



**Department of  
Public Service**

**Public Service Commission**

**John B. Rhodes**  
Chair and  
Chief Executive Officer

**Gregg C. Sayre**  
**Diane X. Burman**  
**James S. Alesi**  
Commissioners

**Thomas Congdon**  
Deputy Chair and  
Executive Deputy

**Paul Agresta**  
General Counsel

**Kathleen H. Burgess**  
Secretary

Three Empire State Plaza, Albany, NY 12223-1350  
www.dps.ny.gov

September 7, 2017

Dear Secretary Burgess:

Please find attached a letter from DPS Staff regarding the implementation of the Commission's December 16, 2016 Order Adopting a Prohibition on Service to Low-Income Customers by Energy Service Companies.<sup>1</sup> Staff submits this letter for filing in Cases 12-M-0476, 98-M-1343, 06-M-0647, and 98-M-0667.

Sincerely,

/S/

Francis (Tom) Dwyer  
Assistant Counsel

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<sup>1</sup> Case 12-M-0476, et al., Retail Access, Order Adopting a Prohibition on Service to Low-Income Customers by Energy Service Companies (issued December 16, 2016).



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September 7, 2017

TO: All electric and gas distribution utilities  
and energy service companies  
operating in New York retail markets

RE: Implementation of December 16, 2016 Prohibition Order

Dear Company Representative:

I write to provide you with an update concerning the implementation of the Commission's December 16, 2016 Order Adopting a Prohibition on Service to Low-Income Customers by Energy Service Companies (Prohibition Order).<sup>1</sup> In light of recent litigation activity and judicial rulings, the transfer of low-income customers from energy service companies to utilities required by the Prohibition Order shall commence by Monday, September 25, 2017.

**Background**

Implementation of the Prohibition Order was to begin 60 days after its effective date. Various parties, including the National Energy Marketers Association, requested an extension of the implementation deadlines. By a Notice Extending Deadlines issued January 25, 2017 (January 25, 2017 Notice), the Secretary extended the deadlines for implementing the prohibition until May 26, 2017.

The December 2016 Prohibition Order subsequently became the subject of an Amended Petition and Complaint brought by the National Energy Marketers Association, the Retail Energy Supply Association, and others before the Albany County Supreme Court. The National Energy

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<sup>1</sup> Case 12-M-0476, et al., Retail Access, Order Adopting a Prohibition on Service to Low-Income Customers by Energy Service Companies (issued December 16, 2016) (Prohibition Order). The Prohibition Order also contained a procedural pathway whereby an energy service company could seek Commission permission to serve low income New Yorkers if the company committed to matching or beating energy commodity rates charged by utilities. Id. at 24-5. Thirteen ESCOs applied for such a waiver; the Department of Public Service is reviewing those applications.

Marketers Association also requested that the court hold the Commission in contempt for issuing the order.

By letters dated May 18, 2017 and May 23, 2017, various parties asked for a further extension of time for implementing the Prohibition Order. A May 23, 2017 notice extended the May 26 implementation date for an additional 30 days (*i.e.*, until June 26, 2017). By letter dated June 15, 2017, various parties again sought an extension of time to comply with the Prohibition Order. On June 23, 2017, the Secretary issued a further notice extending the implementation deadlines contained in the Prohibition Order's Ordering Clauses 1-3 and 5-11 until July 26, 2017.

### **Albany County Supreme Court Upholds the Prohibition Order**

On June 30, 2017, the Albany County Supreme Court issued as Decision and Order upholding the Commission's Prohibition Order, rejecting the challenges presented by the National Energy Marketers Association and the Retail Energy Supply Association, and denying an application for contempt brought by the National Energy Marketers Association against the Commission.<sup>2</sup>

### **The July 18 Notice**

In light of that judicial Decision and Order, the Secretary issued a notice on July 18, 2017 stating that there would be no further adjustment of the Prohibition Order's implementation deadlines. The July 18, 2017 Notice identified the following specific dates for implementation of the Prohibition Order:

