STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Commission Registration of Energy Brokers and Energy Consultants Pursuant To Public Service Law Section 66-t.	)))	**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**

Petition for Rehearing, Reconsideration and/or Clarification and Motion for Stay of Family Energy, Inc.

Family Energy, Inc.[1] [hereinafter "Family Energy"] hereby respectfully submits a Petition for Rehearing, Reconsideration and/or Clarification and Motion for Stay of the Order Adopting Energy Broker and Energy Consultant Registration Requirements ["Order"] issued on June 23, 2023. This Petition and Motion are submitted pursuant to the Commission's regulations at 16 NYCRR 3.6 and 3.7. The regulations permit rehearing to be sought on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination.

The Order adopted regulations in the form of new provisions, and revisions to existing provisions, of the Uniform Business Practices ("UBP") to implement new Public Service Law ("PSL") § 66-t. PSL § 66-t set forth definitions of the terms "energy broker"

[1] Family Energy, Inc. is a Business Corporation, incorporated in New York, and authorized by the Commission to serve electric and natural gas customers as an Energy Service Company.

and "energy consultant," required said entities to register with the Public Service Commission, set forth compensation disclosure requirements and prohibited the payment of rebates by brokers and consultants as an inducement for, or as compensation for any supply business. The Order adopted definitions of "energy broker" and "energy consultant" in UBP Section 1. The Order adopted revisions to UBP Sections 5, 8 and 10 and adopted a new UBP Section 11. The Order also established a number of compliance deadlines. Brokers and consultants must submit a registration package to the Commission by August 31, 2023, for Staff review by December 1, 2023. ESCOs must implement a broker/consultant compensation disclosure statement on ESCO sales documentation by August 31, 2023, and relatedly add a new TPV affirmation as to whether compensation was disclosed by the same date. Although an ESCO's obligation to verify the registration of brokers/consultants will not begin until after the Staff registration package review period is completed in December 2023, an ESCO is required to verify that the brokers and consultants it does business with have filed a registration package by August 31, 2023. The Commission also adopted rules regarding the validity of ESCO contracts, and compensation paid for the same, as impacted by broker and consultant registration status which hinge on the effective date of the broker and consultant registration requirements.

As more fully explained below, Family Energy submits this Petition for Rehearing, Reconsideration and/or Clarification and Motion for Stay due to the procedural impropriety of adopting final rules in the UBP without first engaging in a full and formal

review of those rules. Deferring that review until Staff submits proposed UBP revisions in October 2023, violates State Administrative Procedure Act ("SAPA") requirements on its face. It also requires the industry to expend resources to be compliant with the UBP as of August 31, 2023, and then engage in a duplicative use of resources to comply with future necessary modifications that Staff may identify in October. Rehearing and a stay in this matter will promote the fair, orderly and efficient conduct of this proceeding.

Family Energy also submits this Petition to seek rehearing, reconsideration and/or clarification of various provisions of the Order and associated UBP provisions with respect to:

- Revisions be made to UBP Section 5 to insert the terms "Energy Broker, or Energy Consultant" that do not accurately reflect the relative contractual obligations and responsibilities of the parties and should be withdrawn;

- Exemption from registration for individual contractors and individual agents of brokers and consultants;

- Requirements for broker and consultant compensation disclosure;

- Disclosure of compensation on the Customer Disclosure Statement, rather than on the Sales Agreement;

- Safe harbor for ESCOs prior to Staff's annual review;

- Problematic implementation of the Third Party Verification question regarding broker and consultant compensation;
- Facilitation of ESCO verification of broker and consultant registration;
- Broker and consultant registration status and the impact on contract validity and payment of compensation;
- Violations of the United States and New York Constitutions;
- Violations of the CLCPA; and
- Violations of SEQRA.

I. Motion for Stay

Family Energy respectfully requests that the Commission stay the enforcement of the Order pending its decision on this Petition and its issuance of final, not temporary rules, to implement PSL § 66-t. Family Energy intends to file a request with the Commission Secretary for an extension to the implementation of the Ordering Clauses set forth in the Order, consistent with Ordering Paragraph 11 that requires a request for extension to be filed at least three days prior to the affected deadline. In the instant matter, the deadline for ESCO compliance with the new UBP requirements is August 31, 2023.

The Order was issued adopting UBP changes as of August 31, but the Order expressly contemplated that those revisions will not be the "final word," as Staff was

directed to file a proposal for Commission consideration by October 23, 2023, "to consider additional modifications to these business practices, including the changes adopted herein." (Order at p. 48). Adopting regulations on a temporary basis as the Commission seeks to do here imposes a significant degree of regulatory uncertainty on the industry as well as potentially significant costs of complying with new rules by August 31st only for the rules to be changed again in short order after Staff makes its proposal for Commission review. Certain aspects of the Order also require rehearing, reconsideration and/or clarification to ensure ESCO compliance. The Order should be stayed pending the disposition of this Petition and the Commission's issuance of final rules to implement PSL § 66-t in order to minimize disruption to ESCO operations, promote ESCO compliance, and prevent burdensome, costly and duplicative efforts to comply with the UBP changes as of August 31, 2023, and then subsequently comply with UBP changes that Staff was directed to propose by October 23, 2023.

