

**STATE OF NEW YORK BEFORE THE
PUBLIC SERVICE COMMISSION**

PETITION FOR A DECLARATORY)	Case No. 17-G-_____
RULING THAT NATURAL GAS)	
PRECEDENT AGREEMENTS AND)	
TRANSPORTATION AGREEMENTS ARE)	
SUBJECT TO REVIEW UNDER PUBLIC)	
SERVICE LAW SECTION 110(4))	

**PETITION FOR A DECLARATORY RULING THAT NATURAL GAS PRECEDENT
AGREEMENTS AND TRANSPORTATION AGREEMENTS ARE SUBJECT TO
REVIEW UNDER PUBLIC SERVICE LAW SECTION 110(4)**

Pursuant to Section 204 of the State Administrative Procedure Act and Part 8 of the New York State Public Service Commission’s (“Commission”) Rules (16 NYCRR Part 8), the Environmental Defense Fund (“EDF”) petitions the Commission for a declaratory ruling that natural gas precedent agreements and transportation agreements are contracts for gas subject to review under Public Service Law Section 110(4). In support thereof, EDF states as follows:

I. INTRODUCTION

Public Service Law Section 110 sets forth a comprehensive framework regarding the Commission’s review of transactions between affiliated interests as well as its review of certain other contracts. Section 110(4) extends the Commission’s review to include all written contracts for the purchase of electric energy, gas (natural or manufactured or a mixture of both), and water and establishes that “no charge for such electric energy, gas and/or water...shall exceed the just and reasonable charge....” That subsection also provides that the Commission may disapprove the contract if it is not found in the public interest.

EDF’s Petition seeks Commission confirmation that natural gas precedent agreements and transportation agreements are “contracts for gas” subject to the requirements of Section 110(4) of the Public Service Law. Precedent agreements set forth the commercial, financial, and

operational terms for new pipeline build, committing the pipeline to build the project and the shipper to purchase the expansion capacity. Precedent agreements are a crucial component of any pipeline developer's certificate application to build new pipeline infrastructure. Once a pipeline is approved and placed into service, the terms of a precedent agreement are carried over to an agreement for transportation service and the pipeline provides service to the shipper pursuant to these terms, along with any applicable tariff requirements. Thus, any charges for services flow through the transportation agreement once the pipeline goes into service. However, the essential terms of the arrangement are set forth in the precedent agreement, which underscores the importance that these types of contracts also be filed with the Commission.

Commission precedent and regulations as well as current utility practice compel a finding that both precedent and transportation agreements are subject to the requirements of Public Service Law Section 110(4). As established below, contracts for gas historically encompassed both contracts for the commodity and transportation of gas. Any contrary finding would leave the Commission and interested parties without this vital statutory tool to address, review and, if appropriate, challenge unjust and unreasonable costs that would result from these contracts. The increased prevalence of affiliate agreements demands the Commission's review and scrutiny of these contracts to ensure they are arms-length dealings in the public interest. Finally, as a matter of practice, utilities already file precedent and transportation agreements with the Commission, which suggests no additional regulatory burden will be imposed on these regulated entities.

II. BACKGROUND

A. Description of Petitioner

EDF is a membership organization whose mission is to preserve the natural systems on which all life depends. Guided by science and economics, EDF seeks practical solutions to

resolve environmental problems. EDF uses the power of markets to speed the transition to clean energy resources, and consistent with its organizational purpose, is engaged in activities to facilitate cost-effective and efficient energy market designs that encourage investment to modernize the energy grid so that it can support the ongoing deployment of renewable energy resources and energy efficiency. EDF works collaboratively with market participants sharing these goals and is a member of the North American Energy Standards Board. EDF has more than 36,000 members in New York State and has a substantial interest in protecting these members from unjust and unreasonable pipeline transportation costs, including, but not limited to, those arising from affiliate agreements.

B. Public Service Law Section 110(4)

Section 110(4) of the Public Service Law provides:

All written contracts and all arrangements...including such contracts and arrangements with any affiliated interest...for the purchase of electric energy, gas (natural or manufactured or a mixture of both)...shall first be filed with the commission, and no charge for such electric energy, gas and/or water whether made pursuant to contract or otherwise, shall exceed the just and reasonable charge for such electric energy, gas, and/or water....If it be found that any such contract or arrangement is not in the public interest, the commission, after investigation and hearing, is hereby authorized to disapprove such contract or arrangement.¹

III. PETITION FOR DECLARATORY RULING

Section 204 of the State Administrative Procedure Act provides that, “[o]n petition of any person, an agency may issue a declaratory ruling with respect to . . . the applicability to any person, property, or state of facts of any rule or statute enforceable by it . . .”² A similar

¹ Public Service Law § 110(4).

