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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 flourish at the end.

Stacy Peterson
Director