

# Consumer Protection Developments In New York State's Retail Electricity and Natural Gas Markets

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## *Introduction*

On May 20, 1996 the New York State Public Service Commission (PSC) issued its “vision order” for electric restructuring, *Opinion 96-12*,<sup>2</sup> charting its design for a revised regulatory paradigm. In that vision, portions of New York State’s electricity service market, previously dominated by vertically integrated monopolies, would be opened to competition by new providers. In *Opinion 96-12*, the PSC articulated these objectives:

1. Lowering rates for consumers
2. Increasing customer choice
3. Continuing reliability of service

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<sup>2</sup> *Opinion No. 96-12, Cases 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Regarding Competitive Opportunities for Electric Service* (Issued May 20, 1996). <http://www.dps.state.ny.us/fileroom/doc877.pdf> The commodity element of residential natural gas service was also opened to competition in 1996. Case 93-G-0932, *Restructuring of the Emerging Competitive Natural Gas Industry, Order Concerning Compliance Filings* (Issued March 28, 1996) and *Order Resolving Petitions for Rehearing* (Issued September 13, 1996).

4. Continuing programs that are in the public interest
5. Allaying concerns about market power
6. Continuing customer protections and the obligation to serve

This presentation will focus on the last item, with an emphasis upon residential consumer protection.<sup>3</sup>

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<sup>3</sup> For a discussion of the obligation to serve, and whether utilities may cease the sale of “commodity” gas or electricity, see Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, Recommended Decision* (Issued July 13, 2001) <http://www.dps.state.ny.us/fileroom/doc10156.pdf> See also, *Cullen & Dykman Legal Analysis of a Public Utility's Obligation to Provide Sales Service*, <http://www.cullenanddykman.com/advisory/advisorypage.asp?pubid=0532810272000>

New York State's 6.3 million residential electric customers and 4.2 million residential natural gas customers spend more than \$9.3 billion per year for these services.<sup>4</sup> Consumer protection is fundamentally important and a key determinant in the success or failure of the consumer's experience in the competitive utility service market. If consumers are not better protected or at least as well protected from disadvantageous rates, terms, and conditions for service, or are not as protected from market abuses in the competitive market as they were before restructuring, then the competitive market cannot be said to have succeeded.

Following is a review of the basic utility consumer protection legislation in New York (Part I), a summary of trends since its enactment in 1981 (Parts II and III), the enactment of the Energy Consumer Protection Act of 2002 (Part IV), and current retail consumer market issues (Part V).

### **I. HEFPA: New York State's Consumer Protection for Residential Utility Consumers.**

Article Two of the New York Public Service Law, the Home Energy Fair Practices Act ("HEFPA") is New York's "Bill of Rights" for residential utility consumers, enacted in 1981. HEFPA declares New York State's policy that continued utility service is in the public interest, is necessary for the public health and safety, and that residential service must be provided to consumers "without unreasonable qualifications or lengthy delays."<sup>5</sup> It is designed "to insure continued utility service as part of the public weal."<sup>6</sup>

To accomplish its purposes, HEFPA eases access to utility service, regulates termination or withholding

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<sup>4</sup> *N.Y. State Statistical Yearbook*, 430 - 431, Tables L-21 and L-22 (SUNY Rockefeller Institute (1999)).

<sup>5</sup> L. 1981, c. 713. "This article shall apply to the provision of residential service by gas, electric and steam corporations and municipalities. It is hereby declared to be the policy of this state that the continued provision of gas, electric and steam service to residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest." *PSL § 30*.

<sup>6</sup> *Brooklyn Union Gas Co. v. Richey*, 123 Misc.2d 802, 804 (N.Y. City Civ. Ct. Kings Co. 1984). Utilities are "necessary to sustain life in today's world ... and the discontinuance of gas and electric [service] work tremendous hardships on the users of these essentials...." *Consolidated Edison v. Powell*, 77 Misc.2d 475 (Sup. Ct. N.Y. Co. 1974).

of service as a collection measure, establishes an administrative dispute resolution process, and dovetails with companion provisions of the Social Services Law designed to prevent denial or termination of service to those without the financial means to pay.

