



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

Public Service Commission

Rory M. Christian
Chair and
Chief Executive Officer

Diane X. Burman
James S. Alesi
John B. Howard
David J. Valesky
John B. Maggiore
Commissioners

January 8, 2024

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

NOTICE OF APPARENT VIOLATION

Dear Mr. Gardner:

The New York Department of Public Service (Department) hereby notifies Energy Plus Natural Gas LLC (EPNG) of its apparent non-compliance with regulatory requirements. As summarized below, EPNG apparently failed to return mass market gas customers back to the incumbent utility service 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 Department Staff (Staff) requests that EPNG acknowledge receipt of this NOAV letter within 5 business days and respond to this NOAV letter within 10 business days.

Ordering Clause 6 instructs, "Energy 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 became effective April 16,

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) Pg. 23.

² December 2019 Order pp. 109-110.

2021, 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.³

On November 16, 2020, EPNG filed an application to serve a gas product to customers in New York State pursuant to the December 2019 Order. Staff exchanged emails with Angela Schorr, regulatory contact for EPNG, working through the application process January through March of 2021. On January 22, 2021, Staff emailed Ms. Schorr to inquire as to the status of the sales agreement which was part of its December 2019 Order revised application. On February 1, 2021, Ms. Schorr indicated that EPNG was still working on product options for Energy Plus Natural Gas and would update Staff as soon as possible.

However, on February 9, 2021, EPNG submitted an attestation into Document & Matter Management (DMM) Matter 19-02972. The attestation, which was signed by Mike Starck, Vice President, stated that EPNG was withdrawing its application pursuant to the December 2019 Order and in Clause 5 of the attestation stated further that: “EPNG Natural Gas affirms further that it does not presently intend to continue to renew contracts with customers in New York and/or enroll customers in New York following the April 16, 2021 effective date of the September 18, 2020 Order or as extended.”⁴ In addition to affirmatively stating that it would withdraw from serving mass market customers, EPNG also affirmatively acknowledged that if “at some future time ... [it chose to] renew contracts with customers in New York and/or enroll new customers in New York, that it must apply to the Department for the privilege to do so.”⁵

Staff examined EPNG’s gas migration reports and discovered that EPNG Plus has continued to serve over 1,300 mass market gas customers across the service territories of Consolidated Edison Company of NY, The Brooklyn Union Gas Company d/b/a National Grid, Natural Fuel Gas Distribution Corporation, New York State Electric and Gas Corporation, and Orange and Rockland Utilities, Inc. in New York State, Staff reviewed all sales agreements submitted for review on behalf of EPNG, and the most recent sales agreement submitted prior to the December 2019 application process, was for a month-to-month variable rate product that was submitted as part of its Triennial compliance filing

³ December 2019 Order, P. 108.

⁴ Attestation Letter Matter 19-02972 In the Matter of Revised ESCO Applications in Compliance with Commission Order in Case 15-M-0127 et al. Issued and Effective December 12, 2019, filing submitted February 9, 2021, (Attestation Letter).

⁵ Attestation Letter, Clause 6.

submitted October 7, 2019.⁶ Staff found no evidence of any fixed term contracts filed on behalf of EPNG prior to the implementation of the December 2019 Order. Therefore, Staff asserts that EPNG may have violated the December 2019 Order by failing to return mass market gas customers to the incumbent utility at the end of the monthly term of their contracts.

Ordering Clause 2 of the December 2019 Order clearly states “ effective 60 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 consent to renew the contract as a fixed-rate contract that is priced at no more than 5% greater than the trailing average utility supply rate.”⁷ Since EPNG 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.

Moreover, 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 gas that shifted to a month-to-month contract at the expiration of the contract term, were required to be served via a compliant product following the effective date of the December 2019 Order, which was April 16, 2021. With respect to customers’ month-to-month contracts, the expiration of the agreement is at the end of the current billing period.⁸ Thus, any customers served on month-to-month contracts were required to be returned to utility service or enrolled in a compliant product the month following the effective date of the new product restrictions, which was April 16, 2021.

EPNG opted out of serving mass market customers in its attestation submitted in lieu of submitting a revised application following the December 2019 Order. Therefore, it appears that EPNG knowingly continued to serve mass-market customers on legacy agreements following the expiration of their current monthly term – despite EPNG’s February 2021 Attestation Letter -- instead of dropping these customers back to utility service after the December 2019 Order’s product restrictions went into effect on April 16, 2021.

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

⁶ Matter 14-02554 In the Matter of Compliance with Annual, Triennial and Third Party Marketer/Vendor Listing, filed October 7, 2019.

⁷ December 2019 Order, p. 108.

⁸ 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).

1) An explanation as to why EPNG failed to drop all mass market gas customers back to utility service at the expiration of the contract term.

2) Documentation including signed/effective customer contracts supporting is arguments.

3) Proof that all mass market gas customers currently served remain on a legacy fixed term contract executed prior to April 16, 2021, by submitting copies of all current customer contracts.

If Staff finds that EPNG'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 EPNG's eligibility to operate as an ESCO in the State of New York. Additionally, the Commission may always act on its own motion to begin a proceeding in response to the apparent violations of the UBP.

If EPNG has specific questions about the above noted findings, it should contact Kathleen O'Riley at Kathleen.oriley@dps.ny.gov. Staff requests that EPNG 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 23-02402 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