title to any of the electricity sold, and does not make retail energy sales to customers or (2) that assumes the contractual and legal obligation to provide for the sale of natural gas supply service, transportation or other services to end-use retail customers, but does not take title to any of the natural gas sold, and but does not make retail energy sales to customers.

Energy consultant – any person, firm, association or corporation who acts as broker in soliciting, negotiating or advising any electric or natural gas contract, or acts as an agent in accepting any electric or natural gas contract on behalf of a DER Supplier.

SECTION 2: GENERAL MARKETING STANDARDS **(Generally Applicable)**

A. DER Supplier Shall:

9. Not contract with or otherwise do business with Energy Brokers and Energy Consultants that are not registered with the Commission pursuant to UBP-DERS Section 4. Customer enrollments facilitated by an unregistered Energy Broker or Energy Consultant shall be invalid.

SECTION 4: ENERGY BROKERS AND ENERGY CONSULTANTS

A. Applicability

This Section sets forth the process that an Energy Broker or Energy Consultant is required to follow in order to register with the Department of Public Service (Department) to provide services as an Energy Broker or Energy Consultant in New York State.

B. Registration Requirements

1. Applicants seeking to act as an Energy Broker or Energy Consultant in New York State are required to register with the Department by submitting a registration package containing the following information and attachments:
 - a. A completed Energy Broker/Consultant Registration Form (Registration Form), available on the Department website (www.dps.ny.gov). The Registration Form shall require the applicant to:
 - i. identify the name, postal and e-mail addresses, and telephone and fax numbers for the applicant's main office;

- ii. identify the names and addresses of any entities that hold ownership interests of 10% or more in the Energy Broker or Energy Consultant, including a contact name for corporate entities and partnerships;
 - iii. identify the methods by which it intends to market energy products and services to customers;
 - iv. identify the category/categories of energy products it intends to market to customers (e.g. commodity service, distributed solar, or demand response);
 - v. disclose each state in which the applicant operates, or has operated, as an Energy Broker or Energy Consultant and provide any data in its possession regarding complaint history;
 - vi. disclose any criminal or regulatory sanctions imposed during the previous 36 months against the applicant, any senior officers of the applicant, or any entities holding ownership interests of 10% or more in the applicant;
 - vii. disclose any other trade names used by the applicant and the state in which the trade name was/is used;
 - viii. disclose and describe any data breaches associated with customer proprietary information that occurred in any jurisdiction within the 36 months preceding the date of registration, as well as any actions taken by the applicant in response to the incident(s);
 - ix. disclose and describe specific policies and procedures established by the applicant to secure customer data; and
 - x. disclose any history of bankruptcy, dissolution, merger, or acquisition activities in the 36 months preceding the date of registration, including data for affiliates of the Energy Broker or Energy Consultant applicant and upstream owners and subsidiaries.
- b. A sample standard agreement between the Energy Broker or Energy Consultant and the customer;
 - c. Sample forms of the notices sent upon assignment of sales agreements, discontinuance of service, or transfer of customers to other providers;
 - d. Procedures used to obtain customer authorization for access to a customers' historic usage or credit information;
 - e. Sample copies of informational and promotional materials that the applicant uses for mass marketing purposes;
 - f. Sample disclosures of compensation;
 - g. Proof of registration with the New York State Department of State or proof of an assumed name certificate (DBA) filed with the county clerk.
 - h. Proof of registration to act as a marketer in any municipality where such registration is required;
 - i. An annual \$500 registration fee;
 - j. An irrevocable standby letter of credit issued by a reputable financial institution in the amount of \$100,000 for registering Energy Brokers and \$50,000 for registering Energy Consultants, that meets the following conditions:

- i. The New York State Department of Public Service shall be named as beneficiary and the letter of credit applicant shall be clearly named;
 - ii. Any number of partial drawings shall be permitted from time to time;
 - iii. The process for making a drawing, including any required forms and communications or delivery instructions shall be stated;
 - iv. If a drawing is made, payment shall be made to the beneficiary within 5 business days;
 - v. Any expiration date shall be specified and options for renewal, including automatic renewal, shall be stated.
 - vi. The applicant's filing for bankruptcy, receivership, or any other debt-relief petition shall in no way affect the issuer's liability to the beneficiary under the letter of credit.
 - vii. All commissions, fees, and other charges with respect to the letter of credit shall be paid by the applicant;
 - viii. Except for increases to the amount, the letter of credit shall not be amended, changed, or modified without express written consent of the beneficiary;
 - ix. The beneficiary shall not be deemed to have waived any rights under the letter of credit unless an authorized representative thereof has signed a dated written waiver. No such waiver, unless expressly stated therein, shall be effective as to any subsequent transaction, nor to any continuance of a breach; and
 - x. If the beneficiary should require a replacement of the letter of credit due to loss or destruction of the original, the issuer will provide one upon request.
 - k. A completed Service Provider Contact Form, which can be found on the Department's website <http://www.dps.ny.gov>, identifying the Energy Broker or Energy Consultant's employee(s) responsible for resolving consumer complaints received by the Department and referred to the Energy Broker or Energy Consultant; and
 - l. An Officer Certification document sworn to by a high-level officer of the applicant, such as the Chief Executive Officer, President, or the equivalent, in which the officer affirms that the information contained in the registration package is accurate and truthful, and that the applicant is willing and able to comply with all applicable laws and regulations, including these UBPs.
 2. An applicant that knowingly makes false statements in its registration package is subject to denial or revocation of approval.
 3. If the registration package contains information that is a trade secret or sensitive for security reasons, the applicant may request that the Department withhold disclosure of the information, pursuant to the Freedom of Information Law (Public Officers Law Article 6) and Public Service Commission regulations (16 NYCRR §6-1.3).
- C. Department Review Process
1. The Department shall review the Registration Form information and documentation submitted by each applicant and make a determination as to the applicant's likelihood

- of compliance with the Uniform Business Practices (UBP) if the applicant's registration was approved. To enable the Department to make a thorough assessment of a registration, an applicant shall notify the Department of any major changes in the information submitted in the Registration Form and/or registration package that occurs during the Department review process.
2. Following its review of the registration information and documentation, the Department shall advise the applicant, in writing, if the registration package is approved and the applicant is registered to operate in the State.
 3. If following its review of the registration package information and documentation the Department determines that the applicant is not likely to comply with the UBP if the applicant were deemed eligible, the Department may recommend to the Commission that, for good cause shown, the Commission deny the applicant's registration.
 4. In any instance that the Department recommends to the Commission that an applicant's registration be denied, the applicant shall be afforded an opportunity to provide the Commission with a response in rebuttal to the Department's recommendation and in support of its registration before the Commission renders a final determination.
 5. The Department shall periodically review the registration packages of each Energy Broker and Energy Consultant operating in New York State and make a recommendation to the Commission if the Department finds that the Energy Broker or Energy Consultant should not be permitted to continue operating in New York State.