#### A. Key HEFPA Provisions

1. Prompt service must be provided upon oral or written application. *PSL § 31*
2. Deposits were generally abolished and ordered to be refunded in 1981. *PSL § 36*.
3. Written notices of denial and termination are required. Special termination notice requirements apply to tenants of multiple dwellings, to certain vulnerable customers (elderly, blind and disabled), with personal or telephone contact 72 hours before termination of heat-related service in cold weather periods, and referrals to county DSS (now OTDA) when termination may cause a serious impairment to health or safety. *PSL §§ 31.2, 32.2(d), 32.3; 16 NYCRR § 11.5*.
4. A deferred payment agreement (DPA) to repay arrears in installments must be offered to customers faced with termination for non-payment, and to the applicant for service with arrears from a prior closed account in her name. *PSL § 37*. Customers must be notified of the opportunity to negotiate DPAs based on individual financial circumstances.
5. Consumers may obtain administrative review and written decision by the PSC on their complaints regarding utility actions and matters affecting their bills, including the terms of a DPA, with judicial review available under CPLR Article 78. Termination of service for amounts in dispute while administrative review is underway is prohibited. *PSL § 43*.<sup>7</sup>
6. HEFPA requires a PSC Emergency Hotline for rapid administrative review and determination by the Department of Public Service staff to resolve matters involving a loss or denial of service. *PSL § 48*.
7. In physician-certified medical emergencies, service must be provided to persons whose

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<sup>7</sup> In *Montalvo v. Con Edison*, 110 Misc.2d 24 (Sup. Ct. N.Y. Co. 1981), *rev'd*, 92 App.Div.2d 389 (1st Dept. 1983), *aff'd* 61 N.Y.2d 810 (1983), a pre-HEFPA termination of utility service was allowed prior to an administrative hearing to review disputed charges. The HEFPA provisions requiring continuation of service pending PSC adjudication of disputed charges effectively overruled the result in *Montalvo*.

service otherwise would be denied or terminated due to arrears, for a 30 day period, which is renewable. *PSL* § 32.3.

8. HEFPA included new “Safety Net” provisions to assure service to persons whose service is denied or about to be terminated and who lack the ability to pay. Lower court decisions in the 1970's were divided on whether, under provisions of the Transportation Corporations Law since repealed by HEFPA, a utility must provide service when DSS makes a partial payment for a public assistance recipient. *Compare, e.g., Consolidated Edison v. McClain*, 87 Misc. 2d 776 (City Ct. Mt. Vernon 1976)(requiring the utility to continue service to a public assistance recipient upon partial payment of four months’ arrears by the county DSS, leaving an unpaid balance), *with Rivera v. Berger*, 89 Misc. 2d 586, 390 N.Y.S.2d 537 (N.Y. Sup. Ct. Westchester Co.1976), *aff’ d*, 60 A.D.2d 605, 399 N.Y.S.2d 1022 (N.Y. App. Div., 2d Dept. 1977), *lv. to appeal denied*, 44 N.Y.2d 642 (1978). In *Rivera*, the utility terminated current service to a public assistance recipient based on arrears from a closed account at a previous residence, and refused to continue service despite a four-month partial payment proffered by the county DSS. The court held that DSS must pay all arrears. A justice of the same court disagreed.<sup>8</sup> Most other lower courts followed the *Rivera* doctrine, and the issue was never decided by the Court of Appeals.<sup>9</sup>

Companion legislation adopted with HEFPA repealed the law upon which *Rivera* was based and required the provision of service when a DSS makes a payment for a public assistance applicant or recipient even if the payment does not cover all arrears.<sup>10</sup>

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<sup>8</sup> “This court cannot agree with the holding or reasoning of the *Rivera* case. There would be no need for subdivision 2 of section 15 of the Transportation Corporations Law if the arrears are to be paid by the Department of Social Services because once the account is current the customer is entitled to continued service as a matter of right without the law.... The Transportation Corporations Law was enacted in the public interest to control utility companies serving the public needs..... [It] affords to a utility company an extraordinary creditor's remedy, viz., the right to discontinue service to gain collection of arrears. This remedy may be effective in the ordinary case and may well accomplish the desired result of obtaining payment without litigation. However, its effectiveness is lost as to welfare recipients who have no means to pay. The Legislature in its wisdom recognized that discontinuance of utility service is not an appropriate means of securing payment from recipients of public assistance and enacted subdivision 2 of section 15 of the Transportation Corporations Law. It thereby subjugated the collection remedy of the utility to the more important right of the welfare recipient to survive.” *Harrell v. Consolidated Edison*, 91 Misc. 2d 714 (Sup. Ct. Westchester Co. 1977).

