

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on November 10, 2004

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 03-M-0772 - Petition of Niagara Mohawk Power Corporation
for Authorization to Request Security Deposits
from Applicants for Residential Service, filed
in C 25695.

DECLARATORY RULING

(Issued and Effective November 16, 2004)

BY THE COMMISSION:

On March 25, 2004, we issued an Order on Security Deposits (March Order) in this proceeding, and on June 7, 2004, we issued an Order on Petition for Clarification (June Order). On July 6, 2004, Niagara Mohawk Power Corporation (Niagara Mohawk or the company) filed a second request for clarification of the March Order regarding the interpretation and implementation of our regulations. Three parties timely responded to Niagara Mohawk's request: the New York Consumer Protection Board (CPB); the Department of Public Service Staff (Staff); and the Public Utility Law Project (PULP). On July 27, 2004, Niagara Mohawk replied to certain procedural issues raised in the PULP response.

Niagara Mohawk seeks a clarification of our regulations¹ on three questions: Do the regulations allow the company to impose a security deposit on a delinquent customer who has entered into a deferred payment agreement (DPA) for the arrears before the date on which the company would otherwise be

¹ 16 NYCRR Part II (Home Energy Fair Practices Act (HEFPA)).

entitled to collect a deposit?; Do the regulations permit a security deposit to be required from a customer who moves to a new location more than sixty days but less than six months after having service terminated for outstanding arrears?; and, Must a customer with an existing DPA make timely payments on a security deposit to comply with the DPA's terms?

As a general matter, the HEFPA regulations allow a utility to require a security deposit from any customer who accumulates "two consecutive months of arrears."² After receiving the required notice, a customer can avoid the deposit requirement by making a "reasonable payment," defined as "one half of the total arrears."³ The regulations also provide that a DPA is an agreement "for the payment of outstanding charges" ⁴

PROCEDURAL MATTERS

PULP challenged the nature of Niagara Mohawk's most recent filing, claiming that the issues raised by the filing are not sufficiently related to our previous orders to constitute a "clarification" of those orders. PULP argues that the company's request is in reality a motion for rehearing, which must be based on an "error of law or fact."⁵ Since the company makes no such claim, PULP argues, the request should be dismissed, and Niagara Mohawk should either submit new tariff provisions to deal with the disputed situations or petition for a declaratory ruling. In reply, Niagara Mohawk argues that a new proceeding is not required to answer the three narrow questions it puts forth in its petition and urges that PULP's position be rejected.

Discussion

While both the March Order and the June Order dealt with security deposits and DPAs, a number of the questions

² 16 NYCRR §11.12(d)(2)(i).

³ Id.

⁴ 16 NYCRR §11.10(a)(2).

⁵ 16 NYCRR §3.7(b).

raised now are discrete from the issues addressed in our previous rulings. We agree with PULP that the company's filing is more in the nature of a request for a declaratory ruling, and, in the interest of administrative efficiency and in the exercise of our discretion, we are converting the company's Request for Clarification into a Request for a Declaratory Ruling. Under the circumstances presented here, dismissing the company's request on procedural grounds, as urged by PULP, would serve little purpose.

DPA'S & SECURITY DEPOSITS

The company contends that the regulations should prevent a delinquent customer from avoiding a security deposit by entering into a DPA, unless a down payment of at least one-half of the outstanding arrears is part of the DPA. Niagara Mohawk argues that a security deposit and a DPA serve distinct purposes: the former protecting the company from the potential failure of a customer to make future payments, and the latter allowing qualifying delinquent customers to become current over an extended period of time without losing service. Because of this difference, the company argues, there is no reason why a delinquent customer's entering into DPA should prevent Niagara Mohawk from also protecting its interest in payment for future services by demanding a security deposit.

Staff opposes Niagara Mohawk's proposed interpretation, arguing that it would result in a frustration of HEFPA by greatly expanding the instances in which a security deposit could be imposed. Staff also asserts that because a DPA is an arrangement to satisfy a customer's outstanding debt, there is no delinquency once the DPA is executed, and, therefore, there would be no basis for demanding a security deposit.