D. Maintaining and Updating Registration

1. An Energy Broker or Energy Consultant shall submit by August 31st each year:
 - a. a statement that the information and attachments in its Registration Form and registration package are current; or
 - b. a description of revisions to the Registration Form and registration package and a copy of the revised portions or, at the Energy Broker or Energy Consultant's option, a copy of the revised portions identifying the revisions by highlighting or other means;
 - c. An Officer Certification document, as required by Sub-section B.1.1 of this Section; and
 - d. The required annual registration fee.
2. An Energy Broker or Energy Consultant shall submit at other times during the year:
 - a. A description of any major change in the Registration Form and/or application package and a copy of the revised portions or, at the Energy Broker or Energy Consultant's option, a copy of the revised portions identifying the revisions by highlighting or other means. For purposes of this Section, the term, "major change," means a revision in the terms and conditions applicable to the business relationship between the Energy Broker or Energy Consultant and its customers.
 - b. Changes in marketing plans, including changes to the list required in Sub-section B.1.a.iii of this Section.
 - c. Changes in the Energy Broker or Energy Consultant's business and customer service information displayed on the Department's Website.
 - d. Changes in personnel responsible for resolving consumer complaints received

by the Department and referred to the Energy Broker or Energy Consultant.

E. Marketing

1. This sub-section describes the standards that Energy Brokers and Energy Consultants must follow when marketing to customers in New York State. Nothing in this Section shall be read to modify or remove the marketing standards contained in UBP Section 10.
 - a. Energy Brokers and Energy Consultants shall ensure that the training of their employees and/or marketing representatives includes:
 - i. Knowledge of this Section and awareness of the other Sections of the UBP;
 - ii. Knowledge of the products and services for which the Energy Broker or Energy Consultant is marketing;
 - iii. Knowledge of product rates/cost, payment options and the customers' right to cancel, including the applicability of an early termination fee;
 - iv. Knowledge of the applicable provisions of the Home Energy Fair Practices Act that pertains to residential customers; and,
 - v. The ability to provide the customer with a toll-free number from which the customer may obtain information about the Energy Broker or Energy Consultant's mechanisms for handling billing questions, disputes, and complaints.
 - b. In-Person Contact with Customers: Energy Brokers or Energy Consultants who contact customers in person at a location other than the Energy Broker or Energy Consultant's place of business, or the place of business of the third party on whose behalf the Energy Broker or Energy Consultant is marketing, for the purpose of selling any product or service offered by the Energy Broker or Energy Consultant, or offered by the third party on whose behalf the Energy Broker or Energy Consultant is marketing, shall, before making any other statements or representations to the customer:
 - i. Introduce him or herself with an opening statement that identifies the entity which he or she represents, identifies him or herself as a representative of that specific entity; explains that he or she does not represent the distribution utility; and, explains the purpose of the solicitation.
 - ii. Produce identification, to be visible at all times thereafter, which: (1) prominently displays in reasonable size type face the first name and employee identification number of the marketing representative; (2) displays a photograph of the marketing representative and depicts the legitimate trade name and logo of the entity they are representing; (3) provides the Energy Broker or Energy Consultant telephone number, or the telephone number of the third party on whose behalf the Energy Broker or Energy Consultant is marketing, for inquires, verification, and complaints.
 - iii. An Energy Broker or Energy Consultant must provide each prospective residential customer a business card or similar tangible object with the marketing representative's first name and employee

- identification number; Energy Broker or Energy Consultant's name, address, and phone number, or the name, address, and phone number of the third party on whose behalf the Energy Broker or Energy Consultant is marketing; date and time of visit, and website information for inquires, verification and complaints.
- iv. An Energy Broker or Energy Consultant must provide the customer with written information regarding the marketed products and services immediately upon request which must include the name and telephone number of the third party on whose behalf the Energy Broker or Energy Consultant is marketing for inquires, verification, and complaints. Any written materials, including but not limited to contracts, sales agreements, and marketing materials, must be provided to the customer in the same language utilized to solicit the customer.
 - v. Where it is apparent that the customer's English language skills are insufficient to allow the customer to understand and respond to the information conveyed by the Energy Broker or Energy Consultant or where the customer or another third party informs the Energy Broker or Energy Consultant of this circumstance, the Energy Broker or Energy Consultant shall either find a representative in the area who is fluent in the customer's language to continue the marketing activity in his/her stead, or terminate the in-person contact with the customer. The use of translation services and language identification cards is permitted.
 - vi. An Energy Broker or Energy Consultant must leave the premises of a customer when requested to do so by the customer or the owner/occupant of the premises.
 - vii. All Energy Brokers or Energy Consultants conducting door-to-door marketing must maintain a daily record, by zip code, of the territories in which the Energy Broker or Energy Consultant has conducted door-to-door marketing. This information should be in a form that can be reported to Staff upon request and should be retained by the Energy Broker or Energy Consultant for a minimum of six months.
- c. Telephone Contact with Customers: Energy Brokers and Energy Consultants who contact customers by telephone for the purpose of selling any product or service shall:
- i. Provide the Energy Broker or Energy Consultant's first name and, on request, the identification number;
 - ii. State the name of the third party on whose behalf the call is being made, if applicable;
 - iii. State the purpose of the telephone call;
 - iv. Explain that he or she does not represent the distribution utility.
 - v. Where it is apparent that the customer's English language skills are insufficient to allow the customer to understand and respond to the information conveyed by the Energy Broker or Energy Consultant or

- where the customer or another third party informs the Energy Broker or Energy Consultant of this circumstance, the Energy Broker or Energy Consultant will immediately transfer the customer to a representative who speaks the customer's language, if such a representative is available, or terminate the call;
- vi. Remove Customers' names from the marketing database upon Customers' request.
 - vii. Provide any written materials, including but not limited to contracts, sales agreements, and marketing materials to the customer in the same language utilized to solicit the customer.
- d. Conduct when Marketing: Energy Brokers and Energy Consultants shall:
- i. Not engage in misleading or deceptive conduct as defined by State or federal law, or by Commission rule, regulation, or Order;
 - ii. Not make false or misleading representations including misrepresenting rates or savings of certain energy products and services;
 - iii. Provide the customer with written information, upon request, or with a website address at which information can be obtained, if the customer requests such information via the internet;
 - iv. Use reasonable efforts to provide accurate and timely information about services and products. Such information will include information about rates, contract terms, early termination fees, and right of cancellation consistent with this Section, UBP Section 2, and any other relevant Section;
 - v. Ensure that any product or service offerings marketed by an Energy Broker or Energy Consultant contain information written in plain language that is designed to be understood by the customer. This shall include providing any written information to the customer in a language in which the Energy Broker or Energy Consultant has substantive discussions with the customer or in which a contract is negotiated;
 - vi. Investigate customer inquiries and complaints concerning marketing practices within five days of receipt of the complaint; and,
 - vii. Cooperate with the Department and Commission regarding marketing practices proscribed by the UBP and with local law enforcement in investigations concerning deceptive marketing practices.
- e. Dispute Resolution: Energy Brokers and Energy Consultants shall maintain an internal process for handling customer complaints and resolving disputes arising from marketing activities and shall respond promptly to complaints forwarded by the Department.
2. Disclosure of compensation
- a. Energy Brokers and Energy Consultants shall disclose to customers the form and amount of compensation via a conspicuous statement on any contract or agreement between the energy agent, consultant, broker, or intermediary and its customer.

