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www.dps.ny.gov

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January 8, 2024

Leonard Gardner
Energy Plus Holdings, LLC
910 Louisiana Street, Suite 15000C
Houston, TX 77002
Bucky.gardner@nrg.com

NOTICE OF APPARENT VIOLATION (NOAV)

Dear Mr. Gardner:

The New York Department of Public Service (Department) hereby notifies Energy Plus Holdings LLC (Energy Plus) of its apparent non-compliance with regulatory requirements. As summarized below, Energy Plus apparently failed to enroll or renew customers on compliant products following the effective date of the Public Service Commission's (Commission) Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (December 2019 Order) issued December 12, 2019,¹ which required energy products to be used that Energy Plus did not offer then or now. Department Staff (Staff) requests that Energy Plus acknowledge receipt of this NOAV letter within 5 business days and respond to this NOAV letter within 10 business days.

Ordering Clause 6 of the December 2019 Order instructs, "Energy Services Companies (ESCOs) who are currently operating in New York that intend to continue to renew contracts with customers in New York and/or enroll new customers in New York following the effective date of Ordering Clause No. 1 are directed to file an application in accordance with the body of this Order no later than 30 calendar days following the date the

¹ Case 15-M-0127 *et al.*, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (Issued December 12, 2019) (December 2019 Order), p. 23.

revisions to the Uniform Business Practices (UBP) become effective.”² The December 2019 Order, which due to extensions sought by ESCOs and granted by the Commission did not become completely effective until April 16, 2021,³ adopted enhanced eligibility requirements for ESCOs to abide by. Following the application process outlined in the UBP, which requires Staff to review ESCO documents, including copies of all contracts intended for product offerings, ESCOs that meet the criteria provided in the December 2019 Order are granted eligibility to service mass market-customers. Pursuant to that Order, ESCOs are limited to offering three products to mass market customers: (1) a variable-rate product with a guaranteed savings, (2) a fixed-rate product with a 5% cap, and (3) a renewable electric product.⁴

Several parties requested rehearing of the December 2019 Order, which the Commission denied in a September 2020 Order that also provided clarification to the December 2019 Order.⁵ Following both the December 2019 Order and the September 2020 Order, several ESCO parties requested extension of the deadlines to comply with the new product restrictions adopted in both orders. Those extensions were granted on January 22, 2020,⁶ April 7, 2020,⁷ July 14, 2020,⁸ and for a last time on February 4, 2021.⁹ The final extension ruling provided that the new product restrictions, specifically, Ordering Clause Nos. 3, 4, and 5 of the September 2020 Order, would go into effect on April 16, 2021.

On November 16, 2020, Energy Plus filed its application to serve customers in New York pursuant to the December 2019 Order. Energy Plus proposed to offer a renewable product to residential and small commercial customers and on February 2, 2021, Staff issued a letter to Energy Plus granting eligibility to serve only a renewable energy product to mass market customers in New York (Appendix A) and no other products that it may have served to mass market customers in the past.

The December 2019 Order requires ESCOs who market a renewable energy product to comply with the following requirements: (1) the ESCO must provide at least 50% of their contractual load greater than the renewable mix of the Renewable Energy Standard (RES) load-serving entity (LSE) obligation for the year; (2) the ESCO must comply with the RES location and delivery requirements when procuring Renewable Energy Certificates (RECs) or entering bilateral contracts; (3) ESCOs must satisfy transparency and information disclosure criteria.¹⁰ The Commission further required that all ESCOs offering renewable

² December 2019 Order, pp. 109-110.

³ See footnotes 5-9 *infra*.

⁴ December 2019 Order, p. 108.

⁵ Case 15-M-0127 *et al.*, Order on Rehearing, Reconsideration and Providing Clarification, (issued September 18, 2020) (September 2020 Order).

⁶ Case 15-M-0127 *et al.*, Notice Granting Extension Requests (issued January 22, 2020).

⁷ Case 15-M-0127 *et al.*, Notice Granting Extension Requests (issued April 7, 2020).

⁸ Case 15-M-0127 *et al.*, Notice Granting Extension Requests (issued July 14, 2020).

⁹ Case 15-M-0127 *et al.*, Notice Granting Extension Requests (issued February 4, 2021).

¹⁰ December 2019 Order, p. 108.

products must identify the percentage of renewable energy supplied in the contract and then retire RECs to match that corresponding load in the New York Generation Attributes Tracking System (NYGATS) in their Environmental Disclosure Program (EDP) subaccount.¹¹ This process, verified by Staff, ensures that New York State mass-market customers who choose to support renewable energy receive the contractually obligated loads upon which the ESCOs' ability to serve them is conditioned upon.

