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nationalgrid

August 18, 2014

VIA ELECTRONIC MAIL

Kathleen H. Burgess
Secretary
New York State Public Service Commission
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Albany, NY 12223-1350
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Re: Edward Kalikow
Informal Review Decision
Case #230132
Flushing, NY 13373

Dear Secretary Burgess:

Enclosed for filing is the Appeal of The Brooklyn Union Gas Company d/b/a National Grid NY of the Informal Decision issued on July 3, 2014 in the above referenced case.

Please contact me if you have any questions or require further information.

Yours truly,

/s/ Philip A. DeCicco
Philip A. DeCicco

cc: Douglas DiCeglio (Urac Corp) (via electronic mail)
(DDiCeglio@UracCorp.com)

NEW YORK STATE
PUBLIC SERVICE COMMISSION

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CASE 230132 **Edward Kalikow**

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APPEAL OF
THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID

In accordance with Section 12.13 of the New York Public Service Commission's ("Commission") regulations (16 NYCRR § 12.13), The Brooklyn Union Gas Company d/b/a National Grid NY ("National Grid" or the "Company") hereby appeals those portions of the Informal Review Decision ("Informal Decision"), issued by Hearing Officer Muñoz in Case No. 230132 – Edward Kalikow, on July 3, 2014, finding that "…the utility is responsible for ensuring that customers are on the correct …[rate] based on their respective consumption" and directing National Grid to retroactively rebill the customer to 2009, with interest, to the extent the customer qualified for a lower rate.[1] Informal Decision at 8. As set forth below, these parts of the Informal Decision are erroneous in fact and law and should be reversed.

BACKGROUND

This case arises from National Grid's denial of a request by Utility Rate Analysis Consultants ("URAC") on behalf of Edward Kalikow requesting retroactive rebilling of Mr. Kalikow's account at the service classification ("SC") 6M2 rate to September 29, 2009. National Grid's temperature controlled, multifamily customers are assigned to SC 6M2 when their annual usage is at least 3,500 dth but not greater than 8,999 dth. Customers whose annual usage is at least 9,000 dth but not greater than 25,999 dth are assigned to SC 6M3.

At the time the complainant began receiving service in 1997, the account was, as URAC

[1] The date for filing an appeal was extended to August 18, 2014 at the request of National Grid.

agrees, properly assigned to the SC 6M3 rate because the customer was expected to use more than 8,999 dth per year based on the gas-fired equipment in use at the premises. As further acknowledged by URAC, the account remained on SC 6M3 for many years because the customer's actual usage was consistently above the 8,999 dth threshold. In 2009, the customer's usage dropped below 8,999 dth, but the customer did not contact National Grid to request a rate change until June 25, 2012. In that request, the customer also sought retroactive rebilling to 2009. In response, National Grid indicated that it would change the customer's rate to SC 6M2 effective June 25, 2012 but could not retroactively adjust the customer's account on the grounds that the customer had not notified the Company of the changes in consumption that would have impacted its rate assignment.

On August 30, 2012, the Department of Public Service ("DPS") Office of Consumer Services issued an initial decision ("Initial Decision") upholding the Company's denial of the request for retroactive rebilling and finding that the customer was required to notify the Company of any change in consumption that would affect his rate classification. On August 31, 2012, URAC appealed the Initial Decision and requested an informal review. On July 3, 2014, the DPS issued the Informal Decision, reversing the Initial Decision and directing the Company to retroactively rebill the account to 2009 if the account qualified for the SC 6M2 rate, with interest applied to any overpayment, on the basis that "...the utility is responsible for ensuring that customers are on the correct ...[rate] based on their respective consumption." Informal Decision at 8.

DISCUSSION

1. National Grid's Appeal Satisfies the Commission's Standard of Review

Under Section 12.13(1) of the Commission's regulations, an Informal Decision is subject to appeal if the Hearing Officer "made a mistake in the facts in the case or in the interpretation of laws or regulations which affected his or her decision." In concluding that the Company is responsible for ensuring that customers are on the correct segment of SC 6M based on their consumption, the Informal Decision made the following mistakes in law and fact:

- Ignoring well established Commission precedent holding that a utility has no obligation to monitor a customer's actual gas usage on an ongoing basis or to ensure that a customer is on the best rate;
- Relying on Opinion 96-26[2] issued by the Commission in Case 95-G-0761, to support the conclusion that the Company has a continuing obligation to monitor SC 6M accounts after rate eligibility is determined based on the customer's service application;
- Finding that the Company otherwise annually reviews the types of SC 6M accounts at issue in this case to determine a customer's annual consumption levels; and
- Concluding that SC 6M customers are incapable of determining when their accounts may become eligible for a different segment of the SC 6M rate based on changes in their consumption levels.

These errors are addressed in turn below.

2. The Hearing Officer Ignored Well Established Commission and Court Precedent

In rendering her decision, the Hearing Officer disregarded the long-standing case law that supports National Grid's position that it is not required to monitor a customer's actual usage for purposes of determining whether the customer is eligible for a different SC 6M rate segment

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[2] *Petition of The Brooklyn Union Gas Company for (a) Commission authorization pursuant to §70 of the Public Service Law to form a holding company; (b) Commission approval pursuant to §§66 and 72 of the Public Service Law of the company's accounting and rate treatment, and (c) for an amendment to the Commission's Order Issued May 5, 1995, in Case 94-G-0973*, Case No. 95-G-0761, "Opinion And Order Approving Settlement Concerning Corporate Structure And Rate Plan" (Issued and Effective September 25, 1996)("Opinion 96-26") ("Opinion 96-26").

after the customer was appropriately assigned to SC 6M3 at turn on. In doing so, the Hearing Officer failed to take into account the well-established Commission precedent that unequivocally places the burden of monitoring subsequent usage on the customer and not the utility.

In Case 03-G-0671, *In the Matter of the Rules and Regulations of the Public Service Commission Contained in 16 NYCRR, in Relation to Complaint Procedures—Cross Appeals by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery of New York and the New York City Housing Authority of the Informal Decision Rendered in Favor of New York City Housing Authority (182658)*, "Commission Determination" (Issued and Effective August 23, 2010) ("*Brooklyn Union/NYCHA*"), the New York City Housing Authority ("NYCHA") sought to impose an obligation on the Company to continually monitor usage at all of its buildings in order to ensure that the accounts were on the correct rate. The Company argued, *inter alia*, that monitoring usage at all of the hundreds of NYCHA managed buildings would be impractical. Agreeing with the Company, the Commission considered "the practical applications of [monitoring usage] as well as applicable legal precedent [when rejecting] the imposition of such an obligation." The Hearing Officer erred in imposing upon the Company an obligation to monitor the usage of SC 6M rate customers on an on-going basis when the Commission previously made clear in *Brooklyn Union/NYCHA* that no such obligation exits.[3]

In addition, it is clear that where the customer is in possession of information that would

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[3] *See* Case 97-E-0298, *In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures--Appeal by Consolidated Edison Company of New York, Inc. of the Informal Decision Rendered in Favor of 500 West End Ave. Corp., filed in C 26358 (772979) et. al.*, "Commission Determination" (Issued and Effective March 14, 2001). In that case, the complainant had indicated that the property was for rental-purposes-only on its application, but subsequently used the property for residential purposes. The Commission stated, "In any case, it was the complainant's responsibility when applying for service to inform the utility about the nature of service, and, thereafter, of any changes in it."

demonstrate that a rate change is warranted, the burden is on the customer, not the utility to come forward. See *Silver's Lunch Stores, Inc. v. United Electric Light and Power,* 142 Misc. 744, 255 N.Y. Supp. 515, 523 (City Court, NY Co., 1932) (the court noted that customer was in possession of the facts necessary to properly determine the nature of the service requested). Accordingly, the court held that the utility was not liable for the customer's assignment to an incorrect service rate where the information necessary to determine such rate was not provided by the customer. The Commission has similarly recognized that when customers are in possession of information that indicates that a different rate may be appropriate but does not make an effort to inform the utility of such facts, the customer is not entitled to a retroactive refund. Case 07-E-0598, *In the Matter of the Rules and Regulations of the Public Service Commission Contained in 16 NYCRR in Relation to Complaint Procedures-Appeal by Phillips Houses Services of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc.*, "Commission Determination" (Oct. 17, 2011).

In determining which rate the customer qualifies for at turn on, the Company considers a variety of factors, including equipment ratings, load factor, the size of the building, etc. Once the rate the rate segment is established, the Company uses this information for system engineering and supply planning to ensure reliability based on anticipated customer demand. Thereafter, variables outside the utility's knowledge or control can cause a customer's gas usage to vary year-to-year. In some cases a change in a customer's circumstances (*e.g.*, an equipment change) can result in a long term change in their usage pattern, while in other cases the fluctuation can be an anomaly caused by a temporary condition or weather event, such as switching to oil because the customer was able to secure a more competitive price from the customer's oil company. Where there is a long term change in circumstances on the customer's

side of the meter after turn on, the customer is better positioned than National Grid to make that determination.