- b. All such disclosures shall include any dollar amount paid, the form in which the compensation was given to the Energy Broker or Energy Consultant, the entity which made the payment, and any broker fee or margin which was added to the energy product or service the customer enrolled in. This disclosure must include anything of value that was given as compensation to the Energy Broker or Energy Consultant for their work, including commissions, bonuses, and any non-financial compensation.
 - c. In instances where the Energy Broker or Energy Consultant has a direct contractual relationship with the customer, this disclosure shall be included on the first page of the customer agreement, must be in plain language, and appear in 12-point font size or larger.
 - d. In instances where the Energy Broker or Energy Consultant does not have a direct contractual relationship with the customer, an Energy Broker or Energy Consultant shall disclose to the customer in a separate, written communication any fee splitting arrangement, including the third party receiving the fee and the amount or percentage of fee that the third party will receive.
 - e. If a third party, such as an ESCO or DERS, collects compensation on behalf of the Energy Broker or Energy Consultant, such compensation shall be added to the Customer Disclosure Statement in the third party's customer agreement and reflect the amount and method. In this instance, the Energy Broker or Energy Consultant shall still disclose this information at the time of marketing to the customer.
3. Prohibition on Rebates
- a. No Energy Broker, Energy Consultant or any other person acting for or on behalf of the Energy Broker or Energy Consultant shall offer or make, directly or indirectly, any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the energy rate payer or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any energy supply or energy-related business.
 - i. An applicant; any person, firm, or corporation acting as agent, representative, attorney, or employee of the energy rate payer or of the prospective energy rate payer; or anyone having any interest in the real property shall not knowingly receive, directly or indirectly, any such rebate or other consideration or valuable thing.
 - ii. Any person or entity who violates these prohibitions is subject to a penalty equal to the greater of \$5,000 or up to ten times the amount of compensation or rebate received or paid.

F. Customer Inquires

1. This sub-section establishes requirements for responses by an Energy Broker or Energy Consultant to retail access customer inquiries. An Energy Broker or Energy Consultant shall respond to customer inquiries sent by means of electronic mail, telecommunication services, mail, or in meetings. The subjects raised in inquiries may result in the filing of complaints.
2. General Requirements:

- a. Energy Brokers and Energy Consultants shall provide consistent and fair treatment to customers.
 - b. Energy Brokers and Energy Consultants shall maintain processes and procedures to resolve customer inquiries without undue discrimination and in an efficient manner and provide an acknowledgement or response to a customer inquiry within 2 days and, if only an acknowledgement is provided, a response within 14 days.
 - c. Energy Brokers and Energy Consultants shall provide local or toll-free telephone access from the customer's service area to customer service representatives (CSRs) responsible for responding to customer inquiries and complaints. This shall either be the local or toll-free telephone number of the Energy Broker or Energy Consultant or the local or toll-free telephone number of the third-party on whose behalf of the Energy Broker or Energy Consultant is marketing.
 - d. CSRs shall obtain information from the customer to access and verify the account or premises information. Once verification is made, the CSR shall determine the nature of the inquiry, and, based on this determination, decide whether the distribution utility, the ESCO, or the Energy Broker/Consultant is responsible for assisting the customer.
 - e. The CSR shall follow normal procedures for responding to inquiries. If the inquiry is specific to another provider's service, the CSR shall take one of the following actions:
 - i. Forward/transfer the inquiry to the responsible party;
 - ii. Direct the customer to contact the responsible party; or,
 - iii. Contact the responsible party to resolve the matter and provide a response to the customer.
 - f. Energy Brokers and Energy Consultants may provide a teletypewriter (TTY) system or access to TTY number, consistent with distribution utility tariffs.
3. Specific Requests for Information
- a. An Energy Broker or Energy Consultant shall respond directly to customer inquiries for any information that is related to commodity supply and/or delivery service, to the extent it has the necessary information to respond.
 - b. The entity responsible for the accuracy of meter readings shall respond to customer inquiries related to usage.
4. Emergency Contacts
- a. An emergency call means any communication from a customer concerning an emergency situation relating to the distribution system, including, but not limited to, reports of gas odor, natural disaster, downed wires, electrical contact, or fire.
 - b. If contacted with an emergency telephone call, the Energy Broker or Energy Consultant CSR shall transfer emergency telephone calls directly to the distribution utility or provide the distribution utility's emergency number for direct contact to the distribution utility. If no Energy Broker or Energy Consultant CSR is available, the Energy Broker or Energy Consultant shall provide for after-hours emergency contacts, including transfer of emergency calls directly to a distribution utility or an answering machine message that

includes an emergency number for direct contact to the distribution utility.

G. Customer Data

1. Energy Brokers and Energy consultants must protect against the unauthorized disclosure of confidential customer information.
2. Energy Brokers and Energy Consultants are prohibited from selling, disclosing or providing any customer information obtained from a distribution utility or from the customer themselves to others, including their affiliates, unless such sale, disclosure or provision is required to facilitate or maintain service to the customer, or is specifically authorized by the customer, or required by legal authority. If such authorization is requested from the customer, the Energy Broker and Energy Consultant shall, prior to authorization, describe to the customer the information it intends to release and the recipient of the information.
3. NIST Cybersecurity Framework. Energy Brokers and Energy Consultants that obtain customer information from the distribution utility must have processes and procedures in place regarding cybersecurity consistent with the National Institute of Standards and Technology Cybersecurity Framework.
4. Data Security. Energy Brokers and Energy Consultants that obtain customer information from the distribution utility must comply with any data security requirements imposed by Commission rules.

H. Enforcement

1. An Energy Broker or Energy Consultant may be subject to consequences for reasons, including, but not limited to:
 - a. false or misleading information in the registration package;
 - b. failure to adhere to the policies and procedures described in any contract with customers;
 - c. failure to comply with required customer protections;
 - d. failure to comply with applicable New York Independent System Operator (NYISO) requirements, reporting requirements, or Department oversight requirements;
 - e. failure to provide notice to the Department of any material changes in the information contained in the Registration Form or registration package;
 - f. failure to comply with the UBP terms and conditions, including discontinuance requirements;
 - g. failure to comply with the Commission's Environmental Disclosure Requirements or failure to comply with other Commission Orders, Rules, or Regulations;
 - h. failure to reply to a complaint filed with the Department and referred to the Energy Broker or Energy Consultant within the timeframe established by the Department's Office of Consumer Services which is not less than five days;
 - i. a material pattern of consumer complaints on matters within the Energy Broker or Energy Consultant's control;
 - j. failure to comply with any federal, state, or local laws, rules, or regulations related to sales or marketing; or 'No Solicitation' signage on the premises; or
 - k. failure to comply with any of the Marketing Standards set forth in Section 10 of the UBP.
2. In determining the appropriate consequence for a failure or non-compliance in one or

more of the categories set forth in this Section, the Commission or Department may take into account the nature, the circumstances, including the scope of harm to individual customers, and the gravity of the failure or non-compliance, as well as the Energy Broker or Energy Consultant's history of previous violations.

a. Enforcement Procedures:

- i. The Commission or Department shall either: (a) notify the Energy Broker or Energy Consultant in writing of its failure to comply and request that the Energy Broker or Energy Consultant take appropriate corrective action or provide remedies within the directed cure period, which will be based on a reasonable amount of time given the nature of the issue to be cured; or (b) order that the Energy Broker or Energy Consultant show cause why a consequence should not be imposed.
- ii. The Commission may impose the consequences listed in UBP Section H.2.b. if (a) Energy Broker or Energy Consultant fails to take corrective actions or provide remedies within the cure period; or (b) the Commission determines that the incident or incidents of non-compliance are substantiated and the consequence is appropriate.
- iii. Consequences shall not be imposed until after the Energy Broker or Energy Consultant is provided notice and an opportunity to respond.
- iv. Notwithstanding the requirements of sub-sections i., ii., and iii. of this paragraph, an Energy Broker or Energy Consultant is subject to immediate revocation of its registration if it fails to provide the required annual registration fee.
- v. The notice of consequences imposed by the Commission will be published on the Department's website.

b. Consequences for non-compliance in one or more of the categories set forth in this Section may include one or more of the following restrictions on an Energy Broker or Energy Consultant's opportunity to do business as an Energy Broker or Energy Consultant in New York State:

- i. Suspension from a specific Commission approved program in either a specific service territory or all territories in New York State;
- ii. Suspension of the ability to enroll new customers in either a specific service territory or all service territories in New York State;
- iii. Imposition of a requirement to record all telephonic and door-to-door marketing presentations, which shall be made available to the Department for review;
- iv. Reimbursements to customers who did not receive savings promised in the Energy Broker or Energy Consultant's sales agreement/Customer Disclosure Statement or included in the Energy Broker or Energy Consultant's marketing presentation, or to customers who incurred costs as a result of the Energy Broker or Energy Consultant's failure to comply with the marketing standards set forth in UBP Section 10;
- v. Release of customers from sales agreements without imposition of early termination fees;

- vi. Revocation of an Energy Broker or Energy Consultant's registration and ability to operate in New York State; and,
 - vii. Any other measures that the Commission may deem appropriate.
 - c. In addition to the consequences identified at UBP Section 11.H.2.b., any person, firm, association, or corporation who or which acts in violation of Public Service Law §66-t(2), and codified in this Section, will be subject to a penalty not to exceed \$5,000 for each violation.
- 3. An Energy Broker or Energy Consultant's registration is valid unless: the Energy Broker or Energy Consultant fails to pay its annual registration fee; the Energy Broker or Energy Consultant abandons its registration; or such registration is revoked by the Commission through a final order. Additionally, any person or entity who violates this Section's prohibitions on rebates is subject to a penalty equal to the greater of \$5,000 or up to ten times the amount of compensation or rebate received or paid.
- 4. The Department shall maintain a list of registered Energy Brokers and Energy Consultants for the benefit of third parties who do business with such Energy Brokers and Energy Consultants. As stated in UBP Section 2B, DER suppliers are prohibited from doing business with unregistered Energy Brokers and Energy Consultants.

APPENDIX C:
COMMENT SUMMARY

LIST OF COMMENTERS

Ampion, PBC	Ampion
Aurora Energy Advisors, LLC	Aurora
EMEX, LLC DBA Mantis Energy	Mantis
Energco Power and Gas, LLC	Energco
Evolution Energy Partners	Evolution
Family Energy, Inc.	Family
New York Utilities ¹⁵	New York Utilities
L5E, LLC	L5E
Energy Technology Savings, Inc. DBA Logical Buildings	Logical Buildings
Mirabito Power and Gas, LLC	MPG
NRG Energy, Inc. ¹⁶	NRG
New York Retail Choice Coalition	NYRCC
New York Solar Energy Industries Association	NYSEIA
Coalition for Community Solar Access	CCSA
Public Utility Law Project of New York	PULP
Retail Energy Supply Association	RESA
The Energy Professionals Association	TEPA

COMMENT SUMMARY

Comments on Staff's Proposal were submitted publicly in DMM Case 23-M-0106. The most common subjects that parties

¹⁵ The New York Utilities include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY, KeySpan Gas East Corporation d/b/a National Grid, Niagara Mohawk Power Corporation d/b/a National Grid, Orange & Rockland Utilities, Inc., Rochester Gas and Electric Corporation, and National Fuel Gas Distribution Corporation

¹⁶ 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 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.

provided comments on were the applicability of Staff's Proposal, the compensation disclosure, the financial accountability methods, the definitions of Energy Broker and Energy Consultant, and requests for a Stakeholder Conference. A full, detailed summary of all comments is provided below, and all comments can be found in their entirety in Case 23-M-0106.

Ampion, PBC

Ampion, PBC (Ampion) states the definitions for "Energy Brokers" and "Energy Consultants" should be copied verbatim from the Statute and not applied to other entities, such as Energy Service Companies (ESCOs) and Distributed Energy Resource Suppliers (DERS). Ampion states that the definition of "Energy Consultant" including "on behalf of a DER Provider" language is not what the Statute says. Ampion continues on to state that the definition of "Energy Broker" within the Proposal diverges from the Statute. Ampion argues that the Legislature intended the definition of "Energy Broker" to include only those entities contractually or legally involved in the retail electric or natural gas contracts ultimately offered for sale by ESCOs, not contracts offered by CDG Providers or DERS Providers.

Ampion recommends separating the new regulations for Energy Brokers and Energy Consultants into a new UBP for brokers and consultants. Ampion further notes that whichever approach may be adopted, the definitions of "Energy Broker" and "Energy Consultant" set forth in the Statute should be the definitions used in the final regulation.

Aurora Energy Advisors, LLC

Aurora Energy Advisors, LLC (Aurora) offered comments and suggested revisions to the Proposal to avoid unnecessary administrative hurdles and costs on energy brokers and consultants. Aurora states that the 60-day time period for the

submission of registration applications is constrained. Aurora requests clarification regarding Staff review and finalized registration timelines, arguing avoidable bureaucratic delay or compliance uncertainty in the registration process.

Aurora further commented on the requirement within the Proposal for energy brokers to obtain an irrevocable standby letter of credit issued for a period of at least one year with the New York State Dept. of Public Service as a beneficiary. Aurora states a letter of credit is challenging and expensive to obtain and recommends replacing this requirement for a surety bond of \$50,000 or proof of financial accountability through the presentation of a financial statement showing net assets of the consultant of at least \$50,000.

Aurora notes that the Proposal does not address fee split arrangements, which Aurora states is a major part of many energy management company business functions. Aurora requests that the Commission consider fee split arrangements and clarify how the Proposal impacts such arrangements.

EMEX, LLC dba Mantis Energy

EMEX, LLC dba Mantis Energy (Mantis) states within its comments that while Mantis supports the principals behind the Staff Proposal, there are aspects that may be unnecessary and Staff's intent can be achieved by other means, particularly for commercial and industrial customers. Mantis argues that the Statute requires the payment of an annual fee, it does not require annual registration. Mantis recommends biennial submission of the registration form and the collection of the \$500 registration fee annually.

