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 for Rehearing, Reconsideration and/or Clarification of Family Energy, Inc.

Family Energy, Inc.[1] [hereinafter "Family Energy"] hereby respectfully submits a Petition for Rehearing, Reconsideration and/or Clarification of the Declaratory Ruling and Order on Rehearing [hereinafter "2024 Order"] issued on April 18, 2024, in the above-referenced proceedings. This Petition is submitted pursuant to the Commission's regulations at 16 NYCRR 3.6 and 3.7. The regulations permit rehearing to be sought on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination.

Family Energy requests rehearing, reconsideration and/or clarification of the 2024 Order and associated UBP provisions with respect to the following:

1) The 2024 Order and associated UBP provisions are not appropriately tailored to the operation and function of energy brokers and energy consultants in the retail energy marketplace. By applying the existing rules that govern ESCOs to brokers and

[1] Family Energy, Inc. is a Business Corporation, incorporated in New York, and authorized by the Commission to serve electric and natural gas customers as an Energy Service Company.

consultants in a one-size-fits-all manner, the Commission has engaged in impermissible regulatory overreach.

2) The 2024 Order's direction to Staff in Ordering Paragraph 10 to identify modifications to the Uniform Business Practices (UBP) by August 16, 2024, is explicit recognition that new Section 11 should not and cannot be applied to energy brokers and energy consultants as currently written.

3) The requirement of the 2024 Order for energy brokers, energy consultants and ESCOs to come into compliance with the new UBP provisions as of June 17, 2024, when the Commission expressly stated the intention for Staff to review those same provisions sixty days later for the purpose of future modification is untenable, unworkable and unfair. Requiring entities to expend the resources, time and money to come into compliance with short-lived rules is wasteful, irrational and unreasonable.

4) The process for Staff's review of the UBP should include the inquiry into and consideration of industry solutions as to how to ensure the regulations are right-sized to simultaneously: accomplish the goals of consumer protection and oversight; appropriately reflect the size and scale of the business models and operations of brokers and consultants, many of whom are small businesses; and enhance competition in the marketplace, rather than be so onerous as to eliminate competition.

5) The 2024 Order relied upon contradictory logic to justify the registration requirement for independent contractors and agents of energy brokers and energy consultants. This error warrants reversal by the Commission.

6) The 2024 Order failed to consider industry input regarding the preferability of surety bonds to satisfy the financial accountability requirement. The UBP should be modified to permit the submission of a surety bond or a letter of credit.

I. Procedural History.

Public Service Law (PSL) § 66-t requires "energy brokers" and "energy consultants" to register with the Public Service Commission, set forth compensation disclosure requirements, and prohibited the payment of rebates by brokers and consultants as an inducement for, or as compensation for any supply business. On June 23, 2023, the Commission issued an Order Adopting Energy Broker and Energy Consultant Registration Requirements [hereinafter "2023 Order"] setting forth its interpretation of the requirements of PSL § 66-t in the above-referenced proceedings. Family Energy submitted a Petition for Rehearing, Reconsideration and/or Clarification and Motion for Stay of Family Energy, Inc. on July 24, 2023 [hereinafter "2023 Petition"], regarding the 2023 Order as did others. Commission Staff convened a technical conference on August 8, 2023, to provide a forum for stakeholders to ask questions about the new requirements. The Commission then issued the 2024 Order.

The 2024 Order granted rehearing of three aspects of the 2023 Order, including those raised by Family Energy in its 2023 Petition, namely that: 1) ESCOs are permitted to make payments to unregistered energy brokers and energy consultants pursuant to contracts executed before the effective date of the Uniform Business Practices revisions, and that brokering and/or consulting activities performed by an unregistered broker or consultant after the effective date of the UBP amendments cannot be compensated by ESCOs; 2) the requirement for the third party verification to include a question on compensation disclosure should be withdrawn; and 3) an analysis of the

rules under Sections 7(2) and (3) of the Climate Leadership and Community Protection Act (CLCPA) was required. Family Energy appreciates the Commission's consideration of the issues raised in its 2023 Petition.