II. The Temporary Rules Must Be Withdrawn for Failure to Comply with SAPA Requirements

The Order adopted new and revised UBP provisions that the industry must be in compliance with by August 31, 2023. However, the Order makes clear that those rule changes are temporary placeholders, not final rules. The Order directs Staff to file proposed modifications to the UBP by October 23, 2023, as follows

> the Commission directs Staff to consider *additional modifications to these business practices, including to the changes adopted herein*, with the goal of identifying improvements to the UBP and UBP-DERS' overall consistency and clarity, promoting transparency and accountability for customers, and

> creating more streamlined and less burdensome enforcement processes. Staff shall file a proposal for Commission consideration, including such proposed modifications, within 120 days of the effective date of this Order. Such modifications shall consider removal of superfluous or outdated language, streamlining of required processes, strengthening of consumer protections, clarification of any ambiguous language, *as well as feedback received during the technical conference* discussed above. (emphasis added).

Order at p. 48. The Order asserted that "[w]ith an effective date in the legislation of June 21, 2023, it was imperative that the Commission adopt the required regulations and provide associated guidance by its June 2023 session." Order at p. 47.

Family Energy and other commenters offered extensive redlines to the proposed UBP language in Staff's Proposal.[2] By and large, the Order did not review or address those comments, predominantly focusing on the definitional sections and registration requirements. For example, Family Energy suggested that the proposed insertions of the terms "Energy Broker and Energy Consultant" in multiple provisions of UBP Section 5 were unnecessary, confusing and do not reflect the contractual obligations and relative responsibilities of the parties during the lifespan of the contract. Family Energy noted that Section 5 pertains to ESCO responsibilities for customer enrollments, renewals, drops and assignments. Thus, there is no need to insert the terms "Energy Broker and Energy Consultant" in Section 5 as PSL § 66-t enacted no change in the relative responsibilities of ESCOs, brokers or consultants in that regard. The Order analysis of its decision to adopt

[2] Case 23-M-0106, et. al., *Staff Proposal Regarding Registration of Energy Brokers and Energy Consultants*, filed March 14, 2023.

changes to Section 5 is limited to the addition of the compensation disclosure field and a new TPV affirmation and does not address the significant issue raised by Family Energy. In fact, minimal changes to Staff's proposed UBP verbiage were made in the Order, with the apparent intention that the parties redlined comments and technical conference feedback would be evaluated after-the-fact in a further set of UBP changes to be proposed this fall.

Notwithstanding the perceived urgency to adopt rules at the June session, it does not justify or excuse the procedural impropriety of hastily adopting temporary rules to be effective August 31st, that do not consider stakeholder comments on the proposed rule, and that the Commission has particularly stated its intention to revise after reviewing the comment record and technical conference input. The idea that rules should be adopted first, and stakeholder comments and feedback should be considered after rules are adopted turns the SAPA rulemaking process on its head. SAPA § 202 clearly sets forth the notice and comment process that an agency has to engage in *prior* to rule adoption, not after. Section 202 does include a provision for the adoption of rules on an emergency basis, but the Commission did not seek to do so here, nor would it have been justified as "necessary for the preservation of the public health, safety or general welfare."

In any case, there are major negative consequences to the industry of adopting rules in this manner. ESCOs, brokers and consultants will expend time and resources, and incur costs, to be compliant with the rules as of August 31, 2023. These efforts will all potentially be upended by the Staff's proposed UBP changes this fall. It is wasteful

and illogical to require market participants to proceed in this manner. It is harmful to entities that are newly regulated by the Commission and are adopting systems to become compliant with a completely new regulatory regime. It is also harmful to ESCOs in that it represents another major modification to the New York market, but a modification that has not been adopted in final form.

Scheduling a technical conference to provide a forum for industry questions is helpful. However, the technical conference will take place after Petitions for Rehearing are due to be filed. It is possible, even likely, that the discussion at the technical conference could shed new light on issues that the industry may not have previously identified or understood at the time Petitions are due. A final set of UBP revisions to reflect PSL § 66-t should reflect all of the input received and should be adopted in a cohesive manner.

For the foregoing reasons, the temporary UBP changes that must be complied with on August 31, 2023, must be withdrawn for failure to comply with SAPA. After Staff receives input at the technical conference and after fully and completely considering stakeholder comments a final set of UBP rule changes should be issued for the industry.

III. Revisions to UBP Section 5 Should be Withdrawn

In its initial comments, Family Energy recommended that the majority of Staff's proposed revisions to UBP Section 5 should not be adopted. UBP Section 5, Change in Service Providers, pertains to ESCO responsibilities for customer enrollments, renewals,

drops and assignments – the lifecycle of the ESCO and customer relationship. New PSL § 66-t made no change to these responsibilities. Yet, the Order adopted the Staff Proposal to insert the terms "Energy Broker, or Energy Consultant" throughout UBP Section 5. Family Energy submits this represents a fundamental misunderstanding and misstatement of the role of brokers and consultants in the sales process. To be clear, the Customer Disclosure Statement, the sales agreement, the customer enrollment, and sales verification requirements in Section 5 pertain to the ESCO. While a broker or consultant may be engaged by the ESCO in the sales process utilizing that contract documentation, the fact remains that it is the *ESCO* contract documentation. Including the terms "Energy Broker, or Energy Consultant" confuses the relative responsibilities of ESCOs, brokers and consultants in a way that does not reflect the parties' relative responsibilities and will therefore frustrate compliance efforts. The Order did not mention or review Family Energy's comments in this regard. This is a significant error for which rehearing is sought.

Family Energy resubmits its recommendations on Section 5 language changes as follows (UBP additions from the Order in bold underline):

A. Section 5.B.

> An ESCO, ~~or~~ its agent, **an Energy Broker, or an Energy Consultant** may solicit and enter into a sales agreement with a customer subject to the following requirements

Recommendation: The change should be withdrawn because the sales agreement referenced in Section 5 runs between the ESCO and the customer, even if the ESCO

has engaged another entity to perform the marketing and sales solicitation on its behalf.

