

February 13, 2024

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VIA ELECTRONIC FILING

Tom Dwyer, Esq.
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Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

RE: Request for Confirmation that the Department of Public Service Will Exercise its Enforcement Discretion Relative to the Impending Effectiveness of Certain Amendments to General Business Law § 349-d

Dear Mr. Dwyer:

We represent Kiwi Energy NY LLC and American Power & Gas LLC (together, the Companies) in the above-related matter. On September 20, 2023, New York amended General Business Law (GBL) § 349-d to require, among other things, that energy service companies (ESCOs) obtain a customer's "express consent" for any "change in price or a change to or from fixed or variable pricing" (the Pricing Law).¹ The Pricing Law is set to take effect on March 18, 2024.

While it is our understanding that the Department of Public Service (DPS) anticipates issuing a proposal related to implementation and interpretation of the Pricing Law, the Public Service Commission (the Commission) will be unable to rule on DPS's proposal before the required sixty day comment period runs under the State Administrative Procedure Act (SAPA).² Since the anticipated proposal, to date, has not been noticed in the *State Register*, the Commission is constrained from issuing any determination, before, at the earliest, late April, well after the March 18 effective date.

As a result, without further action or confirmation from DPS, the Companies may be forced to operate without first receiving a final Commission determination on the Pricing Law's intended application. This timeline may negatively impact not only ESCOs, who must undertake considerable time and expense to plan for implementation of the Pricing Law in the absence of any guidance, but also consumers that are currently receiving variable rate products that fluctuate each month (such as guaranteed savings, renewable, and home warranty products), for which it is practically impossible to obtain customer consent each month. The Commission has previously

¹ GBL § 349-d (6).

² SAPA § 202 (1) (a).

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determined that such products are beneficial to New York customers,³ but those products may be limited in the future in the absence of further Commission clarification. Finally, such customers' service may be disrupted, in some cases permanently, even though the Commission could later determine that continued pricing fluctuations may be permissible for such customers without consent.

For all the foregoing reasons, the Companies respectfully request DPS issue a letter confirming that it will exercise its enforcement discretion and decline to enforce the Pricing Law until after the Commission makes a final determination on DPS's anticipated proposal or otherwise issues an order as to the Commission's planned implementation and interpretation of the Pricing Law. Providing such clarification will allow the Companies to continue providing valuable services to customers and prevent disruption to the Companies' operations until the Commission can provide necessary insight on the Pricing Law.

Thank you for your attention to this matter. Please contact me if you have any questions related to this correspondence.

Respectfully submitted,

/s/ Michelle K. Piasecki

Michelle K. Piasecki

cc: Richard Berkley, Director of Office of Consumer Services (*via electronic mail*)

³ Case 15-M-0127, *In the Matter of Eligibility Criteria for Energy Service Companies*, Order on Rehearing, Reconsideration, and Providing Clarification (issued Sept. 18, 2020) at 20-21, 35-42 (finding that guaranteed savings, renewable and home warranty products were permissible to market and sell to mass-market customers).