Mantis further argues that the Commission should not accept the Staff Proposal regarding financial accountability, stating this goes beyond the judgement of the Legislature and should allow for a bond or a letter of credit. Mantis notes that

brokers do not generally hold consumer funds by collecting deposits or participating in the wholesale markets to provide for the purchase of daily energy.

Regarding the "form and amount" of compensation received, Mantis states that compensation, for itself, generally takes two forms: (1) per unit of energy consumed (per-kWh or per-therm/per-MMbtu), (2) through a fee-for-service model, where services are billed monthly, or a hybrid of the two. Mantis argues that the "form and amount" requirement is met by the disclosure of the per-unit compensation. Mantis further notes that the Commission should clarify the applicability of the rebate of portions of broker fees.

Mantis notes that the Staff Proposal for a new UBP section 11 contains incorrect notions that brokers market on behalf of a particular third party. Mantis states that if a broker does in fact represent the interests of a particular supplier, they should indicate that, but Mantis argues this is the exception, not the rule.

Energo Power and Gas, LLC

Energo Power and Gas, LLC (Energo) supports the disclosure for broker fees within the Staff Proposal. Energo states that ESCOs disclose revenue and argue that the broker fee is revenue to the broker and should disclose this amount for price transparency for the customer.

Energo notes within its comments that the proposed UBP section 10.C.4 states that ESCOs may not do business with any unregistered brokers or consultants, yet the effective date of the new law is June 21, 2023. Energo argues this will result in all brokers being unregistered as of this date, and states that a stay of 10.C.4 is needed to align with the date on which Staff intends to commence enforcement of brokers and consultants.

Energo proposed some clarifying questions relating to the proposed UBP section 11.E.2.d stating brokers whose fees are paid through ESCO price are required to disclose fees at this time of marketing. Energo asks if that means a compensation disclosure statement must be provided by the broker to the customer, and if so, will DPS provide this form. Energo further asks what the document retention requirement of brokers is for this information, if TPVs would be required to include customer acknowledgement of the broker fee amount, and what audit functions will DPS employ to ensure broker fees are not recharacterized and properly disclosed.

Energo argues that the addition of "Energy Broker and Energy Consultant" to UBP Section 5.I should not be made. Energo notes that only the ESCO should have the ability to enroll customer for commodity service.

Regarding the definition of energy consultant, Energo requests clarification that this definition includes door to door marketing companies, telemarketing companies, kiosk marketing companies and other similar third-party vendors acting for ESCOs, and that such entities are subject to registration and compliance requirements. Energo notes that if these type of entities are exempted, it will result in companies recharacterizing themselves within exempted categories.

Energo's final comment is that the Energy Broker and Consultant Registration Form must be clarified. Energo states that Section 3 of that form requires a "sample standard sales agreement" and must be clarified to state "a sample standard sales agreement between energy broker/energy consultant and its customer". Energo states the form as is could result in misinterpretation to mean a contract between the ESCO and the customer.

Evolution Energy Partners

While Evolution Energy Partners (Evolution) is generally supportive of the Commission's registration requirements for energy brokers and energy consultants to ensure the Commission's standards and customer protections are adhered to, it offered one comment in its 3-page letter. Evolution feels that the Staff Proposal excludes Bonds as a type of financial assurance included in that proposal. Evolution goes on to state that the language which was signed into law on December 23, 2022 expressly includes Bonds as a method to demonstrate financial accountability and therefore requests that it be included in the language of Staff's final proposal.

Family Energy Inc.

Family Energy Inc (Family Energy) provided a 22-page document containing comments, recommendations and targeted revisions to the Staff Proposal. Family Energy recommends that the Commission direct Staff to convene a stakeholder technical conference to review the new regulations and associated compliance requirements. Family Energy recommends modifying the existing language of an energy broker to include the following legislative language: "...and (1) that assumes the contractual and legal responsibility for the sale of electric supply service, transmission or other services to end-use retail customer, but does not take title to any of the electricity sold, and does not make retail energy sales to customers, or (2) that assumes the contractual and legal obligation to provide for the sale of natural gas supply service, transportation or other services to end-use retail customers, but does not take title to any of the natural gas sold, and...". It also proposes to replace the UBP definition of energy consultant to using the exact legislative language. The comments further state that an ESCO's in-house sales team that is acting on behalf of an ESCO should not be

subjected to these registration requirements. Family Energy also proposes that an energy broker or energy consultant that conducts business on behalf on an ESCO should be included in the existing UBP definition for ESCO marketing representative.

Family Energy goes on to comment that, under the newly proposed registration, conduct and compliance requirements, ESCOs should not be held responsible for the conduct of energy brokers and energy marketers as the Commission now has statutory authority over these entities.

Family Energy comments that the compensation disclosure has numerous varying factors that make it difficult to disclose in both residential and commercial applications and proposes that for commercial customer, ESCOs should include a general statement on the Customer Disclosure Label to the effect that the ESCO is collecting compensation on the broker or consultant's behalf that consists of a mill adder charge in the supply rate that is applied to the customer's actual usage over the term of the agreement. For residential enrollments Family Energy proposes that no financial disclosure should be required because the commissions paid for the acquisition of residential customers are not "broker compensation" under the statutory definition. Additionally Family Energy states that commission for enrollment of a residential customer is not paying the commission, rather it is being paid by the ESCO to the vendor.

Family Energy believes that, with the exception of the addition about financial disclosure described above, that the proposed changes to the UBP Section 5 Changes in Service Providers should not be adopted. It feels that the inclusion of energy broker, or energy consultant throughout the section are unnecessary.

Family Energy suggest that there should be a grace period between when the initial broker and consultant

registrations are filed and when ESCOs are required to verify registration. It believes that this would provide a safe harbor for ESCOs to continue doing business while registrations are processed. Additionally related to registrations, Family Energy feels that the inclusion of the proof of registration to act as a marketer in any municipality where such registration is required should be applied to the entire entity and not to individual sales agent that work for a broker or consultant.

Regarding customer data, Family Energy comments that the proposed section 11.G.3 and 4 should not be adopted as consultants and brokers to not engage in EDI with a utility and as such, should not be required to obtain customer information from the distribution utility. It states that this requirement would be contrary to a prior Commission Order.

Family Energy provided comments on enforcement indicating it wants further clarification on the definition of door-to-door sales, that the recommendation of recording in person sales calls would raise significant privacy concerns, and that the sanctions against brokers and consultants that have been proposed would present challenges for the ESCO as a broker would not be able to reimburse a customer for savings not realized and would not be authorized to waive an early termination penalty.

New York Utilities

The New York Utilities' comments request clarification on three elements of the Staff Proposal, (1) distribution utilities like the New York Utilities are not included in the definition of energy consultant; (2) utility rate consultants that represent customers in connection with rate, tariff, and billing inquiries to utilities and the Commission are included in the definition of energy consultant; and (3) the obligation of energy brokers and energy consultants to comply with the

utility data security requirements includes entering into the Commission's approved data security agreements, where required. The comments also propose additional requirements to protect against unauthorized disclosure of customer information.

