

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.

DECLARATORY RULING AND ORDER ON REHEARING

Issued and Effective: April 18, 2024

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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 April 18, 2024

COMMISSIONERS PRESENT:

Rory M. Christian, Chair
James S. Alesi
David J. Valesky
John B. Maggiore
Uchenna S. Bright
Denise M. Sheehan

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

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DECLARATORY RULING AND ORDER ON REHEARING

(Issued and Effective April 18, 2024)

BY THE COMMISSION:

INTRODUCTION

On June 23, 2023, the Public Service Commission
(Commission) issued the Order Adopting Energy Broker and Energy
Consultant Registration Requirements, which effectuated the
provisions of Public Service Law (PSL) §66-t.¹ Petitions for
rehearing of the June 2023 Order were timely filed by: (1) NRG
Energy Inc. and the NRG Retail Companies (collectively, NRG);

¹ Cases 23-M-0106 et al., Order Adopting Energy Broker and
Energy Consultant Registration Requirements (issued June 23,
2023) (June 2023 Order).

(2) Family Energy, Inc. (Family); and (3) the New York Retail Choice Coalition (NYRCC). In addition, a petition was filed on November 17, 2023, by Metergy Solutions LLC and Quadlogic Controls Corporation (Metergy Petition), seeking a declaratory ruling that PSL §66-t does not apply to submeterers or submetering service providers.

Through this Order, the Commission grants rehearing regarding three aspects of the June 2023 Order and otherwise denies the three petitions for rehearing. First, the Commission grants rehearing related to the aspect of the June 2023 Order that prohibited payments by energy service companies (ESCOs) to unregistered energy brokers and energy consultants pursuant to contracts executed before the effective date of the Uniform Business Practices (UBP) modifications adopted in the June 2023 Order. In this respect, this Order clarifies that ESCOs will be prohibited from making payments to unregistered energy brokers or consultants where the act of brokering or consulting is performed after the effective date of the UBP amendments, regardless of when the contract mandating such payments was executed.

Second, this Order grants rehearing regarding the heretofore required disclosure of broker or consultant compensation during the third-party verification process. Specifically, the Commission omits the requirement for such disclosure to be included in the third-party verification procedure on the grounds that it is unlikely to elicit accurate information from customers regarding whether the Commission's compensation disclosure rules have been followed.

Third, the Commission grants rehearing concerning the application of §7(2) and (3) of the Climate Leadership and Community Protection Act (CLCPA) and finds that the provisions adopted in the June 2023 Order will not interfere with the

attainment of the statewide greenhouse gas emissions limits established in Article 75 of the Environmental Conservation Law and will not disproportionately burden disadvantaged communities.

Further, the Commission provides clarification regarding the applicability of the State Environmental Quality Review Act (SEQRA) to the provisions adopted in the June 2023 Order and finds that the provisions adopted through the June 2023 Order are exempt from review under SEQRA.

The Commission also adopts an effective date of the revised UBP and the Uniform Business Practices for Distributed Energy Resource Suppliers (UBP-DERS), and the date by which energy brokers and energy consultants must register with the Commission, which will be 60 days from the effective date of this Order.

Finally, in response to the Metergy Petition, this Order finds that the registration requirements of PSL §66-t do not generally apply to submeterers and submetering service providers; however, submeterers and submetering service providers may undertake activities that fall within the definitions of "energy broker" and/or "energy consultant" and thus subject them to the registration requirement under PSL §66-t. This issue is further clarified in the body of this Order.

BACKGROUND

Public Service Law §66-t

On December 23, 2022, the Governor signed into law PSL §66-t, which requires that the Commission establish a registration process for all energy brokers and energy consultants.² PSL §66-t provides consumer protections regarding

² Chapter 787 of the Laws of 2022.

deceptive marketing practices, undisclosed fee splitting, and rebates between energy brokers or consultants and third parties. Public Service Law §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" act and §66-t(1) broadly defines those terms.

Section 66-t(3) (b) empowers the Commission to refuse to register or revoke a registration if, in our judgment, the broker or consultant has given cause for the revocation or suspension of operations. Section 66-t(2) (a) (ii) provides that a person or entity that acts as an energy broker or consultant without registering with the Commission is subject to the imposition of a penalty of up to \$5,000 for each violation. 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

³ PSL §66-t(3) (c) and (d).

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 energy agent, consultant, broker, or intermediary and its customer. Broker compensation is defined in §66-t(1) (a) 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. Public Service Law §66-t(5) (b) defines the phrase "an inducement for, or as compensation for, any energy supply business" 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 rate payer, lessee, mortgagee or the prospective energy ratepayer, or any interest therein." PSL §66-t(5) (b) states that "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" are permitted as long as such activity is "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." PSL §66-t(5)(a) 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.

The June 2023 Order

The June 2023 Order established a registration process for energy brokers and energy consultants through adopting amendments to the UBP and UBP-DERS, as recommended in a proposal filed by Department of Public Service Staff (Staff).⁴ The June 2023 Order required energy brokers and energy consultants to register with the Commission, pay a \$500 registration fee annually, and provide an irrevocable standby letter of credit in the amount of \$100,000 for energy brokers and \$50,000 for energy consultants. The June 2023 Order defined "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

⁴ Cases 23-M-0106 et al., Staff Proposal Regarding Registration of Energy Brokers and Energy Consultants (filed March 14, 2023) (Staff Proposal).

other services to end-use retail customers, but does not take title to any of the natural gas sold, and 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.”

The June 2023 Order recognized that these definitions apply to any entities, including ESCOs, distributed energy resource (DER) suppliers, and third-party vendors working on behalf of an ESCO, if such entities are performing the activities set forth in the definitions. The Commission stated that it would not make a blanket judgement on whether certain types of actors in the retail energy market need to register, because the test of the applicability of registration requirements depends on the specific activities performed by an entity. The Commission stated that the term “other services” as used in the “energy broker” definition applies to “energy-related, value-added services bundled with electric and/or gas commodity supply services provided by ESCOs.”⁵ The Commission also limited the applicability of the definition of “energy consultant” 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.”⁶ The Commission specifically exempted from the

⁵ June 2023 Order, p. 15.

⁶ June 2023 Order, pp. 15-16.

definition of "energy consultant" attorneys providing legal services pursuant to an existing attorney-client relationship.

Regarding DER suppliers, the Commission noted that the definitions of "energy broker" and "energy consultant" applied only to commodity service and, consequently, do not apply to CDG sponsors. Although the Commission found that the definitions would apply to CCA administrators, it chose not to apply the requirements of PSL §66-t to CCA administrators as such entities already are required to comply with a robust application process.

The Commission determined that employees of an energy broker or energy consultant would be covered under their employer's registration; however, contractors, vendors, and agents would not be covered under the registration of the entity for which they are performing work, and thus would be required to register themselves if they are performing the activities covered by PSL §66-t.

The June 2023 Order required a broker or consultant to disclose their compensation as it is known at the time of contracting but declined to adopt a standardized form of disclosure given the various structures and methods of providing such compensation. The Commission required brokers and consultants to include in such disclosure the additional fees that may be applied if authorized under the agreement with the customer, whether or not such fees are ultimately applied to a customer. The Commission permitted a general statement that the broker or consultant may receive compensation, bonuses, commissions, or incentives in addition to the listed fees to be used to cover any compensation not known at the time of contracting. The Commission required that ESCOs or DER suppliers include on the Customer Disclosure Statement any compensation that the ESCO or DER supplier pays to the broker or

consultant in addition to the compensation the ESCO or DER supplier collects on behalf of the broker or consultant. The June 2023 Order requires brokers or consultants to disclose any fee splitting arrangements, although there is no requirement that such disclosures be included on Customer Disclosure Statements as ESCOs and DER suppliers are unlikely to be aware of any such arrangements.

The June 2023 Order prohibits ESCOs and DER suppliers from doing business with brokers and consultants that are not registered with the Commission and requires that ESCOs and DER suppliers verify that any broker or consultant with whom they do business is registered with the Commission by checking a list on the Department's website and conducting regular reviews to ensure such registrations remain valid.

The Commission adopted PSL §66-t's prohibition on rebates, finding the prohibition to be broad and, thus, applicable to the provision of any valuable thing by brokers or consultants to applicants or agents or representatives of the energy ratepayer as inducement for or as compensation for any energy-related business. The Commission stated it would apply the prohibition to incentives, sign-up bonuses, prizes, gifts, and referral fees; however, the Commission stated that introductory rates and authorized energy-related value-added services would fall under the exemption for usual and customary marketing activity.

The June 2023 Order established August 31, 2023, as the deadline by which energy brokers and energy consultants must file registration packages for approval, although the Order specified existing entities would be allowed to continue operating until Staff completed review of registrations by December 1, 2023.

PETITIONS FOR REHEARING

As noted, three separate petitions for rehearing were filed by NRG, Family, and NYRCC, summaries of which are provided below.

NRG Energy

NRG argues that the Commission exceeded the authority granted under PSL §66-t by requiring ESCOs to disclose the compensation they pay to third-party vendors. According to NRG, an ESCO's payments to third-party vendors to support NRG's operations should not be considered "broker compensation" because an ESCO's third-party vendors do not fit within the definition of either an "energy broker" or an "energy consultant." Additionally, NRG argues that PSL §66-t(4)(b) only requires an ESCO to disclose broker compensation that it collects on behalf of a broker or consultant, and ESCOs do not collect the compensation paid to their third-party vendors. NRG states that such compensation is not charged to a customer or collected from the rate a customer pays, and instead is simply a cost of doing business. NRG argues that classifying third-party vendors of an ESCO as energy brokers or consultants would be logistically untenable both because elements of the Department's registration form do not apply to such vendors and the rate structure for NRG's sales channels is complex and varies widely by vendor and type of customer enrollment. NRG also claims that the June 2023 Order left unclear whether the fee that must be disclosed by the ESCO would be the fee paid by the ESCO to the vendor or represent the vendor's payment to its employees or contractors. For these reasons, NRG also requests that the Commission reconsider the categorization of third-party sales vendors as energy consultants.

NRG argues that the June 2023 Order exceeded the authority granted to the Commission under PSL §66-t by

prohibiting ESCOs from making payments to unregistered energy brokers or consultants in accordance with contracts that were in existence before the effective date of the UBP amendments. NRG states that such a prohibition would have an impermissible retroactive effect. NRG contends that, although PSL §66-t prohibits unregistered energy brokers and consultants from accepting payment for brokering or consulting services, the statute does not impose such a prohibition on ESCOs and, moreover, there is no evidence that the legislature intended to apply this prohibition to pre-existing contracts. Additionally, NRG contends that there is ambiguity in the UBP language that prohibits an ESCO from contracting with or otherwise doing business with unregistered energy brokers and energy consultants. According to NRG, the phrase "otherwise do business with" contained in UBP §10.C.4. and UBP-DERS §2.A.9. is ambiguous and should not be interpreted to mean any business activities on the grounds that such a prohibition does not take into account the intricacies of the retail market.

NRG also believes that the Commission has no authority to prohibit ESCOs from making payments to unregistered brokers or consultants if such brokers or consultants were registered with the Commission at the time the contract between the ESCO and the broker or consultant was signed. According to NRG, PSL §66-t can in no way be interpreted to grant the Commission the power to interfere with contracts that pre-existed the effective date of the statute. NRG contends that the plain language of PSL §66-t(2)(c) expressly imposes registration obligations at the time of the sale, solicitation or negotiation.

NRG also raises several concerns related to the aspects of the June 2023 Order that would conceivably prohibit ESCOs from making payments that they are obligated to pay under an existing contract only because the energy broker or

consultant is not registered. NRG questions whether modifications to customer agreements are required if an ESCO ceases payments to the broker or consultant or if payments must be made to a broker or consultant if their registration is reinstated after a lapse or revocation.

NRG argues that the June 2023 Order violates the State Administrative Procedure Act (SAPA) by not providing notice that ESCOs would be obligated to disclose third-party vendor compensation unrelated to brokering of customer contracts. According to NRG, neither the Staff Proposal nor the notice of proposed rulemaking gave notice of this provision as a proposed requirement.

