

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 15, 2005

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 98-M-1343 - In the Matter of Retail Access Business Rules.

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.

ORDER ON PETITIONS FOR REHEARING AND CLARIFICATION

(Issued and Effective June 22, 2005)

BY THE COMMISSION:

INTRODUCTION

By Order issued June 20, 2003,¹ the Commission implemented changes to the Home Energy Fair Practices Act (HEFPA, Public Service Law (PSL) §§30-53)² and a policy on pro-

¹ Case 98-M-1343, et al., supra, Order Relating to Implementation of Chapter 686 of the Laws of 2003 [sic 2002] and Pro-ration of Consolidated Bills (issued June 20, 2003)(June Order).

² These changes include authority for energy service companies (ESCO) to suspend utility service to residential customers as a result of non-payment and a requirement that ESCOs provide customer protections, such as, deferred payment agreements and budget billing.

ration.³ On December 5, 2003, the Commission issued an Order resolving issues raised in Petitions for Rehearing and Clarification of the June Order, relating to the pro-ration policy, request for further delay in its implementation, and requirements for implementation of HEFPA amendments.

One petition for rehearing and clarification of the December Order was filed jointly by Consolidated Edison Company of New York, Inc. (Con Edison), KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island, National Fuel Gas Distribution Corporation (NFG), New York State Electric & Gas Corporation (NYSEG), Niagara Mohawk Power Corporation (Niagara Mohawk) and Rochester Gas and Electric Corporation (RG&E) (Joint Petitioners); separate petitions were filed by National Energy Marketers Association (NEM)⁴ and the Small Customer Marketer Coalition (SCMC). Replies to the petitions for rehearing were submitted by Con Edison, NFG,⁵ Strategic Energy, SCMC, and the Public Utility Law Project (PULP). A request for an advisory opinion was filed by Belkin, Burden, Wenig & Goldman, LLP (BBWG), a law firm representing a submeterer. A Notice of

³ The Commission's policy on pro-ration requires billing parties to apply partial customer payments to utility and ESCO charges according to categories of charges. See, Case 98-M-1343, supra, Order on Petitions for Rehearing and Clarification (issued December 5, 2003)(December Order)(modifying the Uniform Business Practices §9.J).

⁴ NEM's petition concerned the imposition by distribution utilities of a reconnection fee. This matter was addressed in another order. See Case 98-M-1343, supra, Order Modifying Suspension Fees and Other Tariff Provisions and Granting Further Relief (issued October 25, 2004).

⁵ NYSEG and RG&E jointly filed a letter in support of NFG's response to the petitions for rehearing filed by SCMC and requested that the Commission grant the relief sought by the Joint Petitioners.

Proposed Rule Making concerning the petitions was published in the State Register on March 9, 2005. No additional comments were received in response to the SAPA, which expired on April 23, 2005.

The petitions raise questions concerning the statutory interpretation of certain HEFPA provision and application of our pro-ration policy. In this Order, we decline to exempt owners of residential submetered buildings from HEFPA, clarify that submeterers may disconnect service to tenants pursuant to the provisions of PSL §32(2),⁶ modify certain provisions of our pro-ration policy, affirm the requirements that ESCOs are required to comply with HEFPA, and deny other requests for rehearing or clarification.

PETITIONS AND DISCUSSION

Statutory Interpretation

A. Submeterers' Exemption from HEFPA

BBWG seeks an advisory opinion⁷ as to whether its client, an owner of a submetered residential building (owner), is eligible for an exemption from HEFPA. BBWG states that the owner provides submetered service, under terms and conditions established in a court approved agreement. The agreement provides that the residential tenants of the building receive a rent reduction as part of agreeing to pay for electricity; each tenant receives a monthly bill for actual electricity usage;

⁶ PSL §32(2) provides in part that "utility service may be terminated, except as otherwise provided in this section, if any person supplied with electric or gas service to a residence: (a) fails to pay charges for any service rendered during the preceding twelve months...(b) fails to pay amounts due under a deferred payment plan. . . ."

⁷ As we do not issue advisory opinions, we will treat this request as a request for an exemption under 16 NYCRR §58.1.

and, the owner is not permitted to disconnect or suspend the provision of electricity for non-payment.⁸

BBWG argues that the owner should be exempt from HEFPA according to 16 NYCRR §58.1. That provision exempts persons from HEFPA if they are engaged in a business other than "owning, operating or managing a gas plant, electric plant...." First, BBWG points to the fact that the owner is not engaged in the primary business of supplying electricity. Second, it states that the owner's business, providing housing for residential customers, is not subject to the jurisdiction of the Commission. Third, because the provisions of HEFPA are contrary to the court approved agreement, the application of HEFPA provisions would result in its nullification, which BBWG argues would be in contravention of public policy.

Submeterers are required to comply with the provisions of HEFPA (PSL §§30 and 53). HEFPA, in pertinent part, defines a utility corporation, for purposes of Article 2, "as any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers" (PSL §53, emphasis added). HEFPA also prohibits the Commission from waiving compliance with any requirement of HEFPA (PSL §53). These statutory requirements specifically establish Commission jurisdiction over submeterers for the purpose of implementing

⁸ The term "disconnect" refers to the action by a distribution utility to cut-off delivery and/or commodity service to a residential customer for non-payment. The term "suspend" refers to the action by an ESCO to cut-off delivery service of the distribution utility to a residential customer for non-payment. The term "terminate" refers to the action by an ESCO to cut-off its commodity service to a residential customer for non-payment. A customer who has been terminated by an ESCO may elect to receive commodity service from the distribution utility or another ESCO.

HEFPA and supersede conflicting regulations such as 16 NYCRR §58.1.

BBWG argues that denial of an exemption from HEFPA would subvert the court approved agreement the owner entered into as a condition for submetering service to tenants.⁹ While the court approved agreement offers some protections not provided by HEFPA (e.g., prohibition of terminating service for non-payment (PSL §32(2)), it fails to provide some basic HEFPA protections (e.g., budget billing and consumer complaint procedures (PSL §§38 and 43)). HEFPA prohibits us from waiving compliance with its provisions (PSL §53). Therefore, BBWG's request for an exemption is denied.

B. Submeterers' Right to Disconnect/Suspend Service

SCMC contends that PSL §32 affords submeterers the right to suspend a customer's service for non-payment, contrary to our finding in the December Order. SCMC acknowledges that PSL §32(5) is limited to the right of commodity suppliers to seek suspension, but it believes that submeterers are providing both commodity and delivery service. SCMC argues that because submeterers provide commodity and distribution service the right to disconnect service provided by PSL §32(2) includes the authority for submeterers to disconnect service to non-paying tenants.

⁹ The case relied upon by BBWG in making its argument, Hallock v. State of New York and Power Authority of the State of New York, 64 NY2d 224 (1984), is not applicable to the facts posited by BBWG. The Hallock case primarily concerned an attorney's ability to bind his clients to a stipulation even where he exceeded the authority granted by his client in entering into a court approved stipulation of settlement. In rendering its determination, the court relied on the general principle that stipulations should not be lightly cast aside, but did not address the impact of a change in law on a court approved stipulation.

In our December Order (p. 40), we determined that submeterers, although falling within the definition of a utility corporation for purposes of Article 2, do not have the right to seek suspension¹⁰ of distribution service because PSL §32(5) applies to entities supplying commodity only and submeterers supply both commodity and delivery service. However, submeterers, defined as utilities subject to HEFPA, may terminate service to non-paying residential customers pursuant to PSL §32(2), because this section permits a defined utility to terminate service to residential customers; and, we have determined that submeterers are utilities for purposes of implementing HEFPA. SCMC's petition on this point is, therefore, granted to the extent discussed above.

C. Second Suspensions

SCMC objects to the prohibition against an ESCO requesting a second suspension for arrears that remain after the customer has paid the lesser amount to reconnect delivery service pursuant to PSL §32(5)(d).¹¹ SCMC contends that HEFPA, although prescribing requirements that must be met to effectuate a suspension, does not affirmatively limit an ESCO's right to seek suspension for arrears remaining after service is reconnected pursuant to PSL §32(5)(d).¹²

¹⁰ Suspension of service occurs when the ESCO directs the distribution utility to cease providing delivery service, and, thus, commodity service, to a customer under §32(5).

¹¹ Pursuant to PSL §32(5)(d) a customer may end suspension of delivery service by paying any lesser amount that the customer would have been charged for distribution utility commodity service.

¹² ESCOs would have available all other legal remedies to collect amounts owed under their contracts with customers.

Joint Petitioners oppose SCMC's proposal. They assert that the statute does not explicitly authorize that such arrears may form the basis of a second suspension of service. Further, they note that such a reading of the statute is incompatible with the provisions of the PSL §32(5)(d) because the customer has already paid the required amount to restore service.

PULP states that PSL §32(5)(d) was designed to provide protection against ESCO prices that are higher than the distribution utility's commodity prices. PULP argues that permitting service to be suspended a second time to recover higher ESCO commodity prices would defeat the provisions of PSL §32(5)(d). PULP contends that the statute cannot be read to permit an ESCO to seek a second suspension because no specific language in the statute permits that result.

We agree with Joint Petitioners and PULP. SCMC's request for second suspensions would render PSL §32(5)(d) meaningless in contravention of the rules of statutory construction.¹³ Thus, SCMC's request is denied.

D. Special Needs Customers

In the December Order, ESCOs were directed to collect information from their customers to identify customers qualifying for the special disconnection protections afforded under the law and our rules (PSL §32(3) and 16 NYCRR §11.5). SCMC contends that all parties having the right to suspend or disconnect distribution utility service have the obligation to ensure that such action does not negatively affect the health and safety of special needs customers. Instead of requiring ESCOs to obtain this information independently, SCMC urges the Commission to require distribution utilities to provide ESCOs

¹³ McKinney's, Statutes §98, stating that "meaning and effect [should be] given to all provisions of the statute."

the information they maintain regarding the identification of special needs customers. SCMC contends that the release of the information would not violate the customer's right to privacy because customers have already identified themselves as special needs customers.

Joint Petitioners agree that the transmission of special needs customer information to ESCOs would not diminish protection of a customer's privacy because distribution utilities are required to collect the information. The Joint Petitioners, however, do argue that provision of the information to the ESCOs, would result in several disadvantages: ESCOs would rely on the information and refrain from conducting a separate inquiry to determine the extent of a customer's special needs; and, ESCOs may be disinclined to enroll a customer if they know in advance that additional HEFPA procedures are required for those customers.

The ESCOs' right to suspend distribution utility services carries with it the obligation to ensure that any decisions to suspend service to special needs customers are made after compliance with special protections afforded those customers by HEFPA. Accordingly, ESCOs must independently obtain from their customers sufficient information to determine whether the special protections afforded by HEFPA are applicable. SCMC's petition on this issue is denied.

E. Change in Distribution Utilities

SCMC seeks clarification that distribution utilities providing service to new customers must ask customers if they previously obtained service from an ESCO in any service territory and if any outstanding balance with the ESCO remains. SCMC proposes that the Commission require the distribution utility to notify the ESCO that the customer has applied for

service in its territory and to require payment of ESCO arrears prior to the initiation of distribution utility service.

PULP opposes SCMC's proposal. SCMC's request, according to PULP, is contrary to the express provision of PSL §32(5)(a)(iii). Pursuant to that provision, the ESCO is not permitted to suspend distribution utility service to non-paying customers if the distribution utility suspending its service is not the same utility providing service at the time of termination of commodity service. Because SCMC is seeking to prevent the initiation of service of a distribution utility who was not the provider of service at the time the ESCO terminated its commodity supply to the customer, PULP argues that SCMC's requests violates the restriction on suspensions provided in PSL §32(a)(iii).

SCMC's request would expand the bounds of the HEFPA amendments to impose an additional condition for initiation of gas or electric service by a distribution utility. As PULP argues, there is no support in the HEFPA amendments for SCMC's request. Accordingly, it is denied.

Application of Pro-ration

A. Proceeds from Collection Agent

The December Order determined that customer payments obtained through the work of collection agencies are subject to pro-ration so long as the billing party is issuing a bill to the customer for electric or gas service. The Joint Petitioners request rehearing and/or clarification of the December Order's application of pro-ration to collection agency proceeds.

