

April 29, 2024

RE: Update on the NY Broker Registration Rule Summary

Dear TEPA Members & Retail Energy Professionals,

As part of our ongoing commitment to keep you informed and engaged in the regulatory landscape affecting our industry, I want to provide you with an update on recent developments concerning the New York Public Service Commission's (PSC) Declaratory Ruling and Order on Rehearing, issued on April 18th.

The PSC has clarified significant points regarding the registration of energy brokers and consultants as stipulated under Public Service Law §66-t. Notably, the Order allows for continued payment to unregistered brokers or consultants for contracts entered prior to the registration deadline. Furthermore, the PSC has removed the requirement for third-party verification to inquire about compensation disclosure by Energy Brokers or Consultants.

Despite these adjustments, the Order leaves much unchanged, and it is clear that further action is necessary. We have a narrow window in the current legislative session to advocate for change and plan to move quickly.

Your active participation will be necessary to advocate for changes that equally protect consumers and ensure brokers and consultants are able to do business in New York based on reasonable policies and regulatory requirements that foster a competitive market.

Thank you,



Executive Director

The Energy Professionals Association

## SUMMARY OF NEW YORK BROKER REGISTRATION RULE

**DISCLAIMER:** This summary is only intended to provide general information on key provisions of the new broker rules and is not intended to be legal advice. Individual circumstances can vary widely, and the rules discussed in the summary may change. As a result, TEPA cannot and does not make any warranties, express or implied, about this summary or the laws and rules described herein. TEPA encourages brokers and anyone reading this summary to consult their own legal counsel and carefully research and consider all applicable laws and regulations when evaluating broker registration requirements and other compliance issues.

### BACKGROUND

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On December 23, 2022, Governor Hochul signed into law Chapter 787 of the Laws of 2022 (L. 2022, ch. 787). Chapter 787 adds a new §66-t to the Public Service Law (PSL) that requires energy brokers and energy consultants to register with the Public Service Commission (Commission).

## TIMELINE OF KEY EVENTS

### 12.02.24

Staff will be required to complete review of initial registration packages and issue letters notifying applicants of approval or denial by December 2, 2024.

### 06.17.24

The new deadline for energy brokers and energy consultants to submit their first annual registration package.

### 04.18.24

The Public Service Commission (“PSC”) issued their Declaratory Ruling and Order on Rehearing (the “Order”) in connection with the Petition for rehearing of the June 23rd Order Adopting Energy Broker and Energy Consultant Registration Requirements, which effectuated provisions of the Public Service Law §66-t.

# TIMELINE OF KEY EVENTS (cont.)

## **11.06.23**

Deadline for further responses to the petitions for rehearing.

## **08.30.23**

The Public Service Commission (Commission) issued a notice concerning petitions for a rehearing and stated comments for rehearing were due by November 6th, 2023.

## **08.08.23**

The Public Service Commission (Commission) directed Department of Public Service Staff (Staff) to convene a technical conference to discuss the regulatory requirements provided for by Public Service Law (PSL) Section 66-t and the amendments to the Uniform Business Practices (UBP) for Energy Service Companies (ESCOs) and Distributed Energy Resource entities (DERs). The Commission explained that the purpose of the technical conference is to “provide a forum for stakeholders to raise any questions regarding the nature and extent of the requirements.” Staff held this technical conference on August 8, 2023, from 10:30 a.m. to 12:30 p.m EST. It was conducted as a hybrid meeting with in person attendance as well as remote participation via webex. At one point, there were over 400 participants on the webex.

## **06.23.23**

The Commission issues the order adopting energy brokers and energy consultants to register. The order is effective on this date. Chapter 787 of the Laws of 2022 enacted a new Public Service Law (PSL) §66-t that requires energy brokers and energy consultants to register with the Public Service Commission (Commission), with the goal of increasing transparency and accountability.

