



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

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January 8, 2024

Mark Eddings
Direct Energy Services LLC
910 Louisiana Street
Houston, TX 77002
Mark.eddings@nrg.com

NOTICE OF APPARENT VIOLATION

Dear Mr. Eddings:

The New York State Department of Public Service (Department) hereby notifies Direct Energy Services LLC (Direct Energy) of its apparent non-compliance with regulatory requirements. As summarized below, Direct Energy 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 requires that only certain energy products be offered to mass market customers that Direct Energy did not offer then and does not offer now. Department Staff (Staff) requests that Direct Energy 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."² The December 2019 Order, which due to

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).

² December 2019 Order, pp. 109-110.

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 follow. 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 June 16, 2020, Direct Energy began submitting documents for its revised application to serve customers in New York pursuant to the December 2019 Order. Direct Energy proposed offering a renewable electric product, a guaranteed savings product, and a fixed-rate product with a 5% cap. On April 15, 2021, Staff issued a letter to Direct Energy granting partial eligibility to serve a guaranteed savings product for electric-only service in Consolidated Edison of New York, Inc.'s (Con Edison) utility territory, as well as a renewable product and a fixed-rate product with a cap to gas and electric mass market customers in New York State (Appendix A), and declining to provide eligibility for Direct Energy to continue to provide any 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 products must identify the percentage of renewable energy supplied in the contract and then retire RECs to match that

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.

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. Direct Energy filed its renewable audit response on June 8, 2023. In that response, the total New York load reported for 2022 was 561,944 MWh. The self-reported voluntary renewable load associated with a portion of that load for compliant renewable products was 583 MWh, while the voluntary non-compliant renewable load was 4,850 MWh.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 April 16, 2021, the effective date of the December 2019.

Staff corresponded through email with Angela Schorr, the regulatory contact for Direct Energy from June 15, 2023, through November 15, 2023 (Appendix B) in this investigation. Staff requested a copy of an active 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 November 15, 2023, Ms. Schorr identified 4,254 customers remained on fixed-term contracts and 36,940 customers remained on non-compliant month-to-month contracts, all legacy contracts executed prior to April 16, 2021. On November 8, 2023, Ms. Schorr confirmed that none of these customers were being served on a renewable product (Appendix B).

Further investigation by Staff revealed that Direct Energy filed an annual guaranteed savings report on November 11, 2022, indicating that Direct Energy had eligibility to serve a guaranteed savings product (GSP) only in Con Edison territory but did not serve any customers on this product from April 16, 2021, through September 30, 2022.¹³ Again, on November 2, 2023, Direct Energy filed its annual guaranteed savings product report and indicated that it did not serve any customers on a GSP from October 1, 2022 through September 30, 2023.¹⁴ Since Direct Energy did not serve customers on a renewable product or a GSP, Staff contends that the majority of Direct Energy's customers were served on non-compliant month to month contracts following the effective date of the December 2019 Order, which apparently violated the December 2019 Order.

Additionally, Staff did an examination of gas migration reports and discovered that Direct Energy has continued to serve gas to over 13,000 mass market gas customers across every

¹¹ 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.

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

¹³ Matter 22-01680, In the Matter of ESCO Annual Guaranteed Savings Reports, filed November 14, 2022.

¹⁴ Matter 23-02258, In the Matter of ESCO Annual Guaranteed Savings Reports, filed November 2, 2023

utility in New York State, despite only being eligible to serve a renewable electric product after April 16, 2021. Such gas service presumptively subjects Direct Energy 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.”¹⁵ Since Direct Energy was given eligibility to market a fixed-rate with cap product to mass market customers, Staff is concerned that customers who were being served on a month to month contract prior to the April 16, 2021, effective date of the December 2019 Order, were not transitioned to the fixed-term with cap product requiring affirmative customer consent, which would be a violation of the December 2019 Order. Therefore, Staff contends that Direct Energy did not transition any existing customer to compliant products after April 16, 2021, 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 product. In Direct Energy’s case, compliance would require the offering of products consistent with the revised eligibility granted by Staff 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.¹⁶

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

- 1) An explanation as to why Direct Energy 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) Proof that all mass market gas and electric customers who were not served on a renewable or GSP product were transitioned to a fixed rate with a 5% cap product and provided affirmative consent after April 16, 2021.

If Staff finds that Direct Energy’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

¹⁵ December 2019 Order, p. 108.

¹⁶ 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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remedies, up to and including the possible revocation of Direct Energy'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 Direct Energy has specific questions about the above noted findings, it should contact Kathleen O'Riley at Kathleen.oriley@dps.ny.gov. Staff requests that Direct Energy 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 23-02403 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