STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

PROCEEDING ON MOTION OF THE COMMISSION TO SEEK CONSEQUENCES AGAINST MPOWER ENERGY LLC FOR VIOLATIONS OF THE UNIFORM BUSINESS PRACTICES	**Case 23-M-0287**

REQUEST FOR REHEARING AND RECONSIDERATION OF

MPOWER ENERGY, LLC

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MPOWER ENERGY LLC
REQUEST FOR REHEARING AND RECONSIDERATION

Mpower Energy LLC ("Mpower" or the "Company") requests that the New York Public Service Commission ("Commission" or "PSC") under Public Service Law ("PSL") § 22 and 16 NYCRR § 3.7 for rehearing and reconsideration of the September 22, 2026 Order Revoking Mpower Energy LLC's Eligibility to Serve Customers in New York ("September 2026 Order"). Mpower seeks abrogation or change of the September 2026 Order, reversal of revocation, and full restoration of its eligibility to serve existing customers and to market to and enroll new customers on otherwise authorized products. References in this Request to Findings 1 through 14 are to the findings made in the September 2026 Order concerning the allegations in OTSC 1, OTSC 2, and OTSC 3. On October 20, 2026, Mpower asked the Secretary to extend the deadlines for implementing Ordering Clauses 2 and 3 of the September 2026 Order, which require Mpower to return its existing customers to full utility service within 60 days and the distribution utilities to transfer any customers who remain with Mpower.

I. PRELIMINARY STATEMENT

The September 2026 Order did not rest revocation on any single finding. It combined fourteen findings into a judgment that Mpower's conduct reflected a "pervasive disregard" of the UBP and the Second Reset Order, and selected revocation on that basis.[1] The record shows a different company. Mpower defended a contract-based legal position, sought the approvals its products required, disclosed its service relationships, answered Staff's inquiries, revised its contracts during Staff's review, and pursued the information it needed to respond. This Request challenges particular determinations and the account of Mpower's conduct that turned them into a basis for market exclusion.

[1] September 2026 Order at 35-37.

The home-warranty record illustrates the difference. Mpower petitioned for authority to offer its home-warranty product ("HWP") in September 2020, obtained approval in the January 2021 Additional Products Order, and filed its HWP terms as that order directed. Answering Staff's service questions, Mpower's November 7, 2022 response named Dira Realty LLC ("Dira") and told Staff that customers could obtain service "through Mpower's affiliate." When Staff asked for the service agreement in April 2023, Mpower filed it within a week. OTSC 2 nevertheless asserted that Mpower's January 2025 letter claimed "apparently for the first time" that Dira was an affiliate. That record, further addressed in Sections III.D, III.G, and IV.E through IV.G, shows disclosure, not concealment.

Mpower also responded to each stage of Staff's review. After Staff's April 2023 request, it suspended HWP marketing and did not resume it. It filed revised HWP contracts four times between January 2023 and May 2024, and Staff's November 2024 determination acknowledged that Mpower "has implemented Staff's recommended corrections to its revised HWP contract filing from February 2024." Staff's grounds for declining approval included two subjects that its HWP White Paper had proposed to address by new rule, proposals on which the Commission has not acted, as further addressed in Sections III.G and IV.D. That is engagement with the regulator, not disregard of it.

The renewable and transition record follows the same pattern. Mpower's continuing-contract position, further addressed in Section IV.C, rests on its agreements, which treat monthly pricing separately from contractual duration and continue until terminated, and on the Commission's statement that the Second Reset Order "only applies to prospective contracts." Monthly pricing does not make those agreements expire and renew each month. The position challenges that classification, not the Commission's authority to regulate the agreements, and Mpower maintained it to preserve customer relationships built over more than seventeen years. After Staff communicated its contrary view in mid-2022, Mpower obtained affirmative consent to

move many thousands of renewable customers to its HWP. It purchased 148,000 national renewable energy credits ("RECs") and retired them through PJM. Responding to Staff's 2023 Notice of Apparent Violation, it offered VCPs for any 2021 shortfall on covered enrollments and renewals and committed to full-load REC purchases going forward. Its OTSC 1 response reported payment of VCPs for the 2022 compliance period. The Department's own notices quantify the shortfalls by year, and NYSERDA confirmed to Staff in December 2025 that it had received a payment. Those are measurable compliance questions, as Section V.A explains, not evidence of indifference.

Mpower missed the OTSC 2 deadline because prior counsel's email-security system captured the FOIL production messages that started the extended response period; Mpower did not know of the final production on February 6, 2026. After the Secretary denied Mpower's request for more time on June 4, 2026, consistent with the advice Mpower received from prior counsel, it filed a complete response on July 10 and exhibits on July 16, more than two months before revocation. The September 2026 Order refused to consider them, entered Findings 5 through 9 by default, and treated the filing as further disregard on the premise that Mpower had been "explicitly instructed not to do so." The June 4 Ruling denied additional time; it contains no express direction forbidding a filing, as further addressed in Sections IV.A and V.F. Mpower's effort to place the OTSC 2 Response before the Commission thus became a further ground for revocation.

A separate records request presents a separate problem. On June 4, 2026, the Department received Mpower's FOIL request for the records underlying the OTSC 3 customer account review. Mpower answered OTSC 3 while that request was pending and asked that OTSC 3 not be decided before it could address the records. The Department extended its own time to respond four times and produced the records on September 21, four days after the Commission's session and one day before the September 2026 Order issued. The production included utility confirmations of changed account numbers, a Department notice bearing on receipt of materials relevant to Finding 12, and

NYSERDA's payment confirmation. Those records, further addressed in Sections III.J and VII, bear on Findings 2, 4, 10 through 12, and 14. Mpower had no opportunity to present them before the Commission acted.

The scope of the findings, further addressed in Section V.G, confirms the overstatement. Findings 1, 5, and 13 apply the same continuing-contract premise in three proceedings, while Findings 7 through 9 apply related reporting provisions to the same Dira relationship and disclosure history. Findings 10 through 14 concern identified accounts and records rather than companywide practices. Treating these overlapping theories and account-specific issues as independent episodes magnified their cumulative weight and supported a characterization of pervasive disregard that the underlying conduct does not establish. Mpower's OTSC 3 response explained that thirteen of the eighteen accounts lacking a conventional agreement were its own internal accounts, and that the guaranteed-savings issue arose from one specially prepared agreement for a single customer and an internal reporting database field. Those findings do not establish pervasive disregard across a customer base the September 2026 Order itself puts at more than 29,000.

Even if the Commission sustains all fourteen findings, including those entered by default, revocation is unjust or unwarranted under PSL § 22, as further addressed in Section VI. On that assumption, Mpower's conduct still matters because it shows which concerns can be addressed while service continues. Mpower's OTSC 3 response proposed specific account-level corrections, including a written Internal Accounts Policy and modification of the GS reporting mechanism. Its OTSC 2 response stated that Mpower was prepared to amend the RAAF if the Commission concluded that an additional disclosure was required. The Commission's Atlantic Energy and NRG orders, discussed in Section VI.C, show that enforceable corrective terms can protect customers while preserving eligibility, including, in NRG's case, where the ESCOs maintained their denials.

Neither order dictates the result here. Revocation instead ends every New York customer relationship.

The Commission should grant rehearing, reverse revocation, and restore Mpower's full eligibility to serve existing customers and to market to and enroll new customers on otherwise authorized products.

II. QUESTIONS PRESENTED AND STANDARD FOR REHEARING

A. Governing standards for rehearing and reconsideration

Under 16 NYCRR § 3.7(b), rehearing may be sought on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination.

PSL § 22 authorizes the Commission, after rehearing and consideration of the facts—including facts arising after the September 2026 Order—to abrogate or change an order that is unjust or unwarranted or should be changed. That authority extends to both correction of the challenged findings and reconsideration of revocation. The Commission may retain supported findings while changing the resulting restriction on eligibility.

Mpower further challenges the September 2026 Order as affected by errors of law, made in violation of lawful procedure, and arbitrary and capricious or an abuse of discretion, including in its selection of revocation. These objections encompass whether the challenged determinations have a sound basis in reason and the record, whether the Commission applied the governing requirements correctly, and whether the procedures afforded Mpower satisfied applicable legal requirements.

B. Questions of law

Whether the Commission abused its discretion by excluding Mpower's completed OTSC 2 Response and sustaining Findings 5 through 9 by default, where the missed deadline resulted from prior counsel's handling of the February 6, 2026 FOIL production, Mpower relied on counsel in good faith and was unaware that the response period had run, and its response and supporting exhibits were filed before the Commission acted?

Whether, even if the OTSC 2 default remains, the Commission erred as a matter of law by sustaining Findings 5 through 9 and selecting revocation without separately determining whether the facts deemed admitted satisfied each governing substantive requirement and whether those facts supported revocation under the UBP?

Whether the Commission erred as a matter of law in sustaining Findings 1, 5, and 13 by equating monthly price determination with monthly contractual expiration and renewal, despite the identified agreements' continuation-until-termination provisions and without establishing a contractual or applicable regulatory basis for the renewal event on which the challenged transition findings depend?

Whether the Commission erred as a matter of law in sustaining Finding 6 by applying a renewable-product transparency condition to Mpower's separately authorized home-warranty product and treating a deferred billing-itemization mechanism as an enforceable obligation, without establishing a violation of an operative requirement applicable to Mpower's HWP contracts or disclosures?

Whether the Commission erred as a matter of law in sustaining Findings 7, 8, and 9 without establishing their respective predicates: a reportable event within the transaction-history provision's twenty-four-month lookback period; Dira's status as an energy affiliate subject to the RAAF listing requirement; and a major change triggering an update obligation, where the service arrangement predated Mpower's HWP enrollments?

Whether revocation is arbitrary and capricious or an abuse of discretion because the Commission's cumulative conclusion of "pervasive disregard" rests on erroneous premises and treats Mpower's disclosures, responses, defense of its legal position, and efforts to address disputed obligations as evidence of regulatory unfitness?

Whether, even if all fourteen findings are sustained, revocation should be changed under PSL § 22 as unjust or unwarranted in light of the conduct actually established, the demonstrated customer impact, Mpower's responses and performance, and the availability of corrective measures permitting continued eligibility?

C. Questions of fact

Whether the September 2026 Order materially misstates the June 4 Ruling by finding that Mpower filed its OTSC 2 Response after being "explicitly instructed not to do so," when that ruling denied additional time but contained no express prohibition on filing?

Whether the September 2026 Order gives Finding 3 a broader factual significance than the record supports by treating disputed product changes affecting identified existing customers as evidence that their original enrollments were unauthorized?

Whether Findings 10 and 11 conflate missing or nonconforming documentation with the absence of actual customer authorization and extend identified account exceptions into a conclusion of companywide enrollment failure without adequately accounting for Mpower's account-specific explanations, authorization affidavits, and evidence of its ordinary electronic enrollment controls?

Whether Finding 14 incorrectly equates accounts identified through an internal "GS" reporting field with accounts governed by guaranteed-savings agreements, and treats the resulting classification issue as evidence of general reporting unreliability without distinguishing the specially prepared savings agreement, other discounted or accommodation accounts, and the relevant billing records?

Whether the Commission's conclusion of "pervasive disregard" materially mischaracterizes Mpower's efforts to defend its contract interpretation, secure approvals, disclose Dira's affiliation, revise agreements, obtain underlying records, and resolve disputed obligations as evidence of unwillingness to comply, while assigning overlapping findings greater cumulative weight than the underlying conduct supports?

D. Errors of law, errors of fact, and new circumstances separately support rehearing

The Request separately identifies and supports each ground for rehearing. Section IV identifies errors of law in the exclusion of the OTSC 2 Response and in the interpretation of the governing orders, UBP provisions, contracts, and disclosure requirements. Section V identifies errors of fact by comparing the findings with the renewable, account, billing, production, and reporting records. Section VII identifies new circumstances in Department and third-party communications produced after the Commission's session. Section VI explains why those errors and new circumstances affect the cumulative rationale for revocation and why the September 2026 Order should be changed even if supported findings remain.

These grounds support consideration of the OTSC 2 Response, correction of the challenged findings, the focused evidentiary proceedings requested for unresolved material disputes, and reconsideration of revocation.

III. BACKGROUND AND PROCEDURAL HISTORY.

A. Description of Mpower's New York Operations

Mpower received New York ESCO eligibility in March 2009. Mpower has served New York customers for more than seventeen years, used directly employed and trained sales representatives after terminating third-party marketing relationships in 2015, and maintained legal, compliance, customer-service, technical, and programming resources devoted to its New York

operations. Mpower actively monitors Commission proceedings, reviewed orders and guidance, and participated in stakeholder meetings and technical conferences addressing changes in the retail market.[2] [3]

B. Evolution of Customer Agreement Renewals: The First Reset Order and Implementing Guidance Used New Enrollment and Renewal as Transition Events

The Commission's February 23, 2016 First Reset Order directed ESCOs, after a short implementation period, to enroll new mass-market customers or renew existing mass-market customers only on products satisfying the new criteria. The operative language thus identified a new enrollment or renewal as the event at which the new product restrictions applied.[4]

The Department's March 2, 2016 ESCO Guidance addressed how that framework applied to several contract categories. It described transition requirements for specified month-to-month variable-rate, fixed-rate, and fixed-term variable-rate arrangements at renewal. The same guidance distinguished products offered before and after the First Reset Order when discussing renewable sourcing and related compliance.[5]

The Department also issued a sample combined sales agreement. Its renewal provision stated that, after the initial term, the agreement 'renews on a month to month basis.' That express renewal language supplied an identifiable contrast to an agreement that states that service continues until either party terminates it.[6]

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[2] For a comprehensive description of Mpower, see Mpower Energy LLC's Response to Order Instituting Proceeding and to Show Cause, Case 23-M-0287 (filed May 9, 2024) ("OTSC 1 Response") at 4-7.
[3] See also OTSC 3 Response at 4.
[4] Case 15-M-0127 et al., Order Resetting Retail Energy Markets and Establishing Further Process (issued Feb. 23, 2016) ("First Reset Order") at 1-2, 21.
[5] Case 15-M-0127 et al., ESCO Guidance (issued Mar. 2, 2016) at 2, 5-8.
[6] Case 15-M-0127 et al., Combined Sales Agreement Revised (issued Mar. 2, 2016) at 1.

