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Michael W. Reville
Deputy General Counsel

October 20, 2005

(716) 857-7313

Hon. Jaclyn A. Brilling
Secretary
Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 05-G-1209
Response to Further Notice Soliciting Comments

Dear Secretary Brilling:

National Fuel Gas Distribution Corporation ("Distribution" or the "Company") is in receipt of a "Further Notice Soliciting Comments" issued in the above-referenced proceeding on October 17, 2005 ("Notice"). The Notice requests comments on a petition submitted by the Consumer Protection Board ("CPB") to have the Commission initiate a new proceeding "to investigate measures for reducing the burden of high energy prices on consumers during the coming heating season." Notice at 1. For its response to the Notice, Distribution submits the following comments.

CPB's complaint under Section 71 of the Public Service Law invokes an adversarial procedure. Bill reductions sought to be achieved under Section 71 would open a Section 72 proceeding, which requires hearings and other formal proceedings that by their nature are time consuming and will constrain innovation and the creative remedies sought by CPB. Furthermore, although the nature of the proceedings potentially invoked by CPB may be appropriate for individual utilities, it is ill suited for the sort of broad-based, generically applicable investigation requested. Thus as a purely procedural matter, that part of CPB's petition should be rejected because it proposes the wrong means to lead to the relief sought in sufficient time to be meaningful.

On the issues, however, CPB's request is not without merit. It would be appropriate, and is perhaps necessary, for the Commission to solicit utilities to voluntarily submit proposals for bill relief and other measures of the kinds described in CPB's complaint. Distribution is, itself, exploring various tools within its disposal to bring some measure of bill relief to its customers this winter and over the long run. These measures will be discussed with Staff and if necessary may become the subject of a formal filing.¹

¹ Such a filing, initiated by the utility under Section 66, can be acted upon without hearing and in 30 days or less.

Distribution believes that under the circumstances, all stakeholder resources would be better spent if utilities voluntarily designed and implemented programs that may serve the very ends described in CPB's complaint. It would be unfortunate, indeed, if Distribution and other like-minded utilities were compelled to direct those same resources toward defending against the adversarial-type proceeding requested by the CPB.


Subject to the foregoing, Distribution's responses to CPB's recommendations for an order are as follows (in the order presented by CPB):

1. CPB's request for "expedited inquiry" under SAPA is not inappropriate for purposes of commencing a proceeding, but it is thoroughly inadequate for the relief ultimately requested. In order to achieve the results sought by CPB via Commission order or directive, the Public Service Law requires a hearing (See Pub. Serv. L. §72). This can be avoided, however, if utilities are requested to voluntarily submit proposals for relief, assuming, of course, that such proposals do not produce significant opposition.
2. CPB's proposal would have the Commission direct utilities to file "proposals to defer or modify programs that are not necessary for health and safety, where such action will result in costs savings this heating season." (emphasis added). CPB says also that in addition to the programs identified by utilities, Staff and "consumer groups" would "identify and recommend additional utility programs to be deferred or modified . . ." While perhaps not intended, by its choice of procedure CPB is inviting an open season against utility rates and programs. This is unnecessary because Distribution believes that there may be significant agreement about programs that are suitable for the treatment requested. Every effort should be made to encourage collaboration and cooperation to avoid the adversarial procedures contained in the Public Service Law, which by their nature are unsuited for the expedited action and large-scale, generic outcome sought by the CPB.
3. For item no. 3, CPB requests that the Commission "require" energy utilities to identify "within seven days, all funds currently held for the benefit of ratepayers as well as the expected uses of those funds. At that time, utilities should also file proposals to return unencumbered ratepayer funds . . ." This item essentially calls for the very voluntary action recommended by Distribution in this letter. Distribution disagrees, however, to the extent that CPB has identified System Benefits Charge ("SBC") funds as "encumbered" and therefore not suitable for gas purposes. This issue is addressed in more detail by Distribution in its reply comments filed in this proceeding on October 14, 2005 (attached).

4. Distribution supports CPB's recommendation to direct more NYSERDA low-income funding to customers in the form of immediate financial assistance. This should also include gas customers who are charged the SBC by electric utilities and who share service territory with Distribution, as explained in Distribution's comments filed on October 14, 2005.
5. Distribution does not oppose CPB's proposal for a proceeding to explore, on a generic basis, gas commodity procurement practices and utility commodity products that may be offered to small-volume customers. It should be recognized, of course, that such a proceeding is not likely to produce any results that will affect the upcoming heating season.