² State Administrative Procedure Act § 204.

provision is included in the Commission's regulations, which state that "[d]eclaratory rulings may be issued with respect to (1) the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission or the validity of any such rule; (2) whether any action by the commission should be taken pursuant to a rule; and (3) whether a person's compliance with a Federal requirement will be accepted as compliance with a similar State requirement applicable to that person."³ The regulations further state that "[a] declaratory ruling may also be issued whenever the commission determines it is warranted by the public interest."⁴

The provisions in the State Administrative Procedure Act and the Commission's regulations support the issuance of this declaratory ruling, which concerns the applicability of Public Service Law Section 110(4) to natural gas precedent and transportation agreements. The public interest also supports the issuance of this declaratory ruling, which if granted will help ensure that a forum will be available to protect ratepayers from unjust and unreasonable costs.

A. Contracts for Gas Encompass Both Contracts for the Commodity and Transportation of Gas

Public Service Law Section 110(4) applies to contracts "for the purchase of...gas (natural or manufactured or a mixture of both)...." At the time that Public Service Law Section 110(4) was enacted in the 1930s, distribution companies bought gas supplies and all related transportation and storage services on a bundled basis from interstate pipeline companies.⁵

³ 16 NYCRR § 8.1(a)(1).

⁴ *Id.* § 8.1(b).

⁵ United States General Accounting Office, Costs, Benefits, and Concerns Related to FERC's Order 636 at 4 (November 1993), <https://www.ferc.gov/legal/maj-ord-reg/land-docs/gao-636study-1993.pdf>; see also *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats & Regs. ¶ 30,939 (1992).

In 1992, the Federal Energy Regulatory Commission (“FERC”) issued Order No. 636, which required interstate pipelines to unbundle the sale of the commodity and the sale of transportation services by the 1993 winter heating season.⁶ On December 20, 1994, this Commission established regulatory policies and guidelines for natural gas distributors in response to Order No. 636 to maximize the competitive benefits in New York and to ensure customer protection during the transition.⁷ As demonstrated by this historical context, at the time Public Service Law Section 110 was enacted, contracts for gas would necessarily include contracts for the transportation of gas given that gas was sold on a bundled basis. It therefore follows that precedent agreements and transportation agreements should be subject to the requirements of Section 110(4) today despite the fact that gas is now sold on an unbundled basis.

This conclusion is compelled by caselaw as well. The Commission has previously considered transportation costs when assessing whether a contract meets the public interest standard of Section 110. For example, the Commission, in assessing two contracts involving the purchase of gas produced by five wells connected to Reserve Gas Company’s system, noted that the “delivered cost of gas from these five wells would be slightly lower than the delivered cost of the next cheapest alternative supply, recently priced at \$3.81/Mcf including transportation charges.”⁸ In assessing a reasonable contract price between affiliates under Section 110(4), the

⁶ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats & Regs. ¶ 30,939 (1992).

⁷ *Restructuring of Emerging Competitive Natural Gas Market*, Case 93-G-0932, Opinion No. 94-26 (issued December 20, 1994).

⁸ *Proceeding on Motion of the Commission for Review of a Contract filed by Reserve Gas Company for the Purchase of Gas from David R. Lyddon (Contract No. 5), Pursuant to Public Service Law Section 110(4); Proceeding on Motion of the Commission for Review of a Contract filed by Reserve Gas Company for the Purchase of Gas from Jacqueline Harris*

Commission noted that the “gas had to be transported from ninety to ninety-five miles through a pipe built by the Penn-York at a large cost.”⁹

Moreover, the Commission already construes “contracts for gas” to include transportation agreements in 16 NYCRR Section 720-1.4 (Filing of Contracts). That section provides, in pertinent part, that “[a]ll other contracts for the sale, purchase, or interchange of electricity, gas, steam, or water must be executed according to the provisions in appropriate service classifications duly filed and posted.”¹⁰ In the Notice of Proposed Rulemaking that ultimately culminated in the implementation of this regulation, the Commission explicitly listed “transportation” as a type of gas contract to be filed.¹¹ It therefore follows that “contracts for gas” should also include precedent and transportation agreements under Section 110(4) of the Public Service Law.

Given this historical context, the Commission’s prior consideration of transportation charges in assessing justness and reasonableness under Section 110, and the requirement in Rule

(Contract No. 6), Pursuant to Public Service Law Section 110(4), Case 91-G-1299 and 91-G-1300, Opinion No. 92-27 at 5-6 (September 18, 1992).

⁹ *In the Matter of Republic Light, Heat and Power Co., Inc. v. Pub. Serv. Comm’n of the State of N.Y.*, 265 A.D. 74, 82 (N.Y. App. Div. 1942).

¹⁰ 16 NYCRR § 720-1.4 (2017).

¹¹ *In the Matter of the Rules and Regulations of the Public Service Commission, 16 NYCRR -- Proposed Amendments to Chapter II, Electric Utilities, Subchapter D, Rates and Charges, Part 136, Construction and Filing of Tariff Schedules, Chapter III, Gas Utilities, Subchapter D, Rates and Charges, Part 270, Construction and Filing of Tariff Schedules, Chapter IV, Steam Utilities, Subchapter D, Rates and Charges, Part 430, Construction and Filing of Tariff Schedules, Chapter V, Waterworks Corporations, Subchapter C, Rates and Charges, Part 530, Construction and Filing of Tariff Schedules, Chapter VI, Telephone Corporations, Subchapter C, Rates and Charges, Part 630, Construction and Filing of Tariff Schedules, and Chapter VII, Provisions Affecting Two or More Kinds of Public Service, filed in Cs 21656 and 29211, Case 97-M-0508, Notice of Proposed Rulemaking at p. 7 (January 27, 1998).*

720-1.4 that transportation contracts be filed, the Commission should explicitly find that precedent and transportation agreements are subject to the requirements of Section 110 of the Public Service Law.

B. The Increased Prevalence of Affiliate Precedent and Transportation Agreements Underscores the Importance of Commission Review and Scrutiny

The Commission should also extend the Section 110(4) requirements to precedent and transportation agreements given the increased prevalence of affiliate arrangements. Although historically pipeline developers and shippers have been unaffiliated entities, a new prevalent financial structure has emerged whereby pipeline developers and the regulated utilities contracting for that capacity are part of the same corporate group.¹² In fact, the main takeaway from the recent American Gas Association conference was that “[p]ipeline and midstream investments look increasingly popular for their low risk and steady earnings profile.”¹³ This financial structure raises the concern that affiliates may be able to transact in ways that transfer benefits from the captive customers of the public utility to the affiliate and its shareholders. A long-term consequence of this risk-shifting is that pipeline capacity buildout will undermine

¹² Testimony of N. Jonathan Peress, Senior Director of Energy Market Policy, Environmental Defense Fund, Before the Senate Energy and Natural Resources Committee, “Oil and Gas Pipeline Infrastructure and the Economic, Safety, Environmental, Permitting, Construction, and Maintenance Considerations Associated with that Infrastructure” at 4-5 (June 14, 2016), https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=51079A26-DD96-4FB5-8486-411C8A7F9024. Additional examples of precedent agreements supported by affiliated captive customers include FERC Docket Nos. CP15-558 (PennEast Pipeline), CP16-22 (Nexus Gas Transmission), CP15-554 (Atlantic Coast Pipeline), CP16-10 (Mountain Valley Pipeline), and CP17-40 (Spire STL Pipeline).

¹³ Credit Suisse, Electric Utilities – AGA Conference Takeaways at 1 (May 24, 2017), <https://research-doc.credit-suisse.com/docView?language=ENG&format=PDF&sourceid=csplusrsearchcp&documentid=1075481631&serialid=UapLyZC9Ey%2B0LmndyjCNDnZKQNRhzybtXUbhTvzcY9k%3D>.

drivers for more efficient solutions and impose long-term environmental and economic costs on captive ratepayers.¹⁴ While New York precedent establishes that Section 110(4) does not distinguish between transactions with affiliates and transactions with any others,¹⁵ that framework does not eliminate the Commission’s obligation to scrutinize transactions between a utility and its affiliates.¹⁶ Given the announced business strategy of utilities at the national level and in New York in particular¹⁷ to invest in new affiliated-backed infrastructure, applying the requirements of Section 110(4) to precedent and transportation agreements will help to ensure that ratepayers will not be subjected to unjust and unreasonable costs.

¹⁴ New York Energy Law § 6-104(5)(b) (2017) (“any energy-related action or decision” from the Commission must “be reasonably consistent with the forecasts and the policies and long-range energy planning objectives and strategies contained in the [State Energy Plan], including its most recent update.”).

