BEFORE THE
PUBLIC SERVICE COMMISSION
STATE OF NEW YORK

In the Matter of Commission Registration of Energy Brokers and Energy Consultants.	)	**Case 23-M-0106**
In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products	)	**Case 15-M-0180**
In the Matter of Retail Access Business Rules.	)	**Case 98-M-1343**

REQUEST FOR REHEARING AND STAY OF THE JUNE 23, 2023 ORDER ADOPTING ENERGY BROKER AND ENERGY CONSULTANT REGISTRATION REQUIREMENTS BY NRG ENERGY INC. AND NRG RETAIL COMPANIES

NRG Energy, Inc., and the NRG Retail Companies (together, "NRG") respectfully submits this Request for Rehearing and Stay of the Order Adopting Energy Broker and Energy Consultant Registration Requirements (the "Order") implementing Public Service Law ("PSL") § 66-t, issued on June 23, 2023 by the Public Service Commission ("PSC" or the "Commission"), pursuant to PSL § 22 and the Commission's Procedural Rules, 16 NYCRR §§ 3.5, 3.6 and 3.7.

INTRODUCTION

On December 23, 2022 Governor Hochul signed into law Chapter 787 of the Laws of 2022, creating PSL § 66-t (the "Broker Bill"). The Broker Bill, effective June 21, 2023, in pertinent part, defines Energy Brokers and Energy Consultants and requires that these entities register with the

Commission and disclose their compensation to customers. In response to the Broker Bill, Department of Public Service Staff ("Staff") issued a Staff Proposal Regarding Registration of Energy Brokers and Energy Consultants (the "Staff Proposal") on March 14, 2023. The Staff Proposal included proposed amendments to the Uniform Business Practices ("UBP") for Energy Service Companies ("ESCOs") as well as the Uniform Business Practices for Distributed Energy Resource Suppliers ("UBP-DERS") in order to implement the newly-adopted law. Notably, the Staff Proposal further expanded upon the requirements of PSL § 66-t and recommended broad applicability of the new statutory obligations, including extending registration requirements to third-party entities that do business with Energy Brokers and Energy Consultants, as well as requiring disclosure of all types of remuneration to customers.

NRG submitted its comments on the Staff Proposal on May 22, 2023.[1] Generally, NRG supported the Staff Proposal, but raised a number of issues for the Commission's consideration, including but not limited to the scope of entities covered by the statutory definitions of Energy Broker and Energy Consultant as opposed to NRG's marketing representatives, as well as the required disclosure of Broker Compensation and issues related to an ESCOs' obligation to ensure that the Energy Brokers and Energy Consultants with which it is contracting are properly registered.

Unfortunately, several of the concerns raised by NRG in its comments are inadequately addressed by the Order. The Order also substantially deviates from the initial proposal contained in the Notice of Proposed Rule Making, published in the State Register on March 22, 2023 (the

[1] Case 23-M-0106, *In the Matter of Commission Registration of Energy Brokers and Energy Consultants*, Comments of NRG Energy, Inc. and the NRG Retail Companies Supporting and Seeking Clarification on the Department of Public Service Staff Proposal Regarding Registration of Energy Brokers and Energy Consultants (May 22, 2023) (hereinafter "NRG Comments").

"NOPR"), raising State Administrative Procedure Act ("SAPA") concerns. Through this Request for Rehearing and Stay, NRG seeks reconsideration and rehearing of three key aspects of the Order.

First, NRG excepts to the Order's broad application of third-party vendor compensation disclosure requirements imposed on ESCOs. Putting aside that NRG does not agree that an ESCO's marketing representatives are Energy Consultants, NRG submits that it does not collect paid Broker Compensation on the behalf of its marketing representatives. The compensation of marketing representatives falls squarely outside the scope of PSL § 66-t and the statutory definition of "Broker Compensation." Moreover, logistical issues make the Order's requirement to disclose compensation paid to marketing representatives with this level of granularity complicated and difficult to perform.

Second, while NRG does not contest the general prohibition on payments to Energy Brokers or Energy Consultants who are not registered, the Order ignores the existing contractual obligations ESCOs have to third parties that pre-date the August 31, 2023 deadline, and essentially orders ESCOs to breach their ***existing*** contractual obligation to pay third-parties if those third parties either are not timely registered with the Commission or are de facto deemed approved but have their registration rejected. Nor does the Order give full consideration to the contractual obligations for any agreement executed between an ESCO and a then-registered Energy Broker or Consultant after August 31, 2023 whose registration is later canceled or lapses.

