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1999 APR 16 PM 1:07

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April 15, 1999

**BY FEDEX**

Honorable Debra Renner  
Acting Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, NY 12223-1350

***Re: Case 98-G-0122 - Proceeding on Motion of the Commission  
to Review the Bypass Policy Relating to the Pricing of Gas  
Transportation for Electric Generation***

Dear Acting Secretary Renner:

Enclosed for filing are 25 copies of a petition of the Brooklyn Union Gas Companies for rehearing of one provision of the Commission's March 17, 1999 Order in the above-referenced proceeding.

All parties on the attached service list have been served with copies of the enclosed petition.

Very truly yours,

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Attorney For  
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RAV:jc  
Enclosures  
[L-G0122.RAV]

cc: All Parties

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**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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Proceeding on Motion of the Commission  
to Review the Bypass Policy Relating to :  
the Pricing of Gas Transportation for  
Electric Generation :  
-----X

Case 98-G-0122

**REQUEST FOR REHEARING  
OF  
THE BROOKLYN UNION GAS COMPANIES**

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**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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Proceeding on Motion of the Commission  
to Review the Bypass Policy Relating to :  
the Pricing of Gas Transportation for  
Electric Generation :  
-----X

Case 98-G-0122

**REQUEST FOR REHEARING  
OF  
THE BROOKLYN UNION GAS COMPANIES**

Pursuant to Section 3.7 of the Commission's regulations, 16 N.Y.C.R.R. Section 3.7, The Brooklyn Union Gas Company and KeySpan Gas East Corporation (together the "Brooklyn Union Gas Companies") request the Commission to reconsider one aspect of its March 17, 1999 Order in this proceeding (the "March 17 Order")--the prohibition on individually negotiated gas transportation contracts with affiliated electric generators.

In addition to the standard gas transportation tariff, the March 17 Order provides that "generators would be free to negotiate terms and prices that would differ to reflect bypass opportunities as well as operational flexibilities." (March 17 Order, p. 4.) However, the Order also concludes, "neither the rate nor any related matters (including, but not limited to, rate structure modifications and levels of interruptions) will be the subject of negotiation with any affiliated entity." (Id., Appendix 2, p. 5.) Therefore, the Local Distribution Company ("LDC") and its generating affiliate are denied the economic benefits that may be available through individually negotiated gas transportation agreements.

The Commission's new prohibition is unnecessarily draconian in that it needlessly (i) denies the LDC opportunities, (ii) diminishes competition, and (iii) deprives LDC-affiliated electric generators of their economic value in spite of the fact that sufficient statutory and regulatory protections exist already to preclude competitive harm from such affiliate contracts.

**I. Denying LDC-affiliated Generators the Ability to Negotiate Individualized Contracts Will Deny Them the Ability to Compete; Thereby, Harming the Generation Affiliate, the LDC, and Consumers.**

The availability of individually negotiated gas transportation contracts to certain electric generators but not to LDC affiliates could present those affiliates with a significant competitive disadvantage. Today, gas transportation agreements with electric generators vary because of differences in operating characteristics of each generator, the needs of each generator's customers and/or steam host (if a cogenerator), and the system characteristics of each LDC. Some generators may be able to accept a higher level of interruptibility because of their emission efficiency, accessibility of environmental credits, or storage capability. These characteristics are driven by several factors beyond a generator's control that may differ from site to site, such as environmental or zoning restrictions. For the same reasons, other generators may need a lower level of interruptibility than 30 days. Whereas 30 days is a reasonable standard, it would be merely coincidental that this level would be ideal for any individual generator. The ability to negotiate interruptibility other than the standard 30 days is an important option to enable generators to optimize the economics of their units.

Similarly, a generator may be in a position to provide an LDC with peaking service (either or both upstream or on the LDC's system) for which a rate discount would be

appropriate.<sup>1</sup> The offering of on-system peaking service at appropriate rates and charges provides the LDC and its firm customers with a valuable gas supply asset used to further ensure system reliability. And, based on the particular characteristics of the generator and the abilities of the LDC, value added services such as balancing, meter reading, maintenance, or others would be in the economic interests of both the generator and the LDC. The inability to negotiate such value-added service denies the LDC, its customers, and the affiliate important business options.

Flexibility in the term of the contract also has been an important factor to generators. If a generator is limited to a five-year gas transportation term, the project becomes less attractive to financiers, fuel suppliers, and customers who may require a greater assurance of long-term commitment (such as cogeneration hosts).

There are numerous examples where both the LDC and the generator can benefit through contract flexibility. Denying that flexibility will impose an economic burden on both the LDC and the generator. Moreover, where only the LDC's affiliate has this burden, a competitive market will ensure that the burden makes the affiliate generator uncompetitive.

In addition to the importance of flexibility to the operational requirements of generators, it is also important to avoid bypass by new generating units of LDC affiliates. Knowing that they are at a competitive disadvantage within an LDC's service territory, LDC-affiliated generators are likely to locate new projects elsewhere--to the disadvantage of the LDC, its customers, and the State and local municipalities within the service territory. Consumers generally will also be hurt because competition is diminished by the elimination of a competitor,

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<sup>1</sup>Although it is the Commission's policy for gas utilities to exit the merchant function, until that is accomplished peaking service will be required for sales service and, afterwards, peaking service may continue to be required for reliability purposes.

particularly one that is highly experienced and skilled in providing safe and reliable service. It has generally been the Commission's policy to allow utility affiliates to compete--as with energy commodity marketing and appliance repair. To deny negotiated agreements will essentially reverse that policy here. The result will be that the ultimate Commission goal of a robust free gas marketplace will be set back by the elimination of a viable competitor.

In sum, the Commission's prohibition on negotiated gas transportation agreements for affiliated generators will strip those generators of their existing economic value and deny LDC affiliates the ability to offer generation within the LDC's service territory. Such a Draconian measure should only be resorted to where otherwise unavoidable--here alternative protections of the competitive market make this policy unnecessary.

## **II. There Already Exist Sufficient Protections to Preclude an LDC From Favoring its Generation Affiliate.**

First, the March 17 Order itself provides sufficient protection against the prospect of an LDC favoring any generator, including an affiliate, by requiring that each negotiated contract "be filed with the Commission along with a full justification for the negotiated rates and terms." (March 17 Order, Appendix 2, p. 5.) The Commission insists on making such information publicly available via tariff addenda: "Otherwise, parties attempting to negotiate contracts can never be sure that they are offered similar rates, terms, and conditions as other similarly situated customers." (*Id.*) The Order provides no explanation as to why such protection against discrimination among generators does not offer sufficient protection against discrimination when the contracted-with generator is an LDC affiliate. Although the economic incentive to discriminate in a favor of an affiliate is clear, the Commission's disclosure policy recognizes that

this is not uniquely an affiliate concern--there may be incentives for the utility to provide preferential terms and conditions to non-affiliates as well and, therefore, the terms and conditions of all negotiated contracts must be made public. Such public disclosure is sufficient to reveal any discrimination and afford the opportunity of a remedy whether the transportation contract is with a non-affiliate or an affiliate. In fact, the affiliate disclosure is certain to attract more scrutiny and be a more certain deterrent to unjust discrimination.

Second, the major New York utilities have adopted Commission-approved codes of conduct that specifically address affiliate transactions. The prospect of gas transportation to affiliated electric generators was clearly before the Commission and all interested parties when those codes of conduct were adopted. The protections in the codes were considered then to be adequate; it is unjustified to now reopen this issue merely to place unilaterally an additional, unnecessary, and burdensome restriction on utilities and their affiliates.

For the Brooklyn Union Gas Companies, in particular, the code of conduct adopted in the Settlement Agreement of their merger proceeding expressly requires that, in offering Commission-regulated gas service, they must "offer the same prices, terms and conditions of service within the service territories of LILCO and Brooklyn Union to all similarly situated non-affiliated customers that they offer to their Affiliates . . . ."<sup>2</sup> Furthermore, the Settlement Agreement stipulates:

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<sup>2</sup>Opinion and Order Adopting Terms of Settlement Subject to Conditions and Changes, Opinion No. 98-9, Issued April 14, 1998 in Case 97-M-0567, *Joint Petition of Long Island Lighting Company and The Brooklyn Union Gas Company for Authorization under Section 70 of the Public Service Law to Transfer Ownership to an Unregulated Holding Company and Other Related Approvals*, Appendix A, (the Settlement Agreement") p. 32.

In the event either LILCO or Brooklyn Union enters into an agreement to provide such services at individually negotiated prices, terms or conditions, for any such Affiliate or any customer of one of such Affiliates within the service territories of LILCO or Brooklyn Union, it shall post expeditiously and conspicuously on its electronic bulletin board or World Wide Web site a detailed summary of the prices, terms and conditions of service under such agreement.” (Id.)

That Settlement Agreement was reached among several parties that included a developer of electric generation and provider of various energy-related services on Long Island--Trigen Nassau Energy Corporation (“Trigen”). Trigen intervened in the proceeding because of its concerns as a competitor of the affiliates of the Brooklyn Union Gas Companies. (See, “Supporting Position Statement of Trigen-Nassau Energy Corporation” submitted in that proceeding (“Trigen Statement” p. 2)). Trigen explained that it supports the Settlement Agreement because of the affiliate transaction disclosure rules contained in the Settlement Agreement and that, in particular, the posting requirement addresses Trigen’s concerns. (Id., p. 3.) Trigen went on to explain that such posting has been adopted by several jurisdictions in their affiliate transaction rules. (Id., p. 4.)

There is no reason for now finding inadequate those measure the parties to the Settlement Agreement adopted and the Commission approved one year ago. In fact, the new bypass policy adopted by the Commission, setting aside the affiliate restriction addressed herein, provides greater protection for generators than had existed previously.

Third, Section 65 of the Public Service Law (“PSL”) prohibits undue discrimination, and violations of the law can result in fines up to \$100,000 a day per violation under PSL Section 25--providing a significant remedy and deterrent.



Fourth, the Federal Energy Regulatory Commission (“FERC”), which has jurisdiction over wholesale sales of electricity, has recognized as adequate protection against affiliate exercise of vertical market power (such as for gas transportation to electric generators) its ability to deny market based rates. If a generator subject to FERC’s jurisdiction or any of its affiliate deny, delay, or require unreasonable terms, conditions, or rates for natural gas service to a potential electric competitor in bulk power markets, the competitor may file a complaint with the FERC challenging the generator’s authority to sell power at market-based rates. Evidence of discrimination in favor of an affiliate certainly would be evidence of unreasonable treatment of a potential competitor of that affiliate. This opportunity to challenge market-based rates is considered by the FERC to be sufficient protection against the imposition of barriers to market entry.<sup>3</sup> The Commission should recognize that not only does FERC provide an adequate remedy, in the wholesale electric marketplace, against the affiliate abuse that concerns the Commission, but that such disciplinary measures are sufficiently available to the Commission as well and are preferable to the Commission’s absolute prohibition.

Finally, if the Commission does not find existing protections adequate, it should allow the LDC and its affiliates to propose additional mitigation measures. The number of new gas transportation contracts with LDC-affiliated generators will not be so numerous as to be unduly burdensome for the Commission to address each on its own merits rather than imposing a blanket prohibition that will cause severe and unnecessary economic harm to LDC-affiliated generators and be injurious to the LDC, its customers, and consumers in general.

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<sup>3</sup>See, e.g., *Duke Power*, 84 FERC Para. 61,235 (1998), p. 62,200.

## CONCLUSION

The Commission's prohibition on individually negotiated contracts for LDC affiliates is unduly punitive to the affiliate and unnecessarily harmful to the LDC and its customers. There has been no showing that the potential harm of affiliate transactions warrants so severe and absolute a prohibition. The imposition of the prohibition is without basis, unduly discriminatory, confiscatory, and arbitrary and capricious. Instead, sufficient measures are available to ensure that LDCs cannot unfairly advantage their generation affiliates through an individually negotiated contract that complies with the Commission's new policy.

Respectfully submitted,



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