The New York Utilities state that, since distribution utilities are already subject to Commission regulation and provide a public service, they do not act as a broker or agent to the customers they serve. Utilities are required to provide customer information regarding their supply options including that they have the option to buy energy from an ESCO, but that does not make those utilities energy consultants. So, as a matter of clarity and avoiding any ambiguity, the New York Utilities propose that the definitions of energy consultants and energy brokers should include specific language that utilities are excluded from those definitions.

The New York Utilities propose that any entity acting on a customer's behalf as a rate consultant that advise a customer or customers on electric or natural gas contracts and represent those customers in inquiries to utilities, complaints filed with the DPS and/or disputes before the Commission are acting within the scope of "negotiating or advising any electric or natural gas contract" and as such should be included in the definitions, and subject to the requirements set forth in the UBP for energy brokers and energy consultants.

The New York Utilities support the proposal that energy brokers and energy consultants comply with any data security requirements imposed by that utility or by Commission rules but further elaborates seeking clarification that "data security requirements" include not only processes and procedures for energy brokers and energy consultants to secure customer data, but also their compliance with applicable utility requirements before they receive customer data. These

requirements could include entering into a data security agreement and completing and including a self-attestation before receiving customer data. The New York Utilities believe this clarification will benefit consumers by further defining the rules and limiting the potential for disputes.

The New York Utilities conclude their comments with additional proposed protections which include a requirement that, once a customer provides authorization for an entity to access their data, that authorization should be subjected to a renewal of authorization at intervals of no less than two years; that energy brokers and energy consultants should be required to provide proof of customer authorization to a utility before any data is released; and that an energy broker or energy consultant will be prohibited from requesting customer data if there is no customer authorization, if the authorization has not been renewed within two years, the contract between the customer and energy broker or energy consultant has been terminated, the customer has revoked their authorization, or if the energy broker or energy consultants representation of the customer in connection with a particular matter has been terminated.

L5E, LLC

L5E, LLC (L5E) generally supports the overall goal of requiring the registration of energy advisors and implementing rules governing the provision of energy advisory services and provided the following comments. L5E supports the filing made by Power Management Co., LLC and concurs with all of the points made in that filing. Specifically regarding the requirement for fee disclosure, L5E recommends that the Commission adopt the approach to fee disclosure used by the Illinois Commerce Commission which states in part "...disclose in plain language in writing to all persons it solicits:... the total price and total anticipated cost, inclusive of all fees and commissions received

by the licensee, to be paid by the customer over the period of the proposed underlying contract.”

L5E concludes its comments with a statement that it agrees with the filing of Aurora Energy Advisors, LLC in its statement that the 60 day time period for the submission of registrations is very short. It believes it is highly likely that DPS Staff will not have sufficient time to process all applications on or before August 31, 2023. L5E proposes that the language should read that any broker that has timely filed an registration shall be permitted to continue to operate in the State pending approval or rejection of its application by the Commission.

Energy Technology Savings, Inc. DBA Logical Buildings

Energy Technology Savings, Inc. DBA Logical Buildings (Logical Buildings) submitted comments in which the Company disagrees with Staff’s definition of what constitutes an energy consultant. Logical Building’s contends that Staff’s definition of “energy broker” is overly broad. Logical Buildings argues that merely advising customers regarding supply contracts does not fit within the statutory definition of “energy consultant” and that the provision of such advice would not make an entity an “energy broker” as it would not involve assuming the contractual and legal responsibility for an energy sale. Logical Buildings goes on to state that entities that provide consulting services that do not act as brokers or agents should not be subject to the registration and reporting provisions of the new law.

Logical Buildings expands on its comments in stating that Staff’s suggestion that the definition of an “energy consultant” includes activity of utility rate consultants would not include acting as a broker or agent in any ESCO sale transactions. Logical Buildings states that utility rate

consultants provide guidance and counsel regarding electric bills and rates, and therefore should not be subject to the definition established in Staff's Proposal. Further, Logical Buildings argues that the Legislature's intent pertains more to limiting those who "act as a broker" or "as an agent", rather than those who would counsel or provide guidance. Logical Buildings states that because the Legislature has declined to authorize the Commission to regulate energy advisors that do not fit with the definitions of "energy brokers" or "energy consultants," then any attempt by the Commission to regulate such advisors is beyond the Commission's authority as established in Public Service Law.

Logical Buildings comments that Staff's proposed broker registration rules would be subject to all DER service providers that fall within the definition of "energy broker or "energy consultant" to a burdensome level of oversight. Logical Buildings argues this because Staff's proposed broker registration rules would potentially subject all DER service providers that fall within the definitions of "energy broker" or "energy consultant" to a level of oversight that may be considered burdensome because the regulations are far more detailed than those that apply to firms providing non-CDG DER services. Logical Buildings goes on to state that it agrees with Staff's proposal in requiring firms that fall in the established definitions to provide a bond or other method of financial accountability, register with the Commission, pay a registration fee, notify the Commission of any name change, and refrain from offering certain rebates. Logical Buildings continues in stating that it does not believe the requirements can be met in the case of non-DER service providers without the need for elaborate registration and marketing requirements for on-site DER providers.

Mirabito Power and Gas, LLC

Mirabito Power and Gas, LLC (MPG) submitted comments and requests for clarification regarding the broker registration proposal in four specific areas. First, MPG contends that the definitions of "energy broker", "energy consultant", and "ESCO Marketing Representative" and other definitions relevant to the legislation should be clarified to ensure consistent and distinct interpretation. MPG states that the definitions for "energy broker" and "energy consultant" lack sufficient specificity to provide enough distinguishable clarification between ESCO sales personnel, brokers, and consultants. MPG argues that the lack of clarity is shown by the wide variance in interpretation and applicability of the rules discovered in meetings with ESCOs and other stakeholders. MPG comments further that if the definitions of "energy broker", "energy consultant", and "ESCO Marketing representative" are not clarified, it is inevitable that misinterpretation of Staff's Proposal will occur resulting in inconsistent implementation, market disruptions, and difficulty in enforcement.

Second, MPG states that the conditions and criteria for determining when "compensation disclosure" is required should be clarified to ensure consistent and specific interpretation of the Proposal's language. MPG requests clarification on the "compensation disclosure" in the following area: "Where an entity (or individual) is directly employed by an ESCO, compensation disclosure is not required when that entity (or individual) is acting directly on behalf of that ESCO and facilitates entry into a retail access supply agreement between a customer and that ESCO in any utility sub-territory (i.e., pooling area) in which that ESCO has been granted retail access authority. In such cases, the ESCO would be subject to

UBP rules applicable to ESCOs regarding, among other things: marketing conduct, data security, documentation, and supply.

Third, MPG states the proposed revisions to the Uniform Business Practices (UBP) should be modified to address inconsistencies in the Proposal's language, notably about authority granted to energy consultants. MPG's request for modifications to address the Proposal's inconsistencies relate to changing the following discrepancies. MPG states that consultants are erroneously included in requirements that apply only to ESCOs, or in certain instances, brokers. MPG provides an example to reaffirm its point in stating that ESCOs have the unique authority to enroll customers with a NYS utility under current Retail Access rules. Further, MPG contends that ESCOs are the only recognized entity in a retail access supply agreement, and utilities have no contractual relationship or visibility to consultants that may be involved in a supply agreement.