B. Section 5.B.1.

The ESCO**, Energy Broker, or Energy Consultant** shall obtain a customer agreement to initiate service and enroll a customer and customer authorization to release information to the ESCO by means of one of the following methods.

Recommendation: The change should be withdrawn because the sales agreement referenced in Section 5 runs between the ESCO and the customer, even if the ESCO has engaged another entity to perform the marketing and sales solicitation on its behalf.

C. Section 5.B.4.k.

A disclosure of the form and amount of compensation provided to an Energy Broker or Energy Consultant if such compensation is collected through the ESCO customer agreement.

Recommendation: See discussion in Section V. and VI. of this Petition pertaining to ESCO disclosure of broker and consultant compensation.

D. Section 5.I.2., 5.I.3. and 5.I.4.

2. A customer may authorize an ESCO**, Energy Broker, or Energy Consultant** to act as the customer's agent ~~(ESCO agent)~~ in establishing distribution utility service. The ~~ESCO~~ agent shall retain, and produce upon request, documentation that the customer authorized the ESCO**, Energy Broker, or Energy Consultant** to act as the customer's agent.

3. An ESCO**, Energy Broker, or Energy Consultant** acting as a customer's agent shall establish a new delivery account on behalf of the customer and enroll the customer with the distribution utility so that ESCO commodity

service commences when distribution utility delivery service begins. The ESCO**, Energy Broker, or Energy Consultant** shall retain, and produce upon request, documentation that the customer authorized the ESCO**, Energy Broker, or Energy Consultant** to act as the customer's agent. An ESCO**, Energy Broker, or Energy Consultant** that is a customer's agent is authorized to submit the customer's application for new delivery service, in compliance with requirements for such applications stated in the law, rules and distribution utility tariffs. An ESCO**, Energy Broker, or Energy Consultant** shall provide the customer's name, service address and, if different, mailing address, telephone number, customer's requested service date for initiation of delivery service, and information about any special need customers, including any need for life support equipment. An ESCO**, Energy Broker, or Energy Consultant** shall refer a customer directly to a distribution utility for arrangement of distribution related matters, such as contribution-in-aid of construction and construction of facilities necessary to provide delivery service and settling of arrears and posting security.

4. Upon a customer's application for service, the distribution utility shall provide an ESCO**, Energy Broker, or Energy Consultant** with the effective date for initiation of delivery service and any other customer information provided to an ESCO**, Energy Broker, or Energy Consultant** in an acceptance of an enrollment request. The distribution utility may notify the customer of the acceptance.

Recommendation: The change should be withdrawn because the ESCO is the party that submits the EDI enrollment with the utility, not the broker or consultant. Likewise, the utility provides the confirmation of enrollment to the ESCO, not the broker.

E. Section 5, Att 1., A

Verification by an Independent Third Party or an Integrated Voice Response system shall be recorded and conducted without the ESCO marketing representative**, Energy Broker, or Energy Consultant**'s presence, either on the telephone or in person.

Recommendation: See discussion in Section VIII. of this Petition pertaining to the third-party verification requirement.

F. Section 5, Att.1, B

The ESCO, ~~or~~ its agent**, an Energy Broker, or an Energy Consultant** shall provide a copy of any Customer Disclosure Statement and sales agreement to the customer by mail, e-mail or fax within three business days after the telephone agreement and independent third-party verification occurs.

Recommendation: The change should be withdrawn because the ESCO is responsible for providing the Customer Disclosure Statement and sales agreement to the customer that is being enrolled, even if the ESCO has engaged another entity to perform the marketing and sales solicitation on its behalf.

G. Section 5, Att.1, D, Telephonic Agreement and Authorization/Third Party Verification Requirements

An ESCO**, Energy Broker, or Energy Consultant** shall retain independent third-party verification records for two years from the effective date of the agreement and/or authorization or for the length of the sales agreement whichever is longer. In the event of any dispute involving agreement. authorization and/or the independent third-party verification, the ESCO**, Energy Broker, or Energy Consultant** shall make available the audio recording of the customer's agreement and/or authorization, including the independent third-party verification within five business days after a request from the Department.

Recommendation: The change should be withdrawn because the responsibility to obtain the TPV to document the customer enrollment resides with the ESCO, even if the ESCO has engaged another entity to perform the marketing and sales solicitation on its behalf. The corresponding responsibility to retain those TPV

records also resides with the ESCO. See also discussion in Section VIII. of this Petition pertaining to the third-party verification requirement.

H. Section 5, Att.2. A, B, C, D, E, Electronic Agreement and Authorization Requirements

A. To enter into an electronic agreement with a customer to initiate service and begin enrollment or to obtain customer authorization for release of information, an ESCO, ~~or~~ its agent**, an Energy Broker, or an Energy Consultant** shall electronically record communications with the potential customer. As required in Section 5, the Electronic Agreement and authorization may also require an independent third-party verification call, which must include the information in Attachment 1. An ESCO**, Energy Broker, or Energy Consultant** shall provide the following electronic information, as applicable, to substantiate the customer's agreement and/or authorization:

B. The ESCO**, Energy Broker, or Energy Consultant** shall, within three business days of any final agreement to initiate service to a customer, send an electronic confirmation notice to the customer at the customer's e-mail address.