An annual renewable energy audit was conducted by Staff following the close of the 2022 Clean Energy Standard compliance year on June 30, 2023. Every ESCO who was given eligibility to market a renewable product was required to file a renewable audit response in Document and Matter Management (DMM) 22-00900 by June 15, 2023. Energy Plus filed its renewable audit response on June 8, 2023. The self-reported load data that was submitted on behalf of Energy Plus reported that 3,401 MWh of load was served on a voluntary compliant renewable product while 15,597 MWh of load was associated with a non-compliant voluntary renewable load product.¹² This prompted further investigation into the number of mass market customers being served on compliant products versus those who continued to be served on non-compliant legacy products that continued on a fixed term or month-to-month variable product following the April 16, 2021 effective date of the December 2019 Order.

Staff corresponded with Angela Schorr, the regulatory contact for Energy Plus from June 15, 2023, through November 16, 2023 (Appendix B) in this investigation. Staff requested a copy of an active 2022 customer contract on June 15, 2023, which was submitted on June 21, 2023. Referencing the renewable audit response that was previously submitted, Staff questioned the email response that was provided on July 5, 2023, which indicated that Energy Plus assessed a portion of its load to compliant voluntary renewable load, yet Ms. Schorr indicated that there were no new customer acquisitions in 2022 in an email response dated November 11, 2023. Ms. Schorr explained that "yes, we served some customers in 2022 that were signed up in 2021 on a compliant 50% renewable product. Additionally, as some customers' pre-market reset order rates were expiring, they renewed in 2022 onto a 50% renewable product.

In further review, the contract that was provided on June 21, 2023, was a renewal contract sent December 30, 2020, as a variable 100% renewable month-to-month contract with an effective date of February 23, 2021. The language in this contract specified that Energy Plus would purchase RECs produced by wind power generation facilities located in the United States to match 100% of your electricity usage. Since this was a month-to-month contract that should have transitioned to a compliant product after the effective date of the December 2019 Order, Staff requested confirmation that these RECs were included in the

¹¹ Only RECs retired in an ESCOs EDP subaccount are compliant with the December 2019 Order. Any other method(s) of retirement potentially subject an ESCO to an NOAV.

¹² Matter 22-00900, In the Matter of Renewable Energy Audits, filed June 8, 2023.

EDP compliant load data that was self-reported and on June 30, 2023. Ms. Schorr explained that “Those customers are included in the non-compliant load.” This assertion revealed that Energy Plus continued to serve customers on non-compliant electric products following the effective date of the December 2019 Order.

The Commission’s December 2019 Order required that any ESCO customers enrolled on a month-to-month contract, including those enrolled on a fixed-rate plan for electricity that shifted to a month-to-month contract at the expiration of the contract term, were required to be served going forward via a compliant renewable product based on Energy Plus’s revised eligibility following April 16, 2021, the effective date of the December 2019 Order. With respect to customers’ month-to-month contracts, the expiration of the agreement was at the end of the current billing period.¹³

Therefore, any Energy Plus customers served on month-to-month contracts were required to be returned to energy service provided by the utility or enrolled in a compliant product the month following the effective date of the new product restrictions, which was April 16, 2021. In apparent violation of the Commission’s Orders however, it appears that Energy Plus continues to serve mass-market customers on legacy agreements following the expiration of their current monthly term instead of transitioning these customers to compliant products after the April 16, 2021, effective date of the December 2019 Order.

In furtherance of the Department’s continuing investigation, Energy Plus Holdings LLC is directed to submit the following:

- 1) An explanation as to why Energy Plus failed to transfer its existing customers onto compliant products following April 16, 2021.
- 2) Documentation including signed/effective customer contracts to support its argument.
- 3) All contracts, if any, showing affirmative consent for all customers who were renewed in 2022 from expiring “pre-market reset order rates onto a 50% renewable product.

If Staff finds that Energy Plus’s reply to this NOAV is insufficient or in any way evidences a failure to comply with the UBP and the December 2019 Order, Staff may seek an Order to Show Cause from the Commission. Such Order to Show Cause may seek penalties and remedies, up to and including the possible revocation of Energy Plus’s eligibility to operate as an ESCO in the State of New York. Additionally, the Commission may choose to act on its own motion to begin a proceeding in response to the apparent violations of the UBP.

¹³ Case 12-M-0476, et al., Order Adopting Prohibition on Service to Low Income Customers by Energy Service Companies (issued December 16, 2016), p. 21; see also Nat’l Energy Marketers Ass’n v. New York State Pub. Serv. Comm’n, 167 A.D.3d 88,98,88 N.Y.S. 3d 259, 267 (3d Dept. 2018) (upholding Commission’s adoption and implementation of the prohibition on ESCO service to low-income customers).

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If Energy Plus has specific questions about the above noted findings, it should contact Kathleen O'Riley at Kathleen.oriley@dps.ny.gov. Staff requests that Energy Plus acknowledge receipt of this NOAV within 5 business days by contacting the Staff listed above. All responses to this NOAV letter should be submitted through the Document and Matter Management, or DMM, system under Matter Number 23-02400 within 10 business days.

Regards,



Richard Berkley, Director
Offices of Consumer Services
NYS Department of Public Service
3 Empire State Plaza
Albany, NY 12233

cc: Kathleen O'Riley DPS
Francis Dwyer DPS
Dennis DiBari DPS