Pro-ration should not apply to proceeds obtained through collection activities undertaken to recover amounts due for distribution service because, Joint Petitioners contend, those activities take place after consolidated billing to the customer ceases. Further, the Joint Petitioners argue that the

collection agent is acting as a result of its contractual relationship with the distribution utility to collect the utility's debt, not the ESCO's debt. They also argue that requiring pro-ration of collection agency proceeds contravenes UBP §9.J.3, which relieves billing parties from the obligation to conduct collection activities for non-billing parties.

SCMC supports the decision to subject proceeds from collection agents to pro-ration. Because pro-ration applies to both distribution utility and ESCO proceeds obtained through collection agencies, SCMC contends that the policy for pro-ration is equally applied to all and is consistent with the requirements of PSL §32(5)(c) and the Commission's policy. SCMC dismisses the Joint Petitioners' claim regarding the contractual relationship with collection agents because such agreements do not address the distribution utility's dispersal of the money after receipt from the collection agent. SCMC rejects the claim that customers will be surprised that their payments to the collection agents are subject to pro-ration. According to SCMC, the customer is fully aware that all charges must be paid (both ESCO and distribution utility) in order to maintain service.

If collection activity takes place after billing on the account has terminated, pro-ration is not required because that policy only applies to customers who continue to receive bills. The policy is based on the observation that, absent an agreement to the contrary (such as the purchase of accounts receivables (POR) programs), neither party has a right or obligation to conduct collections activities on behalf of the other.

While pro-ration will not apply to amounts recovered by collection agencies after billing for electric or gas service has terminated, PSL §32(5)(c) requires pro-ration of customer payments after an ESCO's suspension of delivery service.

Pursuant to this statutory provision, customer payments, even those obtained by a collection agency, must be pro-rated if they are made after an ESCO's suspension of service. As discussed above, PSL §53 does not permit us to waive the HEFPA provisions, therefore, our policy on pro-ration comply with the provisions of PSL §32(5)(c).

The Joint Petitioners' request for rehearing and/or clarification is granted to the extent that we will not require pro-ration of proceeds collected from customers by collection agencies, unless those payments are collected after an ESCO's suspension of distribution utility service.

B. Multiple-Dwellings and Two-Family Dwellings

SCMC seeks rehearing on the exclusion from our pro-ration policy of any non-residential customer payments made after termination of ESCO commodity service (December Order p. 11). SCMC states that service to multiple-dwellings is often designated as a non-residential account, even though the electric service is redistributed to residential tenants. It argues that PSL §32(5) permits an ESCO to terminate commodity supply and seek suspension of distribution utility service for non-residential accounts serving multiple-dwellings and two-family dwellings. As such, SCMC contends that PSL §32(5)(c) requires pro-ration of partial non-residential customer payments for multiple-dwellings and two-family dwellings after termination of an ESCO's commodity service. Therefore, according to SCMC, our pro-ration policy for non-residential customer payments for service to multiple-dwellings and two-family dwellings is inconsistent with PSL §32(5)(c).

Strategic objects to SCMC's rehearing request. According to Strategic, applying PSL §32(5) (right to suspend distribution utility service) would result in the requirement that ESCOs provide HEFPA protections to non-residential customer

accounts for multiple-dwellings and two-family dwellings. Specifically, it states that the December Order correctly held that multiple-dwellings owned by a corporation, landlord, condominium, or cooperative are not considered residential end-use customers, but rather commercial customers, and, thus, HEFPA protections do not apply. As to the application of HEFPA protections to the non-metered residential tenants of the building, Strategic believes that it is up to the owner of that building to provide HEFPA protections to its tenants.

Joint Petitioners argue that PSL §32(5) applies only to residential customers. They indicate that this application is consistent with the treatment provided to multiple-dwellings and two-family dwellings owners and their tenants under PSL §§33 and 34.¹⁴ Because a landlord is not a residential customer, Joint Petitioners argue that protections offered by HEFPA, including DPAs, are not available to landlords. Joint Petitioners agree with the determination to cease pro-rating non-residential customer payments after termination of commodity service.

