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July 13, 2020

The Honorable Michelle L. Phillips
Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350
secretary@dps.ny.gov

RE: Case 20-M-2066 – Proceeding on Motion of Commission Regarding the Effects of Covid-19 on Utility Service (COVID-19 Docket-CORRECTION)

Dear Secretary Phillips:

The National Energy Marketers Association (NEM)¹ hereby respectfully resubmits its attached filing in Cases 15-M-0127, 12-M-0476 and 98-M-1343 – Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process - NEM Request for Reconsideration and Further Extension in Light of Recent Events. NEM incorporates that filing herein.

The attached filing and these comments in the above reference COVID-19 Docket support a fundamental reconsideration of the NYPSC's Order that requires ESCOs to underprice utilities even though NY utilities have never been properly and transparently unbundled. **NYSERDA's July 1, 2020 Report and Aggressive Energy's Comments herein present persuasive evidence of significant reduction in the historical demand curves upon which competitive capital has been invested in NY.** These investments also have been made in reliance on NYPSC rules, regulations and policy changes since the inception of competitive energy markets in NY and particularly the massive changes that were promulgated merely one month before the COVID-19 Pandemic.

NEM submits that this Black Swan Event requires the fundamental reconsideration of current NYPAC policies affecting competitive energy markets. NEM submits that Aggressive Energy makes a persuasive case that the extra \$1.1 Billion currently being held by NY public utilities should properly be distributed **immediately** to parties that have been negatively affected by the Pandemic. Until the Commission properly reverses the December 2019 Order, it continues to exercise price controls over both Utilities and ESCOs. **However, NEM continues to maintain that the NYPSC never intended to implement price controls over private investment capital deployed into the NY energy market to serve NY consumers of all sizes.**

¹ The National Energy Marketers Association (NEM) is a national, non-profit trade association representing wholesale and retail marketers of natural gas, electricity, as well as energy and financial related products, services, information and advanced technologies throughout the United States, Canada, and the European Union.

This Black Swan Event is beyond any reasonable private investment parameters given the monopoly profits that have been collected by a combination of the utilities failure to unbundle completely and transparently and the continual rate subsidies enacted over the last 100 years. Utilities are still **essential delivery services** but should be limited solely to natural monopoly functions.

In the 1920's, an exception was granted to the utility industry from Antitrust laws. However, NEM submits that both the facts and circumstances as well as public policies that supported this exception have changed materially over the last 100 years. Unfortunately, utilities may also still benefit from the State Action Doctrine which has permitted unanimous jury verdicts and unlawful utility conduct to withstand Supreme Court Challenges.

Utilities potentially are still partially exempt from antitrust laws in exchange for an **Obligation to Serve** the public. **However, NEM submits that under federal and evolving Constitutional law, this exception currently should only apply for essential delivery infrastructure,** not the myriad of competitive services that have never been unbundled from utility rate bases.

Today, 100 years later, these services are provided by extremely competitive ESCOs (including competitive demand response providers) as an **Opportunity to Serve** the public. **CHOICE IS NOT AN OBLIGATION BUT AN OPPORTUNITY** and all members of NEM have demonstrated that they have been and are willing to invest scarce PRIVATE investment capital for the Opportunity to Serve NY consumers. **This competitive economic activity should be rewarded not punished.**

The NYPSC again can and should demonstrate its thought leadership in structuring/restructuring competitive energy markets. NEM urges this Commission to encourage and defend its competitive energy markets consistent with the comments submitted herein.

Respectfully submitted,



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