Mpower's later continuous-contract position developed against that regulatory background. The First Reset Order and the implementing materials repeatedly used enrollment, expiration, and renewal as operative events, while the sample form expressly identified when a month-to-month renewal occurred. Mpower's filed contracts used different duration and termination language, as discussed below.

C. The September 2020 Clarification Order Guidance on Applicability of New Requirements to Prospective Customers

The First Reset Order was vacated in court on procedural grounds.[7] On December 12, 2019, the Commission issued a December 12, 2019 Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process ("Second Reset Order"), which again established product requirements by directing ESCOs to enroll new mass-market customers or renew existing mass-market contracts only if one of the approved product conditions was satisfied. The Second Reset Order also referred repeatedly to prospective customers, new agreements, new contracts, re-enrollment, renewal, and automatic renewal.

After market participants sought rehearing concerning the effect of the new requirements on existing agreements, the Commission issued the September 2020 Clarification Order on September 18, 2020.[8] In responding to the contention that the Second Reset Order interfered with existing contracts, the Commission stated that the Second Reset Order 'only applies to prospective contracts.'

Mpower's contract language was the factual basis for its view that many existing customer relationships did not experience a monthly expiration and renewal. The 2017-2020 residential

[7] National Energy Marketers Assn. v New York State Pub. Serv. Commn., 53 Misc 3d 641, 656 (Sup Ct, Albany County 2016).
[8] Case 15-M-0127, Order on Rehearing, Reconsideration and Providing Clarification (issued Sept. 18, 2020.

Customer Disclosure Statement provided that, after the identified fixed-rate period, the contract would continue at a variable rate determined monthly until terminated by either party or renewed at a fixed rate. Section 6 of the Terms and Conditions separately stated that the agreement continued until either party gave notice of cancellation and the utility completed termination. The 2019-2020 commercial form likewise stated that the agreement continued until cancellation and utility processing. The form identified as '2021-Present' stated that 'Renewal is not necessary' and that the agreement continued until cancellation and utility processing.

The agreements were therefore terminable, not perpetual. They gave both parties a means to end service and treated monthly price determination separately from contractual duration. Mpower's interpretation was that the Commission's enrollment-and-renewal trigger had to be applied to those actual provisions, rather than inferred solely from monthly pricing or billing. The position did not deny the Commission's authority to prescribe requirements for new enrollments, actual renewals, later material changes, or future service; it disputed whether the existing agreements expired and renewed each month.

Mpower repeated that same contract-based position in its response to the 2023 Notice of Apparent Violation, its May 2024 OTSC 1 response, its July 2026 OTSC 2 response, and its June 2026 OTSC 3 response. The continuity of that position is part of the procedural history: Mpower did not devise a new theory after the Commission initiated revocation proceedings, but continued to rely on the same contract terms and the same enrollment-and-renewal language while responding to successive Staff and Commission inquiries. Despite contending that it did not need to do so based on the continuing nature of its legacy contracts, Mpower nonetheless followed Staff's interpretation by retiring eligible RECs and paying VCPs for the remaining shortfall.[9]

[9] OTSC 1 Response at 4 n.7, 28–29; Renewable Shortfall Letter (Oct. 31, 2023) at 1–2.

D. Mpower Recognized the Commission's Reset Framework and Adapted Its Products, Contracts, and Compliance Processes to the Evolving New York Market

Mpower's actions after the Second Reset Order reflected recognition that the Commission had changed the framework governing the New York retail market. Mpower monitored the market-reset proceedings and related guidance, participated in the revised eligibility process, and submitted product materials for review. It did not continue marketing new products without regard to that process; it sought authorization for products it intended to offer under the new framework.[10]

On September 9, 2020, Mpower petitioned the Commission for authority to offer a home-warranty product that would qualify as an energy-related value-added service outside the default price-guarantee rule.[11] The Commission's January 25, 2021 Additional Products Order approved Mpower's petition as one of the proposals satisfying the criteria for a home-warranty product bundle and directed Mpower to file its standard sales agreement in Matter 14-02554 within thirty days.[12]

Mpower filed its HWP terms on February 24, 2021 and supplemented the filing on March 31, 2021. On April 15, 2021, Staff issued a revised eligibility letter identifying Mpower as eligible to market a guaranteed-savings product, a fixed-rate product subject to the five-percent cap, a renewable electric product, and a home-warranty product.[13]

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[10] OTSC 1 Response at 6-7 & n.10 (describing Mpower's review of Commission orders and participation in stakeholder meetings and technical conferences).
[11] Order Addressing ESCO Petitions Requesting Authorization to Provide Additional Products and Services (issued Jan. 25, 2021) ("Additional Products Order") at 15-16, 20.
[12] Case 15-M-0127 et al., Petition for Waiver Pursuant to December 12, 2019 Order and/or Expedited Declaratory Ruling as to Home Warranty and Green Gas Products (filed Sept. 9, 2020);
[13] Matter 14-02554, Heating System Terms and Conditions (filed Feb. 24, 2021); Matter 14-02554, Letter to Secretary (filed Mar. 31, 2021); Matter 19-02972, Revised Eligibility Letter - Mpower Energy LLC (filed Apr. 15, 2021).

E. The Renewable Review and NOAV: Mpower Explained Its Position and Proposed a Concrete Resolution

The dispute that became OTSC 1 developed through a Department renewable-energy review. Mpower submitted renewable-load and procurement information, later revised aspects of its audit responses, and identified categories it believed should be treated separately, including large commercial load, legacy continuous-service customers, home-warranty customers, and guaranteed-savings customers during the guaranteed-savings period. The Department's own audit correspondence requested information concerning voluntary renewable load associated with noncompliant products entered into before April 16, 2021.[14]

Staff issued a NOAV on April 24, 2023. Mpower responded on May 22, 2023. The response preserved Mpower's position concerning existing contracts and the application of the Second Reset Order but it also proposed a concrete path to resolution rather than refusing to act.[15]

Mpower's proposed resolution demonstrated regard for Commission authority despite its continuing legal disagreement. It offered to provide proof of the retirement of 148,000 RECs that it had purchased and retired in PJM; purchase VCPs from NYSERDA for any 2021 shortfall attributable to customers enrolled or renewed on products subject to the Reset Order; and, prospectively, purchase RECs commensurate with its full renewable load even for customers Mpower continued to regard as served under valid preexisting agreements. Mpower also requested a one-time waiver for the disputed 2021 treatment while committing to Staff's interpretation going forward. Those commitments show that Mpower sought to preserve its legal position while

[14] Mpower renewable-audit responses, reproduced as OTSC 1 Response Attachment 1; Department correspondence concerning pre-April 16, 2021 voluntary renewable load, reproduced as OTSC 1 Response Ex. B.

[15] Mpower Energy LLC Notice of Apparent Violation (issued Apr. 24, 2023) ("NOAV"); Mpower Response to Notice of Apparent Violation (filed May 22, 2023) ("NOAV Response").

conforming its future conduct to the Commission's asserted requirements, not to disregard the Commission's authority.[16]

Mpower also undertook customer-transition activity after Staff communicated its contrary interpretation. Beginning in or about November 2022, Mpower conducted an extensive affirmative-consent campaign and obtained consent to transition many thousands of renewable customers to a home-warranty product. Mpower further reported that it complied with Staff's VCP interpretation for the 2022 compliance period. These steps demonstrated Mpower's commitment to follow Staff's interpretation going forward and reflect respect for regulatory authority, not disregard of it.

The NOAV history therefore included more than a continued legal disagreement. It included revised audit submissions, proof offered concerning REC procurement, a proposed VCP cure, prospective full-load procurement, an affirmative-consent campaign, and a request to continue dialogue with Staff and the Commission.

F. OTSC 1: Mpower Addressed Allegations and Continued Its Compliance Efforts

The Commission issued OTSC 1 on November 27, 2023. Mpower submitted a FOIL request concerning the allegations, obtained extensions tied first to the FOIL response and filed its response in May 2024.[17]

Staff alleged that Mpower: (1) failed to transition customers to compliant contracts following the effective date of the December 2019 Order; (2) violated UBP § 2.5.b by failing to honor sales-agreement terms requiring the purchase of a specified percentage of Renewable

[16] OTSC 1 Response at 3, 26–27.
[17] Case 23-M-0287, Order Instituting Proceeding and to Show Cause (issued Nov. 27, 2023) ("OTSC 1"); Ruling on Extension Request (issued Dec. 29, 2023); Ruling on Extension Request (issued Apr. 2, 2024); OTSC 1 Response (filed May 9, 2024).

Energy Credits ("RECs"); (3) violated UBP § 5.B.5.d by failing to obtain affirmative customer consent before transferring customers to a compliant product; and (4) violated the December 2019 Order by failing to follow the Environmental Disclosure Label Program ("EDP") rules requiring retirement of RECs sufficient to match its renewable-load obligations.[18]

The response addressed each of the four allegations separately. It supplied the relevant contract forms, traced the First and Second Reset Orders and the September 2020 Clarification Order, explained Mpower's treatment of existing continuous-service agreements, described its REC purchases and audit responses, identified the proposed VCP resolution, and addressed the affirmative-consent issue.[19]

On the first allegation, Mpower explained that OTSC 1 misread its earlier statements to Staff: "Mpower does not concede that it failed to properly transition customers to compliant products after implementation of the Second Reset Order."[20] Mpower's position was that customers served under continuous-service agreements were not required to move to compliant products until either party terminated the agreement. The response quoted the duration and termination language of each contract form, tied the Second Reset Order's restrictions to new enrollments and renewals, and explained why a monthly-renewal reading could not be reconciled with the UBP's renewal-notice requirements. It also reported that, after Staff communicated its contrary view in mid-2022, Mpower obtained affirmative consent to move many thousands of renewable customers to a home-warranty product.[21]

On the second and fourth allegations, concerning the REC terms of Mpower's sales agreements and EDP retirement, Mpower explained that the Second Reset Order's locational and

[18] OTSC 1 at 4-5.
[19] OTSC 1 Response at 2-5, 13-30 and Exs. A-B.
[20] OTSC 1 Response at 13.
[21] *Id* at 20, n69.

delivery requirements applied to new enrollments and renewals, not to customers served under preexisting continuous-service agreements. It explained its understanding that its Commission-approved home-warranty product fell within the Second Reset Order's express exception. It described the revised audit responses that excluded load for customers who were not promised renewable energy or were served under exempt products. Mpower reported that it "conservatively purchased 148,000 national RECs for its entire load." It also offered a cure for the disputed load. Mpower had already agreed to pay VCPs for home-warranty customers and for any shortfall under its 2021-Present contract, and it reported paying VCPs for the 2022 compliance period.[22]

On the third allegation, Mpower explained that the UBP in effect when the affected customers enrolled required express consent only for a material change in the terms or duration of a contract. Neither Mpower's agreements nor the Department's sample agreement specified a customer's generation source, and the September 2020 Clarification Order first required ESCOs to disclose the renewable content of their products. On that basis, Mpower's interpretation was that "customer consent is not required to change a customer's fuel supply, including to provide the customer with renewable energy."[23]

Mpower did not condition all action on acceptance of its legal interpretation. It stated that it had undertaken the affirmative-consent campaign after learning of Staff's contrary view, had complied with Staff's VCP interpretation for the 2022 compliance period, remained prepared to address any applicable shortfall, and wished to continue working with Staff and the Commission. The OTSC 1 response thus presented both a merits defense and a series of actions undertaken to address the practical compliance concerns raised by Staff.

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[22] OTSC 1 Response at 26-29.
[23] OTSC 1 Response at 30.

Taken together, the response answered each OTSC 1 allegation and showed that each underlying compliance concern was being addressed through completed or committed measures. Neither Staff nor the Commission had acted on Mpower's request for a one-time 2021 waiver or confirmed whether Mpower should pay the VCPs it had offered. No further enforcement was needed to secure compliance on the issues OTSC 1 raised.

G. The Parallel HWP Review: Mpower Identified Dira as Its Affiliate in 2022, Filed the Service Agreement, and Answered Each Staff Inquiry

Staff's review of Mpower's HWP ran from July 2022 through January 2025. The contemporaneous record of that review consists of Mpower's letters and filings and Staff's own correspondence. Mpower named Dira Realty LLC ("Dira") as its service provider, described Dira as its affiliate, filed the Dira service agreement, suspended HWP marketing at Staff's request, revised its contracts, and answered each Staff inquiry.

The service arrangement predated Mpower's HWP offering. Mpower and Dira entered into their service agreement, dated April 6, 2021, nine days before Staff's April 15, 2021 revised eligibility letter. Under the agreement, Dira performs covered repair work at Mpower's expense, and Mpower handles customer service, intake of service requests, and management of the service provider. Customers are not billed separately for the warranty.[24]

In July 2022, Staff asked Mpower for its HWP terms and whether a third-party home warranty company administered the service. Mpower responded on July 20, 2022. It supplied its HWP terms and conditions and stated that it "does not currently use a third party home warranty provider."[25] As Mpower interpreted that question, that statement was accurate. Mpower handled

[24] Dira Agreement §§ 2(a), 3(c), 3(f).
[25] OTSC 2 at 7 (quoting Mpower's July 20, 2022 email to Staff); Mpower Home Warranty Product Terms and Conditions, reproduced as Mpower's Response to Second Order to Show Cause, Case 23-M-0287 (filed July 10, 2026) ("OTSC 2 Response") Ex. D.

the administration aspect of the home warranty program. No company stood between Mpower and its customers.

