NRG Retail
3711 Market Street 10th Floor
Philadelphia, PA 19104

July 13, 2020

By Electronic Mail

Hon. Michelle L. Phillips
Acting Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 20-M-0266, *Proceeding on Motion of the Commission Regarding the Effects of COVID-19 on Utility Service*, Order Establishing Proceeding

Dear Secretary Phillips:

Reliant Energy Northeast LLC d/b/a NRG Home and d/b/a NRG Business Solutions, Green Mountain Energy Company, Energy Plus Holdings LLC, Energy Plus Natural Gas LLC, Independence Energy Group LLC d/b/a Cirro Energy, XOOM Energy New York, LLC, and Stream Energy New York, LLC, all subsidiaries of NRG Energy, Inc. ("NRG") that operate in New York as energy service companies (collectively, the "NRG Retail Companies") respectfully submit the following comments in response to the Commission's request for comments in the *Proceeding on Motion of the Commission Regarding the Effects of COVID-19 on Utility Service* (the "COVID-19 Proceeding").[1] The NRG Retail Companies have participated in the New York retail market for the last two decades. The NRG Retail Companies are committed to improving retail access markets in New York for the convenience and protection of customers. The comments of the NRG Retail Companies focus on electric and gas utilities only and no position is offered regarding other regulated utilities.

NRG Retail Companies are concerned that two existing regulatory policies will cause utilities' returns to be divorced from the economic realities of the post-COVID-19 economy—to the ultimate disadvantage of consumers. The first is the Commission-approved revenue decoupling mechanism ("RDM") in effect for all major energy utilities in the state. The RDM has a salutary effect in certain conditions, removing the disincentive to pursue energy efficiency policies. In the current situation, however, it will function to make the utilities whole even in the face of a significant decline in overall commercial economic activity in the State of New York.

[1] Case 20-M-0266, Order Establishing Proceeding, issued and effective June 11, 2020.

This is unjust and insulates utilities from the real-world economic realities of COVID-19 in which nearly all other people and businesses must participate.

Second, utilities appear to be engaged in a non-transparent regime of deferred accounting—making decisions that are, by their nature, predicated on utilities' expectations of future recovery of present-day losses or higher incremental costs from regulators.[2] Investors, customers, and energy service companies ("ESCOs") have been left to guess about what the regulated utilities' books and records actually contain. The Commission has not entered any accounting orders that would justify entries of regulatory assets within Account 182.3 ("Other regulatory assets") under the FERC Uniform System of Accounts.

Moreover, to the degree that these accounting deferrals encompass energy-related costs, they cause utilities' prices-to-compare to depart from the economic realities of the present situation—all on the assumption that utilities will be made whole later. This is inappropriate. Eight months ago, the Commission issued its most recent order in a several-years long proceeding and instituted a major reform of the competitive retail energy markets, which used the price-to-compare as an essential component of what products would be permitted to be marketed and sold to New Yorkers. If the price-to-compare is unmoored from the economic realities of COVID-19 and its associated economy, then the logic of the Order Adopting Changes to the Retail Access Market and Establishing Further Process (the "Reset II Order") no longer holds.[3] The present situation underscores the need for the Commission to initiate the Phase 2 proceeding in the Reset II Order and expand, rather than artificially limit, the types of products available to mass market customers.

In this proceeding, meanwhile, the Commission should issue an accounting order that denies deferred accounting for all but an extremely limited number of costs that were incurred in relation to the utilities' strict compliance with governmental mandates related to COVID-19. Additionally, the Commission should also temporarily revise utilities' RDM tariffs. In both cases, the Commission either should require utilities to absorb these losses in their bottom line—or, if it has concerns about the financial viability of utilities during this time, require those costs to be incorporated into the "price-to-compare" so that consumers at least will have an opportunity to bypass these charges by shopping for ESCO products and services.

---

2 Based on investor analysis, it appears Avangrid companies in New York have recorded deferrals on COVID-19-related losses including increased bad debt and late fees, while Consolidated Edison ("ConEd") has not. As Bank of America/Merrill Lynch ("BAML") reported, "[The Commission] has not yet directly dealt with the issues of bad debt and expenses related to [COVID-19]. …We stress this pick-up in bad debt is likely a transient, one-time item (2020-22) and critically likely to be recovered in some form eventually…though for now ED stands in contrast to AGR which is reflecting full recovery." BAML, "Consolidated Edison: Not assuming anything on bad debt, foregone fees drives '20 guide cut," May 8, 2020. Meanwhile, ConEd announced unilaterally and without regulatory authorization that it would defer summer capacity costs in a regulatory asset, along with a return on that deferral. https://www2.dps.ny.gov/ETS/search/searchSubmissionID.cfm?sub_id=2807517 (last accessed July 7, 2020). The deferral appears to have been canceled on June 1, 2020.