CPB echoes Staff's concerns and urges that Niagara Mohawk's interpretation be rejected. CPB argues that imposing a security deposit on a customer who has entered into a DPA would be contrary to the legislative intent in HEFPA; would only ensure that more customers would fail to meet their obligations

to the company; and would result in an exacerbation of the company's delinquency problems. PULP agrees with Staff and CPB that entering into a DPA prevents the company from assessing a security deposit against an otherwise delinquent customer.

Discussion

A utility may require a security deposit from a customer who has accumulated two consecutive months of arrears.⁶ Under the regulation, a customer may avoid a security deposit by making a "reasonable payment," defined as half the amount owed.⁷ The deposit itself may be paid over a period not to exceed 12 months.⁸ DPAs, on the other hand, allow for "any size or no down payment,"⁹ with payments to be made over "any period of time if mutually agreed to by the parties."¹⁰

Both provisions serve the same basic purpose: to ensure that a utility recovers the money it is owed for services provided. The difference in payment requirements between the two regulations is the result of the DPA's primary purpose: providing those consumers most at risk of default the opportunity to pay their outstanding arrears to the utility while retaining service. By entering into a DPA, a qualifying customer agrees to remain current on all future payments¹¹ in exchange for being given the time needed to pay arrears on a schedule that accommodates his or her financial condition. In this way the economic interests of the utility are balanced with those of the consumer. As shown below, imposing an additional mandatory payment on the consumer may not provide any additional benefit to the utility and could frustrate HEFPA's intent that security deposits be permitted only in specifically defined circumstances.

⁶ 16 NYCRR §11.12(d)(2).

⁷ 16 NYCRR §11.12(d)(2)(i).

⁸ 16 NYCRR §11.12 (d)(3).

⁹ 16 NYCRR §11.10 (a)(iv).

¹⁰ Id.

¹¹ 16 NYCRR §11.10(c).

As we suggested in our June Order, a requirement to pay a security deposit imposed after the execution of a DPA could constitute a significant change in the customer's financial circumstances that would in turn permit the customer to renegotiate the DPA.¹² This could lead to a reduction in the DPA payment by an amount equal to the monthly security deposit payment. The net result would be an increase in the amount a customer owes the utility at any given time, without any increase in the customer's monthly payments to the utility.

Furthermore, while Niagara Mohawk characterizes the issue a simple clarification, adopting its interpretation of the regulations could have a profound effect. As noted in Staff's comments, virtually any customer who would be qualified to enter into DPA could, according to Niagara Mohawk, also be assessed a security deposit, unless a payment of half the arrears is made at the same time.¹³ This would effectively invalidate the intended flexibility and protection built into the DPA regulations¹⁴ and could serve to frustrate the purpose of HEFPA.

Finally, we note that a security deposit can only be required if a customer has unpaid arrears. Once a DPA is executed, however, the utility and the customer have agreed to change the nature of past due amounts (arrears) into a promise to pay specified amounts in the future. The existence of the agreement changes the utility's available legal remedy from collecting a debt for services rendered to enforcing the future terms of the DPA. We therefore conclude that the customer's arrears are satisfied by the DPA, subject to the condition subsequent that the terms of the DPA are met. Under these circumstances, a security deposit would not be appropriate under our regulations, and the interpretation posited by the company is not adopted.

¹² June Order, p. 4; Public Service Law, §37(1).

¹³ Staff Response, pp. 2-3.

¹⁴ 16 NYCRR §11.10 (a)(iv).

MOVING TO AVOID SECURITY DEPOSIT

Niagara Mohawk's second request for clarification involves whether a security deposit can be assessed against a customer who, after having service terminated for nonpayment, requests service at a new location less than six months, but more than sixty days, after the termination of service.

The issue raised is whether a person in this situation is an applicant or new residential customer, who cannot be assessed a security deposit,¹⁵ or a "current residential customer" who can be assessed a security deposit.¹⁶ The sixty day period is referenced because the regulations define "current residential customer" as a person who "was a residential customer . . . within 60 days of making the request [for service]. . . and has moved to a different dwelling. . . ." ¹⁷ The six-month period refers to the security deposit rules which provide that a "current customer" may be assessed a deposit if the customer had service terminated for nonpayment within the past six months.¹⁸ The company argues that the person it describes¹⁹ should be considered a current residential customer, despite the sixty day limitation on that status under §11.2. Such an interpretation would allow the company to assess a security deposit under §11.12(d)(2).

