

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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PROCEEDING ON THE MOTION OF THE
COMMISSION TO ADDRESS ISSUES ASSOCIATED
WITH THE RESTRUCTURING OF THE EMERGING
COMPETTIVE NATURAL GAS MARKET
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CASE 93-G-0932

COMMENTS OF THE PUBLIC UTILITY LAW PROJECT OF
NEW YORK, INC. REGARDING THE CONSUMER SERVICES DIVISION
DISCUSSION PAPER ON CONSUMER PROTECTIONS IN THE EMERGING
COMPETTIVE NATURAL GAS MARKETS

INTRODUCTION

These comments are submitted on behalf of the Public Utility Law Project of New York, Inc. ("PULP"), a public interest law firm representing the interests of low-income utility and energy consumers, in accordance with Opinion No. 94-26, *Opinion and Order Establishing Regulatory Policies and Guidelines for Natural Gas Distributors* (issued December 20, 1994), as amended by the *Order on Reconsideration* (issued August 11, 1995). Ordering Paragraph 1 of Opinion No. 94-26, p. 75, stated:

Each gas utility subject to the jurisdiction of the Commission shall file, within 60 days of the date of issuance of this Opinion and Order, draft tariff leaves setting transportation rates for aggregation customers, establishing minimum transportation volumes, providing for transition cost recovery, and establishing requirements and charges for the use of recording meters, as required by this Opinion and Order.

The Commission ordered that proposals to implement all other policies and guidelines adopted in Opinion No. 94-26 be submitted in each local gas distribution company's ("LDC's") next general rate case filing.¹ The Commission stated at page 57:

It is impossible now to anticipate all the questions that might arise as aggregation programs are attempted, much less answer those questions. As with any relatively novel proposal, there are many questions about customer aggregation. Some of them are largely matters of curiosity and will be answered as proposals are submitted, such as the identity of the marketers offering such services, their experience, the customers to whom such services appeal, and the reasons why those services might appear relatively more attractive than utility services. *Others have an important bearing on existing policies, such as the extent to which consumer protection rules (both HEFPA and the non-residential rules) do or should continue to apply to customers participating in aggregation programs.* And still others, involving the allocation of rights and responsibilities between and among LDCs, marketers, and customers, might go beyond mere matters of contract and would be subject to our primary jurisdiction.

The solution is to require, at least initially, that aggregation programs be submitted as joint proposals of the participating marketers and LDCs, and that *any waivers of existing rules, requirements, or policies that are necessary to make the programs work should be identified and justified in those proposals.* The requested waivers would then be subject to review and approval before the programs could be implemented. *(Emphasis added).*

The August 11, 1995 *Order on Reconsideration*, p. 26, amended Ordering Paragraph 1 of Opinion No. 94-26:

. . .to require the LDCs to submit the proposals described in that paragraph on or before 90 days after the date of issuance of this order. The proposals should be

¹ Opinion No. 94-26 allowed for faster implementation of "any policies and guidelines for which implementation was or is proposed before the general compliance filing, e.g., in a currently pending rate case or pursuant to an existing multi-year rate agreement." (*Id.*). Opinion No. 94-26 also noted the establishment of a new proceeding to consider policies and guidelines pertaining to gas purchasing and affordability of service. The new proceeding, Case 95-G-0050, *Proceeding on Motion of the Commission to Investigate Standards and Procedures for Reviewing Gas Purchasing Practices and Allowing the Recovery of Gas Costs, and to Develop Plans for Assuring the Availability of Affordable Service to Core Customers*, was established by the Commission's *Order Instituting Proceeding* (issued January 17, 1995).

in the form of tariff amendments instead of the draft revised tariff leaves required by Ordering Paragraph 1 of Opinion No. 94-26.

In early November 1995, all eleven New York State LDCs filed tariffs to comply with the Commission's order.² Subsequent to those filings the Department of Public Service Staff ("Staff") convened a series of technical conferences and interested parties to discuss the compliance filings of each utility.³ These meetings provided the opportunity for LDCs to describe their proposed tariffs, including in some cases refinements and revisions made since the original November filings, and for interested parties to seek clarifications regarding these proposed tariffs.

At the meetings PSC Staff announced that the Consumer Services Division ("CSD") would be issuing a white paper on consumer protection issues. A CSD discussion paper, *Consumer Protections in The Emerging Competitive Natural Gas Markets* ("*CSD Discussion Paper*"), was distributed February 1, 1996. In that paper, CSD lists as goals that all consumers "be able to choose among vendors of natural gas services;" "receive essential and timely information enabling them to make informed decisions;" and "be assured of safe, reliable service with adequate customer protections."⁴ Some

² The Brooklyn Union Gas Company ("Brooklyn Union"), Central Hudson Gas & Electric Corporation ("Central Hudson"), Consolidated Edison Company of New York Inc. ("Con Ed"), Corning Natural Gas Corporation ("Corning"), Long Island Lighting Company ("LILCO"), National Fuel Gas Distribution Corporation ("NFG"), New York State Electric & Gas Corporation ("NYSEG"), Niagara Mohawk Power Corporation ("NMPC"), Orange and Rockland Utilities, Inc. ("O&R"), Rochester Gas and Electric Corporation ("RG&E") and St. Lawrence Gas Corporation ("St. Lawrence").

³ The meetings took place on January 10, 11, 12, 18 and 19 at the Commission offices in Albany and New York City.

⁴ *CSD Discussion Paper*, p. 2.

concerns identified by Staff include "unavailability of service, unwarranted service terminations, inaccurate or improper billings and lack of timely notice of service changes,"⁵ plain language bills, and the need for "a system to handle customer complaints."⁶ These consumer concerns, and many others, are already addressed in the Home Energy Fair Practices Act (HEFPA)⁷ or other provisions of law.⁸

CSD proposes that gas marketers and aggregators be allowed to skirt HEFPA requirements. CSD would merely condition LDC transportation tariffs for gas marketers and aggregators upon (1) the design and operational existence of an unspecified new "system to handle customer complaints;"⁹ (2) a requirement that bills be in "plain language;" and (3) a 15 day notice requirement prior to termination "to allow customers

⁵ *Id.*, p. 2.

⁶ *Id.*, p. 5.

⁷ "In 1981, the Legislature manifested its own concerns about protecting the rights of residential utility customers when it enacted the Home Energy Fair Practices Act (HEFPA; Public Service Law, art 2). HEFPA declares it "to be the policy of this state that the continued provision of gas, electric and steam service * * * without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest." (Public Service Law, § 30.) In furtherance of this policy, HEFPA established various rights, duties and responsibilities of utility companies and their customers. These include procedures governing applications for service, termination of service, deferred payment plans, billing procedures, and the handling of complaints. It also directed the Public Service Commission to "adopt such additional rules and regulations as it deems necessary and proper to implement [HEFPA's] provisions." (Public Service Law, § 50.) Thus, on April 8, 1982, the Public Service Commission adopted a set of final rules implementing the Home Energy Fair Practices Act (16 NYCRR 11.1-11.22)." *Brooklyn Union Gas Company v. Richey*, 123 Misc. 2d 802, 475 N.Y.S.2d 981 (1984).

⁸ *E.g.*, 16 NYCRR § 275.2 (notices in "nontechnical language"); 16 NYCRR § 273.1 (r) and (s) (bill messages must not "confuse the customer" and abbreviations "not in common English usage" must be explained).

⁹ *Id.*, p. 5.

the opportunity to pay the overdue bill or request service from another provider."¹⁰ CSD envisions contracts between aggregators and customers containing "generic language advising the customers of protections that have been waived in the transaction."¹¹ Each gas marketer or aggregator will be required to "file with staff a copy of its standard contract/service offering."¹² The *CSD Discussion Paper* does not discuss the necessity for reduced customer protection, identify any specific protection that is an obstacle, or analyze whether any of the existing protections can be waived by the customer or by the Commission.

CSD believes these truncated consumer protections for customers of marketers or aggregators are acceptable because its plan will still:

"assure that the LDCs will remain the providers of last resort. Thus, the Commission's consumer protection rules will remain in effect for all tariffed services provided by the LDC."¹³

With respect to all the consumer protections now "in effect for all tariffed services provided by the LDC," *id.*, CSD proposes a new review, to be undertaken by "staff and the LDCs" in order to "determine what changes should be recommended."¹⁴

¹⁰ *Id.* CSD Staff does not envision a Commission role in the complaint resolution process for residential customers. For non-residential customers, Staff envisions a six-month transitional period during which the Commission would decide disputes with marketers, while an unspecified new procedure is developed. *Id.*, p. 4.

¹¹ *Id.*, p. 4.

¹² *Id.*, p. 4.

¹³ *Id.*, at p. 4. Obviously, CSD's model does not contemplate any LDC exiting the merchant function. CSD also urges parties to "examine alternatives to the provider-of-last-resort requirement." *Id.*

¹⁴ *Id.*, p. 5.

CSD proposes that the Commission will monitor complaints against marketers, aggregators, and LDCs and gather information regarding "development of the marketplace to ensure that no vendors or groups of vendors are exerting undue influence over the market, and correct any undesirable or unintended consequences resulting from imperfect competitive markets."¹⁵ CSD does "not intend to impose onerous requirements...."¹⁶

On February 8, 1996 PSC staff convened a meeting to discuss the February 1, 1996 paper. Interested parties were invited to submit written comments on or before February 14, 1996.

PULP's comments will focus on the following areas of concern:

- A. Whether marketers and aggregators are gas corporations as defined by the Public Service Law ("PSL") and therefore subject to the Home Energy Fair Practices Act ("HEFPA").
- B. Whether the Commission has power to waive statutory requirements applicable to marketers and aggregators.
- C. Whether customers can waive statutory protections in contracts with marketers and aggregators.
- D. Whether there has been any showing that elimination of any customer protection laws or rules is necessary for residential aggregation or marketing proposals to go forward.
- E. Whether requiring LDS's to be a provider-of-last-resort is an adequate or lasting substitute for HEFPA compliance by marketers and aggregators.
- F. Whether the consumer protection measures proposed by CSD for customers of gas marketers and aggregators are adequate.

¹⁵ *Id.*, p. 3.

¹⁶ *Id.*, p. 3.

G. Whether new billing and collection rules need to be developed.

Discussion

A. Gas marketers and Aggregators are "Gas Corporations" Under the Plain Meaning of Public Service Law § 2.11 and Therefore They are Subject to HEFPA in their Dealings with Residential Customers.

Under the competitive structure envisioned, the LDC performs the transportation function for the customer, while a marketer or aggregator chosen by the customer performs or facilitates the sale of commodity gas. In contrast to the "bundled" full service now received by residential customers from the LDC, a customer might be billed separately by the LDC for its transportation service and by the chosen marketer or aggregator for the gas purchased.

The Home Energy Fair Practices Act ("HEFPA") applies "to the provision of residential service by gas ... corporations" PSL § 30. The *CSD Discussion Paper* does not discuss the applicability of HEFPA to gas marketers, aggregators, and their residential customers. A review of the relevant statutes shows that a marketer or aggregator who sells gas to residential customers is a "gas corporation" subject to HEFPA.

A "gas corporation" is defined very broadly by the Legislature 'to include, *inter alia*, any corporation, partnership, or person "owning, operating or managing any gas plant."

PSL § 2.11. The statutory definition of "gas plant" is equally expansive:

"The term '*gas plant*,' when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with *or to facilitate* the manufacture, conveying, transportation, distribution, *sale* or furnishing of gas" PSL § 2.10.
(*Emphasis added*)

A gas marketer or aggregator who uses any personal property (e.g., a computer and telephone) to "facilitate" the "sale" or "furnishing" of gas to customers clearly is using "gas plant" as defined in PSL § 2.10, and therefore is a "gas corporation" as defined by the Legislature in PSL § 2.11. The language of the statute is clear, and permits no contrary or alternative interpretation by the Public Service Commission.¹⁷ Thus, the LDCs, gas marketers and aggregators all are "gas corporations" under PSL § 2.11, and all are subject to the requirements of HEFPA.

