

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding to Implement Customer Credits and) Case 22-M-0159
Reimbursements Pursuant to Public Service Law Section 73)

Comments of the Public Utility Law Project of New York

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I. Introduction

The Public Utility Law Project of New York (“PULP”) is a 40-year-old nonprofit consumer watchdog and public interest law firm that was incorporated in the same year as the enactment of Article 2 of the Public Service Law (“PSL”), the Home Energy Fair Practices Act (“HEFPA”). PULP intervenes in all major rate cases and in “generic proceedings” that are reasonably likely to increase unaffordability or to have a potential effect on consumer protections.

While PULP does not believe PSL §73 or these regulations will increase unaffordability, we concur with the Sponsor’s memo that the law “puts rate payers first in the event of prolonged service outage (by) providing compensation via customer's accounts ... and, if utilities fall short restoring service, customers now have recourse.”¹ Consequently, we are filing the comments set forth below.

II. Procedural History

On August 4, 2020, Tropical Storm Isaias struck New York State, causing widespread and extended outages on Long Island, New York City, and several counties extending up the Hudson Valley from Westchester to Ulster County.² Peak outages from the storm affected approximately one million households.³ Roughly 1.5 million households suffered outages in

¹ See, Introducer’s Memorandum concerning S.4824A/A3360A of 2021, at p. 2

² See, Proceeding on Motion of the Commission of an Investigation into the Utilities’ Preparation for and Response to August 2020 Tropical Storm Isaias and Resulting Electric Power Outages, Interim Investigation Report on Tropical Storm Isaias (“Isaias Storm Report”), p. 2, at <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B7BCDA40-2075-4231-A208-702C436893C0}>.

³ Id.

total. Central Hudson’s restoration of peak outage customers was fastest at 72 hours, but the other utilities ranged from 4 to 6 days to achieve restoration of at least 90% of customers.⁴

The preliminary investigation by the Department of Public Service (“DPS” or “Staff”) determined that PSEG-LI/LIPA, Con Edison, Orange & Rockland and Central Hudson failed to follow their statutorily required Emergency Response Plans.⁵ Subsequently, the utilities reached settlement with the DPS exceeding \$117 million,⁶ but customers were left without clear and uniform processes to seek financial remedies for spoiled food or medicine for residential customers, and perishable business supplies for commercial/industrial customers.

Of the utilities affected by Tropical Storm Isaias, Con Edison was the only utility with long standing policies and “guarantees” governing reimbursement to customers for spoiled food and medicine. Nonetheless, Attorney General Letitia James investigated the utility’s behavior and found that the utility violated §349 of New York’s General Business Law and §63(12) of New York’s Executive Law by violating its own policies for customer claims of reimbursement.⁷ Con Edison was ordered by the Attorney General to provide an additional \$53 million in reimbursements for customers that did not receive the amounts the company had promised.⁸

In the end, several other utilities provided reimbursements to customers. However, Tropical Storm Isaias reinforced the reality that the State neither possesses a uniform process for awarding reimbursements nor a uniform policy of seeking and awarding such reimbursements. Section 73 and this rulemaking process established in Case 22-M-0159 will institute such uniform processes and policies.

III. Executive Summary

⁴ Id. At 5.

⁵ Id. At 3.

⁶ See, Governor Andrew Cuomo press release concerning Tropical Storm Isaias settlements, July 15, 2021 at 1; <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={69F28774-4753-42E3-8AB4-D70869809219}>.

⁷ See, Attorney General James Delivers More Than \$530,000 to New Yorkers Who Lost Power Following Tropical Storm Isaias, June 8, 2021, at <https://ag.ny.gov/press-release/2021/attorney-general-james-delivers-more-530000-new-yorkers-who-lost-power-following>.

⁸ See, Assurance of Discontinuance, pp. 2-4, at https://ag.ny.gov/sites/default/files/con_edison_aod_executed_6.8.2021.pdf.

On December 22, 2021, *S4824 (Comrie) /A3360-A (Paulin)* was signed into law, Chapter 786 of the Laws of 2021, which added §73 to the Public Service Law. Under this new provision, electric and gas utilities are required to provide compensation to customers who have experienced prolonged and widespread outages. The Department of Public Service was granted the authority to define specific terms, including “widespread prolonged outage,” “small business customer,” and “proof of loss.

On April 11, 2022, the Commission issued a Notice of New Proceeding and Seeking Comments (“Notice Soliciting Comment”) in Case 22-M-0101, Proceeding to Implement Customer Credits and Reimbursements Pursuant to Public Service Law §73, seeking comments on definitions of the statutorily required terms and proposing procedures and rules to implement PSL §73.4.