<sup>9</sup> *E.g., Troche v. Blum* [Orange & Rockland Utilities], 78 A.D.2d 678 (App. Div.2d Dept. 1980); *Barroncini v. Shang*, 77 A.D.2d 803 (App. Div. 4<sup>th</sup> Dept 1980); *Fahey v. Niagara Mohawk Power Corporation*, 91 Misc. 2d 866 (Sup. Ct. Albany Co. 1977). In *Barroncini, supra*, the Fourth Department followed *Rivera*, but signaled the need for new legislation to resolve the problem.

<sup>10</sup> Social Services Law 131-s(6) allows the utility to collect the balance unmet by a public assistance payment through conventional means other than denial or termination of service. See *Letter of PSC Chairman to Governor’s Counsel Regarding Passage of HEFPA*, July 16, 1981. <http://www.pulp.tc/DPSChairMemo5-12-03.pdf>

- a. Provisions of L. 1981 c. 895 amended the Social Services Law to create a new utility payment assistance program not only for public assistance recipients but also for applicants who do not qualify for regular public assistance, who lack the funds to pay their utility bills and who cannot make alternative living or alternative payment arrangements (e.g., a DPA). *SSL § 131-s*.
  - b. Under a Public Service Law provision of L. 1981, c. 895, utilities must provide service upon notice from a social services official that a direct payment will be made on behalf of the customer. *PSL § 65-b*.
9. HEFPA also specifically addresses stale bills, back billing, meter reading and meter verification, level billing plans, late payment charges, shut-offs of service to entire buildings, permissible days and times for termination, notification of customer rights and remedies, and numerous other matters.

## **B. HEFPA Exemptions**

1. Municipal utilities receiving NYPA power (full requirements customers) are exempt from HEFPA. *Public Authorities Law § 1005(5)(g)*.<sup>11</sup>
2. Non-residential service is exempt from HEFPA.

## **II. Utility Consumer Protection Developments in the 80's and 90's**

1. In 1984, the PSC adopted regulations similar to HEFPA for residential telephone consumers (“TEFPA Rules”) that apply to both incumbent and new competitive providers of local telephone service. *16 NYCRR Part 609*.
2. In 1986 HEFPA was amended to cover private water companies with gross revenues over \$250,000 and their customers. *PSL § 50; 16 NYCRR Part 14*.
3. In 1987, the PSC issued consumer protection regulations applicable to non-residential customers addressing many of the same topics as HEFPA, including deferred payment

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<sup>11</sup> The Power Authority of the State of New York issued regulations similar to HEFPA, but not as comprehensive. 21 NYCRR Parts 451, 452, 457, 459. In contrast, in creating the largest public power utility in the state, the Long Island Power Authority (“LIPA”), the legislature required LIPA to adopt rules providing full HEFPA protections to its customers. *Public Authorities Law § 1020-cc*.

agreements, notice requirements and complaint procedures. *16 NYCRR Part 13.*

4. In 1988, the PSC issued regulations providing for case by case approval of residential submetering (e.g., in cooperatives owned by the residents),<sup>12</sup> requiring applicants for submetering approval to assure that rates do not exceed those for tariffed residential utility service, and “complaint procedures and tenant protections consistent with the Home Energy Fair Practices Act (Public Service Law, sections 31 - 50; 16 NYCRR Parts 11 and 12).” *16 NYCRR § 96.2*<sup>13</sup>
5. In 1991, the legislature enacted the “Shared Meter Law” requiring landlords to separately configure wiring and piping so that tenants would not be responsible for service consumed outside their dwelling unit. *PSL § 52.*
6. In 1992, the legislature amended the SSL § 131-s utility payment assistance program, converting it to a loan program for applicants whose income exceeds the public assistance income eligibility level, requiring a written agreement by the applicant to repay the assistance provided within one year. *SSL § 131-s(1).*
  - a. State DSS then issued regulations to implement SSL § 131-s(1) which disqualify from any future 131-s(1) assistance payments persons who are in default in repaying a prior 131-s(1) loan. *18 NYCRR § 352.5(e). See Childs v. Bane*, 194 App. Div.2d 221 (3d Dept. , *appeal dismissed* 83 N.Y.2d 846, *lv. to appeal denied* 83 N.Y.2d 760.<sup>14</sup>
7. In March, 1996 the PSC adopted non-HEFPA consumer protection standards for “gas