B. The Commission Has No Discretion to Waive HEFPA Compliance by Gas Marketers and Aggregators.

HEFPA does not exclude from its coverage of gas corporations the activities of gas marketers and aggregators, PSL §§ 30 - 52, or permit the Commission to grant discretionary waivers from HEFPA requirements.. It cannot be argued that the Commission has discretion to waive statutory obligations applicable to gas corporations and the Commission itself under HEFPA. *Cf., Digital Paging v. Public Service Commission*, 46 A.D.2d 92, 360 N.Y.S.2d 931 (3d Dept. 1974).

In *Digital Paging*, one-way wireless paging companies argued they were not "telephone corporations" under PSL § 2.17, because they do not utilize a "telephone line," as seemingly required by the statutory definition of "telephone corporation" in PSL § 2.18. The argument was rejected:

¹⁷ Significantly, in PSL §§ 2.11(a), (b), (c) and (d) the Legislature specifically exempts from the definition of "gas corporation" some entities carrying on certain activities not relevant here. Gas marketers and aggregators are not among those statutorily excepted from the definition, and therefore it must be concluded that they are "gas corporations."

The commission has concluded that the statutory definitions of "telephone line" and "telephone corporation" were legislatively drafted in broad enough terms to include technological advances in the telephonic communications industry and that the term "telephonic communications" includes the communication services offered by Radio Relay's one-way paging system, regardless of whether it is interconnected with a landline telephone company. *Digital Paging v. Public Service Commission, supra.*

In this case there is no need for the Commission to interpret or go beyond the words of PSL § 2.11 because there can be no doubt whatsoever that any gas marketer who uses any personal property in the course of selling or facilitating the sale of gas is a "gas corporation" within the plain meaning of PSL §2.11. Thus it would be unlawful for the Commission to fail or refuse to perform its duties under HEFPA with respect to gas marketers.

C. Statutory Rights and Remedies of Residential Customers Under HEFPA Cannot be Waived.

The Commission plays an integral role in resolving many HEFPA issues, and as shown above the Commission is powerless to abandon its statutory responsibility. The *CSD Discussion Paper* implies that HEFPA rights and remedies available through the Commission can be waived by *customers* as part of their contracts with marketers or aggregators. CSD would allow contracts with "generic [boilerplate] language advising the customers of protections that have been waived in the transaction."¹⁸ Commission acquiescence to or approval of such contract language would be tantamount to

¹⁸ *CSD Discussion Paper*, p. 4. Under CSD's model, by contract the obligation under PSL § 65-b to continue service to a customer whose bills are paid by a department of social services could be waived; the bill disclosure requirements of 16 NYCRR § 273 could be abridged or dispensed with altogether; or the customer deposit requirements of PSL § 117 might be avoided.

abandonment of its statutory obligations, for example, to resolve customer billing complaints under PSL § 43.

HEFPA represents the public policy of the State of New York and the exercise of its police power to set fair ground rules for the provision of energy services essential to the well-being of the people. It is well established that statutory rights conferred on a private party, but affecting the public interest, cannot be waived or superseded by contract where the waiver or release contravenes the statutory policy.

If the agreement to "waive" or extend the Statute ... is made at the inception of liability it is unenforceable because a party cannot "in advance, make a valid promise that a statute founded in public policy shall be inoperative" (Shapley v Abbott, 42 NY 443, 452; Croker v Ireland, 235 App Div 760; Pine v Okoniewski, 256 App Div 519; cf. Wood Co. v Horgan, 291 NY 422, 426; see, also, Simpson, Contracts, § 41, pp 128- 129). *Of course at that stage there is a greater likelihood that a "waiver" or extension of the defense, as part of the initial contract or obligation, was the result of ignorance, improvidence, an unequal bargaining position or was simply unintended. Kassner & Co. v City of New York, 46 NY2d 544, 550-551 (1979). (Emphasis added).*

The remedies of HEFPA and the Commission's role in its administration simply cannot be bargained away by parties to a private contract:

This statutory obligation cannot be transformed into a contractual performance, nor may the [customer's] statutory right be transformed into a contractual privilege.
Goncalves v. Regent Hotels, 58 N.Y.2d 206, 220, 460 N.Y.S.2d 750 (1983)

In sum, CSD's proposal to allow HEFPA and similar consumer protections to be bargained away would be unlawful, because the public interest involved forbids the enforcement of contractual waivers of the customer's statutory rights and remedies.

