NEW YORK STATE
PUBLIC SERVICE COMMISSION

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

COMMENTS OF CONSTELLATION NEWENERGY, INC. AND CONSTELLATION NEWENERGY – GAS DIVISION, LLC

Pursuant to the April 17, 2024, New York State Register Notice, Constellation NewEnergy, Inc. ("CNE") and Constellation NewEnergy – Gas Division, LLC ("CNEG" and together with CNE, "Constellation") hereby respectfully submit to the New York Public Service Commission ("Commission") these comments on the March 26, 2024, Staff Proposal for Implementing Stronger Price Transparency for Consumers ("Staff Proposal") issued by Department of Public Service staff.

As discussed further below, Constellation respectfully submits that the Staff Proposal's proposed changes to the Uniform Business Practices ("UBP") do not implement the legislative intent of the underlying statutory changes. The UBP changes will restrict energy service companies' ("ESCOs") ability to provide a beneficial customer experience. For example, the new changes do not allow ESCOs to effectuate price decreases without customer consent, and do not allow flexibility to change prices in interaction with other legal requirements and existing mass market products. This will lead to higher prices to prepare against those risks. Further, the Staff Proposal impermissibly attempts to regulate all customer classes, beyond the statutory authority granted, without any legal or factual support, or indeed without any substantive discussion at all, in a way that is arbitrary and capricious or an abuse of discretion.

To address these concerns further, Constellation respectfully submits the below comments on the Staff Proposal for the Commission's consideration.

I. BACKGROUND

On September 20, 2023, Governor Hochul signed into law Chapter 482 of the Laws of 2023, effective March 18, 2024, which amended sections 6 and 7 of General Business Law ("Gen. Bus. Law") § 349-d to require ESCOs to provide new and more detailed notice regarding price and contract transparency to customers prior to a change in energy service pricing. On March 26, 2024, Department of Public Service staff issued the Staff Proposal proposing implementation of the new requirements in Gen. Bus. Law § 349-d in the UBP. On April 17, 2024, the Staff Proposal was noticed in the New York State Register, with comments due in 60 days.

II. DESCRIPTION OF CNE AND CNEG

Constellation is a leading competitive supplier of electricity and natural gas. Both CNE and CNEG are licensed as ESCOs in New York. CNE has received eligibility to serve large commercial customers as well as mass market customers on a fixed price product with a cap at 5% of the utility trailing 12-month average, a renewable product, and a home warranty product. CNEG has received eligibility to serve large commercial customers as well as mass market customers on a fixed price product with a cap at 5% of the utility trailing 12-month average and a home warranty product. As such, Constellation will be directly and substantially impacted by the Staff Proposal.

III. ESCOS SHOULD BE ABLE TO LOWER CUSTOMER PRICES WITHOUT AFFIRMATIVE CONSENT

The Staff Proposal's UBP changes create several problematic logistical realities that will limit the ability of ESCOs to provide the best price or experience for the customer. First, the UBP edits do not provide any exception to the affirmative consent requirements for price changes that decrease the price to the benefit of the customer. Providing the additional barrier of affirmative customer consent for price decreases will result in the unintended consequence of holding prices steady, including at times when prices could have been decreasing. In some cases, the ESCO may

be unable to serve a product at all given the ESCO's concern that the customer will be dropped at the first instance affirmative consent is required (because the customer doesn't see the notice and, therefore, doesn't provide the affirmative consent) if, for contractual or regulatory reasons, the ESCO could not continue to serve the customer without the price change. This would create unnecessary customer frustration and an erosion of good will towards ESCOs and the New York competitive markets.

In addition, the Commission is set to implement new requirements on energy brokers and consultants on July 31, 2024.[1] Under those requirements, an unregistered broker or consultant cannot receive payment for their services. However, if that payment was being collected from the customer, under the Staff Proposal, the ESCO cannot change the customer's price to remove the fee of the unregistered broker without customer consent. Inadvertently, unless the Commission clarifies that downward shifts in price do not require affirmative consent, a customer may be dropped back to utility supply if they do not provide affirmative consent to allow the ESCO to bill them at a lower price.