C. The ESCO**, Energy Broker, or Energy Consultant** shall use an encryption standard that ensures the privacy of electronically transferred customer information, including information relating to enrollment, renewal, re-negotiation, and cancellation.

D. Upon request of a customer, the ESCO**, Energy Broker, or Energy Consultant** shall make available additional copies of the sales agreement throughout its duration. An ESCO**, Energy Broker, or Energy Consultant** shall provide a toll-free telephone number and e-mail address for a customer to request a copy of the sales agreement.

E. ~~An~~ ESCO**s, Energy Brokers, and Energy Consultants** shall retain documentation of a customer's agreement in a retrievable format for two years from the effective date of the customer's acceptance and/or authorization or for the length of the sales agreement whichever is longer. In the event of any dispute involving an electronic agreement or authorization, the ESCO**, Energy Broker, or Energy Consultant** shall provide a copy of the customer's acceptance of the sales agreement and/or authorization for release of information or provide on-line access to the acceptance and/or authorization within five calendar days after a request from the Department.

Recommendation: The change should be withdrawn because it is the ESCO's responsibility to record the electronic agreement for the customer enrollment, and it is also the ESCO's responsibility to provide the customer contract documentation and send the confirmation notice, even if the ESCO has engaged another entity to perform the marketing and sales solicitation on its behalf.

I. Section 5, Att.3, Written Agreement and Authorization Requirements

A. An ESCO**, Energy Broker, or Energy Consultant** may enter into a written agreement (original or fax copy of a signed document) with a customer to initiate service and begin enrollment or to obtain customer authorization for release of information. As required in Section 5, the Electronic Agreement and authorization may also require an independent third-party verification call, which must include the information in Attachment 1. A sales agreement shall contain, in addition to the Customer Disclosure Statement discussed in UBP Section 2.B.1.b.2, the following information, as applicable:

B. ESCOs**, Energy Brokers, or Energy Consultants** shall retain written agreements and/or authorizations for two years from the effective date of the agreement and/or authorization or for the length of the agreement whichever is longer. In the event of any dispute involving a sales agreement or authorization, the ESCO, Energy Broker, or Energy Consultant shall provide a copy of the sales agreement and/or authorization within five business days after a request from the Department.

Recommendation: The change should be withdrawn because the sales agreement runs between the customer and the ESCO, even if the ESCO has engaged another entity to perform the marketing and sales solicitation on its behalf. The ESCO has the responsibility to provide the written agreement, obtain the TPV and retain records of the transaction. See also discussion in Section VIII. of this Petition pertaining to the third-party verification requirement.

IV. Individual Contractors and Individual Agents of Brokers and Consultants Should be Exempt from Registration

The Order should be clarified to recognize an exemption from the registration requirement for individual contractors and individual agents of brokers and consultants. In its proposal, Staff "d[id] not recommend that the individual employees of a registered energy broker or consultant must also register. In such a case, the employer's registration would cover its individual employees, contractors and agents." Staff Proposal at p. 12. Family Energy supported this recommendation in its comments. Family Energy comments at p. 3. The Order addressed this issue by stating that "[w]hile the Commission agrees with Staff's proposal that individual employees of a registered broker or consultant need not register because these entities will be covered under their employer's registration, the Commission does not adopt Staff's proposal that contractors, vendors, and agents of an ESCO do not need to register." Order at p. 22-23. Family Energy requests rehearing, reconsideration and/or clarification that the Order's approach to exempt individual employees of a registered broker and consultant from registration also applies to individuals that work as contractors and agents for a broker or consultant. In adopting Staff's proposal to exempt individual employees from registration it appears that the Order agreed with Staff's reasoning. Extending this approach to individual contractors and agents makes sense as the conduct of these individuals would be covered under the registration of the broker or consultant entity. Additionally, requiring individual contractors and agents to register could potentially extend the requirement to so many individuals as to become difficult or impossible to administer and oversee.

V. The Requirements for Broker and Consultant Compensation Disclosure Should Be Clarified

The approach in the Order to ESCO disclosure of broker and consultant compensation is that "all compensation paid to brokers and consultants, including commissions, bonuses, and non-financial compensation, be disclosed" with the allowance that "if the specific details of any such compensation are unknown at the time of contracting, a general statement including the types of compensation the broker or consultant may receive is sufficient." Order at p. 42. The Order also declined to adopt one standard method for disclosing compensation. Order at p. 28. Family Energy agrees with the approach taken in the Order that recognizes that a general statement of compensation is appropriate when specific details are unknown. Indeed, the method of compensating a broker or consultant can involve many variables. The intended purpose of this disclosure is to provide customer awareness, transparency and protection. Family Energy submits that a general statement of compensation to the effect that "ABC ESCO is working with an energy broker/energy consultant (as applicable) to make this sales solicitation, and the energy broker/energy consultant will receive financial benefits associated with the sale of products and services to customers" achieves this purpose. The general statement educates the consumer that the energy broker/energy consultant is not an objective, disinterested participant and is motivated to complete the sale transaction. With that known, the consumer can better evaluate the merits of the sales pitch. However, disclosures of specific payments of bonuses or prizes or dinners, if known in value at the time of the sale, do little to enhance the educational value of the

disclosure. Likewise, disclosures of specific fees paid by the ESCO per enrollment do not promote transparency as the payment of the fees is not a separable component of the specific price quoted to the customer on the date of the transaction and is not expressed as a fee per unit of energy. In this regard, these fees are a cost of doing business that get rolled into rates along with costs to an ESCO of rent, insurance, taxes, office supplies and other items. When a fee per unit of energy is a component of broker or consultant compensation, that may be paid in a range, depending on a number of variables. Thus, even if the range is known, a specific value on the date of the transaction may very well not be.