On October 19, 2022, Staff requested a sample of every active customer contract, including HWP contracts, and the number of customers served under each. Staff also posed specific questions about how HWP service was performed. Mpower answered each question in writing on November 7, 2022. Mpower identified Dira by name as "a large New York City property management firm with a large staff of repair personnel experienced in HVAC systems" that performed the HWP service work. It told Staff that customers could obtain service "through Mpower's affiliate, noted above," or could retain their own licensed contractor and receive reimbursement up to the $1,000 annual limit. Mpower also supplied its full HWP enrollment package, its marketing materials, and its HWP customer counts for each utility service territory. When Staff sent a follow-up request on November 8, 2022, Mpower answered it two days later.

The November 7, 2022 Response thus disclosed both Dira's identity and its affiliation with Mpower. OTSC 2 later stated that Mpower's January 22, 2025 letter claimed "apparently for the first time" that Dira was an affiliate.[26] The November 7, 2022 Response had done so more than two years earlier.

In November 2022, Staff also issued information requests on HWPs to all twenty-one ESCOs then eligible to offer them. One request asked: "Is the ESCO's HWP offered solely by the ESCO itself or is it offered in partnership with a third-party provider?"[27] Mpower answered on November 30, 2022. It stated that its HWP "is offered solely by Mpower itself and is not offered in partnership with a third-party provider," and that it "contracts with a third-party to perform

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[26] OTSC 2 at 20; *see id.* at 21-22.

[27] Case 24-M-0324, *In the Matter of the Commission to Regulate Energy Services Company Home Warranty Product Offerings*, Department of Public Service Staff White Paper on Energy Service Company Home Warranty Products (filed May 29, 2024) ("HWP White Paper") at 1 & Att. at 19 (Question 1.b).

repair services."[28] Those answers were consistent with the July 20 and November 7 responses. Mpower handled administration of the program, and Dira performed the repairs.

Mpower filed a revised HWP contract with its January 31, 2023 annual compliance filing. And then again, with revisions Staff requested, filed on April 10, 2023, together with the executed Dira Agreement. Mpower also suspended HWP marketing at Staff's request and did not resume it.[29]

On February 29, 2024, before amended GBL § 349-d took effect on March 18, 2024, Mpower filed another revised HWP contract. Staff returned its edits on April 2, 2024. Staff's cover email stated that Mpower "has not provided this company's name" and had not provided the service provider's terms. By then, Mpower had named Dira in November 2022, Staff had named Dira in its own April 2023 email, and the Dira Agreement had been on file in DMM for nearly a year. On May 20, 2024, Mpower filed revised contracts responding to Staff's additional requested revisions. OTSC 2 later acknowledged Staff's position that its concerns about the HWP terms, coverage restrictions, and pricing disclosures "were largely resolved by May 2024."[30]

Staff sent further questions on June 14, 2024. Mpower responded on July 15, 2024 and supplemented its response on July 22, 2024.[31] The July 15, 2024 Response explained that Dira is a full-service real estate management company that maintains the HVAC systems of the properties it manages. It explained why Dira does not maintain a public website, described Dira's HVAC repair staff, licensing, and parts warehouses, and described how Mpower routes service requests to Dira.[32] On August 9, 2024, Staff stated that it would give the HWP no further consideration

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[28] OTSC 2 at 8 (quoting Mpower's November 30, 2022 responses to Staff's November 18, 2022 information requests).
[29] Letter from Mpower to the Secretary, Mpower Energy LLC Responses to Warranty Inquiries, Matter 14-02554, (filed July 15, 2024) ("July 15, 2024 Response") at 2.
[30] GBL § 349-d(6); L 2023, ch 482.
[31] July 15, 2024 Response; Letter from Mpower to the Secretary, Matter 14-02554 (July 22, 2024).
[32] July 15, 2024 Response at 1-2.

until Mpower provided the terms governing the Dira relationship, and that it could find no such filing in DMM. Mpower replied on August 12, 2024 that the Dira Agreement had been filed in DMM on April 10, 2023. It explained the arrangement again and twice requested a telephone conference. Staff replied the same day. Staff thanked Mpower for "pointing to the DMM filing which contained the previously requested terms and conditions" and stated that it would arrange a call once its questions were addressed.[33]

Mpower's review proceeded alongside a broader Staff effort to impose stronger requirements on ESCO HWPs. Staff's November 2022 information requests opened an industry-wide review.[34] On May 29, 2024, Staff filed the HWP White Paper in Case 24-M-0324. It recommended new rules, including a prohibition on HWPs offered under the "third-party model"; a requirement that only ESCOs with certified maintenance personnel "employed directly by the ESCO itself" offer HWPs; line-item or separate billing of HWP costs; limiting HWPs to guaranteed-savings or capped fixed-rate products; and an HWP "reset" requiring every eligible ESCO to re-file its contracts for approval under new requirements. Staff called the prohibition of the third-party model its "most essential recommendation."[35] Mpower filed comments in that proceeding. It disclosed that its HWP had been "temporarily ceased at Staff's instruction" and stated that ESCOs should be able to report HWP performance data periodically.[36] The HWP White Paper's recommendations were proposals. As of July 2026, the Commission had not acted on them. Thus at the time, the Commission's directive to Staff under the Additional Products Order was to

[33] Email exchange between Staff and Mpower (Aug. 6-12, 2024).
[34] HWP White Paper at 1.
[35] *Id.* at 1, 16-18.
[36] Case 24-M-0324, White Paper on Energy Service Company Home Warranty Product (filed Aug. 28, 2024) at 1, 3.

review HWP sales agreements and "ensure compliance with the Uniform Business Practices (UBP) and Commission orders."[37]

On November 25, 2024, Staff issued the HWP Determination Letter to Mpower. Staff declined to approve Mpower's revised HWP contract and its use of Dira.[38] The stated grounds included Dira's registration status with the Department of Financial Services, Dira's lack of a web presence, the number of Dira's licensed technicians, service to customers outside New York City, and pricing transparency.[39] Two of those subjects, itemized pricing and the role of the entity performing HWP service, were not items the Commission authorized Staff to review under the Additional Products Order, but rather suggested recommendations in the HWP White Paper proposed to address by new rule.[40] The letter also acknowledged that Mpower "has implemented Staff's recommended corrections to its revised HWP contract filing from February 2024."[41] It asked Mpower to explain its September 2020 petition and, "[i]f applicable," to provide timelines for returning HWP customers to utility service "upon the expiration of their contract term."[42]

Mpower responded on January 22, 2025,[43] and explained why Mpower had not supplied expiration timelines. Mpower's HWP agreements are continuous. They do not expire or renew, and they continue until either party cancels. A timeline keyed to contract expiration therefore did not apply. The response also stated that Dira and Mpower "are affiliates that are commonly owned and controlled," described Dira's maintenance workforce and service vehicles, and explained the

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[37] Case 15-M-0127 *et al.*, Order Addressing ESCO Petitions Requesting Authorization to Provide Additional Products and Services (issued Jan. 25, 2021) ("Additional Products Order") at 16-17.
[38] Letter from Staff to Mpower, Mpower Energy LLC – Home Warranty Contract Determination (Nov. 25, 2024) ("HWP Determination Letter") at 1, 8.
[39] *Id.* at 5-7.
[40] HWP White Paper at 8-15, 17.
[41] HWP Determination Letter at 8.
[42] *Id.* at 8-9.
[43] Response to Home Warranty Contract Determination Letter (Supplemental Request) ("January 22, 2025 Response"), filed in Matter 24-01067 (Jan. 22, 2025).

timing of the April 6, 2021 Dira Agreement. It noted that the HWP White Paper recommended that only ESCO employees perform warranted repairs, and that Dira's technicians performed that role for Mpower. Mpower stated its disagreement with Staff's remaining conclusions, raised concern that Staff's review applied stricter requirements than those applied to other HWP applications, and requested a meeting with Staff.[44]

Staff did not respond to the January 22, 2025 Response or to the request for a meeting. Nearly seven months later, the Commission issued OTSC 2. Staff's contentions in OTSC 2 rested on "the history of Mpower's representations about Dira Realty" and the January 22, 2025 Response.[45]

The HWP record therefore reflects disclosure and continued engagement. Mpower named Dira and described it as its affiliate in November 2022. It filed the Dira Agreement in April 2023, stopped marketing when Staff asked, revised its contracts until Staff acknowledged its corrections, answered Staff's operational questions, participated in the generic HWP proceeding, and responded to the HWP Determination Letter. Mpower maintained legal objections to parts of Staff's review. It did not withhold the Dira relationship. Sections IV.E through IV.G address the legal effect of this chronology on Findings 7 through 9.

H. OTSC 2: Mpower Filed a Complete Response That the Commission Did Not Consider

The Commission issued OTSC 2 on August 19, 2025. Mpower requested an extension tied to a FOIL request seeking records concerning the allegations, and the Secretary granted an extension until thirty days after receipt of the FOIL response.[46]

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[44] January 22, 2025 Response at 1-6.
[45] OTSC 2 at 15.
[46] Case 23-M-0287, Order to Show Cause (issued Aug. 19, 2025) ("OTSC 2"); Mpower Request for Extension of Time (filed Sept. 15, 2025); Ruling on Extension Request (issued Sept. 19, 2025).

The Records Access Officer issued a partial production on December 19, 2025 and a final production on February 6, 2026. Mpower's prior counsel later explained that the production messages were captured by the firm's email-security system and that neither counsel nor Mpower had contemporaneous knowledge that the productions had occurred.[47] After learning of the issue through issuance of OTSC 3 in May 2026, Mpower sought additional time and explained both the email-security issue and Mpower's lack of awareness.

The Secretary denied the extension request on June 4, 2026 ("June 4 Ruling"). Mpower nevertheless completed and filed its substantive response on July 10 and filed five supporting exhibits on July 16. Those exhibits included Staff's April 3, 2023 email requesting service-process information and a halt to HWP marketing (Ex. A), Staff's October 19, 2022 request for sample contracts, including HWP contracts (Ex. B), Staff's April 2, 2024 email (Ex. C), Mpower's HWP terms (Ex. D), and Staff's edits to Mpower's February 2024 contract (Ex. E). Mpower's response is attached as Exhibit 1.

The response addressed all five OTSC 2 allegations. It presented Mpower's contract-duration position, the January 2021 HWP authorization and subsequent filings, the Track II history, the Dira disclosures and service agreement, the language of the RAAF, and Mpower's position that the form requested disclosure of energy affiliates and specified transaction history rather than a list of every affiliated entity. Mpower also stated that it was prepared to amend the RAAF if the Commission concluded that an additional disclosure was required.[48]

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[47] CITE TO MICHELLE'S OTSC 2 extension request

[48] OTSC 2 Response at 11-25 & Exs. A-E; Retail Access Eligibility Application Form sections 1(B) and 7(R); HWP Determination Letter (Nov. 25, 2024) at 2-3.

I. OTSC 3: Mpower Responded to Account-Specific Issues and Offered Corrective Measures

The Commission issued OTSC 3 on May 14, 2026. Mpower filed its response in June 2026 while its further FOIL request concerning the underlying account review remained pending.[49]

Mpower's response began by describing the ordinary electronic enrollment controls summarized above. It then distinguished the limited group of internal, employee, family, and accommodation accounts from ordinary public solicitations. According to the response, thirteen of the eighteen accounts for which a conventional agreement could not be produced were Mpower internal accounts; for the five non-Mpower accounts, Mpower submitted affidavits addressing authorization.

Mpower addressed the accounts individually and explained why they had not entered through its ordinary sales channel. It also described the relationship between an older server failure and the search for archived paper files, rather than treating those explanations as alternatives. With respect to the guaranteed-savings issue, Mpower explained that it did not market a GSP through its sales force, that only a single specially prepared agreement for a single customer contained an express savings guarantee, and that the internal 'GS' field had also been used to identify other reduced-rate accommodation accounts that did not contain the same promise.

The response proposed specific corrective measures: execute compliant agreements and complete TPVs for active friends-and-family accounts lacking located contracts or drop those accounts; file additional affidavits; adopt a written Internal Accounts Policy requiring a contract and TPV for every account, including owner, officer, employee, and family accounts; and modify the GS reporting mechanism so that non-GSP products would not be captured.[50]

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[49] Case 23-M-0287, Order to Show Cause (issued May 14, 2026) ("OTSC 3"); OTSC 3 Response (dated June 11, 2026; filed June 12, 2026); Mpower FOIL Request No. 1762-060426 (received June 4, 2026).
[50] OTSC 3 Response at 15-16.

On July 10, 2026, Mpower asked that OTSC 3 not be decided until Mpower could review the FOIL production and supplement its OTSC 3 Response. The Secretary denied that request on August 26, 2026. The June response nevertheless remained a detailed account-specific submission that described Mpower's ordinary controls, the exceptional accounts, the records produced, the explanations offered, and the corrective actions Mpower proposed.