Finally, NRG moves for a stay of enforcement of the June 2023 Order until ninety days after the Commission issues a determination in this matter to allow ESCOs adequate time to update system programming and ensure fees are accurately disclosed.

Family Energy

Family asserts that the June 2023 Order is arbitrary and capricious on a variety of grounds. For example, Family contends that the Commission violated SAPA through adoption in the June 2023 Order of, what Family claims to be, temporary regulations. In support of this allegation, Family points to the directive in the June 2023 Order to Staff to consider additional modifications to the UBP, the directive to schedule a technical conference after issuance of the order, and the lack of response in the order to each of the changes Family recommended in comments on the Staff Proposal. In this respect, Family contends that the Commission intended to adopt rules and only consider stakeholder comments after adoption. Family requests that a stay should be granted until the Commission issues final rules to implement PSL §66-t.

Family restates the comment it originally offered to the Staff Proposal that the modifications to UBP Section 5 should be withdrawn. According to Family, UBP Section 5 pertains to ESCO responsibilities for customer enrollments, renewals, drops and assignments and no entity registered as an energy broker or consultant would have these responsibilities.

Family requests that the June 2023 Order be clarified to recognize an exemption from the registration requirement for individual contractors and agents of brokers and consultants. Family believes that the conduct of contractors and agents would be covered under the registration of the broker or consultant and extending the registration requirement to individual contractors and agents would potentially extend the requirement to so many individuals as to become difficult or impossible to administer and oversee.

Family requests that the Commission clarify the forms of broker or consultant compensation that must be disclosed by ESCOs. Family agrees that a general statement regarding compensation to brokers or consultants meets the intended purposes of disclosure; however, Family argues that disclosure of specific payments of bonuses, prizes or dinners, if known at the time of the sale, do little to enhance the educational value of disclosure. Family also argues that disclosures of specific fees paid by the ESCO per enrollment do not promote transparency as such fees are not a separable component of the price quoted to the customer and is not expressed as a fee per unit of energy. Family argues that disclosing assistance in obtaining a letter of credit is unlikely to be meaningful to a customer and should be considered part of a general disclosure statement. Family also states that the compensation rates set forth on the Customer Disclosure Statement should be specific to the electricity or natural gas product and not a bundled rate.

Family requests that the Commission clarify that compensation should be disclosed on the Customer Disclosure Statement, rather than the Sales Agreement.

Family requests that safe harbor be provided to ESCOs that make good faith efforts to comply with compensation disclosure requirements until Staff reviews annual ESCO filings.

Family contends that the addition of a question regarding disclosure of broker or consultant compensation to the third-party verification process is problematic. Family believes that the addition of this question is duplicative of the requirement to disclose compensation on the Customer Disclosure Statement. Additionally, Family states that the customer will not have the Customer Disclosure Statement in hand at the time third-party verification is conducted for any circumstances other than door-to-door sales. It contends that there is no requirement that compensation be disclosed verbally to a customer and, thus, where a sale is made through telemarketing, the customer may not receive the Customer Disclosure Statement until three business days after the third-party verification is conducted. Family also states that ESCOs will not be aware of fee splitting arrangements of third parties and any such third-party verification questions should be limited to compensation about which the ESCO is aware.

Family seeks answers to the following questions:

- When a broker or consultant registration lapses or is revoked, what is the effective date for ESCO purposes of the requirement to cease doing business with that entity?
- During the period between when a broker or consultant submits its annual renewal and when Staff determines the entity's registration should be renewed or denied, can an ESCO continue to do business with the broker or consultant?
- For a new broker or consultant that seeks to become registered after these requirements take effect, will an

ESCO be allowed to do business with that entity pending Commission review of the registration?

Family expresses concern over the requirement that an ESCO verify registration of brokers and consultants with whom the ESCO does business. Family believes the Commission should proactively notify ESCOs of unregistered brokers or consultants. Family would be supportive of DPS sending an email to all eligible ESCOs regarding changes in a broker's or consultant's registration status and of allowing a cure period for any non-compliant brokers or consultants.

Family requests clarification that a broker or consultant must be registered on the date a contract is signed, and not the date of enrollment of the account by the ESCO with the utility, for the customer's contract to be considered valid.

Family argues that the prohibition on compensating unregistered brokers or consultants for contracts that pre-exist the registration requirements would be an unfair retroactive application of the law as no such prohibition existed at the time of contracting. Family requests rehearing, reconsideration and/or clarification that ESCOs may continue to provide compensation to a broker or consultant for specific contracts where a broker or consultant was registered at the time a contract was signed, but the registration has since lapsed or been revoked. Family argues that PSL §66-t(2)(c) is satisfied where a broker or consultant is registered at the time of the contract. As a hypothetical example, Family states that a broker or consultant that chooses to no longer operate in New York should still be allowed to continue to receive compensation under the contract that it brokered when it was registered. Family asserts that prohibited compensation under this example would constitute an impermissible interference with valid contract rights between the ESCO and its customers in violation

of the Contract and Takings Clauses of the United States and New York Constitutions. Family seeks clarification of whether an ESCO can continue to serve a customer through auto-renewal or affirmative consent in instances where an unregistered broker or consultant arranged the original contract but is not involved in the renewal.

Family contends that the June 2023 Order violates the Climate Leadership and Community Protection Act (CLCPA) because the Commission did not consider whether the June 2023 Order would be inconsistent with or interfere with the attainment of the CLCPA's statewide greenhouse gas emissions limits or whether it would disproportionately burden disadvantaged communities, as required by CLCPA §7(2) and (3). Family thus contends that its petition should be granted at least to the extent of the Commission undertaking this analysis.

Family argues that the June 2023 Order also violates the State Environmental Quality Review Act (SEQRA). In support of this claim, Family states that the June 2023 Order may have a chilling effect on the marketing and distribution of renewable energy supply throughout New York State due to the burden it places on suppliers of such resources and those who facilitate their sale and use, which, in turn, would have adverse impacts on air and water quality, wildlife and more. Family thus asserts the rehearing should be granted so that the Commission undertakes this review.

New York Retail Choice Coalition

NYRCC requests that the Commission clarify that agents and subcontractors of registered consultants and brokers are excluded from registration requirements under PSL §66-t and the June 2023 Order. NYRCC argues that the oversight exercised by vendors over contractors is similar to that exercised over employees and requiring contractors to register is unlikely to

lead to substantial improvements in the retail marketplace or a decrease in questionable marketing practices.

NYRCC also requests clarification regarding the specific entities that are subject to the UBP amendments as energy consultants or energy brokers. NYRCC asserts in this respect that the broad nature of activities that fall within the definition of "energy broker" or "energy consultant" necessitates substantial guidance from the Commission and a bright line that identifies the specific entities subject to the rules adopted pursuant to the June 2023 Order.

NYRCC argues that the Commission committed an error of law, violated SAPA, and breached procedural due process by including within the coverage of PSL §66-t an ESCO's contractors, vendors, and agents absent any mention of such an outcome in the SAPA notice issued for the Staff Proposal. NYRCC also contends that the Commission failed to mention in the SAPA notice for the Staff Proposal that energy brokers and consultants would be required to retain records of independent third-party verification of telephonic and door-to-door sales agreements for two years.

PETITION FOR DECLARATORY RULING

As noted, the Metergy Petition seeks a declaratory ruling confirming that submeterers and submetering service providers are not "energy brokers" or "energy consultants" within the meaning of PSL §66-t or, in the alternative, exempts submeterers and submetering service providers from regulation under PSL §66-t.

The Metergy Petition asserts that submeterers and submetering service providers do not fit the definition of "energy broker" as that term only applies to non-utility entities and submeterers are considered utilities under PSL §53

and Commission precedent. Additionally, the petition states that submeterers take title to the electricity they sell to building occupants, which would exclude submeterers from the definition of "energy broker." The Metergy Petition also asserts that submeterers and submetering service providers do not meet the definition of "energy consultant" because they do not act as intermediaries for the purpose of soliciting, negotiating, or advising energy contracts and they do not accept contracts on behalf of ESCOs or DER suppliers.

The Metergy Petition argues that, if the Commission finds the definitions of "energy broker" or "energy consultant" to apply to submeterers or submetering service providers, the Commission should elect not to apply registration requirements to submeterers or submetering service providers. According to the petition, the Commission already strictly regulates submetering and requires Commission approval of applications to submeter buildings and approval of submeters.

NOTICE OF PROPOSED RULEMAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), three notices of proposed rulemakings were published in the State Register on September 6, 2023, in relation to the petitions for rehearing filed by NRG, Family, and NYRCC [SAPA Nos. 23-M-0106SP2, 23-M-0106SP3, and 23-M-0106SP4, respectively]. The time for submission of comments pursuant to these Notices expired on November 6, 2023. Regarding the Metergy Petition for a declaratory ruling, which is not subject to SAPA, responses to a petition for declaratory ruling may be filed within 21 days of the date the petition is

filed.⁷ The time for submission of comments pursuant to the Metergy Petition expired on December 8, 2023.

A summary of the comments received is provided below. Of note, several commenters filed comments regarding underlying policy determinations made in the June 2023 Order, which were not raised in the petitions for rehearing and, consequently, those comments are not addressed in this Order.

RESPONSES TO THE PETITIONS FOR REHEARING

Agway

Agway wrote to support NRG's petition. Agway believes the June 2023 Order broadens the definitions of "energy brokers" and "energy consultants" beyond the statutory definitions and their traditional use. According to Agway, the expansive reach of the June 2023 Order fails to achieve its purpose because it regulates entities that are already regulated and who do not receive customer fees collected by ESCOs on their behalf. Agway does not believe the requirements set forth in the June 2023 Order should apply to "ordinary marketers on the grounds that these "ordinary marketers" are employed for internet advertising, direct mail, and/or telemarketing and are already regulated by Section 10 of the UBP.

Agway also believes that the June 2023 Order conflates ordinary marketing expenses with broker fees. Agway states that its customers do not pay compensation to Agway's marketers and, consequently, PSL §66-t does not require any disclosure by Agway of these fees.

Finally, Agway argues that it did not receive adequate notice as required by SAPA regarding who would fall under the definitions of "energy broker" and "energy consultant" because

⁷ Sixteen NYCRR §8.2(c).

the SAPA notice associated with the June 2023 Order failed to mention third-party ESCO marketers specifically. Agway also joins in NRG's request for a stay of the implementation of the June 2023 Order until 90 days after a determination is made on the NRG Petition.

American Power & Gas

American Power & Gas (APG) comments that the notice of proposed rulemaking associated with the June 2023 Order did not provide proper notice by failing to indicate the full potential effect of the rulemaking on ESCOs and telemarketers. APG states that implementation of the June 2023 Order would be overly burdensome for marketers and the definitions of "energy broker" and "energy consultant" from the June 2023 Order do not coincide with definitions used in other states. APG also states that ESCOs are already required to register their marketers with the Commission and telemarketers have a separate requirement to register with the State. According to APG, another such registration and fee for the exact same purpose is not needed. APG urges the Commission to remove telemarketers, door-to-door marketers, and kiosk marketers from the definition of "consultant" or to make the registration less burdensome through reducing the amount of the letter of credit.

EnergyMark, LLC

EnergyMark, LLC (EnergyMark) commented that it was in full support of registration requirements for energy brokers and consultants and stated that it had seen an increase in misleading and improper sales practices from some energy consultants in recent years, such as unregistered door-to-door sales, misrepresentations by energy brokers and consultants that they are acting as a representative of a utility or current energy supplier as a way to obtain copies of invoices, bait and switch and aggressive sale tactics, and unauthorized enrollments

of customers.

