

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT

VT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

2014 MAR 28 P 4:03

In Re: IRVING ENERGY

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CIVIL DIVISION

Docket No. _____

ASSURANCE OF DISCONTINUANCE

FILED

The State of Vermont, by and through Vermont Attorney General William H. Sorrell, and Highlands Fuel Delivery, LLC (“Irving” or “Respondent”), hereby enter into this Assurance of Discontinuance (“AOD”) pursuant to 9 V.S.A. § 2459

Background

Irving Energy

- 1 Highlands Fuel Delivery, LLC d/b/a/ Irving Energy Distribution and Marketing, d/b/a Irving Energy, is a Maine limited liability company whose headquarters are located at 190 Commerce Way, Portsmouth, NH 03801 Irving’s operations include the retail marketing, sale and distribution of heating oil, propane and diesel to homes and businesses in Maine, Vermont, and New Hampshire.
2. Irving is one of the largest propane suppliers in Vermont.

Regulatory Framework

- 3 Pursuant to 9 V.S.A. § 2461b, the Vermont Attorney General’s Office has enforcement and rulemaking authority to promote business practices which are uniformly fair to sellers and to protect consumers concerning propane gas. Vermont Consumer Protection Rule 111 for liquefied petroleum (“propane”) was amended in 2009, effective on January 1, 2010 (“2010 CP 111”), and amended again in 2011, effective on January 1, 2012 (“CP 111”).

4. CP 111 16(a) requires a propane gas seller at the time of disconnection or termination to, “refund the consumer, within 20 days of the date when the seller disconnects propane service or is notified in writing that the seller’s equipment is no longer connected, whichever is earlier” (1) the amount paid by the consumer for any propane remaining in the storage tank, less any payments due the seller from the consumer; or (2) the amount paid by the consumer for 80 percent of the seller’s best reasonable estimate of the quantity of propane remaining in the tank, less any payments due from the consumer, if the quantity of propane remaining in the storage tank cannot be determined with certainty. The seller shall refund the remainder of the amount due as soon as the quantity of propane left in the tank can be determined with certainty, but no later than 14 days after the removal of the tank or restocking of the tank at the time of reconnection.” *See also* 9 V.S.A. § 2461b(e)(2)(A)-(B) and 2010 CP 111.18(b).
5. Beginning May 25, 2011, 9 V.S.A. § 2461b(e)(4) required a propane seller to pay a penalty to consumers of \$250 on the first day after the refund was due plus \$75 per day for each day thereafter until the refund and penalty were mailed or delivered, for failure to issue a timely refund. *See also* CP 111 16(c)(1). As of July 1, 2013, 9 V.S.A. § 2461b(e)(4)(B) limits the total penalty to be paid to consumers under that provision to not more than ten times the amount of the refund. Prior to May 25, 2011, there was no statutorily prescribed consumer penalty amount for refund delays.
6. CP 111 15(a) requires a propane seller to remove any storage tank that it owns at the consumer’s request within 20 days for an aboveground tank (30 days in the

case of an underground tank) or as soon as weather and access to the tank allow, provided, however, that the customer's request must be in writing if the tank was disconnected by someone other than the seller *See also* 2010 CP 111 18(a). As of July 1, 2013, 9 V.S.A. § 2461b(h)(1) requires a propane seller to remove a storage tank within 20 days (30 days in the case of an underground tank) of the earliest of the following dates: (A) the consumer's request for service termination; (B) the seller's disconnection of propane service; or (C) written notification from the consumer that service has been disconnected. If a consumer schedules a specific pick-up date, as of July 1, 2013, 9 V.S.A. § 2461b(h)(2) requires the seller to remove the tank within 10 days of the specific date (or the period of subsection (h)(1), whichever is later).

7. As of July 1, 2013, 9 V.S.A. § 2461b(h)(3) requires a propane seller to pay a penalty to consumers of \$250 on the first day after the tank should have been removed plus \$75 per day for each day thereafter until the penalty is mailed or delivered, provided, however that the total penalty to be paid to consumers under (h)(3)(b) cannot exceed \$2,000, for failure to remove a tank in accordance with the timeframes. Prior to July 1, 2013, there was no statutorily prescribed consumer penalty amount for tank removal delays.
8. A violation of CP 111 constitutes an unfair and deceptive trade act and practice in commerce under Vermont's Consumer Protection Act, 9 V.S.A. § 2453(a), as provided by CP 111.01

9. Violations of the Consumer Protection Act are subject to a civil penalty of up to \$10,000.00 per violation of the Consumer Protection Act. 9 V.S.A. § 2458(b)(1).
10. Jurisdiction over this AOD and venue is pursuant to 9 V.S.A. §§ 2458-59 and applicable law.

