

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Eligibility Criteria for Energy Service Companies.

Case 15-M-0127

Proceeding on Motion of the Commission to Assess Certain Aspects
of the Residential and Small Non-residential Retail Energy Markets
in New York State.

Case 12-M-0476

In the Matter of Retail Access Business Rules.

Case 98-M-1343

**KIWI ENERGY NY LLC PETITION FOR DECLARATORY RULING RECOGNIZING
KIWI GUARD PRODUCT AS A COMPLIANT ENERGY-RELATED VALUE-ADDED
PRODUCT, OR, IN THE ALTERNATIVE, PROVIDING A LIMITED WAIVER OF THE
ORDER ADOPTING CHANGES TO THE RETAIL ACCESS ENERGY MARKET AND
ESTABLISHING FURTHER PROCESS**

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On December 12, 2019, the New York State Public Service Commission (the “Commission”) issued an *Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process* (the “Second Reset Order”).¹ The Second Reset Order requires energy service companies (“ESCOs”) to provide certain customers with products that either include: (i) guaranteed savings; (ii) a fixed-rate capped at a trailing 12-month average utility rate plus 5 percent; or (iii) a renewable electric component.² In addition, the Second Reset Order recognizes that products that “further the State’s energy policy goals and provide meaningful value to the customer” qualify as energy-related value-added products and services (“ERVAS”), but, absent further process, the Second Reset Order limited provision of certain products to Agway

¹ Case 15-M-0127, *et al.*: *In the Matter of Eligibility Criteria for Energy Service Companies*, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (Issued December 12, 2019). Implementation of the Order has subsequently been stayed pending further Commission action on several petitions for rehearing.

² *Id.* at 23.

Energy Services, LLC (“Agway”).³ For the reasons discussed in detail below, Kiwi Energy NY LLC (“Kiwi Energy”) respectfully seeks a declaratory ruling from the Commission recognizing Kiwi Energy’s home warranty and maintenance product, hereinafter referred to as “Kiwi Guard,” as a permissible ERVAS under the Second Reset Order, or, in the alternative, providing Kiwi Energy a limited waiver to sell and provide Kiwi Guard to current and prospective customers during the pendency of the Commission’s review of ERVAS during Track II of these proceedings.

I. STANDARD OF REVIEW

Pursuant to the Department of Public Service rules and regulations in Title 16 of the New York Codes, Rules and Regulations (“NYCRR”), a petition for declaratory ruling may be sought with respect to “(1) the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission or the validity of any such rule; (2) whether any action by the commission should be taken pursuant to a rule; or (3) whether a person’s compliance with a Federal requirement will be accepted as compliance with a similar State requirement applicable to that person.”⁴ In addition, the Commission may also review a petition for declaratory ruling where “warranted by the public interest.”⁵

Here, the Second Reset Order explicitly recognizes the beneficial value to customers of warranty-type products that protect against needed or emergency repairs and/or replacement of home energy equipment.⁶ The Second Reset Order, however, states that only Agway has the option to provide this type of product to customers and requires all other ESCOs to petition the Commission for approval of their ERVAS products. Kiwi Energy has developed a product that, similar to Agway, provides warranty-type coverage of home heating and cooling systems. Unlike

³ *Id.* at 52.

⁴ 16 NYCRR § 8.1 (a).

⁵ 16 NYCRR § 8.1 (b).

⁶ Second Reset Order at 52.

the numerous other examples of potential qualifying ERVAS cited in the Second Reset Order, which have not previously been reviewed by the Commission, there is no meaningful distinction between Agway's product and Kiwi Guard. Since the Commission has previously ruled that such products are compliant ERVAS, a petition for declaratory ruling is warranted here to clarify that Kiwi Energy may provide customers with its Kiwi Guard product once the product restrictions in the Second Reset Order take effect. In addition, as noted below, it is also in the public interest for the Commission to issue a declaratory ruling recognizing Kiwi Guard as a compliant ERVAS.

Pursuant to 16 NYCRR § 8.2 (c), the comment period for a petition for declaratory ruling is 21 days.⁷ Since this petition deals with the applicability of an already established rule (*i.e.*, Commission approval of a warranty-type product as a compliant ERVAS under the Second Reset Order), the requirements in the State Administrative Procedure Act for notice, publication, and comment are not applicable. All interested and participating parties to these proceedings have been provided notice consistent with 16 NYCRR § 8.2 (b).

II. INTRODUCTION

On December 12, 2019, the Commission issued the Second Reset Order, which limited ESCO products to the following: (1) guaranteed savings products, (2) fixed products that are capped at a certain price, or (3) products that provide added value to customers.⁸ For purposes of determining qualifying ERVAS products under the Second Reset Order, the Commission stated that “‘value-added’ means ‘something more than the standard; something that exceeds the expectations associated with provision of what is otherwise an undifferentiated commodity.’”⁹ In particular, products that “provide meaningful value to the customer” are explicitly recognized in

⁷ 16 NYCRR § 8.2 (c).

⁸ *Id.* at 39, 65, and 75-76.

⁹ *Id.* at 51.

the Second Reset Order as ERVAS.¹⁰ Although the Commission theorized that “demand-management programs or tools, voluntary dynamic pricing programs or tools, [] energy efficiency measures” and other similar products might qualify as compliant ERVAS, the Commission noted that it would need to further consider “whether and how ESCOs could and would be willing to provide those services and whether the tethering of those services with energy supply by ESCOs would create benefits.”¹¹

With respect to warranty-type products, on the other hand, the Commission determined that Agway’s “EnergyGuard” product met the definition of a value-added product or service.¹² Indeed, the Commission noted that Agway’s EnergyGuard product provided customer’s with benefits “‘similar to a pre-paid maintenance contract” because it covered the cost of parts and repairs, up to \$1,000 annually, for a customer’s air-conditioning unit, as well as the cost for any needed electrical repairs up to \$1,000 annually.”¹³

Despite recognizing the value of this type of product, however, the Second Reset Order only expressly permits Agway Energy to provide its EnergyGuard product to customers and requires all other ESCOs to petition the Commission for approval to provide an ERVAS product.¹⁴ As such, and since Kiwi Guard is the same product structure as Agway’s EnergyGuard, Kiwi Energy seeks a declaratory ruling from the Commission that the rule adopted in the Second Reset Order recognizing warranty-type products as ERVAS also applies to Kiwi Guard such that Kiwi Energy can sell and provide Kiwi Guard to current and prospective customers once the product restrictions in the Second Reset Order take effect.

¹⁰ *Id.* at 52.

¹¹ *Id.* at 53.

¹² *Id.*

¹³ *Id.* at 52.

¹⁴ *Id.* at 53-55.

III. KIWI GUARD PRODUCT

Kiwi Energy is a retail electric and natural gas provider that predominantly serves residential and some small commercial customers in many of the utility territories across the State. Kiwi Energy has been operating in New York since approximately 2010 and prides itself on developing desirable and innovative products for its customers.

Kiwi Guard is a home services product that provides customers with security to cover certain repairs and replacement of their home heating and cooling equipment in the event of mechanical failures. With Kiwi Guard, customers are able to log into their online accounts or call at any time, 24 hours a day/seven days a week, to report a problem. The customer is then matched with local service professionals who will respond to the service request within a reasonable amount of time, depending on the severity of the issue. The Kiwi Guard plan covers customers' central air conditioning and heating systems, ductwork, refrigerant, rust and corrosion, and unknown pre-existing conditions.

The maximum amount of coverage allowable under Kiwi Guard is \$750 on an annual basis plus a \$25 credit included in the plan towards the cost of a filter, which can help ensure the customer's heating and cooling systems continue to operate at peak performance. While there is a \$125 deductible, that cost covers the initial service fee and any additional visits necessary to fully resolve the issue, whether the service is for repair or replacement. In addition to any product warranties that may apply to the repair or replacement parts, Kiwi Guard also provides a workmanship warranty of 180 days. Finally, the Kiwi Guard plan provides coverage, up to \$1,200 on an annual basis, for the cost of emergency lodging in the event of certain equipment outages or failures.

IV. THE COMMISSION PREVIOUSLY APPROVED THE KIWI GUARD PRODUCT STRUCTURE AS A COMPLIANT ERVAS

In the Second Reset Order, the Commission noted that only those products that truly provide meaningful benefit and added-value when tied to a customer's energy supply will be recognized as ERVAS. Indeed, the Commission stated that “appropriate value-added products and services have the potential to provide benefits to customers” and that “only energy-related products and services will satisfy the Commission's definition of value-added products or services.”¹⁵ Kiwi Guard clearly provides such value.

Similar to Agway's EnergyGuard product, Kiwi Guard provides customers with peace of mind and security that should their energy equipment fail, someone will be available 24/7 to assist and remedy the problem at minimal cost to the customer. Further, Kiwi Guard provides access to over 18,000 pre-screened and licensed professionals to assist with needed home repairs and replacements of heating and cooling systems so customers do not need to worry about finding a reputable repair company to quickly respond to any issues. Finally, the value provided to customers is measurable in that customer repairs and/or replacement of equipment is covered up to \$750 on an annual basis, along with the cost of emergency lodging in case of a prolonged outage.

Importantly, the Commission has already expressly recognized the Kiwi Guard product structure as a compliant ERVAS, thus no additional in-depth review or determination is required here. In approving Agway's EenergyGuard product, the Commission specifically noted the energy-related added-value that such warranty-type products provide to customers. Kiwi Energy is not proposing a new or different ERVAS structure here.¹⁶ As such, a declaratory ruling is entirely

¹⁵ *Id.* at 52.

¹⁶ Indeed, despite Agway's previous filings in response to other similar petitions, Kiwi Energy has provided the same level of detail regarding its Kiwi Guard product – aside from customer testimonials since this is a new customer product – that Agway provided during the evidentiary hearing in these proceedings. As such, any comments or protests from Agway to the contrary should be disregarded and recognized as purely anticompetitive behavior. *See* Case 15-

appropriate to clarify that Kiwi Energy may provide customers with its Kiwi Guard product once the product restrictions in the Second Reset Order take effect.

Further, a declaratory ruling in favor of Kiwi Energy's petition is also in the public interest. In the same manner that customers find home insurance and car insurance products to be beneficial, retail energy customers find value in warranty-type products that protect against unexpected costs to repair or replace their energy equipment. As such, it is in the public interest to ensure that as many customers as possible have access to such products.

V. CONCLUSION

For all of the foregoing reasons, the Commission should issue a declaratory ruling recognizing Kiwi Energy's home warranty and maintenance product as a permissible ERVAS under the Second Reset Order, or, in the alternative, providing Kiwi Energy a limited waiver to sell and provide Kiwi Guard to current and prospective customers during the pendency of the Commission's review of ERVAS during Track II of these proceedings

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M-0127, *et al.*: *In the Matter of Eligibility for Energy Service Companies*, IGS New York Green Gas Reply Comments (Filed July 2, 2020) (noting same).