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<sup>12</sup> Prior court decisions held that landlords cannot submeter service, i.e., resell retail electric service to their tenants, because they are not “electric companies” as defined in the Public Service Law. *See, Campo Corp. v. Feinberg*, 279 App. Div. 302, 303, *affirmed* 303 N.Y. 955 (1952 ); *Owners & Tenants Electric Co. v. Tractenberg*, 158 Misc. 677 (N.Y. Mun. Ct. 1936).

<sup>13</sup> The PSC recently cited the Energy Consumer Protection Act of 2002 as statutory confirmation of HEFPA protection for residents of submetered apartment buildings, stating that “[b]ecause ... owners of submetered buildings sell electricity to residential customers, Chapter 686 will require that HEFPA protections, including Commission dispute resolution procedures, be provided to those residential customers.” Case 99-M-0631, *In the Matter of Customer Billing Arrangements*; Case 03-M-0017, *In the Matter of Implementation of Chapter 686 of the Laws of 2003*, (Issued June 20, 2003), at 6, fn.11. <http://www.dps.state.ny.us/fileroom/doc13394.pdf> As indicated above, PSC regulations have required this result since 1988.

<sup>14</sup> *Childs* upheld the disqualification in the regulation but held that the repayment agreement applies only when income countable for public assistance purposes exceeds the public assistance standard of need. After *Childs*, the legislature in 1995 further limited DSS grants of utility aid by requiring a repayment agreement from any applicant for public assistance whose *gross* income exceeds the financial need standard for public assistance.

marketers,” and adhered to the two-tier system on rehearing.<sup>15</sup>

- a. Enron, seeking full deregulation, said HEFPA applicability “will likely result in few, if any, non-utility gas supply options.”<sup>16</sup>

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<sup>15</sup> Case 93-G-0932, *Restructuring of the Emerging Competitive Natural Gas Industry, Order Concerning Compliance Filings* (Issued March 28, 1996). “For purposes of HEFPA, gas utility service includes sale of the gas itself (the “commodity”) as well as the transportation of that gas. Customers obtaining both services from the utility have HEFPA protections on both services. Customers purchasing the commodity from a marketer have HEFPA protection on only the utility transportation segment. Accordingly, customers desirous of availing themselves of the HEFPA rule on, for example, deposits, may do so by remaining a utility service customer.” Case 93-G-0932, *Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market. Order Resolving Petitions for Rehearing* (September 13, 1996) at 30, fn. 1.

<sup>16</sup> [http://www.pulp.tc/ENRON\\_Affidavit.pdf](http://www.pulp.tc/ENRON_Affidavit.pdf)

- b. Others predicted that inapplicability of HEFPA to new providers would allow customer abuse, create uncertainty, and deter residential customers from switching to new providers.<sup>17</sup>
- c. Litigation on applicability of HEFPA to gas marketers was inconclusive.<sup>18</sup>
- 8. In May 1996, the PSC adopted its “vision order” indicating it would lighten HEFPA requirements for competitive electricity service providers “ESCOs” as it had for “gas marketers.” Litigation by utilities and consumers challenging the PSC power to effectuate restructuring and relax regulation as envisioned in the “vision order” without new enabling legislation was inconclusive.<sup>19</sup>

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<sup>17</sup> See “*State Forgot Consumer Protection In Deregulating Gas*,” Buffalo News, December 10, 2000; *Adamantine Customers and the Utility Restructuring Juggernaut*, November, 1999, [http://archive.pulp.tc/html/speech\\_news.html](http://archive.pulp.tc/html/speech_news.html) ; *Retail Choice: A Race to the Bottom*, Fortnightly Jan. 1, 1998, <http://www.pur.com/jan0198.html> .

