STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

Case 93-G-1030 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16NYCRR, in Relation to Complaint Procedures --Appeal by North Shore Tower, Inc. of the Informal Decision Rendered in Favor of Consolidated Edison Company of New York, Inc., filed in C 26358 (370490)

COMMISSION DETERMINATION
(Issued and Effective May 9, 1996)

This is an appeal by North Shore Tower, Inc., complainant,[1] of an informal hearing decision dated September 15, 1993 (copy attached), which found that Consolidated Edison Company of New York, Inc. ("Con Edison" or the utility) properly advised complainant's builder, Sigmund Sommer Construction Company, Inc., that Service Classification No. 6, Interruptible-Large Volume, (SC-6) was not available when gas service was requested in the early 1970's[2] and that it is inappropriate, twenty years later, to second-guess the utility's judgment of its

[1] Complainant is represented in this complaint by attorney John C. Brennan of Bass & Brennan, P.C.

[2] Sigmund Sommer Construction Company, Inc. preceded complainant as the customer of record and originally requested SC-6, established for off peak use of gas, in 1971 for service to four boilers (supplementary space and water heating) and six cogeneration engines serving a large residential housing complex. By letter dated March 20, 1972, Con Edison advised complainant's builder that because additional gas supplies were not going to be available for some period from its suppliers, SC-6 was closed in July 1970 in order to protect supplies for its existing firm and interruptible customers as well as projected loads from new customers. The utility also stated that service to the boilers could be provided on Service Classification No. 5, Interruptible-Temperature Controlled, (SC-5), that cogeneration service did not qualify for SC-5, but that sufficient gas was available under contract from the gas suppliers to furnish gas to the engines on Service Classification No. 4, Commercial and Industrial, (SC-4). Billing the boilers and the engines on different rates entailed separate metering. Upon the builder's request, by letter dated November 20, 1973, service was billed accordingly on SC-5 and SC-4. When SC-4 was cancelled in 1977, the engines were transferred to Service Classification No. 2, Small Commercial, (SC-2) and to SC-5 in 1985, when the SC-5 tariff was modified to permit gas use for cogeneration.

ability to supply gas service to existing customers at that time.[3] Complainant argued that its two accounts should have been combined and rebilled for SC-6 service in the period of December 1978[4] to April 1988, when SC-6 was cancelled, and thereafter on SC-12 (Priority E) until August 1993, when the two accounts were transferred to SC-16 (Priority E).[5] In reaching his decision in favor of the utility, the hearing officer noted that the utility's closing of SC-6 to new applicants in the early 1970's can, in some respects, be considered more restrictive than

[3] Attorney Martin C. Seham of Surrey, Karasik, Morse and Seham first complained to the Public Service Commission on behalf of Sigmund Sommer Construction Company, Inc., by letter dated February 7, 1975, regarding Con Edison's refusal to assign the cogeneration plant to SC-5 or SC-6. The attorney requested that the matter be consolidated with the hearing then pending in the utility's application to modify the SC-4 tariff. Con Edison subsequently withdrew its tariff proposal, which eliminated the need for such a proceeding, and advised the builder's attorney of the withdrawal. At that point, the issue was dropped, until North Shore Towers' attorney, John C. Brennan, filed a complaint with the Consumer Services Division in 1991. Complainant acknowledges that the events in question occurred when the prior customer, Sigmund Sommer Construction, first requested service in 1971 and subsequently became responsible for service in late 1973 or early 1974. However, complainant claims that Con Edison wrongfully denied the builder's request for SC-6 service to the boilers and cogeneration engines and that, as a result, the incorrect billing continued when North Shore Towerbecame the customer of record.

[4] The utility's records indicate that service was initiated on January 21, 1987, not in December 1978, as complainant appears to claim. This question, however, is not relevant to our determination, which upholds the hearing officer's decision.