PULP believes that Staff’s proposal places this initial rulemaking for PSL §73 in alignment with the public interest. In furtherance of that, PULP has provided a range of comments below for consideration, including recommendations relating to additional factors deserving consideration, information involving alternative definitions, and advice on which sections could benefit from greater specificity. PULP appreciates the opportunity to provide comments on Staff’s proposal.

IV. Discussion

1. Definitions

A. How should “widespread prolonged outage” be defined?

Staff proposes to define a “widespread prolonged outage” as an interruption of service that impacts at least 20,000 electric or 500 gas customers concurrently where one or more households remain without power for 72 hours or greater. The outage must be due to a failure of the utility’s own equipment for electric customers. These protections are not applicable to gas customers that deny the utility access to inspect and relight their service prior to the 72-hour mark.⁹

⁹ See, Case 22-M-0159 Staff Proposal: Procedure and Definitions, pp. 2-3.

“Prolonged” is well-defined in the plain language of PSL §73(a). However, we believe that staff’s definition of “widespread” may be problematic because the major, investor-owned utilities vary in how many customers they serve and how large their service territories are. Comparing Con Edison, for example, which serves approximately 3.3 million electric customers across the population dense New York City and Westchester County,¹⁰ to Central Hudson Gas and Electric Co., which has an electric customer base of approximately 300,000 in the Hudson River Valley,¹¹ yields significantly different outage percentages.

The potential problem appears to be implicated in the above comparison, but there are also approximately fourteen electric providers whose customer base is less than 20,000,¹² that would not suffer “prolonged widespread outages” per Staff’s suggested definition. Consequently, PULP argues for a more granular approach of dividing the utilities into tiers or using some other factor(s) to group the utilities so that a logical and reasonably uniform set of standards and procedures can identify “widespread prolonged outages” where compensation must be considered.

For example, there should be some consideration of creating and applying different triggering standards for major utilities as opposed to small utilities, and even among and between small jurisdictional utilities. It is obvious that a storm event, like Tropical Storm Isaias or Hurricane Sandy, or an ice storm, affects all utilities. But severe weather should naturally (*ceteris paribus*) have a disproportionately larger impact upon larger utilities, such as Con Edison or Niagara Mohawk (aka “National Grid-Upstate”), than utilities with smaller service territories. The difference between utilities arising from percentages of underground versus overhead plant, or other indicia of reliability and resilience planning and investment, could also be potentially considered. Finally, to meet Staff’s minimum standard, a much smaller percentage of Con Edison’s customers (0.61%), than Central Hudson’s (6.6%) would have to experience an outage lasting longer than 72 hours. PULP believes that this is not just unfair, it is discriminatory to the customers of smaller utilities like Central Hudson.

¹⁰ The 20,000-customer standard would trigger when approximately .61% of Con Edison’s customer to be affected if the system were treated as a whole.

¹¹ The 20,000-customer standard would trigger when approximately 6.5% of Central Hudson’s customers to be affected.

¹² See, e.g., NYS DPS’s website of electric utilities regulated by the NYS Public Service Commission, <https://www3.dps.ny.gov/W/PSCWeb.nsf/All/03627EFC626529EE85257687006F39CD?OpenDocument>

While the public interest and the State’s interest in holding larger utilities to stricter standards are a compelling State interest, PULP believes that a final determination in this rulemaking should go into more depth into the best practices, national or international standards, and historic major outages in New York and their effects, when finalizing this definition.

B. How should “small business customer” be defined?

Staff proposes to define a “small business customer” as a person, corporation, or other entity whom receives electric or gas service, does not exceed certain electric and/or gas usage requirements, and is not considered a residential customer as defined in Section 11.2(a)(2) of Title 16 of the New York Codes, Rules and Regulations.¹³ PULP however cautions that defining a small business customer based on their energy demand or usage could lead to situations that run afoul of the apparent original legislative intent, which is to provide uniform, simple and logical pathways and procedures to reasonable recompense for losses suffered due to a utility’s actions/inactions leading to, or failing to avert, a widespread prolonged outage be valuable criteria without regard to the electric usage.

For example, a corporation with over 100 employees and revenues that exceed millions of dollars could be classified as a small business if its electric demand is below 500 kilowatts or its annual gas consumption is no higher than 750 dekatherms per year (e.g., a non-temperature-controlled storage warehouse that might or might not contain perishables). This hypothetical situation is not all that uncommon, and moreover, it is highly probable that such businesses would carry some form of business interruption insurance or a rider on their property and casualty insurance to replace lost income in the event that business is disrupted or halted due to a service outage. We, therefore, maintain that Staff consider whether it is within the public interest to grant credits and reimbursements for these businesses where the disparity between their resources and bargaining power and the utility is not wide as exists between typical residential customers and small businesses such as those defined below.

