

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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

**Case 23-M-0106**

**In the Matter of Regulation and Oversight of  
Distributed Energy Resource Providers and  
Products.**

**Case 15-M-0180**

**In the Matter of Retail Access Business Rules.**

**Case 98-M-1343**

**PETITION OF THE NEW YORK RETAIL CHOICE COALITION FOR  
REHEARING, RECONSIDERATION & CLARIFICATION OF THE  
ORDER ADOPTING ENERGY BROKER AND ENERGY CONSULTANT  
REGISTRATION REQUIREMENTS AND  
MOTION FOR STAY OF IMPLEMENTATION**

The Impacted ESCO Coalition<sup>1</sup> (“Coalition” or “NYRCC”) petitions for rehearing, reconsideration and clarification (“Petition”), in accordance with Public Service Law Section 23 and 16A NYCRR Section 3.7, of the *Order Adopting Energy Broker and Energy Consultant Registration Requirements*, issued by the New York Public Service Commission (“PSC” or “Commission”) on June 23, 2023 (“June 2023 Order”), and further Motion for Stay.

The Coalition, formed in 2015, represents the interests of small-to-medium sized energy service companies (“ESCOs”), Distributed Energy Service Providers (“DERS”) and retail agents, brokers and consultants, many of whom have their primary business in New York. While the Coalition is overall supportive of the amendments to the Uniform Business Practices (“UBP”) for energy service companies (“ESCOs”) and the Uniform Business Practices for Distributed Energy Resource Suppliers (“UBP-DERS,” with UBP-ESCO, “UBPs”), implementing new section 66-t

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<sup>1</sup> The New York Retail Choice Coalition (the “Coalition”) is an ad hoc group of like-minded small to midsize ESCOs that seek to strengthen New York’s competitive energy markets, preserve customer choice and ensure an equal playing field for all ESCOs. The make-up of the Coalition varies on a per matter basis.

to the Public Service Law (“PSL”) and adopted under the June 2023 Order (“UBP Amendments”), there remain certain crucial aspects that necessitate clarification and adherence to public notice requirements.

The NYRCC firmly believes that the rule changes should align with the legislative intent to “increase[e] transparency and accountability in a formerly unregulated marketplace”.<sup>2</sup> However, to ensure the effectiveness of such rule changes, it is essential that the applicability and scope of the new rules are clear both to the entities required to comply with them and to the Commission entrusted with their enforcement. Consequently, the Coalition presents specific threshold issues that require clarification and emphasizes the need for proper public notice, in line with State Administrative Procedure Act requirements.

## **I. BACKGROUND & PROCEDURAL HISTORY**

### **a. The Coalition Supports Light Regulation of Consultants and Brokers**

Since its establishment in 2015, the Coalition has advocated for light regulation of agents, brokers and consultants in the New York retail choice marketplace. The actions of unregulated, unscrupulous agents, brokers and consultants damaged the retail choice marketplace, and materially increased the price of commodity service to rate payers. In response to these concerns, the Coalition engaged consumer advocacy groups and urged members of the NYS Assembly and Senate to introduce legislation requiring energy consultants and brokers to register with the NYPSC, disclose compensation to consumers and prohibit kickbacks (the “Broker Bill”). Governor Hochul signed the Broker Bill into law,<sup>3</sup> on December 23, 2022, with an effective date of June 21, 2023, adding new section § 66-t to the PSL.

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<sup>2</sup> June 23 Order at 1.

<sup>3</sup> Specifically, Governor signed into law Chapter 787 of the Laws of 2022.

**b. Development of Rules to Implement the Broker Bill, August 31, 2023,  
Effective Date and Directive for Further Revisions to the UBPs**

On March 14, 2023, the New York Department of Public Service issued a Staff Proposal Regarding Registration of Energy Brokers and Energy Consultants ( “Staff Proposal”). Per the requirements of SAPA, the history of the proceeding, a brief summary of the Staff Proposal and a comment deadline of May 22, 2023, was noticed in the State Register on March 22, 2023 (“SAPA Notice”).<sup>4</sup> The Staff Proposal outlined an implementation plan for new law § 66-t by amending the UBP for ESCOs and the UBP-DERS.