Facts

- 11 Since January 1, 2010, thirteen (13) Vermont consumers have complained to the Attorney General's Office, Consumer Assistance Program ("CAP") regarding delays in service termination (tank removal and refund checks). Irving has responded to those complaints, most of which have been resolved through the CAP process.
12. Between January 1, 2010 and October 10, 2012, Irving identified 79 Vermont consumers who did not receive a refund check within the timeframes prescribed in ¶ 4.
- 13 Between January 1, 2010 and October 10, 2012, Irving identified 118 Vermont consumers who terminated service with Irving and had tanks on their premises that were not removed within the timeframes prescribed in ¶ 6.

The State's Allegations

14. The Vermont Attorney General's Office alleges the following violations of the Consumer Protection Act and Rules.
 - a. The failure to reimburse Vermont consumers for unused gas remaining in the tank following disconnection or termination of service within the

required timeframe is a violation of CP 111 16(a), 9 V.S.A. § 2461b(e)(2), and 2010 CP 111 18(b); and

- b. The failure to remove storage tanks, without apparent justification, within the required timeframe is a violation of CP 111 15(a) and 2010 CP 111 18(a).

15 The State of Vermont alleges that the above behavior constitutes unfair and deceptive acts and practices under 9 V.S.A. § 2453

Assurances and Relief

In lieu of instituting an action or proceeding with litigation, the Attorney General and Irving are willing to accept this AOD pursuant to 9 V.S.A. § 2459. Agreeing to the terms of this AOD for purposes of settlement does not constitute an admission by Irving to a violation of any law, rule, or regulation. Accordingly, upon execution of the AOD, the parties agree as follows:

Injunctive Relief

16 Irving shall comply with this AOD and all applicable Vermont laws and regulations, including but not limited to the Vermont Consumer Protection Act, 9 V.S.A., Chapter 63, and CP 111, as the same may from time to time be amended.

17 Within 20 days of the date when Irving disconnects propane service or is notified by the consumer in writing that service has been disconnected, whichever is earlier, Irving shall refund to the consumer (by cash, check, or the same method or manner used by the consumer to make payments, per CP 111 16(b)).

- a. The amount paid by the consumer for any propane remaining in the storage tank, less any payments due Irving from the consumer; or
- b. Refund the amount paid by the consumer for 80 percent of Irving's best reasonable estimate of the quantity of propane remaining in the tank, less any payments due from the consumer, if the quantity of propane remaining in the storage tank cannot be determined with certainty Irving shall refund the remainder of the amount due as soon as the quantity of propane left in the tank can be determined with certainty, but no later than 14 days after the removal of the tank or restocking of the tank at the time of reconnection.
- c. Refunds shall not be provided in the form of a credit to a customer's existing account with Irving unless specifically requested or agreed to by the customer.

18. Irving shall remove propane storage tanks within 20 days of the date on which the consumer requests disconnection or the date on which Irving receives a written notice from the consumer that the tank has been disconnected. For an underground tank the removal time period will be 30 days. If weather or other conditions not caused by Irving do not allow for tank removal within the prescribed time period, tank removal will occur as soon as weather and access to the tank allow; provided however, that Irving shall not claim the need for special equipment or extra manpower as a basis for a delay, unless weather or access conditions require such special equipment or manpower. If a consumer

schedules a specific tank pick-up date, Irving shall remove the tank within 10 days of the specific date (or within any other period allowed by law).

- 19 For a period of one year from and after the date of this AOD, Irving shall document its compliance with CP 111 by recording the dates and manner that:
- (a) a consumer requests termination of service;
 - (b) the consumer's propane tanks are disconnected or removed (if known); and
 - (c) the consumer's refund is issued.
20. Irving shall prepare reports to the Attorney General's Office, documenting its handling of all service terminations since the date of this AOD, including but not limited to, the dates and manner that: (a) the consumer requested service termination; (b) gas tanks were disconnected or removed, whichever is earlier; and (c) refunds were issued. If there are delays in terminating service (i.e., beyond the allowable timeframes), Irving shall document the reason(s) for the delay(s). Such reports and documentation shall be prepared every 90 days after execution of this AOD for one year, for a total of four reports. Irving may submit the reports up to 30 days after the end of each 90-day reporting period.

Payments to Consumers

- 21 Within 60 days of signing this AOD, Irving shall pay to each of the 56 consumers identified in ¶ 12 who received a refund check after May 25, 2011, \$250 plus \$75 per day for each day after the first 21 days after termination until the date that the refund check was issued, with the per-day penalty amounts generally being limited to the greater of 10 times the refund amount or \$2,250, for a total of \$78,188.80 paid to these consumers; and to each of the 23

consumers identified in ¶ 12 who received a refund check before May 25, 2011, Irving shall pay \$250 each, for a total of \$5,750 paid to these consumers.

22. Within 60 days of signing this AOD, Irving shall pay to each of the 118 consumers identified in ¶ 13 whose propane tank was removed after the prescribed removal period. \$500 for any removal period up to 30 days; \$1,000 for any removal period up to 60 days; \$1,500 for any removal period up to 90 days; and \$2,000 for any removal period greater than 90 days; for a total of \$82,000 paid to these consumers.
23. For any of the 197 consumers who receive a payment pursuant to this AOD, Irving shall send a letter from the Attorney General (Exhibit A), along with the applicable explanatory letter from Irving (Exhibit B and/or C) and the consumer's payment, in an envelope provided by the Attorney General's Office.
24. Within 60 days of signing this AOD, Irving shall send to the Attorney General's Office a list (in electronic Excel spreadsheet) of all consumers to whom consumer restitution payments were mailed, including, for each consumer, contact information, the amount paid, and an indication of which explanatory letter was sent.
25. In the event that Irving is not able to locate consumers to whom any payments are owed and no later than 120 days after signing this AOD, Irving shall mail to the Attorney General's Office:
 - a. A single check, payable to "Vermont State Treasurer" in the total dollar amount of all checks that were returned as undeliverable or that otherwise went uncashed because the consumer could not be located, all

to be treated as unclaimed funds, under Vermont's unclaimed property statute, Title 17, Vermont Statutes Annotated, Chapter 14,

- b. A list, in electronic Excel format, of the consumers whose checks were returned or were not cashed (which list shall set out the first and last names of the consumers in distinct fields or columns), and for each such consumer, the last known address and consumer restitution amount; and
- c. The company's corporate address and federal tax identification number

26. Subject to any applicable limitations period, Irving agrees to consider claims presented by any Vermont consumer not among the 197 identified consumers who believes he or she experienced an impermissible delay in tank removal or refund check processing between January 1, 2010 and October 10, 2012. For these consumers, Irving shall review each complaint within 20 days. In the event the consumer demonstrates that the refund or tank pick-up was untimely under Vermont law (a) for a refund delay, Irving shall pay the penalty per the terms of this AOD; (b) for a tank delay, Irving shall pay a penalty per the terms of this AOD; and (c) if Irving disputes that any penalty is owed, Irving shall send a written explanation to the consumer as to why it believes no penalty is owed, and shall include a statement that the consumer may contact the Consumer Assistance Program at (802) 656-3183 or consumer@uvm.edu, if the consumer disagrees.

Payment to the State of Vermont

27 Within 60 days of signing this AOD, Irving shall pay to the State of Vermont \$100,000 in civil penalties and costs. Payment shall be made to the "State of

Vermont” and shall be sent to the Vermont Attorney General’s Office at the following address: Justin E. Kolber, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609

28. Within 60 days of signing this AOD, Irving shall pay to the Vermont Low Income Home Energy Assistance Program (“LIHEAP”) \$160,000. Payment shall be made via the Vermont Department for Children and Families, Economic Services Division, Fuel Assistance, 103 South Main Street, Waterbury, Vermont 05671. A copy of the cover letter for this payment shall be sent to the Attorney General’s Office.

Reporting

29. Irving shall submit the reports described in ¶ 20 above.
30. Irving shall submit a copy of any written consumer complaint that it receives on or after the date of this AOD that pertains to any matter in this AOD as well as the company’s response for a period of one year from the date of this AOD. Such written consumer complaints shall be submitted to the undersigned Assistant Attorney General within 20 days of receipt.

Other Terms

31. This AOD shall be binding on Irving and its successors and assigns. Irving shall promptly take reasonable steps to ensure that copies of this document are provided to its officers and directors.
32. Acceptance of this AOD by the Vermont Attorney General’s Office shall not be deemed approval by the Attorney General of any of the practices or procedures

of Irving not required by this AOD, and Irving shall make no representation to the contrary

33. This AOD resolves all existing claims that the State of Vermont may have against Irving stemming from the conduct described in this document as of October 10, 2012, provided, however, that nothing herein waives the Attorney General's right to assert and prove any violations of law unrelated to the conduct described in this AOD.
- 34 Nothing in this AOD waives the right of any consumer to pursue claims stemming from the conduct described in this document; excepting, however, any consumer who accepts a check provided pursuant to this AOD and does not return it to Irving within 90 days shall waive any claim regarding delayed refund checks and tank removals.
- 35 Any notice related to this AOD shall be given to Irving at:
- a. Irving Energy Distribution and Marketing, Attn. U.S Legal Affairs, 190 Commerce Way, Portsmouth, New Hampshire 03801, and
 - b. Mark P Snow, Perkins Thompson, P.O. Box 426, Portland, ME 04112-0426; and
 - c. Such other address as Irving may from time to time designate.
36. Communications and notices related to this AOD shall be given to the Attorney General's Office to the undersigned Assistant Attorney General listed below
- 37 In the event that the Attorney General believes that Irving has violated any terms of this AOD, the Attorney General may pursue any remedies available under 9 V.S.A. Chapter 63

38. In the event that the Attorney General's Office receives a request for disclosure of any of the information described or referenced in this AOD, the Attorney General and/or State of Vermont shall promptly notify Irving to permit it to take any steps it may deem necessary to prevent disclosure. If the Attorney General or State of Vermont is required to disclose any information described in this AOD to any third party, it shall promptly notify Irving.

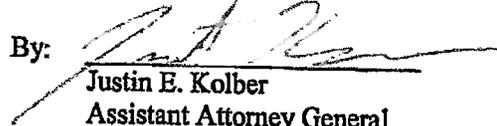
*** SIGNATURES APPEAR ON NEXT PAGE ***

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

DATED at Montpelier, Vermont this 20th day of March, 2014

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 
Justin E. Kolber
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-5620
jkolber@atg.state.vt.us

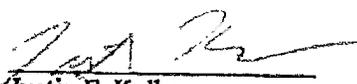
DATED at Portsmouth NH, this 28 day of March, 2014

IRVING ENERGY

By: 
Its Authorized Agent

Gregory B. Portras, Secretary
Name and Title of Authorized Agent

APPROVED AS TO FORM


Justin E. Kolber
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

For the State of Vermont


John A. Hobson
Perkins Thompson
One Canal Plaza
PO Box 426
Portland, ME 04112

For Irving Energy

EXHIBIT A

[DATE]

Re: Irving Energy settlement

Dear Vermont consumer:

You have been identified as a current or former customer of Irving Energy (“Irving”) who, between January 1, 2010, and October 10, 2012, terminated propane service from Irving.

As a result of a settlement with the Attorney General’s Office, Irving is providing the enclosed payment and further explanation to address any delays that may have occurred in terminating your propane service. Those delays may have been caused by removing propane storage tanks or issuing refund checks outside the timeframes required by Vermont law.

For more information on the Vermont consumer protection rules or the terms of this settlement, please visit the Attorney General’s Office website at www.atg.state.vt.us or call the Consumer Assistance Program at 800-649-2424 or (802) 656-3183.

Sincerely,

William H. Sorrell
Attorney General

Enc.

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

EXHIBIT B

[Date]

[Name]

[Address]

[Town, VT zip]

Re. Settlement Agreement

Dear [Name of Consumer]

Under the terms of a settlement agreement with the Vermont Attorney General's Office, you have been selected to receive \$_____ because, subsequent to the disconnection of your propane service, a refund for the unused propane may not have been mailed to you within the time frame in accordance with Vermont law

This check is in **FULL SATISFACTION** of any claim that you may have against Irving arising from the alleged delay in receiving a refund.

IMPORTANT: If you **ACCEPT** the check, you will **WAIVE** whatever rights, if any, that you may possess to pursue an individual claim against Irving resulting from any delay in issuing a refund, including claims brought pursuant to Vermont Consumer Protection Act, 9 V.S.A. § 2461b.

You may decline to accept the check by returning or mailing it to Irving, first class postage, within 90 days of the date of this letter, to the following address:

Irving Energy Distribution and Marketing
Attn: U.S. Legal Affairs
190 Commerce Way
Portsmouth, NH 03801

Sincerely,

[Insert Name and Title of Irving Official]

Enclosure

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

EXHIBIT C

[Date]

[Name]

[Address]

[Town, VT zip]

Re: Settlement Agreement

Dear [Name of Consumer].

Under the terms of a settlement agreement with the Vermont Attorney General's Office, you have been selected to receive \$____ because, subsequent to the disconnection of your propane service, your propane tank may not have been removed within the time frame in accordance with Vermont law

This check is in **FULL SATISFACTION** of any claim that you may have against Irving arising from the alleged delay in removing the tank.

IMPORTANT: If you **ACCEPT** the check, you will **WAIVE** whatever rights, if any, that you may possess to pursue an individual claim against Irving resulting from any delay in removing the tank, including claims brought pursuant to Vermont Consumer Protection Act, 9 V.S.A. § 2461b.

You may decline to accept the check by returning or mailing it to Irving, first class postage, within 90 days of the date of this letter, to the following address:

Irving Energy Distribution and Marketing
Attn: U.S. Legal Affairs
190 Commerce Way
Portsmouth, NH 03801

Sincerely,

[Insert Name and Title of Irving Official]

Enclosure

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609