J. The Department Produced the Requested Records After the Commission Met and One Day Before the September 2026 Order

Earlier in this proceeding, the Secretary tied Mpower's response deadlines to the Department's FOIL production. In OTSC 1, the Secretary extended the response date until 30 days after the Department responded to Mpower's FOIL request, and later granted a further 30 days. In OTSC 2, the Secretary again extended the response date until 30 days after the FOIL response.[51]

That approach changed in 2026. On June 4, the Secretary denied Mpower's request for additional time to respond to OTSC 2. The same day, the Department received Mpower's FOIL Request No. 1762-060426, which sought the records underlying the OTSC 3 account review and related communications with utilities, agencies, and third parties. Mpower filed its OTSC 3 response on June 12 while that request was pending. It reserved the right to supplement and asked that OTSC 3 not be decided before it could receive and address the requested material. On August 26, the Secretary denied Mpower's July 10 request for leave to supplement the OTSC 3 record.[52][53]

The Department, for its part, extended its own time to respond to FOIL No. 1762-060426 four times, by letters dated July 3, July 31, August 28, and September 14. The Department

[51] Ruling on Extension Request (issued Dec. 29, 2023); Ruling on Extension Request (issued Apr. 2, 2024); OTSC 1 Response at 1-2; Mpower Request for Extension of Time (filed Sept. 15, 2025); Ruling on Extension Request (issued Sept. 19, 2025).

[52] Ruling on Extension Request (issued Aug. 26, 2026).

[53] Letters from the Records Access Officer, FOIL Request No. 1762-060426 (July 3, July 31, Aug. 28, and Sept. 14, 2026); Final Response Letter (Sept. 21, 2026).

produced the responsive records on September 21 (the "September 21 Production"), four days after the session and one day before the September 2026 Order issued on September 22. Mpower had no opportunity to present those records before the Commission acted.

The September 21 Production included Department and third-party communications that Mpower could not have obtained from its own files. Utility communications confirmed changed account numbers and explained supply billing. A March 17, 2026 DMM notice shows that the Department processed a filing Mpower made on March 16, which bears on whether materials relevant to Finding 12 had been received. When Staff asked in December 2025 whether Mpower had paid its VCP invoice, NYSERDA confirmed receipt of a payment. Those records bear on Findings 2, 4, 10 through 12, and 14, as Sections V and VII explain.

Mpower requested the records before it answered OTSC 3 and asked that the proceeding await them. The Department produced them after the Commission met, and the September 2026 Order issued without them. Section VII addresses their effect.

The factual history therefore presents a company that maintained a legal disagreement about whether the Commission's enrollment-and-renewal trigger applied to contracts that continued until termination, while repeatedly operating through the Commission's processes and responding to regulatory concerns. Mpower sought approvals, filed contracts, revised agreements, produced records, requested underlying information, procured renewable attributes, offered VCPs, undertook a customer-consent campaign, ceased new HWP marketing in response to Staff's direction, and proposed account-specific remediation. Those facts supply the background for the legal and factual errors addressed in the sections that follow.

IV. THE COMMISSION COMMITTED ERRORS OF LAW

A. Exclusion of the completed OTSC 2 response was an error of law that warrants rehearing and a merits determination

1. The OTSC 2 Response warrants consideration

The Commission should vacate the OTSC 2 default and accept Mpower's July 10 response and July exhibits. It treated five allegations as admitted while refusing to consider the OTSC 2 Response filed more than two months before revocation. The excluded OTSC 2 Response addressed the legal and factual elements of findings 5 through 9. Sustaining those allegations without considering the OTSC 2 Response distorted both the findings and the basis for terminating eligibility.

The OTSC 2 Response was before the Commission when it acted and addressed each allegation underlying Findings 5 through 9. The Commission therefore could have accepted the filing, permitted Staff to respond, and decided those allegations on the merits before imposing revocation. Instead, it treated the allegations as admitted by default without separately determining whether the admitted facts and the existing record supplied sufficient support for each legal finding or for the resulting revocation. A default resolves the failure to respond; it does not relieve the Commission of determining whether the facts deemed admitted satisfy the governing requirements or justify the consequence imposed. The chronology in Section III supports reopening and merits review.

2. Mpower relied on counsel, and the Commission should excuse the resulting default

Mpower entrusted the FOIL request to counsel, including receipt and review of the production, monitoring its status, and necessary follow-ups. Mpower did not know that the productions had occurred or that the response period had run. It relied on counsel to perform the assigned work; it did not knowingly choose to ignore the proceeding. That distinction supports

relief from the default and defeats the inference that counsel's handling of the FOIL matter demonstrated the Company's disregard of regulatory authority.

Prior counsel's continued correspondence with the Department on other matters is consistent with a filtering problem affecting particular production messages. It does not establish that those messages reached prior counsel's inbox or were brought to Mpower's attention. The Department's reliance on unrelated communications with Mpower's prior counsel therefore does not rebut that Mpower was unaware of the FOIL production or refute the explanation for this missed response.[54]

The extension tied the response deadline to receipt of the FOIL response. Prior counsel's explanation was that email filtering prevented receipt of the messages establishing that event and the resulting deadline. After learning of the default, Mpower sought relief and filed the OTSC 2 Response. That conduct shows continued pursuit of the proceeding, not abandonment of it.

As explained in the May 25 letter, the Department's FOIL productions were among the messages that did not reach prior counsel's inbox. The May 25 letter goes on to describes a filter that captured messages purporting to come from Department addresses, including the February 6, 2026 final production which triggered the 30-day OTSC 2 response deadline. Notification of those FOIL productions differed from earlier FOIL emails: they came from a different sender address and contained links rather than attachments.

Staff emphasized the absence of a status inquiry after the October 14 letter. That criticism concerns work Mpower had assigned to counsel. It does not establish that Mpower knew the production had occurred or intended to leave the allegations unanswered. Indeed, upon learning

[54] Letter from the Office of Investigations and Enforcement, New York State Department of Public Service, to the Secretary, New York State Public Service Commission, Case 23-M-0287 (June 4, 2026) ("OIE Letter") at 1-2; September 2026 Order at 25.

the FOIL response had been produced, Mpower's in-house counsel requested a copy on May 19, 2026, and the Department sent it on May 27, 2026.

After the missed deadline became known through the issuance of OTSC 3 in May 2026, prior counsel located the captured production messages and requested additional time to respond to OTSC 2. The May 25 letter explained that counsel and Mpower had been unaware of the February 6, 2026 final production because the notice had been captured after changes to the firm's email rules. After the Secretary denied additional time on June 4, Mpower completed and filed its OTSC 2 Response on July 10, with supporting exhibits filed on July 16, to preserve its defenses and place the merits before the Commission before it acted.

The Secretary's concern that a regulated company remain current in its proceeding does not require treating counsel's error as Mpower's knowing defiance. Responsibility for a procedural omission and a conclusion of operational unfitness are different matters. Mpower's lack of awareness and reliance on counsel support discretionary relief from the first and do not establish the second.

The Commission should exercise its discretion under PSL § 22 and 16 NYCRR § 3.7 to excuse the default. Mpower explained the missed deadline, established that the FOIL productions and resulting deadline were not brought to its attention, and filed the OTSC 2 Response before the Commission acted. Mpower's explanation is supported by the chronology and by the sworn affidavit submitted with this Request as Exhibit 2. Excluding that response supplied five findings used to terminate the Company's entire New York business. By analogy, the reasonable-excuse and meritorious-defense considerations reflected in CPLR 5015(a)(1) support reopening, while the requested relief rests on the Commission's own reconsideration authority. But even if the factual assertions in OTSC 2 are deemed true by virtue of a procedural default, the legal conclusions (i.e., the violations) cannot simply be deemed established by default. As discussed below, one of the

two UBP rules OTSC 2 alleges Mpower violated does not require what OTSC 2 states, and the other rule was not in effect when it was allegedly violated.

Further, the June 4 Ruling denied additional time; it did not contain the express prohibition on filing that the September 2026 Order later attributed to it. On rehearing the Commission can accept the OTSC 2 Response, afford Staff an opportunity to respond, and decide the disputed obligations. That process addresses the substance of findings 5 through 9 and permits a reliable assessment of their significance for revocation.

3. Exclusion independently distorted the findings and the revocation determination

Excluding the OTSC 2 Response independently warrants rehearing because it distorted both the evidentiary record and the Commission's cumulative rationale. The Commission declined to consider evidence directly addressing five findings and then relied on those untested findings to revoke Mpower's eligibility.

Exclusion introduced the disputed HWP, affiliate, transaction, and update theories without consideration of the filed response and repeated the transition premise. The Commission then treated Mpower's submission of that response as further evidence of disregard. This compounded the error: Mpower's effort to answer was used against it, while the information explaining its conduct was excluded. The resulting characterization affected the choice of revocation.[55]

4. Federal and state due process independently required a meaningful opportunity to defend existing eligibility

The September 2026 Order deprived Mpower of its existing eligibility and customer relationships without a meaningful opportunity to defend them, in violation of the Fourteenth

[55] September 2026 Order at 24–25 (OTSC 2 Response and Exhibits A–E, refusal to consider them, and treatment of the submission as further disregard).

Amendment and Article I, § 6 of the New York Constitution. Mpower's asserted protected interest is an operating authorization already exercised in serving customers, not an expectation of future business. UBP §§ 2.D.2 and 2.D.7 describe eligibility as continuing unless limited, abandoned, or revoked through the prescribed process. Termination of that existing authorization required a meaningful opportunity to address the grounds for doing so.[56] Mpower never argued that the Commission cannot regulate (or indeed prohibit) continuing service agreements. It simply argues that the Commission excluded them from the December 2019 Order.

a. The value of additional safeguards must be assessed on Mpower's record

Under *Mathews*, the adequacy of process turns on the private interest, the risk of erroneous deprivation under the procedures used and the probable value of additional safeguards, and the governmental interest, including the burden of additional process.[57] *Portofino* applies that framework and recognizes that due process requires a meaningful opportunity to be heard at a meaningful time.[58] *Portofino* upheld the procedures before it based on their particular features, including the availability of a later full hearing and review; it does not hold that the Commission's procedure here was unlawful. Applied to the materially different procedure here, each Mathews consideration supports the focused additional process requested.

- Private interest. Revocation ends statewide eligibility and triggers compelled transfers. The loss encompasses established customer relationships and the resulting regulatory, contractual, and operational consequences. The severity and practical irreversibility of that deprivation increase the importance of a reliable merits determination.
- Risk of error and value of the safeguard. Five disputed allegations became conclusive findings without consideration of defenses already filed. In addition, the September 21 production supplied the particular Department and third-party communications identified

[56] U.S. Const. amend. XIV; N.Y. Const. art. I, § 6; UBP §§ 2.D.2, 2.D.7 (Dec. 2025), at 8, 11. Mpower asserts the existing-interest theory; the UBP provisions do not themselves resolve whether that interest is constitutionally protected.
[57] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).
[58] Matter of Portofino Realty Corp. v. New York State Division of Housing & Community Renewal, 193 A.D.3d 773, 777 (2d Dep't 2021).

below after the Commission session and one day before issuance. The safeguards requested are concrete: consider the response and exhibits, permit an account-specific and year-specific submission addressing that evidence, allow Staff to answer, and resolve any remaining material factual disputes through a targeted hearing. Contract interpretation that can be decided as a matter of law need not await that hearing.

- Governmental interest and burden. Prompt enforcement, orderly procedure, and customer protection favor a reliable merits determination. The OTSC 2 Response was already available for review; the separate September 21 production calls for the focused supplemental analysis described in Section VII, with an opportunity for Staff to respond. A hearing limited to unresolved, outcome-determinative facts would address the remaining risk of error without retrying legal issues or undisputed history.

Earlier notice of the allegations does not answer the defect in the Commission's later decision to exclude the OTSC 2 Response and use the resulting admissions to revoke statewide eligibility. Mpower's procedural error was remediable through review of an available submission. The severity of the deprivation and the submission's direct bearing on the OTSC 2 findings (5-9) warranted that safeguard before revocation.

b. The September 21 production presents a separate opportunity-to-respond issue

The September 21 production created a separate procedural defect. The material communications identified below were unavailable for Mpower's response before the September 17 session and were produced one day before issuance. Mpower thus lacked a meaningful opportunity to present their effect on the findings before eligibility was revoked. Changed access to those records also supplies the independent rehearing ground in Section VII.

Mpower continues to review the production and reserves the right to seek leave to submit the account and compliance-period comparisons bearing on these issues, with an opportunity for Staff to respond. That opportunity was lacking before revocation and remains necessary independently of the disposition of the OTSC 2 default.

B. The UBP enforcement predicates require separate consideration of the response and revocation

The UBP requires both a basis for substantiating noncompliance and a determination that the selected consequence is appropriate. Section 2.D.6.a.2 addresses those predicates, while Section 2.D.6.a.3 requires notice and an opportunity to respond. Those requirements supply an independent basis for rehearing of the Commission's treatment of the OTSC 2 Response and selection of revocation.

The September 2026 Order used the OTSC 2 default and adverse characterization of the late submission to sustain findings 5-9 and support revocation without resolving the legal defects addressed in Sections IV.C-G. Notice of the original allegations did not establish a later prohibition on filing or answer the excluded defenses. The resulting determination therefore failed to address both what the admitted facts established under the governing provisions and why those facts warranted revocation.

Mpower requests correction of those legal errors under § 3.7, consideration of the OTSC 2 Response, and reversal of revocation under PSL § 22. Even if a procedural default remains, the substantive requirements and the appropriateness of revocation remain independent questions.

C. Monthly pricing does not establish contractual renewal (Findings 1, 5, and 13)

1. The governing orders selected enrollment and renewal as the transition events

Ordering Clause 1 of the Second Reset Order conditioned new mass-market enrollments and renewals of existing mass-market contracts on compliance with the specified product requirements. The distinction between existing agreements and new or renewed agreements was deliberate. The September 2020 Clarification Order rejected Direct Energy's retroactivity

argument because the Second Reset Order "only applies to prospective contracts."[59] That assurance must be given effect in determining when Mpower's pre-existing agreements became subject to the new restrictions.

The September 2026 Order treats the end of a billing cycle as the expiration and renewal of the agreement "for regulatory purposes." The missing step is the legal basis for classifying Mpower's particular agreements as contracts with successive one-month terms. An order regulating renewal does not answer that question simply because the customer is billed monthly or the price is determined monthly. The contractual term, the renewal provision, and any applicable rule displacing those provisions must supply the answer.[60]

The September 2026 Order's reasoning assumes the disputed classification. Actual month-to-month contracts expire at the end of their monthly terms. That proposition does not establish that every variable-rate agreement has such a term. By using monthly pricing to supply monthly duration, the September 2026 Order expands the transition requirement beyond the event identified in the governing text and conflates two entirely distinct contract principles – contract pricing and contract duration.

The implementation date must be applied to the events those orders regulated. April 16, 2021 governed the applicable renewal restrictions as well as new enrollments. Ordering Clause 2 of the Second Reset Order and Ordering Clause 4 of the September 2020 Clarification Order separately address automatic renewal following a fixed-rate term. The relevant inquiry is whether the particular agreement expired, when expiration occurred, and which operative clause applied. An implementation date supplies no missing expiration term.

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[59] Second Reset Order at 108.
[60] September 2026 Order at 11.

2. The actual agreements continue until termination and must be evaluated by category

The sample language discussed in the September 2026 Order provides for a variable rate determined monthly until either party terminates the agreement, while separately addressing renewal at a fixed rate. The monthly interval describes rate calculation; continuation until termination describes duration. The separate reference to fixed-rate renewal further demonstrates that continuation at a variable rate and renewal were not used interchangeably.[61]

The UBP treats price and duration as separate terms. UBP § 5.B.4.a.2 requires disclosure of the price or its method of calculation, the contractual term and end date "if any," and renewal provisions "if any." Section 5.B.4.b gives the customer disclosure statement controlling effect over conflicting provisions elsewhere in the sales agreement. A monthly price provision cannot displace an express continuation term without addressing those rules. The Commission must read the provisions together before finding monthly contractual expiration.

An initial fixed-price period does not, by itself, resolve the issue. The complete agreement must establish whether that period is the contractual term or a pricing interval within a continuing agreement. Where a contract actually expires and renews after April 16, 2021, the Commission can identify that event and apply the governing requirement. Where a fixed-price interval ends under an agreement that expressly continues, the Commission must explain why the pricing change terminates and renews the agreement. It cannot treat the two situations as identical without addressing the operative provisions.

The customer analysis must distinguish variable pricing from inception, an initial fixed-price period ending before April 16, 2021, an initial fixed-price period ending afterward, agreements expressly providing monthly renewal, and later amendments. The full agreement

[61] September 2026 Order at 14.

determines whether a fixed-price period was also a contractual term. A conclusion concerning one category does not establish a violation for another. Mpower seeks rejection of the blanket monthly-renewal premise and application of the actual transition rule to each relevant category and date.

The regulatory-compliance and cancellation provisions discussed in footnote 25 of the September 2026 Order do not close this gap. A cancellation right identifies a means of ending an agreement; it does not establish that the agreement expires each month without cancellation. The Commission's reliance on those provisions therefore does not establish the renewal event on which the challenged findings depend.[62]

3. Monthly billing and pricing do not establish monthly contractual expiration

Monthly performance does not create successive monthly contracts. A recurring payment or price calculation governs performance under an agreement; expiration and renewal govern the agreement's duration. An agreement that continues until either party terminates it remains terminable, not perpetual: the termination provision supplies an endpoint when exercised, while the monthly pricing provision determines the charge during the continuing term. Treating the pricing interval as the contractual term deprives the continuation and termination provisions of independent meaning.

A contract that continues until either party terminates does not bind either party forever. The termination provision supplies an endpoint when exercised; the monthly pricing provision determines the charge while the agreement continues. The statutory definition of continuous service refers to continuation until the consumer cancels. The bilateral termination language therefore remains relevant as contract text, but it is not identical to that definition. New York's continuous-service legislation, enacted November 11, 2020 after the Second Reset Order, draws

[62] September 2026 Order at 12 & n.25.

the same underlying distinction: automatic renewal follows the end of a definite term, while continuous service remains in effect until cancellation.[63] Because that legislation postdates the Second Reset Order, it is offered as interpretive support, not as evidence of that order's original meaning.

4. National Energy Marketers does not decide the term of these agreements

The September 2026 Order's reliance on National Energy Marketers to support this point is misplaced. The Order relies on the Appellate Division's 2018 decision upholding the Commission's low-income order, and that order confirms that duration turns on the agreement's terms. It directed de-enrollment "at the expiration of the existing agreement," addressed month-to-month agreements separately, and required that agreements with a "gift term"—where the customer receives a gift or period of free service after remaining with the ESCO for a designated period—"be deemed to expire only after the end of the gift term." The Appellate Division sustained the order because it "did not affect existing contracts." The Commission thus looked to what each agreement actually provided, and it extended the transition date where the agreement tied the customer's benefit to continued service. Mpower's 2021-Present agreement does the same: enrollment "entitles you to the benefits of the MPOWER PROTECT home warranty … during the period of your enrollment with Mpower," and the agreement continues until either party terminates it. As the September 2026 Order acknowledges, the decision "did not analyze specific contract terms." It cannot classify agreements that, by their terms, continue until terminated and state that "[r]enewal is not necessary."[64]

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[63] See GBL s.527-a.
[64] *Matter of National Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n*, 167 A.D.3d 88, 98 (3d Dep't 2018); September 2026 Order at 10.

5. Later terminology does not establish the content of earlier requirements

Staff's January 28, 2026 industry interrogatory defined month-to-month contracts by reference to a one-month term and automatic renewal unless canceled. That formulation identifies duration and renewal as the defining characteristics. It does not define the category merely by monthly price determination. Mpower's March 6, 2026 revised response distinguished its variable-rate accounts using that definition.[65]

The November 13, 2025 UBP Order reaffirmed monthly expiration for regulatory purposes. That ruling does not answer Mpower's antecedent point: the specified agreements did not contain one-month terms or automatic monthly renewal provisions. Treating the agreements as successive monthly contracts presupposes the very contract structure disputed here. The Commission must examine the governing agreement and disclosure statement and identify the earlier operative requirement that imposed its asserted classification during the period at issue.

GBL article 29-BB supports Mpower's antecedent distinction, but only as interpretive support and only for agreements whose actual terms fit the statutory concept. GBL § 527 defines "automatic renewal" as an arrangement renewed at the end of a definite term for a subsequent term, while "continuous service" is an arrangement that continues until the consumer cancels the service. Those definitions apply "[f]or the purposes of this article." They therefore do not directly control the meaning of "renew" in the Second Reset Order or independently establish that an ESCO agreement falls into either category. They do confirm that New York law recognizes two different contractual structures: successive terms following expiration, and one continuing agreement lasting until cancellation. Nothing in those definitions provides that monthly billing, monthly

[65] Matter 26-00183, DPS-ESCO 2026, Request No. 2, Question 2; Mpower Revised Response (March 6, 2026).

performance, or monthly price calculation converts the latter structure into successive one-month contracts.

That distinction must be applied contract by contract. The 2017–2020 sample agreement states that, after the identified fixed-rate period, service will continue at a Variable Rate determined on a monthly basis until terminated by either party, or unless renewed at a Fixed Rate, and separately provides that the agreement continues until notice of cancellation and completion of termination by the utility. The form identified as "2021-Present" likewise separates monthly variable pricing from duration: its disclosure statement continues the agreement until cancellation and states that "[r]enewal is not necessary." Those provisions support Mpower's position that the monthly interval governed price calculation rather than contractual duration. They do not establish the terms of every legacy agreement, however. Any agreement expressly providing a one-month term, automatic monthly renewal, expiration at the end of a billing cycle, or a fixed term followed by a new successive term must be analyzed under its own language and dates.

Section 527-a regulates offers and performance without collapsing those concepts. Its current text separately requires clear disclosure of material terms, affirmative consent to the initial automatic-renewal or continuous-service arrangement, accessible cancellation mechanisms, and specified treatment of later price increases. Those duties may govern a continuing agreement without turning each charge or price change into expiration and formation of a new contract. The current price-increase provision is particularly instructive: it addresses a higher price relating to an automatic renewal or continuous service offer to which the consumer previously consented, thereby contemplating a price increase within either form of arrangement. That language does not establish that every recurring price change is a renewal event. Nor, however, does classification as continuous service excuse compliance with any disclosure, cancellation, price-change, or later-consent requirement that independently applies. The current text and its amendments cannot be applied retrospectively without first identifying their effective-date and applicability provisions.

Mpower's argument on the November 13, 2025 UBP Order is narrower. For the agreements containing the continuation language quoted above, there was no recurring expiration and automatic-renewal event to characterize. The September 2026 Order instead inferred monthly expiration from monthly variable pricing. It deemed those month-to-month contracts "to expire, at least for regulatory purposes, at the end of the monthly billing cycle." Neither the November 2025 UBP Order nor the Commission's regulatory authority eliminates the need to identify the contractual or contemporaneous regulatory provision that supplied that expiration event.

The same separation applies to GBL § 349-d. The 2023 amendments, effective March 18, 2024, treat a change in price or pricing scheme as material and require express consent for covered material changes. Those requirements can govern conduct under an existing agreement without establishing that the agreement expires and renews whenever its variable price changes. The Commission may therefore apply later price-change, consent, disclosure, termination, eligibility, or product requirements to a continuing agreement while still recognizing that it was not a succession of monthly contracts. Consent to the original variable-price mechanism likewise does not satisfy a later-enacted express-consent requirement. The proper analysis identifies, for each contract category and period, the agreement's duration language, any actual expiration or amendment, the independently applicable statutory or UBP obligation, and its effective date. The Commission should reject the blanket equation of monthly pricing with monthly renewal while separately deciding any requirement that reached continuing agreements without depending on renewal.

6. The Same Due Process Requirements Discussed Above Apply to the Commission's New Interpretation

The Revocation of Mpower's authority deprived it of a meaningful opportunity to defend itself for the same reasons discussed above. The September 2026 Order retroactively applied to

Mpower's existing agreements an interpretation that the December 2019 Order did not state – an interpretation which is inconsistent with longstanding contract law, New York (and sister state) statute, and other state Commissions' application of the identical legal principle. Termination of its authorization required a meaningful opportunity to address the grounds for doing so and not the retroactive enforcement of a newly advocated interpretation; which is, in essence, retroactive enforcement of an entirely new rule. Mpower never argued that the Commission cannot regulate (or indeed prohibit) continuing service agreements. It simply argues that the Commission excluded them from the December 2019 Order.

D. The HWP itemization requirement is not established (Finding 6)

Finding 6 sustains an HWP pricing-transparency violation. The Commission's own orders show that the transparency condition it invokes does not govern Mpower's HWP. In the restated product criteria, that condition is part of the renewable-product category. An ESCO may enroll customers in "a renewably sourced electric commodity product" if, among other requirements, "there is transparency of information and disclosures provided to the customer with respect to pricing and commodity sourcing."[66] A separate category covers enrollment in "a product or service otherwise expressly authorized by the Commission." The Additional Products Order expressly authorized Mpower's HWP. The renewable-product disclosure condition does not apply to it.[67]

The Commission also deferred the itemization mechanism on which Finding 6 depends. The September 2020 Clarification Order stated that "[t]he December 2019 Order did not direct ESCOs to immediately implement new pricing transparency requirements, and instead directed Staff and the distribution utilities to develop a Joint Billing Plan for each utility to address these transparency

[66] Second Reset Order at 19.
[67] Additional Products Order at 15-16, 20; OTSC 2 at 18. See also OTSC 2 Response at 19-20.

concerns in the future."[68] It added that the Commission was "not persuaded that ESCOs are unable to serve customers in the meantime before those requirements are developed and adopted."[69] Staff's May 2024 HWP White Paper later recommended line-item or separate billing of HWP costs. The Commission has not acted on that recommendation, and Case 24-M-0324 remains open. In June 2026, the Joint Utilities petitioned to recover the cost of billing changes needed to implement new statutory itemization requirements.[70] A requirement the Commission deferred, and that the utilities' billing systems do not yet support, cannot establish that Mpower violated it. On-bill unbundling depends on the provisions governing that mechanism. A contractual disclosure or HWP approval condition is a different obligation, measured against its own terms and the disclosures Mpower supplied. The default did not resolve those legal differences.

OTSC 2 acknowledges the implementation problem. Mpower uses utility consolidated billing, and OTSC 2 states that those systems cannot break out ESCO HWP costs. Footnote 37 cites the Joint Utilities' August 26, 2024 comments that their software cannot itemize additional non-utility charges, including bundled third-party products. The inability to use that function is not evidence that Mpower refused to use it. Any separate contractual disclosure duty must instead be assessed against the required disclosure and the contracts Mpower submitted.

Mpower's agreements show how the HWP was provided. The "2021-Present" agreement states that enrollment with Mpower "entitles you to the benefits of the MPOWER PROTECT home warranty" during the period of enrollment. It states a single commodity rate and no separate warranty price. OTSC 2 contrasted that structure with an earlier proposal to factor warranty value into rates. The existence of warranty value does not establish an undisclosed incremental charge.

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[68] September 2020 Clarification Order at 50-51.
[69] *Id.*
[70] Case 15-M-0127 et al., Joint Utilities Petition – Cost Recovery and Other Relief Related to GBL § 349-d(9) and (10) (filed June 15, 2026) at 2.

The rate structure, billing, and contractual disclosures determine what customers actually paid and were told.

A requirement to allocate or disclose a bundled component, if applicable, is distinct from an allegation that Mpower collected an undisclosed extra charge. Finding 6 cannot substitute an inference about economic value for proof of the particular omission.

The approval history also contradicts a refusal to disclose. The Additional Products Order directed Staff to ensure compliance with the UBP and Commission orders but did not itself impose the disputed requirement. The form stated no separate warranty charge. Mpower repeatedly revised its materials, and OTSC 2 acknowledges that specified terms, coverage restrictions, and disclosure concerns were largely resolved by May 2024. The remaining dispute concerned particular requirements and implementation questions, not concealment of the offering. Those responses weigh against the September 2026 Order's characterization of pervasive disregard.

Mpower requests that Finding 6 be vacated or narrowed to an omission established under an identified, operative requirement, after consideration of the disclosures and approval history presented in its response. Correcting that finding changes both the substantive basis for revocation and the inference that Mpower refused to provide information or use an available billing mechanism.

E. No reportable affiliate transaction is identified (Finding 7)

The transaction-history question is narrow. RAAF Item 7.R asks the applicant to "[d]isclose any history of bankruptcy, dissolution, merger, or acquisition activities during the 24 months prior to this application for each trade name used as well as affiliates of the ESCO, including upstream owners and subsidiaries." UBP § 2.B.1.a.vii requests the same history. Mpower answered that neither it nor its affiliates had such history. The question was therefore

whether a reportable event occurred within the lookback period, not whether the form separately identified every entity under common ownership.[71]

Common ownership is not a merger or acquisition within the reporting period. The September 2026 Order identifies no reportable event that made Mpower's transaction-history answer inaccurate. A separate duty to list affiliates cannot supply that missing element. Finding 7 should therefore be vacated.

The missing transaction, date, and corresponding reporting duty are the elements that distinguish this allegation from the other Dira issues. Treating the existing relationship as the undisclosed event both expands the form's question and adds an unsupported component to the September 2026 Order's account of concealment.

The legal issue remains even if the historical facts are treated as admitted by default. Existing common ownership must be tested against the reporting provision's transaction and lookback requirements. A deemed admission of that relationship does not answer whether it constitutes a merger, acquisition, or other reportable event within the specified period.

F. The September 2026 Order expands the energy-affiliate disclosure requirement beyond its terms (Finding 8)

RAAF Item 1.B asks the applicant to "[l]ist energy affiliates, including upstream owners and subsidiaries." Mpower listed its energy affiliate, Mpower Energy NJ LLC. Dira is a full-service real estate management company, as Mpower's July 15, 2024 Response explained; it is not engaged in the retail energy business. The phrase "including upstream owners and subsidiaries" identifies which energy affiliates must be listed. It does not remove the word "energy." In other

[71] Retail Access Eligibility Application Form, Item 7.R; UBP § 2.B.1.a.vii; Mpower RAAF, Attachment R; September 2026 Order at 35-37, Finding 7 (reportable transaction). See also OTSC 2 Response at 23.

words, this disclosure is limited to entities in the energy sector.[72] Dira, a real estate management company does not fall within that category. Nor would a home warranty company for that matter.

Dira's common ownership and maintenance services do not convert its real-estate management business into an energy affiliate under the field as written. Mpower's use of the word affiliate in another context is not a concession that Dira falls within every category using that word. The limiting term energy controls this disclosure question.

Mpower answered the question the application asked. An enforcement finding based on a broader category than the form states changes the obligation after the fact. The excluded response squarely raised that defect and warrants merits consideration.

The same legal error remains even if the facts of common ownership and maintenance services are admitted by default. Those facts do not dispense with the energy-affiliate limitation. The Commission can correct the legal scope of the field independently of reopening the default.

Mpower seeks vacatur of finding 8 insofar as it rests on that expanded classification. Correcting the field's legal scope also removes an unsupported basis for characterizing Mpower's disclosures as concealment.

G. No triggering major change is identified for the update obligation (Finding 9)

Finding 9 requires a major change under UBP § 2.D.4.a that triggered an update obligation. Mpower's arrangement with Dira did not revise the terms and conditions governing its relationship with customers. Under the Mpower Protect program terms, Mpower may terminate the agreement if anyone "other than an Mpower employee or its agent(s) renders repairs or adjustments to the equipment, except as instructed by Mpower." Under the Dira Agreement, Dira performs covered

[72] Although "energy affiliate" is not formally defined, it is generally understood to encompass entities operating in the energy sector or regulated by a state or federal commission overseeing wholesale or retail energy markets.

repair work at Mpower's expense, and Mpower handles customer service and service requests. The arrangement also predates every HWP enrollment: the Dira Agreement is dated April 6, 2021, and Staff places all HWP enrollments on or after April 16, 2021. No later change to the customer relationship occurred. The September 2026 Order's reliance on the existence of the service-provider relationship does not establish the triggering change.

The three Dira allegations require separate predicates. Finding 7 requires a reportable transaction within the applicable lookback period. Finding 8 requires that Dira fall within the RAAF's energy-affiliate category. Finding 9 requires a major change triggering an update obligation. The existence of a commonly owned service-provider relationship cannot establish all three propositions, and exclusion of Mpower's response did not eliminate the Commission's obligation to apply each governing provision to the admitted facts.

The documented chronology contradicts the inference that Dira's identity and role were concealed. Mpower's November 7, 2022 Response named Dira and described the service work it performed. Staff's April 3, 2023 email referred to "a third party in the past (Dira Realty) that would handle service requests." On April 10, 2023, Mpower filed the Dira Agreement in Matter 14-02554. Staff's November 2022 information requests to all eligible ESCOs asked whether each HWP was "offered solely by the ESCO itself or is it offered in partnership with a third-party provider," and Mpower answered. Disclosure of common ownership and completion of particular RAAF fields present separate questions; neither erases that documented history.[73]

To the extent such information could be construed as needing to be disclosed, it had been disclosed—Mpower's November 7, 2022 Response described Dira as "Mpower's affiliate." OTSC 2's premise that Mpower first disclosed the affiliation in January 2025 is contrary to the record.

[73] November 7, 2022 Response at 1-4; Email from Staff to Mpower (Apr. 3, 2023); Matter 14-02554, (filed Apr. 10, 2023); HWP White Paper at 1 & Att. at 19 (Question 1.b); OTSC 2 at 7-9, 19-20.

Whatever dispute remains over a particular RAAF answer, the record does not support treating the relationship as concealed.

Default cannot supply the missing legal link between the asserted facts and a reportable material change. Mpower requests vacatur of the Dira findings to the extent those facts do not satisfy the governing provisions. Three related disclosure theories are not three demonstrated episodes of deception, and they cannot be given that cumulative weight in deciding revocation.

V. THE COMMISSION COMMITTED ERRORS OF FACT

The September 2026 Order's factual conclusions also require correction. The renewable, consent, account-documentation, and reporting findings concern different obligations and different evidence. Each should be confined to the conduct established. An identified deficiency does not establish the broader pattern or inability to comply attributed to Mpower, and that distinction bears directly on the choice of revocation. The Commission must also give appropriate weight to the steps Mpower took to supply information, explain particular accounts, correct reporting, and address disputed obligations. A defense or corrective proposal does not become evidence of unwillingness to comply merely because Staff rejected the accompanying explanation.

A. Renewable and EDP noncompliance is overstated without separating obligations and performance (Findings 2 and 4)

1. The findings must distinguish the applicable obligations and demonstrated performance

Findings 2 and 4 concern different duties: the renewable promises in customer agreements and compliance with EDP requirements. The September 2026 Order acknowledges that Mpower purchased 148,000 nationally sourced RECs and retired them through PJM. The overstatement arises from treating disputed questions about qualifying source, load matching, retirement treatment, and reporting as though Mpower had failed to procure or retire renewable attributes at

all. The findings should instead identify the actual purchases and isolate the specific contractual or EDP deficiency established for each customer category and compliance period.

2. The purchases are material even where their source or retirement did not satisfy the applicable requirement

Mpower purchased and retired renewable attributes; the dispute concerns which purchases qualified and how the applicable load should have been matched and reported. A deficiency in source, vintage, or tracking treatment differs materially from a refusal to procure the promised attributes. That difference limits both the finding of nonperformance and its significance for revocation.

The 148,000-REC purchase and retirement is therefore evidence of substantive effort and performance that weighs against the September 2026 Order's cumulative characterization. The remaining qualification dispute does not erase that conduct.

3. Express renewable promises and the HWP approval must be analyzed separately

The contract categories determine the applicable renewable obligations. Correcting the monthly-renewal premise changes the standard for affected legacy agreements; an independent sourcing or delivery promise remains governed by its own terms. Combining those categories obscures both the obligation and the deficiency for the relevant customer load.

4. The year-specific record requires a defined shortfall and credit for completed performance

Mpower identified accounting issues, including the treatment of certain large commercial load, and offered a compliance-payment approach. Rejecting that proposal did not resolve the disputed load or establish the full extent of nonperformance. Mpower requests correction of the

findings to reflect the particular procurement, retirement, disclosure, and transition obligations and the evidence of performance under each.[74]

The remaining deficiency depends on the compliance year, affected load, customer category, contractual percentage, qualifying attributes, and retirement and disclosure treatment. Those elements define a measurable compliance issue. The proposed payment mechanism and the evidence of a received payment must be given their respective weight in determining what remained outstanding.

The produced notices quantify the issues. By way of example, the October 31, 2023 letter identifies a 2022 obligation of 124,825 MWh, retirement of 101,125 RECs, and a 23,700-REC shortfall; the corresponding invoice demands $829,500. The 2024 notice identifies an 82,149-MWh obligation, 78,986 retired RECs, and a 3,163-REC shortfall. These year-specific quantities provide a basis for identifying and addressing the deficiency rather than treating renewable performance as an undifferentiated failure.[75]

The interagency correspondence also confirms completed payment activity. On December 22, 2025, Staff asked NYSERDA whether Mpower had paid its VCP invoice. NYSERDA confirmed receipt the following day, and Staff acknowledged that confirmation. Mpower's performance was therefore not confined to an unfulfilled proposal. The confirmation and Staff's knowledge of it bear directly on the weight given to Mpower's response and ability to correct the identified issues.[76]

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[74] September 2026 Order at 15-23.
[75] Renewable Shortfall Letter (Oct. 31, 2023) at 1-2; Invoice No. 22VCP0008 (Oct. 31, 2023) at 1; September 21 Production at 33, 47-48 (2024 shortfall notice); Invoice No. 24VCP0004 (Dec. 1, 2025) at 1. The identified 2022 invoice is a demand for payment, not proof that payment was made.
[76] September 21 Production at 142 (Dec. 22-23, 2025 Department-NYSERDA exchange). The email confirms receipt but does not state the invoice number, amount, or actual payment date.

The December 2025 correspondence, which was obtained from the September 21, 2026 FOIL production, identifies the accounting dispute: Mpower calculated an 82,149-REC obligation using 68,574 MWh at 100 percent and 27,150 MWh at 50 percent and proposed treatment of mandatory Tier 1 purchases alongside 78,986 EDP retirements. Staff rejected that combined treatment except under its stated full-book renewable condition. Though Mpower disagreed with Staff's interpretation, it retired eligible RECs and paid VCPs for the remaining shortfall. The sequence documents Mpower's calculation, its proposed resolution, Staff's response, and the later payment confirmation. It is evidence of engagement with the obligation, not indifference to it.

B. The product-change consent finding does not establish widespread unauthorized enrollment (Finding 3)

Finding 3 sustains OTSC 1's allegation that customers were moved from standard electricity service to a renewable product without affirmative consent. OTSC 1 identifies three customers and quotes Mpower's explanation that one enrolled on December 18, 2015 and had received a renewable product since 2017, with a later change in REC sourcing following the Second Reset Order. That chronology reflects an incremental increase in the product's environmental characteristics. Mpower disputes the Commission's determination that the identified change required additional affirmative consent. It does not establish that the original enrollment was unauthorized or that the entire legacy population underwent an unauthorized change.[77]

Even if a product-change consent deficiency remains, it concerns the affected accounts and the particular change. It is not a finding that the original enrollments were unauthorized or that the entire legacy population was changed without consent. The September 2026 Order gives the finding an unwarranted broader significance when using it to support market-wide exclusion.

[77] OTSC 1 at 9–10.

C. Account-level authorization and enrollment findings do not establish companywide failures (Findings 10 and 11)

Findings 10 and 11 extend account-specific authorization and documentation issues into a prediction of companywide enrollment failure. The reviewed accounts included internal, employee, family, friend, and accommodation arrangements, with explanations, affidavits, and verification materials supplied for the matters addressed. Mpower distinguished those exceptions from its ordinary electronic enrollment process, which uses electronic agreements and TPV. The September 2026 Order's broader inference disregards that distinction.[78]

Mpower's response explained that its internal utility accounts were not ordinary customer sales and that the employee, family, and accommodation accounts (i.e., the relevant eighteen accounts) arose from existing relationships rather than solicitation. It supplied account explanations and affidavits evidencing authorization and described the controls governing ordinary enrollment. Those facts rebut an inference that the account holders lacked knowledge of the service or that ordinary enrollments lacked safeguards, even if the Commission finds deficiencies in the form of authorization or documentation.