The Assembly floor debates support the proposition that only price increases were contemplated. In a discussion between Representatives Ra and Dinowitz (the sponsor of the bill), Representative Ra stated that "in terms of, you know, ***price increases*** and I don't know -- well, I would assume sometimes in contracts could be on a shorter duration, sometimes they could be on a longer one, maybe, you know, multiple years." (emphasis added). Representative Dinowitz added "for a ***price increase***, but we want to make sure that the consumer knows." (emphasis added). Displaying the intent of the legislation, he added that they "want to make sure that people

[1] *See* Case 23-M-0106 et al., *Order Adopting Energy Broker and Energy Consultant Registration Requirements* (Jun. 23, 2023), as extended by Notice Extending Deadlines issued on June 10, 2024.

are informed and that they're not ripped off." Decreasing a customer's price is the opposite of "ripping off" the customer and would clearly be supported by the legislature.

IV. THE STAFF PROPOSAL IMPERMISSIBLY ATTEMPTS TO REGULATE ALL CUSTOMER CLASSES

a. The language of the Staff Proposal would apply new requirements to all customer classes

Amended section 6 of Gen. Bus. Law § 349-d provides[2] that "[n]o material change shall be made in the terms or duration of any contract for the provision of energy services by an ESCO without the express consent of the customer. A change in price or a change to or from fixed or variable pricing shall be deemed to be material."[3] Section 1 of Gen. Bus. Law § 349-d clearly defines "customer" as "any person who is sold or offered an energy services contract by an ESCO (i) for residential utility service, or (ii) through door-to-door sales".[4] The definition of "customer" was unchanged by the recent legislation.

The Staff Proposal states that "[t]o structurally make these changes to the UBP, Staff proposes to make the material change and renewal provisions currently found at UBP §5.B.5.d through 5.B.5.F their own section found at UBP §5.B.5. The remaining provisions of the existing UBP §5.B.5 would now be found at UBP §5.B.6." The narrative around these changes, quoted here, makes this seem like a simple "structural" change.

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[2] The preexisting provisions of GBL §349-d(6) require "express consent of the customer" for any "material change ... made in the terms or duration of any contract for the provision of energy services by an ESCO." The law, as amended, additionally provides that "[a] change in price or a change to or from fixed or variable pricing shall be deemed to be material."

[3] Gen. Bus. Law 349-d(6).

[4] Constellation adds that the law was not intended to cover community choice aggregation (CCAs), which is fundamentally different in form and process than traditional third party supplier service. For example, CCA customers receive an opt-out notice rather than provide affirmative consent. The Commission has previously found it "imprudent and inappropriate to adopt any broad changes to the CCA processes" in a supplier market review proceeding. Case No. 15-M-0127, *Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process* (Dec. 12, 2019) at 107-08. The same is true of the Staff Proposal and this proceeding. The Commission has established a separate proceeding to address CCA oversight in Case No. 14-M-0224.

In fact, the existing UBP § 5.B.5 contains "[a]dditional terms and conditions applicable to residential customers and customers solicited via door-to-door sales." The Staff Proposal, in creating a new UBP § 5.B.5 and moving the existing § 5.B.5 requirements to a new § 5.B.6 also moves that qualifier limiting the requirement to residential customers and customers solicited via door-to-door sales to the new § 5.B.6 and does not retain that limitation for the new requirements added to UBP § 5.B.5 pursuant to the amendments to Gen. Bus. Law § 349-d, despite that law itself being so limited. As written, it appears that the new UBP § 5.B.5 would apply to all customer classes. The Staff Proposal makes this change with no explanation or justification more than the language quoted above, that this is for purposes of "structurally" making the changes.

b. There is no legal support to include commercial customers under the new requirements