In view of these factors, Family Energy requests rehearing, reconsideration and/or clarification of the compensation disclosure requirements discussed in the Order and UBP provisions as follows:

A. Disclosure of Assistance in Obtaining a Letter of Credit

The Order found that ESCOs could assist brokers or consultants in obtaining Letters of Credit to satisfy the registration requirement, but that such assistance constituted compensation that must be disclosed. Order at p. 30-31. Family Energy questions whether the disclosure to customers of either the form or amount of assistance paid to an energy broker or consultant in obtaining a Letter of Credit truly aids in promoting transparency to the customer. Disclosures at this level of detail are unlikely to be meaningful to customers. Payments such as this should fall within the rubric of a general statement to the effect that "ABC ESCO is working with an energy

broker/energy consultant (as applicable) to make this sales solicitation, and the energy broker/energy consultant will receive financial benefits associated with the sale of products and services to customers." Moreover, it is unclear how such a payment could be expressed as a fee per energy unit.

B. Compensation Received as a Fee Per Enrollment

The compensation received by a broker or consultant as a fee per enrollment should fall within the rubric of a general statement to the effect that "ABC ESCO is working with an energy broker/energy consultant (as applicable) to make this sales solicitation, and the energy broker/energy consultant will receive financial benefits associated with the sale of products and services to customers." This is appropriate for many reasons. First, the total commission to be paid is unknown at the time of contracting, as it is impacted by a number of variables including the number of customers to be ultimately enrolled with the utility. Additionally, the fee per enrollment is not expressed as a rate per energy unit that is separately identifiable in the price, and therefore the specific disclosure does not contribute to price transparency. Moreover, the adopted UBP language at Section 5.B.4.k. refers to ESCO disclosure "if such compensation is collected through the ESCO customer agreement." A fee per enrollment is not collected through the ESCO customer agreement. It is paid by the ESCO directly to the entity that is aiding in the sale.

C. Compensation Disclosure for Different Commodity Products

ESCOs pay compensation to brokers and consultants at different rates for electricity and natural gas products. As such, the compensation rates set forth on the Customer Disclosure Statement should be specific to the electricity or natural gas product that the Statement pertains to and not a "bundled rate." Rehearing, reconsideration and/or clarification is requested the compensation disclosure is intended to be specific to each electric and gas product.

VI. The Requirement to Disclose Compensation on the Customer Disclosure Statement, Rather than on the Sales Agreement, Should Be Clarified

The Order addressed the requirement of PSL § 66-t for ESCOs to disclose broker and consultant compensation. The Order directed as follows,

> "To satisfy this requirement, ESCOs and DER suppliers are required to update the Customer Disclosure Statement in all future agreements with customers to include a field titled "Third Party Compensation Disclosure" which includes the required disclosure discussed above or indicates that such field is inapplicable to the present agreement. ESCOs and DER suppliers are further required to update the sample contracts provided to Staff but will be required to do so at the time of their next annual filing. This should prevent an influx of contract approvals received contemporaneously with the energy broker and consultant registration filings that may overwhelm Staff resources. However, ESCOs and DER suppliers must immediately update the contract furnished to customers as of the effective date of these new registration requirements."
>
> Order at 42-43.

While the Order states that the disclosure should be made on the Customer Disclosure Statement, the inclusion of the compensation disclosure language in Section 5.B.4.k. of the UBP, rather than Section 5.B.4.b., could be read to contradict this and

require the disclosure on the sales agreement. Family Energy recommends that the UBP should be revised at Section 5.B.4.b. regarding the compensation disclosure requirement on the Customer Disclosure Statement, and not Section 5.B.4.k. pertaining to the sales agreement. Family Energy made this observation in its initial comments in view of the requirement set forth in PSL § 66-t that the disclosure be made on the customer disclosure label. Family Energy comments at p. 7. The inconsistency is further highlighted by the addition of a field for "Compensation Disclosure" on the sample Customer Disclosure Statement at UBP Section 5, Attachment 4. ESCOs must know definitively where the disclosure must appear. Rehearing, reconsideration and/or clarification should be made, consistent with the plain language of PSL § 66-t, that compensation disclosure should be set forth on the Customer Disclosure Statement.

VII. Safe Harbor Should be Provided for ESCOs Prior to Staff's Review of Annual Filings

In addition, the Order does not require Staff review and approval of the compensation disclosure prior to its use by ESCOs on August 31, 2023 (although ESCOs may choose to voluntarily provide a sample to Staff for its review), deciding instead that the verbiage will be reviewed in ESCO annual filings. However, in the absence of Staff feedback, and given significant questions regarding appropriate compensation disclosure, it will create significant regulatory risk and uncertainty for ESCOs that their contracts may later be deemed non-compliant. Accordingly, ESCOs that make good faith efforts to comply with the Order requirements on compensation disclosure should be

provided with a safe harbor against enforcement issues and customer complaints during the period until Staff reviews the annual ESCO filings next year.

VIII. Third Party Verification Question Regarding Broker and Consultant Compensation is Problematic

The Order found "the addition of a question requiring customer acknowledgement of broker or consultant compensation to be an appropriate addition to the voice-recorded verification required for telephonic and door-to-door sales agreements." Order at p. 30. This was reflected in a revision to the UBP at Section 5, Attachment 1, to add the question at A.17., "If the sale was facilitated by an Energy Broker or Energy Consultant: Did the Energy Broker or Energy Consultant disclose their compensation?"