Finally, this customer has been a Rate 6M3 customer since 1997 and has been receiving the Company's annual brochure describing its rights as a customer and informing him to contact the utility with any questions about his rates and service. While, as this customer admits, his consumption changed in 2009 in such a way so as to impact rate assignment, he and/or his rate consultant nevertheless waited until 2012 to inquire about a rate change. Given these circumstances, a retroactive rate adjustment is not appropriate. *See In the Matter of the Rules and Regulations of the Public Service Commission Contained in 16 NYCRR In Relation to Complaint Procedures – Appeal by Plaza Auto Mall of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc.* Case 06-E-1292, "Commission Determination" (April 19, 2010) (the annual brochure mailed to complainant who had been a customer of the utility for many years constituted reasonable notification by the utility of available rates and the need to contact the utility about a change; because the customer did not contact the utility, a retroactive rate change was no appropriate).

Based upon the foregoing, the law is clear that having been placed on the correct rate at turn on, it was the customer's responsibility to inform National Grid of subsequent changes in actual usage. Accordingly, the Hearing Officer erred in determining that it was the Company's obligation to monitor the customer's actual usage to ensure the correct rate assignment.

3. Reliance on Opinion 96-26 Was Misplaced

One of the more confusing aspects of the Informal Decision is the reliance on Opinion 96-26 because that Opinion did not authorize or establish the SC 6M segments at issue in this case. When Opinion 96-26 was issued, the SC 6M rate segments at issue had not yet been

proposed by the Company. Instead, as expressly noted in Opinion 96-26, that Opinion merely gave National Grid the right to propose SC 6M segments in a subsequent filing with the Commission. *See* Opinion 96-26, *mimeo* at 21-22. As discussed below, a subsequent filing was made and the Commission order approving that filing did not impose an obligation to monitor SC 6M account consumption levels after turn on to determine whether a customer qualifies for a different SC 6M segment.

In Opinion 96-26, the Commission approved a Stipulation to resolve National Grid's (then, The Brooklyn Union Gas Company) proposal to form a holding company and to establish a rate plan. That Stipulation, *inter alia*, permitted the Company to file new tariff leaves issued on June 1, 1997 (and each June 1 thereafter through June 1, 2001) to "reflect revisions to … Temperature Controlled Service rates implementing the revenue requirement and rate design changes described in [the Stipulation]." Stipulation at 8. On September 22, 1997, the Commission approved the Company's proposal filed on May 30, 1997, ("May 30 Proposal") to establish four consumption based rate segments.[4] The rate segments approved in the September 22 Order are the rates at issue in this case and continue through today. Nowhere in the May 30 Proposal, the September 22 Order or the tariff leaves filed in compliance with the September 22 Order is there any mention of a requirement that obligates the Company to monitor SC 6M accounts once properly assigned to a rate segment to determine whether that account subsequently qualifies for a different SC 6M rate segment. Thus, the Hearing Officer's reliance on Opinion 96-26 was improper.

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[4] *Petition of The Brooklyn Union Gas Company for (a) Commission authorization pursuant to §70 of the Public Service Law to form a holding company; (b) Commission approval pursuant to §§66 and 72 of the Public Service Law of the company's accounting and rate treatment, and (c) for an amendment to the Commission's Order Issued May 5, 1995, in Case 94-G-0973*, Case No. 95-G-0761, "Order On Review of Rate Plan Filing" (Issued and Effective September 22, 1997) ("September 22 Order").

4. The Company Does Not Annually Review SC 6M Accounts

The Informal Decision cited a letter dated January 6, 1997 ("January 6 Letter"), from National Grid to URAC regarding a Fred C Trump account to demonstrate that the Company annually reviews SC 6 accounts to determine consumption levels. As set forth below, the Informal Decision improperly relied on this letter. More importantly, no such review process for all SC 6 accounts even exists.

First, the January 6 Letter only establishes that the Company had not reviewed the annual usage for the specific account in question in that case, a negotiated SC 6 customer. Moreover, the SC 6M rate referenced in the January 6 Letter was entirely superseded by the SC 6M rate approved by the September 22 Order, which imposed no ongoing obligation on the Company to monitor SC 6M consumption levels.

Further still, the January 6 Letter does not establish any kind of a standing National Grid policy of reviewing SC 6M customer usage. As noted above, it is the tariff that governs the terms and conditions of SC 6M service as well as any obligations imposed on National Grid concerning the provision of that service. The tariff does not reflect a National Grid policy of annually reviewing SC 6M account consumption levels. Moreover, even if the letter could be construed as admitting to an annual SC 6M account consumption review policy, as reflected in the Affidavit of Dawn Herrity attached hereto, no such policy even exists. Therefore, any indication by the employee in the January 6 Letter concerning a generic policy was simply untrue. *Vivitorian Corporation v. Brooklyn Union Gas Company et. al.*, 672 NYS2d 919 (App. Div. 2nd Dept. 1998) citing *Loschiavo v. Port Auth. of N.Y. & N.J.*, 58 N.Y.2d 1040 (1983) ("[t]he hearsay statement of an employee is admissible against the employer only if the making of the statement is an activity within the scope of the employee's authority). Thus, reliance on

the January 6 Letter as demonstrating a policy of reviewing SC 6M customer usage was inappropriate and premised on false facts.