Third, the Order applies PSL § 66-t to third-party vendors in contract with ESCOs whose activities do not implicate them as Energy Brokers or Energy Consultants under the respective definitions. Neither the NOPR nor the Staff Proposal at the center of the proposed rulemaking contemplates this possibility. As such, NRG, other stakeholders, and the public at large were not

given adequate notice, nor an opportunity to weigh the possible consequences of such actions. Accordingly, the Order and the rules it adopts were promulgated in contravention of SAPA.

Lastly, NRG moves for a stay of implementation of the entire Order due to the short compliance window remaining – roughly a month before the August 31st registration deadline – and the number of important, outstanding questions that have yet to be addressed by Staff or the Commission. Notably, Staff has still not scheduled the technical conference required by the Order. NRG and other ESCOs need to fully understand their new obligations to the Commission, their customers, and Energy Brokers and Energy Consultants with whom they have contracted. They also need appropriate time to ensure their systems can meet the newly ordered requirements. Until these questions are addressed and regulatory certainly obtained, ESCOs and any would-be Energy Brokers and Energy Consultants will be hesitant to enter into contracts, ultimately harming customers and impairing retail choice. Under the circumstances, a Stay of the Order is necessary for the stability of the retail electric and gas markets.

BACKGROUND

NRG Energy, Inc. is a Fortune 500 company headquartered in Houston, Texas with its regional offices located in Princeton, New Jersey. Operating across the United States, NRG employs roughly 15,000 employees. Servicing residential, commercial, and industrial customers, NRG has several brands operating in New York as ESCOs, some of which that have been active since 1997. Nationwide, NRG Energy served over seven million customers in 2022, with its energy portfolio among the largest in the country, with 155 TWhs of electricity and 1,1918 MMDth of natural gas sold, respectively. This positions NRG as a leader in integrated power, drawing on its considerable experience to not only meet customer needs, but to consistently offer reliable and cost-effective energy solutions. NRG continues to offer a range of products and services including

demand response and energy efficiency, 100% renewable energy, energy plans bundled with smart home technology, as well as charitable products. NRG is also committed to a green future, with a goal of reducing its CO2 emissions 50% by 2025 and achieving net zero by 2050.

NRG transacts with a variety of third-parties, including vendors that act on behalf of NRG, in the retail electric and gas markets.[2] Most of these channels target mass market customers. These employees and vendors work on behalf of NRG, are already covered by the UBP and are not paid Broker Compensation.[3]

Large commercial and industrial ("C&I") customers often use third-parties to represent their interests directly and who are not acting on behalf of NRG. These third-parties have traditionally been considered "brokers." In fact, these third-party "brokers" contract directly with the C&I customer and are acting at their direction. NRG does not have control over their actions or business operations. NRG contracts with these traditional "brokers" ***only*** to define how they may obtain NRG pricing and to facilitate NRG's flow through payment of their fee on behalf of the C&I customer if the customer selects NRG as its ESCO. If the C&I customer selects NRG for its energy supply service, NRG and the C&I customer enter into a separate contract which states that the customer's price includes the broker's fee, and NRG enrolls the C&I customer in accordance with the UBP. NRG therefore becomes contractually obligated to pay this fee on behalf of the C&I customer to the broker.

A full understanding of the characteristics of the distinct sales channels is important for determining who falls within the definitions of Energy Brokers and Energy Consultants. It is particularly important for NRG and other ESCOs who are now responsible for ensuring their own

---

2 NRG Comments at 2.

3 *Id.* at 3.

compliance with the Commission's new rules and regulations, as well as the new obligations to contract only with registered Energy Brokers and Energy Consultants and to disclose Broker Compensation on its Customer Disclosure Statements.

A. Summary of Legislation

The Broker Bill adds three new definitions to the New York retail landscape: Broker Compensation, Energy Broker, and Energy Consultant:

> 'Broker compensation' means any payment made to an energy broker or energy consultant for the purposes of securing or procuring of energy for the end-use customer, or advising on the securing or procuring of energy for the end-use consumer.
>
> 'Energy broker' means an entity that assumes the contractual and legal responsibility for the sale of electric supply service, transmission or other services to end-use retail customers, but does not take title to any of the electricity sold, or an entity that assumes the contractual and legal obligation to provide for the sale of natural gas supply service, transportation or other services to end-use retail customers, but does not take title to any of the natural gas sold.
>
> 'Energy consultant' means any person, firm, association or corporation who acts as broker in soliciting, negotiating or advising any electric or natural gas contract, or acts as an agent in accepting any electric or natural gas contract on behalf of an ESCO.[4]

The Broker Bill penalizes those entities who act as Energy Brokers or Energy Consultants who do not register with the Commission.[5] The Broker Bill also requires Energy Brokers and Energy Consultants to disclose their form and amount of compensation to their customers, and additionally obligates ESCOs to disclose to customers on the customer disclosure label any Broker Compensation collected on behalf of the Energy Broker or Energy Consultant. Subsection 4 of the Broker Bill titled *Disclosure of Compensation* states:

---

[4] PSL § 66-t (1)(a), (c), and (d).