3 Case 15-M-0127, *In the Matter of Eligibility Criteria for Energy Service Companies*, et al., issued and effective December 12, 2019. The Order limits ESCO offers for new enrollments and renewals to either a guaranteed saving off the utility default rate, a fixed term capped at 5 percent of the utility's back-looking 12-month average rate, or a product that includes at least 50 percent renewable energy from New York generation sources. The Order also establishes a Phase 2 collaborative to develop additional energy-related value-added products.

On a longer-term basis, the Commission should contemplate how it can properly allocate risk within the retail market so that sophisticated market participants—and not consumers—are expected to bear the financial consequences of an economic downturn: both in terms of rising customer non-payment and lower sales volumes. The NRG Retail Companies point to the Texas electric and Georgia gas retail markets as examples. In those states, competitive retailers are responsible for billing and collecting from consumers. When consumers are unable to pay in larger than expected numbers, as has occurred during the COVID-19 pandemic, those consequences accrue to the bottom line of those retailers—not all other customers. This produces a market where prices and ancillary fees reflect the expected risk of routine and even irregular events like an economic downturn. And, more importantly, regardless of whether those companies guess the magnitude of this risk correctly, the ultimate consequences of that risk's coming home to roost rests with these companies. This is a more appropriate and socially just construct than the socialization of costs that New Yorkers presently experience.

In addition, there are methods by which customers can enjoy protections from disconnection even in the event of nonpayment in a competitive retail market. The competitive electricity market in Texas has seen during the COVID-19 pandemic the introduction of an Electricity Relief Program that protects affected customers from disconnection. It has not suffered a spate of disconnections—leading one to question why a regime that relies on a broader socialization of costs to consumers (and not shareholders) would be preferred. The Commission should undertake to ensure that *all* companies selling customers electricity and natural gas on a retail basis have skin in the game.

The NRG Retail Companies offer the following specific responses to select questions raised in the Appendix to the COVID-19 Proceeding instituting Order. To the extent references are made to utilities, those references are limited to electric and gas utilities only. The NRG Retail Companies take no position on the various other regulated entities involved in the COVID-19 Proceeding.

Collections and Termination of Service

- How should the Commission direct the regulated entities (electric utilities, gas and steam distribution utilities, private water supply companies, and telecommunications companies) to address the post-crisis resumption of collections and terminations, in a manner that provides appropriate consideration in cases of hardship while preserving the entities' ability to continue to serve all customers safely, reliably and cost-effectively?
- How should the Commission direct the regulated entities to account for and manage the financial ramifications of such policies, so as to preserve financial integrity?

The COVID-19 pandemic has underscored the need for all sectors in private business to participate in a just and equitable basis with the ups and downs of the wider economy. Unfortunately, regulated utilities are largely insulated from this environment. New York should require all companies to participate in their shareholders' exposure to rising levels of consumer bad debt and lower sales volumes.

The Commission can do so by establishing a program in which both utilities and ESCOs are permitted to bill customers for their consolidated electric and/or natural gas charges. In those cases, the business sending the customer the bill should own the risk of customer non-payment or declining sales volumes—without regulatory instruments that would make them whole. The NRG Retail Companies recommend the Commission establish a process by which a transition to a more just outcome where companies participate in the trends of the wider economy. Such a market already exists in Texas, where 95% of customers are billed by a competitive retailer that assumes the financial risk associated with an economic downturn. Additionally, this market structure has proven during the COVID-19 pandemic to be compatible with necessary public assistance measures. In the Texas competitive market, more than 560,000 households are being protected from disconnection, with ESCOs' receiving a $0.04 per kilowatt-hour reimbursement for uncollectible energy charges associated with those customers.[4] By design, this payment is not enough to make whole those ESCOs—it strikes a balance between protecting customers and ensuring that those who supply customers continue to have skin in the game. Of course, ESCOs that experience lower sales volumes also absorb that risk, in its entirety. A successful competitive market in New York would have similar features.