5. SC 6M Customers Can Determine Their Consumption Levels

The Informal Decision found that SC 6M customers are unable to determine when their accounts become eligible for a different segment of the 6M rate because the eligibility requirement for 6M service classification is based on "annual weather normalized usage." As a preliminary matter, normalizing usage is an industry accepted practice for determining gas usage. Regardless, for many customers, most importantly Mr. Kalikow, there is such a negligible difference between a SC 6M customer's actual and normalized usages that it is a distinction without a difference for purposes of determining SC 6M consumption thresholds. Schedule A contains a comparison of Mr. Kalikow's actual and normalized usages for the calendar years ending 2012, 2013 and 2014. In all the years, his actual and normalized consumptions vary insignificantly from each other. The customer's actual usage, which is reflected on his bills, is so far below the 9,000 dth threshold that it should have been obvious to the customer to request that the Company review his account. While the Hearing Officer indicated that the customer has no way of knowing which twelve months apply to determine usage, the tariff makes clear that consumption is based on annual usage and does not require a specific twelve month period. Accordingly, the customer had sufficient information to prompt him to inquire with the Company about a rate change, and it was improper for the Hearing Officer to conclude otherwise.

CONCLUSION

For the reasons explained above, National Grid is not required to continually monitor the usage of SC 6M customers to ensure that they are on the correct rate segment. Accordingly, Mr. Kalikow is not entitled to have his account retroactively rebilled, and National Grid respectfully requests that the Informal Decision be reversed.

Respectfully submitted,

National Grid plc
By its Attorneys,

/s/Philip A. DeCicco
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Dated: August 18, 2014

Schedule A

Kalikow Annual Usage

From Date	To Date	No Days	Actual DDs	Normal DDs	Diff DDs	Weather Variance	Act Use (therms)	(dt)		Weather Adj (dt)	Adj Use (therms)		
7/26/2013	7/28/2014	367	4959	4655	304	6.5% Colder	63,981	6,398	-29% Below 9,000 dt Min	(288)	6,110	-4.5%	Decrease
8/27/2012	7/26/2013	333	4636	4655	-19	-0.4% Warmer	71,123	7,112	-21% Below 9,000 dt Min	18	7,131	0.3%	Increase
8/25/2011	8/27/2012	368	3716	4684	-968	-20.7% Warmer	58,040	5,804	-36% Below 9,000 dt Min	967	6,771	16.7%	Increase

SC 6M

Rate Schedule 1	1,000	to	3,500
Rate Schedule 2	3,500	to	9,000
Rate Schedule 3	9,000	to	26,000
Rate Schedule 4	26,000	to	+

NEW YORK STATE
PUBLIC SERVICE COMMISSION

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CASE 230132 **Edward Kalikow**

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AFFIDAVIT OF DAWN HERRITY IN SUPPORT OF THE APPEAL OF THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID

STATE OF NEW YORK)
)SS.:
COUNTY OF KINGS)

DAWN HERRITY, being duly sworn, deposes and states:

1. I am the Principle Program Manager – NY Gas Pricing of The Brooklyn Union Gas Company d/b/a National Grid NY and I am fully familiar with the facts of the above-captioned proceeding.
2. I submit this affidavit in support of National Grid's appeal of the Informal Decision issued in Case No. 230132 –Edward Kalikow, on the grounds set forth in the brief in support of the appeal that accompanies this Affidavit. Specifically, I submit this affidavit to support the factual assertions contained in the accompanying brief that National Grid never had a policy in place by which the Company annually reviews SC 6M (temperature controlled, multifamily) accounts to determine whether SC 6M customers should be reclassified to a different SC 6M segment.
3. Having been employed by National Grid since November 12, 1984, I have been with the

Company since the effectiveness of both the SC 6M rates at issue in the January 6, 1997 letter and the rates superseded by the SC 6M rates at issue in this case. At no time during the effectiveness of either of these rates has the Company ever had a practice by which it annually reviews SC 6M accounts after turn on to determine whether the account should be reclassified to a different SC 6M segment. It has always been the case that once an account is properly assigned to a SC 6M consumption segment at turn on, the Company does not monitor a customer's usage to determine whether to reclassify the customer to a different SC 6M segment. It is and always has been the responsibility of a customer to notify the Company of any changes in consumption that impact rate eligibility.

4. In summary, the Company has never had a practice of reviewing the consumption levels of SC 6M accounts after turn on.

Dawn Herrity

Sworn to before me this 18th day of August, 2014

Notary Public

SONYA D. JOHNSON
Notary Public, State of New York
Registration #02JO6007140
Qualified In Kings County
My Commission Expires May 18, 2018