Lastly, MPG requests that a technical conference should be held among stakeholders prior to any ruling on the Order from the Commission. MPG contends that, based off discussions with numerous stakeholders, it is necessary to hold a stakeholder engagement meeting considering the wide variety of interpretations regarding the Proposal. MPG states that concurrence and clarity among stakeholders will be less likely without a stakeholder conference. Finally, MPG states that if the Proposal is not clarified, it is inevitable that misinterpretation will occur resulting in inconsistent implementation, market disruptions, and difficulty in enforcement.

NRG Energy, Inc

NRG Energy, Inc (NRG) submitted comments that were generally supportive of the Broker Registration process and the

fee disclosures for energy brokers and energy consultants, but NRG emphasizes that it is crucial to determine which entities are required to register and a process to set a standardized fee disclosure standard. Specifically, NRG submitted comments to focus on clarifying the scope of classifying energy brokers and energy consultants, clarifying the ESCO Marketing Representative definition, standardizing the fee disclosure for broker's, and contextualizing the potentially complex scenarios that may come up with different broker scenarios and the administrative process of amending the UBP and registering affected stakeholders.

NRG contends that the Broker Registration Bill and Staff Proposal could create an environment of confusion surrounding what entities or persons would be required to register with the Department. Specifically, NRG is concerned about the nuanced situations in which the Company uses brokers for large commercial and industrial (C&I) customers. NRG characterizes the "brokers" used for large C&I enrollments as being used in distinct sales channels in which the ESCO will contract with a broker negotiating on behalf of a large C&I customer. NRG goes on to comment that they contract with these types of brokers only to define said brokers means of seeking pricing and facilitating payment of their fee on behalf of a large C&I customer. NRG continues its comments by requesting explicit clarity regarding the entities covered by the provisions outlined in the Broker Registration Law and Staff Proposal. NRG states that the Broker Registration Law and Staff Proposal define an energy broker as an entity that contracts with a customer and takes on legal responsibility for the sale. NRG contends that energy broker's do not take on the legal obligation for the sale because customers will work with an energy broker to shop around for the best possible rate. NRG

states the process ends when the customer pays their broker and then signs up with a specific ESCO. Under this depiction, NRG contends that the broker does not fall under the previously established definition but does fall under the definition of an Energy Consultant. NRG continues that direct employees and vendors of an ESCO, including an ESCO's marketing representative, do not fall within the definition of energy broker as neither party assumes the contractual and legal responsibility for the sale of electric or gas supply service.

NRG states that it would be improper and unnecessary to amend the existing definition of an ESCO Marketing Representative to include energy broker or energy consultant. NRG contends that the three categories act in separate and distinct functions all of which perform different activities with respect to energy contracts and have different relationships with customers and ESCOs. NRG states that the energy broker is less common, the energy consultant acts as a broker, and these traditional brokers have no relationship with any given ESCO, unless it pertains to payment to the ESCO on behalf of a customer. NRG expresses concern that changing the definition of ESCO Marketing Representative distorts the distinction between marketing representatives trained by an ESCO directly and Energy Brokers and Energy Consultants that are working directly for the customers and have no training or oversight.

NRG states that it is generally supportive of the disclosure for broker fees, including a disclosure from an ESCO when they are collecting a broker compensation. NRG states that it is imperative to ensure the disclosure is standardized and uniform so that each ESCO is clearly able to display the fee in the same way. NRG contends that allowing different interpretations of the disclosure may result in some energy

brokers or consultants having an unfair competitive advantage, which in turn could create a competitive advantage for certain ESCOs if they elect to employ unclear disclosures that do not accurately capture the true amount and method of the broker compensation. To address this, NRG proposes adding a row into customer disclosure statements for mass market enrollments where the disclosure would only show up in instances where the end customer utilized an energy broker or energy consultant. Such an additional disclosure would, according to NRG, be an added element of transparency that would disclose to the customer any information that affected the price of the service agreement.

NRG states that the Staff Proposal which seeks to amend the UBP by adding definitions for an energy broker and energy consultant will ultimately cause confusion in the marketplace. NRG contends that the proposed UBP changes create confusion as they make it unclear whether all entities, or, if only one entity, is required to comply with a specific requirement. Further, NRG is concerned about the timing of the registration and the workload Staff will be forced to undertake to get brokers registered. As such, NRG states that Staff should allow for a 60-day grace period to get all affected brokers and consultants registered. Such an extension would be beneficial to the affected stakeholders as it would allow them to continue business while coming into compliance with the Staff Proposal.

NRG states additional concerns regarding the implementation of the Staff Proposal as there may not be enough time to allow ESCOs the time to update their systems to incorporate any new contract charges. NRG contends that unregistered energy brokers or energy consultants should not be listed on the DPS website. Further, NRG expresses concern that due to the varying deadlines associated with the implementation

of the Staff Proposal, customers could be adversely affected by utilizing the services of an unregistered broker or consultant, which could in turn cause issues with the service agreement with the ESCO. NRG recommends that ensuring the list of registered energy brokers and energy consultants be updated regularly so that ESCOs can rely on the current DPS website data to utilize the services of properly registered entities.

New York Retail Choice Coalition

New York Retail Choice Coalition (NYRCC) submitted four recommendations in their comments. NYRCC supports the requirement that brokers/consultants obtain a financial instrument but recommends that bonds should be included. NYRCC supports the requirement that brokers/consultants renew registration annually but recommends that a letter stating no changes have been made along with an Officer Certification be allowed in lieu of providing a full registration packet annually. NYRCC recommends standardizing the compensation disclosure requirement, so that the compensation is collected on a per unit basis (I.e., per kWh and/or Ccf). In addition, when compensation is subject to fee-splitting, a description of the arrangement should be disclosed in the customer disclosure statement.

NYRCC disagrees that the broker/consultant registration requirement was intended to extend to entities already registered with the Department. NYRCC explains that requiring ESCOs and DERs to also register as a broker/consultant only creates regulatory confusion and a burden on Staff. NYRCC supports Staff's recommendation that the definition of "energy broker" applies to CCA administrators.

NYRCC requested confirmation that no disclosure is required when an ESCO directly compensates an energy broker/consultant. NYRCC explains that energy consultants that

solicit customers via D2D or telemarketing are typically compensated by the ESCO directly. NYRCC wants confirmation that the disclosure is only required when the broker/consultant compensation is collected from the customer by the ESCO for the benefit of the broker/consultant. NYRCC agrees with Staff's interpretation of the definition of "energy consultant" but seeks confirmation that under the definition of "energy consultant", the following are included: entities that represent customers in renegotiating supply rate/terms between the customer and ESCO; entities that submit inquiries/complaints to DPS on behalf of the customer against an ESCO; and entities handling enrollment of customers for commodity service on behalf of an ESCO. Lastly NYRCC states the category of entities under the term "agent" is unclear. NYRCC believes that these entities also meet the definition of "energy consultant" and should be required to register.