We implemented our pro-ration policy, in part, to reduce the chances of suspension and disconnection of a residential customer's service by applying payments to charges imposed by both ESCOs and distribution utilities. We declined to require pro-ration of non-residential customer payments after

¹⁴ PSL §§33 and 34 establish requirements and rights that must be met or offered by a distribution utility or ESCO prior to disconnection/suspension of service to residential multiple-dwellings or two-family dwellings. These requirements do not include offering deferred payment agreements (DPAs) to non-residential landlords of the dwellings, but do include the right of tenants to prevent disconnection/suspension by making payments for delivery and/or commodity service to the distribution utility or ESCO.

the termination of commodity supply by the ESCO because ESCOs do not possess the statutory right to seek suspension of distribution utility service for non-residential customers.

At the time of the December Order, no party raised an issue regarding the characterization of residential multiple-dwellings as non-residential customers. We conclude that a clarification of this policy is in order.

PSL §32(5)(a), in pertinent part, lists the types of customers eligible for ESCO suspension of distribution service as:

a residential customer terminated pursuant to this section or ... a multiple-family dwelling pursuant to section thirty-three of this article or a two-family dwelling pursuant to section thirty-four of this article (emphasis added).

The choice of the word "or" in the listing permits ESCOs to terminate commodity service and seek suspension of distribution utility service to multiple-family and two-family dwellings, even if such dwellings are characterized by distribution utilities as non-residential customer accounts (PSL §32(5)(a)).

Because we have determined that ESCOs have the right to suspend distribution utility services to non-residential customers serving multiple-dwellings and two-family dwellings, partial payments made for service to these dwellings shall be pro-rated in accordance with our pro-ration policy set out for residential customers: pro-ration after termination of service for the longer of one year from the termination of commodity service by the ESCO, until all arrears are paid in full, if the ESCO suspends service within one year of commodity termination, or the customer is paying the ESCO arrears under a DPA.

Strategic is partially correct that non-residential customers are not entitled to all HEFPA protections, such as

budget billing. However, if an ESCO wishes to suspend distribution utility delivery service to a multiple-dwelling, the provisions of PSL §32(5)(d) require that suspension ends after one year from the date of commodity termination or in accordance with the provisions of PSL §35(a-e). These provisions offer customers, among other things, the option to enter into a DPA in order to end the suspension of distribution utility service. The provisions of PSL §32(5)(d) make no distinction between residential and non-residential customers. Therefore, if the ESCO suspends service to the non-residential multiple dwelling owner, then by operation of PSL §32(5)(d), these HEFPA provisions, such as DPAs, become available to the non-residential customer.

We grant, in part, SCMC's rehearing request as discussed above and clarify for Strategic when HEFPA applies to non-residential customer accounts serving multiple-dwellings or two-family dwellings.

C. Arrears Pre-dating June Order

Our policy on pro-ration requires that any customer arrears for ESCO service accumulated prior to February 3, 2004 (initiation of pro-ration), must be used as the basis for pro-rating partial customer payments and that any such amounts a distribution utility previously eliminated from customer bills must be reinstated on the customer's bill (December Order pp. 8-9). As a result, arrears incurred by an ESCO customer prior to February 3, 2004 and outstanding on that date are subject to pro-ration.

The Joint Petitioners object to this policy. They contend that it is not authorized by HEFPA and conflicts with the June Order's principles for implementing the pro-ration policy. Joint Petitioners argue that customers were not on notice at the time they incurred the ESCO arrears that those

arrears would reappear on a consolidated bill and become subject to a potential suspension of distribution utility service. According to the Joint Petitioners, the fact that ESCOs may not have succeeded in collecting arrears prior to the HEFPA amendments and initiation of our pro-ration policy does not lead to the conclusion that pro-ration should be applied to those arrears.

SCMC supports continuation of the pro-ration policy and SCMC offers a compromise position: reinstatement of ESCO arrears on customer bills for service provided on or after June 20, 2003 (effective date of the June Order) and pro-ration of these arrears. SCMC argues that this proposal addresses any concerns that distribution utilities may have relating to the need for some administrative certainty for billing purposes.