Instead, PULP proposes that the Department adopt the definition of “small business customer” as it presently exists in Public Service Law §32 subdivision (6). This definition, which was added in Chapter 106 of the Laws of 2021 through the Parker-Richardson Moratorium Act

¹³ See, Case 22-M-0159 Staff Proposal: Procedure and Definitions, pp. 3-4.

(“Parker-Richardson”), considers a small-business customer to be one with 25 or fewer employees that is not a:

- (a) publicly held company, or a subsidiary thereof;
- (b) seasonal, short-term, or temporary customer,
- (c) high energy customer as defined by the commission; or
- (d) customer that the utility can demonstrate has the resources to pay the bill, provided that the utility notifies the small business customer of its reasons and of the customer's right to contest this determination through the commission's complaint procedures.

Although the purpose of the Parker-Richardson Act was to extend a shutoff moratorium necessitated by the unparalleled amount of utility arrears New Yorkers accrued due to COVID-19, it still established a precedent in the PSL and through the Department's subsequent guidance. The cap of 25 or fewer employees kept small stores and shops open and averted financial harm, while it was assumed that high usage customers and businesses that were capable of payment had sufficient resources and bargaining power to negotiate on equal terms with the utilities. These small businesses outlined by §32 subdivision (6), the critical drivers of economic development in New York's rural and urban communities, will likewise be most affected by prolonged widespread outages. It is near-impossible to open without electricity or natural gas service, and stores and restaurants, or independent pharmacies, or other businesses involved in industries with perishable goods such as florists, also run the very real likelihood that much of their product will spoil. This is to say nothing of the potential of prolonged widespread outages upon funeral homes and morgues.

Parker-Richardson will sunset on July 1, 2022, and arguably this definition was intended to be temporary. If so, New York has two other statutory definitions of small business that could be referenced; both of which consider only how many people are employed by the company. The Economic Development Law §131 considers any business with fewer than 100 employees that is domiciled in New York, independently owned and operated and not dominant in its field to be a small business. Elsewhere, the federal Affordable Care Act (“ACA”) classifies a small business

(or group) as an employer with 1-50 employees.¹⁴ The ACA gave states the option to expand the classification to include up to 100 employees, which New York opted to do as of January 1, 2016.¹⁵

The definitions as they exist in the Economic Development Law and Insurance Law are reasonable alternatives to the staff proposal, as are the criteria that currently exist due to Parker-Richardson in §32 subdivision (6) of the PSL. PULP argues here that the definition created through Parker-Richardson is the most reasonable and equitable to effectuate efficient implementation of extended outage and food spoilage credits.

PULP notes, finally, that the focus only upon “firm” customers may be too narrow. In recent cases and investigations, such as those inquiring into the National Grid-NYC/L.I. (aka KEDNY and KEDLI) company-imposed gas moratorium of May-November 2019, the category of temperature-controlled/interruptible customer was increased to account for the perceived current and future needs for demand reduction. Consequently, PULP suggests Staff consider small interruptible customers for potential inclusion in the small business gas customer definition of §73 of the PSL.

C. How should “proof of loss” be defined?

Staff proposes to define “proof of loss” as verifiable proof, or photographic evidence, of food and/or prescription medication spoilage. To determine the reimbursement amount for perishable goods, the customer must provide itemized list, along with store/cash register or credit card receipts, photographs of replacement goods that also indicate the price of the item, or other verifiable documentation of the market value of the item, such as electronic records of the customer, or potentially of a third-party whose records would be allowable under the “business records” exception to the hearsay rules in the State’s statutes. In some “appropriate circumstances,” according to Staff, an interview with the claimant is also acceptable, but there are no specific instances provided where this would be applicable. PULP believes this concept should be further developed, which we will elaborate on below.

Although the time in which a residential or small business customer has to file a claim (within fourteen days of the outage) and what they need to provide the utility with (an itemized

¹⁴ See, 42 U.S. Code § 18024 (b)(2).

¹⁵ See, NYS Insurance Law §3231(a)(1) and §4317(a)(1).

list or proof of loss) for reimbursement is well-defined in the plain language of PSL §73(b), (c), and (d), PULP believes that Staff’s proposal – specifically the requirement of an itemized receipt or, in cases where that is lacking, a verifiable document of the item’s market value – will place undue burden on residential customers and hinder the original intent of this law. It is rare to maintain every printed receipt one receives from the grocery store, and it is improbable to assume that those records would be available electronically in the future. Further, the claimant would be required to produce verifiable documentation of the item’s market price under staff’s proposal, which could be difficult to obtain given the fourteen-day window of opportunity and the fact that the place of purchase might be affected by the prolonged outage too.

