STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 03-M-0772 - Petition of Niagara Mohawk Power Corporation for Authorization to Request Security Deposits from Applicants for Residential Service Filed in Case 25695.

RULING ON REQUEST FOR INTERIM RELIEF

(Issued July 1, 2003)

JEFFREY E. STOCKHOLM, Administrative Law Judge:

The purpose of this ruling is to address a June 19, 2003 motion by the Public Utility Law Project (PULP) which, in part, requested, pending the outcome of this proceeding, that residential utility service be immediately provided to Mr. John Walsh without first requiring a security deposit and that the same relief be provided to all other similarly situated applicants for utility service. PULP's motion also requested that Mr. Walsh be granted active party status.

In an e-mail notice on June 20, 2003, the active parties were advised that I would hear oral arguments on PULP's motion in a conference call on June 23, 2003.[1] In that notice, I also defined the class of applicants for service for which PULP was seeking relief as those denied service in the absence of a security deposit on the grounds that they had month-to-month leases and who were not currently being provided service. I also noted that the interim relief requested by PULP would be granted only if likely success on the merits of PULP's petition could be established and a balancing of the equities favored the defined class. The matter at issue on this motion as contained in PULP's June 3 petition is its request that the company's definition of short-term customer (here applied to tenants with month-to-month leases) be declared in violation of Public Service Law §36 and 16 NYCRR §11.12(a).

[1] Niagara Mohawk Power Corporation (Niagara Mohawk or the company), Staff, and PULP participated in the conference.

Prior to the June 23 oral argument, I was informed by Department advisory staff that Niagara Mohawk had been directed on June 20, by an authorized employee of the Office of the Consumer Services (OCS), to provide service to Mr. Walsh. However, while electricity was on in Mr. Walsh's apartment and apparently had been since the date of his original application on June 12, the company had not opened an account in his name.[2] As a result, the company was again directed by OCS (June 24) to place the utility service in Mr. Walsh's name.

On June 25, 2003, I sent an e-mail to the company's counsel (with a copy to the active parties) asking whether (and when) Mr. Walsh's service had been placed in his name, and whether the company intended to continue its policy of requiring deposits from customers living under month-to-month tenancies. The company responded on June 25 stating that an account in Mr. Walsh's name had been opened that day without requiring a security deposit, and the company's policy of requiring a security deposit on the sole basis that an applicant has a month-to-month lease would be suspended, at least through August 30, 2003.

Discussion

Before reviewing the substance of PULP's motion, a clarification of the authority of the Commission's authorized designees (as a general matter, employees within OCS) under Part 11 of 16 NYCRR should be addressed. No provision of the Public Service Law or of the Commission's regulations thereunder diminish in any way the authority of such designees to order a utility to commence service to an applicant on either a temporary or a permanent basis simply because the same request had been made to an Administrative Law Judge (ALJ) in a pending case. While the authority to direct that action might also be within the jurisdiction of an ALJ under appropriate

[2] According to the company, it believed that the issue of Mr. Walsh's utility service was pending before me and that directions from OCS, therefore, need not be followed.

circumstances, the pendency of a request before a Judge does not affect a utility's obligation to comply with such directives.

While the relief sought for Mr. Walsh was effectively provided on June 25, rendering this portion of PULP's motion moot, the failure to provide that service within two business days (or within 24 hours, if OCS so required) raises a question regarding Mr. Walsh's entitlement to the $25/day penalty for such failures, as provided in 16 NYCRR §11.3(c). However, any such relief would properly be determined by OCS.

Turning to PULP's petition, I first observe that the relief it seeks for all ratepayers in Mr. Walsh's position is analogous to the provisional remedy (i.e., pending the outcome of the proceeding) of a temporary injunction under the Civil Practice Law and Rules (CPLR).[3] Under the CPLR, a defendant may be restrained from acting in violation of a plaintiff's rights during the pendency of an action where the plaintiff is ultimately seeking a judgment restraining the defendant from continuing to act in such manner and where the continuance of the defendant's actions during the proceeding would injure the plaintiff (CPLR, §6301). The courts have long held, under this provision, that a movant must establish a likelihood of success on the merits and a balancing of the equities that favors the movant. As I noted in my July 20 e-mail to the parties, PULP's motion could be granted if it could establish a superior equitable position regarding damages that would occur in the absence of an injunction as compared to the damage that might occur if one were issued, as well as a likelihood of success on the merits of its position.

While the provisional relief PULP seeks for tenant applicants for utility service under month-to-month leases has been voluntarily granted by Niagara Mohawk at least until August 30, it seems reasonable, nevertheless, to address the issues raised. I first conclude that PULP has failed to sustain its burden of proof regarding damages. While Mr. Walsh was

[3] CPLR, Article 63. The CPLR is not binding in our proceedings but may be applied by analogy in appropriate circumstances.

denied service by the company because he had a month-to-month lease and did not post a security deposit, it appears that his damages as a result of the denial were minimal because the gas and electricity service continued to be provided by Niagara Mohawk to the apartment. Customers under identical circumstances would similarly have insufficient damages to justify the equitable remedy of a Commission order pendente lite precluding the company from applying its lease-based policy. Further, while the record shows that hundreds of customers have been denied service due to the absence of a security deposit since the company changed its policy, no evidence has yet been provided that such a denial has led to tenants living in apartments rendered uninhabitable due to the lack of electricity or gas. While one cannot rule out the possible existence of such circumstances, the evidence submitted on PULP's motion, including the company's June 25 affidavit and PULP's June 27 affirmation,[4] fails to establish them.