More immediately, the NRG Retail Companies urge the Commission to carefully consider the social needs of New Yorkers in making a decision on how to resume collections and terminations. It should consider establishing a targeted program, for which both utility and ESCO supply customers are eligible, that furnishes a certain, fixed subsidy to customers substantially in arrears and who are facing financial hardship as a result of COVID-19 and its related economic effects. Such a program could be funded through a surcharge on the distribution side of the bill. The Commission could inquire into using existing databases of public support to qualify customers for support. Such a program could be compatible with both the current retail market structure in New York, as well as one more adapted to having all retailers' having skin in the game, as described above.

Commission Priorities in Serving the Public Interest

- What should the Commission consider in determining whether and how rate relief should be provided for ratepayers?

Any rate relief should be provided to all ratepayers on the distribution charges portion of their bill, regardless of whether they choose ESCO supply service or default to utility supply service. Rate relief should be agnostic as to the supplier, as all ratepayers in New York are grappling with the effects of the pandemic.

- Should investments in and collections for clean energy programs be modified during the pandemic and, if so, how should these actions be reflected in customer rates?

The NRG Retail Companies already are making purchases associated with New York's clean energy laws. As Load Serving Entities ("LSEs"), our companies must comply with the Commission's various renewable and clean energy generation requirements just as utilities do.

---

4 Public Utility Commission of Texas, " PUC agrees to extend Electricity Relief Program," (July 2, 2020) https://www.puc.texas.gov/agency/resources/pubs/news/2020/PUCTX-PR-ERPupdate-07022020.pdf. The number of customers in the ERP is approximately 8.5% of the total number of residential customers in the Texas retail market.

ESCOs are obligated to procure Zero Emissions Credits ("ZECs"), Tier 1 and 2 Renewable Energy Credits ("RECs") and also offer renewable based electric products (and many hope to offer green gas products as well). To the extent any decision is made to relieve utilities and their customers of these mandates, the same treatment should apply to ESCOs and their customers.

In addition, if the Commission chooses to extend any relief in the form of lowered renewable compliance for ESCOs, the NRG Retail Companies seek assurances they can pass through these lower costs to their customers without the need to seek affirmative consent. ESCO customers should benefit from any temporary modification to renewable compliance, particularly where lower costs are concerned. ESCOs should not have to notify every single customer to give those customers a break on their energy bills.

Rate and Financial Aspects

- How should previously authorized rate increases and revenue adjustment mechanisms for regulated entities (electric utilities, gas and steam distribution utilities, private water supply companies, and telecommunications companies) be addressed?
- Should the Commission consider passing back net regulatory liabilities outside of traditional rate-setting?
- Should reconciliation or deferral of any expenses related to COVID-19 be permitted and, if so, with what guidance?

The financial relief that utilities obtain from the Commission should be strictly cabined to the increased costs resulting from governmental requirements that have attached to them in light of the COVID-19 pandemic. In this regard, the experience of Indiana, which already has held a fully litigated regulatory proceeding on this matter, is instructive.[5] In that state, consumer interests argued that only costs "associated with any required stay of disconnections, waiver of certain utility fees, and expanded payment arrangements" should be treated on a deferred-accounting basis.[6] The Indiana Utility Regulatory Commission ("IURC") largely agreed, although it also allowed incremental bad debt or uncollectible expense to be included.[7]

The Commission should instead consider implementation of policies that ensure customers are at the forefront of COVID-19 relief considerations, not the utilities. To the extent

---

5 The treatment NRG Retail Companies suggests is consistent with a recent order of the Indiana Utility Regulatory Commission, which after a robust hearing procedure, sided with consumer interests in finding that the regulated utilities could only recover for COVID-19 impacts directly associated with customer-related measures implemented in response to COVID-19, in part based on Governor Holcomb's Executive Order prohibiting Indiana utilities from disconnecting service during the COVID-19 public emergency. *See Verified Joint Petition of Duke Energy Indiana, LLC et al., for (1) Authority for All Joint Petitioners to Defer as a Regulatory Asset Certain Incremental Expense Increases and Revenue Reductions of the Utility Attributable to COVID-19; and (2) the Establishment of Subdockets for each Joint Petitioner in which Each Joint Petitioner May Address Repayment Programs for Past Due Customer Accounts, Approval of New Bad Debt Trackers, and/or Details Concerning the Future Recovery of the COVID-19 Regulatory Asset, et al.*, Case No. 45380, Phase 1 and Interim Emergency Order of the Commission, Approved June 29, 2020 (the "Indiana COVID-19 Interim Order").

