



# Department of Public Service

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## Public Service Commission

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January 8, 2024

Mark Parsons  
Green Mountain Energy Corporation  
910 Louisiana Street  
Houston, TX  
[Mark.parsons@nrg.com](mailto:Mark.parsons@nrg.com)

### NOTICE OF APPARENT VIOLATION (NOAV)

Dear Mr. Parsons:

The New York Department of Public Service (Department) hereby notifies Green Mountain Energy Corporation (Green Mountain) of its apparent non-compliance with regulatory requirements. As summarized below, Green Mountain 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,<sup>1</sup> which required energy products to be used that Green Mountain did not offer then or now. Department Staff (Staff) requests that Green Mountain 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 revisions to the Uniform Business Practices (UBP) become effective."<sup>2</sup> The December 2019 Order, which due to extensions sought by ESCOs and granted by the Commission did not become completely

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<sup>1</sup> 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.

<sup>2</sup> December 2019 Order, pp. 109-110.

effective until April 16, 2021,<sup>3</sup> 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 serve 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.<sup>4</sup>

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.<sup>5</sup> 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,<sup>6</sup> April 7, 2020,<sup>7</sup> July 14, 2020,<sup>8</sup> and for a last time on February 4, 2021.<sup>9</sup> 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, Green Mountain filed its application to serve customers in New York pursuant to the December 2019 Order. Green Mountain proposed to offer a renewable product to residential and small commercial customers. On May 27, 2021, Staff issued a letter to Green Mountain granting eligibility to serve only a renewable energy product to mass market customers in New York State (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.<sup>10</sup> The Commission further required that all ESCOs offering renewable 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.<sup>11</sup> This process, verified by Staff, ensures

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<sup>3</sup> See notes 5-9 *infra*.

<sup>4</sup> December 2019 Order, p. 108.

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

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

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

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

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

<sup>10</sup> December 2019 Order, p. 108.

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

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. The self-reported renewable load data that was submitted on behalf of Green Mountain reported that 132,507 MWh of load was served on a voluntary compliant renewable product while 229,530 MWh of load was served on a non-compliant voluntary renewable product.<sup>12</sup> This prompted further investigation into the number of mass market customers being served on compliant products versus those customers who continued to be served on non-compliant legacy products that continued on a fixed term or month to month term following April 16, 2021, the effective date of the December 2019 Order.

Staff corresponded through email with Angela Schorr, the regulatory contact for Green Mountain, from June 15, 2023, through July 10, 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. In a follow up email to Staff's request for customer counts, on July 10, 2023, Ms. Schorr reported that Green Mountain had 43,013 variable and 839 fixed non-compliant legacy customers. By continuing to service customers on non-compliant variable rate month-to-month renewable electric contracts, Green Mountain has apparently violated the December 2019 Order.

Additionally, Staff examined gas migration reports and discovered that Green Mountain has continued to serve gas to residential and small commercial customers, despite not having eligibility to do so. In September 2020, the Commission indicated that the December 2019 Order did not exempt green gas products from the default guarantees savings rule.<sup>13</sup> Green Mountain filed a petition seeking an exemption from the guaranteed savings rule for a natural gas products bundled with carbon offsets or RECs as a value-added energy related product. In January 2021, the Commission denied the proposals but authorized a one-year limited waiver to permit "ESCOs currently selling natural gas bundled with either a carbon offset component or a REC purchase component to continue to market such eligible bundles to customers already purchasing them."<sup>14</sup>

On July 15, 2022, the Commission issued an Order denying a request for extensions of the waiver and directed that ESCOs shall, "within 120 days of the effective date of this Order, transfer residential customers served on a "green gas" product pursuant to a waiver to either: (1) a product that complies with the Commission's December 12, 2019 Order Adopting Changes to

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

<sup>13</sup> Case 15-M-0127 Order on Rehearing, Reconsideration, and Providing Clarification (issued September 18, 2022) (September 2020 Order), p. 39.

<sup>14</sup> Case 15-M-0127, et al., Order Addressing ESCO Petitions Requesting Authorization to Provide Additional Products and Services (issued January 25, 2021) (January 2021 Order) p. 21.

the Retail Access Energy Market and Establishing Further Process and the Commission's January 25, 2021 Order Addressing ESCO Petitions Requesting Authorization to Provide Additional Products and Services; or (2) full utility service. Such transfers shall occur upon expiration of the current contract term with the customers and on customers' regularly scheduled meter ready dates, consistent with the discussion in the body of this Order."<sup>15</sup>

To date, Green Mountain continues to serve over 2,500 mass market gas customers in Consolidated Edison Company of New York, Inc., and The Brooklyn Union Gas Company d/b/a National Grid NY territories according to migration data. Green Mountain is only eligible to market an electric renewable product. Consistent with Ordering Clause 2 of the July 15, 2022, Waiver Order, Green Mountain was directed to transfer these gas customers to a product that complies with the Commissions December 2019 Order or drop them back to utility service, which did not occur. Such non-compliant gas service presumptively subjects Green Mountain to an NOAV for non-compliant service.

Ordering Clause 2 of the December 2019 Order clearly states: "effective 60 calendar days from the date of this Order, any mass-market customer contract for a fixed rate commodity service that is subject to automatic renewal shall be renewed by the ESCO only as a contract for variable-rate, commodity-only service that includes a guaranteed savings over the utility price, unless the ESCO obtains affirmative customer consent to renew the contract as a fixed-rate contract that is priced at no more than 5% greater than the trailing 12-month average utility supply rate."<sup>16</sup> Since Green Mountain was never issued eligibility to market or serve a gas product to mass market customers following the December 2019 Order, it appears to be in violation of the 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 Green Mountain'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 is at the end of the current billing period.<sup>17</sup>

Therefore, any Green Mountain 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 Green Mountain continues to serve mass-market customers on legacy agreements following the

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<sup>15</sup> Case 15-M-0127, Order Regarding Energy Service Company Waivers, (issued July 15, 2022) (Waiver Order), p. 19, Ordering Clause 2.

<sup>16</sup> December 2019 Order, p. 108.

<sup>17</sup> 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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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, Green Mountain Energy Corporation is directed to submit the following:

- 1) An explanation as to why Green Mountain failed to transfer its existing renewable electric customers onto compliant products following April 16, 2021.
- 2) Documentation including signed/effective customer contracts to support its argument.
- 3) Proof that all mass market gas customers remain on a compliant fixed term contract by submitting copies of all current customer contracts.

If Staff finds that Green Mountain'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 Green Mountain'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.

If Green Mountain has specific questions about the above noted findings, it should contact Kathleen O'Riley at [Kathleen.oriley@dps.ny.gov](mailto:Kathleen.oriley@dps.ny.gov). Staff requests that Green Mountain 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 23-02405 within 10 business days.

Regards,



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cc: Kathleen O'Riley DPS  
Francis Dwyer DPS  
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