Expanding statutory requirements to a class of customers more broadly than authorized in the statute is not a "structural" change, it is a substantive change that is unsupported – indeed, not discussed at all – in the Staff Proposal. The legislature certainly could have chosen to place these affirmative consent requirements in a statutory section that did not so narrowly define "customer" or to make clear that, for purposes of the recent amendments, "customer" had a meaning more broad than the definition in section 1. It did not do so. The legislature is "presumed to be aware of the existing state of the law when a new statute is enacted."[5]

In fact, in the Assembly floor debate, Representative Ra refers to the previous version of Section 349-d(6), noting that "current law does require this consent of the consumer for a material change, but what this is doing is saying that a price change -- it's explicitly saying that a price change would be a material change, correct?" To which the bill sponsor, Representative Dinowitz

[5] *United Univ. Pros. v. State*, 36 A.D.3d 297, 301 (2006) (citing *Matter of Delese v. Tax Appeals Trib. of State of N.Y.*, 3 A.D.3d 612, 614 (2004), *appeal dismissed* 814 N.E.2d 462 (2004).

responded "Yes."[6] Indeed there is no discussion in the floor debate of expanding the customer class more broadly than the existing law required. The legislature did not draft such an expansion, nor did they intend to. The amendment to Gen. Bus. Law § 349-d(6) does exactly what Representative Dinkowitz confirmed for Representative Ra – it clarifies the existing material change consent requirement (limited to residential and door to door customers) to include changes to price.

In those instances where the issue is a matter of pure statutory analysis, courts do not need to give deference to an agency's interpretation. *Crucible Materials Corp. v. New York Power Auth*., 50 A.D.3d 1353 (2009) find that courts will attempt to effectuate the legislative intent and give clear effect to plain meaning of words employed. The words here could not be clearer, "customer" is defined and that definition did not change based on the A. 703-A legislative language. It would contravene legislative intent to all of a sudden expand the customer class in a way that would not be rubber stamped by a court.[7]

If the Commission were to adopt the Staff Proposal's UBP edits as written, which expand the statutory requirement to all customer classes with no explanation or discussion, such an expansion would be arbitrary and capricious or even an abuse of discretion warranting an appeal under Article 78 of the New York Civil Practice Law and Rules.[8]

c. There is no practical support to include commercial customers under the new requirements

There are numerous reasons that customer classes should, in appropriate circumstances, exist under differing standards, as the UBP acknowledges with the existing § 5.B.5, which is

[6] Assembly Transcript, May 18, 2023, at 34-35.

[7] *See Brown v. New York State Racing & Wagering Bd*., 60 A.D.3d 107, 115 (2009) (courts will give plain meaning to the words used).

[8] *See* NY CPLR § 7803.

limited to residential and door to door customers. This section includes requirements around payments, fees, variable charges, renewal notices, and the material change provisions amended in Gen. Bus. Law § 349-d. The UBP and the underlying statute are correct to place these requirements in a section limited in scope with respect to customer classes. Commercial customers are differently situated from residential customers in a number of ways that make application of the new section 6 requirements inefficient and ineffective with respect to commercial customers. Unless the Commission order is appropriately limited to residential and door-to-door customers, it is likely there will be an almost immediate erosion of the competition markets for commercial customers that currently provides bill relief to many in comparison to high energy costs.[9] Representative Giglio, during the Assembly floor debate on this legislation, noted that "we pay the highest in the country, especially on Long Island, and the renewable energy projects are only going to pile on to those utility bills, and it's really becoming unaffordable to live in the State of New York, especially when it comes to utilities." Expanding the requirement for affirmative consent for price changes to commercial customers would surely limit, if not eliminate, quality products to commercial customers that would uncut the hallmarks of a thriving competitive market to allow customers the ability to shop for plans that best fit their needs.