Based on the discussion of this issue in the section of the Order focused on brokers and consultants and the insertion of the terms "Energy Broker, or Energy Consultant" throughout UBP Section 5, Attachments 1 through 3, it could be construed to require both an ESCO and a broker or consultant to perform a TPV. Such a result is unnecessarily duplicative and does not provide any additional protections to consumers. Consistent with Family Energy's initial comments in this proceeding (Family Energy comments at p. 11-16), the references to "Energy Broker, or Energy Consultant" in the Section 5 Attachments should be struck as it is the ESCO's responsibility to obtain the TPV and maintain the TPV records.

The TPV question itself is also problematic. The Order did not require the verbal disclosure of the compensation. The disclosure is required to be made in written documents by the broker or consultant (if applicable) and the ESCO in the Customer Disclosure Statement. If the ESCO makes the disclosure in the Customer Disclosure Statement, that should be sufficient without requiring a duplicative TPV question.

Moreover, depending on the method of sales solicitation, the customer will not have the Customer Disclosure Statement in hand at the time the TPV is conducted. From a practical perspective, the customer will only have the CDS in-hand during a door-to-door sale interaction. In the case of telemarketing, UBP Section 5, Attachment 1, paragraph B, requires that the Customer Disclosure Statement and sales agreement be provided within three business days *after* the telephone agreement and TPV occur. As such, a consumer that is enrolled telephonically will not yet have the Customer Disclosure Statement at the time the TPV is performed and so will not be able to affirm whether the Customer Disclosure Statement included the field on compensation disclosure at that time.

There is a related issue regarding fee splitting arrangements. The Order found that ESCOs will not be required to disclose fee splitting arrangements of third parties, inasmuch as the terms of those arrangements will be unknown to the ESCO. Order at p. 31. Family Energy agrees with that approach. The problem is, if the ESCO is required to ask "Did the Energy Broker or Energy Consultant disclose their compensation?," the ESCO will not know if the fee splitting arrangement was disclosed. The Commission

must rehear, reconsider, and/or clarify, if such a TPV question is required, that it be limited to compensation about which the ESCO is aware.

IX. Facilitation of ESCO Verification of Broker and Consultant Registration

Under new UBP Section 10.C.4.h., an ESCO is prohibited from contracting with or otherwise doing business with unregistered energy brokers and energy consultants. The Order addressed this requirement in view of the fact that registrations are not due until August 31, 2023, and Staff review of the registrations is not due until December 1, 2023. In the transitional period between August 31 and December 1, 2023, the Order allows ESCOs to do business with brokers and consultants that have submitted a registration package by August 31, 2023. After December 1, 2023, an ESCO will need to be engaged in an on-going review of whether the brokers and consultants it engages with are appropriately registered with the Commission. This will be complicated by the fact that brokers and consultants must renew their registrations annually on August 31st going forward.

While the intention of the Order is to aid in the transition to the verification requirement for ESCOs, certain implementation details remain unanswered. The registration process as detailed in the Order and relevant UBP provisions raises the following questions for which rehearing, reconsideration and/or clarification is sought:

- When a broker or consultant registration lapses or is revoked, what is the effective date for ESCO purposes of the requirement to cease doing business with that entity?

- During the period between when a broker or consultant submits its annual renewal and when Staff determines the entity's registration should be renewed or denied, can an ESCO continue to do business with the broker or consultant?

- For a new broker or consultant that seeks to become registered after these requirements take effect, will an ESCO be allowed to do business with that entity pending Commission review of the registration?

Family Energy is also concerned that the only manner that a broker or consultant's registration status will be communicated to ESCOs is via review of registration packages submitted in Matter 23-01227 and a list of registered brokers and consultants that will eventually be posted on the Department website. The Order does not contemplate that Staff or the Commission will take any proactive measures to notify ESCOs about the change in registration status of a broker or consultant. It is possible, therefore, that a broker or consultant's registration status could lapse or be revoked despite an ESCO's good faith efforts to monitor it. In this regard, it is recommended that the notification process that the Pennsylvania Public Utility Commission (PAPUC) utilizes works well. The PAPUC will send a blanket email to all competitive licensees when a broker or supplier fails to submit a required report effecting its licensure, such as a renewal

application. The PAPUC provides the non-compliant entity with thirty days to cure the problem. If this Commission adopted a similar approach it would aid in ESCO efforts to ensure they only did business with appropriately registered entities.

X. Clarification of Broker and Consultant Registration Status and the Impact on Contract Validity and Payment of Compensation

The Order addressed the Commission's approach to broker and consultant registration status and the impact on contract validity and the ability to compensate such entities for their services, which hinged on the effective date of the registration requirements. Family Energy requests rehearing, reconsideration and/or clarification with respect to the following scenarios.

The Order states that "following the effective date of these new registration requirements, agreements entered into between the customer and the ESCO or DER supplier that are facilitated by an energy broker or consultant that is unregistered at the time of enrollment shall be invalid." Order at p. 44. Family Energy requests rehearing, reconsideration and/or clarification that the term "time of enrollment" as used in that sentence refers to the date the contract was signed by the customer and not the flow date (the date of enrollment of the account by the ESCO with the utility), which are not necessarily synonymous. The date of the contract signing should be the operative fact for whether a registration is in effect should be the contract sign date, not subsequent changes in status after the contract is signed. Such an approach will also promote

certainty in the marketplace, and avoids confusions and unintended consequences with implementation.

