NEW YORK STATE
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Retail Access Business Rules Case 98-M-1343

COMMENTS OF JOULE ASSETS ON DEPARTMENT OF PUBLIC SERVICE STAFF PROPOSAL FOR IMPLEMENTING STRONGER PRICE TRANSPARENCY FOR CONSUMERS

INTRODUCTION

On March 26, 2024, the Department of Public Service (DPS) issued a Proposal[1] to revise the Uniform Business Practices (UBP) as a result of amendments to General Business Law (GBL) 349-d. Joule Assets, Inc. ("Joule"), a Community Choice Aggregation Administrator, submits comments on the Proposal.

Within the structure of CCA programs, municipalities sign contracts on behalf of residential and small business customers. Since 2016, the foundation of CCA programs is that municipal authority serves as a proxy for individual customer consent and CCA programs are exempt from individual customer consent requirements. Altering the consent structure of CCAs requires the Public Service Commission (PSC) to directly address this issue within the CCA Proceeding (Case 14-M-0224). The CCA contracting structure relies on municipal authority including for contract changes after initial contract execution. CCA contracts allow for rate changes without individual customer consent. To prevent further disruption to the CCA market, Joule requests that the PSC explicitly confirm that the proposed UBP changes do not impact contracting for Community Choice Aggregation (CCA) programs.

[1] Case 98-M-1343, In the Matter of Retail Access Business Rules, *Staff Proposal for Implementing Stronger Price Transparency for Consumers* (March 26, 2024) (Proposal)

DISCUSSION

I. CCA programs are exempt from individual customer consent requirements

The Public Service Commission took the interpretation that in regard to CCA programs "customer consent" comes from the municipality. Nothing in the amendments to GBL 349-d alters that interpretation and CCA programs continue to use municipal authority in place of express customer consent.

In 2016, to facilitate the opt-out structure of CCA, the PSC declared the municipality was a proxy for individual customer consent. "In particular, the requirement that elected officials approve a CCA program before one is implemented represents a *reasonable proxy for customer consent* [emphasis added], when coupled with consumer education efforts and individual customer opt-out processes[2]."

The PSC ruled that "CCA programs will be permitted to enroll eligible customers on an opt-out basis[3]." For an opt-out structure to function within New York's retail market construct and align with the UBP, the PSC suspended sections of the UBP related to "affirmative consent" of customers. "Uniform Business Practices Sections 4(B)(1)-(3), 5(B)(1), 5(D)(4), and 5(K) are suspended for municipalities participating in Community Choice Aggregation programs[4]." To account for further changes to the UBP, the PSC clarified that, "To the extent that those provisions of the UBP are renumbered, this Ordering Clause shall be construed as referring to those provisions regardless of their numbers *as well as to any provisions with substantially similar effect* [emphasis added][5]." The PSC was extremely clear that CCAs do not require individual customer consent. The fundamental structure of CCA is the opt-out nature of the program, and as such, New York CCAs would not be possible if individual customer consent was required.

General Business Law 349-d existed in substantially the same form before the PSC authorization of CCA. In advance of the 2016 CCA Framework Order (and at current) 349-d says, "No material change shall be made in the terms or duration of any contract for the provision of energy services by an ESCO *without the express consent of the customer obtained under the methods authorized in the UBP* [emphasis added][6]." The processes for obtaining customer consent/authorization are outlined in UBP Section 5(B)(1). The

---

[2] Case 14-M-0224, Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs, *Order Authorizing Framework for Community Choice Aggregation Opt-out Program* (April 21, 2016)
[3] Id.
[4] Id.
[5] Id.
[6] Case 98-M-1343, In the Matter of Retail Access Business Rules, *Order on Rehearing, Reconsideration, and Providing Clarification* (September 18, 2020)

CCA Framework Order explicitly excepted CCAs from UBP 5(B)(1). Since 2016, CCA contracts have coexisted with the requirements for consent in both GBL 349-d and the UBP. The amendments to GBL 349-d clarify that "material change" includes price changes but does not alter the requirements for customer consent. Regardless of what is considered a "material change," CCAs do not have to obtain "the express consent of the customer obtained under the methods authorized in the UBP[7]" because the PSC exempted CCA from the process of obtaining customer consent. Nothing in the GBL 349-d amendment alters CCAs' exemption of the consent provisions of the UBP issued by the PSC in 2016 and CCA programs continue to use municipal authority in place of express customer consent.

II. To alter the consent structure of CCAs the PSC would need to do so in the CCA proceeding

The PSC was very intentional in authorizing the opt-out structure of CCA and they have made it clear that CCA's opt-out structure cannot exist without PSC approval. "Permitting the inclusion of customers in CCA on an opt-out basis rather than requiring explicit, affirmative consent represents a significant policy change[8]," and "Approval of CCA as an opt-out program is specific to its context and to the protections it provides, and should not be interpreted as an indication that the Commission intends to eliminate or modify the general requirement for explicit customer consent[9]."

In addition, the PSC has also been clear that changes to CCA need to be directly addressed in the CCA proceeding. In an Order addressing broader retail access market changes the PSC said, "It would [be] imprudent and inappropriate to adopt any broad changes to the CCA processes in these proceedings. Any proposed modification to the CCA process should be raised in the context of the CCA oversight case (Case 14-M-0224)[10]." Given that the PSC has been explicit about both the exemption of customer consent and the process for making changes to CCA programs, an update of the UBP precipitated by the amendment to 349-d cannot be used to alter CCA's consent structure. The municipality serving as a proxy for customer consent is unaltered by these legal and regulatory changes.

---

[7] Id.
[8] Case 14-M-0224, Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs, *Order Authorizing Framework for Community Choice Aggregation Opt-out Program* (April 21, 2016)
[9] Id.
[10] Case 12-M-0476, Proceeding on Motion of the Commission to Access Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State, *Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process* (December 12, 2019)

III. Current CCA contracts allow for rate changes without individual customer consent

The only "material changes" that are made to a CCA contract are "material changes" that have been agreed to in advance of contract execution and are explicitly outlined in the contract. Longer-term and shorter-term fixed-rate contracts both have mechanisms for rate changes. What causes these rate changes and how they are communicated to CCA program participates is also included in the contract. In both longer- and shorter-term fixed rate contracts, rate changes benefit the customer by ensuring the original rate does not include premiums for components of the rate that are unknown at the time of contracting.

When a municipality executes a CCA contract with a longer-term fixed-rate (e.g. 18-36 months) certain pass-through costs are unknown at the time of contract execution. These are costs that the customer must pay if they are on third-party supply or if they are a full-service utility customer. As such, CCA contracts allow for a rate increase or decrease once these pass-through costs are known. A specific example is the cost of compliance with the Clean Energy Standard (CES). In April 2023 Joule executed a CCA contract that serves customers through November 2025. At the time of contracting, the compliance obligation was only known through 2024. To provide a fixed rate that includes CES compliance for 2025 the ESCO serving the CCA must make assumptions of both the percentage of load requirement and the cost of RECs to meet this requirement starting in 2025. To ensure that customers do not over or underpay for the CES the ESCO is allowed to adjust the rate after the contract is executed.

As New York continues to determine how to pay for our climate goals and the regulatory landscape continues to shift, it makes the CCA contract structure inclusive of rate changes even more critical. This has been true since the very first CCA contract executed in New York. In this case, the Zero Emissions Credit (ZEC), also a pass-through cost paid for by all ratepayers, was unknown at the time of contracting. Once the State established the ZEC payment the CCA rate had to increase to include collection of the ZEC payment. Given that the municipality is a proxy for customer consent for CCA programs, the municipality consents to the rate change and customers are notified. Customers are able to leave the program at any time with no fee or penalty.

When a municipality executes a CCA contract with a shorter-term fixed-rate (e.g. 6 months) the parameters for setting a subsequent shorter-term fixed-rate are determined at the time of contract execution. When the municipality executes the CCA contract they know the dates when the rate may change (it may also remain the same); how much the rate can change (increase/decrease); and how customers will be informed if there is a rate change. A municipality focused on development of new renewables will use this contract structure so that they have the ability to purchase the new renewables

and incorporate them into the contract (thus impacting the rate) when the renewables become operational.

In both longer- and shorter-term fixed-rate CCA contracts, the municipality is agreeing to future "material changes," including increases or decrease to the rate, at the time of contract execution and in advance of the rate change taking effect. The contract outlines the specific process for municipal consent in advance of these changes and it also outlines the notification requirements of the CCA participants. Allowing the continuation of intra-contract rate changes for CCAs is essential to ensure that participants do not pay a risk premium and are able to advance their renewable electricity goals. As the proxy for individual customer consent, municipalities are able to authorize these rate changes in the same why they are able to execute the contract.

CONCLUSION

DPS Staff's proposed updates to the UBP have no impact on Community Choice Aggregation programs. Since New York authorized CCA programs in 2016, CCAs have been exempt from customer consent requirements. The amendments to GBL 349-d did nothing to alter CCA's customer consent exemptions and such changes would require a process within the CCA proceeding. CCA contracts have always allowed intra-contract rate changes authorized by the municipality, and the GBL 349-d changes do not impact their ability to authorize such changes in the future. To prevent further disruption to the CCA market, Joule requests that the PSC explicitly confirm that the proposed UBP changes do not impact contracting for Community Choice Aggregation (CCA) programs.