The 2024 Order also provided clarification of various aspects of the new broker and consultant rules, in response to questions raised by Family Energy and other parties. While the Commission declined to change the definitions of "energy broker," "energy consultant" and "ESCO marketing representative" to be set forth in the UBP, it did provide further detail with respect to which entities are subject to the registration requirement. The 2024 Order provided further detail on the form and content of the compensation disclosure requirement. The 2024 Order also addressed the timing of when ESCOs must cease doing business with unregistered brokers and consultants and how ESCOs should monitor Matter 23-01227 to apprise themselves of the status of broker and consultant registrations. The 2024 Order clarified the responsibilities of ESCOs, brokers and consultants for satisfying UBP Section 5 requirements.

The 2024 Order found that contractors and agents of registered brokers and consultants must register with the Commission. This stands in contrast with the Commission's determination in the 2023 Order that employees of brokers and consultants do not need to register. The 2023 Order also found that an ESCO in-house sales team was not subject to a registration requirement, but that independent contractors, vendors and agents that are third party marketing representatives of the ESCO do need to register.

The 2024 Order did not address the topic of broker and consultant registration fees and financial accountability requirements, including the letter of credit requirement, at all.

The aforementioned change to the TPV requirement in the 2024 Order was the only substantive change to the UBP provisions from that previously set forth in the 2023 Order and Staff's February 2023 proposal.

II. The 2024 Order and Associated UBP Provisions Are Not Appropriately Tailored to the Operation and Function of Energy Brokers and Energy Consultants in the Retail Energy Marketplace.

The stated legislative purpose behind PSL § 66-t was to "create a regulatory framework for energy brokers and energy consultants." No new regulatory framework for energy brokers and energy consultants was created by the 2023 Order or 2024 Order, rather the existing ESCO industry framework in the UBP was carried over into a new Section 11 without making necessary changes to reflect the distinct differences in business models and operations of energy brokers and energy consultants, many of whom are small businesses. By applying the existing rules that govern ESCOs to brokers and consultants in a one-size-fits-all manner, the Commission has engaged in impermissible regulatory overreach.

The problem is not limited to applying the same ESCO rules to both brokers and consultants. It is also that the rules expansively include entities, many of whom are small businesses, that have not heretofore been considered to be brokers and consultants in industry practice. The rules additionally fail to distinguish the compliance responsibilities between brokers and consultants themselves, which perform different functions from each other. This is tantamount to treating these entities as "small ESCOs," which they are not.

UBP Section 11 is replete with instances of rules that have not been appropriately scaled to the energy brokers and energy consultants to which oversight is being exercised. Beginning for example with the fundamental task at hand of registering with the Commission, Section 11.B.1.

requires the submission of materials that would be exclusively within the purview of the ESCO (such as customer notices and marketing materials). Moreover, Section 11.B.1., because it largely mirrors Section 2.B.1. for ESCO applications, reflects a more burdensome approach to registration than is necessary to oversee brokers and consultants. Section 11.B.1. is also deficient because it ignores the text of PSL § 66-t that allows brokers and consultants to submit a bond in satisfaction of the financial accountability requirement, and instead only allows submission of a letter of credit. This error is at the crux of failing to right-size these rules to small entities. Indeed, it is this one error that will render the New York market unworkable for many entities that would otherwise be able to comply with the new requirements.

Broker and consultant marketing standards are set forth in Section 11.E. Section 11.E. is nearly verbatim to the Section 10 Marketing Standards that apply to ESCOs and their marketing representatives, which raises the question of whether the same result could have been achieved by simply reiterating broker and consultant responsibilities (as ESCO marketing representatives) to adhere to Section 10.

UBP Section 11.F. requires brokers and consultants to develop and implement the infrastructure to respond to customer inquiries subject to the same standards applied to ESCOs in UBP Section 6. This entails making customer service representatives available by phone to respond to inquiries, including acknowledging the inquiry within two days and providing a response within fourteen days, and having the internal technological capability to track and monitor these inquiries. Brokers, consultants and ESCOs should be expected to coordinate their responses to inquiries from the same customer. Section 11.F. fails by merely carrying over the same ESCO standard from UBP Section 6 and creating redundancy (which again, will be costly and burdensome for small entities to comply with) rather than attempting to identify how to

enhance the coordination between brokers, consultants and ESCOs. This is related to the issue, left unresolved, as to how customer complaints will be handled by the Commission going forward when multiple entities subject to Commission oversight are involved in the chain of the sale, and whether and how all of the relevant parties will receive notice, be given an opportunity to respond, how it will be coordinated and what the appropriate remedies will be.

The reasons why brokers and consultants will be subject to enforcement consequences are set forth in Section 11.H.1., which is nearly verbatim to Section 2.D.5 that applies to ESCOs. Again, the conduct listed in Section 11.H.1. appears outsize to the actual functions that brokers and consultants perform. For example, the responsibility for compliance with Environmental Disclosure Requirements rests with load serving entities. Yet, Section 11.H.1.g. would subject a broker or consultant to consequences for failing to comply with Environmental Disclosure Requirements.

UBP Section 11.H.2.b. goes on to delineate possible consequences to a broker or consultant for non-compliance. This is drawn nearly verbatim from UBP Section 2.D.6.b. that applies to ESCOs. Subparagraph ii of Section 11.H.2.b. would allow for the suspension of the broker or consultants "ability to enroll new customers." Inasmuch as brokers or consultants do not enroll new customers with the utility, rather ESCOs perform that function, this subparagraph should not have been included. Subparagraphs iv. and v. raise a complicated issue, for which no record has been developed, as to how brokers, consultants and ESCOs will shoulder the responsibility for customers that do not receive savings promised or that incur costs as a result of a failure to comply with UBP Marketing Standards as well as how to apply the remedy of releasing customers from sales agreements. Joining brokers and consultants under the Commission's purview for

enforcement with ESCOs is going to require a different process and more coordination than the existing UBP contemplates.

III. Requiring Brokers, Consultants and ESCOs to Comply With UBP Requirements That Are Expected to Soon Change is Arbitrary and Capricious.

In Ordering Paragraph 10 of the 2024 Order, Staff was directed to identify modifications to the UBP to "improve overall consistency and clarity" by August 16, 2024. As was explained in Section II above, there are many UBP provisions that would benefit from this review. However, the 2024 Order's adoption of UBP requirements that become effective June 17, 2024, subject to an immediate review process is explicit recognition that new Section 11 should not and cannot be applied to energy brokers and energy consultants because it is defective as currently written.

The requirement of the 2024 Order for energy brokers, energy consultants and ESCOs to come into compliance with the new UBP provisions as of June 17, 2024, when the Commission expressly stated the intention for Staff to review those same provisions sixty days later for the purpose of future modification is untenable, unworkable and unfair. Requiring entities to expend the resources, time and money to come into compliance with short-lived rules is wasteful, irrational and unreasonable. As many of the brokers and consultants that are subject to the registration requirements and marketing standards are small businesses, requiring them to comply with new rules in June and then a set of revised rules shortly thereafter will impose a particularly significant burden. Indeed, for many brokers and consultants, the regulatory recordkeeping, registration, reporting and extensive compliance responsibilities will be new tasks that will require back-office investments to perform. There is no rational justification for imposing those requirements in June as a moving target that is expected to change in short order.

In order to maximize the benefit of Staff's UBP review process, and to mitigate the impact of the expansive interpretation of entities deemed "brokers" and consultants" for registration purposes, goals for the process should be clearly established. Staff's UBP review process should include the inquiry into and consideration of industry solutions as to how to ensure the regulations are right-sized to simultaneously: accomplish the goals of consumer protection and oversight; appropriately reflect the size and scale of the business models and operations of brokers and consultants, many of whom are small businesses; and enhance competition in the marketplace, rather than be so onerous as to eliminate competition.

IV. Independent Contractors and Agents of Energy Brokers and Energy Consultants Should Not Be Required to Register with the Commission.

The 2024 Order decided that independent contractors and agents of energy broker and consultants must be registered with the Commission. The decision was premised on: 1) the purported need to ensure consistent training for independent contractors to that received by employees; and also 2) due to differing legal obligations between a business and a contractor as compared with an employee. (2024 Order at p.37). However, this rationale is directly contradicted by the requirements of new UBP Section 11 and prior Commission decisions.

While the 2024 Order expressed concerns about the training received by contractors and agents relative to employees, by the very terms of UBP Section 11.E.1.a., employees, contractors and agents are held to the same training standard. Specifically, UBP Section 11.E.1.a. requires brokers and consultants to ensure "the training of their employees and/or marketing representatives" on the UBP; products and services being marketed, including rates, payment options and early termination fees; applicable HEFPA requirements; and the ability to provide a toll-free number for handling billing questions, disputes and complaints. This instruction to establish a uniform

training standard regardless of status as an employee or independent contractor directly refutes the 2024 Order claim that consistent training cannot be ensured.