EnergyMark supports the Commission providing a standardized format for disclosure of broker and consultant fees on a per unit basis to allow the customer to properly evaluate the cost of the services they are being provided. EnergyMark also supports the letter of credit requirement, stating that “[h]aving Energy Brokers and Consultants with ‘skin in game’ helps to maintain a level of commitment, professionalism, and enhanced energy market knowledge for the consumer.” EnergyMark agrees with NRG’s comment that brokers and consultants should not be included in the definition of ESCO Marketing Representative as it confuses the roles and definitions of each. NRG

NRG submitted comments in support of its own petition and the petitions of Family and NYRCC. The bulk of NRG’s comments reiterate the arguments it made in its petition for rehearing, summarized above. NRG agrees with those aspects of Family’s petition for rehearing, alleging that the Commission adopted temporary rules in violation of SAPA. NRG also notes its agreement with those aspects of NYRCC’s petition, contending that the June 2023 Order’s record retention requirement for records of third-party verification and door-to-door sales agreements for two years was not sufficiently noticed in the notice of proposed rulemaking and thus violates SAPA. NRG supports the requests made in the petitions filed by Family and NYRCC that the Commission clarify that 1099 contractors are excluded from registration requirements. NRG believes that the costs of registration would be unduly burdensome, and that registration would be unnecessary as 1099 contractors are exclusive to a company and are trained and subject to the same degree of oversight as employees. NRG also agrees with the argument made in Family’s petition that ESCOs should not have to

disclose assistance offered to brokers or consultants to obtain a letter of credit as such assistance would be difficult to quantify and is of little consequence to the consumer. NRG also agrees with the contention made in Family's petition that third-party verification of broker compensation is duplicative as compensation will already be disclosed in written material.

Retail Energy Supply Association

The Retail Energy Supply Association (RESA) contends that the Commission erred by requiring independent contractors of ESCOs to register under PSL §66-t but then not imposing the same requirement on an ESCO's in-house sales team. According to RESA, independent contractors and an ESCO's in-house sales team perform identical functions and ESCOs are equally responsible for the actions of both. RESA also notes that ESCO marketing representatives are required to identify the ESCO they represent when interacting with customers. Because of this, RESA believes that the registration of ESCO marketing representatives is not necessary to increase transparency and accountability.

RESA further argues that, because PSL §66-t only requires disclosure of compensation that an ESCO collects on behalf of an energy broker or consultant, the Commission erred in requiring ESCOs to disclose the compensation they pay to third-party contractors acting as ESCO marketing representatives as these marketing representatives are paid directly by the ESCO. RESA states that these marketing representatives are already required to disclose that they are conducting marketing activities on behalf of an ESCO and, consequently, disclosure of compensation to ESCO marketing representatives does not provide further transparency to customers.

RESA requests that the Commission clarify the specific entities subject to the registration requirements under PSL §66-t. RESA notes that the June 2023 Order exempts an ESCO's "in-

house sales team" from registration but does not define that term. RESA requests that the Commission clarify that employees of an ESCO affiliate, independent contractors, and customer service representatives working on behalf of an ESCO are considered part of an ESCO's "in-house sales team." RESA requests that the Commission clarify that third parties that perform a warranty service that is bundled with commodity offered by an ESCO would not have to register as an energy broker or consultant under the "other services" clause of the energy broker definition.

RESA requests that the Commission clarify when an entity is considered to be "directly facilitating" an energy contract such that the entity would be required to register as an energy consultant. RESA specifically asks for clarification of whether the following entities are "directly facilitating" an energy contract:

- "Current, former or potential customers that refer other potential customers to an ESCO
- Entities (such as associations) with relationships with ESCOs where the ESCO is 'endorsed by' or the 'preferred supplier of' the entity but customers have no obligation to buy from the endorsed/preferred ESCO
- Entities/individuals handling inbound customer service and/or sales calls, and/or outbound calls related to topics such as customer service and inquiries, courtesy notifications, account status updates, and similar activities".⁸

RESA requests that the Commission clarify the specific entity that has the responsibility to meet the various requirements of Section 5 of the UBP. RESA states that the revisions to UBP Section 5 require ESCOs, consultants, and brokers to obtain voice recorded verifications from customers

⁸ RESA Comments (filed November 6, 2023), p. 11.

before enrollment and it is unclear whether the ESCO, the broker/consultant, or both parties must obtain this voice recorded verification. RESA requests that the Commission clarify that an ESCO is not obligated to perform a function if the broker or consultant has already performed that obligation in connection with a transaction.

RESA requests that the Commission clarify that a broker or consultant must be registered at the time the agreement between the broker/consultant and the customer is executed, and not at the time that the utility processes the enrollment. RESA states that months can pass between the execution of the agreement between the customer and the broker/consultant and the enrollment of the customer by the utility and, in this time period, a broker's or consultant's registration status may change.

RESA believes the Commission should clarify that the June 2023 Order does not apply to existing agreements and argues that the legislature did not demonstrate an intent to apply PSL §66-t to pre-existing contracts. RESA states that applying PSL §66-t to pre-existing contracts could expose ESCOs and customers to breach of contract claims if payments to unregistered brokers and consultants under pre-existing agreements are prohibited.

RESA requests that the Commission clarify how ESCOs must "demonstrate compliance" with the requirement to update their customer sales agreements to include broker or consultant compensation disclosure. RESA agrees with petitioners that ESCOs will be exposed to potential sanctions if Staff determines that their disclosure was not sufficient for the period before Staff reviews the customer sales agreements at the company's annual compliance filing.

RESA also requests that the Commission clarify that ESCOs will not be subject to enforcement if they enter into

transactions with brokers or consultants whose applications have been denied before Staff posts the list of registered brokers and consultants as it will be untenable for ESCOs to monitor the docket for applications.

The AOBA Alliance

The AOBA Alliance (Alliance) requests that the Commission construe the definition of "energy broker" and "energy consultant" to exclude entities whose only nexus to the sale of electricity or natural gas in the State of New York is the utilization of a form of service agreement.

Constellation NewEnergy, Inc.

Constellation NewEnergy, Inc. (Constellation) requests that the Commission confirm that the June 2023 Order will not impact future payments to a broker that was properly registered with the Commission when the broker's duties were performed or when the broker performed such duties prior to the registration requirement taking effect. Constellation states that, if an ESCO cannot remit the broker fee to a broker or consultant due to that entity's registration lapsing the ESCO would either continue collecting a fee it cannot pass on or the ESCO would have to alter the customer's fee structure, which would cause customer confusion and differ from the requirements of the customer agreement.

Constellation also requests clarification of the June 2023 Order to ensure that its marketing agents are exempt from registration requirements on the grounds that these agents market on behalf of Constellation, represent themselves as Constellation's agents, and Constellation bears responsibility and liability for their actions. Additionally, Constellation notes that some of its agents provide services beyond marketing, such as customer service, and are not compensated separately for

those services, complicating Constellation's disclosure obligations.

Constellation requests that the Commission provide at least ninety days from the date of its issuance of an order on rehearing for implementation of any required changes to ESCO's systems and processes.

Vistra Corp.

Vistra Corp. (Vistra) requests that the Commission exempt employees of an ESCO parent company or other entity in the same family of companies from broker and consultant registration requirements. Vistra states that an ESCO may not directly employ personnel but may share resources with other entities in the same family of companies to provide services to numerous affiliates. Not employing redundant personnel for each brand allows the ESCO to operate more efficiently and keep prices down.

Vistra requests that non-employee personnel of an ESCO or a registered broker or consultant be exempted from registration requirements. Vistra states that some companies may use independent contractors, seconded employees, temporary workers employed by an external agency, employees of broker/consultant parent companies or other entities in the same family of companies. Vistra states that determining whether an individual is an "employee" raises the question of which jurisdiction's laws must be used to evaluate whether an individual is an "employee." According to Vistra, registered energy brokers and consultants may be domiciled across the globe. Vistra believes determining the meaning of "employee" leads to unnecessary complexity. Vistra notes that, where an individual is employed by a company and that company contracts with the ESCO to perform services, the ESCO would have very little visibility into the compensation structure between the

company and its employee. Vistra also states that the burden of registration will likely drive individuals and the entities that hire them out of the market to the detriment of potential customers.

Vistra requests customer referral programs be exempt from registration requirements as requiring individual consumers to register as a broker or consultant in order to continue referring customers to an ESCO or DER supplier would effectively prohibit such referral programs.

Vistra requests confirmation that companies or individuals handling customer service functions for the ESCO do not need to register as brokers or consultants even where such work results in customer enrollments. Vistra states that, if a customer service representative cannot enroll a customer it would harm the customer experience and the representative would have to refer the customer to the ESCO's website or a registered entity to complete enrollment. Additionally, Vistra notes that, because these individuals are not hired for broker or consultant services, it is unclear what compensation an ESCO would be responsible for disclosing.

Vistra requests confirmation that a vendor who services an approved home warranty product but does not market the product or interface with customers prior to enrollment, is not required to register as a broker or consultant. Vistra also requests confirmation that, where the product being marketed is not an ESCO's commodity service and is not bundled with commodity service, there is no "electric or natural gas contract" that would necessitate registration as a broker or consultant.

Like other commenters, Vistra requests ninety days from the date of issuance of an order on rehearing to implement any necessary changes.

Elite Energy Group

Elite Energy Group (Elite) states that contractors, vendors, and agents should not have to register as energy brokers and consultants. Elite argues that the Commission has never had any issue in the past with indirectly regulating the various segments of the competitive retail marketplace. Elite argues that the Commission should conform to its past practice and regulate such entities through the registration of corporate parents, affiliated companies, or employers. Elite suggests that the Commission allow vendors, contractors, and agents to be subsumed by the registrations of their corporate parents, affiliated companies, or employers and that brokers and contractors file a list of their contractors, vendors, and agents with the Commission.

Elite also requests that payment of commissions under existing contracts be allowed to continue until terminated. Elite argues that a prohibition on paying commissions to unregistered brokers and consultants for contracts that were executed prior to adoption of the registration requirements would require ESCOs to breach their existing contractual obligations and result in retroactive application of the law.

Inspire Energy

Inspire Energy wrote in support of the NRG and Family petitions.

LEGAL AUTHORITY

The Commission's regulatory power over ESCOs stems from its "authority to condition ESCOs' eligibility to access utility [distribution systems] on such terms and conditions that

the [Commission] determines to be just and reasonable.”⁹ Consistent with this authority, the Commission adopted the UBP, 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 or consultant, or revoke a registration if, in the Commission’s judgement, there is cause for revocation or suspension of operations.

Declaratory rulings may be issued with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the Commission or the validity of any such rule; whether any action by the Commission should be taken pursuant to a rule; and whether a person’s compliance with a Federal requirement will be accepted as compliance with a similar State requirement applicable to that person.¹⁰ A

⁹ Matter of National Energy Marketers Ass’n v. New York State Pub. Serv. Comm’n, 33 N.Y.3d 336, 351, reargument denied, 33 N.Y.3d 1130 (2019); accord id. at 350; see PSL §§5(1)(b), 65(1), 66(5), 66-d(2); GBL §349-d(11), (12).

¹⁰ Sixteen NYCRR §8.1(a).

declaratory ruling may also be issued whenever the Commission determines it is warranted by the public interest.¹¹

Rehearing may be sought only on the grounds that the Commission committed an error of law or fact, or that new circumstances warrant a different determination.¹² A petition for rehearing must separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing.¹³

DISCUSSION

Submeterers and Submetering Service Providers

We start by reviewing the Metergy Petition on the question of whether the definitions of “energy broker” and “energy consultant” apply to submeterers and submetering service providers. We find as a general matter that submeterers and submetering service providers do not fall within the scope of either definition. However, as discussed below, the definitions of “energy consultant” and “energy broker” found in §1 of the UBP and UBP-DERS are based on the activities of an entity and person, not their title. Thus, any submeterer or submetering service provider may still be subject to PSL §66-t if they participate in activities that come within the purview of either definition.

A submeterer is defined as “[a]ny multi-unit residential premises owner or utility customer of record who purchases electricity for delivery by the utility to the premises and facilitates the sale or redistribution of such electricity for use by the premises occupants whose units are

¹¹ Sixteen NYCRR §8.1(b).

¹² Sixteen NYCRR §3.7(b).

¹³ Id.

separately metered and billed based on the measurement of electricity use in each occupant's unit."¹⁴ The definition of "energy broker" adopted in the June 2023 Order specifically states that brokers do not take title to any of the electricity sold.¹⁵ This is not the case with submeterers, who take title to the electricity they receive from the utility.

