BEFORE THE
PUBLIC SERVICE COMMISSION
STATE OF NEW YORK

In the Matter of Retail Access Business Rules	**)**	**Case 98-M-1343**
	)	
Proceeding on Motion of the Commission	**)**	
Regarding Cyber Security Protocols and	**)**	**Case 18-M-0376**
Protections in the Energy Market Place	**)**	

RETAIL ENERGY SUPPLY ASSOCIATION'S RESPONSE TO THE PETITION OF THE JOINT UTILITIES FOR DECLARATORY RULING REGARDING THEIR AUTHORITY TO DISCONTINUE UTILITY ACCESS TO ENERGY SERVICES COMPANIES IN VIOLATION OF THE UNIFORM BUSINESS PRACTICES

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The Retail Energy Supply Association ("RESA")[1] respectfully submits this Response to the "Petition of the Joint Utilities for Declaratory Ruling Regarding Their Authority to Discontinue Utility Access to Energy Services Companies in Violation of the Uniform Business Practices" (the "Petition") that was filed on November 9, 2018, with the New York State Public Service Commission (the "Commission").[2] This Response is filed pursuant to the Commission's November 30, 2018 Notice Extending Comment Deadline.

The Joint Utilities have petitioned the Commission "to issue a declaratory ruling confirming the Joint Utilities' right under the UBP to discontinue an Energy Service Company's ("ESCO") access to Petitioners' various systems, in their relevant retail access program, if that ESCO fails to meet minimum data security standards, including the execution of a Data Security

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] Case No. 18-M-0376, Petition of the Joint Utilities for Declaratory Ruling Regarding Their Authority to Discontinue Utility Access to Energy Services Companies in Violation of the Uniform Business Practices (November 9, 2018).

Agreement ("DSA") in accordance with UBP provisions governing 'Eligibility Requirements' for ESCOs." *See* Petition, pp. 1-2. The Joint Utilities also seek a declaration that they hold authority to initiate the discontinuance process unilaterally and without intervention of the Commission. *See* Petition, p. 8. As detailed below, the Commission should deny the declaratory ruling sought by the Joint Petitioners because not doing so would effectively constitute an amendment to the Uniform Business Practices ("UBP") that has not been subjected to the rulemaking requirements of the State Administrative Procedure Act ("SAPA"). Additionally, the Commission should reject the Joint Petitioners' claim that they may initiate a discontinuance without Commission intervention, as such intervention is clearly required under the UBP and to suggest otherwise would set a dangerous precedent.

BACKGROUND

Following a cyber security incident in the spring of this year, the Joint Utilities sought to require ESCOs doing business on their systems to execute Data Security Agreements (DSAs) and Vendor Risk Assessments (VRAs). Subsequently, on May 31, 2018, the Department of Public Service Staff ("Staff") facilitated a meeting with the Joint Utilities, ESCOs and ESCO representatives, and EDI providers in which the Joint Utilities explained their reasoning for imposing the new requirements and the ESCOs voiced their concerns.

On June 14, 2018, following ESCO industry requests for the formal docketing and initiation of an associated regulatory process with respect to the development of DSAs and VRAs, the Commission opened Docket 18-M-0376 to address cyber security protection in the energy marketplace. The Commission stated that it seeks to "ensure that adequate cyber security protections are in place to protect utility systems and confidential and sensitive customer information, and to explore whether insurance is an efficient and effective vehicle for mitigating

any potential financial risks."[3] The Commission noted that a "business-to-business" process would be used by the Joint Utilities and ESCOs, and directed Staff to file a report on its status.

The Joint Utilities and ESCOs engaged through an in-person meeting, multiple conference calls, and the exchange of comments and drafts of the DSA, and the successor to the VAR – the Self-Attestation document ("SA"). While the process was beneficial, it certainly did not result in universal agreement. However, in an August 16, 2018 email, the Joint Utilities wrote:

> The Joint Utilities consider the DSA, and the previously sent Self-Attestation, to be final. ESEs must submit the completed and signed Self Attestation by August 24, 2018. Modified Self Attestation are not acceptable. As previously stated comments explaining the status of compliance for each question are encouraged so that the Utilities can work with the ESEs to attain adequate security at this time. If you have already submitted an executed non-modified Self Attestation, you do not need to submit the final Self Attestation. If you submitted a modified or unexecuted Self Attestation, you must submit and execute the final Self Attestation. The final DSA must be executed and submitted to the applicable Utilities by August 31, 2018.[4]

On September 24, 2018, Staff filed its "Report on the Status of the Business-to-Business Collaborative to Address Cyber Security in the Retail Access Industry." [5] Staff concluded that the business-to-business process "resulted in a balanced DSA." However, because of the superior bargaining power held by the Joint Utilities, the agreements provide the Joint Utilities with a significant amount of control over their ESCO competitors. In particular, under the current terms, the Joint Utilities hold audit rights over ESCO operations, restrict derivative data