Likewise, the contention that independent contractors and agents must be registered "because of the lack of control of such entities" by brokers and consultants is contradictory to the UBP and prior Commission decisions. The degree of control a business exercises over an independent contractor versus an employee is a defining difference of these designations. However, that relative difference does not excuse employees, contractors or agents from conforming with the Commission's UBP standards. UBP Section 11.H.1. sets forth non-compliant conduct that would subject a broker or consultant to consequences with the Commission. The companion provision in UBP Section 2.D.5. for ESCOs has been construed to cover the actions of contractors and agents. The Commission reasoned that,

> the Commission has previously stated that an ESCO "bears full responsibility for those entities marketing on its behalf and must work to ensure that its employees and agents comply with UBP marketing and enrollment requirements and consumer protections." Rejecting the contention that an ESCO cannot be held responsible for rogue actions of marketing agents, the Commission stated that such rogue actions do not "absolve or excuse" an ESCO of liability for such violations. Indeed, an ESCO must work to ensure that its agents or employees do not engage in such actions.[2]

Given that the language of Section 11.H.1. largely mirrors that set forth in Section 2.D.5., Section 11.H.1. should likewise be construed to cover the actions of contractors and agents of brokers and consultants.

This also highlights the tendency in the 2024 Order to engage in unwarranted regulatory overreach by requiring what is tantamount to duplicative registration for brokers and consultants

[2] Case 20-M-0589, Order Denying Sunsea Energy, LLC's Petition for Rehearing and Reconsideration, issued September 16, 2022, at p. 28 (footnotes omitted) (citing to Case 20-M-0446, Order Confirming Revocation of Eligibility, issued May 16, 2022).

as well as the independent contractors they choose to engage. There is nothing in the legislative history or statutory purpose of PSL § 66-t to support the application of this expansive level of oversight over independent contractors and agents of brokers and consultants, nor is it necessary to achieve the intended consumer protection goals.

For these reasons, the rationale underlying the 2024 Order requirement is incorrect. Independent contractors and agents of brokers and consultants should not need to be separately registered as their conduct would be covered under the license of the broker or consultant.

V. The Submission of a Surety Bond Should Be Permitted to Satisfy the Financial Accountability Requirement.

Section 3(c) of PSL § 66-t sets forth an annual $500 registration fee requirement for each registered broker and consultant. Section 3(a) of PSL § 66-t sets forth a financial accountability requirement for brokers and consultants. It states that,

> An energy broker or energy consultant shall register with the commission authorizing such registered energy broker or energy consultant to act as an energy broker or energy consultant in a manner prescribed by the commission; provided that such:
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> **(i)** energy broker demonstrates financial accountability as evidenced by a bond or other method of financial accountability in an amount not less than one hundred thousand dollars; and
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> **(ii)** energy consultant demonstrates financial accountability as evidenced by a bond or other method of financial accountability in an amount not less than fifty thousand dollars.

In the 2023 Order, the Commission reviewed the financial accountability requirement in PSL § 66-t(3)(a) and concluded that it could only be satisfied with an irrevocable standby letter of credit.

> 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.
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> 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. (2023 Order at p. 36-37).

The Commission's interpretation of PSL § 66-t to require a letter of credit to satisfy the financial accountability requirement was incorporated into the energy broker and consultant registration requirements set forth in new UBP Section 11.B.1.j. The annual $500 registration fee is set forth in new UBP Section 11.B.1.i.

Subsequent to the issuance of the 2023 Order, Commission Staff convened a technical conference on August 8, 2023, to provide a forum for stakeholders to ask questions about the new requirements.[3] A number of participants in the technical conference expressed concern with the determination that the only form of financial accountability that the Commission would accept is a letter of credit despite the fact that PSL § 66-t expressly states that a bond may be used for that

[3] Case 23-M-0106, et. al., Notice Scheduling Technical Conference, issued July 27, 2023.

purpose.[4] Commission Staff explained that stakeholders should express their concerns to the Commission with a filing in the docket. A number of commenters did so.[5]

Despite the numerous submissions made regarding the Commission's interpretation that the financial accountability requirement could only be satisfied with a letter of credit, the 2024 Order is completely silent on the topic. Given the legitimate arguments raised by commenters, it was incumbent upon the Commission to consider those concerns. The failure to do so is an error justifying rehearing. Indeed, when entities (many of which are small businesses) that have not previously been subject to the Commission's jurisdiction, and do not possess the same familiarity with Commission processes and procedures for gathering input, seek to participate and contribute to the record through the submission of public comments, those comments should be afforded due consideration and weight.

The gravity of the error of failing to consider commenter views on alternative methods of satisfying the financial accountability requirement is compounded by the expansive application of the registration requirement to contractors and agents of brokers and consultants as well as ESCO marketing representatives. A reasonable financial accountability requirement should be appropriately tailored to the registrant in form and amount. PSL § 66-t was not intended to apply to the numerous small businesses that are required to register the 2024 Order and 2023 Order. The lack of a tiered registration fee or scaled financial accountability requirements in the law bears that out. Likewise, it is not rational for the Commission to apply the same registration fee and financial accountability requirement in a one-size-fits-all manner to these various entities.

[4] The August 8, 2023, technical conference can be viewed at: https://youtu.be/geQpF2Hz3-Y

[5] See, e.g., Public comment submissions of Utility Services Advisory Group, Inc., dated November 6, 2023; Assembly Member Marjorie L. Byrnes, dated September 7, 2023; T. Lichtenstein, dated, August 11, 2023; Pedro Gonzalez, dated August 10, 2023; Joe Sutton, dated August 10, 2023; and United Energy Consultants, LLC, dated July 31, 2023.

The 2023 Order recited the reasons why the Commission prefers a letter of credit, namely that a letter of credit provides the Commission with easier access to the funds because the letter of credit is not subject to a claims process as a surety bond would be (2023 Order at p.36-37.), but it did not appropriately weigh numerous valid reasons why the industry would prefer to satisfy the financial accountability requirement with the submission of a bond. Neither did the 2024 Order, despite discussion of the issue at the technical conference and the submission of multiple filings in response.

To be clear, a surety bond is a preferred means for satisfying the financial accountability requirement because it would not diminish a broker or consultant's working capital. In addition, although surety bonds would require the broker or consultant to pay an annual premium to the surety company as a percentage of the bond amount, bonds are generally cheaper to procure and maintain than letters of credit. By comparison, a letter of credit is generally obtained by the broker or consultant approaching a bank with which it has an established relationship. It can take an extended period to obtain because the broker or consultant would be subject to credit approval and have to complete requisite documentation. The bank issuing the letter of credit would hold an offsetting deposit from the broker or consultant to secure the guarantee of payment. The broker or consultant would not have access to the deposit as long as the letter of credit is outstanding. There is also typically an additional annual fee charged by the bank as a percentage of the letter of credit amount. This is in addition to the $500 registration fee.

Simply stated, many of the entities that will be required to register with the Commission under the new rules are small businesses that lack the liquidity to have $50,000 or $100,000 set aside in an inaccessible deposit as would be needed to obtain a letter of credit. So even though the Commission has a stated preference for letters of credit, given that both a surety bond and a letter

of credit serve the same purpose of guaranteeing payment in the event of an unpaid obligation to customers, and also given the significant reasons that brokers and consultants favor the use of a surety bond, the Commission should expand the financial accountability requirement to allow the submission of surety bonds.

Moreover, an interpretation of PSL § 66-t(3)(a) finding that the Commission was vested with discretion to completely reject a registrant's use of a bond is unfounded. Indeed, the statutory language is clear that the "discretion" to be exercised is that of the broker or consultant as to whether to post a "bond *or* other method of financial accountability." (emphasis added.) In other words, under the plain language of the statute, the broker or consultant is entitled to post a bond or another instrument. The Commission has authority to define what the "other method of financial accountability" can be, but it was not given authority to reject the use of a bond.

For the foregoing reasons, the financial accountability requirement should be permitted to be satisfied by the submission of a surety bond, in addition to a letter of credit.

VI. Conclusion

For the foregoing reasons, Family Energy respectfully requests that the Commission issue an Order rehearing, reconsidering and/or clarifying the issues consistent with the arguments set forth herein.

Respectfully submitted,

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