<sup>18</sup> The Appellate Division held that plaintiffs challenging non-HEFPA alternative standards approved by the PSC for gas marketers lacked standing and thus did not address the merits. *PULP, et al. v. Public Service Commission*, 252 App. Div.2d 55 (3d Dept 1998). [http://archive.pulp.tc/html/gas\\_marketers.html](http://archive.pulp.tc/html/gas_marketers.html)

<sup>19</sup> *Opinion No. 96-12, Cases 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Regarding Competitive Opportunities for Electric Service* (Issued May 20, 1996). Utilities challenged the agency’s claim of authority, without enabling legislation, to effectuate retail wheeling to all customer classes and to deregulate competitive retail electric energy suppliers. The trial court held that because the “vision order” was merely a policy statement and not a rule, the PSC had not yet coercively ordered compliance with its vision, and so the challenges were not justiciable. The utilities later entered into voluntary restructuring

9. In May 1997, the PSC adopted alternative consumer protection standards for new electricity providers in *Opinions 97-5*, and adhered its two-tiered consumer protection system in its decision on rehearing, *Opinion 97-17*.<sup>20</sup>

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settlements and eventually abandoned their appeals. The Appellate Division then held that intervenors lacked standing to challenge PSC lightening of regulation for competitive providers of retail electric service. *Energy Association of New York v. Public Service Commission*, 169 Misc. 2d 924, (Sup. Ct. Albany Co. 1996), *aff'd* 273 A.D. 2d 708 (3d Dept. 2000), *lv. denied* 95 N.Y.2d 765 (2000).

<sup>20</sup> Case 94-E-0952, *Opinion and Order Establishing Regulatory Policies for the Provision of Retail Energy Services*, *Opinion No. 97-5* (issued May 19, 1997); and *Opinion and Order Deciding Petitions for Clarification and Rehearing*, *Opinion No. 97-17* (Issued November 18, 1997).

- a. “In Opinion No. 97-5, the Commission established a two-tiered structure to provide consumer protections.... Utilities would continue to provide HEFPA and non-residential protections, and the ESCOs would be required to provide a more limited set of protections. Requiring all energy providers to provide the same level of protections offered by the utilities was expected to "act as a barrier to entry for many ESCOs, particularly small providers." .... The Commission also decided that ESCOs should not be required to use our complaint resolution procedures established for the regulated utilities....”<sup>21</sup>
  - b. Lower court decisions in cases challenging this analysis and alternative standards for ESCOs did not reach the merits.<sup>22</sup>
10. In December, 1997 the PSC adopted a “Single Retailer ESCO” Regulatory Regime Order, allowing ESCOs to deal directly with residential consumers for all service, stating “we conclude that HEFPA was designed to apply only to the provision of monopoly services. Since ESCOs are not providing monopoly service, HEFPA does

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<sup>21</sup> Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, Recommended Decision* (Issued July 13, 2001), at 86. <http://www.dps.state.ny.us/fileroom/doc10156.pdf>

<sup>22</sup> In litigation challenging the PSC’s waiver of HEFPA standards for competitive electricity providers, the trial court denied a motion to dismiss, the Appellate Division reversed, holding the plaintiffs lacked standing, and the Court of Appeals denied plaintiffs’ motion for leave to appeal. *PULP, et al v. Public Service Commission*, 252 A.D.2d 55 (3d Dept. 1999), *lv. denied* 94 N.Y.2d 755 (1999). [http://www.pulp.tc/html/electric\\_escos\\_court\\_decision.html](http://www.pulp.tc/html/electric_escos_court_decision.html)

not apply to them.’<sup>23</sup>

11. The state Assembly passed several bills in an effort to clarify that all residential electric and natural gas service is subject to HEFPA no matter which company provides it.<sup>24</sup>

#### **IV. Developments of the ‘00s.**

##### **A. Assembly Bills to Clarify HEFPA Application to ESCOs.**

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<sup>23</sup> Cases 94-E-0952, *In the Matter of Electric Competitive Opportunities Regarding Electric Service* and Case 96-E-0898, *In the Matter of Rochester Gas and Electric Corporation’s Plans for Electric Rate/Restructuring Pursuant to Opinion 96-12, Order Regarding Regulatory Regime For Single Retailer Model* (Issued December 24, 1997). The only utility to have attempted a “single-retailer” ESCO plan is now ending it. See Case 02-E-0198, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric Service, Order Adopting Recommended Decision with Modifications*, (Issued March 7, 2003) at 93, approving transition from its single-retailer model to a multi-retailer model.