[3] Case 18-M-0376 Proceeding on Motion of the Commission Regarding Cyber Security Protocols and Protections in the Energy Market Place, *Order Instituting Proceeding*, p.3 (June 14, 2018).
[4] *See* Joint Utility Message Regarding Data Security Agreement and Self Attestation posted to the Business-to-Business Process webpage available at: http://www3.dps.ny.gov/W/PSCWeb.nsf/All/4A24D0D51395B1F8852582A2004398A3?OpenDocument.
[5] *See* Case 18-M-0376, Staff Report on the Status of the Business-to-Business Collaborative to Address Cyber Security in the Retail Access Industry, p. 8.

uses in a manner that could undermine DER product development, restrict locations for ESCO processing and information storage, and impose a new $5 million cyber-insurance requirement.[6]

On November 9, 2018, the Joint Utilities filed the Petition, which requested that the Commission:

> [I]ssue a declaratory ruling confirming the Joint Utilities' right under the UBP to discontinue an Energy Service Company's ("ESCO") access to Petitioners' various systems, in their relevant retail access program, if that ESCO fails to meet minimum data security standards, including the execution of a Data Security Agreement ("DSA") in accordance with UBP provisions governing 'Eligibility Requirements' for ESCOs.

See Petition, pp. 1-2. Significantly, the Joint Utilities indicate in their Petition that they believe, and seek confirmation, that the "UBPs permit individual utilities to initiate the discontinuance process pursuant to UBP Section (2)(F)(2) without intervention of the Commission." *See* Petition, p. 8. As explained below, the Commission should reject the Joint Utilities' request as it effectively seeks to amend the UBP without undergoing any formal notice and comment as required by SAPA, and asks the Commission to interpret the UBP in a manner that grants the Joint Utilities with inappropriately broad power over the ESCOs—effectively granting the Joint Utilities the power of judge, jury, and executioner.

ARGUMENT

THE COMMISSION SHOULD REJECT THE PETITION

I. The Joint Utilities' Petition Seeks To Create Rules In Violation Of SAPA

The DSA and SA Seek to Amend the UBP and are Subject to SAPA

The Public Service Law grants the Commission with the authority to promulgate and adopt rules pursuant to notice and rulemaking requirements prescribed by SAPA. The DSA and SA as set out in the Joint Utilities' Petition in essence seek to impose significant requirements

[6] *See* Case 18-M-0376, Petition for Commission Guidance and Related Request for Modification to the Procedural Schedule of the National Energy Marketers Association, dated August 21, 2018, pp. 7-11.

that are not in existing Commission rules. Granting the Joint Utilities' Petition would create new rules that were not promulgated pursuant to SAPA. Accordingly, the Commission should treat the DSA and SA as proposed rules subject to a SAPA rulemaking procedure. Because they have not been treated as such, the Joint Utilities' Petition should be denied.

Under SAPA, an agency that proposes to adopt a "rule" is required to adhere to the strict requirements of SAPA. *See* SAPA, § 202. SAPA defines a "rule" as: "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof." *See* SAPA, § 102. Courts in New York have stated that a rule means a "fixed, general principal to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers."[7]

The Petition is effectively seeking to promulgate a rule subject to SAPA because it seeks to amend the UBP by making acceptance and compliance with the DSA and SA mandatory regardless of whether the failure to sign the DSA and complete the SA actually creates any material risk to any Joint Utilities' system. Further, if the Commission were to grant the Joint Utilities' Petition, it would provide the Joint Utilities with direct authority to discontinue ESCO service if an ESCO fails to execute the DSA and SA. This would expand the authority of the Joint Utilities under Section 2.F of the UBP, which presently requires Commission intervention in the discontinuance of ESCO services (as explained under Point II below). Accordingly, the granting of the Joint Utilities' Petition would approve the terms of the DSA and SA and effectively alter the UBP – changes which amount to a rule subject to rulemaking procedures prescribed under SAPA.

[7] *New York City Tr. Auth. v. New York State Dept. of Labor*, 88 N.Y.2d 225, 229 (1996).

The Commission Has Not Promulgated The Rules Pursuant To SAPA

Only the Commission holds rulemaking authority for the New York energy marketplace and must do so pursuant to the requirements of SAPA. The Commission could consider providing a SAPA notice that the Commission is seeking to promulgate cybersecurity standards or amend the UBP. It cannot, however, create new rules by simply granting the declaratory relief sought by the Joint Utilities in their Petition.

Relevant here, SAPA §202 requires the following:

> 1. Notice of proposed rule making. (a) Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule. Unless a different time is specified by statute, the notice of proposed rule making must appear in the state register at least sixty days prior to either (i) the addition, amendment or repeal of a rule for which statute does not require that a public hearing be held prior to adoption, or (ii) the first public hearing on a proposed rule for which such hearing is so required.
>
> 5. Notice of adoption. (a) When an agency files a rule with the secretary of state, such agency shall also submit a notice of adoption to the secretary of state for publication in the state register. Except as provided in subdivision six of this section, an agency may not file a rule with, or submit a notice of adoption to, the secretary of state unless the agency has previously submitted a notice of proposed rule making and complied with the provisions of this section.

Here, there has been no compliance with the notice and opportunity to comment requirements of SAPA. No proposed rule incorporating the cybersecurity standards set out in the DSA and SA has been propounded and issued for public comment in the New York State Register as required under SAPA § 202(1)(a). The DSA and SA have not been filed by the Joint Utilities in the cybersecurity proceeding, in the UBP or UBP DERS proceedings, as a proposed utilities tariff, or in any other venue. The Commission has not reviewed and adopted the DSA and SA as rule or regulation. No notice of rule adoption has been filed in the New York State

Register as required under SAPA § 202(5). Such notice is required under SAPA to establish any obligation upon any ESCO. The DSA and SA cannot and should not be imposed on ESCOs by providing the Joint Utilities with unilateral discontinuance power without first satisfying the requirements of SAPA.

The business-to-business process the Commission directed, which led to the DSA and SA, cannot serve as a replacement to the requirements of SAPA, and allowing this process to go forward would set a dangerous precedent. Accordingly, because the DSA and SA were not developed and approved by the Commission pursuant to the requirements of SAPA, the DSA and SA are not valid Commission rules and they cannot be enforced by granting the Joint Utilities' request for the power to discontinue ESCOs without Commission involvement.

II. The Utilities Lack Authority To Discontinue ESCO Service Without Commission Intervention

The Joint Utilities appear to claim that they have the authority to discontinue an ESCO's access to a utilities' systems where an ESCO fails or refuses to execute the DSA and that they have authority to do so without Commission intervention. Specifically, the Joint Utilities' Petition states: "The Joint Utilities believe the UBPs permit individual utilities to initiate the discontinuance process pursuant to UBP Section (2)(F)(2) without intervention of the Commission." *See* Petition, p. 8.

To support this claim, the Joint Utilities point to UBP Section 2.F.2 which sets out how the discontinuance process may be initiated. However, UBP Section 2.F.2 does not suggest, much less state, that individual utilities may initiate the process unilaterally and without intervention from the Commission.

The Joint Utilities' Petition completely ignores the balance of Section 2, which makes clear the Commission oversight is to be present when initiating a discontinuance. First and foremost, a discontinuance requires a case-specific finding under Section 2.F.1 that there is cause

to discontinue an ESCO. It goes without saying that the Commission would need to be involved in establishing that sufficient cause exists to discontinue an ESCO. Meanwhile, Sections 2.F.4 and 2.F.5 explicitly indicate that the Commission is to play an active role in any discontinuance. Section 2.F.4 provides that the utility seeking to discontinue service "shall submit a sample copy of its discontinuance notice to the Department for review and approval prior to distribution to customers." Section 2.F.5 provides that a utility "may request permission from the Department to expedite the discontinuance process upon a showing that it is necessary for safe and adequate service or in the public interest." These provisions demonstrate that Commission intervention in the process is a necessary and required check before a utility may discontinue ESCO service. Indeed, the UBP was designed, in part, to specifically afford the ESCOs with fundamental due process rights in advance of any potential discontinuance of service and accordingly the interpretation urged by the Joint Utilities would have the opposite effect by doing away with such rights. The need for Commission intervention is further supported by Staff's Report in Case 18-M-0376 which states that "The UBP details the discontinuance process, including timeframes, and includes participation by Staff."[8]

Aside from the fact that a plain reading of the UBP does not support the Joint Utilities' claims, the very idea that the Joint Utilities could discontinue ESCO service without Commission intervention is troubling as a matter of policy and defies basic principles of the regulatory framework. In essence, the Joint Utilities are requesting a declaration that the Commission abandon its regulatory role and allow the Joint Utilities unchecked power to implement its own policies with respect to when they believe discontinuing service is appropriate and to do so against ESCOs with which the Joint Utilities are often in competition. In other words, the Joint Utilities seek to claim legislative, judicial, and executive functions over a marketplace in which

[8] Case 18-M-0376, Staff Report on the Status of the Business-to-Business Collaborative to Address Cybersecurity in the Retail Access Industry, dated September 24, 2018, at p. 2.

they are also participants. Checks and balances are a fundamental part of agency regulation and granting the Joint Utilities request to be the judge and enforcement arm of a dispute to which it is also a party, with no Commission oversight, defies common sense. For all these reasons, the Commission should make clear that under no circumstances can ESCO service be discontinued without Commission oversight.

CONCLUSION

For the foregoing reasons, RESA respectfully requests that the Commission deny the Joint Utilities' Petition for a Declaratory Ruling.

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