[5] PSL § 66-t (2)(c).

a. Energy brokers and energy consultants shall be required to disclose their form and amount of compensation to customers via a conspicuous statement on any such contract or agreement between the energy agent, energy consultant, energy broker or energy intermediary and its customer.

b. If an energy service company collects broker compensation on behalf of an energy broker or energy consultant, such broker compensation shall be added as a provision to the customer disclosure label and shall reflect the amount and method of broker compensation.

B. The Commission's Implementation of the Broker Bill

The Order exceeds the bounds of the Broker Bill in two ways. First, the Order's expansive interpretation of "Broker Compensation" conflates business expenses and unrelated marketing and business development activities with the actual monetary payment provided by NRG to its third-party partners. The Order also imposes a disclosure requirement where such payments are not "collected" on behalf of the third-party vendor. This expansive reading of the statute exceeds the bounds of the Broker Bill.

Second, the Broker Bill does not state that an ESCO must stop properly authorized payments to an Energy Broker or Energy Consultant if the Energy Broker or Energy Consultant loses or does not obtain timely registration. The Broker Bill correctly places the obligation on the Energy Broker and Energy Consultant to refuse accepting payment if not appropriately registered. The Order takes this directive and turns it on its head, requiring ESCOs to monitor the registration status of Energy Brokers and Energy Consultants and prohibiting the ESCO from paying an unregistered entity – even if the Energy Broker or Energy Consultant had no obligation to be registered at the time of contracting or were either deemed to be or were fully registered at the time of customer enrollment. Not only is there no statutory authority for this denial of payments, but this requirement impermissibly interferes with an ESCO's contractual relationships and obligations. It should be clarified that an ESCO may continue to pay an Energy Broker or Energy

Consultant any agreed upon compensation that predates the Order's August 31, 2023 effective date. The Commission should also revisit the Order and find that, for any agreements executed after August 31, 2023 between an ESCO and an Energy Broker or Energy Consultant, the ESCO is only required to confirm registration status at the time the customer executes an agreement under one of the approved methods under the UBPs. So long as the Energy Broker or Energy Consultant is appropriately registered ***at the time*** of customer enrollment, the ESCO must be able to honor their contractual arrangements and continue to pay the Energy Broker or Energy Consultant their fee.

ANALYSIS

I. THE ORDER EXCEEDS THE SCOPE OF PSL § 66-t BY REQUIRING DISCLOSURE OF THIRD-PARTY VENDOR COMPENSATION TO ESCO CUSTOMERS

The Order extends Broker Compensation disclosure requirements to third-party vendors beyond the scope of the Broker Bill. Broker Compensation is defined as "any payment made to an Energy Broker or Energy Consultant for the purposes of securing or procuring of energy for the end-use customer, or advising on the securing or procuring of energy for the end-use consumer."[6] NRG reiterates that it does not object to registration requirements (and in turn compensation disclosure) for third-party vendors, to the extent their independent activities render them an Energy Broker or Energy Consultant under the statute's definitions. However, many third-party vendors, particularly ESCO marketing representatives, perform a variety of activities and have relationships with ESCOs that are different than the relationship between an ESCO and an Energy Broker or Energy Consultant. The disclosure of compensation for these incidental activities would be both

[6] PSL § 66-t(1)(a).

impracticable and unworkable because the compensation is not attributable to any specific customer or contract.

A. ESCOs do not collect Broker Compensation on behalf of their third-party vendors, nor do these vendors perform broker activities implicating registration under PSL § 66-t.

Third-party marketers should be treated similarly to in-house ESCO employees. NRG's payment to third-party vendors to support NRG's operations should not be considered Broker Compensation. The Order's requirements that ESCOs disclose payments to their contracted marketers and other vendors is both arbitrary and capricious.

PSL § 66-t(4)(a) requires Energy Brokers and Energy Consultants to disclose their form and amount of compensation to customers, and PSL § 66-t(4)(b) requires ESCOs that ***collect*** Broker Compensation on those entities' behalf include that compensation in its disclosures. While NRG previously requested that the Staff Proposal be clarified to distinguish Energy Brokers and Energy Consultants from an ESCO's marketing representatives, the Order disagreed.[7] Instead, the Commission found that there is a distinction between in-house marketers and third-party vendors, despite their performing an identical function and despite marketing on behalf of an entity already being sufficiently regulated by the Commission.[8]

The Order's premise that the Commission needs "direct regulatory authority over any contractors and agents of an ESCO" is hollow at best, given the entities must already conform their conduct to the requirements and guidelines of the UBP and UBP-DERS.[9] Indeed, the purpose of the legislation was to capture "energy brokers and energy consultants who act as third parties for

---

7 NRG Comments at 5; Order at 14.
8 Order at 23.
9 *Id.*

purposes of procuring energy for the end use customer from the energy service company" ***who are not already regulated by the UBP***.[10] An ESCO's third-party vendors, specifically their marketing representatives, are already regulated by the UBP.[11]

If the entities do not act "as broker in soliciting, negotiating or advising any electric or natural gas contract, [n]or acts as an agent in accepting any electric or natural gas contract on behalf of an ESCO," then they are not Energy Consultants and the inquiry ends there for the purposes of PSL § 66-t. Vendors of an ESCO, including an ESCO's marketing representatives, do not fall within the definition of Energy Broker. They neither assume the contractual and legal responsibility for the sale of electric supply service, transmission, or other services to end-use retail customers, nor assume the contractual and legal obligation to provide for the sale of natural gas supply service. They also do not fall into the definition of Energy Consultant as they do not "act [] as brokers." As such, characterizing an ESCO's third-party vendors as if they were now Energy Brokers or Energy Consultants creates unnecessary confusion and flies in the face of the statutory definitions.

Even assuming these third-party vendors are Energy Consultants as the Order concludes, the Broker Bill does not require that an ESCO disclose their compensation. PSL 66-t(4)(b) requires an ESCO to disclose ***only*** such compensation that is "***collects*** … on behalf of an energy broker or energy consultant." (Emphasis added).

"It is well established that in exercising its rule-making authority an administrative agency cannot extend the meaning of the statutory language to apply to situations not intended to be

[10] *See* NRG Comments; Sponsor's Memorandum, N.Y.S. Senate Bill S9414, Relates to requiring the registration of energy brokers. (Emphasis Added).
[11] *See* UBP § 10.

embraced within the statute."[12] An agency also may not "promulgate a rule out of harmony with or inconsistent with the plain meaning of the statutory language."[13] Stated differently and applying the standard canons of statutory construction, "the plain meaning of the statutory phrasing must be honored by the agency[.]"[14]

ESCOs do not ***collect*** the compensation paid to their third-party vendors. Their compensation is not tied to a specific product offering or rate. It also is not included in a customer's rate. Rather, it is a cost of business to the ESCO, not charged to the customer or collected from the rate that a specific customer pays. Accordingly, as NRG does not collect the compensation paid to its third-party vendors, even if the vendor must register as an Energy Consultant and the compensation falls within the definition of Broker Compensation (which NRG disputes), there can be no obligation on an ESCO to disclose that compensation. The Order's contrary directive is not supported by PSL 66-t's plain language.

B. Logistically, reporting third-party vendor registration and disclosure of compensation is untenable.

In addition to the legal flaws in the Order's decision to classify an ESCO's third-party vendors as Energy Consultants, the Order also overlooks the substantial logistical issues with such a classification that require rehearing.

First, an ESCO's third-party sales vendors, including telemarketers, door-to-door marketers, in person sales personnel in retail locations, and direct mail merchants will be unable to complete the required registration form; the form is simply not designed or practicable for these

---

[12] *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595 (1982) (citing *Matter of Jones v Berman*, 37 N.Y.2d 42 (1975).

[13] *Id.* (citing *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 N.Y.2d 471 (1978) and *Matter of Harbolic v Berger*, 43 N.Y.2d 102 (1977); *see also BMW Pizza v. Urbach*, 235 A.D.2d 146, 148 (3d Dep't. 1997) (noting that "regulations which are inconsistent with a statute or which alter statutory language to include situations not embraced within its terms must be struck down").

[14] *Vink v. N.Y. State Div. of Hous. & Cmty. Renewal*, 285 A.D.2d 203, 209 (1st Dep't. 2001).

entities. The form is designed for Energy Brokers and Energy Consultants, under the Order, yet, this largely inapplicable form would be required for an ESCO's third-party vendors and their independent contractors. For example, a third-party vendor that operates a call center for an ESCO does not have a sample standard agreement with a customer. This is because they do not work on behalf of the customer and do not enter into any agreement with a customer. Their only agreement is with the ESCO. Such a third-party vendor also does not have sample forms of the notices sent upon assignment of sales agreements, discontinuance of service, or transfer of customers to other providers. They also do not have procedures to obtain customer authorization for access to a customers' historic usage or credit information or information on the methods by which they intend to market energy products and services. This is because all of this information belongs to the ESCO and is ***not*** generated by the third-party vendor. These are the very same materials that an ESCO is already required to file with the Commission and is further evidence that these third-party vendors are not Energy Consultants. Indeed, they are already subject to Commission regulation and oversight through the UBP.

Another logistical issue is the vast array of rate structures. Unlike in the traditional broker relationship, which arises primarily in the C&I context, the rate structure for NRG's sales channels is complex and varies widely by vendor as well as type of customer enrollment. There is also variation between what an ESCO pays their third-party vendor and what that vendor may pay their direct employees and independent contractors. The Order imposes logistical pretzel knots. Ignoring that the "fee" is not being collected by the ESCO, how is the "proper" fee for disclosure to be determined? Is it the fee paid to the vendor or the vendor's payment to its individual employees or independent contractors? It is virtually impossible to properly provide the disclosure the Order currently requires for these third-party vendors or to ensure that each third-party vendor,

or its employees and independent contractors, are disclosing the proper fee when a customer is enrolled.[15]

NRG therefore respectfully requests that the Commission reconsider the Order's decision to categorize third-party sales vendors (i.e., marketing representatives) as Energy Consultants and find that they are not. At a minimum, their registration requirements should be simplified, particularly for independent contractors of a third-party vendor, and their compensation which is not collected from the customer by NRG should not be subject to disclosure by NRG.

II. THE ORDER EXCEEDS THE COMMISSION'S JURISDICTION AND FAILS TO CONSIDER THE IMPLICATIONS OF NEGATING ESCO'S CONTRACTUAL OBLIGATIONS TO ENERGY BROKERS AND CONSULTANTS

The Order implements an unworkable prohibition on payments to Energy Brokers or Energy Consultants who are either not registered or whose applications for registration are neither granted nor are revoked. This prohibition attaches regardless of NRG"s pre-existing contractual obligations to pay these entities for customers they helped enroll.

Specifically, the Order amends Section 10 of the UBP, governing marketing standards. New section (h) is added, which reads:

"ESCOs shall:

> h. Not contract with or ***otherwise do business with*** Energy Brokers and Energy Consultants that are not registered with the Commission pursuant to UBP Section 11. Customer enrollments facilitated by an unregistered Energy Broker or Energy Consultant shall be invalid."[16]

NRG recognizes that on its face, the prohibition seems to be a commonsense approach to ensuring Commission oversight of the covered entities. However, the failure to consider the

[15] *See, e.g.*, UBP § 5, Attachment 1(A)(17); Attachment 2(A).
[16] Order, Appendix A, at 5. (Emphasis added).

intricacies of the retail market means that the Order will interfere with existing contracts. Put differently, "otherwise do business with" creates ambiguity that must be resolved by clarification from the Commission as well as rehearing.

A. Nothing in the language of PSL § 66-t indicates an intent for retroactive applicability; reasonable due diligence at the time of contracting should suffice.

Although the new UBP language can and should be interpreted as applying solely to future activity, it nonetheless fails to address how future obligations will impact past obligations and transactions. This issue is further confused by vague language in the Order suggesting that retroactive applicability is intended.[17]

ESCOs, including NRG, currently have existing contractual agreements with Energy Brokers and Energy Consultants requiring the payment of compensation to these entities. Because there was no obligation to register until August 31, 2023,[18] nor even a process to do so, the Order should be clarified to confirm that payment obligations for contracts entered into prior to August 31, 2023 are not affected and may continue.

The language of PSL § 66-t clearly prohibits an Energy Broker or Energy Consultant from accepting a fee for services covered by the statute if it has not already registered with the Commission. NRG does not object to the PSC requiring the inverse: ensuring ESCOs do not make payments to an unregistered entity. However, this language cannot and should not retroactively apply to payments under existing contracts entered into before August 31, 2023. Under the Commission's implementation, PSL § 66-t would have retroactive effect as "it would impair rights

[17] *See* Order, p. 43 (stating that energy brokers and consultants may not accept compensation where its registration is denied, revoked or has lapsed and that "[t]his also applies to any contract with an unregistered broker or consultant that was entered into before August 31, 2023.")

[18] *See* Order, Ordering Clauses 5, 6.

a party possessed when he acted, increase a party's liability for past conduct, ***or impose new duties with respect to transactions already completed***."[19] The courts have long recognized a presumption against retroactivity; there must be a clear expression of legislative purpose to justify retroactive application of a statute,[20] regardless of whether the covered entity's non-compliance is willful or unintentional. Importantly, the intent of PSL § 66-t was to regulate the conduct of Energy Brokers and Energy Consultants, not ESCOs (insofar as they do not perform Energy Broker or Energy Consultant functions), however, ESCOs too would be penalized under the Order.

Accordingly, regardless of whether an Energy Broker or Energy Consultant submits a registration packet or is ultimately denied registration, there should be no bar to an ESCO paying its Energy Brokers and Energy Consultants in accordance with a preexisting contractual obligations that arose prior to August 31, 2023.

B. The Order Fails to Consider the Implications of the Payment Prohibitions on Existing Contracts, Without a Rational Basis.

Going forward, a similar issue exists relative to the registration status of an Energy Broker or Energy Consultant. While payments to unregistered Energy Brokers and Energy Consultants are prohibited, the same must not be true for payments to then-registered Energy Brokers or Energy Consultants that fall out of compliance at a later date. Yet, under the Order, ESCOs would be required to cease payments that were already set and enforceable by a contract between the ESCO and the Energy Broker or Energy Consultant because at the time of contracting, the Energy Broker or Energy Consultant was either deemed or fully registered.[21]

---

[19] *Landgraf v. USI Film Products*, 511 US 244, 278-280 (Apr. 26, 1994) (emphasis added).

[20] *See Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332, 370 (Apr. 2, 2020)(citing *Landgraf*, 511 US at 265) ([t]his "deeply rooted" presumption against retroactivity is based on "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly"); *Gleason v. Gleason*, 26 N.Y.2d 28, 36 (Jan. 21, 1970).

[21] *Id.*

This hardline rule regarding payments to unregistered entities, or entities denied registration after timely applying, creates the potential for interference with contracts. For this reason, NRG advocated that the prohibition on payment to Energy Brokers and Energy Consultants attach ***at the time*** of customer contract execution. While an ESCO can and should confirm an entity's registration status prior to contracting with a customer, any change in registration status post-contracting should not require an ESCO to cease payment.[22]

Under the Order, an ESCO must cease paying an Energy Broker or Energy Consultant that has their registration denied or later loses its registration, either because it allows it to lapse or it is revoked. However, an ESCO's contracts with Energy Brokers and Energy Consultants still obligate the ESCOs to pay them the fees the customers owed to them. Thus, an ESCO must choose to either violate the Order or breach their contract.

The Court of Appeals has clearly established that the Commission only possesses the powers expressly delegated to it by the Legislature, or those incidental to or by necessary implication of those express powers; this power ***excludes*** the ability to interfere with contracts.[23] The Court of Appeals has previously stated:

> Under our statutes, it is only an agreement between affiliates for "management, construction [or] engineering" services or for the "purchase of electric energy and/or gas" which need be filed by a telephone company for commission approval. In every other instance, the commission is powerless to ***impair*** the obligation or otherwise ***invalidate*** a utility's contract.[24]

Here, the Commission has no authority to impair or invalidate an ESCO's contract with its vendors, nor does the language of PSL § 66-t provide or even imply such authority.[25] The pertinent

---

[22] *See* NRG Comments at 16.

[23] *Niagara Mohawk Power Corp. v. Public Service Commission*, 69 N.Y.2d 365, 368-69 (1987).

[24] *General Telephone Company v. Lundy*, 17 N.Y.2d 373, 378-79 (1966) (citations omitted, emphasis in original).

[25] *See Abiele Contracting, Inc. v. New York City School Const. Auth.*, 91 N.Y.2d 1, 10 (1997)(agency determination is "void where it is made either without statutory power or in excess thereof").

language of PSL § 66-t(2)(c) reads: "[n]o person shall accept any commission, service fee, brokerage or other valuable consideration for selling, soliciting or negotiating an energy contract in this state if that person is required to be registered under this section and is not so registered, unless stated otherwise herein." This section expressly imposes registration obligations **at the time of the** sale solicitation or negotiation. Nowhere does it suggest a retroactive rejection of valid contracts and the right to payment of consideration for those valid contracts. This provision is "clear and unambiguous" and thus, the language's plain meaning should be given effect.[26] Accordingly, rehearing is warranted given ESCOs must remit the payments owed by their customers to the Energy Broker or Energy Consultant or risk frustrating contractual obligations.

Even assuming prohibition of payments under an ESCOs' contract with an Energy Broker or Energy Consultant is required (NRG maintains that it is not), additional challenges can arise in these scenarios. For example, if an ESCO ceases payments to the Energy Broker or Energy Consultant, does that require modification of its customer agreements? Further, if an unregistered Energy Broker or Energy Consultant resolves their compliance issues and are reinstated by Staff or the Commission, what effect does that have in regard to fees owed? The Order fails to address these likely scenarios and regardless, NRG posits that either situation is untenable. Ultimately, the agreement between the ESCO and the would-be Energy Broker or Energy Consultant attaches regardless of whether that Energy Broker's or Energy Consultant's registration is not approved or its registration lapses or is revoked. As the Commission has no authority to interfere with the contracts between the ESCO and the Energy Broker and Energy Consultant, the Order must be reconsidered.

[26] *See Majewski v. Broadalbin-Perth Central School District*, 91 N.Y.2d 577, 583 (1998).

III. THE ORDER'S CLEAR DEPARTURE FROM THE STAFF PROPOSAL WAS UNPRECEDENTED AND NOT PROPERLY NOTICED IN VIOLATION OF SAPA

To the extent the Commission departs from the provisions of its NOPR, the Order also raises procedural concerns: namely that NRG and other stakeholders were not given adequate notice and were not afforded an opportunity for comments on several actions not previously proposed. To be clear, NRG recognizes the Commission need not adopt a Staff Proposal as-is to be SAPA compliant. However, the Order contains substantial deviations from what was proposed in the NOPR: it impermissibly expands to third-party vendors compensation disclosure requirements that are unrelated to brokering of customer contracts. The Staff Proposal does not even consider these requirements, nor is this discrete issue raised in the NOPR. Therefore, NRG, other stakeholders, and the public at large were not apprised of the possibility that the Commission would add these additional ESCO compliance obligations. Tellingly, no third-party vendors or other entities that would be captured under these additional obligations have participated in this proceeding; since such entities do not engage in broker conduct or other activities that would implicate them, these entities may be unaware of the proceeding in its entirety. The Order is not in conformance with SAPA requirements and must be reheard.

Under SAPA, the Commission must "submit a notice of proposed rulemaking to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule."[27] This opportunity must be meaningful; the notice must be "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who

[27] N.Y. St. Admin. P. Act § 202(1)(a).

are to be heard,' to insure that they are given a meaningful opportunity to present their case."[28] Rules that are not properly noticed must be annulled.[29]

The language of the NOPR only references that the Commission was considering the Staff Proposal. The passage concerning compensation disclosure in its entirety is as follows:

> To effectuate the compensation disclosure requirement of PSL § 66-t, Staff recommends that any energy broker or consultant that has ***a direct contractual relationship with customers*** be required to set forth the form and amount of their compensation on the first page of any contract or agreement with their customers. ***If an ESCO or DER supplier collects broker compensation on behalf of the broker or consultant***, such compensation shall be added to the Customer Disclosure Statement in the ESCO or DER supplier's customer agreement and reflect the amount and method. (Emphasis added).

This language is nearly identical to the language contained in the Staff Proposal.[30] The remainder of the discussion is tied to compensation made to Energy Brokers or Energy Consultants and does not address ESCO third-party vendors. While Staff opined that the Broker Bill applied to "individuals acting on behalf of ESCOs and DER suppliers," this was in the context of undertaking the activities that render an entity to be an Energy Broker or Energy Consultant as the terms are defined. Staff did not consider this discrete topic; the Staff Proposal and in turn, the NOPR cannot be construed to have given adequate notice. Without regard to whether the Commission has the authority under PSL 66-t to make these changes to the UBP – NRG contends that it does not – the Commission erred in failing to issue an additional SAPA notice and afford NRG and others a meaningful opportunity to engage on this issue. Accordingly, the Order is procedurally flawed and must be reconsidered.

---

[28] *National Energy Marketers Assn. v. New York State Pub. Serv. Comm.*, 37 N.Y.S.3d 178, 186 (July 22. 2016) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)).

[29] *Matter of Homestead Funding Corp. v. State of N.Y. Banking Dep't*, 95 A.D.3d 1410, 1412-13 (3d Dep't. 2012).

[30] *See* Staff Proposal at 7.

MOTION FOR STAY

NRG moves to stay enforcement of the Order until ninety (90) days after the Commission issues a determination in this matter. A grace period is necessary to allow adequate time for ESCOs to update their system programming to ensure fees are adequately and accurately disclosed.[31] The Commission has acknowledged the need for further discussion, as signaled through its directions to Staff to convene a technical conference and its acknowledgement of the ongoing questions and concerns of stakeholders.[32] While Staff was directed to convene the technical conference within the "two-plus months" compliance period, at the time of this writing, no notice has been issued to schedule the conference. Thus, there is precariously little time to address the compliance issues, which will have lasting effects on the retail market and cause unnecessary growing pains, for the covered entities attempting to navigate compliance without appropriate guidance, and for Staff, who will only have roughly three months to review hundreds of registration applications.

This Petition also specifically seeks rehearing on the entities required to register and the extent of compensation that must be disclosed. Such issues need to be resolved before an ESCO can appropriately update their customer disclosure statements or determine what entities should have submitted registration packets by August 31, 2023.

The Commission purported to address some of NRG's concerns, stating "the obligation for ESCOs and DER suppliers to verify the registration of Energy Brokers and Energy Consultants will begin after the Staff review period closes."[33] However, even though entities that have filed

---

[31] NRG Comments at 14; *see also* Case 23-M-0106, *In the Matter of Commission Registration of Energy Brokers and Energy Consultants*, Comments of Family Energy, Inc., at 22 (May 22, 2023) (requesting a technical conference and surmising a phased approach to implementation may be prudent, given "the extensive nature of the proposed rules").

[32] Order at 47.

[33] *Id.* at 43.

their registration applications by August 31, 2023 will be considered to be in full compliance while Staff performs its review (until December 1, 2023) and thus ESCOs may contract with customers brought by those quasi-registered Energy Brokers and Energy Consultants, the open question remains regarding the fate of existing contracts entered into before August 31, 2023 or those entered into between August 31, 2023 and December 1, 2023 if the registrations are rejected. Nor does it resolve the complications that will arise if an entity falls out of compliance at any time after December 1, 2023. The presumptions of compliance will inevitably create a false sense of security and unreasonably burden both the covered entities and Staff.

Furthermore, while in theory a Commission-maintained list of registered Energy Brokers and Energy Consultants posted on its website appears to be a feasible means to track whether or not an entity is registered and in turn, to determine whether an ESCO may do business with them, in practice if the ESCO relies on the list in good faith and the list is either incorrect or out of date, there are no safeguards under the Order and that ESCO may nonetheless be in violation of the Order. For example, there is no indication that the list will be regularly updated, either dynamically or at regular intervals. The PSC's suggestion that ESCOs merely track filings on the Document Matter Management ("DMM") System in lieu of a formal list is also only a half-measure; while a registration application on DMM can indicate compliance, the omission of filings thereafter is not necessarily determinative of compliance status.[34] There must be a more active means of confirming registration status, or at least assurances that ESCOs relying on Commission-hosted information in good faith will not be unfairly penalized.

A stay of the implementation of the Order allows the fruitful discussion of these issues at the technical conference and the resolution thereof, before the covered entities, ESCOs, and Staff

[34] *See id.*

expend resources or run into avoidable compliance issues. NRG respectfully requests that the Commission stay implementation of the Order until 90 days after a determination is made on the foregoing Petition for Rehearing and Reconsideration.

CONCLUSION

For the foregoing reasons, NRG respectfully seeks clarification that the Order and UBP amendments do not apply retroactively such that payments to Energy Brokers and Energy Consultants for customer contracts entered into prior to August 31, 2023 may continue regardless of whether the Energy Broker or Energy Consultant files or has their registration application approved by Staff. NRG requests the Commission grant rehearing to meaningfully address the lack of statutory authority for the Order's (1) broad application of third-party vendor compensation disclosure requirements and (2) impermissible requirement that an ESCO cease payments under a valid contract with an Energy Broker or Energy Consultant even where the Energy Broker and Energy Consultant was in compliance with PSL §66-t at the time that the customer contract for enrollment was executed.

NRG also seeks a stay of implementation of the registration and compliance obligations is warranted as it will avoid unnecessary confusion and compliance issues. At a minimum, the stay will allow Staff a meaningful opportunity to engage with stakeholders at the technical conference and recommend changes to alleviate most of NRG's concerns.

Respectfully submitted,

/s/

Yvonne E. Hennessey, Esq.
Gabrielle A. Figueroa, Esq.
David J. Solimeno, Esq.
Barclay Damon LLP
80 State Street
Albany, New York 12207
(518) 429-4293
yhennessey@barclaydamon.com

Attorneys for NRG Energy, Inc., and NRG Retail Companies

Dated: July 24, 2023