For contracts entered into *prior to the effective date* of the registration requirements, the Order clarified that the underlying ESCO-customer contract would not be impacted by the change in registration status of a broker or consultant or the failure to ultimately register. The Order went on to state that in that situation "the ESCO or DER supplier will no longer be able to utilize the services of the energy broker or consultant and would no longer be able to compensate them for their services, but the underlying contract between the customer and the ESCO or DER supplier would continue pursuant to the terms of that agreement." Order at p. 44. It is unclear if the Order intended to apply the prohibition on compensation for services to a pre-existing contract, or if the statement was directed to the broader idea that unregistered brokers cannot receive compensation, while still grandfathering broker and consultant compensation for pre-existing contracts. The latter approach, by which compensation is grandfathered when the contract is grandfathered, is appropriate. To do otherwise, would be an unfair retroactive application of the law and regulations to conduct that was permissible at the time of contracting.

Third, the Order states that "ESCOs and DER suppliers shall not provide payments to unregistered energy brokers or consultants, even if the broker or consultant was registered at the time the contract was signed." Order at p. 43-44. Family Energy requests rehearing, reconsideration and/or clarification that ESCOs may continue to

provide compensation to a broker or consultant for specific contracts where, at the time the contract was signed, the broker or consultant was registered, but the registration has since lapsed or been revoked. Specifically, SFE argues the operative fact is whether, at the time of contracting, the broker or consultant was registered, not whether the registration has since lapsed or been revoked. The Order states that "where an energy broker or consultant has had its registration denied or revoked or has allowed its registration to lapse, accepting any compensation for brokering or consulting services would be in violation of PSL §66-t(2)(c)." Order at p. 43. However, PSL §66-t(2)(c) specifically states that no broker or consultant may accept compensation "for selling, soliciting or negotiating an energy contract . . . if that person is required to be registered under this section and is not so registered." Where a broker or consultant is registered at the time of the contract, PSL §66-t(2)(c) is satisfied as to that contract and the prohibition on compensation should not apply for the life of the contract, regardless if, for example, the broker or consultant chooses to no longer operate in New York. To hold otherwise would result in impermissible interference with valid contract rights between ESCOs and would be a retroactive application of the law to pre-existing contractual relationships. Nothing in the law, with a forward effective date, suggests an intent to void contract rights that were valid at the time of enactment.

Fourth, lapsed or revoked broker registration should not affect the ability of an ESCO in privity with their customer to renew, either through appropriate auto-renewal or affirmative consent, and continue to serve such customers, so long as no part of the

renewal involved the broker/consultant that has since terminated its registration. The Order lacks clarity on this important point for which Family seeks rehearing and/or clarification.

XI. The Order Unconstitutionally Violates the Contract Clause, and the Takings Clause of the United States and New York Constitutions

Under the Contracts Clause of the United States Constitution, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[3] To the extent that the Order requires or results in termination of contracts before their expiration, it violates the Contracts Clause. Absent reversal, revision (or clarification) on rehearing (and a stay pending such action), Family Energy's contracts with brokers and consultants may be unconstitutionally voided.

As discussed above, the Commission appears to have determined that ESCO's will not be permitted to pay brokers and consultants fees agreed to on validly entered contracts after a broker or consultant is no longer registered with the Commission. Order at p. 43. Where the broker or consultant was registered with the commission at the time of the contract, awarding of compensation pursuant to the Order and PSL §66-t is fully permitted and the contractual obligations created thereto would be binding. Yet, the Order would prohibit an ESCO and a broker or consultant from the benefits and obligations of any such contract after the termination of registration, regardless of

[3] U.S Const. art. I, § 10.; Allied Structural Steel Co. v. Spannus, 438 U.S. 234 (1978).

whether the contract has terminated. The potential impairment of Family Energy's contracts due to the Commission's Order would be a violation of the Contract Clause and requires rehearing, reconsideration, and/or clarification.

For essentially the same reason as the Contract Clause, above, the Order also violates Family Energy's (and other ESCO's) protected property interest in its contractual relationships with its brokers and consultants. Unless the order is reversed, revised (or clarified) on rehearing (and a stay prevents interim taking pending such action), the order will interfere with Family Energy's investment backed expectations in those contracts. The Takings Clause of the Fifth and Fourteenth Amendment to the United States Constitution prohibits the State from taking private property without just compensation.[4] Likewise, Article I, Section 7 of the New York State Constitution prohibits taking of private property for public use without just compensation.[5] Contract rights are protected property interests under the Fifth Amendment.[6] Family Energy has made significant investments in support of its long term contracts with its brokers and consultants. To the extent that the Order requires these relationships to be essentially terminated prior to their expiration, there is a regulatory taking.

[4] U.S. Const. amend. V; amend XIV. (The Takings Clause applies to the States through the Fourteenth Amendment). *See* Kelo v. City of New London, 545 U.S. 469, 472 n.1 (2005); Chicago, B. & Q.R. Co. v. Chicago,166 U.S. 226 (1897).
[5] New York State Const. art. 1, Sec. 7.
[6] Lynch v. United States, 292 U.S. 571, 579 (1934).

XII. The Order Violates the CLCPA

The Order is an action under the Climate Leadership and Community Protection Act ("CLCPA") § 7(2) and § 7(3) and therefore, the Commission was required to apply the requirements of the same prior to adopting the Order. Section 7(2) & 7(3) specifically states:

> [§7(2)] In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities, and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits, each agency, office, authority, or division shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.
>
> [§7(3)] In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, pursuant to article 75 of the environmental conservation law, all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law.