<sup>24</sup> A. 5989 (1997 and 1998); A. 8800 (1999).

The state Assembly again passed bills to clarify that all residential electric and natural gas service is subject to HEFPA.<sup>25</sup>

### **B. Recommended Decision in the PSC “End-State” proceeding.**

In July 2001, administrative judges issued a Recommended Decision for one standard of customer protection (HEFPA). “As the parties have largely agreed, the experience of the past four years, including the almost uniform approach taken by other states ... suggest that a single set of consumer protections should be provided by the utilities and by ‘ESCOs that seek to market or aggregate electricity for retail sale to customers in New York.’”<sup>26</sup> The Recommended Decision was not acted on by the PSC.

### **C. AARP Survey of Consumers.**

In 2002, AARP surveyed its New York State members on energy consumer protection issues, finding “[m]ore than eight in ten residents surveyed support pending legislation to provide New York state citizens with the same consumer protections regardless of whether they [receive service from ESCOs.]\*\*\*\*\* New Yorkers age 50 and over support consumer protections for users of energy services. They believe consumers are entitled to equal protections whether they use a private energy company or choose to continue service with a public utility. They support pending consumer protection legislation as well as a proposal before the Public Service Commission that requires all energy companies to abide by the Home Energy Fair Practices Act.”<sup>27</sup>

### **D. Energy Consumer Protection Act (ECPA) of 2002.**

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<sup>25</sup> A. 8978 (2001 and 2002).

<sup>26</sup> Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, Recommended Decision* (Issued July 13, 2001), at 87 (footnotes omitted). <http://www.dps.state.ny.us/fileroom/doc10156.pdf>

<sup>27</sup> AARP New York Energy Survey, March, 2002, <http://archive.pulp.tc/AARPEnergyreport.pdf>

In 2002, the legislature acted to guarantee that residential customers of new providers have the same protections as customers of a utility provider of fully bundled service.

1. Consumer advocates negotiated with the Small Customer Marketer Coalition and developed ECPA language over about 6 weeks in May - June 2002.
2. The bill was then printed in the Senate and the Assembly, aged in the normal process, and did not require a message of necessity. It then passed unanimously in the Senate and the Assembly.<sup>28</sup>
3. The Senate sent ECPA to the Governor for his review and approval after the November 2002 election and he signed it December 20, 2002.
4. The legislation included a six-month delay in its effective date. Therefore, its effective date is June 18, 2003.

## V. Current Retail Consumer Market Developments and Issues

### A. ECPA 2002 Implementation

1. In February 2003, the PSC commenced Case 03-M-0117, requesting comments on ECPA 2002 implementation questions.<sup>29</sup> Parties filed comments and reply comments in response to the notice.<sup>30</sup>
2. On June 20, 2003, the PSC issued its *Order Relating to Implementation of Chapter 686 of the Laws Of 2003 And Pro-ration of Consolidated Bills* on June 20, 2002,

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<sup>28</sup> The Assembly Sponsor's Memorandum states: "The Home Energy Fair Practices Act guards residential customers against any unreasonable demands, conditions, and burdens placed on them by a utility for access to residential service. This clarification of existing law guarantees that these rights for residential customers related to access to and the continuation of utility service will be available even if some or all of the utility service is taken from a competitive supplier. Under the bill, all suppliers are placed on a level playing field with respect to the consumer protection rules with which they must comply, and the public can be confident that the twenty year old structure of consumer protections for electric and gas customers will be applicable to all transactions. These provisions take a significant step towards the further assurance to customers and the public that those who choose to participate in the competitive energy market will not be worse off than they were when receiving all service from the regulated supplier and, if competition does produce lower prices for equivalent service, may in fact be better off." *Memorandum of Paul D. Tonko, Chairman, Assembly Committee on Energy, in Support of ECPA 2002*, A. 8978B.

<sup>29</sup> Case 99-M-0631, *In the Matter of Customer Billing Arrangements*; Case 03-M-0117, *In the Matter of the Implementation of Chapter 686 of the Laws of 2002, Notice Requesting Comments*, (Issued February 24, 2003).