SCMC's proposal is reasonable. We direct distribution utilities to reinstate ESCO arrears on customer bills for ESCO service provided on or after June 20, 2003 and apply pro-ration to those arrears. Setting a temporal limit on the ESCO arrears subject to pro-ration would limit the administrative burden of restoring ESCO arrears based upon some indefinite period of past commodity service for an ESCO no longer serving the customer; and it is reasonable to provide a point in time for determining the amount of arrears that need to be restored on the customer's bill. Using June 20, 2003 as the starting point for determining the ESCO arrears subject to pro-ration is logical because that is the date we implemented the HEFPA amendments. Accordingly, we adopt SCMC's proposal and deny the Joint Petitioners' rehearing request.

D. Priority of Categories for Pro-ration

The December Order established a list in order of priority for application of partial customer payments to ESCO and distribution utility charges as follows: (1) amounts owed

pursuant to disconnection, suspension or termination notices; (2) amounts owed under a DPA; (3) arrears; and (4) current charges.¹⁵

The Joint Petitioners request clarification that partial customer payments should not be applied equally to amounts owed under termination notices as compared to amounts owed under disconnection and suspension notices. They allege that to do otherwise would be inconsistent with principles established in HEFPA and the December Order's determination to apply pro-ration in a manner that minimizes the customer's risk of losing distribution utility service. They contend that failure of a customer to pay the amounts owed under a termination notice would not place the customer in an imminent threat of losing distribution utility service, whereas failure to pay amounts owed under a suspension or disconnection notice would have that effect.

In order to reflect the proper threat of loss of service posed by termination notices, Joint Petitioners recommend inserting another category of ESCO/distribution utility charges for termination notices in UBP §9.J.4, after the first category of charges for suspension and disconnection notices and before the category of DPAs.

SCMC contends that the Joint Petitioners' arguments are unpersuasive because failure to equally apply partial customer payments to amounts owed under termination, disconnection and suspension notices may result in the ESCOs election to immediately suspend distribution utility service. Additionally, if termination notices are subordinate to disconnection or suspension notices, according to SCMC, the customer will still face a shut-off situation because the ESCO

¹⁵ See UBP §9.J.4.

would ultimately suspend service. SCMC argues that subordinating amounts owed under termination notices to those owed under suspension and disconnection notices would result in dueling notices; both parties will be encouraged to issue disconnection and suspension notices quickly in order to equally share in the customer's partial payment.

While failure to pay amounts owed under a termination notice will not result in the immediate loss of electric or gas service to the residential customer, it moves the customer one step closer to the loss of that service. Further, to subordinate amounts owed under termination notices to those owed under suspension and disconnection notices could result, as SCMC indicates, in providing ESCOs an incentive to issue combined termination/suspension notices. Therefore, we deny the Joint Petitions' request to amend the prioritization of charges contained in the December Order.

E. Application of Pro-ration After Termination

SCMC argues that the Commission erred in determining that PSL §32(5) requires pro-ration of partial customer payments after suspension of utility distribution service, but does not mandate pro-ration after an ESCO terminates its commodity service without suspension of delivery service. According to SCMC, the statute requires pro-ration of partial customer payments after termination of ESCO commodity service. SCMC states that the statute purposely uses the terms "termination" and "suspension" arguing that the use of "termination of service" in PSL §32(5)(c) plainly directs an equitable allocation of customer payments after termination of ESCO commodity service.

Joint Petitioners oppose SCMC's interpretation, noting that the statute does not define or differentiate among the terms "suspend," "suspension" or "termination". Joint

Petitioners support our determination that PSL §32(5)(c) requires pro-ration after suspension of delivery service, stating that it is a reasonable interpretation of the statute.

PSL §32(5)(c) states:

The utility shall make its best efforts to institute such suspension of distribution service promptly and shall receive reasonable compensation from the terminating utility, as determined by the commission, for any costs associated with such suspension of distribution service. Any payments for arrears made by a customer after the termination of service shall be allocated equitably on a pro rata basis between the terminating utility and the utility that provided distribution services, to the extent arrears are owed to both such utilities.

The provision relating to pro-ration of arrears in PSL §32(5)(c) is ambiguous as is evident from the divergent interpretations posited by SCMC and Joint Petitioners. Because the provision of PSL §32(5)(c) relating to pro-ration of arrears comes at the end of a subparagraph discussing the requirements of the distribution utility to suspend service and require compensation for that suspension, it is logical to interpret the provision as requiring pro-ration of customer partial payments only after suspension of distribution utility service.

Even though we interpret PSL §32(5)(c) to require pro-ration of partial customer payments after suspension of distribution utility service and not after an ESCO terminates its commodity service, our policy on pro-ration requires pro-ration of all partial customer payments after an termination of commodity service and equally applies those payments to amounts due under disconnection, suspension and termination notices, as discussed above. Thus, in practical terms, our interpretation

of PSL §32(5)(c), in light of our pro-ration policy, does not materially affect the ability of the ESCO to equitably share partial customer payments with the distribution utility.

Therefore, SCMC's request is denied.

F. Multiple Services

SCMC seeks clarification as to how pro-ration applies to customers that receive a consolidated bill for service to multiple service addresses. SCMC states that, because ESCOs are permitted to terminate service based on the customer's non-payment of a consolidated bill, regardless of the number of service addresses, pro-ration of partial customer payments should also be based on the consolidated bill and not separately applied to each service address of the customer.

We agree with SCMC and clarify that pro-ration is applied on the basis of the customer's consolidated bill, regardless of the number of service addresses. To do otherwise would further complicate the administrative requirements of the pro-ration policy because billing parties would be required to take each customer's account and apply a customer's partial payment according to amounts owed for ESCO/distribution utility service to each service address rather than pro-rating that payment on the basis of the total amounts owed.

G. Niagara Mohawk Charge-backs

Niagara Mohawk's POR program is with recourse,¹⁶ and, therefore, the ESCO is charged back any arrears that remain uncollected by Niagara Mohawk after 120 days. SCMC states that Niagara Mohawk drops ESCO charges from customers' bills and stops pro-ration once the charge-back is made to the ESCO. As a

¹⁶ Development of a new Niagara Mohawk retail access plan is underway in Case 05-M-0333, Niagara Mohawk - Plan to Foster Development of Retail Energy Markets.

result, these arrears would not be reflected on the customer's bill.

SCMC seeks clarification that Niagara Mohawk should apply pro-ration to customer partial payments according to the amount owed by the customer for distribution utility and ESCO services, including any amount that was charged back to the ESCO under Niagara Mohawk's POR Program. Further, SCMC states that all charge-backs should be recorded in the balance of arrears as of February 3, 2004.¹⁷

SCMC states that under Niagara Mohawk's program, once a customer violates a DPA for payment of charges for ESCO commodity and the company's delivery service, any subsequent notice for disconnection of service issued by the utility does not include ESCO charges. SCMC argues that this practice is unfair to ESCOs. It urges that we require Niagara Mohawk to include the unpaid portion of ESCO charges in its disconnection notices.

We grant, in part, SCMC's request for clarification. Distribution utilities are required, as discussed above, to include any ESCO arrears accrued on and after June 20, 2003 into consolidated bills and to include these amounts when pro-rating customer payments. Therefore, any amounts charged back to ESCOs on and after June 20, 2003, as part of Niagara Mohawk's POR program, must be placed on the consolidated bills and partial

¹⁷ SCMC also requests that we clarify that Niagara Mohawk will not charge back any amounts to ESCOs under its 120-day charge-back POR program until its new program, with a 365-day charge-back period, is adopted and implemented. This request is not related to the December Order in that it presents a new and unrelated request for Commission action and as such the request is denied. Further, the issue may be moot as Niagara Mohawk is currently in collaborative discussions with stakeholders concerning implementation of a POR program without recourse in Case 05-M-0333, supra.

customer payments on those bills must be pro-rated accordingly. Additionally, Niagara Mohawk is not required to include in its disconnection notices both the arrears of the company and the ESCO, unless the ESCO has issued a termination or suspension notice to the customer.¹⁸