Commission has previously determined that the CLCPA, with limited exceptions,[7] is broadly applicable and that the Commission must comply with the mandates of § 7(2) & 7(3) when undertaking administrative approvals. For example,

[7] Case 21-M-0238, *Fortistar North Tonawanda Inc. and Digihost International Inc.*, Declaratory Ruling on Upstream Transfer Transaction (issued September 15, 2022).

the Commission in its 2021 Order Approving Joint Proposal, As Modified, and Imposing Additional Requirements,[8] applied § 7(2) & 7(3) to its approval of rate plans for certain gas utilities [9] ("Brooklyn Order"). The Brooklyn Order was promulgated pursuant to SAPA and by its terms did not involve discreet approval of any project or undertaking, but the Commission determined § 7(2) &7(3) applied because it was a threshold determination for further approvals by the Commission.[10]

The Order must be reheard, reconsidered and/or clarified to include the required CLCPA § 7(2) and 7(3) analysis. Like the Brooklyn Order, the Order was promulgated pursuant to SAPA and amounts to an administrative approval of Staff's and other parties' requests respecting the registration of brokers and consultants under statute and regulation. Furthermore, it is immaterial that the Order does not provide approval, permit, or other action to a specific project, as the Commission has recognized the broad applicability of the CLCPA goals and mandates to similar Commission actions. This is so even though the brokers and consultants would be acting within a sphere of Commission policy making that has been or will otherwise be subject to

[8] *Proceeding on Motion of the Commn. As to the Rates, Charges, Rules and Regulations of the Brooklyn Union Gas Co. d/b/a Natl. Grid Ny for Gas Serv.. Proceeding on Motion of the Commn. As to the Rates, Charges, Rules and Regulations of Keyspan Gas E. Corp. d/b/a Natl. Grid for Gas Serv.. Petition for Approval Pursuant to Pub. Serv. Law Section 113(2), of A Proposed Allocation of Certain Tax Refunds Between Keyspan Gas E. Corp. d/b/a*, 2021 WL 3634080, at *1 [Aug. 12, 2021] [hereinafter, the "Brooklyn Order"].
[9] Brooklyn Union Gas Company d/b/a National Grid NY; Keyspan East Corp. d/b/a National Grid.
[10] Brooklyn Order at § VIII.A. ([a]lthough a Commission rate order approves only an overall capital expenditure plan and not the specific projects that were reviewed to provide evidentiary support for the utility's rate recovery, absent Commission approval of that rate recovery, such projects would likely not be pursued by the utility).

CLCPA review. The law requires such review or a rationale why it should not be applied.

XIII. The Order Violates the State Environmental Quality Review Act

The Commission is obligated to comply with the provisions of Article 8 of the Environmental Conservation Law and the regulations at 6 NYCRR Part 617 (collectively "SEQRA") relative to the Order. Specifically, SEQRA provides: "No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQRA."[11] An "Action" includes "adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment."[12] If the action is one which may have a significant adverse environmental impact, an environmental impact statement must be prepared.[13]

The purpose of SEQRA is plain: to require agencies to incorporate environmental considerations directly into their decision making, and where necessary, to modify that action to mitigate adverse environmental effects.[14] SEQRA reflects the clear legislative determination to inject environmental considerations directly into governmental decision

[11] 6 NYCRR § 617.3(a).
[12] 6 NYCRR § 617.2(b)(3); *see also* 16 NYCRR § 7.1 (the PSC adopts the definitions in 6 NYCRR § 617.2)
[13] Long Island Pine Barrens Soc'y, Inc. v. Planning Board of Town of Brookhaven, 591 N.Y.S.2d 982, 80 N.Y.2d 500 (1992).
[14] Coca-Cola Bottling Co. of N.Y. v. Bd. of Estimate of City of N.Y., 72 N.Y.2d 674, 679(1988). *See also* Billerbeck v. Brady, 224 A.D.2d 937, (4th Dep't 1996).

making.[15] SEQRA is designed to "force[ ] agencies to 'strike a balance between social and economic goals and concerns about the environment.'"[16]

Here the Order may affect the environment. It may have a chilling effect on the marketing and distribution of renewable energy supply throughout New York State due to the burden it places on suppliers of such resources and those who facilitate their sale and use. Such impact would likely have concomitant negative impacts on air and water quality, wildlife, and more. Accordingly, the Order should be reheard, reconsidered, and/or clarified following the outcome of a fulsome SEQRA review.

XIV. The Order is Arbitrary and Capricious

Under well-settled law, the actions of an administrative agency may be annulled if they are arbitrary, capricious, contrary to law, or taken without regard to the facts. Based on the numerous errors of law and fact discussed above, the Order should be reversed on rehearing and reconsideration.

XV. Conclusion

For the foregoing reasons, Family Energy respectfully requests that the Commission issue an Order rehearing, reconsidering and/or clarifying the issues consistent with the arguments set forth herein. Family Energy also requests that the

[15] N.Y.C. Coal. to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 348 (2003); Coal. of Future of Stonybrook Vill. v. Reilly, 299 A.D.2d 481, 483 (2d Dep't 2003).
[16] Spitzer v. Farrell, 100 N.Y.2d 186, 190 (2003) (citation omitted) (quoting Jackson, 67 N.Y.2d at 414).

Commission stay the Order pending its consideration of Family Energy's Petition and the Commission's issuance of final rules to implement PSL § 66-t.

Respectfully submitted, Dated: July 24, 2023

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