<sup>30</sup> Informal comments of the parties on the draft regulations are at [http://www.pulp.tc/html/implementation\\_proceeding.html](http://www.pulp.tc/html/implementation_proceeding.html).

stating “[t]he objective of the new law is to provide customers receiving commodity service from ESCOs with the same statutory protections provided to customers who purchase gas, electricity, and delivery service from distribution utilities.”<sup>31</sup>

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<sup>31</sup> Case 99-M-0631, *In the Matter of Customer Billing Arrangements*; Case 03-M-0017, *In the Matter of Implementation of Chapter 686 of the Laws of 2003*, (Issued June 20, 2003)  
<http://www.dps.state.ny.us/fileroom/doc13394.pdf>

3. The DPS staff invited informal comments,<sup>32</sup> on its informal drafts of revised 16 NYCRR Part 11 HEFPA regulations,<sup>33</sup> and Part 12 complaint handling regulations.<sup>34</sup>
4. Collaborative workshops with staff and parties were initiated to discuss ECPA implementation issues. These issues include:
  - a. Prepayments.<sup>35</sup>
  - b. ESCO suspension of distribution service, timing and notification duties.
  - c. Supersession of inconsistent contract terms and conditions.
  - d. Scope of definition of “utility.”

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<sup>32</sup> <http://www.pulp.tc/StaffRequestforComments6-20-03.pdf>

<sup>33</sup> [http://www.pulp.tc/draftrulespart\\_11-6-20-03.pdf](http://www.pulp.tc/draftrulespart_11-6-20-03.pdf)

<sup>34</sup> <http://www.pulp.tc/DraftRulesPart12-6-20-03.pdf>

<sup>35</sup> The PSC indicated its belief that prepayments are not barred by HEFPA and ECPA: “in the absence of a specific prohibition of prepayments in Chapter 686, we will allow ESCOs to continue to offer prepayment plans to customers under the terms and conditions specified in our 2002 Order [in Case 00-M-0504, Order Concerning ESCO Deposits and Prepayments (Issued May 9, 2002)]... which addressed prepayments. In our view, Chapter 686 does not address or effect the policies established in those orders. Case 99-M-0631, *In the Matter of Customer Billing Arrangements*; Case 03-M-0017, *In the Matter of Implementation of Chapter 686 of the Laws of 2003*, (Issued June 20, 2003) at 28. <http://www.dps.state.ny.us/fileroom/doc13394.pdf>

5. Petitions for Rehearing and Clarification of the PSC's ECPA implementation order.
  - a.. Small Customer Marketer Coalition (SCMC).
  - b. Total Gas & Electric requested clarification policies on pro-rata, procedures for ESCO-initiated suspension of distribution service, and purchase of receivables by ESCOs or distribution utilities.

## **B. Other Issues Affecting New York's Residential Retail Utility Service Markets**

1. Customer demand for stable, predictable rates.<sup>36</sup>
2. Provider creditworthiness, pyramid schemes, slamming and cramming not yet resolved.
3. Affordability issues and impact of rising natural gas rates.
4. Competitively neutral rates for unbundled elements of service.

## **Conclusion**

Incumbent "default service" providers continue to serve the vast majority of New York's residential utility customers who do not affirmatively select another provider. The legislative step taken in ECPA 2002 clarifies the law, establishing firm ground rules and a level playing field for competitors to win customers by offering service that meets or exceeds HEFPA standards at better rates.

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<sup>36</sup> See, *Positioning the Consumer for the Future: A Roadmap to an Optimal Electric Power System*, at 43 - 58 (CECA 2003) <http://www.cecarf.org> ; NASUCA Resolution 02-01: *Urging Jurisdictions Introducing the Competitive Provision of Electricity or Natural Gas Service to Assure the Continued Availability of Reliable Service to Customers from a Default Service Provider at Just and Reasonable Rates*, <http://www.nasuca.org/res/elect/elect200202.php> ; and *Managing Default Service to Provide Consumer Benefits in Restructured States: Avoiding Short-term Price Volatility*, Alexander (June 2002). <http://neaap.ncat.org/experts/defservintro.htm>