## **03.14.23**

- The New York State Department of Public Service (NYSDPS) Staff issued proposed rules regarding registration of energy brokers and consultants implementing Senate Bill S9414.
- Case 23-M-0106 - In the Matter of Commission Registration of Energy Brokers and Energy Consultants.
- 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.

## **12.23.22**

Governor Hochul signed into law Chapter 787 of the Laws of 2022 (L. 2022, ch. 787). Chapter 787 adds a new §66-t to the Public Service Law (PSL) that requires energy brokers and energy consultants to register with the Public Service Commission (Commission).

# TECHNICAL CONFERENCE OVERVIEW

Staff had requested that questions were submitted in advance in order to provide an efficient use of all stakeholders' time. The technical conference opened with Staff addressing a few of the presumably submitted questions while having the below general topics outlined on screen for review. Shortly after the meeting started, Staff opened it up to live questions from the attendees with the intent to provide clarification.

Due to the high volume of participants, the majority of the meeting was consumed with these comments/questions and not all of the below topics were covered. This summary document will continue to be updated as we continue to get additional information.

## SUMMARY OF TOPICS

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# BROKER & CONSULTANT

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The following are updated definitions for "Broker", "Consultant" and "ESCO Marketing Representative" per SB9414:

**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.

## 04.29.24 UPDATE

**ENERGY BROKER** is a non-utility entity that performs energy management or procurement functions on behalf of customers or ESCOs, and (1) 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, and does not make retail energy sales to customers, or (2) 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, and but does not make retail energy sales to customers.

**ENERGY CONSULTANT** is 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.

**ESCO MARKETING REPRESENTATIVE** is an entity that is either the ESCO, or a contractor/vendor, an Energy Broker, or Energy Consultant conducting, on behalf of the ESCO, any marketing activity that is designed to enroll customers with the ESCO.

# COMPENSATION DISCLOSURE

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Staff acknowledged that there will be some flexibility here since a specific dollar amount is not always known prior to contract execution but reiterated that brokers and consultants should be as descriptive as possible so customers can understand the dollar amount.

## ACCEPTABLE METHODS OF COMPENSATION DISCLOSURE:

- Fee Per Unit of energy
- Recurring Fee
- Flat Fee

## 04.29.24 UPDATE

**DECLARATORY RULING AND ORDER ON REHEARING:** The Commission provided reinforcement as well as additional guidance around the requirement that ESCOs must disclose the “amount and method” of compensation collected on behalf of the broker or consultant. The Commission states that if a broker or consultant receives financial compensation, the disclosure shall include either the dollar amount or, if the dollar amount is not known at the time of disclosure, the disclosure shall include an explanation of the formula that will be used to calculate the financial compensation.

For any non-financial compensation, if the details of such compensation are unknown at the time of contracting it is sufficient to include a statement that the broker or consultant may receive additional compensation, bonuses, or incentives in addition to the fee listed.

The compensation disclosure must be included on the Customer Disclosure Statement.

The Commission has removed the requirement for third-party verification to inquire about compensation disclosure by Energy Brokers or Consultants by removing the question “Did the Energy Broker or Energy Consultant disclose their compensation?”

# REGISTRATION PROCESS

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Brokers and Consultants must file a registration by August 31.

Staff confirmed that brokers and consultants meeting the August 31 filing deadline may continue to operate in good standing until Staff rules on their registration application. Staff will have until December 1 to review all applications.

A list of registered brokers and consultants will be available for viewing on the PSC website, but until that is available, ESCO's can review brokers and consultants that have applied for registration in the PSC DMM System.

## **04.29.24 UPDATE**

The new deadline for energy brokers and energy consultants to submit their first annual registration package is set for June 17th, 2024 which is 60 days after the effective date of the rehearing order issues on April 18th, 2024.

Staff will be required to complete review of initial registration packages and issue letters notifying applicants of approval or denial by December 2, 2024.

After the initial registration process, the annual compliance year will run from September 1 to August 31, with annual renewals due on August 31st of each year.

Those energy brokers and consultants that register by June 17th, 2024 or prior to August 31, 2024 will have their 2024 registration package, including the annual registration fee be valid until August 31, 2025.

# THIRD-PARTY REGISTRATIONS

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Staff stated that only employees of broker or consultants are exempt from having to individually register while acting on behalf of an employed entity engaging in activities that fall within the definition of brokers and consultants.

## **TEPA COMMENTS:**

It is possible this topic will be further discussed in a follow up session, but in the interest of providing additional clarity, the language below is copied from the order. It is our recommendation that you seek legal advice if you have agents or 1099s who act on your behalf.

The applicability of energy broker and energy consultant registration requirements ultimately depend on whether an entity's actions meet the definition of "energy 10 N.Y. Judiciary Law, Article 15. CASE 23-M-0106, et al. -18- broker" and "energy consultant" provided in PSL §66-t. The Commission will not at this time make a blanket judgment on whether certain types of actors in the retail energy market need to register because one type of actor may take on various roles. The test for the applicability of the registration requirement will examine the business model or models followed by the energy broker and energy consultant, whether such models provide greater transparency and accountability for the marketplace, and whether such entities have direct contact with customers.

## **04.29.24 UPDATE**

The Commission determined that employees of registered brokers and consultants are not subject to registration requirements because employers exercise control over the work performed by their employees and consultants. By contrast, the Commission determined that non-employee entities that perform work for the registered broker or consultant must be subject to registration.

Therefore, if you have agents, independent contractors/consultants, or individuals who provide referral services, they ARE still required to register with the Commission individually and are NOT covered by your company registration.



## CONTRACTS ENTERED INTO BEFORE 08.31.23

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Staff confirmed that customer contracts using a broker or consultant services entered into prior to Aug31, 2023 are valid and can continue regardless of whether or not that broker or consultant chooses to register. Staff also clarified that the ESCO can NOT continue to compensate a broker or consultant if they do not register by the Aug 31st deadline. Staff noted the date of contract execution (not start or flow date) was a key factor.

### **TEPA COMMENTS:**

In order for brokers and consultants to continue to be paid on deals they acted as a broker or consultant on prior to Aug 31, 2023, they must be registered by that deadline.

### **04.29.24 UPDATE**

The order allows for continued payment to unregistered brokers or consultants for contracts entered prior to the registration deadline as long as the payments/compensation are tied to an activity undertaken prior to the deadline.

# LETTERS OF CREDIT | FINANCIAL REQUIREMENTS

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Staff reiterated that the commission decided to only accept a Letter of Credit as an acceptable means of demonstrating financial responsibility. The amount required for the broker is \$100,000 and the amount required for a consultant is \$50,000. If an entity acts as both at certain times, they are only required to meet the \$100,000 broker amount and are not required to pay the combined amounts.

## **TEPA COMMENTS:**

Many stakeholders raised concerns about the Commission's decision that the statutorily required demonstration of financial accountability be satisfied through an irrevocable stand by letter of credit and asked that brokers or consultants be allowed to satisfy this requirement through a bond. As we outlined in our comments to (i) energy broker demonstrates financial accountability as evidenced by a bond or other method of financial accountability in an amount not less than one hundred thousand dollars; and (ii) energy consultant demonstrates financial accountability as evidenced by a bond or other method of financial accountability in an amount not less than fifty thousand dollars.

## **04.29.24 UPDATE**

There was no change to the requirement that the Commission will only accept a Letter of Credit as an acceptable means of demonstrating financial responsibility to operate as a broker or consultant. Below are the updated registered requirements in Appendix A: ESCO UPB Redlines Section 11 to use a reference to meet these requirements.

An irrevocable standby letter of credit issued by a reputable financial institution in the amount of \$100,000 for registering Energy Brokers; and \$50,000 for registering Energy Consultants, that meet the following conditions:

- The New York State Department of Public Service shall be named as beneficiary and the letter of credit applicant shall be clearly named;
- Any number of partial drawings shall be permitted from time to time;
- The process for making a drawing, including any required forms and communications or delivery instructions shall be stated; CASES 23-M-0106, et al. Appendix A -7-
- If a drawing is made, payment shall be made to the beneficiary within 5 business days; v. Any expiration date shall be specified and options for renewal, including automatic renewal, shall be stated.
- The applicant's filing for bankruptcy, receivership, or any other debt relief petition shall in no way affect the issuer's liability to the beneficiary under the letter of credit.
- All commissions, fees, and other charges with respect to the letter of credit shall be paid by the applicant;
- Except for increases to the amount, the letter of credit shall not be amended, changed, or modified without express written consent of the beneficiary;
- The beneficiary shall not be deemed to have waived any rights under the letter of credit unless an authorized representative thereof has signed a dated written waiver. No such waiver, unless expressly stated therein, shall be effective as to any subsequent transaction, nor to any continuance of a breach; and
- If the beneficiary should require a replacement of the letter of credit due to loss or destruction of the original, the issuer will provide one upon request.

## SALES AGREEMENTS

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Was not addressed, presumably due to time constraints.

**NO UPDATE AS OF 04.29.24**

## DATA SECURITY AGREEMENTS

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Staff confirmed that energy brokers and consultants that obtain customer information from the distribution utility will be required to comply with the Commission's data security requirements, including entering into a DSA and completing self-attestations, before being granted access to customer data. Staff also said that all PII (Personally Identifiable Information) was subject to comply with the data security requirements when responding to a stakeholder question, however that is not mentioned specifically in the order.

### **TEPA COMMENTS:**

Those brokers and consultants who obtain customer data from the distribution utility are required to comply with Commission data security requirements. If you rely upon a third party to retrieve customer data (EDI Company, ESCO, Service/Technology Provider etc) you are exempt from the data security requirement stated about. It is important to note the potential for other requirements and we will continue to update this information as we receive more information.

**NO UPDATE AS OF 04.29.24**

## ENFORCEMENT

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Was not addressed, presumably due to time constraints.

**NO UPDATE AS OF 04.29.24**

## HELPFUL LINKS

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### ENERGY BROKER AND ENERGY CONSULTANT REGISTRATION INFORMATION

*This page contains information on the Order, the Registration Form, a Letter of Credit template, and the updated UBP and UBP-DERS*

<https://dps.ny.gov/energy-broker-and-energy-consultant-registration>

### DMM MATTER FOR COMMENTS AND UPDATES 23-00117

<https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=23-m-0106&CaseSearch=Search>

### NEW YORK BROKER REGISTRATION FORM

[https://dps.ny.gov/system/files/documents/2023/07/energy-broker-and-energy-consultant-registration-form\\_0.pdf](https://dps.ny.gov/system/files/documents/2023/07/energy-broker-and-energy-consultant-registration-form_0.pdf)

### DMM MATTER FOR FILING REGISTRATIONS 23-01227

<https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=23-01227>

### DMM E-FILER INSTRUCTIONS AND FILING WITHIN DMM (E-FILER)

[https://dps.ny.gov/system/files/documents/2023/01/how\\_to\\_register.pdf](https://dps.ny.gov/system/files/documents/2023/01/how_to_register.pdf)

### MATTER FILING MANUAL

[https://dps.ny.gov/system/files/documents/2022/11/dmm\\_matter\\_filing\\_manual.pdf](https://dps.ny.gov/system/files/documents/2022/11/dmm_matter_filing_manual.pdf)

### TEPA NY BROKER REGISTRATION RULE SUMMARY FORUM (TEPA MEMBERSHIP REQUIRED)

<https://www.tepausa.org/forum/topic/new-york-broker-registration/>

**NO UPDATE AS OF 04.29.24**

## TEPA CONTACT INFORMATION

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### EXECUTIVE DIRECTOR

Shannon McGriff

[shannon@tepausa.org](mailto:shannon@tepausa.org)