6 *Id.*, p. 6.

7 *Id.*, pp. 9-10.

COVID-19 deferrals are implemented, the utilities should only be allowed to defer costs directly related to COVID-19 customer relief, including prohibitions on utility disconnection, collection of late fees, convenience fees, deposits, and reconnection fees, as well as deferred payment arrangements. However, deferral of costs related to decreased load, impacts on utility operations, or utility access to capital markets, and increased pension contributions, among other things, should not be included in any utility deferrals. Additionally, although the Indiana Commission appears to have allowed utilities to engage in deferred accounting for incremental bad debt, utilities should not be allowed to engage in deferred accounting of this cost unless it is material to the utility's earnings. Rather than defer any of these costs, the Commission should require the utilities to absorb these losses. In the alternative, if the Commission does grant deferred accounting treatment for any of these costs, either as a matter of policy or because it believes those costs are material and impactful to one or more utility's financial health, the costs should be incorporated in the utility's commodity price, giving customers the opportunity to mitigate these costs by switching to a retail supplier.

To clarify what is and is not being accounted for, utilities should as soon as possible be ordered to make monthly reports of their entries in FERC Account 182.3.

- Should revenue decoupling be modified to address the impact of current economic conditions on different rate classes?

The Commission should modify utilities' RDM tariffs to provide either for the suspension of the decoupling rate adjustment or its allocation to the commodity cost, associated with the treatment of deferred regulatory accounting described above. It would be perverse in the current circumstances to insulate utilities from a major economic downturn while the rest of the business world and society in general suffered from a profound downturn in demand for many products.[8]

Here, too, the IURC's ruling provides guidance. While Indiana considered lost revenues associated with lower sales volumes as part of its deferred accounting consideration, its rationale still is persuasive here, where a formal decoupling mechanism exists: "[A]sking customers to go beyond their obligation and pay for service they did not receive is beyond reasonable utility relief based on the facts before us. A utility's customers are not the guarantors of a utility earning its authorized return."[9] The Commission should follow the lead of the IURC. Utilities should not expect customers to pay for services they did not receive. Again, to the degree this Commission nevertheless wishes to retain the decoupling mechanism, it should engage in temporary cost allocation and rate design procedures that ensures the cost effect is bypassable to customers who wish to shop to avoid it.

Conclusion

The NRG Retail Companies are concerned that the COVID-19 Proceeding will ultimately reap a benefit for the state's utilities, who can defer costs (and collect a return on those deferred

---

[8] Travis Kavulla, "Will regulators allow utilities to reap a windfall because of COVID-19," *Utility Dive* (June 23, 2020), https://www.utilitydive.com/news/will-regulators-allow-utilities-to-reap-a-windfall-because-of-covid-19/580279/.

[9] Indiana COVID-19 Interim Order, pp. 8-9.

costs), not only making the utilities whole for any deferred costs but potentially creating a windfall.

Additionally, deferral of utility costs harms ESCOs and their customers under the Reset II Order due to the requirement for ESCOs to meet or beat the utility's 12-month trailing average price when offering a variable rate product. For fixed rate products, ESCOs must cap the product price at 5% over the utility's 12-month trailing average price. ESCOs cannot (and should not be required to) compete with a trailing 12-month average price that is artificially lowered by cost deferrals. Utility customers ultimately have to pay these deferred costs, with interest. No one wins in this scenario except for the utility. It is more reasonable for the costs subject to deferral to be limited—and then to have them allocated to the price-to-compare, so price-sensitive customers can avoid them by shopping.

Finally, the COVID-19 pandemic has underscored one core benefit of retail competition that New York's current retail market does not enjoy: the absorption of the risk of something like a major economic downturn by those who sell energy—and not consumers. The Commission should consider taking structural reforms to ensure a socially just, long-term outcome where consumers are not automatically expected to pick up the tab of unforeseen events like the ones we are presently seeing unfold.

Please contact me at 609-524-4696 or travis.kavulla@nrg.com if you wish to discuss this matter.

Respectfully,

/s/ Travis Kavulla

Travis Kavulla
Vice President, Regulatory Affairs
NRG Energy, Inc.

/s/ Angela Schorr

Angela Schorr
Director, Regulatory Affairs
NRG Energy, Inc.