The legal issue on which PULP must establish a likelihood of success on the merits concerns the provisions of 16 NYCRR §11.12. Under those rules a utility may demand a security deposit as a condition of service, if the applicant ". . . requires service for a specified period of time that does not exceed one year."[5] In oral argument, Niagara Mohawk suggested that, because a month-to-month tenant can be assured of his residency for only 60 days, a service request by such a customer should be construed as a request for a specified period of service of no more than 60 days. PULP opposed that interpretation noting that long term leases can also be ended short of their term and that the term of the lease should not be the determining factor. Staff suggested during the conference call that PULP was most likely correct in its interpretation of the Commission's regulations.

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[4] In deciding this motion, I have also considered PULP's June 3 petition and supporting affidavits, PULP's motion and supporting affidavit, Niagara Mohawk's June 25 e-mail response, and the oral argument of the parties on June 23.

[5] 16 NYCRR §11.12(a).

On this question, I believe PULP has sustained its burden of establishing likely success on the merits. The fundamental issue raised by the above-quoted rule is the duration of service sought by the applicant, which itself should depend on the intent of the applicant. For example, Mr. Walsh never stated that he was requesting service for any specific period of time. He states in his affidavit that he was seeking service for an indefinite period. In requiring a security deposit, Niagara Mohawk's policy assumes the applicant's intent to be a short-term customer based on a landlord's business decision to use month-to-month leases. It seems unlikely under these circumstances that the landlord's lease form would necessarily reveal the tenant's intent.

Under the Commission's rule, a security deposit would likely be appropriate only if the applicant states that service is required for a specific time period less than a year. Mr. Walsh's requesting service for an indefinite period does not seem to meet this standard, and I therefore judge it unlikely that Niagara Mohawk's application of the rules to month-to-month leases would be upheld by the Commission. Therefore, it is likely that PULP will be ultimately successful in its effort to have the Commission preclude Niagara Mohawk from demanding security deposits solely on the basis that the applicant for service has a month-to-month lease. As the company has agreed to discontinue this policy at least until August 30, however, no further action is required at this time.

Finally, the issue of PULP's request to add Mr. Walsh as an active party should be addressed. The company opposed this request during oral argument on the grounds that Mr. Walsh's affidavit is unreliable in material ways and that his participation through PULP would add nothing to the record that could not be provided by the three tenant organizations joining in PULP's petition. On the question of the veracity of the affidavit, I am concerned with Mr. Walsh's June 18 statement that: "...the apartment lacks electricity for light, refrigeration, cooking and other essential purposes. I was and still am unable to live in the apartment...[.] causing

continuing hardship, cost, and inconvenience to me."[6] According to Niagara Mohawk's affidavit of June 25, 2003,[7] and the attached transcripts of Mr. Walsh's conversations with Niagara Mohawk representatives, Mr. Walsh stated on June 12, 2003: "I believe the electricity is already turned on ... ."[8] Niagara Mohawk's affidavit(¶5) further states that both gas and electric service were connected and "alive" on June 23, 2003, before service was placed in Mr. Walsh's name.

On June 27, PULP filed an affirmation of counsel explaining (¶7) that Mr. Walsh never stated that the apartment he rented was not supplied with electricity, but rather that "electricity was not being supplied to him . . .", because there was no account in his name. According to the affirmation, Mr. Walsh wanted to use his electricity to operate the appliances, etc., and that is what he had wanted from the beginning.

I appreciate the fine distinction PULP attempts between wanting electricity in Mr. Walsh's name and wanting electricity to be able to live in the apartment, but it is nevertheless true that Mr. Walsh stated that "the apartment lacks electricity" and that he is unable to live in it. The qualification PULP posits as critical to understanding the affidavit (not just the presence of electricity, but the presence of electricity being billed to Mr. Walsh) appears nowhere in the affidavit. Therefore, the affidavit leaves the clear impression that there was no electricity in the apartment and that it was uninhabitable as a result. As it appears that electricity was available, I find the affidavit misleading at best.

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[6] June 18, 2003 affidavit of Mr. John E. Walsh, ¶8. I have reviewed all of the alleged inconsistencies noted by Niagara Mohawk and find only the questions noted in the text of this ruling to be material.

[7] Affidavit of Mr. John O. Leana.

[8] Leana Affidavit, Exhibit A, p. 1.

Notwithstanding the above conclusion, however, the Commission's active party status rules (16 NYCRR §4.3) contain no standard regarding the credibility of a party seeking active status. The rules provide that a party may be allowed to intervene "if the intervention is likely to contribute to the development of a complete record."[9]

While the general practice is to broadly construe this standard and allow formal intervention upon the showing of a legitimate interest in the subject matter and the ability to contribute to the development of a complete record, I find that Mr. Walsh's position fails to meet this standard, even broadly construed. First, Mr. Walsh has now received permanent service in his name and without a security deposit and therefore has no personal stake in Niagara Mohawk's lease-based security deposit policy. Second, there is no evidence that Mr. Walsh could add anything to the development of the record (beyond that he has already provided) which the three tenant organizations already represented by PULP could not provide. I would reconsider this ruling if PULP can show that Mr. Walsh's participation would uniquely add to the development of the record, but in the absence of such a showing, PULP's request for active party status for Mr. Walsh is denied.

(SIGNED) JEFFREY E. STOCKHOLM

[9] 16 NYCRR §4.3(c)(1).