[5] Con Edison denied complainant's request for combined billing under Priority E of SC-12 because separate meters were originally installed for "customer purposes" when service was requested under SC-5 and SC-4 (see footnote #2). Each account is now being billed under Priority E of Service Classification No. 16, Off-Peak Service, (SC-16) as of August 1993. Complainant notes that the minimum usage requirements of SC-16 are such that it is not necessary to combine the recorded use of the two gas meters to receive the benefit of SC-16 billing.

the restrictions adopted in Case 25766[6] and, therefore, the utility neither canceled nor was required to cancel the tariff provision in which it reserved the right to deny applications for SC-6 service.[7] Further, the hearing officer found no basis for the claim to SC-6 billing that similarly situated customers received preferential treatment, and that because the request for SC-5 and SC-4 at the inception of service required the installation of separate meters, complainant did not qualify for combined billing from service turn-on. Our determination denies complainant's appeal and upholds the informal hearing officer's decision.

On appeal, North Shore Tower makes the same arguments, summarized here, that were raised at the informal hearing to advance its position that it was wrongly denied SC-6 at the inception of service and thereafter, that this action was discriminatory, and that its two gas meters should have been combined for billing purposes when service was initiated. Regarding the first issue, complainant makes several points in support of its contention that it was wrongly denied SC-6 service, and that the closing of SC-6 from 1970 to 1988 does not

---

[6] Case 25766, Proceeding on Motion of the Commission to Determine Whether and to What Extent Restrictions on the Attachment of New Gas Customers Should be Imposed Upon the Gas Corporations and Electric and Gas Corporations (Issued October 26, 1971 and amended December 16, 1971). The Commission's opinion and order directs the utilities to cease all promotional activities designed to acquire new gas customers or increase gas sales to existing customers effective January 1, 1972, and states, "All existing tariff restrictions presently in effect, except where such provisions are more restrictive than those herein established, will be cancelled concurrent with the effectiveness of the tariff filings herein required."

[7] Special Provision A of the SC-6 tariff then in effect states:

> "Applications under this Service Classification will be accepted only when, and to the extent that, the Company in its judgment has sufficient natural gas supply available after providing for the requirements of firm Customers and Company use and Customers already taking interruptible service, and without requiring unreasonable extension or reinforcement of facilities for the service requested."(Leaf No. 40, PSC No. 8-Gas).

reflect concern for the gas supply to existing customers at the time but was based on economic considerations.[8] Particularly, complainant asserts that the hearing officer's finding that it is inappropriate to second-guess Con Edison's decision to close SC-6 in 1970 misses the point, and that the question is whether the utility could rely on a 1970 assessment of gas supply to deny interruptible service to its total energy plant (six boilers and four engines) when North Shore Tower went on line in 1974 and to continue to deny SC-6 service thereafter. Complainant also argues that Con Edison's decision to close SC-6 for so many years was done without the consent or, apparently, the knowledge of the Commission, that this action goes far beyond what the language in Special Provision A permits,[9] and is inconsistent with Section 66.12 and 65.5 of the Public Service Law.[10] Complainant claims it was a de facto interruptible customer and would have been among the first customers to be cut off in the event of a

---

[8] In support of its claim that Con Edison closed SC-6 for economic considerations, complainant relies on Columbia Gas of New York v. New York State Electric & Gas Corporation, 56 Misc.2d 367, 289 N.Y.S.2d 339 (Sup. Ct., Broome Co. 1968), which held that a cause of action was stated by a complainant who alleged that a utility's new "interpretation" of an existing tariff was merely an attempt by the utility to avoid the statutory rate making scheme.

[9] See footnote #7.

[10] Complainant notes that Section 66.12 provides that "[n]o change shall be made in any rate or charge...or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility" without first filing the change with the Commission. Complainant further notes that Section 65.5 authorizes the establishment of different service classifications, but requires that each service classification be filed with the Commission, and "be subject to change, alteration and modification by the commission." Complainant states that the statutes represent a clear intention by the state legislature to take away from gas utilities the power to unilaterally fix rates and to determine what rates are just and reasonable. In support of this assertion, complainant relies on Morrell v. Brooklyn Union Gas, 113 Misc. 65, 184 N.Y.S. 651 (Supt. Ct. Kings Co., 1920). Complainant also states that responsibility for authorizing changes in service classifications was intended to be placed with the Commission and, in support of this assertion, relies on Childs v. Brooklyn Edison Co. of New York, 109 N.Y.S.2d 503 (Sup. Ct. Kings Co., 1951).

shortage. Thus, complainant reasons, Con Edison obtained all the benefits of having an interruptible customer while collecting substantially higher firm rates.

North Shore Tower also contends that the Commission Opinion and Order in Case 25766 canceled the closing of SC-6 because the closing contravened the policies enunciated in the Opinion and Order to encourage the growth of interruptible service. In addition, complainant acknowledges that the federal Public Utility Regulatory Policies Act of 1978 (PURPA) involves the sale of electricity, but claims that the SC-6 closing undermined the objective of PURPA and Section 66-c of the Public Service Law of encouraging the development of cogeneration facilities.

Further, complainant asserts that even if Con Edison was concerned about a gas shortage in 1970, the evidence does not reflect this concern nor does it justify the utility's decision to maintain SC-6 closed from 1970 through 1988. Complainant specifically claims that if Con Edison anticipated a shortage it would not have granted firm SC-4 service to large users, as it did to North Shore Tower's cogeneration facility when service was requested in 1973; that a Gas Division memorandum of November 2, 1972 indicated there was a sufficient gas supply to meet firm commitments because of the utility's large interruptible loads; and that Con Edison was instrumental in eliminating from the Commission Opinion and Order in Case 25766 the required deadline (June 1, 1972) for connecting customers to whom gas commitments have been made and in substituting a less restrictive definition of "substantial investment" to be eligible for new service.[11]

---

[11] The Opinion and Order issued on October 26, 1971 originally ordered that customers "to whom commitments have been made prior to the date of issuance of the order herein, or who have made substantial investments prior to such date, may be connected prior to June 1, 1972." The Opinion and Order also defined "substantial investment." For existing buildings, "substantial investment" required the submission of satisfactory written evidence that the customer was legally obligated to purchase gas equipment prior to the effective date of the Commission order and had installed the equipment no later than June 1, 1972. For new buildings, it meant (continued...)

With respect to the issue of discriminatory treatment, North Shore Tower claims Con Edison's refusal to provide SC-6 service was inconsistent with Sections 65.2 and 65.3 of the Public Service Law, which state that the utility may not discriminate among similarly situated customers.[12] Complainant also cites a letter to the Commission, dated August 1, 1983, from Con Edison Assistant Vice President John Monsees as evidence that the utility favored certain large customers for economic reasons

---

[11](...continued)
the submission of satisfactory written evidence regarding the actual expense, ordering of gas equipment, and detailed plans for the utilization of the gas equipment prior to the effective date of the Commission order and the pouring of concrete foundations or footings prior to December 1, 1971. Con Edison found that because of the nature of construction in its service territory, particularly large apartment projects, its customers would need well over the eight months allowed (October 1971 to June 1972) to be connected. The utility also found that the requirements to show substantial investment involving existing and new buildings would cause unnecessary hardship to customers who could show that prior to the effective date of the Commission order they had a legal obligation to purchase gas equipment, but were unable to meet the stringent Commission requirements. At the urging of Con Edison and other utilities, the Commission removed the deadline date of June 1, 1972 and substituted a less strict definition of substantial investment in the amended Opinion and Order of December 16, 1971.

[12] Complainant notes that Section 65.2 prohibits a gas utility from charging a customer a greater or less compensation for service than it charges another customer "for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions" and that Section 65.3 prohibits a gas utility from granting "any undue or unreasonable preference or advantage" to any customer. Complainant also relies on New York and Queens Gas Co. v. McCall, 245 U.S. 345 (1917), where the Court held that utilities "which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to service and restricting the development of the remaining portions by leaving their inhabitants in discomfort." Complainant notes that the same sentiment is echoed in Brewer v. Brooklyn Union Gas, 33 Misc.2d 1015, 228 N.Y.S.2d 11777 (Sup. Ct., Queens Co., 1962) and Morrell v. Brooklyn Union Gas, 113 Misc. 65, 184 N.Y.S. 651 (Sup. Ct. Kings Co., 1920).

and that this is not a legitimate basis for the different treatment accorded to it.[13]

Regarding the issue of combined billing, complainant argues that two meters were installed when the accounts were opened, not for customer purposes, but because the utility refused to provide interruptible service to the cogeneration facility and required the installation of a second meter to provide SC-4 service to this facility. Complainant asserts that even if Con Edison were justified in refusing to provide SC-6 service at the inception of service, its refusal to combine the two SC-12 Priority C accounts from 1988 through 1993 was without justification because, as stated above, separate meters were originally installed as a result of the utility's improper conduct and it would be unfair to expect a customer to alter the gas piping, at considerable expense, in order to be billed for heating and cogeneration gas recorded on a single meter.

In response to the appeal the utility reiterated the position that it had previously set forth during the investigative and hearing stage of the complaint. In these papers Con Edison points out that complainant filed its claim to SC-6 billing sixteen years after the same complaint was raised by the previous customer in 1975 (and disposed of at that time) and that in a prior complaint[14] the Commission took the position

---

[13] Complainant notes that Mr. Monsees states that Con Ed was requesting to reopen SC-6 in order to keep certain large customers who (as a result of falling oil prices) had switched or were threatening to switch to oil, and to "avoid the imminent danger of injury through load loss." On March 27, 1981, over two years before the request to reopen SC-6, Rule III.13.A.2 of the utility's tariff took effect and closed both SC-5 and SC-6. As a result, Con Edison no longer had the discretion under Special Provision A of SC-6 to accept or deny service on this rate. Complainant also notes his statement that Con Edison was establishing higher daily consumption requirements for SC-6 in order "to avoid a migration to lower priced SC-6 interruptible service of other dual-fuel customers."

[14] 90-E-038, Appeal by Consolidated Edison Company of New York, Inc. of the Informal Decision in favor of 319 West 48th Street Realty Corp., Commission Determination (February 26, 1992).

that a customer who waits more than six years before filing a complaint has a very heavy burden to sustain.

As Con Edison suggests, we have imposed the burden in this case on complainant. Indeed, there is a serious question as to whether this complaint about Con Edison's decision to close SC-6 in the early 1970's is time-barred, especially given that complainant's builder requested service in 1971, took service in late 1973 or early 1974, and initially complained in 1975. Con Edison has not, however, asserted that this complaint is time-barred, and we would be unable to reach a decision on this complex issue without the benefit of further arguments from the parties. This question of timeliness is, however, of no consequence to our ultimate decision because we are convinced that North Shore Tower's appeal should be denied and the hearing officer's decision upheld on the merits. There is, therefore, no need for us to ask for additional briefing and expend additional resources on the timeliness of this complaint. The fact that we have not delved into this question of timeliness should not, however, be construed as a conclusion that this claim and others like it are not time-barred.

In reaching our determination on the merits of the complaint, we have taken into account the findings in the Case 25766 proceeding concerning the general state of the gas supply in the 1970's and the arguments and evidence presented by North Shore Tower to show that Con Edison wrongfully closed SC-6 in 1970. We conclude that complainant's position does not provide grounds to question the utility's denial of SC-6 service at that time or at any point thereafter.

Specifically, complainant's argument disputing Con Edison's reliance on a 1970 assessment of gas supply to reject its builder's request for SC-6, the least expensive rate for cogeneration service, fails to consider that the gas shortage that emerged in the early 1970's was viewed as a long-term problem. Indeed, the closing of SC-6 coincided with the Commission's recognition then that the gas supply might not be adequate and its decision to initiate the Case 25766 proceeding

to investigate whether and to what extent restrictions on the attachment of new gas customers and promotional activities should be imposed.[15] In the course of this proceeding, the Hearing Examiner noted that the problem of adequate gas supply provided by the gas producers would continue for some years and that long-range estimates showed that the gas supply might be depleted by the end of the century in the absence of technological or exploratory breakthroughs.[16] He also noted that in 1970 a majority (53%) of Con Edison's gas service was being used to generate electricity and steam, that this use represented a substantial margin on which to rely in meeting the annual requirements of firm customers, and that the utility was decreasing the use of gas for electric generation and intended to do so over the next several years to meet annual load growth in gas for residential, industrial and commercial use.[17] Considering that SC-6 was a preferential service rate available primarily to very large non-firm gas users and the uncertainty regarding the adequacy of the gas supply at the time, there is no basis to question Con Edison's decision to close this rate in July 1970, nor any reason to conclude that the precarious state of the gas supply changed appreciably by the time of the SC-6 requests made by complainant's builder in late 1973 and thereafter.

Complainant's argument, that Con Edison closed SC-6 for economic reasons and without the knowledge or consent of the Commission, overlooks the fact that Special Provision A of the SC-6 tariff was approved by the Commission, consistent with Sections 65.5 and 66.12 of the Public Service Law, and clearly granted the utility the discretion, based on its judgment of the adequacy of the gas supply, to accept or reject applications for SC-6. Complainant's reference to Morrell and Childs in support

---

[15] Case 25766, Commission session of July 21, 1970.

[16] The Hearing Examiner's recommended report of June 16, 1971 in Case 25766, page 68.

[17] Ibid., page 31-32.

of this argument does not alter our conclusion that Con Edison had the discretionary right to close SC-6 since these court cases involve allegations that the utility charged rates that were not approved by the Commission, which is not the case here. Nor does complainant's reliance on Columbia Gas of New York v. New York State Electric & Gas Corporation support its claim that the closing of SC-6 in the period of 1970 to 1988 was done for economic reasons or that the utility wished to circumvent public hearings to obtain a rate increase. Columbia Gas of New York involves a dispute between the utility and a competitor and questions whether a special rate for lighting was authorized by the utility's tariff. It also involved the plaintiff's request for a preliminary injunction. The court found that the plaintiff's complaint did allege a cause of action under Section 65.5 of the Public Service Law, but denied the plaintiff's request for a preliminary injunction. It should also be noted that, although we do not know with certainty at this late date why Con Edison maintained SC-6 closed for eighteen years, the closing of this service rate is consistent with the Hearing Examiner's conclusion in the Case 25766 proceeding that the gas shortage was a long-term problem and the fact that, effective March 27, 1981, the utility's tariff explicitly prohibited accepting new or additional gas service under both SC-6 and SC-5. These interruptible service rates remained closed until they were cancelled in 1988, at which time interruptible service under SC-12 was introduced.

Further, the Opinion and Order in Case 25766 did not cancel the closing of SC-6, as complainant claims. Although the Opinion and Order states the Commission's policy to encourage the growth of interruptible gas service, it also states that tariff restrictions on the attachment of new customers that were more restrictive than those required by the Opinion and Order would not be canceled.[18] By permitting the more restrictive tariff provisions to stand, the Commission allowed the utilities limited

[18] See footnote #6.

flexibility to determine how the purpose of the restrictions, to protect the gas supply of their existing firm and interruptible customers, would be achieved. Con Edison's closing of SC-6, pursuant to Special Provision A, predates the Opinion and Order in Case 25766 and, since the closing denied SC-6 service to new applicants, is more restrictive than the Commission's restrictions. It should also be noted that Con Edison was not obligated to assign a new customer to an interruptible service rate because the customer had dual-fuel equipment. The Commission recognized the importance of extending service to customers with dual-fuel equipment, as complainant has noted, but did so primarily as a means of protecting the gas supply to existing firm customers, particularly domestic users. Since SC-6 had been closed to all new customers since July 1970, Con Edison properly denied the builder's original request for SC-6 in 1971 and assigned SC-4 (cogeneration engines) and SC-5 (boilers) in accordance with the builder's November 1973 request.

With respect to complainant's assertion that the closing of SC-6 frustrated the objectives of PURPA and Section 66-c of the Public Service Law to encourage the development of cogeneration facilities, the evidence does not support this claim. It should be noted that PURPA and Section 66-c do not require the utility to assign a cogeneration customer with dual-fuel equipment to a preferential rate. As stated above, Con Edison provided firm SC-4 service to North Shore Tower's cogeneration engines, and was able to do so because the bulk of its gas supply was already dedicated to service used for electric generation by the early 1970's and the Commission permitted it to decrease such use for electric generation in order to meet annual firm load requirements. In view of the gas shortage at the time and the need to protect the gas supply to existing customers, we find that the utility's decision to divert cogeneration gas to meet firm load requirements was reasonable.

North Shore Tower next argues that even if Con Edison was concerned about a gas shortage in 1970, the evidence does not reflect this concern nor does it justify the utility's decision

to maintain SC-6 closed from 1970 through 1988, particularly considering that the utility was able to provide firm service on SC-4, instead of interruptible SC-6 service, to the cogeneration facility when service was requested in 1973. In further support of this argument, complainant refers to a Gas Division memorandum of November 2, 1972, which indicates that there was a sufficient gas supply to meet firm commitments because of the utility's large interruptible loads, and the fact that the utility was instrumental in having the Commission Opinion and Order modified to make it easier for new customers to secure service.

We find that complainant's evidence does not support its argument. Con Edison's letter in response to the builder's request for service, dated March 20, 1972, explained why SC-6 was closed in 1970 and that sufficient gas was available under contract to provide service for cogeneration on SC-4. The utility's response to the builder's service request and the Gas Division memorandum of November 1972 are consistent with the restrictions ordered in Case 25766 to protect the gas supply of existing firm and interruptible customers and the fact that the utility was permitted to plan for additional loads to accept new customers. We have no reason, over twenty years later, to question Con Edison's decision to close SC-6 in 1970 and find it more logical to conclude that the utility was in a position to provide firm SC-4 service to the cogeneration engines-- and firm service generally, as evidenced by the November 1972 Gas Division memorandum-- because of the Commission's imposition of gas restrictions and the closing of SC-6. It should also be noted that the Commission amended the Opinion and Order because it found that the changes suggested by Con Edison expressed a legitimate concern for the ability of new customers who received a commitment from the utility for gas service but, because of the nature of construction in its franchise territory, would not have been able to meet the deadline for service connection or the original requirements of substantial investment. We find no basis to conclude otherwise.

Regarding North Shore Tower's claim that the denial of SC-6 service constituted discriminatory treatment among similarly situated customers under Sections 65.2 and 65.3 of the Public Service Law, we find no merit in this assertion. Discriminatory treatment exists where two or more customers, with equal qualifications to receive service on a specific available rate, apply for service on that rate and one customer is denied service. In this case, SC-6 had been closed in 1970 and, thus, was not available to new customers. There is no evidence presented in this case that similarly situated customers or applicants were treated differently.[19] Con Edison's letter of August 1, 1983, is not evidence of discriminatory treatment. The utility official states in his letter that the tariff revision was necessary in order to keep Con Edison's two largest dual-fuel firm customers from switching to lower cost oil, that the loss of these customers would result in higher gas costs to all other customers, and that in order to avoid a migration of other gas customers to lower cost SC-6 gas the utility was requesting approval to increase the daily consumption requirements for service on this rate. The Commission found Con Edison's request to be reasonable and, pursuant to Section 65.5 of the Public Service Law, approved the tariff revision. The different treatment granted to Con Edison's two largest dual-fuel firm customers was in accord with the duly filed and approved tariff and is presumed valid and non-discriminatory.

With respect to complainant's argument in support of its request for combined billing, the resolution of this issue, like the claim of discriminatory treatment, depends on our finding regarding the availability of SC-6 in the early 1970's. Complainant argues that the installation of two gas meters was actually done for utility purposes because Con Edison improperly refused to provide interruptible gas to the cogeneration

[19] We note that in support of this argument complainant cites New York and Queens Gas Co. v. McCall, Brewer v. Brooklyn Union Gas Co., and Morrell v. Brooklyn Union Gas. None of these court cases involve the denial of service on an available service classification.

facility, thereby necessitating the installation of separate meters for service on SC-4 (cogeneration) and SC-5 (boilers). As discussed above, we find that in view of the gas shortage that emerged in the 1970's Con Edison had good reason to deny SC-6 service at that time. Thus, it was necessary for complainant's builder, in order to be billed on the most beneficial rates then available, to request service under two meters since gas used for cogeneration did not qualify for service under SC-5 at that time.

In order to assure that all aspects of this case have been properly addressed, we have thoroughly reviewed the entire complaint file. We determine that Con Edison properly denied SC-6 service (pursuant to Special Provision A of the SC-6 tariff), that the denial of SC-6 service was not discriminatory, and that because SC-6 service was not available and cogeneration gas was not eligible for billing under SC-5, North Shore Tower's service did not qualify for combined billing. Therefore, complainant's appeal is denied and the hearing officer's decision is upheld.