

**ORIGINAL**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY**

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In the Matter of the Application of

**NATIONAL FUEL GAS DISTRIBUTION CORP.,**

Petitioner

--against--

**THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NEW YORK,**

Respondent

**DECISION/ORDER**

Index No. 6712-04  
RJI No. 01-04-ST5055

For a judgment pursuant to Article 78 of the  
Civil Practice Law and Rules.

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**Supreme Court, Albany County: CPLR Article 78 Special Term: May 9, 2005  
Hon. Dan Lamont, Acting J.S.C., presiding**

APPEARANCES:

WHITEMAN, OSTERMAN & HANNA  
By: NEIL L. LEVINE, ESQ., of counsel  
for Petitioner

WOLF, BLOCK, SCHORR & SOLIS-COHEN, LLP  
By: BRUCE V. MILLER, ESQ., of counsel  
for Petitioner

DAWN JABLONSKI RYMAN, ESQ.,  
PSC General Counsel  
By: DIANE T. DEAN, ESQ.  
for Respondent

DAN LAMONT, J.

By Notice of Motion and supporting papers, respondent Public Service Commission ("PSC") moves this Court for leave to reargue that portion of this Court's March 4, 2005 Memorandum and Judgment which granted the application by petitioner National Fuel Gas Distribution Corporation ("National Fuel") for an injunction prohibiting the PSC—as part of its Competition Outreach and Education Program ("O&E")—"from requiring petitioner National Fuel to state that 'Safety, reliability, and utility customer service are not

affected if a customer switches". Petitioner has filed papers in opposition, and respondent has filed papers in reply thereto.

**CPLR § 2221. Motion affecting prior order.** provides in applicable part as follows:

"(d) A motion for leave to reargue:

"1. shall be identified specifically as such;

"2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; \* \* \*

### **DISCUSSION**

This Court in its March 4, 2005 Memorandum and Judgment—upon grounds of a violation of National Fuel's First Amendment right to freedom of speech—prohibited the PSC from requiring petitioner National Fuel to state in the O&E program that: "Safety, reliability and utility customer service are not affected if a customer switches" ("Bulletin #3"). Respondent PSC contends that this Court in its March 4, 2005 Memorandum and Judgment misapprehended the meaning of the words "safety," "utility customer service," and "risks" (to which customers might be exposed due to competition in the natural gas industry).

The PSC's position upon this motion for reargument brings to mind Humpty Dumpty's statement to Alice: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" ("Through the Looking Glass", by Lewis Carroll: Chapter VI: Humpty Dumpty).

Indisputably: (1) petitioner National Fuel remains charged with the duty to maintain the same level of safe delivery of natural gas to a customer who switches to an

alternative energy service company (“ESCO”), as is provided to its own customers; and (2) petitioner National Fuel is charged with the duty to provide natural gas to customers who have switched to ESCOs, if and when an ESCO is not capable of providing gas to its customers. Whether or not petitioner would be capable of providing sufficient natural gas to a large ESCO’s customers, if such ESCO were not capable of providing the gas, is an issue in controversy which could affect overall “reliability” and could create a possible “risk” to customers. An argument could be made that the “reliability” of the natural gas supply affects the overall “safety” of the public based upon a possible inability to provide such natural gas. However, the “safe” delivery of natural gas would clearly not be affected. The PSC contends that “reliability” will not be affected by the competitive market, but concedes that National Fuel may argue the point under the First Amendment (PSC’s Memorandum of Law dated May 6, 2005: at page 5).

The Court agrees with National Fuel’s position that the meaning of the words in the statement: “Safety, reliability and utility customer service are not affected if a customer switches” should be viewed by the Court in the same way an average reasonable natural gas customer receiving such message would understand them. This Court continues to believe that such a broad and comprehensive statement in the minds of the average natural gas customer would put National Fuel in the position of espousing a concept with which it does not agree—(i.e. that “reliability” could not under any circumstances be affected by National Fuel having insufficient natural gas to supply a failed ESCO’s customers). Very few natural gas customers would be versed in the various definitions of words as interpreted by the PSC.

This Court did not associate the words “benefits and risks” with the “safety” of the delivery of natural gas, as respondent PSC contends this Court misapprehended

those words. The words "benefits and risks" as used by the PSC in Bulletin #7 of its O&E program can easily be interpreted to pertain to "reliability" risks as well as the price risks if a customer switches to an ESCO. If the PSC has "repeatedly stated that the primary 'risks' of which customers must be made aware in a competitive market are price risks" (PSC's Memorandum of Law dated April 7, 2005: at page 3), then the PSC should specifically state that in the bulletins required by its O&E program. Natural gas customers simply have no way to know what Bulletin #7 of the O&E program refers to—reliability, safety or price "risks and benefits." In other words, the PSC should not need to tell the Court what words mean, but rather the PSC should more carefully draft the terms used in the O&E program so that their meaning is clear to natural gas customers and the general public ("the entire purpose behind the Outreach & **Education** Program").

Fatal to respondent PSC's motion for reargument is its concession that National Fuel may validly argue the service "reliability" point under its rights to freedom of speech as guaranteed by the First Amendment. Where commercial speech and "core" speech are inextricably intertwined, the Courts "cannot parcel out the speech, applying one test to one phrase and another to another phrase." (Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, page 796 [1988]). The Supreme Court has held that the test for fully protected expression should be applied to such speech (*ibid.*). In determining the level of scrutiny to apply to a compelled statement, the courts must evaluate "the nature of the speech taken as a whole and the effect of compelled statement thereon." (*Id.*, at 795).

This Court based upon petitioner National Fuel's voluntary compliance has previously allowed virtually all of the bulletins contained within the O&E program to be continued. This Article 78 proceeding and this motion to reargue do not constitute the

proper forum or procedure to add additional language to the O&E program or to further pare down or modify the language contained within Bulletin #3. This Court has reviewed respondent's arguments and contentions and finds them insufficient to justify any departure from the Court's previous determination. Accordingly, this Court holds and determines that respondent's motion for reargument should be and the same is hereby denied, with \$100.00 costs to petitioner.

However, this Court's determination does not constitute a bar to the PSC properly amending the wording of the bulletins contained within the O&E program—either through the administrative process or through mutual agreement of the parties.

### CONCLUSION

This Court holds and determines that respondent's motion to reargue should be and the same is hereby denied, with \$100.00 costs to petitioner. This Memorandum shall constitute both the Decision and Order of the Court. All papers, including this DECISION/ORDER, are being returned to petitioner's attorney. The signing of this DECISION/ORDER shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that section respecting filing, entry, and notice of entry.

ENTER.

Dated: Albany, New York  
June 29, 2005



DAN LAMONT, Acting J.S.C.

cc: ✓ Neil L. Levine, Esq.  
✓ Bruce V. Miller, Esq.  
✓ Diane T. Dean, Esq.

*Sent  
6/30/05  
AR*

PAPERS CONSIDERED:

- 1) Respondent's Notice of Motion dated April 7, 2005.
- 2) Affidavit of Diane T. Dean, Esq. sworn to April 7, 2005, with exhibits.
- 3) Respondent's Memorandum of Law dated April 7, 2005.
- 4) Affidavit of Michael Reville sworn to April 29, 2005.
- 5) Petitioner's Memorandum of Law dated May 2, 2005.
- 6) Respondent's Reply Memorandum of Law dated May 6, 2005.