Distribution, again, wants to make it clear that the Company is in fundamental agreement with CPB's objectives and that its opposition is to the manner in which those objectives are being sought to be achieved. Distribution stands ready to cooperate fully with Staff, the CPB and any other parties to bring about relief for our customers before we are too far into this difficult heating season.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael W. Reville', with a long horizontal flourish extending to the right.

Michael W. Reville

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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Petition of New York State Electric & Gas Corporation and	:	
Rochester Gas and Electric Corporation to Implement an	:	Case 05-G-0209
Emergency Financial Aid Program for Low Income Natural	:	
Gas Heating Customers	:	
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RESPONSE OF
NATIONAL FUEL GAS DISTRIBUTION CORPORATION

I. INTRODUCTION

By petition dated September 27, 2005, New York State Electric & Gas Corporation ("NYSEG") and Rochester Gas and Electric Corporation ("RG&E") (or "Energy East") jointly seek the Commission's approval to use credits generated by their electric department customers to provide rate relief for their low-income gas customers (hereinafter "Energy East Petition" or "Petition"). National Fuel Gas Distribution Corporation ("Distribution" or the "Company") believes that the goal sought to be achieved by Energy East is appropriate. Distribution observes, however, that Energy East's omission from this program of those Distribution low-income customers who are also electric customers of NYSEG and RG&E is discriminatory and ought to be corrected. There is no reason to give relief to those low-income electric customers of NYSEG and RG&E who happen also to be gas customers of the Energy East companies while depriving such benefits to other low-income electric customers who are provided gas distribution service by Distribution. This brand of discrimination – perhaps inadvertent but discrimination nonetheless - must be prevented especially because the petition itself acknowledges that the revenue and credits to be used to provide the relief for NYSEG and RG&E gas customers were

derived from all of those companies' electric customers – including those thousands of Energy East customers who take gas service from Distribution.

Also in response to the Petition, the Public Service Commission (“Commission”) issued a Notice Soliciting Comments on October 7, 2005, requesting comment on three questions relating to Energy East’s proposal. This response to the Petition also responds to the Commission’s Notice.

II. FACTS

Distribution is a gas distribution utility in Western New York providing gas commodity and transportation services to approximately 500,000 customers. Distribution has, for many years, offered rate relief and other assistance to its low-income customers. Currently, Distribution has three such programs in operation. One, designed to aid elderly, blind and disabled customers, provides rate relief, counseling and equipment repair and replacement to such individuals. A second, targeted to people transitioning off public assistance also provides financial aid and direct counseling. Finally, a third, much larger program, offers direct discounts to as many as 30,000 low-income customers.¹

Despite the existence of such programs, Distribution is concerned about the effect on its customers of the recent dramatic increase in natural gas costs (discussed in the Energy East Petition). Accordingly, Distribution is looking at additional options to help its customers defray the higher cost of heating in the upcoming winter.

A gas-only utility, Distribution does not have a Systems Benefits Charge (“SBC”) fund to draw upon as Energy East proposes in the Petition. Nearly all of Distribution’s customers,

¹ This program, pursuant to National Fuel’s recently approved Joint Proposal, is currently the subject of a collaborative effort to restructure it to provide more targeted benefits.

however, are electric customers of one of the three major combination utilities that share franchise territory with Distribution. These customers, many of them Energy East electric customers, are billed SBC charges and are paying into the SBC fund, just like Energy East electric customers in Energy East combination gas territories. Indeed, approximately 201,000 Distribution customers are also electric customers of the Energy East companies. Energy East's proposed Emergency Program inexplicably stops at the border of Energy East's gas service territory, and does not extend the same benefits to Energy East's electric customers in Distribution's territory.

II. DISCUSSION

A. Energy East's Spending of Funds on a Program for the Benefit of Gas Ratepayers is Justified.

The Notice asks:

How can NYSEG's spending of funds on a program for the benefit of gas ratepayers be justified, when the funds are collected from NYSEG's electric ratepayers for SBC purposes?

How can RG&E's spending of funds on a program for the benefit of gas ratepayers be justified, when the funds are collected from RG&E's electric ratepayers for SBC purposes, retained to fund electric DSM projects, but subject to return to other SBC purposes when not spent?

(Notice at 2). The simple response to these questions is that in most instances, the Energy East SBC charges are paid out of the same pockets that pay Energy East's gas bills. Beyond that simple but incomplete response, the analysis in this instance must consider that these are extraordinary circumstances that demand extraordinary relief. Distribution agrees with Energy East that the use of electric SBC funds for gas or gas-related programs is reasonable and perfectly justified on an emergency basis. As explained in the Petition:

It is not unreasonable to use electric customer balances for several different reasons. First, . . . the overall objective of the Emergency Program is to reduce low income customers' overall energy bills. This objective is fully consistent with the NYSERDA President's statement quoted earlier that '[r]educing energy costs for low-income consumers is essential.' Importantly, NYSERDA's President did not limit his comment to reducing gas costs. By using electric customer balances, the [Energy East Companies] are achieving the result sought by NYSERDA.

Energy East Petition at 6 (emphasis in original)(citation omitted). The Commission, too, has recognized the importance of applying an "all fuels" approach to fashioning solutions for high energy costs. *Id.* From an Energy East customer's perspective, it matters little that gas bills are being paid to Energy East or Distribution – in both cases, the bills are contributing to overall household expenses, as do the SBC charges paid by the same households.

The Notice also asks parties to explain how Energy East's proposal to withhold SBC funds from NYSERDA might affect NYSERDA's ability to proceed with its programs already budgeted. Notice at 1-2. Distribution cannot ascertain from the face of the Energy East Petition or the Commission's Notice the extent to which NYSERDA programs that rely on SBC funding may be affected by Energy East's proposal. Distribution knows of no legal obligation owed Energy East to NYSERDA with respect to NYSERDA's funding requirements through the SBC. As a purely legal matter, there is no bar in the Public Service law that would prevent the Commission from approving that part of Energy East's Petition that requests the redirection of SBC funds *without* changing utility rates, so long as the Commission's action has a rational basis.

Given that Energy East's Petition requests emergency, temporary relief in response to a public welfare crisis, there is no need to consider whether as a general matter the use of SBC funds for other purposes is acceptable from a public policy perspective. Ultimately the question before the Commission should be whether, on balance, the public is better served by strict

protection of Energy East's SBC funds, or emergency use of those SBC funds, on a one-time basis, to provide rate relief for low-income customers this winter.

B. Energy East's Rationale in Support of the Petition Requires that Distribution's Customers Be Eligible for the Same Benefits.

Energy East lists two reasons why its gas customers are deserving of emergency financial assistance. The primary reason is that its low-income gas customers, facing a time of unprecedented gas cost increases, are "desperately in need of financial aid." Petition at 7. The second reason is that the "customers who would receive the aid" – electric customers who also consume gas – "have already contributed to the [SBC and other] balances." Petition at 7. Both reasons apply with equal force to Energy East's electric customers who are also gas customers of Distribution. Indeed, with regard to the second rationale, Energy East concedes that gas customers other than Energy East gas customers are contributing to the SBC balance.² It would be manifestly unfair for Distribution's 38,000³ low-income customers who are Energy East electric customers to be deprived of the benefits proposed in Energy East's Petition solely because those customers are not Energy East gas combination customers.⁴

C. As Filed, the Energy East Proposal is Unduly Discriminatory.

As a matter of law, Energy East's electric customers in Distribution's territory cannot be deprived of the same benefit bestowed on their Energy East neighbors. A utility may not grant any undue or unreasonable preference or advantage to any person, or to any particular kind of

2 "[T]he Companies estimate that more than one-third of their electric customers are also natural gas customers." Petition at 7.

3 Reported households with income below federal poverty level located in shared franchise territory.

4 Use of electric SBC funding for gas programs is an issue that is currently being debated before the Commission. See, Case 05-M-0090, Notice (issued August 31, 2005). Under the narrow circumstances set forth in Energy East's Petition, proposed to be implemented on an emergency basis, use of electric SBC funding for low-income assistance to gas customers should be considered for Distribution's customers located in National Grid's service territory, which overlaps most of Distribution's service territory in western New York. Although National Grid has not petitioned the Commission for similar relief, the facts and legal authority for producing the same result are identical.

service in any respect whatsoever, nor may any person or particular type of service be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Public Service Law, §65(3); §66(12)(d). "Rate discrimination can be countenanced only if it is either cost-justified or if some other rational basis is to be found in the record." New York State Council of Retail Merchants, Inc. v. Public Service Comm'n., 45 N.Y.2d 661, 669 (1978).

Certainly, there is no cost basis upon which to confer the credits only to Energy East gas customers because Energy East acknowledges that all low-income electric customers, regardless of who provides their gas service, contributed to the funds that are being proposed to be paid only to gas customers of Energy East.

Neither is there any equitable or other rational basis to provide the relief only to Energy East's gas customers, especially when the Energy East essentially concede that the benefits were contributed to by electric customers served by gas companies other than Energy East. On the contrary, the Court of Appeals noted, citing earlier case law, that "when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another the law intervenes for the protection of the latter." Columbia Gas of New York, Inc. v. New York State Electric & Gas Corp., 28 N.Y.2d 117, 126 (1971).⁵

The Court of Appeals has held it improper to discriminate among classes without a rational basis. Lefkowitz v. Public Service Comm'n., 40 N.Y.2d 1047, 1048 (1976). Where, as here, all electric customers have paid for the SBC credits proposed to be used to provide rate relief for low-income gas customers, there is no rational basis to deprive some of those low-

⁵ See also, Burke v. New York State Public Service Comm'n., 39 N.Y.2d 766, 768 (1976) where the Court approved the gradual phase out of a discount over a five-year period and without inclusion of municipalities which had not previously enjoyed the discount and which therefore could not claim economic hardship unless given the benefit of the phase out. In contrast, all of NYSEG's and RG&E's electric customers contributed to the payments that give rise to the low-income relief and so all low-income customers, regardless of gas supplier, should be entitled to the payments to ameliorate their gas bills.

income customers relief solely because they are not also Energy East gas customers. See Lefkowitz v. Public Service Comm'n., 50 A.D.2d 338, 341 (3d Dept. 1975), aff'd, 40 N.Y.2d 1047 ("It is clear that the relief ordered constituted an undue preference and advantage in violation of subdivisions 2 and 3 of section 65 of the Public Service Law, and a finding that residential . . . customers were entitled to relief under the PSC order did not constitute a classification based upon a reasonable consideration under subdivision 5 of the statute. We observe that every homeowner in the State has suffered the impact of higher petroleum prices, and that the cost of home heating oil has reached new heights for the same reason that has caused fuel oil prices to reach new levels.")

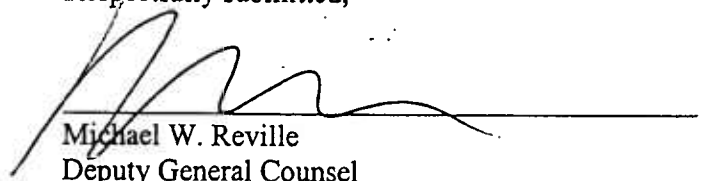
III. CONCLUSION

Distribution acknowledges the efforts of Energy East to provide relief to gas customers during this upcoming winter heating season. Distribution also supports the disposition of the Energy East request on an emergency basis. Distribution believes that Energy East's proposal to utilize electric SBC funds for gas purposes as described is an appropriate response to an acute emergency situation. The hardship faced by low-income customers as described in the Petition (and the instant response) outweighs the social or economic cost that might result from the one-time, short-term redirection of funds away from SBC programs. Energy East seeks regulatory relief that, modified as described herein, is generally within the Commission's authority and public mandate to grant.

The benefit that Energy East proposes to confer solely on Energy East's gas customers, however, would be unduly discriminatory and unfair because those companies admit that all of their electric customers contributed to the credits from which such relief will be provided. Accordingly, NYSEG and RG&E should be permitted to initiate this program only if the credits

flow to all gas customers in said companies' electric service territories, regardless of which gas company, Energy East or otherwise, is supplying gas service to said customer.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Michael W. Reville', is written over a horizontal line.

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Dated: Buffalo, New York
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