In the June 2023 Order, the Commission determined that the term "energy consultant" would apply 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."¹⁶ An individual or entity that acts only as a submeterer does not receive valuable consideration for acting on behalf of third parties or their residents to solicit, negotiate, or advise upon an energy contract. Submeterers take title to electricity and redistribute that electricity to a building's occupants based on the occupant's usage.

Submetering service providers, likewise, do not fit the definition of either an "energy broker" or "energy consultant." Submetering service providers act as the submeterer's agent by installing meters and reading meters, and sometimes also handling billing on behalf of a submeterer.¹⁷ Unlike an energy broker, an individual or entity acting solely as a submetering service provider does not assume the

¹⁴ Sixteen NYCRR §96.1(1).

¹⁵ June 2023 Order, pp. 3-4.

¹⁶ June 2023 Order, pp. 15-16.

¹⁷ Sixteen NYCRR §96.1(1).

contractual and legal responsibility for the sale of electric supply service and, unlike an energy consultant, a submeterer does not solicit, negotiate, or advise upon energy contracts.

Consequently, the Commission finds, as a general matter, that submeterers and submetering service providers, as defined by the Commission's regulations, are not subject to regulation as energy brokers or energy consultants under PSL §66-t. To be clear, the definitions of "energy broker" and "energy consultant" are activity based. A person or entity would not be considered an energy broker or energy consultant based solely on actions taken as a submeterer or submetering service provider. However, a submeterer or submetering service provider may be required to register as an energy broker or energy consultant if such individual or entity engages in additional activities that otherwise fall within the coverage of PSL §66-t. However, it should be noted that PSL §66-t(5)(a) specifically prohibits anyone having any interest in real property from receiving any rebate, consideration, or valuable thing from a broker or consultant as an inducement for, or as compensation for, energy-related business.

Applicability of Energy Broker and Energy Consultant Definitions

We next address the allegation in NYRCC's petition for rehearing that the definitions of "energy broker" and "energy consultant" found in §1 of the UBP are unconstitutionally vague because they apply to a broad range of activities and the Commission failed to draw a bright line that identifies certain entities that are required to comply. NYRCC appears to argue that the definitions are unconstitutionally vague, at least in part, based on the Commission's decision to use activity-based definitions, rather than subjecting to coverage under PSL §66-t the titles used in the retail energy industry for certain types

of personnel, such as contractors, vendors, and agents of an ESCO, telemarketers, or door-to-door marketers.¹⁸

In Indep. Ins. Agents & Brokers of N.Y., Inc. v. N.Y.S. Dep't of Fin. Services,¹⁹ the Court of Appeals ruled that a regulation is unconstitutionally vague if "it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement."²⁰ We disagree with NYRCC that the definitions of "energy broker" and "energy consultant" in §1 of the UBP are vague under this standard of review. As noted in the June 2023 Order, PSL §66-t identifies an entity as an energy broker or energy consultant based specifically on the covered entity's activities. For example, the term "energy broker" is defined to include any 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, and does not make retail energy sales to customers" or any 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 does not make retail energy sales to customers."²¹ The term "energy consultant" is also defined in terms of specific activities, applying to those entities that "act[] as broker in soliciting, negotiating or advising any electric or

¹⁸ NYRCC Petition, pp. 5-6.

¹⁹ 39 N.Y.3d 56, 63-64 (2022).

²⁰ Id., pp. 63-64.

²¹ June 2023 Order, Appendix A (emphasis added).

natural gas contract, or act[] as an agent in accepting any electric or natural gas contract on behalf of an ESCO.”²²

These activity-based definitions are taken directly from PSL §66-t. We find the definitions of “energy broker” and “energy consultant” to be sufficiently circumscribed based on the specific activities subject to coverage and consistent with the plain language of PSL §66-t. For these reasons, the Commission rules that the definitions of “energy broker” and “energy consultant” included in the June 2023 Order are not unconstitutionally vague.

We also disagree with the notion that a title-based approach to coverage under PSL §66-t would be preferable from a policy perspective. To the contrary, the Commission finds that using a title-based approach would cause confusion in the marketplace as certain types of actors may take on various roles in the retail energy marketplace and be assigned different responsibilities for the same title.

We next address NYRCC’s request for clarification and Family’s request for rehearing, reconsideration and/or clarification regarding whether contractors, vendors, and agents of registered brokers and consultants are exempt from registration requirements. NYRCC states that many vendors that market on behalf of ESCOs work as “1099 contractors” and are compensated on a contract basis. NYRCC maintains that these contractors “are often exclusive to a specific vendor, trained by that vendor, and required to indemnify the vendor in case of non-compliant enrollments.”²³ NYRCC believes this level of oversight justifies the exclusion of contractors from the registration requirement. Additionally, NYRCC states that

²² Id. (emphasis added).

²³ NYRCC Petition, p. 4.

requiring contractors to individually register is administratively inefficient and burdensome and is unlikely to lead to substantial improvements in the retail marketplace or increased customer protection. Family states that it makes sense to exempt individual contractors and agents of a broker or consultant from registration requirements as the conduct of these individuals would be covered under the registration of the broker or consultant. Family also notes that requiring individual contractors and agents to register could extend the requirement to so many individuals as to become difficult or impossible to administer and oversee.

The June 2023 Order states that "individual employees of a registered broker or consultant need not register because these entities will be covered under their employer's registration."²⁴ In other words, in the Commission's view, it is enough to have jurisdiction over the registered broker or consultant, and not their employees, to ensure compliance with PSL §66-t. The Commission also noted, in response to stakeholder comments requesting clarity about registration requirements for third parties that market on behalf of ESCOs, that "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.'" This reasoning applies in the same manner to contractors or agents of energy brokers or consultants.

Several commenters wrote in support of this request for rehearing, reconsideration and/or clarification, including Agway, APG, NRG, RESA, Constellation, Vistra, and Elite, arguing that the costs of registration would be unduly burdensome for

²⁴ June 2023 Order, p. 23.

contractors, vendors, and agents of registered brokers and consultants and that contractors are exclusive to a company and trained and subject to the same degree of oversight as employees. Vistra also states in its comments that determining the meaning of "employee" is unnecessarily complex and raises the question of which jurisdiction's laws must be used to evaluate whether an individual is an "employee."

The Commission disagrees that this aspect of the June 2023 was based on an error of law or fact. As a threshold issue, the laws of New York draw a distinction between whether a worker is considered an employee or an independent contractor. In accordance with existing caselaw, this determination is based on the degree of control exercised by an employer over the work and how it is performed and includes an examination of whether the worker is free to engage in other employment and is on the employer's payroll, among other considerations.²⁵ For example, in Bynog v. Cipriani Group, Inc., the Court of Appeals found that the plaintiffs, a group of professional banquet waiters hired to work at the defendant's banquet facility, were independent contractors of the defendant, and not employees.²⁶ The Court of Appeals noted that the plaintiffs worked at their own discretion, worked for other caterers, including the defendant's competitors, without restriction, and were under the exclusive control of the temporary service agency that interviewed, hired, trained, supervised, and compensated the plaintiffs and from whom the plaintiffs received federal tax form 1099.²⁷ In the event a question arises regarding whether a particular entity is an independent contractor or an employee of

²⁵ See Bynog v. Cipriani Group, Inc., 1 N.Y.3d 193, 198 (2003).

²⁶ Id., p. 199.

²⁷ Id., pp. 198-99.

a registered energy broker or consultant, or an employee of an exempted entity (i.e., an ESCO), the Commission will consider these factors in evaluating the relationship between the parties.

The Commission cannot base its regulation of brokers and consultants on unsupported and vague claims that contractors work for one entity and receive the same training as employees of the broker or consultant. There may be brokering and consulting businesses that do not require the same training of their contractors as they do with respect to their employees, and there are obviously different legal obligations that a business has with respect to its contractors as compared with its obligations to its employees. As the Commission appropriately found in the June 2023 Order, PSL §66-t is reasonably construed to provide the Commission with regulatory authority over contractors and agents who perform energy broker or energy consultant activities, as defined by PSL §66-t. The Commission determined that employees of registered brokers and consultants are not subject to registration requirements because employers exercise control over the work performed by their employees and consultants. By contrast, the Commission determined that non-employee entities that perform work for the registered broker or consultant must be subject to registration requirements because of the lack of control over such entities.

Agway argues in its comments that the June 2023 Order broadens the statutory definitions of "energy broker" and "energy consultant" and the traditional use of those terms to the point where it captures "ordinary marketers," which Agway states are employed for internet advertising, direct mail, and/or telemarketing. As made plain above and in the June 2023

Order,²⁸ the definitions of "energy broker" and "energy consultant" are based on a person's activities, not his/her title. As applied here, these definitions encompass those entities that directly solicit contracts from customers and not entities that engage solely in mailing advertisements or placing advertisements on the internet.

In its comments, RESA requests several clarifications regarding the aspect of the definition of "energy consultant" that subjects to registration a person or entity that directly facilitates an energy contract. Specifically, RESA requests clarification regarding customer referral programs, entities that endorse an ESCO or present that ESCO as its preferred supplier, and "entities/individuals handling inbound customer service and/or sales calls, and/or outbound calls related to topics such as customer service and inquiries, courtesy notifications, account status updates, and similar activities."²⁹ Vistra, through its comments, also requests that customer referral programs and customer service representatives be exempt from registration.

With respect to RESA's first request for clarification, an end-use gas or electric customer that participates in a customer referral program, and otherwise does not act as an energy broker or consultant, would not be required to register under PSL §66-t. This general clarification, however, should not be interpreted to allow an energy broker or energy consultant to simply sign up with an ESCO or DER supplier as an end-use customer in order to avoid registration by claiming that their services fall within an exempt customer referral program. The Commission is unable to address RESA's

²⁸ June 2023 Order, p. 17.

²⁹ RESA Comments (filed November 6, 2023), p. 11.

second request regarding an entity that endorses an ESCO or presents an ESCO as its preferred supplier because it is unclear from the request whether such entity would be taking any actions to facilitate a contract. To the extent RESA's request relates to an entity that is compensated solely for promoting or advertising an ESCO, as stated above, such activities would not require the entity to register. With respect to RESA's final request related to the myriad of basic functions performed apparently by a person handling phone calls on behalf of an ESCO, so long as such person does not receive valuable consideration for soliciting, negotiating, or providing advice related to energy contracts, he/she is not required to register.

In their respective comments, RESA and Vistra also request clarification regarding whether a non-ESCO third party that performs a warranty service that is bundled with commodity offered by an ESCO would be required to register as an energy broker or consultant under the "other services" clause of the energy broker definition. Under the specific facts presented, the non-ESCO third party providing only a warranty service would not be subject to registration requirements even when such service is associated with a bundled commodity sold by an ESCO. The Commission bases this finding on its presumption that the non-ESCO third party would not be assuming the contractual and legal responsibility for the sale of those services to the end-use retail customer, and would not otherwise be soliciting, negotiating, or providing advice with respect to an electric or natural gas contract or acting as an agent in accepting such a contract on behalf of an ESCO.

Vistra also requests in its comments "confirmation that where the product being marketed is not an ESCO's commodity service and is not bundled with an ESCO's commodity service, there is not an 'electric or natural gas contract', and

therefore registration as an energy consultant is not required.”³⁰ The Commission is unable to provide any clarity with respect to this request because it lacks specificity with respect to the type of product being marketed; therefore, the Commission is unable to determine whether or not this product fits within the “other services” clause of the energy broker definition. In the June 2023 Order, the Commission found that the term “other services” within the definition of “energy broker” “applies to energy-related, value-added services bundled with electric and/or gas commodity supply services provided by ESCOs.”³¹ Accordingly, an entity that assumes the contractual or legal responsibility for the sale of energy-related, value-added services bundled with electric and/or gas commodity supply services provided by an ESCO would be required to register as an energy broker.