Implementation of the HEFPA Amendments and Pro-ration

The Joint Petitioners contend that the December Order erroneously determined that no changes to the UBPs were needed to implement HEFPA termination notice requirements. They request clarification that changes to the UBP and the electronic data interchange (EDI) protocols are necessary in order to implement the HEFPA amendments. They offer as an example the UBP requirements for dropping¹⁹ a customer, which require 15 days notice. According to the Joint Petitioners, this provision may permit an ESCO to drop a customer after 15 days notice, even in the event the customer makes a payment or executes a deferred payment agreement (DPA) within those 15 days. This may occur because there is no defined EDI transaction to reverse an ESCO drop request should the customer take action (i.e., make a payment or enter into a DPA) to avoid termination of commodity supply or suspension of distribution utility service.

Modifications to the UBP and the development of corresponding EDI protocols can be useful, but are not critical to implement the HEFPA amendments. While the example provided

¹⁸ Because Niagara Mohawk's POR program provides for a charge back to ESCOs of any amount uncollected from the customer, ESCOs may avail themselves of PSL §32(5) and request disconnection of service because the customer is in a non-payment situation once the charge back occurs.

¹⁹ Customer drops refer to the process, initiated either by the customer or the ESCO, of switching the customer from an ESCO to either the utility or another ESCO.

by the Joint Petitioners does not present a rationale to forestall implementing HEFPA; it does provide an example of how the HEFPA amendments have changed the manner in which business is to be conducted by ESCOs. As required by HEFPA, ESCOs must now give a residential customer 15 days to satisfy a termination or suspension notice prior to terminating or suspending service (PSL §32(2)(d)). If a drop request is irreversible, then the ESCO should wait until the expiration of the 15 day HEFPA notice period before communicating the drop request to the distribution utility. If the drop request was processed, thus terminating ESCO service to the customer despite the fact that the customer rendered payment or entered into a DPA, the ESCO could be wrongfully terminating commodity service.

The Joint Petitioners' request for modification of the UBP and EDI protocols to implement HEFPA is denied. The enactment of HEFPA amendments added new requirements for customer protections. The ESCOs and distribution utilities need to coordinate compliance with HEFPA in accordance with the UBP and EDI protocols, as discussed above. Further, the growing implementation of POR programs²⁰ by distribution utilities may necessitate different changes to the UPB and EDI protocols. This is so because, under POR programs, the distribution utility provides HEFPA protections for the ESCO and distribution utility accounts.

A. Multiple Dwellings

HEFPA imposes an independent obligation on ESCOs to follow the procedures established for the termination of commodity service to multiple dwellings. Thus, SCMC's request

²⁰ Under POR programs (without recourse), the distribution utility purchases ESCO accounts receivable at a discount and collects amounts due for ESCO and distribution utility charges from the customer.

is denied. However, ESCOs and distribution utilities may, on their own, work together to comply with these provisions if both the ESCO and the distribution utility are terminating service to the multiple dwelling.

B. Agency-billing

Currently, Con Edison is the only distribution utility that has an ESCO issuing a consolidated bill to customers on behalf of both the ESCO (ECONnergy - a member of SCMC) and the distribution utility. SCMC requests clarification that an ESCO issuing a consolidated bill on behalf of Con Edison is required to send copies of termination notices to the customer and Con Edison even after the ESCO ceases issuing the consolidated bill to the customer.

We clarify for SCMC that once the ESCO ceases issuing a consolidated bill, the new billing party must be informed of the issuance of a termination notice and the arrears that are the subject of that notice. Therefore, the terminating ESCO must send copies of any termination notices it issues to an affected distribution utility. The distribution utility shall forward this information to any other ESCO that provides consolidated billing to the customer.

CONCLUSION

For the reasons set forth above, the petitions for rehearing and clarification of our December 3, 2003 Order are denied, except to the extent that clarification is granted.

The Commission orders:

1. The petitions for rehearing and clarification are denied, except to the extent that clarification is granted.
2. The request of Belkin, Burden, Wenig & Goldman, LLP is denied.

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3. These proceedings are continued, except that Case 99-M-0631 is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary