

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on July 18, 2024

COMMISSIONERS PRESENT:

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

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

CASE 15-M-0180 - In the Matter of Regulation and Oversight of
Distributed Energy Resource Providers and
Products.

CASE 98-M-1343 - In the Matter of Retail Access Business Rules.

ORDER DENYING PETITION FOR REHEARING

(Issued and Effective July 23, 2024)

BY THE COMMISSION:

INTRODUCTION AND BACKGROUND

On June 23, 2023, the Commission issued an Order Adopting Energy Broker and Energy Consultant Registration Requirements (June 2023 Order) to effectuate the provisions of Public Service Law (PSL) §66-t.¹ The June 2023 Order established a registration process for energy brokers and energy consultants

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

through adopting amendments to the Uniform Business Practices (UBP) and the Uniform Business Practices for Distributed Energy Resources (UBP-DERS), as recommended in a proposal filed by Department of Public Service Staff (Staff).² The UBP and UBP-DERS modifications required brokers and consultants to submit a registration form, a \$500 annual registration fee, and an irrevocable standby letter of credit in the amount of \$100,000 for energy brokers and \$50,000 for energy consultants. The modifications to the UBP and UBP-DERS also established compensation disclosure requirements, requirements for interactions with customers, and enforcement procedures. In the June 2023 Order, the Commission determined that a registration would apply to a broker or consultant and its employees, but not contractors, vendors, or agents of the registered entity, who would have to register themselves as a broker or consultant. The June 2023 Order also directed Staff to review the UBP and UBP-DERS to "identify modifications intended to improve the overall consistency and clarity of the documents and provide a proposal for Commission consideration within 120 days."³

Following the issuance of the June 2023 Order, a petition for a declaratory ruling and three petitions seeking

² Cases 23-M-0106 et al., Staff Proposal Regarding Registration of Energy Brokers and Energy Consultants (filed March 14, 2023) (Staff Proposal).

³ June 2023 Order, p. 50.

rehearing of the June 2023 Order were filed.⁴ The petitions requested rehearing of several issues, including whether a registration should extend to the contractors, vendors, and agents of a registered broker or consultant. Family Energy, Inc. (Family), which also submitted the petition for rehearing that is the subject of this Order, also asserted in its rehearing petition that the Commission violated the State Administrative Procedure Act (SAPA) by adopting temporary placeholder rules that would soon be amended, as evidenced by the Commission's directive to Staff to review the UBP and UBP-DERS.

On April 18, 2024, the Commission addressed these petitions through issuing a Declaratory Ruling and Order on Rehearing.⁵ The Commission granted rehearing in part and denied rehearing in part. Notably, the Commission denied rehearing regarding its prior June 2023 determination that a registration would not extend to the contractors, vendors, and agents of a registered broker or consultant and it also rejected Family's contention that the UBP and UBP-DERS modifications violated SAPA or should be interpreted as temporary.

⁴ Cases 23-M-0106 et al., Verified Petition of Metergy Solutions LLC and Quadlogic Controls Corporation for Declaratory Ruling that Public Service Law §66-t Does Not Apply to Submeterers or Submetering Service Providers (filed November 17, 2023); 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 (filed July 24, 2023); Petition for Rehearing, Reconsideration and/or Clarification and Motion for Stay of Family Energy, Inc. (filed July 24, 2023); Petition of the New York Retail Choice Coalition for Rehearing, Reconsideration & Clarification of the Order Adopting Energy Broker and Energy Consultant Registration Requirements and Motion for Stay of Implementation (filed July 25, 2023).

⁵ Cases 23-M-0106 et al., Declaratory Ruling and Order on Rehearing (issued April 18, 2024) (April 2024 Rehearing Order).

On May 17, 2024, Family submitted a petition for rehearing of the April 2024 Rehearing Order. By this Order, the Commission denies Family's petition for rehearing.

PETITION FOR REHEARING

Family presents several different arguments in its petition. Family asserts that the Commission engaged in impermissible regulatory overreach by applying the existing rules that govern energy service companies (ESCOs) to brokers and consultants in a one-size-fits-all manner. Next, Family argues that the Commission is acting in an arbitrary and capricious manner by requiring brokers and consultants to come into compliance with new UBP provisions that the Commission is requiring Staff to review and modify soon thereafter. Family further contends that the rationale supporting the Commission's decision to require independent contractors and agents of energy brokers and energy consultants to register with the Commission is directly contradicted by the new UBP requirements and prior Commission decisions. Family argues that the Commission made an error when it failed to consider comments submitted regarding the Commission's interpretation that the financial accountability requirement of PSL §66-t be satisfied with a letter of credit. Finally, Family states that the Commission erred in its interpretation of PSL §66-t(3)(a) when it determined that the Commission was vested with the discretion to determine the method of financial accountability, rather than the energy broker or energy consultant.

LEGAL AUTHORITY

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

the [Commission] determines to be just and reasonable.”⁶ Consistent with this authority, the Commission adopted the UBP, which set forth various regulatory eligibility requirements for ESCOs to begin accessing, and to continue accessing, utility distribution systems for the purpose of selling energy services to customers.

The Commission’s authority to impose rules and requirements on DER suppliers stems from both its authority over electric corporations, as defined in PSL §§2(13) and 53, as well as its responsibility to ensure that participants in Commission directed or authorized programs, tariffs, or markets receive appropriate protections.

In enacting PSL §66-t, the Legislature provided that energy brokers and consultants shall register with the Commission and provides that such registration authorizes brokers and consultants to act in a manner prescribed by the Commission. The statute also authorizes the Commission to refuse to register a broker or consultant, or revoke a registration if, in the Commission’s judgement, there is cause for revocation or suspension of operations.

Rehearing may be sought only on the grounds that the Commission committed an error of law or fact, or that new circumstances warrant a different determination.⁷ A petition for rehearing must separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing.⁸

⁶ Matter of National Energy Marketers Ass’n v. New York State Pub. Serv. Comm’n, 33 N.Y.3d 336, 351, reargument denied, 33 N.Y.3d 1130 (2019); accord id. at 350; see generally PSL §§5(1)(b), 65(1), 66(5), 66-d(2); GBL §349-d(11), (12).

⁷ 16 NYCRR §3.7(b).

⁸ Id.

DISCUSSION

This Order denies Family's petition for rehearing because Family's arguments lack merit and are either time-barred or were previously addressed and rejected by the Commission in the April 2024 Rehearing Order. Family Energy fails to articulate any error of law or fact, or any change in circumstances, that would warrant rehearing of the April 2024 Rehearing Order.

Family argues that that the Commission engaged in regulatory overreach by applying existing rules that govern ESCOs to brokers and consultants in a one-size-fits-all manner. Family notes that UBP Section 11, which was adopted in the June 2023 Order, requires brokers and consultants to submit certain materials as part of the registration process that are exclusively within the purview of the ESCO, such as customer notices and marketing materials, applies the existing marketing standards for ESCOs to brokers and consultants, requires brokers and consultants to develop infrastructure to respond to customer inquiries to the same standard as ESCOs, and applies the same enforcement consequences for ESCOs to brokers and consultants. Family contends that these requirements are not appropriately scaled to the regulation of brokers and consultants.

Family failed to bring this argument to the Commission within thirty days of the effective date of the June 2023 Order, as required by 16 NYCRR §3.7(a); therefore, Family now is time-barred from raising this issue. Although Family raised a similar argument in its first rehearing petition, it was raised specifically in relation to the modifications to UBP Section 5 and not in relation to UBP Section 11. Nevertheless, the Commission's response is the same: the UBP Section 11 modifications "are meant to encompass all business models involving brokers or consultants and the many functions those

entities may provide in the retail energy marketplace.”⁹ Family Energy is incorrect when it states that customer notices and marketing materials, for example, are exclusively within the purview of the ESCO. While that may be Family Energy’s particular business model, some energy brokers and consultants may have their own marketing materials, customer notices, and customer agreements which would need to be provided as part of a registration package.

Next, Family argues that the Commission is acting in an arbitrary and capricious manner by requiring brokers and consultants to come into compliance with new UBP provisions while directing Staff to review those same provisions for the purpose of future modification. Family raised this same issue in its first rehearing petition and the Commission denied rehearing in its April 2024 Rehearing Order.¹⁰ Family has failed to raise any new circumstances that would justify a second rehearing of this issue pursuant to 16 NYCRR §3.7(b); therefore, the Commission denies a second rehearing for the same reasons articulated in the April 2024 Rehearing Order.

Family contends that independent contractors of brokers and consultants should not be required to register with the Commission. The Commission denied rehearing of this issue in the April 2024 Rehearing Order.¹¹ Again, the Commission denies a second rehearing of this issue as Family has not cited any new circumstances that justify a second rehearing.

Finally, Family argues that PSL §66-t requires the Commission to accept a surety bond to satisfy the financial accountability requirement. Further, Family states that the

⁹ June 2023 Order, p. 68.

¹⁰ June 2023 Order, p. 67.

¹¹ June 2023 Order, pp. 36-37.

Commission erred by not addressing in the April 2024 Rehearing Order comments that were filed subsequent to the June 2023 Order in relation to the letter of credit requirement.

The Commission required applicants to demonstrate financial accountability through an irrevocable standby letter of credit in the June 2023 Order. Family failed to seek timely review of this issue in accordance with 16 NYCRR §3.7(a) and is, therefore, time-barred from seeking rehearing. Regardless, the Commission also finds this argument to be without merit. PSL §66-t(3)(a) requires brokers and consultants to demonstrate financial accountability "as evidenced by a bond or other method of financial accountability." Family contends that this language grants the Commission authority to define the other methods of financial accountability but does not allow the Commission to reject the use of a bond. The Commission does not agree with Family's proffered interpretation. PSL §66-t requires the establishment of a registration process for brokers and consultants and gives the Commission broad authority to refuse to register or revoke registrations.¹² As such, PSL §66-t(3)(a) vests the Commission with authority to determine the proper method of financial accountability for brokers and consultants as a part of its establishment of a registration process.

Additionally, the Staff Proposal recommending a letter of credit to demonstrate financial accountability was subject to a sixty-day comment period in accordance with SAPA. Several commenters raised the issue of allowing brokers and consultants to use a bond instead of a letter of credit to demonstrate financial accountability and the Commission summarized and

¹² PSL §66-t(3).

addressed these comments in the June 2023 Order.¹³ The method of financial accountability was not an issue raised in any of the three petitions for rehearing of the June 2023 Order, and thus was not before the Commission in the April 2024 Rehearing Order. The submission of additional comments related to the method of financial accountability after the issuance of the June 2023 Order does not obligate the Commission to address the same issue again when it was not the subject of a petition for rehearing. Therefore, the Commission denies rehearing on these issues.

CONCLUSION

In sum, the Commission finds that the issues raised in Family's petition lack merit and are procedurally barred from review because of the petitioner's failure to timely file for rehearing or to present error of law or fact, or changed circumstances, that would justify rehearing. Therefore, the petition for rehearing is denied.

The Commission orders:

1. The petition for rehearing filed by Family Energy, Inc. is denied for the reasons discussed in the body of this Order.
2. These proceedings are continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

¹³ June 2023 Order, pp. 35-37.