In its comments, Alliance provides a summary of its history and activities, including that it entered into a contract with Constellation for Constellation to provide electric supply to Alliance participants in Washington, D.C. Alliance also notes that its participants later used this single-supplier contract with Constellation to purchase electric supply for property located outside Washington, D.C., including in New York State. According to Alliance, Constellation is responsible for all marketing, sales, supply and customer contact and the contract is between the supplier and the local customer. Alliance states that there is no membership fee to purchase electric supply pursuant to the contract, nor does Alliance receive compensation for the use of the contract form. Alliance states that it cannot properly be defined as an energy

³⁰ Vistra comments, pp. 3-4.

³¹ June 2023 Order, p. 15.

consultant because it does not solicit, negotiate, or advise on an electric or natural gas contract, and it cannot be considered an energy broker because it does not perform energy management or procurement functions.

It is clear based on its comments that Alliance operates as an energy broker in other states. Nevertheless, if Alliance members use the precise form contract that was originally negotiated by Alliance for use in other states to procure energy supply for properties owned by Alliance members in New York, and Alliance receives nothing of value as a result of the transactions of its member, it appears likely that Alliance would not be subject to registration requirements. However, at this time, the Commission is unable to make a blanket or conclusive judgment regarding utilization of Alliance's form service agreements in New York absent a full understanding of Alliance's relationship to its members.

Compensation Disclosure

NRG asserts in its petition for rehearing that the June 2023 Order exceeds the scope of the Commission's authority granted under PSL §66-t by requiring disclosure of compensation paid directly to third-party vendors who engage in brokering or consulting activities as defined by PSL §66-t. NRG bases this part of its petition on the argument that PSL §66-t(4)(b) requires ESCOs to disclose compensation when collected "on behalf of the energy broker or energy consultant" but does not expressly require the disclosure of compensation paid directly to energy brokers or energy consultants. Agway submitted comments supporting this argument. In accordance with PSL §66-t(4)(b), the June 2023 Order requires ESCOs and DER suppliers to disclose compensation that they collect on behalf of a broker or consultant on the Customer Disclosure Statement. Additionally, as noted in NRG's petition, the Commission is also requiring

ESCOs and DER suppliers to include on the Customer Disclosure Statement any other compensation that such entities pay directly to an energy broker or energy consultant. The Commission stated that this disclosure must include "any flat fees, commissions, bonuses, or non-financial compensation, including but not limited to prizes or event tickets."³²

The Commission disagrees with NRG that the Commission lacks authority under PSL §66-t to require ESCOs and DER suppliers to include on the Customer Disclosure Statement compensation that they pay directly to energy brokers and consultants. Public Service Law §66-t(4)(a) requires energy brokers and energy consultants "to disclose their form and amount of compensation to customers via a conspicuous statement on any such contract or agreement" with the customer. As noted, PSL §66-t(4)(b) requires the ESCO to provide a similar disclosure on the Customer Disclosure Statement when it "collects broker compensation on behalf of an energy broker or energy consultant." In most instances, the contract between the ESCO and the customer is the only contract that will exist in relation to the transaction facilitated by the broker or consultant, as many brokers or consultants do not enter into a contractual relationship with the customer. Additionally, the broker or consultant that works in conjunction with an ESCO is most likely to receive compensation that is either collected by an ESCO on behalf of the broker or consultant, or is paid by the ESCO to the broker or consultant.

By its terms and by its structure PSL §66-t(4)(a) and (b) evinces a legislative intent to ensure that all commercial parties subject to an agreement with an ESCO or DER provider disclose the exchange of compensation among them as a means to

³² June 2023 Order, p. 42.

provide a straightforward and accurate disclosure of compensation to the customer so that the customer can then properly evaluate such parties' motivations in recommending an energy supplier. Additionally, the disclosure requirements under PSL §66-t(4) are self-effectuating in that they do not require the PSC to adopt regulations to make them effective. Section 66-t otherwise provides the Commission with broad regulatory authority to effectuate its purposes.³³ Finally, PSL §4(1) provides the Commission with broad power "necessary or proper to enable it to carry out the purposes of this chapter." Taken together, we find that these provisions provide the Commission with ample authority to require ESCOs and DER suppliers to disclose compensation provided directly to energy brokers and consultants.

We also note that the Commission has broad authority beyond that provided under PSL §66-t to impose a requirement on ESCOs to disclose any compensation they pay to brokers or consultants. In Matter of National Energy Marketers Ass'n v. N.Y.S. Pub. Serv. Comm'n,³⁴ the Court of Appeals confirmed that the Commission has broad authority to condition an ESCO's eligibility to access utility distribution systems on such terms and conditions that the Commission determines to be just and

³³ See, e.g., PSL §66-t(3)(b) (authorizing Commission to "refuse to register or revoke a registration, if in the Commission's judgment, the energy broker or energy consultant has given cause for the revocation or suspension of operations").

³⁴ 33 N.Y.3d 336 (2019).

reasonable.³⁵ While PSL §66-t expressly requires ESCOs to disclose the compensation that the ESCO collects on behalf of their brokers and consultants, the Commission's authority under PSL §§5(1)(b), 65(1), 66(5), and 66-d(2) provides an additional basis upon which to require ESCOs to disclose all other compensation it pays to the broker or consultant. Thus, the Commission determines that, in addition to the authority provided by PSL §66-t, the disclosure of compensation is just, appropriate, and reasonable and will further transparency and competition.

NRG raises another argument in its petition related to the aspect of the June 2023 Order requiring each ESCO to disclose any other compensation it pays directly to a broker or consultant, in addition to disclosing fees collected on behalf of brokers or consultants. NRG states that its rate structures are varied and complex and it is unclear whether this requirement would apply to the compensation paid to a third-party vendor or the vendor's payment to an individual employee or contractor.

The Commission disagrees that this provision of the June 2023 is unclear. The June 2023 Order states that an ESCO is required to include on the Customer Disclosure Statement any other compensation it pays directly to a broker or consultant. The June 2023 Order further states "[t]here is no obligation for

³⁵ See id. at 350 ("a necessary corollary of the [[Commission's] authority to regulate utilities' delivery of ESCOs' energy is that the [Commission] has the authority to determine the terms and conditions under which ESCOs are eligible to purchase delivery services - for both gas and electricity - from utilities."); see also id. at 351 (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"); GBL §349-d(11), (12).

ESCOs or DER suppliers to disclose broker or consultant compensation when the compensation is being paid by a third party.”³⁶ Thus, under a plain reading, an ESCO that provides any compensation to a registered broker or consultant must disclose that compensation in accordance with the June 2023 Order. There is no obligation that an ESCO disclose payments made by a third party. Brokers and consultants may work with ESCOs to include on the Customer Disclosure Statement any other compensation that the broker or consultant is obligated to disclose that is not collected by the ESCO or paid by the ESCO.

For its part, Family asserts in its petition for rehearing that the June 2023 Order inappropriately requires the disclosure of specific payments made by an ESCO to a broker or consultant regarding bonuses, prizes, or dinners, or fees paid by an ESCO to a broker or consultant on the grounds that disclosure of such payments or fees do not provide any value to the customer. According to Family, fees paid by an ESCO to a broker or consultant per enrollment are a cost of business that is embedded in the ESCO’s rate and a fee per unit of energy may be paid in a range, depending on a number of variables. Family submits the following compensation disclosure should suffice to satisfy the Commission’s compensation disclosure requirements: “ABC ESCO is working with an energy broker/energy consultant (as applicable) to make this sales solicitation, and the energy broker/energy consultant will receive financial benefits associated with the sale of products and services to customers.” Family asserts that disclosure of any assistance provided by an entity to a broker or consultant in obtaining a letter of credit and compensation received as a fee per enrollment should be covered by such a general disclosure statement. Additionally,

³⁶ June 2023 Order, p. 42.

Family states that compensation rates should be specific to the electricity or natural gas product to which the disclosure pertains and not a bundled rate.

The Commission denies this part of Family's petition finding that it fails to raise an error of law or fact that warrants rehearing on the issues noted. Public Service Law §66-t requires disclosure of "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 customer."³⁷ As the Commission noted in the June 2023 Order, "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 marketplace."³⁸ For these reasons, the June 2023 Order required that any compensation provided to an energy broker or consultant, including prizes, bonuses, or tickets to events, must be disclosed to the customer, regardless of whether such compensation is embedded in the customer's payment for services.

The Commission does not agree with Family's suggestion that a compensation disclosure should be specific to an electricity or natural gas product and not a bundled rate. Disclosures apply to the entire product for which the customer is signing up. If a customer is enrolling in a bundled commodity product, the compensation associated with enrolling in that product must be disclosed. Compensation disclosure is not limited to just the commodity portion of the product.

³⁷ PSL §66-t(1) (a).

³⁸ June 2023 Order, p. 29.

Finally, the general statement of disclosure offered as an example by Family would not, on its own, satisfy disclosure requirements. Public Service Law §66-t(4)(a) requires brokers and consultants to disclose the "form and amount" of their compensation and PSL §66-t(4)(b) requires ESCOs to disclose the "amount and method" of the compensation the ESCO collects on behalf of the broker or consultant. The Commission otherwise declined to adopt a standard form for compensation disclosure because of the wide range of business models that may be impacted by the provisions of PSL §66-t.³⁹ For example, although finding that disclosing compensation as a fee-per-unit of energy, a recurring fee, or a flat fee all constituted adequate methods of disclosure, the Commission found that "any other compensation given for brokering or consulting services, including any commissions, bonuses, or non-financial compensation" must also be disclosed to customers.⁴⁰ The June 2023 Order specifically states that, "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, or incentives in addition to the fee listed."⁴¹

Based on the requests made in the petitions and comments, the Commission finds it necessary to provide additional guidance to ensure that entities subject to the compensation disclosure requirements understand their compliance obligations and do not seek to conceal compensation behind a general disclosure statement. Accordingly, if a broker or consultant receives financial compensation, the disclosure shall

³⁹ June 2023 Order, p. 28.

⁴⁰ Id.

⁴¹ Id. (emphasis added).

include either the dollar amount or, if the dollar amount is not known at the time of disclosure, the disclosure shall include an explanation of the formula that will be used to calculate the financial compensation for the broker or consultant. The same requirements apply to any additional fees that may be applied to that transaction in the future. Thus, if the dollar amount and frequency of future fees is known, that information shall be disclosed, and, if the dollar amount and frequency are not known, the formula that would be used to calculate future payments shall be disclosed. For any non-financial compensation, if the value of such compensation is known then a description of the non-financial compensation and the dollar value of the compensation shall be disclosed. If the dollar value of non-financial compensation is not known at the time of disclosure, then a description of the non-financial compensation will suffice. Disclosures should also identify the entity paying the compensation to the broker or consultant.

In its petition, Family also requests clarification regarding the form of document on which compensation disclosure must be made. Family claims that, although the June 2023 Order states that disclosure should be made on the Customer Disclosure Statement, the modifications to UBP section 5.B.4.k. indicate that disclosure should be made on the sales agreement. The Commission does not recognize any contradictions in this regard between the June 2023 Order and the UBP modifications. The Customer Disclosure Statement is a part of the sales agreement. Not only do the UBP modifications require compensation disclosure to be made as part of the sales agreement in UBP section 5.B.4.k., UBP section 5, attachment 4 was modified to indicate that compensation disclosure must be included on the Customer Disclosure Statement. To be clear, the compensation disclosure must be included on the Customer Disclosure

Statement. No ESCO should misinterpret the UBP modifications to allow for the compensation disclosure to be included elsewhere in the sales agreement.

In its petition, Family requests that a safe harbor be granted to ESCOs regarding their efforts to comply with compensation disclosure requirements prior to their review by Staff in annual ESCO filings. RESA made this same request in its comments. Both Family and RESA assert that such safe harbor is necessary because ESCOs will be exposed to potential sanctions if Staff determines the disclosure was not sufficient, even if the ESCO made a good faith effort to comply with disclosure requirements. The Commission does not agree that a safe harbor is necessary. ESCOs will be expected to comply with compensation disclosure requirements between the time when the UBP modifications take effect and the annual filings, and will not be granted safe harbor if their statements are found to be noncompliant prior to being reviewed by Staff in ESCO annual filings. The June 2023 Order, as well as this Order, provide adequate guidance with respect to this issue.

Family also seeks clarification regarding the question added to the third-party verification (TPV) provisions of UBP section 5, attachment 1, paragraph A, requiring verification that a broker or consultant disclosed their compensation to the customer. Family notes that a customer may not have been provided with a Customer Disclosure Statement by an ESCO or its agent when a TPV is conducted, as UBP section 5, attachment 1, paragraph B, allows for such statement to be provided up to three business days after a telephone agreement and TPV occurs. RESA also submitted comments claiming that it is unclear whether the ESCO or the broker/consultant is obligated to perform the TPV.

UBP section 5, attachment 1, paragraph A, requires voice-recorded verification to enter into a telephonic or door-to-door agreement with a customer to initiate service and begin enrollment. This same provision provides a series of questions that must be asked to a customer as a part of the TPV to substantiate the customer's agreement to an ESCO's offer. The customer disclosure statement and sales agreement must be provided to the customer within three business days after the TPV occurs.⁴² In the June 2023 Order, the Commission found appropriate the addition of a question requiring customer acknowledgement of broker or consultant compensation "to ensure that a customer is aware of all the charges that may be imposed upon them through the agreement."⁴³ Accordingly, for those sales that were facilitated by an energy broker or energy consultant, the Commission modified the UBP to require that the customer be asked: "Did the Energy Broker or Energy Consultant disclose their compensation?"⁴⁴

The Commission agrees with the concerns raised in Family's petition and RESA's comments regarding the timing of the TPV and when a customer would receive the customer disclosure statement that resulted from a telephone agreement. Additionally, the Commission finds that the inclusion of such a question in TPV requirements is not essential to the Commission's enforcement of compensation disclosure requirements and, without context, such a question may not elicit an accurate answer from customers on whether compensation was properly disclosed as customers are unlikely to have knowledge of compensation disclosure requirements. Accordingly, the

⁴² UBP §5, Attachment 1(B).

⁴³ June 2023 Order, p. 30.

⁴⁴ June 2023 Order, Appendix A, pp. 2-3.

Commission grants Family's petition to the extent of modifying the UBP to remove this question from TPV requirements.

Prohibition on Payments to Unregistered Brokers and Consultants

NRG and Family, through their petitions, and RESA, Constellation, and Elite, through their comments, raise concerns about whether ESCOs would be prohibited from making payments to unregistered brokers and consultants pursuant to contracts that were entered into prior to the effective date of the UBP modifications. NRG in its petition, and RESA in its comments, submit that prohibiting such payments would constitute an impermissible retroactive application of the law. Family in its petition contends that such a prohibition constitutes a violation of the Contract Clause and the Takings Clause of the U.S. Constitution.⁴⁵ These parties also question whether payment would be prohibited to brokers and consultants that had a valid registration at the time a contract is executed but then subsequently either allowed their registration to lapse or had their registration revoked by the Commission.

The Commission grants, in part, the aspect of the petitions filed by NRG and Family seeking clarification regarding the prohibition on unregistered brokers or consultants accepting compensation. Specifically, NRG and Family object to the Commission's initial determination that the prohibition against unregistered brokers or consultants accepting compensation could apply to compensation provided under contracts signed before the effective date of the UBP amendments. Public Service Law §66-t(2)(c) provides that "[n]o person shall accept any commission, service fee, brokerage or

⁴⁵ See U.S. Const. art. I, §10, cl. 1; U.S. Const. amend. V. Family also references N.Y. Const. art. 1, §7. As part of its petition, Family does not present existing contracts to support these theories and contentions thus precluding the opportunity to address specific contracts.

other valuable consideration for selling, soliciting or negotiating an energy contract in this state if that person is required to be registered under this section and is not so registered, unless stated otherwise herein." As noted above, the definitions of "energy broker" and "energy consultant" are activity-based. Individuals or entities must be registered under PSL §66-t if they perform the activities that would qualify them as either an energy broker or energy consultant. The June 2023 Order made clear that the appropriate analysis regarding this issue is whether or not the entity subject to coverage under PSL §66-t performs a covered action subsequent to the effective date of these requirements.

Under the June 2023 Order, the Commission determined that the existence of a contract for brokering or consulting services that was executed prior to that registration deadline would not permit an unregistered broker or consultant to receive compensation for any energy brokering or consulting services performed after that effective date, irrespective of the contract arrangement between the ESCO and energy broker or consultant. As part of our review in this Order, the Commission acknowledges here a potential scenario whereby (1) an ESCO might have entered into a contract prior to the registration deadline with an individual whose activities are covered under the definitions of either "energy broker" or "energy consultant," and (2) the contract may have authorized such individual to obtain compensation associated with signing up a customer on behalf of the ESCO or providing some related service, and such consideration might be envisioned as continuing beyond the registration deadline. We understand the question posed in the petitions as concerning whether the Commission would allow the ESCO under these circumstances to provide, and for such individual to receive, compensation after the registration

deadline if the individual does not register as an energy broker or energy consultant by the deadline.

Upon further review of such specific circumstances, the Commission, at this time, does not interpret §66-t to allow an ESCO to continue to provide compensation under a contract to either an unregistered energy broker or energy consultant where the activities of a "energy broker" or "energy consultant" are undertaken after the registration deadline, even where a contract covering such activities was executed prior to that registration deadline. The Commission bases this determination on the text of PSL §66-t(2)(c), which prohibits such individual from accepting "any commission, service fee, brokerage or other valuable consideration for selling, soliciting or negotiating an energy contract in this state if that person is required to be registered under this section and is not so registered." Under this provision, the prohibition against receiving valuable consideration is tied back to the individual broker or consultant undertaking the specified activities noted after the registration deadline.

Based on this interpretation, the Commission finds that an unregistered "energy broker" or "energy consultant" may continue to receive payments under a contract in connection with covered activities, even after the registration deadline, so long as the payments/compensation are tied to an activity undertaken prior to the deadline. To be clear, PSL §66-t(2)(c) otherwise prohibits an unregistered broker or consultant (1) from receiving compensation with respect to any contracts that were executed after the effective date of these requirements (i.e., the registration deadline), and (2) from undertaking any covered activities after the registration deadline, even if the contract was executed prior to the deadline.

The Commission rejects Family's contention that the prohibition against unregistered brokers or consultants accepting compensation violates the Contract Clause of the U.S. Constitution. Contrary to Family's contention, Contracts Clause jurisprudence confirms that legislatures retain broad power to adopt generally applicable laws without being concerned that private contracts will be impaired or entirely frustrated as a result.⁴⁶ Supreme Court caselaw has identified various factors to assist in the determination of whether a state law that affects pre-existing contracts may be considered to be violative of the Contract Clause. As an initial matter, an examination must be made to determine if the state law at issue has "operated as a substantial impairment of a contractual relationship," by considering, among other things, the extent to which the law undermines the contractual bargain or interferes with a party's reasonable expectations.⁴⁷ This part of the analysis includes a consideration of whether, and the extent to which, the industry in question has been previously regulated by the state.⁴⁸ If a determination is made that the state law constitutes a substantial impairment of an existing contract, the next step of the review requires consideration of "whether

⁴⁶ Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 436-438 (1934) (citing cases).

⁴⁷ See generally Sveen v. Melin, 584 U.S. 811, 819 (2018). This initial inquiry contains "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial" General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992); Am. Econ. Ins. Co. v. State, 30 N.Y.3d 136, 150 (2017).

⁴⁸ Energy Reserves Group Inc., v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983) (upholding price controls in gas markets against a contract clause challenge).

the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose.”⁴⁹

Based on this standard of review, the Commission finds there to be no substantial impairment of any contractual relationship had between ESCOs and their brokers and consultants. The brokers and consultants subject to coverage under PSL §66-t and the June 2023 Order simply have to register with the Commission to provide a means to receive compensation pursuant to a retail energy contract. This registration requirement simply cannot be construed to substantially impact existing contracts. Additionally, the retail energy market has for several years been closely regulated in New York and in other states. In fact, several states have already adopted registration or licensing requirements that are similar to those required under PSL §66-t and the June 2023 Order.⁵⁰ It would thus be unreasonable for energy brokers, energy consultants, real estate entities, or ESCOs to enter into contractual relationships related to ESCO-based products based on an objectively realistic or legitimate belief that the regulatory landscape would remain unchanged in New York or that ESCOs and their agents would not face additional government oversight, disclosure, regulation, or restriction. At the least, one would reasonably expect such contracts to include a change of law provision that recognizes the possibility that the regulatory framework may change going forward and considers the types of regulatory changes that could affect the contract. Moreover, the Commission’s determination above that unregistered energy

⁴⁹ Id. at 411, 417 (internal quotation marks omitted); see also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 505 (1987).

⁵⁰ See Tex. Pub. Util. Regul. Act §39.3555; 220 Code Mass. Regs. §11.05; Conn. Gen. Stat. §16-245.

brokers and/or energy consultants may continue to receive compensation from an ESCO for activities undertaken prior to the registration deadline obviates any argument that §66-t applies retroactively to activities that were allowed absent registration prior to the deadline.

We note that the legislature, through passage of PSL §66-t, and the Commission, through issuance of the June 2023 Order, seek to advance a legitimate public purpose through the regulation of energy brokers and consultants. Prohibiting payments to unregistered brokers and consultants will remove the incentive for unscrupulous or noncompliant actors to continue operating in New York State, ensuring that any remaining brokers or consultants are making the proper compensation disclosures, increasing market transparency and cost comparisons, refraining from impermissible rebates, and following the Commission's rules for interacting with customers. The prohibition combined with various enforcement remedies (including, but not limited to, PSL §66-t(2)(a)(ii), (3)(b), (5)) will deter unscrupulous conduct and disgorge impermissible financial gains.

The Commission also rejects Family's claim that the prohibition on payments to unregistered brokers and consultants constitutes a regulatory taking in violation of the Fifth Amendment of the U.S. Constitution because of its purported impact on Family's alleged property interest in its contractual relationships with brokers or consultants. The Supreme Court has long held that "the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking."⁵¹ A three factor test is applied to determine whether adoption of a regulation has the effect of constituting a taking in violation of the Fifth

⁵¹ See generally Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224 (1986).

Amendment of the U.S. Constitution: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."⁵² On the first component of the test, Family fails in its petition to identify a specific economic impact associated with the prohibition on payments to unregistered brokers and consultants, making only a conclusory statement that the June 2023 Order might lead Family to discontinue or breach its contractual relationships with unregistered brokers or consultants.

The June 2023 Order does not compel contract termination and, indeed, the Commission is not prohibiting compensation for activities undertaken prior to the effective date of the requirements at issue here. As already noted, the Order requires the simple act of an energy broker or energy consultant filling out a registration application, providing proof of financial accountability, and furnishing an annual registration fee to be authorized to be compensated for services performed after the effective date of these requirements. Family's petition is otherwise unclear regarding how an unregistered energy broker or consultant would be harmed regarding activities to be undertaken subsequent to the effective date. However, it is difficult to see how an unregistered energy broker or consultant would have any investment-backed expectations regarding services that such individual would be prohibited from undertaking in New York. Indeed, through this Order, the Commission will have extended the original registration deadline from August 31, 2023, to 60 days after issuance of this Order, providing ample time for

⁵² Id. at 224-225.

ESCOs and energy brokers/consultants to take necessary steps to ameliorate any business-related expectations should they decide not to register. For reasons already noted above, the governmental action advances legitimate public policy objectives.

In its petition, NRG also argues that PSL §66-t does not provide the Commission with authority to prohibit ESCOs from making payments to unregistered brokers or consultants for services associated with contracts entered into before the amendments to the UBP become effective on the grounds that the statute did not indicate that such prohibition may be applied retroactively. As noted above, the Commission, through this Order, is granting relief regarding the application of the compensation prohibition to activities that pre-exist the registration deadline. The prohibition would not apply to such activities. To reiterate, the unregistered energy broker and/or consultant would otherwise be prohibited from providing any services related to energy contracts subsequent to the registration deadline. For example, if a contract entered into prior to the deadline by an ESCO and broker provided the broker with a form of compensation that continued past the deadline (e.g., the broker receives a portion of the customer's monthly payment to the ESCO for the duration of the ESCO service), the broker would be allowed to continue to be provided with that compensation after the deadline if he/she failed to register by the deadline. However, the unregistered broker in this example would be prohibited from undertaking any broker-related activities in New York subsequent to the effective date of these requirements.

