



**Department of  
Public Service**

**Public Service Commission**

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**Kathleen H. Burgess**  
Secretary

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

September 12, 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> and in response to letters filed by several ESCOs. 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).



September 12, 2017

Re: Implementation of December 16, 2016 Prohibition Order

Dear Secretary Burgess:

This letter responds to recent requests to the Department of Public Service Staff (Staff) that the implementation of the Public Service Commission's December 16, 2016 Order be further delayed.<sup>1</sup> Following the Appellate Division's September 1, 2017 denial of a motion to stay the Order and Staff's September 7, 2017 communication that the transfer of low-income customers from energy service companies (ESCOs) to utilities required by the Order shall commence by Monday, September 25, 2017, various ESCOs have asked that the September 25 date be extended.

Staff does not agree with those requests. Although the ESCOs express concerns and complain about difficulties, the present situation is of their own making. As such, the ESCOs should immediately take every action to comply with the Commission's Order as well as return low-income customers to utility service. It is worth noting that for the period January 2014 through June 2016 low-income customers in New York were overcharged by ESCOs in the amount of approximately \$96 million – or an average of \$3.1 million per month. Additional delay is contrary to the public interest.

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<sup>1</sup> PSC 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). The Order also contained a procedural pathway whereby an ESCO could seek Commission permission to serve low-income New Yorkers if the company committed to matching or beating energy commodity rates charged by utilities. Order at p. 24-5. Thirteen ESCOs applied for such a waiver; the Department of Public Service is reviewing those applications.

As a result of actions and requests by ESCOs, the transfer date has already been deferred by 6 months. The December 16, 2016 Order initially provided for the transfer of low-income customers to commence no later than March 16, 2017.<sup>2</sup> That Order provided for a methodical approach for that transfer.<sup>3</sup> In light of litigation initiated by the National Energy Marketers Association, the Retail Energy Supply Association, and various ESCOs before the Albany County Supreme Court, the Commission's Secretary extended the implementation of the December 16, 2016 Order while the legal challenges were pending before that court.<sup>4</sup> On June 30, 2017, the Albany County Supreme Court issued a 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>5</sup> Thereafter, the Commission's Secretary made clear to all concerned entities that implementation of the December 16, 2016 Order would begin on July 26, 2017, with the transfer of customers from the ESCOs to the utilities to commence no later than August 25, 2017.

Consistent with the Secretary's notice, utilities provided information to ESCOs to facilitate the transfer of low-income customers to utility service. Utilities provided these lists on or before July 26, 2017. Thirteen days later on August 8, 2017, three ESCOs and a trade association asked the Appellate Division to stay the implementation during an appeal of the Albany County Supreme Court's decision.<sup>6</sup> A single justice issued a temporary order restraining the Commission from implementing the December 2016 Order and referred the stay motion to a panel of justices. On September 1, 2017, a panel of four Appellate Division justices unanimously denied the motion for a stay. The Appellate Division's denial of the stay motion returned the litigants to where they were as of August 9 – which was 16 days before the August 25 transfer date, and one day before the ESCOs were to provide additional advance notification to customers.

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<sup>2</sup> The Order also required utilities to send letters to low-income consumers within 60 days (*i.e.*, by February 14, 2017) informing those customers of the upcoming transfer. Order, at p. 27, ¶5. Consistent with this provision, the utilities have now already informed customers of the transfer.

<sup>3</sup> The Department notes that – in the converse situation – ESCOs previously requested that utility companies transfer customers to ESCOs within only 5 days of customers enrolling with an ESCO. This accelerated switching for electric supply was approved by the Commission in an Order issued December 15, 2014. The Commission approved an Order streamlining the process for switching a customer's gas commodity supplier on December 23, 2015.

<sup>4</sup> A summary of the extensions is set out in the Department's September 7, 2017 communication to ESCOs and utilities.

<sup>5</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>6</sup> The four appellants were Bluerock Energy, Inc., Residents Energy, LLC, Verde Energy USA New York, LLC, and the National Energy Marketers Association.

### **The Transfers Should Proceed Based on the Information Already Provided by the Utilities**

One argument offered to support a further extension is a speculative allegation that the lists provided by utilities to the ESCOs 45 days earlier – in late July – are no longer useful.<sup>7</sup> Department Staff finds this argument unpersuasive. A customer is identified as an assistance program participant because the utility received a Home Energy Assistance Program (HEAP) payment on the customer’s behalf. HEAP runs from November to April. Customers would not have received a HEAP payment in August. Therefore, there would be no appreciable difference between the list the utilities compiled and provided to the ESCOs in July and a list that is compiled by the utilities today.

IDT Energy and other ESCOs cannot maintain that they were unaware of the Secretary’s July 18 notice, the August 25, 2017 date to begin transfer of ratepayers to utility service, and that the ESCOs were obligated to comply with that date. The fact that IDT Energy, and possibly other ESCOs, affirmatively chose not to take steps to facilitate the orderly transition of low-income customers following the July 18 notice and their receipt of information from the utilities is the responsibility of those ESCOs. Moreover, having unilaterally elected not to comply with the Commission’s December 16, 2016 Order between July 18 and August 9, IDT Energy’s argument now seeks to further delay implementation by imposing additional costs and burdens on the utilities who – unlike IDT – did take steps to comply with the Commission’s Order. IDT, Spark, Kiwi, and other ESCOs should not use the utilities’ timely compliance with the Commission’s directive as a sword against ESCOs’ own compliance. Similarly, the fact that the utilities provided information 45 days ago does not provide the ESCOs with a shield to continue to hold on to customers in violation of that Commission directive.

### **The ESCOs Already Have Had Ample Advance Notice**

Another argument presented in support of an extension is that the ESCOs purposefully did not review the information and lists sent to them by the utilities.<sup>8</sup> IDT states that licensed attorneys instructed ESCOs to ignore or destroy the information sent by the utilities in July.<sup>9</sup> These ESCOs argue that they now do not have sufficient time to inform customers that they will begin to be transferred to utilities on September 25. This again is a situation entirely of the ESCOs’ own making. On August 9 (the day the temporary court order was signed), the ESCOs were only one day away from having to send out advance notices so that they could comply with the Commission’s December 16, 2016 Order. Arguably, as of that date, the ESCOs should have already sent those notices in order to provide the customers 15 days’ notice. Moreover, the Appellate Division denied the motion on September 1, 2017, and the Department sent out its communication on September 7, 2017. Thus, the ESCOs effectively received additional time to facilitate the transfer of customers to the utilities. Having elected not to take steps to comply and facilitate the transfer of customers, IDT, Spark, Kiwi, and the other ESCOs are responsible for the consequences of their decisions. The utilities already have sent letters notifying the

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<sup>7</sup> See, e.g., IDT Energy letter to Office of Consumer Services, dated September 8, 2017 (September 8, 2017 IDT Letter) at ¶ 2; see also Spark Energy, LLC and Kiwi Energy NY LLC letter to the Secretary (September 8, 2017 Spark & Kiwi Letter) at p. 1.

<sup>8</sup> See September 8 IDT Energy letter at ¶3.

<sup>9</sup> See September 8 IDT Energy letter at ¶3.

customers of the transfer from the ESCOs to utility service, *see* Order at p. 27, ¶5, and, thus, the customers have already received notice. Instead of seeking further delay, the ESCOs should also notify customers.

**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 must 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 the utility service on or before Monday, September 25, 2017 – which was 18 days from Staff’s September 7 communication to the energy service companies and utilities in New York, and 24 days from the Appellate Division’s September 1, 2017 Decision and Order denying the stay motion presented by the National Energy Marketers Association, Bluerock Energy, Inc., Residents Energy, LLC, Verde Energy USA New York, LLC. As such, the ESCOs should immediately take every action to comply with the Commission’s Order as well as return low-income customers to utility service. Also, consistent with the Prohibition Order, ESCOs are now prohibited from enrolling new low-income customers in ESCO service.

Sincerely,

*s/ Francis Dwyer*

Francis Dwyer  
Assistant Counsel  
Office of General Counsel  
Department of Public Service

cc: All ESCOs & Utilities by email