The September 2026 Order refers to more than 29,000 customers and raises the possibility of other undocumented accounts, but identifies no population review establishing the prevalence of the questioned deficiencies. A possibility of additional exceptions is not evidence that the ordinary enrollment process is unreliable. The eighteen-account group and the other identified OTSC 3 issues must be assessed on the evidence concerning them, rather than extrapolated into companywide inability to comply.[79]

Authorization, record retention, enrollment requests, and product compliance involve different conduct. A missing document may establish a retention or production deficiency without

[78] September 2026 Order at 26-30.
[79] September 2026 Order at 28-30 & n.66.

proving that the customer never agreed to service. Applying several UBP provisions to the same account does not dispense with the evidence needed for each finding.

Mpower requests correction of finding 10 insofar as it infers actual unauthorized enrollment despite the relationships, explanations, and affidavits presented. Finding 11 likewise must turn on the authorization and sales-agreement basis for the particular enrollment request. A missing conventional document cannot stand in for proof that every required step was absent. Correcting those inferences changes both the individual findings and the unsupported prediction of companywide failure.

D. Nonproduction, historical loss, and records supplied to the Department are conflated (Finding 12)

Finding 12 combines different production problems into an account of noncooperation and unreliable present systems. The record distinguishes agreements never executed in the required form, executed records affected by a server incident, and records later located or supplied. Those are different events with different implications. The September 2026 Order's reliance on them to support findings 10 and 11 and present unfitness requires those distinctions, not a single generalized characterization.[80]

Mpower's explanation that certain internal accounts had no executed agreement is distinct from its explanation that an executed record was lost in the server incident. Neither circumstance establishes a refusal to respond to Staff. The applicable documentation requirement and the significance of any failure depend on which circumstance affected the account.

[80] September 2026 Order at 28-30 & nn.64-66.

The paper-file search was an additional effort to locate an agreement that might have been omitted during scanning. Undertaking that search is evidence of an effort to retrieve the record, not proof that the current electronic-retention system is unreliable.

A historical loss does not establish a current system failure. Mpower described the controls used for present enrollment and retention; that evidence bears directly on prospective compliance. The decade-old incident cannot substitute for evidence that those controls are unreliable.

The Department's processing record contradicts the account of apparent nonreceipt. At 1:48 p.m. on March 17, 2026, DMM sent Staff a processed-filing notice for Mpower's March 16 filing described as copies of contracts requested by Staff. At 3:31 p.m., Staff advised that the eighteen requested agreements appeared not to have been submitted. Mpower responded that they had been uploaded the previous day. The internal notice shows that Mpower timely submitted the requested documents on March 16. Mpower did not refuse to provide the requested documents, as may have been implicated.[81]

The March 16 filing and March 17 notice establish delivery, not by themselves timely and complete compliance with the March 10 request identified in OTSC 3. But a question about timeliness or adequacy is different from a refusal to supply records. Finding 12 and the revocation determination should reflect the delivered materials and the specific remaining deficiency, rather than treat perceived nonreceipt as noncooperation.[82]

The utility correspondence independently corroborates the account-matching problem. On February 13, 2026, Staff told Con Edison that changed account numbers made it difficult to ensure the same customers were being compared; Con Edison offered to add the old numbers. On February 17, National Grid confirmed that two queried numbers identified the same customer

[81] September 21 Production at 331 (March 17, 2026 DMM notice; March 16 filing date); at 211-212 (Staff demand, Mpower response, and original request).
[82] OTSC 3 at 14-15; UBP § 4.B.3, quoted in OTSC 3 at 3; September 21 Production at 211-212, 331.

before and after its May 2024 KEDNY conversion. These confirmations support Mpower's explanation and undermine reliance on unmatched identifiers as evidence of additional missing accounts or inconsistent reports.[83]

Mpower requests correction or vacatur of finding 12 to the extent it rests on apparent nonreceipt contradicted by the Department's records or conflates the distinct production events. The same evidence defeats the broader inference of refusal to cooperate or unreliable present systems. Any remaining production deficiency must be assessed for what it actually establishes.

E. A specific savings agreement and a reporting-field issue are treated as general unreliability (Finding 14)

Finding 14 conflates an April 15, 2025 agreement containing a savings guarantee with entries in a reporting field used for discounted accommodation accounts. Mpower explained that the agreement was specially prepared for a close friend of its Chief Operating Officer who owned multiple properties. The contractual guarantee arose from that agreement, not from the database label applied to other accounts. In response to Staff's February inquiries, Mpower submitted revised reports and explained the search logic. Those explanations concern an identified classification issue; they do not establish that the Company's reporting as a whole was unreliable.[84]

The agreement and the reporting field establish different things. The agreement defines the savings promise for the accounts it covers. The field identifies accounts returned by the reporting search. Inclusion in that field does not establish that every listed account had the same contractual guarantee, just as one agreement may cover more than one service account.

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[83] September 21 Production at 183-184 (February 13, 2026 Department-Con Edison exchange); at 164 (February 17, 2026 National Grid-Department exchange). The National Grid email also identifies service-period supply charges, rather than bill-print dates or delivery charges, as the requested comparison basis.
[84] OTSC 3 Response at 13; September 2026 Order at 32.

The specially prepared agreement is not evidence of a widespread GSP marketing practice. Its actual terms govern the affected customer's entitlement, while Mpower's account explanations and reporting logic define the scope of the classification problem. Treating those matters as interchangeable overstates finding 14.

The revised submissions, field explanation, and source account data address the reporting issue identified by Staff. An error in that classification is not proof that Mpower cannot report accurately or that every discounted account was a guaranteed-savings product. Mpower seeks correction or narrowing of finding 14 and its use in the revocation determination.[85]

National Grid's February 23, 2026 explanation to Staff provides independent evidence of the treatment of certain accommodation accounts. Consolidated bills included delivery charges but no Mpower supply charges because Mpower had not submitted the required 810 invoices. National Grid remained the distribution utility; Mpower retained responsibility for supply through the Gas Transportation true-up process. For accounts matched to that response, the evidence supports the zero-charge accommodation explanation and informs customer impact. Mpower did not intend to charge these customers, and that is the reason Mpower did not submit an invoice for them.[86]

National Grid's formal response gives distinct meanings to its entries: N/A ESCO charges mean Mpower was not the active supplier; zero charges mean Mpower was active but submitted no supply charges for billing; and an N/A refund entry means National Grid received no adjustment for the period. That last entry addresses utility-processed adjustments, not whether a direct refund occurred or was owed. Reading those entries according to their stated meaning is essential to an accurate finding.[87]

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[85] September 2026 Order at 33-37.
[86] September 21 Production at 150, 156-157, especially 156 (February 23, 2026 National Grid response to the Department). The explanation concerns the accounts and periods addressed in that exchange.
[87] Response to DPS-NG-001 (Feb. 20, 2026) at 1-2 (explanations of table entries).

Con Edison's GSP inquiry table independently supports Mpower's position on customer impact for the accounts it covers. Its thirty-three rows show Mpower supply charges below the utility comparison for October 1, 2024 through September 30, 2025. Those actual billing results bear directly on the scope and seriousness of the alleged reporting problem.[88]

The other Con Edison table concerns separate entries: five of six in its first group show Mpower charges above the utility comparison, and the accompanying correspondence reports no observed December 2025 refunds for the queried accounts. Those entries require matching to the savings promise, reporting field, and any utility adjustment or direct refund. They cannot be combined with the favorable thirty-three-row table into a generalized conclusion about all accounts. Finding 14 should reflect what the particular customers were promised, charged, and paid.[89]

F. The June 4 Ruling did not contain the express instruction not to file attributed to it

The September 2026 Order states that Mpower submitted belated responses despite being "explicitly instructed not to do so" and relies on that asserted disobedience to support the default and the inference of regulatory disregard. The June 4 Ruling denies the requested extension after discussing diligence and the elapsed deadline. It contains no express direction forbidding submission of a completed response. If the Commission relied on language other than the June 4 Ruling, it should identify that language and its date. Otherwise, treating denial of an extension as

[88] Confidential table, Mpower GSP inquiry to Con Edison, at 1-2 (twenty-six rows on p. 1 and seven on p. 2); September 21 Production at 22 (March 2, 2026 correspondence concerning public filing of redacted tables) and at 314 (filing notice). The tables concern particular accounts and periods.

[89] Confidential table, Con Edison verification of Mpower electric customer data, at 1 (first group of six entries); September 21 Production at 205-206 (February 19, 2026 Con Edison response concerning queried accounts and December 2025 refunds). This table is distinct from the redacted Con Edison verification table.

an express no-filing directive adds a factual premise not contained in the ruling and materially affects the stated inference of regulatory disregard.

Denial of an extension did not expressly prohibit submission of a completed response. Mpower filed the response not to defy the Secretary, but to preserve its existing eligibility, customer relationships, legal position, and right to place its defenses before the Commission. The filing left the Commission free to determine its procedural status and weight and did not displace the Commission's authority. Treating that effort to preserve Mpower's defenses as an additional indication of regulatory disregard materially affected the cumulative rationale for revocation. Mpower requests correction of that factual premise and reconsideration of exclusion and revocation without the added inference. If the Commission relied on a different prohibition, Mpower requests identification of its text, timing, and notice and an opportunity to address it.

G. The findings do not establish the pervasive disregard attributed to Mpower

The fourteen findings do not establish fourteen independent instances of disregard. Findings 1, 5, and 13 repeat the same continuing-contract premise across the three OTSCs. Findings 7 through 9 apply different reporting provisions to the same Dira relationship and disclosure history. Findings 10 through 12 arise from the same group of account-specific authorization and production issues, while Finding 14 concerns a specially prepared agreement and the related reporting field. Findings 5 through 9 were also sustained by default without consideration of Mpower's completed response. Counting each resulting finding as independent misconduct therefore multiplied the weight of overlapping legal theories and related facts without establishing a correspondingly broad pattern of conduct.

Mpower sought approval, disclosed Dira's service role, revised contracts, answered the February 2026 account inquiries, filed its defenses, purchased RECs, and made a payment confirmed to Staff by NYSERDA. Those are affirmative acts of engagement and performance.

They contradict the account of a company that ignored its regulator and weigh against characterizing unresolved requirements or rejected positions as pervasive disregard.

The missed deadline likewise is not proof of a knowing choice to ignore OTSC 2. Mpower relied on counsel, lacked awareness of the production, continued responding to the account inquiry, and submitted the OTSC 2 Response. The Commission may address the procedural omission without converting it into evidence that the Company is unwilling or unable to comply.

The correction sought is substantive, not arithmetic. The documents show defended contract rights, an extended approval process, disclosed relationships, procurement, payment, and responses to account inquiries. Giving that evidence its proper effect removes the overstated characterization on which revocation rests. Section VI.B separately establishes why revocation remains unjust or unwarranted even if all fourteen findings are sustained.

VI. REVOCATION IS UNJUST AND UNWARRANTED AND THE SEPTEMBER 2026 ORDER SHOULD BE CHANGED

The identified errors warrant correction of the findings and the cumulative assessment of Mpower's conduct. Separately and independently, Mpower requests abrogation or change of the revocation determination under PSL § 22 even if all fourteen findings remain sustained. The following alternative assumes those findings solely to assess the consequence; it does not admit violations, abandon the continuing-contract defense, or withdraw the request to reopen OTSC 2.

A. Correction of the factual characterization changes the basis for revocation

The September 2026 Order selected revocation on a cumulative finding of pervasive disregard. Sections V.F-G show why that characterization is overstated, including the added premise that Mpower disobeyed an express filing prohibition. Removing those errors changes the basis for market exclusion, not merely the number of findings. Revocation should be reconsidered on the actual conduct established.

B. Revocation is unjust or unwarranted even if all fourteen findings are sustained

1. The alternative assumes all fourteen findings in the September 2026 Order without admitting violations

Even assuming all fourteen findings in the September 2026 Order, including the five entered by default, revocation is disproportionate to the conduct established. The findings concern specific transition, disclosure, renewable, authorization, production, and reporting obligations. They do not justify terminating every New York customer relationship instead of addressing the identified issues while preserving eligibility. Mpower requests full restoration or, alternatively, continued eligibility subject to appropriate conditions developed through further discussion.[90]

2. The transition, renewable, consent, and EDP issues do not establish a need to terminate all service (Findings 1–4)

Findings 1 through 4 of the September 2026 Order, if sustained, would establish transition, renewable, EDP, and product-change deficiencies. Their seriousness must be measured by the actual conduct: the transition issue concerns contract classification; the renewable record includes purchases and retirements as well as disputed shortfalls; and the consent finding concerns product changes rather than unauthorized original enrollment. Contract and transition controls, load and REC reconciliation, EDP verification, and correction of affected consent records address those obligations directly. Those targeted means of correction weigh against ending all service.[91]

Mpower's OTSC 1 Response describes the purchase of 148,000 national RECs retired through PJM, and the September 2026 Order quotes that description.[92] Mpower offered to make

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[90] This alternative revocation analysis preserves Mpower's factual and legal challenges to all fourteen findings in the September 2026 Order. Assuming those findings solely to evaluate revocation is not an admission and does not withdraw any defense.
[91] September 2026 Order at 15–23, 19–20, 35–36.
[92] OTSC 1 Response at 26; September 2026 Order at 21 & n.48.

voluntary compliance payments in its NOAV Response, and its OTSC 1 Response represented that Mpower followed Staff's interpretation for the 2022 compliance year.[93][94]

HWP eligibility and independent renewable promises involve different obligations. A customer's express renewable commitment remains relevant regardless of product approval. But the identified questions about qualifying attributes, load, and payment are capable of defined correction. Mpower's purchases and proposed resolution distinguish this record from a refusal to perform renewable obligations.

The chronology reinforces the case against revocation. Mpower responded to OTSC 1 on May 9, 2024 and remained eligible for more than twenty-eight months before the September 22, 2026 Order. The Commission later made findings addressing allegations in all three OTSCs and relied on those findings collectively to revoke eligibility. The intervening proceedings are part of that history, but they do not erase the significance of the prolonged continued service after the OTSC 1 response when assessing whether those issues require exclusion now.

3. The transition, HWP, affiliate, and update issues do not make statewide revocation necessary even if sustained (Findings 5 through 9)

For this alternative, finding 5 establishes a legacy-transition failure, finding 6 an HWP disclosure deficiency, and findings 7-9 the transaction-history, affiliate, and update violations stated in The September 2026 Order. Even accepting each finding, their actual scope and the Company's responses do not justify statewide revocation.[95]

The HWP and Dira correspondence documents the proposed offering, identification of the service provider, repeated contract revisions, and responses to requests for information.

[93] NOAV Response at 5–6; see OTSC 1 Response at 3–4.
[94] OTSC 1 Response at 4 n.7, 28–29.
[95] September 2026 Order at 22-25, 35-37, Findings 5–9 (OTSC 2 allegations).

Inadequacy under a particular disclosure duty does not erase that engagement. Several reporting provisions applied to the related Dira history, together with another finding on continuing contracts, do not establish separate patterns of misconduct across every authorized product and operation.

Resolution of the actual transition and disclosure requirements offers a means to protect customers while preserving otherwise authorized service. Mpower's filed responses and willingness to discuss appropriate conditions support that course. Even with Findings 5 through 9 of the September 2026 Order intact, complete revocation remains an unjust or unwarranted response under PSL § 22.

4. The authorization, production, transition, and reporting issues concern identified accounts (Findings 10 through 14)

Assuming Findings 10 through 14 of the September 2026 Order stand, their consequences remain tied to the identified accounts and conduct. The account explanations, historical records issue, and reporting-field dispute do not establish that every enrollment or report is unreliable. They support targeted correction, not termination of all New York service.[96]

Mpower identified eighteen internal, employee, family, or personal-associate accounts in explaining the challenged exceptions. The Commission noted that the UBP contains no exception for such accounts and that promised agreements and TPVs had not yet been completed. Those points may support corrective directions and scrutiny. They do not establish the frequency of the problem across more than 29,000 New York mass-market customers or demonstrate why every customer must be transferred.[97]

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[96] September 2026 Order at 26–30 & n.66, 33–37.
[97] September 2026 Order at 27-30 & n.66. The eighteen-account figure describes the identified group; it is not a representation that every issue in OTSC 3 is confined to that group.

The specially prepared GSP agreement, repurposed reporting field, historical records, and enrollment deficiencies have identifiable causes and corresponding means of correction. Combining them into a claim of system-wide incapacity overstates their collective significance. Additional concerns can be addressed as the evidence establishes their scope; the possibility of broader issues is not itself a basis for revocation.

5. Repeated reliance on a disputed interpretation does not prove future compliance is impossible

Even accepting findings 1, 5, and 13, repetition of the continuing-contract dispute in three OTSCs is not proof of three independent patterns of customer injury or future inability to comply. Mpower defended a contractual interpretation grounded in continuation language and the transition orders. Its conduct after any particular directive must be evaluated on that chronology. An adverse interpretation does not transform the act of asserting the defense into regulatory unfitness.

C. Public corrective dispositions inform whether revocation is unjust or unwarranted

The Commission has resolved comparable categories of compliance concerns through correction rather than revocation. In Case 23-M-0166, the January 28, 2025 Atlantic Energy order resolved noncompliant-product, legacy-transition consent, and corrective-action allegations. Atlantic acknowledged approximately 250 noncompliant enrollments and changes to 25 agreements without affirmative consent. The disposition required a $100,000 payment, $3,234.67 in refunds, controls, training, and recurring audits while preserving eligibility. The Commission expressly credited Atlantic's corrective conduct.[98]

[98] Case 23-M-0166, Order Adopting Settlement Agreement (issued Jan. 28, 2025), at 2-8 and Appendix 1. The September 2026 Order credited admissions, voluntary marketing suspension, corrective measures, and continuing controls; those features are part of the comparison, not assumed facts about Mpower.

The April 16, 2026 NRG-affiliated ESCO order resolved disputed legacy-transition, renewable, value-added-product, low-income, and disclosure allegations through billing adjustments, a prospective guaranteed-savings offer subject to consent, reporting, and auditing. The approved agreement preserved eligibility for the settled matters subject to compliance and retained denials and a non-admission provision. That disposition demonstrates that maintaining disputed legal positions and accepting enforceable customer protections can coexist.[99, 100]

Those dispositions demonstrate that customer protection and continued eligibility can coexist, including where an ESCO maintains disputed legal positions. Atlantic's admissions and reforms and the NRG agreement's negotiated obligations were important to their respective outcomes. Here, Mpower's disclosures, responses, performance, and willingness to address remaining concerns warrant consideration of the same corrective approach. Maintaining its defenses is not a reason to foreclose that avenue.

The consistency principle recognized in Field Delivery and Terrace Court requires a reasoned basis for departure from an established interpretation or materially comparable disposition. The public orders demonstrate available corrective approaches to the types of concerns presented here; the earlier transition language supplies the distinct interpretive comparison developed in Section IV.C. Those authorities support consideration of the actual similarities and

[99] Cases 25-M-0516 et al., Order Adopting Terms of Settlement Agreement (issued Apr. 16, 2026), at 5-10; Appendix 1 §§ 3.g-j, 5.c, 9.b, 10, at 18-21. The agreement contains non-admission and reservation provisions and resolves the identified show-cause matters; it did not vacate a prior revocation. Primary order: https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BA0A3979D-0000-C335-B7DD-AC9315F1C025%7D.

[100] Cases 25-M-0516 et al., Order Adopting Terms of Settlement Agreement (issued Apr. 16, 2026), Appendix 1, recitals concerning denials, settlement discussions and corrective actions; §§ 2, 3.a (continued eligibility subject to compliance), 3.g (no admission of liability), and 10 (reservation of rights). These are the operative terms of the Commission-approved agreement.

differences, rather than treating preservation of Mpower's legal position as inconsistent with continued eligibility.[101]

The Atlantic and NRG outcomes reinforce Mpower's request for a disposition directed to the actual conduct and customer impact. A negotiated resolution with enforceable protections is an available alternative to exclusion and should be considered on its merits.

D. The record supports changing revocation under PSL § 22

1. Rationality requires support for revocation as well as the underlying findings

The errors identified above deprive revocation of a rational basis on the record the Commission used. The September 2026 Order combines disputed legal classifications, five default findings entered after exclusion of the OTSC 2 Response, and overstated inferences from particular accounts and reports. Correcting those premises requires reconsideration of the resulting exclusion from the market.

Agency expertise does not supply a missing contract term or cure a construction contrary to the operative language. *Glenwyck* distinguishes questions requiring regulatory expertise from questions of statutory reading while recognizing deference to reasonable regulatory interpretations. Mpower's challenge concerns the text and application of the governing requirements, and the evidence supporting the findings.[102]

The exclusion of the OTSC 2 Response, errors of law, unsupported factual inferences, and disproportionate choice of revocation provide independent grounds for relief under § 3.7 and PSL § 22. They also present the unlawful-procedure, error-of-law, arbitrariness, and abuse-of-discretion objections preserved under CPLR 7803(3).

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[101] *Matter of Charles A. Field Delivery Serv., Inc*., 66 N.Y.2d 516, 516–517 (1985).
[102] *Matter of Glenwyck Development, LLC v. New York Public Service Commission*, 167 A.D.3d 1375, 1376-1377 (3d Dep't 2018).

2. Demonstrated customer harm must be assessed directly

The customer-impact evidence supports a narrower response. The utility records discussed in Section V.E identify zero-charge accommodation accounts and a group of accounts with supply charges below the utility comparison, while the renewable records identify year-specific quantities and shortfalls. Those facts bear directly on the gravity of the conduct and the correction it requires.

Other queried billing entries and any remaining obligations must be assessed on the relevant contracts and periods. Their existence does not permit the September 2026 Order to treat every customer relationship as harmful. Revocation reaches all of those relationships despite the materially different issues and outcomes in the record.

E. The requested final relief is full restoration of eligibility

Mpower seeks full restoration of eligibility to serve existing customers and to market to and enroll new customers on otherwise authorized products. That relief reverses the statewide exclusion imposed by the September 2026 Order; separate product-approval requirements remain applicable.

F. The Commission should consider a negotiated resolution permitting continued eligibility

Mpower asks the Commission to consider a negotiated resolution that addresses the disputed obligations and permits continued service. Mpower is willing to accept appropriate conditions, with their substance to be developed through further discussion, while preserving its legal positions. The public dispositions discussed in Section VI.C show that enforceable customer protections and continued eligibility can coexist. Mpower requests an opportunity to pursue that avenue without postponing determination of the merits.

If a comprehensive agreement is executed, Mpower requests leave to submit it and, upon approval, vacatur and replacement of the entire September 2026 Order with that disposition. The

agreement and its terms may furnish a new circumstance under § 3.7 and a basis for abrogation or change under PSL § 22. The present merits and interim-relief requests proceed independently.[103]

VII. NEW CIRCUMSTANCES WARRANT A DIFFERENT DETERMINATION

A. The identified records bear on specific findings in the September 2026 Order

Mpower seeks rehearing under PSL § 22 and 16 NYCRR § 3.7 based in part on material Department and third-party communications disclosed in the Department's September 21, 2026 response to FOIL Request No. 1762-060426. The records identified below support the specific factual and procedural errors addressed in Sections IV.A.4 and V and the challenge to revocation.

Utility communications confirming changed account numbers and explaining supply billing bear on the account comparisons relevant to Findings 10 through 12 and 14. The Department's March 17 processed-filing notice bears on whether materials relevant to Finding 12 had been received. These communications affect the reliability of the adverse inferences drawn from account mismatches and apparent nonreceipt. The processing notice does not, by itself, establish that the filing was timely and complete.[104]

B. The late disclosure supports a separate ground for rehearing

The production occurred after the September 17 Commission session and one day before issuance of the September 2026 Order, following the requests for records and an opportunity to supplement. That sequence left no meaningful interval before issuance to present the records' account-specific and compliance-period significance. Mpower relies on the identified communications as new circumstances under § 3.7(b) and as evidence supporting the errors of fact

[103] PSL § 22; 16 NYCRR § 3.7.
[104] September 21 Production at 150, 156–157, 164, 183–184, 211–212, 331; see Sections VI.C–E.

identified in Section V. They also support reconsideration of revocation under PSL § 22 independently of reopening the OTSC 2 default.

Mpower does not contend that the Secretary erred in declining to defer the proceeding until the FOIL production was complete. The rulings described in Section III.J matter here only because they explain why these records were not before the Commission when it acted.

The September 21 Production contained Department and third-party communications that Mpower did not have and did not know Staff had received: NYSERDA's December 2025 confirmation to Staff that it had received a payment, utility responses to Staff confirming changed account numbers and explaining supply billing, and the Department's internal March 17, 2026 notice that Mpower's March 16 filing had been processed. Because those communications were produced after the Commission's session, the Commission had no opportunity to consider them. PSL § 22 permits the Commission to change an order after "a consideration of the facts, including those arising since the making of the order."[105]

The newly disclosed information on which Mpower relies consists of the particular Department and third-party communications identified above. Mpower does not characterize its own previously known correspondence or records already available on the docket as newly learned merely because another copy was produced. Likewise, the forwarding email for two TPV recordings corroborates receipt already acknowledged in OTSC 3.[106]

[105] PSL § 22; 16 NYCRR § 3.7(b). See Section VIII.A.
[106] September 21 Production at 6; OTSC 3 at 14–15.

C. Mpower continues to review the September 21 Production

Mpower continues to review the September 21 Production and reserves the right to seek leave to supplement this Request if that review identifies additional material evidence satisfying the standard for rehearing.[107]

VIII. CONCLUSION

For the foregoing reasons, Mpower respectfully requests that the Commission grant rehearing under PSL § 22 and 16 NYCRR § 3.7, abrogate or change the September 2026 Order, and restore Mpower's full eligibility to serve customers in New York, including authority to market to and enroll new customers on otherwise authorized products.[108]

Alternatively, even if the Commission sustains all fourteen findings, it should determine that revocation is unjust or unwarranted and replace it with an appropriate disposition permitting Mpower to continue operating in New York. The Commission should also grant the alternative procedural and evidentiary relief requested above to the extent necessary to resolve disputed issues, including relief from the OTSC 2 default, consideration of Mpower's completed OTSC 2 response and the September 21 evidence, including any focused supplement for which Mpower seeks leave under Section VII.C, and, only if unresolved material factual disputes prevent disposition on the written record, the targeted hearing requested in Section IV.A.4.

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[107] Mpower's review of the September 21 Production remains ongoing. If that review identifies additional evidence showing an error of law or fact, or new circumstances warranting a different determination, Mpower may seek leave to submit a focused supplement under 16 NYCRR § 3.7(b) and PSL § 22.

[108] September 2026 Order at 23–25, 35–37; Case 23-M-0287, Mpower Energy LLC, Response to Order to Show Cause (filed July 10, 2026) ("OTSC 2 Response"); Exhibits A–E (July 2026 submission); PSL § 22. See Section V.A.

Mpower also remains available to discuss with Staff, through counsel, a negotiated resolution and appropriate conditions without delaying determination of this Request or limiting the merits relief requested.

Respectfully submitted,
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Dated: Brooklyn, New York

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