For purposes of clarity, the prohibition on compensation applies to any contractual arrangement entered into by an energy broker or energy consultant after the registration

deadline. The statute is clear that no unregistered person "shall accept any commission, service fee, brokerage or other valuable consideration for selling, soliciting or negotiating an energy contract in this state."⁵³ Although the Commission is extending the registration deadline until 60 days after the effective date of this Order, the statute became effective on June 21, 2023.⁵⁴ The legislative structure and intent was to provide time between its enactment and effective date only for the Commission to adopt regulations to effectuate the prohibition against unregistered persons accepting consideration related to selling, soliciting or negotiating energy contracts. In this regard, the Commission is simply effectuating the plain language of and intent underlying the statute.

Family, in its petition, and RESA, through comments, ask for clarification concerning the timing of registration. Specifically, they ask whether a broker or consultant must be registered on the date a contract is executed or instead on the date of enrollment of the account by the ESCO with the utility. The June 2023 Order states that "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."⁵⁵ The Commission was thus clear that a broker or consultant must be registered on the date the contract is executed for the enrollment to be considered valid.

Family also seeks clarification of whether an ESCO can renew a contract with a customer if the enrollment was facilitated by a broker or consultant that is no longer

⁵³ PSL §66-t(2)(c).

⁵⁴ See L.2022, c. 787, §2.

⁵⁵ June 2023 Order, p. 44.

registered. The June 2023 Order did not specifically address contract renewals for customers that were enrolled by a broker or consultant that is no longer registered. Nevertheless, consistent with other elements of the June 2023 Order, the Commission finds that it is permissible for an ESCO to renew a contract with a customer if the broker or consultant associated with the enrollment is no longer registered.

"Doing Business" with Unregistered Energy Brokers or Energy Consultants

NRG asks in its petition for clarification of the prohibition on ESCO's doing business with unregistered energy brokers and consultants to the extent that such entities serve different functions within the retail energy market. Without delving deeply into such a hypothetical question, suffice it to say that the types of activities subject to registration are those that fall within the definitions of "energy broker" and "energy consultant" established in the June 2023 Order. If the activities do not fall within the definitions, then the individual or entity does not have to register with the Commission as an energy broker or consultant. Conversely, if, after the registration date, the conduct does fall within the scope of energy broker or consultant activity as defined by PSL §66-t, then ESCOs must ensure that they are dealing with a broker or consultant that has registered with the Commission and whose registration remains in good standing. Regarding what is meant by "doing business," the Commission clarifies that this means contracting with an energy broker or consultant to perform any of the activities described in PSL §66-t(1)(c) and (d).

Family asks for clarification concerning the timing when an ESCO must cease doing business with a broker or consultant that has failed to register as such with the Commission. While the June 2023 Order did not specifically address this issue, in accordance with PSL §66-t and the June

2023 Order, the date on which the energy broker and energy consultant is no longer allowed to perform services in New York is the day such entity's registration either lapses by operation of law or is revoked by the Commission. Accordingly, the date on which an ESCO must cease doing business with an unregistered broker or consultant is the date the entity's registration lapses or is revoked. Since the registration period will run annually from September 1 to August 31 each year, the date a registration lapses would occur on September 1.⁵⁶

Family references a period between when a broker or consultant submits its annual renewal and when Staff determines the registration should be renewed or denied and asks whether the ESCO can continue doing business with the broker or consultant during this period. The June 2023 Order allowed for an entity that submitted a registration package by the initial compliance deadline to continue operating while Staff completed its review of registration packages unless the entity receives a letter from Staff rejecting its application.⁵⁷ Only those brokers or consultants that submit initial registration packages within 60 days of the effective date of this Order may continue to operate during the initial Staff review of registration packages. If brokers or consultants have submitted their initial application within 60 days of the effective date of this Order, then ESCOs may continue to do business with these brokers or consultants while Staff reviews registration applications. An ESCO cannot do business with a broker or consultant who submits an initial registration package after the effective date

⁵⁶ As discussed further below, initial registration applications will be due within 60 days of the effective date of this Order, with the annual compliance period running from September 1 to August 31 beginning in 2025.

⁵⁷ June 2023 Order, p. 33.

of these requirements until that entity's registration is approved.

Verifying Registration of Energy Brokers and Energy Consultants

In their petitions, NRG and Family raise concerns about relying on the list of registered energy brokers and energy consultants maintained on the Department's website, stating that there are no safeguards under the June 2023 Order that will prevent an enforcement action against the ESCO if it relies on the Department's list and the name of a broker or consultant included on the registration list turns out to be unregistered. Family suggests that the Department send an email to all ESCOs to notify the industry of changes to a broker's or consultant's registration status.

The list of registered energy brokers and consultants will be generated automatically based on registrations and revocations submitted in the docket for Matter No. 23-01227. ESCOs and DER suppliers will be required to monitor the list generated to ensure any broker or consultant they are doing business with is registered. If ESCOs and DER suppliers subscribe to receive notice of filings in Matter No. 23-01227 then they will receive a notification when a registration is revoked. ESCOs and DER suppliers are also encouraged to adopt a requirement that brokers and consultants provide proof of registration to the ESCO or DER supplier and that the registration remains in good standing. The Commission finds that these mechanisms provide appropriate notice to ESCOs regarding energy brokers and consultants that are properly registered.

Compliance with SAPA

NYRCC and NRG argue in their petitions that the Commission violated SAPA by failing to include contractors, vendors, agents, and third-party vendors of ESCOs as entities

that would be subject to registration requirements in its SAPA notice of proposed rulemaking. Agway and APG wrote in their comments that they support this contention.

The Commission rejects this contention. SAPA requires an agency to submit a notice of proposed rulemaking to the Secretary of State for publication in the State Register 60 days prior to adoption and to afford the public an opportunity to submit comments on the proposed rule.⁵⁸ The notice must contain a description of the subject, purpose, and substance of the rule and the full text of the proposed rule may be posted on the agency's website.⁵⁹ The crux of the argument made by NYRCC and NRG is that the Commission violated SAPA by failing in the notice of proposed rulemaking to include the terms "contractors," "vendors," "agents," and "third-party vendors" of ESCOs as entities that would be subsumed within the definitions of "energy broker" and "energy consultant." As noted throughout the June 2023 Order and this Order, PSL §66-t provided activity-based definitions of the terms "energy broker" and "energy consultant." Each ESCO likely uses a variety of different titles for the individuals and entities that serve as energy brokers and consultants. Those titles may provide some relevance but are not dispositive. Consistent with this approach, the Commission's notice of proposed rulemaking stated that the proposed modifications to the UBP and UBP-DERS would apply to any entity whose actions fall within the definition of either "energy broker" or "energy consultant."⁶⁰ That the Commission did not specify whether specific industry-based titles triggered the definitions is irrelevant.

⁵⁸ SAPA §202(1)(a).

⁵⁹ Id.

⁶⁰ XLV N.Y. Reg. 29 (March 22, 2023).

NYRCC and NRG also argue in their petitions that the Commission violated SAPA by allegedly failing to provide specific reference in the notice of proposed rulemaking that brokers and consultants would be required to retain two years of independent third-party verification records. The Commission disagrees with this argument on the grounds that the full text of the Staff Proposal, along with the amendments to the UBP and UBP-DERS, expressly included this requirement.

NRG next argues that the Commission violated SAPA by allegedly failing to provide proper notice that ESCOs would be required to disclose third-party vendor compensation unrelated to brokering of customer contracts. In essence, NRG argues that this requirement constitutes a "substantial revision" to a proposed rule, which cannot be adopted absent a new notice of proposed rulemaking. The Commission disagrees that this disclosure requirement constitutes a "substantial revision," finding it to be a logical outgrowth of the Staff Proposal.

SAPA requires a notice of revised rulemaking to be submitted when there has been a substantial revision to a proposed rule.⁶¹ A "substantial revision" means "any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect."⁶² The purpose of this requirement is "to provide the public with notice so that they may comment upon proposed changes" and not to "delay administrative action by requiring administrative agencies to start anew each time minor changes in regulations are made as a result of the outcome of public hearings and comments."⁶³ In determining whether a revision is

⁶¹ SAPA §202(4-a).

⁶² SAPA §102(9).

⁶³ Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Jorling, 152 Misc.2d 405, 409 (Sup. Ct., Albany County 1991).

substantial, the revision must be examined within the context of the entire proposed regulation.⁶⁴ The test for whether a final rule is considered a logical outgrowth of a proposed rule is “whether the agency’s notice would fairly apprise interested persons of the subjects and issues of the rulemaking.”⁶⁵

The Staff Proposal recommended that compensation disclosure “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.”⁶⁶ The Staff Proposal stated that, “[t]o the extent that an energy broker or consultant has a direct contractual relationship with customers” the form and amount of compensation should be required on the first page of any such contract or agreement.⁶⁷ Additionally, Staff proposed that, if an ESCO collects compensation on behalf of a broker or consultant, such compensation shall be added to the Customer Disclosure Statement.⁶⁸ The Commission adopted these recommendations in its June 2023 Order and also required the ESCO to disclose any other compensation that it pays to the broker or consultant directly. Because most brokers and consultants that work with ESCOs do not have a contract with the customer, the most direct and effective method of making the customer aware of such disclosure is to place it on the contract between the ESCO and the customer. ESCOs have the means to make

⁶⁴ Id.

⁶⁵ National Black Media Coalition v. FCC, 822 F.2d 277, 283 (2d Cir. 1987) (internal citations omitted); see also Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams, 131 A.D.2d 205 (3d Dept. 1987), aff'd 72 N.Y.2d 137 (1988).

⁶⁶ Staff Proposal, p. 8.

⁶⁷ Id., p. 7.

⁶⁸ Id.

such disclosures as they will have direct knowledge of the compensation they are paying to a broker or consultant.

The Staff Proposal made clear that brokers and consultants would have to disclose all compensation received for their work and that ESCOs would be involved in placing compensation disclosures on contracts between the ESCO and customer. Indeed, NRG acknowledged in its comments on the Staff Proposal that it would be impractical for an ESCO to disclose all things of value given to the broker or consultant for its work unless they "are paid directly by the ESCO on behalf of the customer"; otherwise, "the ESCO would have no way of disclosing them."⁶⁹ Other comments submitted on the Staff Proposal sought clarification on whether ESCOs would be required to disclose any compensation that the ESCO paid directly to brokers or consultants, rather than collected on their behalf.⁷⁰ These comments demonstrate that the regulated community considered there to be a likelihood that this disclosure requirement would be included in the Commission's final order.

The entire purpose of compensation disclosure, as envisioned by PSL §66-t and the Commission's rules, is to promote transparency and increase customer awareness of the costs related to energy commodity contracts facilitated by brokers or consultants. The Commission's decision to require ESCOs to disclose any compensation the ESCO pays to the broker or consultant, in addition to anything the ESCO collects on behalf of the broker or consultant, is a logical outgrowth of the Staff Proposal.⁷¹ In any event, the Commission issued a

⁶⁹ NRG Energy, Inc. and NRG Retail Companies Comments (filed May 22, 2023), pp. 10-11.

⁷⁰ NYRCC comments (filed May 22, 2023) p. 2.

⁷¹ See Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce, 131 A.D.2d at 212.

notice of proposed rulemaking with respect to the petitions for rehearing at issue here. Thus, the Commission provided NRG and other parties with the precise opportunity for public comment addressed here that it would have gotten through the SAPA process associated with a substantive revision to a proposed rule.

