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Upendra Chivukula
Commissioner

Bob Gordon
Commissioner

DATE: December 2, 2020
TO: Each New Jersey Licensed Third Party Supplier
RE: In The Matter of the Cease and Desist and Refund Instructions Letter of January 22, 2019 to Third Party Suppliers; Docket No. EO20100654

On January 22, 2019, in response to complaints filed with the Board of Public Utilities (the "Board"), Board Staff issued a letter to all Third-Party Suppliers ("TPSs") licensed to sell retail electricity in the State of New Jersey, interpreting the Board's rules regarding changes to a fixed price for electricity during the term of the contract, without the customer's prior authorization (the "January 22 Letter"). A copy of the January 22 Letter is appended hereto.

Background:

The January 22 Letter advised that, pursuant to N.J.A.C. 14:4-7.12, any contract to sell electricity at rates characterized as "fixed" or "firm", "not variable" or other similar language (collectively referred herein as a "fixed rate"), could not be increased during the pendency of the contract, without the customer's affirmative consent, as permitted in N.J.A.C. 14:4-7.6(l). The January 22 Letter set forth Staff's view that changes to the solar carve-out in the 2018 solar renewable portfolio standard law, P.L. 2018, c. 17 ("2018 Solar RPS Law"), were not an acceptable justification for charging more than the fixed rate.

Remedy:

In an effort to resolve this matter, Staff has developed a pathway for TPSs to reach resolution and to close out the matter by certifying that they have substantively complied with the terms of this subsequent Secretary's Letter. Entities wishing to discuss options for substantive compliance are encouraged to contact Lanhi Saldana at Lanhi.Saldana@bpu.nj.gov.

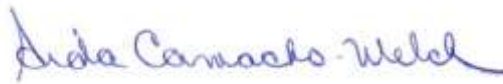
TPSs who charged customers a rate that was higher than the fixed rate, without the customer's affirmative consent, including because of the charges associated with the 2018 Solar RPS Law, hereinafter referred to as "2018 Solar RPS Costs", may be released from further obligations associated with the January 22 Letter, if they certify that they have taken the following actions:

1. For any contracts that remain in effect, refrain from collecting additional 2018 Solar RPS Costs from New Jersey residential customers or small commercial customers (defined as those who utilized 11,000 kWh or less per year and hereinafter referred to as "SCC");
2. Provide a refund to all qualifying residential customers and SCC as follows:
 - a. TPSs shall place an electronic banner on the main page of its website for residential customers or SCC, which will appear when the webpage is accessed by a New Jersey IP address, that will inform the customer that they may be eligible for a refund of 2018 Solar RPS Costs. The electronic banner will act as a hyperlink to a webpage where the customer may submit information to determine whether the customer is eligible for a refund of the 2018 Solar RPS Costs. For identification purposes, the residential or SCC customer must supply information that includes, but is not limited to, the name, address, telephone number, and e-mail address of the account holder. The customer may, but is not required to, provide the account number against which the 2018 Solar RPS Costs were billed. The electronic banner shall appear on the TPSs' website within sixty (60) business days from the date of this Notice and remain on the TPSs' website and available to SCC or residential customers for a period of thirty (30) calendar days after the banner first appears. TPSs shall take all reasonable measures to ensure the webpage and any associated hyperlinks upon which the residential customer or SCC is relying to make a request for a refund is fully functional and operating within the TPSs' control. TPSs shall address any technical issues within a reasonable period of time once notified of any technical difficulties experienced by any residential or SCC customer seeking information about a refund.
 - b. Once the residential customer or SCC has been identified as a customer of the TPS, the TPS shall review the customer's account status, contract terms, and usage in order to determine the customer's eligibility for a refund of the 2018 Solar RPS Costs and calculate the potential refund within a reasonable period of time. The TPSs shall not unreasonably delay or cause delays in making timely evaluations of the residential or SCC customer's eligibility for a refund. The evaluation shall consider objectively verifiable metered data in determining the customer's eligibility.
 - c. In order for a residential customer or SCC to receive a refund, if eligible, the residential or SCC customer must be in good standing with the TPS. If the residential or SCC customer owes any sum to the TPS, any refund due to the residential or SCC customer shall first be deducted from the customer's outstanding balance and any remaining refund shall be issued as set out in section (d) below.
 - d. If a residential or SCC customer is eligible for a refund, the TPS shall issue a check to the residential or SCC customer and mail same to the residential or SCC customer's address on record within sixty (60) days from the date eligibility was determined.
 - e. Upon the expiration of the thirty (30) days of the electronic banner appearing on the main page of the TPSs' webpage, TPSs shall send a letter to the Director of Energy of the Board within ten (10) days detailing the actions taken by the TPS to comply with this Notice. Additionally, the letter shall include the number of

customers who sought a refund, the number of customers deemed ineligible and the reasons for the ineligible classification, the number of refunds actually issued and pending, the dates and amounts of the refunds or projected refunds, and all other information that may be relevant in the Board's evaluation of compliance by the TPS.

- f. TPSs are not required to take any additional actions related to non-residential customers, other than those described above as SCC.

TPSs seeking to opt into this settlement may notify the Secretary of the Board of their intent to comply by sending a letter to board.secretary@bpu.nj.gov, which will be placed into the public record of this docket. Those who complete compliance with the foregoing requirements will thereafter be released from the January 22 Letter.



Aida Camacho-Welch
Secretary of the Board

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CEASE AND DESIST AND REFUND INSTRUCTION

January 22, 2019

TO: Each New Jersey Licensed Third Party Supplier

RE: Increase to Fixed Rates – P.L. 2018, c. 17

It has come to Staff's attention that following the passage of P.L. 2018, c. 17, which increased the renewable portfolio standards, there are instances where New Jersey Third Party Suppliers ("TPSs") violated the Board's Energy Competition regulations when they charged a higher rate than the fixed price in the customer's contract. The TPSs increased their fixed rates, either by increasing the fixed rate or by adding a new charge to the customer's bill. This letter serves as a reminder to all TPSs of their obligations to comply with the Board's Energy Competition rules, which prohibit a TPS from changing a fixed price during the term of the contract without the customer's authorization.

Moreover, if your company has increased or charged the customer a rate that is higher than the fixed rate during the period for which the rate was fixed, you are hereby notified that your company is in violation of N.J.A.C. 14:4-7.12. If this is the case, you are instructed to **cease and desist** charging these customers a rate higher than the rate for which they contracted with your company. Further, you are instructed to **refund** to each of these customers the amount that your company charged the customer in excess of the amount it would have charged the customer had the increase not been implemented. You are instructed to complete these refunds within five weeks of the date of this letter.

Pursuant to N.J.A.C. 14:4-7.12, if a TPS signs up a customer or renews a customer for a rate that the TPS characterizes as "fixed" or "firm," or the TPS uses other language to describe the rate as not variable, the TPS may not charge the customer a rate that is higher than the fixed rate during the period for which it is fixed, except as permitted in N.J.A.C. 14:4-7.6(l), without the customer's affirmative consent. N.J.A.C. 14:4-7.6(l) states:

The contract may not include provisions (sometimes referred to as "material change notices") that permit the TPS to change material terms of the contract without the customer's affirmative authorization unless the change is required by

operation of law. "Material terms of a contract" include, but are not limited to, terms regarding the price, deliverability, time period of the contract, or ownership of the gas or electricity. . . . Changing the price to reflect a change in the Sales and Use Tax or other State-mandated charge would be permitted as a change required by operation of law.

The rulemaking history of N.J.A.C. 14:4-7.6(l) is instructive to the facts in this matter. Some commenters noted that in addition to a change in sales taxes, a TPS's costs can be affected by a federal or state requirement that increases its costs. As an example, they cited "A2966/S1925 [P.L. 2012, c. 24], a statute that imposes new, costly, solar renewable energy requirements on each TPS." The commenters stated that the TPS must be able to adjust their pricing to account for these changes. In rejecting the comments, the Board stated:

A TPS may experience increased costs during the time period covered by a contract and wish to increase fixed price customer contracts to recoup these costs. However, for many customers, this would defeat the purpose of a fixed price contract. Customers who choose fixed priced contracts do so in order to avoid price risk. . . .

Regarding the inclusion of Federal or local mandates in the definition of "non-material," the Board notes that the basis for the exception for State taxes lies in the ability of the State to collect these taxes directly from the customer if not collected by the TPS. Allowing other mandated charges to be included changes the contract from a fixed rate benefiting the customer to a variable rate benefitting the TPS.

[45 N.J.R. 934(b)]

As noted by the above text, TPSs are required by law to collect sales and use taxes from customers and pursuant to N.J.S.A. 54:32B-14, "all sellers of energy or utility service shall include the tax imposed by the "Sales and Use Tax Act" within the purchase price of the tangible personal property or service." TPSs are not required by operation of law to change the prices that they charge to their customers as a result of P.L. 2018, c. 17. Therefore, the fact that a TPS may incur an increase in its costs as a result of P.L. 2018, c. 17 does not permit the TPS to increase fixed rates under N.J.A.C. 14:4-7.6(l), without the customer's affirmative consent.

If your company has increased a rate for electric generation or gas supply service that it has characterized as "fixed" or "firm," or your company has used other language to describe the rate as not variable, and you have charged the customer a rate that is higher than the fixed rate during the period for which the rate was fixed, you are hereby notified that your company is in violation of N.J.A.C. 14:4-7.12. If this is the case, you are instructed to **cease and desist** charging these customers a rate higher than the rate for which they contracted with your company. Further, you are instructed to **refund** to each of these customers the amount that your company charged the customer in excess of the amount it would have charged the customer had the increase not been implemented. You are instructed to complete these refunds within five weeks of the date of this letter.

Finally, you are instructed to send a letter to me by no later than **March 1, 2019** detailing the actions your company has taken to remedy this situation. This letter shall include at a minimum, the number of customers affected, the amounts of the refunds, and the dates of the refunds.

Sincerely,

A handwritten signature in black ink that reads "Stacy Peterson". The signature is written in a cursive style with a long horizontal line extending to the right.

Stacy Peterson
Director