New York Solar Energy Industries Association and the Coalition for Community Solar Access

New York Solar Energy Industries Association (NYSEIA) and the Coalition for Community Solar Access (CCSA) requests clarification that the proposed changes do not pertain to certain DER providers. NYSEIA and CCSA state that although some of their member's companies enter into referral arrangements with energy brokers/consultants for clean DERs, that the majority do not provide energy supply contracts and are not subject to the proposed requirements. NYSEIA and CCSA agree with Staff's interpretation that the proposed changes do not apply to CDG providers and certain DER providers. NYSEIA and CCSA encourage Staff to provide the same clarification that these changes do not apply to DER providers. NYSEIA and CCSA also recommend that no modifications be made to the UBPs for DERs. NYSEIA and CCSA state that the energy brokers/consultants

will be covered under the UBP for ESCOs and it is not necessary to include this in the UBP for DERs.

Public Utility Law Project of New York

The Public Utility Law Project of New York (PULP) is generally supportive of the registration of energy brokers/consultants and has provided comments for consideration. PULP recommends that the Commission carefully consider consequences that could result from the broad reading of Section 66-t(1)(d). The definition of "energy consultant" provided by Staff could include third party entities that provide free advice and counsel to utility customers. PULP recommends that the Commission use the definition of "energy consultant" as written in the law so that these groups are not included. The definition in the law reads "any person, firm, association or corporation who acts as broker in soliciting, negotiating or advising any electric or natural gas contract, or acts as an agent in accepting any electric or natural gas contract on behalf of an ESCO".

PULP also recommends that the "cause" for refusal or revocation of registration needs to be specified to protect customers. PULP states that if there is a record that a broker/consultant used deceptive marketing practices, slamming, undisclosed fee-splitting, and/or rebates between brokers and third parties at any point, that the Commission should be authorized to consider such. In addition, the Commission should look at complaints against the broker/consultant as this could highlight systemic problems such as issues with customer service.

PULP also recommends that the broker/consultant registration forms be made publicly available (to the extent practicable to not violate privacy or trade secret practices) in

a manner that is easily accessible on the Department's and the broker/consultant's website.

Retail Energy Supply Association

Retail Energy Supply Association (RESA) supports the registration of brokers and consultants, as the process will provide DPS Staff and the Commission with direct oversight and enforcement authority over those entities. However, RESA recommends that the Commission take certain factors into consideration when adopting which requirements to implement. Specifically, recognition of the role that brokers and consultants play in the retail energy markets; avoidance of unnecessary or duplicative registration requirements; avoidance of confusion about the energy broker and consultant compensation disclosure requirements; and distinguishing the agreements that energy brokers and consultants have with customers from the agreements that ESCOs and DER Suppliers have with customers.

More specifically, RESA claims that the proposal seems to presume that brokers and consultants are acting on behalf of ESCOs or DER Suppliers, however that is typically not the case, and they generally act as representatives of consumers. This therefore creates ambiguity by deviating from the language used in the UBP and UBP-DERS. To provide clarity, RESA recommends that the Commission adopt certain criteria for evaluating whether a third party is acting on behalf of an ESCO or DER Supplier. By adopting certain criteria, the Commission can ensure that all parties understand how the relationships of the various participants in the competitive energy markets will be evaluated and that ESCOs and DER suppliers are not held liable for the actions of third parties over whom they have no control.

Regarding registration requirements, RESA states that the proposal includes ESCOs and DER Suppliers in the definitions of both brokers and energy consultants, which could result in

ESCOs and DER Suppliers possibly being required to register as brokers or energy consultants. As the Commission already has oversight and enforcement authority over ESCOs and DER Suppliers, and their marketing representatives, RESA recommends removing ESCOs and DER Suppliers from the definition of brokers and energy consultants. Additionally, RESA recommends removing broker and energy consultant from the definitions of ESCO marketing representative and DER Supplier marketing representative, in order to avoid marketing representatives from having to individually register as a broker or energy consultant.

RESA commented that while it does not object to a fee disclosure requirement, it is recommended that the Commission clarify the requirements. Specifically, because broker and energy consultant fee structures vary, to avoid potential confusion, RESA requests that, when adopting the requirements to implement, the Commission clarify that ESCOs and DER Suppliers are only required to disclose broker or energy consultant fees included in the prices charged by ESCOs and DER Suppliers to customers that are for specific amounts.

Lastly, with regards to broker and consultant agreements, RESA recommends that the Commission adds a new definition called a "Service Agreement", to distinguish between broker and energy consultant agreements and that which is currently defined as "sales agreement" between ESCO and DER Supplier agreements with customers. Additionally, RESA requests corresponding changes in the UBP and UBP-DERS to avoid confusion about which agreements brokers and energy consultants are required to provide during registration.

The Energy Professionals Association

The Energy Professionals Association (TEPA) is concerned that the current definitions of energy brokers and

energy consultants are convoluted and will lead to more confusion instead of providing the clarity that should come with a registration process. TEPA offers an alternative suggestion of definitions for energy brokers and consultants as "An Energy Broker or Consultant is a person or entity that provides brokerage or consulting services. Brokerage and/or Consulting services are the provisioning of advice or procurement services to, or acting on behalf of, a retail customer regarding the selection of an Energy Service Company (ESCO). Generally, an Energy Broker will be compensated by an ESCO, but may take payments from the retail customers in some circumstances. Generally, an Energy Consultant will be compensated directly by the retail customers but may take payments from an ESCO in certain circumstances."

TEPA has concerns that the proposed rule requiring an irrevocable standby letter of credit (LOC) as the only means to demonstrate financial capability would hinder aggregators, brokers and consultants from being able to do business in New York State as a LOC can be expensive and difficult to obtain, especially considering the current economic climate. TEPA recommends that the Commission consider including the option to demonstrate financial accountability as evidenced by a bond which is consistent with the approach envisioned by the legislature and required by other states.

TEPA is concerned that requiring Energy Brokers and Consultants to disclose a dollar amount in a compensation disclosure is excessive and the per unit compensation is unknown at the time of contract execution. Incorrectly stating a dollar amount that will fluctuate based on the consumers future energy consumption will create confusion and could lead to unnecessary burden on staff and ESCOs to handle disputes on estimated

numbers. TEPA recommends limiting the disclosure to a fee per unit of energy contracted.

TEPA requests a stakeholder meeting to prevent any confusion and ensure that there is a complete and accurate understanding of the proposed rules.

Public Comments

There were 11 public comments. 9 of the 11 comments are in agreeance with comments submitted by TEPA. One public comment requests that the Commission consider a Surety Bond in place of a Standby Letter, as this is not required in other states. If it is to be a Standby Letter, it is requested that it be for a lesser amount, and that details and a template for requirements to provide a financial institution is outlined.

One public comment is in opposition of the proposed changes, and states that broker and energy consultant registration is an infringement on personal privacy rights, and that in no other industry are contractors, owners, or employees required to divulge their commission/profit on a particular job or project that they are hired for. It is also stated that requiring a letter of credit for a bank, as well as the proposed registration fee, are high, unnecessary burdens to impose on NY energy consultants, and the industry as a whole should not be penalized because of the bad behavior of a small minority.