PULP asserts that residential customers should have an additional avenue to remedial compensation in cases like these or when their records have been destroyed altogether (e.g., Superstorm Sandy). It is here where we believe staff’s interview concept could potentially be applicable. Additionally, to maintain the balance of equities between lesser resourced residential customers and the utility, staff should implement a process where a customer could submit a “rough”/initial itemized list in the first 14-days that can be supplemented after an additional two-weeks or perhaps after the “state of emergency” has ended.

Lastly, PULP believes that staff and the Commission should consider adding flexibility of interpretation for residential customers concerning the 14-day timeline.¹⁶ The seriousness of the underlying event that gave rise to the outage, or a contemporaneous state or federal declaration of disaster, suggests that resource allocation would be better aimed at disaster recovery first, then administrative overhead later. The creation of a post-hoc waiver process would add more administrative burden, but such a process might be well suited to small businesses and the utilities, while a self-certification of unreasonable burden or another explanation of why a residential customer prioritized other requirements in the first 14-days should be considered by Staff.

2. Procedures, Standards and Methodologies

A. Preservation of Rights

¹⁶ See, Case 22-M-0159 Staff Proposal: Procedure and Definitions, pp. 2.

As Staff notes in the notice and proposal issued in this proceeding,¹⁷ the effective date of the statute and rulemaking process completion are misaligned. PULP concurs with Staff's recommendations on page 4-5 of the notice and proposal that the intent of "PSL §73 is clear; residential customers and to be defined small business customers are to receive credits and reimbursements in a timely and efficient manner," and therefore such customers should receive the protections of PSL §73 and proper notice from the utility in a manner that protects their rights while a Commission determination is pending.¹⁸

B. Exception(s) to "loss of gas service"

PULP asserts here that inability to use gas appliances due to electric service loss, in contrast to Staff's suggestion,¹⁹ should in certain circumstances constitute loss of gas service as defined herein as a compensable condition. For example, many households have an electric thermostat and/or "ignition system" attached to gas heating systems such that loss of electric service makes use of gas heating appliances impossible, as is identified by the "Domestic Electric Emergency HEAP" category. Additionally, it is conceivable that Life Saving Equipment ("LSE") customers' medical condition and life-supporting appliances might well require a loss of electric service to also be treated as a loss of gas service. While PULP will not provide an exhaustive list here, we note that Staff should consider this topic and either create a non-enumerated category that residential/small business customers can assert with proof (akin, perhaps, to the process for claiming a "medical emergency" under HEFPA) or modify this proposal for additional comment by disability and senior advocacy organizations, and by the utilities.

C. Proration of credits for outages

Staff recommends that the period covered by the daily \$25 outage credit not be prorated to be beginning of the 72-hour outage triggering customer remedies under PSL §73. PULP

¹⁷ See, Case 22-M-0159, Notice of New Proceeding and Soliciting Comments, at <https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A47D9B9B-AFEF-4C53-B2D7-6BAB4451B28C}>.

¹⁸ Id. at pp. 4-5.

¹⁹ Id. at p. 5.

disagrees.²⁰ Staff's rationale concerning why it did "not propose any pro-ration of credits [was] for ease of administration and to avoid customer confusion".²¹ PULP agrees that ease of administration and avoidance of consumer confusion are often laudable goals but does not believe that consumers will be confused about when the outage began, and their losses started. Further, pro-rated outage credits are not a new concept in New York, as many major cable franchises have such concepts beginning after four hours of outage. The legislative intent is to compensate customers for outages in a manner that allocates the burdens of proof and production appropriately and acknowledges the disparities of recordkeeping resources and legal sophistication of the parties. Consequently, PULP argues that proration of credits back to the beginning of the 72 consecutive hour outage is appropriate.

V. Conclusion

As noted above, PULP believes that Staff's proposal places this initial rulemaking for PSL §73 in alignment with the public interest. PULP has provided suggestions above for consideration of additional factors, greater granularity in sections, and some flexibility of interpretation concerning the "14-day" deadlines for customers and utility to file after a widespread prolonged outage if such also results in a declaration of emergency. PULP appreciates the opportunity to assist with this important regulatory process, which will see the implementation of §73 to the Public Service Law. PULP has not addressed every part of Staff's proposal herein, and reserves its right to do so in the reply comment phase of this proceeding or in such other comment opportunities as may arise before a final order.

²⁰ Id. at p. 6.

²¹ Id.