1. Compliance with Ordering Clause 4 had already been completed;
2. Compliance with Ordering Clauses 1, 2, 3, and 11 shall begin on the first day of implementation, July 26, 2017;
3. As discussed in the Prohibition Order, compliance with Ordering Clause 5 shall be done no later than 14 days after compliance with Ordering Clauses 1 and 2 (*i.e.*, August 9, 2017); and
4. Compliance with Ordering Clauses 6, 7, 8, 9, and 10 shall be done on a rolling basis, as described in the Ordering Clauses and the Prohibition Order.

### **Litigation Before the Appellate Division**

On August 8, 2017, the National Energy Marketers Association and three ESCOs applied to the New York State Supreme Court Appellate Division Third Department for a temporary restraining order and a stay pending the court's review. On August 10, the appellants served a temporary restraining order (dated August 9, 2017) on the Commission's Office of General Counsel. As of the August 9 date, there was one day before the ESCOs were required to provide advance notice to customers that would be returned to utility service, and sixteen days before certain low-income ratepayers were to be transitioned back to utility service.<sup>3</sup>

The temporary restraining order stated that it would remain in force pending a ruling on the motion for stay. The temporary restraining order also permitted the Commission to submit

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<sup>2</sup> Matter of National Energy Marketers Assoc. et al. v New York State Public Service Commn., (Albany Co. Index No. 5860-16); Matter of Retail Energy Supply Assoc. et al. v New York State Public Service Commn., (Albany Co. Index No. 5693-16), slip op. (Zwack, J., June 30, 2017).

<sup>3</sup> Prohibition Order, at 28 (Ordering Clause ¶ 10); *id.*, at 20-21, n 35; July 18, 2017 Secretary Notice.

opposition papers to the stay request. The Commission filed its opposition papers on August 23, 2017.

On Tuesday, September 6, 2017, the Office of General Counsel received a Decision and Order from the Appellate Division denying the appellants' motion for a stay (dated September 1, 2017).<sup>4</sup> Accordingly, the temporary restraining order was terminated by operation of the September 1, 2017 Decision and Order.

**Conclusion**

With the denial of the stay motion and the lifting of the temporary restraining order, the implementation of the December 2016 Prohibition Order may continue. Accordingly, utilities and ESCOs shall continue to implement the December 2016 Prohibition Order. Consistent with the Secretary's July 18 notice and taking into account the limited duration of the August 9 temporary restraining order, it is Staff's interpretation that the utilities and ESCOs shall begin returning low-income ratepayers to utility service on or before Monday, September 25, 2017 – which is eighteen days from today. Also, consistent with the Prohibition Order, ESCOs shall not enroll and sign up new low-income customers.

Sincerely,

*s/ LuAnn Scherer*

LuAnn Scherer  
Director  
Office of Consumer Services  
Department of Public Service

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<sup>4</sup> Matter of National Energy Marketers Assoc. et al. v New York State Public Service Commn., No. 525360 (3d Dep't Sept. 1, 2017). A copy of the Appellate Division's ruling is attached hereto.

Attachment

Matter of National Energy Marketers Assoc. et al. v New York State Public Service Commn.,  
No. 525360, Decision and Order on Motion  
(3d Dep't Sept. 1, 2017)  
(Egan Jr., J.P., Lynch, Clark, Mulvey, JJ.)

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: September 1, 2017

525360

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In the Matter of NATIONAL ENERGY  
MARKETERS ASSOCIATION et al.,

Appellants,

v

DECISION AND ORDER  
ON MOTION

NEW YORK STATE PUBLIC SERVICE  
COMMISSION,

Respondent.

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Motion for preliminary injunction pending appeal.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Egan Jr., J.P., Lynch, Clark and Mulvey, JJ., concur.

ENTER:



Robert D. Mayberger  
Clerk of the Court

**RECEIVED**

SEP 06 2017

Public Service Commission  
Office of Counsel