Family and NRG additionally contend that the Commission failed to comply with SAPA by including what they claim were temporary placeholder rules within the June 2023 Order. To support this contention, Family cites the Commission's directive to Staff in the June 2023 Order to consider additional modifications to the UBP and UBP-DERS, the lack of a specific response to the redlines to the Staff Proposal that were offered by Family, and the scheduling of a technical conference after the June 2023 Order was issued.

We reject this contention. The Commission complied with the procedures and substantive rules set forth in SAPA regarding all issues addressed in the June 2023 Order. It is of no moment that the Commission also directed further proceedings related to the UBP and UBP-DERS. Such a directive does not somehow turn a final rule into a temporary rule.

Finally, APG contends in its comments that the June 2023 Order violated SAPA because the Commission did not provide sufficient notice that the requirements of the order would impact ESCOs or telemarketers. This argument is without merit as the notice of proposed rulemaking clearly indicated that the definitions of energy broker and energy consultant may "apply to a range of entities, including Community Choice Aggregation (CCA) administrators, DER suppliers, ESCOs, and entities that provide rate consulting services."⁷² Moreover, given the

⁷² XLV N.Y. Reg. 29 (March 22, 2023) (emphasis added).

activities that are the subject of PSL §66-t, it is obvious that the activities of a telemarketer could potentially be covered under these new requirements.

Modifications to UBP Section 5

Through its petition, Family resubmits its recommendations regarding modifications to UBP Section 5 set forth in the June 2023 Order. Family argues that the modifications to UBP Section 5 included with the June 2023 Order represent a fundamental misunderstanding and misstatement of the role of brokers and consultants in the sales process and confuses the relative responsibilities of ESCOs, brokers, and consultants. Family contends that these modifications constitute an error of law. RESA also requests clarification of which entities have the responsibility to meet the various requirements of UBP Section 5 and whether an ESCO must perform an action required under UBP Section 5 if a broker or consultant has already performed that action.

As the June 2023 Order notes, the definitions of “energy broker” or “energy consultant” may encompass a wide variety of actors within the retail energy market.⁷³ The modifications to UBP Section 5 are meant to encompass all business models involving brokers or consultants and the many functions those entities may provide in the retail energy marketplace. Accordingly, the Commission does not see a need to clarify which party is responsible to perform duties outlined in UBP Section 5. To the extent UBP Section 5 places an obligation on an entity, that entity must meet that obligation; however, the changes to UBP Section 5 state that requirements may be fulfilled by an ESCO, energy broker, or an energy consultant. In most cases, the Commission expects that the ESCO will remain

⁷³ June 2023 Order, pp. 14-5.

responsible for the activities required under UBP Section 5 to changes in service providers, though that does not exclude the possibility that an energy broker or consultant may perform these obligations in certain business arrangements. Entities involved in a transaction may work out amongst themselves who will take on these responsibilities.

State Environmental Quality Review Act (SEQRA) Argument

Family asserts that the Commission's June 2023 Order violated SEQRA because the Commission did not perform a SEQRA review. Family states that the June 2023 Order may have a chilling effect on the marketing and distribution of renewable energy supply due to the burden the June 2023 Order places on suppliers and those who facilitate their sale and use. Family alleges that "this impact would likely have concomitant negative impacts on air and water quality, wildlife, and more."⁷⁴ The Commission grants clarification on this point in order to address the application of SEQRA to the June 2023 Order.

SEQRA requires State agencies to prepare an environmental impact statement on actions which "may have a significant effect on the environment."⁷⁵ In determining whether an action "may" have a significant effect on the environment and trigger a SEQRA review, an agency "should consider reasonably related effects of the action."⁷⁶ Additionally, SEQRA regulations categorize actions as Type I actions that carry the presumption that they are likely to have a significant adverse impact on the environment, Type II actions that have been determined not to have a significant impact on the environment

⁷⁴ Family Petition, p. 32.

⁷⁵ Environmental Conservation Law (ECL) §8-0109(2).

⁷⁶ Bergami v. Town Bd. of Rotterdam, 97 A.D.3d 1018, 1021 (3d Dept 2012).

and do not require review under SEQRA, and Unlisted actions that are not identified as either a Type I or Type II action.⁷⁷

Although the June 2023 Order was silent on the application of SEQRA, the Commission clarifies here that the actions undertaken in that Order qualified as Type II actions that "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under [SEQRA]."⁷⁸ In particular, the June 2023 Order adopted procedures for energy brokers and consultants to register with the Commission and prohibited them operating as a broker or consultant without being registered with the Commission. The regulations implementing SEQRA explicitly include on the list of Type II actions "inspection and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession."⁷⁹ The Commission views the procedures adopted in the June 2023 Order as within the scope of these actions and related to "inspections and licensing activities" regarding the qualifications of energy brokers and energy consultants "to engage in their business or profession." Further, the SEQRA regulations exclude the "adoption of regulations, policies, procedures and local legislative decisions in connection with any action on this [Type II] list."⁸⁰ The June 2023 Order represented the "adoption of regulations, policies, [and] procedures" in connection with the Type II listed "inspection and licensing activities." Consequently, the June 2023 Order qualifies as a Type II action that does not require SEQRA review.

⁷⁷ Six NYCRR §617.

⁷⁸ Six NYCRR §617.5(a)

⁷⁹ Six NYCRR §617.5(c) (30).

⁸⁰ Six NYCRR §617.5(c) (33).

The Commission declines to engage in conjecture regarding Family's assertion that the June 2023 Order may have a significant effect on the environment. Family neither identifies the supposed "burden" the June 2023 Order places on suppliers of renewable energy resources and those who facilitate their sale and use, nor explains how such "burden" would result in a "chilling effect on the marketing and distribution of renewable energy supply." Although Family states that this "chilling effect" would have "negative impacts on air and water quality, wildlife, and more" it provides no explanation of how such negative impacts would arise from the "chilling effect" and fails to identify said "negative impacts." The Commission does not consider unspecified "negative impacts on air and water quality, wildlife, and more" to be a reasonably related effect of the UBP modifications adopted in the June 2023 Order.

Climate Leadership and Community Protection Act (CLCPA) Argument

Family argues in its petition that the June 2023 Order must be subject to rehearing so that the Commission undertakes the review required under CLCPA §7(2) and (3). CLCPA §7(2) provides that "[i]n considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities, and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in Article 75 of the Environmental Conservation Law."⁸¹ Additionally, when an agency finds a decision to be inconsistent with attainment of statewide greenhouse gas (GHG) emissions limits, CLCPA §7(2) requires that the agency "provide a detailed statement of justification as to

⁸¹ Chapter 106 of the Laws of 2019, §7(2).

why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.” CLCPA §7(3) also provides that “[i]n considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, pursuant to article 75 of the environmental conservation law, all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law.”⁸²

The Commission has interpreted CLCPA §7(2) and (3) to apply to situations where the Commission makes an affirmative approval and decision, including but not limited to rate cases, which may result in increased GHG emissions. The Commission has found that CLCPA §7(2) and (3) apply to the adoption of joint proposals in rate cases as they constitute “other administrative approvals and decisions” and the Commission’s approval of overall capital expenditure plans, while not being an approval of specific projects, is necessary to the utility’s pursuit of such projects. The Commission has undertaken a CLCPA §7(2) and (3) review prior to granting certificates of public convenience and necessity under PSL §68, and certificates of environmental compatibility and public need under PSL Article VII.⁸³ Because the June 2023 Order constitutes an “approval and decision” within the meaning of CLCPA §7(2) and (3), the Commission should

⁸² Id., §7(3).

⁸³ See Case 22-G-0505, Liberty Utilities (St. Lawrence Gas) Corp., Order Granting a Certificate of Public Convenience and Necessity (issued February 17, 2023); Case 21-T-0340, New York Power Authority and Niagara Mohawk Power Corporation d/b/a National Grid, Order Adopting Joint Proposal (issued August 11, 2022).

have undertaken the required review under those provisions. For this reason, the Commission grants rehearing for the limited purpose of undertaking this review.

The June 2023 Order adopted a Staff Proposal to establish a registration process for energy brokers and energy consultants, as required by PSL §66-t. The Commission finds that the adoption of a process for energy brokers and energy brokers to register with the Commission is not inconsistent with and will not interfere with the attainment of the statewide greenhouse gas emissions limits established in Environmental Conservation Law (ECL) Article 75. This registration process will not result in the development of additional GHG emitting generating facilities, nor will it impact existing or in-development renewable generation facilities. Additionally, the Commission finds that the registration process for energy brokers and energy consultants will not disproportionately burden disadvantaged communities. These registration requirements apply Statewide to entities performing the covered actions. While energy brokers and energy consultants may engage directly with customers, the requirements that they register with the Commission and observe certain consumer protections will not have an impact on customers residing in a disadvantaged community differently from those customers who do not reside in a disadvantaged community. For these reasons, the Commission finds that the process for energy brokers and energy consultants to register with the Commission is not inconsistent with and will not interfere with the attainment of the statewide greenhouse gas emissions limits established in ECL Article 75, nor will the registration process disproportionately burden disadvantaged communities.

Deadline for Compliance

The petitioners and several commenters, including Agway, Constellation, and Vistra, requested a stay of the June 2023 Order for ninety days after a final order on rehearing is issued to allow for ESCOs to make any necessary changes to their programming and processes.

The June 2023 Order established an annual compliance year running from September 1 to August 31 each year and required brokers and consultants to submit their first annual registration package by August 31, 2023, to continue operation in New York State. Staff would have been required to complete review of registration packages and issue letters notifying applicants of approval or denial by December 1, 2023. The petitioners and Vistra each submitted requests for an extension of the August 31, 2023 compliance deadline between July 28 and August 9, 2023. In response to these requests, the Secretary issued a notice extending deadlines on August 10, 2023, which granted the request to extend the August 31, 2023 deadline until such time as the Commission issues its decision in response to the petitions seeking rehearing.

Accordingly, the Commission sets a new deadline for energy brokers and energy consultants to submit their first annual registration package within 60 days of the effective date of this Order. Staff will be required to complete review of initial registration packages and issue letters notifying applicants of approval or denial by December 2, 2024.

Following the initial registration date, the annual compliance year will run from September 1 to August 31, with annual renewals due on August 31 each year. For energy brokers and consultants that register on the initial registration date (within 60 days of the effective date of this Order), or for energy brokers and consultants that register after the initial

registration date, but prior to August 31, 2024, their 2024 registration package, including the annual registration fee, will be valid until August 31, 2025.

The Commission finds, orders, and declares:

1. Submeterers and submetering service providers, as defined by Title 16 of the New York Codes, Rules, and Regulations Part 96.1(1), are not subject to regulation as energy brokers or energy consultants under Public Service Law §66-t, as discussed in the body of this Order.

2. The petitions for rehearing, reconsideration, and clarification are granted in part and denied in part for the reasons discussed in the body of this Order.

3. Revisions to the Uniform Business Practices are adopted in accordance with the discussion in the body of this Order and the Appendices to this Order. These revisions shall be effective within 60 days of the effective date of this Order.

4. 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 directed in this Order. The tariff revisions shall be filed, on not less than one day's notice, to become effective on or before June 17, 2024.

5. 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. 4 are waived because the process in this proceeding and this Order give adequate notice of the changes.

6. 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, as discussed in the body of this Order and the Appendices thereto.

7. Energy brokers and energy consultants shall register with the Public Service Commission by filing a completed registration package in Matter Number 23-01227 within 60 days of the effective date of this Order, as discussed in the body of this Order.

8. Department of Public Service Staff shall, by December 2, 2024, review the registration packages received within 60 days of the effective date of this Order, as discussed in the body of this Order.

9. Energy service companies and distributed energy resource suppliers shall update their customer sales agreements within 60 days of the effective date of this Order 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.

10. 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.

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.

CASES 23-M-0106, et al.

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, amount and/or method of compensation provided to an Energy Broker or Energy Consultant if such compensation is collected through the ESCO customer agreement or is paid to the Energy Broker or Energy Consultant by the ESCO.**

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 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:

- A. 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 or provides compensation to 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 form, amount and/or 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
 1. 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 or provides compensation to 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 form, amount and/or 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 Inquiries

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.