Subsequently, on June 23, 2023, the Commission issued an order largely adopting the amendments to the UBPs proposed by Staff, setting as the effective date for the UBP Amendments August 31, 2023. The adopted amendments include the following:

- Adding regulatory definitions for “energy broker” and “energy consultant” in line with new PSL §66-t.
- Establishing a registration process for brokers and consultants which includes the requirement for brokers to post a \$100,000 Letter of Credit (“LOC”) and consultants to post a \$50,000 LOC.
- Requiring brokers and consultants to disclose compensation on the first page of any agreement with a customer (including the addition of a new section to the Customer Disclosure Statement).
- Prohibiting rebates (or kickbacks) as stated in PSL §66-t(5).
- Requiring 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.
- Restricting ESCOs and DERs from doing business with unregistered brokers and consultants after August 31, 2023, deadline.

Additionally, the Commission directed Staff to review and assess registration packages from consultant and broker applicants and issue letters of rejection or eligibility by December 1, 2023. Recognizing that expeditious process followed to adopt the Amendments to the UBPs

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<sup>4</sup> SAPA No. 23-M-0106SP1.

implementing new PSL Section §66-t, the Commission took the unusual step of tasking 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.”<sup>5</sup> Staff is required to propose these modifications for Commission consideration within 120 days of the effective date of the June 23 Order. Finally, “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.”<sup>6</sup> As of July 24, 2023, the technical conference has yet to be scheduled.

## **II. REQUESTS FOR CLARIFICATION**

### **a. The Commission Should Clarify That Agents and Subcontractors of Registered Consultants and Brokers are Excluded From Consultant and Broker Registration Requirements**

The Coalition urges the Commission to exclude agents and/or vendors of a registered Energy Broker or Consultant (referred to as, “1099 Contractors”) from the registration requirement in order to avoid imposition of a costly and burdensome registration process on 1099 Contractors. Many vendors that market on behalf of ESCOs operate under a business model where individuals working as 1099 Contractors are compensated on a contract basis. While not technically employees, these individuals are often exclusive to a specific vendor, trained by that vendor, and required to indemnify the vendor in case of non-compliant enrollments. As such, the level of oversight exercised by the vendor over these 1099 Contractors is similar to the oversight exercised over employees, justifying their exclusion from the registration requirement.

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<sup>5</sup> June 23 Order at 48.

<sup>6</sup> June 23 Order at 47.

Requiring 1099 Contractors to individually register with the NYPSC, post a letter of credit, and meet other registration requirements is administratively inefficient and burdensome. It is unrealistic to expect 1099 Contractors earning less than \$100,000 annually to undergo this process independently, potentially resulting in the loss of livelihood for many individuals working for Energy Consultants and Energy Brokers. Moreover, such registration is unlikely to lead to substantial improvements in the retail marketplace or increased customer protection against questionable marketing practices.

**b. The Commission Should Clarify Which Entities Are Subject to the UBP Amendments as Energy Consultants and/or Energy Brokers**

The scope of entities subject to the UBP Amendments as Energy Consultants is unclear, and the lack of clarity makes the regulation susceptible to being deemed unconstitutionally vague.

Energy Consultant is defined in the UBPs as, “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.” The broad nature of the activities that fall within the definition of an Energy Consultant (*i.e., soliciting, negotiating, advising or acting as an agent on behalf of an ESCO*) necessitates substantial guidance from the Commission to determine which entities must register as Energy Consultants. The June 23 Order and UBP Amendments do not provide sufficient clarity for stakeholders to definitively identify which entities are required to register with the NYPSC.

Apart from the categories of entities explicitly required to register as an energy consultant or broker (such as contractors, vendors, and agents of an ESCO, such as: telemarketers, door-to-door marketers, etc.), or conversely explicitly excluded from the registration requirements (such as attorneys, CCAs and employees of registered ESCOs) the limited guidance provided by the

Commission fails to provide a bright line that clearly identifies which entities are required to comply with rules applicable to energy consultants. Instead, the June 23 Order sets forth a test of applicability of the registration requirement “based on 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.”<sup>7</sup>

Additional guidance provided in the June 23 Order as to which entities fall within the definition of “energy consultant” is inconsistent and confuses the issue further. Page 15 of the June 23 Order provides that the applicability of the term “energy consultant” is limited 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.”<sup>8</sup> Later in the June 23 Order, at page 24, it states that, “[o]nly 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.”<sup>9</sup> Inclusion of the phrase, “directly facilitating” in the latter guidance implies a narrower scope of activities that would fall within the scope of entities required to register as an “Energy Consultant”. In contradiction, the exclusion of the phrase “directly facilitate” and general reference to, “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

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<sup>7</sup> June 23 Order at 18.

<sup>8</sup> June 23 Order at 15.

<sup>9</sup> June 23 Order at 24.

customer and a third parties” in the page 15 guidance implies a broad interpretation of entities subject to the energy consultant registration requirement.

Agency rules and regulations must be clear and unambiguous to be enforceable. Clarity on which entities are required to register as an energy consultant or broker is necessary, not only for effected entities to comply with the new law, but also because ease and clarity of compliance will allow the NYPSC (and DPS Staff) to enforce the Amendments to the UBP implementing the Broker Bill with fairness, objectivity and consistency. Without clarification on the scope of entities that are required to register as a consultant or broker, the Amendments to the UBPs implementing new law § 66-t are subject to annulment as unconstitutionally vague.

The limitation permitting ESCOs to “do business” only with energy brokers and consultants that are registered with the NYPSC further compounds the significance of this issue.<sup>10</sup> Without further clarification, it is impossible an ESCO or DER to confirm that it is only doing business with registered entities, as required by new ESCO UBP Section 11.H.4.<sup>11</sup> Clarity on the entities required to register as energy consultants or brokers is crucial for effective compliance with the new law and to ensure fair, objective, and consistent enforcement by the NYPSC and DPS Staff. Without clarification, implementation should be delayed to allow entities to register and address any allegations of non-compliance before enforcement actions are taken. Therefore, the Coalition requests that the Commission grant clarification and delay the implementation of this requirement until the scope of entities required to register as consultants or brokers is clearly defined.

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<sup>10</sup> June 23 Order at 43-44

<sup>11</sup> New ESCO UBP Section 10.C.4.h states that ESCOs shall, “[n]ot 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.”

### III. REQUESTS FOR REHEARING AND RECONSIDERATION.

#### a. **The Commission Properly Extended Energy Consultant Registration Requirements to an ESCO's Contractors, Vendors and Agents, But Committed an Error of Law and Violated SAPA by Failing to Include In Its SAPA Notice That Entities That Market On Behalf of ESCOs Are Required to Register as Energy Consultants**

The June 23 Order appropriately rejected DPS Staff's exclusion of contractors, vendors, and agents of an ESCO from the consultant and broker registration requirements. The exclusion was inconsistent with the language of the new PSL Section 66-t and contradicted the statute's intent to extend Commission oversight to entities marketing on behalf of ESCOs. These entities have direct interactions with customers and play a crucial role in the marketplace, necessitating their accountability to the NYPSC for their actions.

However, there was an oversight in the SAPA Notice, as these entities were not mentioned, leading to a lack of proper notification regarding the UBP Amendments and the requirement for them to register with the NYPSC. This constitutes an error of law, a violation of SAPA, and a breach of procedural due process. SAPA Notices must enumerate and explain the type of significant UBP changes that materially increase an entities' compliance burdens; otherwise, parties have not been afforded requisite procedural due process. Furthermore, before material changes may be adopted, "the PSC must provide an opportunity to be heard in a meaningful manner and at a meaningful time."<sup>12</sup> SAPA "requires submission of notice of the proposed rule-making to the Secretary of State for publication in the state register, followed by a public comment period, a public hearing (where applicable), and the filing and publication of a notice of adoption

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<sup>12</sup> *National Energy Marketers Association et al. v. New York Public Service Commission*, Alb. Co. Index No. 868-16, Decision/Order, dated July 22, 2016.



of the rule.”<sup>13</sup> Where an agency fails to follow the procedural requirements of SAPA, the rule does not become effective.<sup>14</sup>

**b. By Failing to Properly Notice The Amendment To The ESCO UBP Requiring Energy Brokers & Consultants To Retain TPVs and Sales Agreements For Two Years, The Commission Violated SAPA Notice Requirements**

The June 23 Order amends the ESCO UBP to require “energy brokers and consultants to 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.”<sup>15</sup> This new requirement appears is referred to in each of the three attachments of UBP Section 5. The Commission erred in adopting this provision because it failed to provide proper notice of the this adopted change.

The Commission is required to notice the applicable requirements pursuant to SAPA. It is an error of law, violation of SAPA and procedural due process to require Third-Party Vendors to comply with these recordkeeping requirements and UBP Amendments without proper notice and opportunity for comment. Neither Staff’s Proposal nor the SAPA Notice provide adequate notice of the “purpose and substance” of this particular change. The SAPA Notice does not include *any* reference to a requirement to retain records of an independent TPV, D2D sales agreement, or electronic agreement.<sup>16</sup> There is also no reference to a new two year recordkeeping retention requirement in the body of Staff’s Proposal. While the redlines attached to Staff’s Proposal refer to the two year recordkeeping requirement, Staff neither explains its rational for this change, nor explains how this change will further the new goals §66-t. Accordingly, the Commission failed to

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<sup>13</sup> *Kahrman v. Crime Victims Bd.*, 14 Misc. 3d 545, 550 (Sup. Ct. 2006); see SAPA §§ 202, 203.

<sup>14</sup> *Kahrman v. Crime Victims Bd.*, at 550.

<sup>15</sup> June 23 Order at 29-30; Amended ESCO UBP at: Section 5, Attachments 1, 2 & 3.

<sup>16</sup> *See, generally*, SAPA Notice.

provide proper notice of this amendment to the UBP. Accordingly, the Commission should grant the NYRCC's request for rehearing and eliminate this requirement in its entirety from Section 5, Attachments 1, 2 and 3 of the UBP.

Requiring Energy Consultants to retain records of TPVs and sales agreements is a material compliance burden, and SAPA Notices must enumerate and explain the type of significant UBP changes that materially increase an entities' compliance burdens; otherwise, parties have not been afforded requisite procedural due process. SAPA "requires submission of notice of the proposed rule-making to the Secretary of State for publication in the state register, followed by a public comment period, a public hearing (where applicable), and the filing and publication of a notice of adoption of the rule."<sup>17</sup> Where an agency fails to follow the procedural requirements of SAPA, the rule does not become effective.<sup>18</sup> Accordingly, the Commission should grant the NYRCC's request for rehearing and rescind this requirement.

#### **IV. MOTION FOR STAY**

The Coalition respectfully requests a Stay of the June 2023 Order, either until sixty (60) days after a final order on rehearing, reconsideration and clarification is issued; or, alternatively, sixty (60) days after the technical conference to be scheduled in this proceeding.

Further guidance from the Commission on the implementation of the rules implementing the broker bill, and opportunity for public input is required under SAPA before the UBP Amendments can become effective.<sup>19</sup> Accordingly, the Coalition respectfully requests a Stay of the Effective Date of the UBP Amendments until sixty (60) days after the Commission issues a

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<sup>17</sup> *Kahrman v. Crime Victims Bd.*, 14 Misc. 3d 545, 550 (Sup. Ct. 2006); see SAPA §§ 202, 203.

<sup>18</sup> *Kahrman v. Crime Victims Bd.*, at 550.

<sup>19</sup> The Coalition plans to file an extension request of the August 31, 2023, deadline with the Commission Secretary at least three days prior to the affected deadline.

Clarifying Order and/or Ruling on the Requests for Rehearing. In case the Commission determines that public notice of the changes to the UBP are required under SAPA, the Stay should be extended until after the notice and comment period expires.

As an alternative, the Coalition requests a Stay of the Effective Date until sixty (60) days after the Staff Technical Conference. The Commission recognizes the importance of stakeholders' understanding of the regulatory requirements adopted under the June 23 Order are fully understood by impacted stakeholders, and ordered Staff to "convene a technical conference to provide a forum for stakeholders to raise any questions regarding the nature and extent of the requirements."<sup>20</sup> Implementation of the UBP Amendments are scheduled to go into effect in a mere five weeks – on August 31, 2023; however, as of July 24, 2023, the Technical Conference has not been scheduled. It is anticipated that the Technical Conference will be noticed within the next week, and that the Technical Conference will be held at least two weeks after the issuance of such notice; likely pushing the date of the Technical Conference to mid-August (under the best of circumstances). This timeframe does not provide sufficient time for stakeholders, including, third-party vendors, ESCOs and DERs, to comply with the new rules and complete registration packages. To allow for proper regulatory clarity and compliance, a Stay of the Effective Date until sixty (60) days after the technical conference is warranted.

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<sup>20</sup> June 23 Order at 47.

## V. CONCLUSION

The Coalition respectfully requests that the Commission grant this Petition for Rehearing, Reconsideration, and Clarification and provide proper guidance to affected entities, as requested herein. Additionally, the Coalition seeks a Stay of the Effective Date to ensure fair implementation and adherence to the new rules implementing new PSL § 66-t until sixty (60) days following issuance of a Clarifying Order and/or Ruling on the Requests for Rehearing, or in the alternative, until sixty (60) days following the technical conference.

Respectfully submitted,

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