To start, large commercial and industrial customers are sophisticated parties and are often represented by energy experts and counsel. Their energy needs, and therefore their contracts, differ from those of residential customers and are often highly negotiated. Large commercial customers choose the type of product that best fits their needs and goals and many of them choose a product that uses a referenced and transparent index for the energy price that can change up to every 15

[9] *See, e.g.,* Average residential Sector retail electricity price in the United States as of January 2024, by state, Statista (May 2024) *available at* https://www.statista.com/statistics/630090/states-with-the-average-electricity-price-for-the-residential-sector-in-the-us/ (showing New York as the 7th most expensive state in the country for electricity).

minutes. Large commercial customers would be unduly burdened if they had to give affirmative consent to a price change every 15 minutes and would not get the full benefit of the index price if their product is not allowed to be priced in accordance with the product they chose, which includes both price increases and price decreases on short intervals. This index pricing is advantageous and preferable to large commercial customers, as due to their size and risk premiums, a fixed price for a large commercial customer would generally mean a premium price to hedge against the associated risk.

In addition, large commercial customers, as the label suggests, have significant loads. If large commercial customers that have chosen an index priced product are allowed to leave after an interval price change (or must be dropped due to regulatory or contractual limitations because they miss a notice and do not provide the affirmative consent), it could create large load swings for the default supplier. This in turn could create the same swings for the wholesale suppliers that provide for that default supply which must now accommodate the increased load. The implication on the wholesale market, therefore, is for suppliers providing utility load with a higher price to account for risk premiums of load shifts.

Allowing for a robust retail electricity market in New York, especially for commercial and industrial customers, has allowed for a variety of products, including renewable, green, and emissions free electricity. If the Commission does decide to extend the section 6 requirements to commercial and industrial customers, the customer should be allowed to give their consent in the form of an ongoing consent in the agreement itself.

Additionally, section 7 of § 349-d requires renewal notices to contain, *inter alia*, the "price that is charged by the customer's distribution utility." The Staff Proposal adds "with respect to the information that must be included in renewal notices pursuant to GBL §349-d(7), specifically

the price that is charged by the customer's distribution utility, Staff proposes to allow ESCOs to utilize the 12-month trailing average posted by distribution utilities quarterly to satisfy this requirement."[10] Constellation is aware that the utilities in New York post 12-month trailing average prices for mass market customers in this docket. This further supports Constellation's position that the amendments to Gen. Bus. Law section 349-d should not apply to commercial customers. Constellation requests confirmation that this is the current and accurate "price to compare".

V. THE COMMISSION SHOULD CLARIFY THAT THE RENEWAL NOTICE REQUIREMENTS DO NOT APPLY TO MONTH-TO-MONTH PRODUCTS

The Staff Proposal is incorrect that "contract renewals would apply to all month-to-month agreements, which expire and are renewed each month."[11] The amendments to Gen. Bus. Law § 349-d apply to new and renewing contracts. The new language in Gen. Bus. Law 349-d section 7 expands the contents of the renewal notices, but does not expand the circumstances in which renewal notices are to be sent. The Staff Proposal is perfunctory and conclusory in its determination to apply this obligation now to month-to-month agreements. Month-to-month holdover contracts are not, and have never been treated as, renewals monthly, but rather are a single continuation of a holdover period following an initial term. Furthermore, when a contract transitions to a month-to-month holdover period, it is per the initial agreement by the customer given as part of the initial contracting process. If the price changes, Constellation understands that the new requirements in Gen. Bus. Law § 349-d would apply, but in all other cases the existing law and contractual arrangements should not be undermined. For staff to expand this requirement without explanation is not only arbitrary and capricious, but puts an undue burden on suppliers

[10] Staff Proposal at 6.

[11] Staff Proposal at 7.

and will create a negative customer experience by inundating them with additional documentation even when nothing is changing.

VI. CONCLUSION

Constellation respectfully requests that the Commission consider the above concerns before issuing a decision on the Staff Proposal.

Respectfully submitted,

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