¹⁵ *In the Matter of Republic Light, Heat and Power Co., Inc. v. Pub. Serv. Comm’n of the State of N.Y.*, 265 A.D. 74, 78 (N.Y. App. Div. 1942). (“Subdivision four does not differentiate or distinguish transactions with affiliates from transactions with any or all others, if the transactions be in the nature of contracts or arrangements for the purchase of gas. The subdivision provides that the public utility purchasing gas must purchase it at a just and reasonable price. If the price exceeds a just and reasonable one for such gas the contract may be found to be “not in the public interest” and the Public Service Commission has authority to disapprove of it.”).

¹⁶ *Rochester Tel. Corp. v. Pub. Serv. Comm’n*, 201 A.D.2d 31, 35-36 (N.Y. App. Div. 3d Dep’t 1994) (“The PSC’s broad authority to determine just and reasonable rates includes not only the right but the duty to scrutinize transactions between a utility and its affiliates....”).

¹⁷ *See, e.g., Mountain Valley Pipeline Project*, FERC Docket No. CP16-10 (supported by 100% affiliate-backed precedent agreements, including one signed by Consolidated Edison); Credit Suisse – Consolidated Edison, Takeaways from Visit with CEO McAvoy at 1 (April 4, 2017) (Con Ed “is likely to stay more narrowly focused on asset expansion and development. Continued development of its Crestwood partnership and the company’s 12.5% investment in EQT’s Mountain Valley Pipeline (pending FERC approval; recently delayed) are good examples.”).

C. If Contracts for Gas Do Not Include Precedent and Transportation Agreements, Interested Parties Would be Left Without Recourse to Challenge Unjust and Unreasonable Costs

Section 110 of the Public Service Law has served as an important check against unjust and unreasonable utility charges. In several prior cases, the Commission has protected ratepayers from being overcharged for goods and services, particularly those exchanged between utility affiliates.¹⁸ Exempting gas transportation agreements from review under Section 110(4) would significantly disadvantage ratepayers and leave them without recourse to challenge unjust and unreasonable rates.

The costs associated with gas transportation agreements are significant, particularly because Local Distribution Companies are required to pay certain fixed charges under these transportation agreements regardless of whether the contracted capacity is used. For example, for Consolidated Edison Company of New York, Inc. (“Con Ed”) and Orange and Rockland Utilities, Inc., these fixed charges amounted to \$301 million in 2016, including \$263 million for Con Ed.¹⁹ In order to ensure ratepayers are protected from any unjust and unreasonable costs of these agreements, the Commission should confirm that the requirements of Section 110(4) apply to both precedent and transportation agreements.

D. As a Matter of Practice, Utilities Already File Precedent Agreements and Transportation Agreements with the Commission

Extending the requirements of Section 110(4) to precedent and transportation agreements would not subject utilities to any increased regulatory burden. As noted above, utilities already

¹⁸ See, e.g., *General Tel. Co. v. Lundy*, 17 N.Y.2d 373 (N.Y. 1966); *National Fuel Gas Distribution Corp. v. Pub. Serv. Comm’n*, 107 A.D.2d 357 (N.Y. App. Div. 3d Dep’t 1985).

¹⁹ Con Edison Annual Report 2016 at 23, available at http://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_ED_2016.pdf.

file both transportation and precedent agreements in Case 93-G-0932.²⁰ EDF's requested relief simply seeks confirmation that such agreements are also subject to the framework provided in Section 110(4) which seeks to protect ratepayers from unjust and unreasonable costs associated with these agreements.

IV. CONCLUSION

For the reasons stated herein, EDF respectfully requests a declaratory ruling from the Commission that natural gas precedent and transportation agreements are contracts for gas subject to review under Public Service Law Section 110(4).

Respectfully submitted,



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Dated: October 2, 2017

²⁰ See, e.g., Precedent Agreement between Empire Pipeline, Inc. and National Fuel Gas Distribution Corporation, Case 93-G-0932 (filed August 31, 2017); Gas Transportation Contract between Iroquois Gas Transmission System, L.P. and Consolidated Edison Company of New York, Inc., Case 93-G-0932 (filed August 14, 2017). The filing of these contracts in this docket appears to be a vestigial requirement from Opinion No. 94-26. *Restructuring of Emerging Competitive Natural Gas Market*, Case 93-G-0932, Opinion No. 94-26 (issued December 20, 1994).