Staff agrees with the company's position, interpreting it to mean that such a hypothetical customer would be offered service at the new location and then assessed a security deposit. CPB does not address this issue in its filing. PULP contests the company's reading of the regulations, arguing that delinquent customers who move do so to better align their expenses with their ability to pay, not to avoid paying a

¹⁵ 16 NYCRR §11.12(b).

¹⁶ 16 NYCRR §11.12(d)(2).

¹⁷ 16 NYCRR §11.2(a)(2)(iv).

¹⁸ 16 NYCRR §11.12(d)(2)(ii).

¹⁹ That is: a customer who had service disconnected for nonpayment; who had no service in his/her name for more than 60 days thereafter; and who reapplies for service within six months of the disconnection at a new location.

potential security deposit. To assess a security deposit against such individuals, PULP contends, only serves to further burden their limited resources.

Discussion

We first agree with PULP that avoiding a security deposit that may cost a customer \$13/month is a highly unlikely motivation for moving to a new residence. We also observe, as a practical matter, that the company's financial interests are provided protection in either event. If the customer the company describes is considered a current customer, a security deposit could be required. If that customer were considered an applicant or new customer, full payment of all arrears could be required.²⁰

Turning to the regulations, §11.12(d)(2) defines when a "current customer" is delinquent; it does not define who is a "current customer." Because the regulations define a current customer as one now taking service or who had service in their name within the past 60 days, we conclude that a customer who had no service in his/her name within the past 60 days is a new applicant. This interpretation limits the circumstances under which security deposits may be demanded, consistent with HEFPA's intent to strictly limit those circumstances. Accordingly, we do not adopt the interpretation proposed by the company.

NON-PAYMENT OF SECURITY DEPOSITS

Niagara Mohawk's third request involves whether a DPA's requirement for a customer to make timely payment on all current charges includes payments due on assessed security deposits. The company argues that the answer to this question should be "yes." This issue was not addressed in the filings by Staff or CPB.

PULP argues that adopting the company's interpretation would place a greater burden on social services agencies because a default in a security deposit payment would also result in a

²⁰ 16 NYCRR §11.3 (a)(2)(i). An exception to the full-payment requirement is made for those eligible for a DPA.

default under a DPA, even if all payments had otherwise been timely made under the DPA. If a customer defaults under a DPA, PULP contends, the customer would not be entitled to another, and the cost to the customer (or to social services if the customer is eligible for those benefits) to continue service would be higher. In effect, PULP argues that the company's interpretation would increase the barrier to the customer's continuing receipt of utility services.

Discussion

In light of our discussion above, it would be rare for a customer to be paying both a DPA and a security deposit. Should those circumstances arise, however, we believe the specific terms of the DPA should control on the question of which charges must be paid to avoid a default on the DPA. If the DPA includes the security deposit payments or if its terms specify that failure to pay a separate security deposit will be a default under the DPA, then the company's proposed interpretation would be correct. If the DPA is silent, however, a default under a security deposit payment plan should not be construed a default under a DPA. Because a customer would lose a statutory right to a DPA if the customer defaults on a security deposit payment under the company's interpretation, that result should only occur if the specific language of the DPA clearly so states.

In any event, however, we note that the company has an adequate remedy for such a default. If the non-payment of the security deposit violates the terms of the DPA, service may be discontinued for violating the DPA. If the default is only of the security deposit requirement, service may also be discontinued.²¹

²¹ Case 28080 - Implementation of the Home Energy Fair Practices Act, Order and Resolution Adopting Final Rules Implementing the Home Energy Fair Practices Act (issued April 8, 1982), p. 18.

CONCLUSION

For the reasons set forth above, we are granting Niagara Mohawk's request for a declaratory ruling. We conclude that our regulations will not allow a security deposit to be assessed against a person who has entered into a DPA to satisfy the arrears on which the security deposit would otherwise be based. We also conclude that a person cannot be assessed a security deposit if they have not had service provided in their name within the past 60 days. Finally, we conclude that a default in a security deposit payment will not automatically result in a default on a customer's DPA, unless the DPA specifically so provides.

The Commission orders:

1. Niagara Mohawk's Second Request for Clarification dated July 6, 2004, is converted to a Request for a Declaratory Ruling.
2. Niagara Mohawk Power Corporation's request for a Declaratory Ruling is granted to the extent set forth herein and is otherwise denied.
3. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary