STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 07-E-0479 - Tariff Filing of New York State Electric & Gas Corporation to Offer Customers a Single Fixed Supply Service.

PROCEDURAL RULING

(Issued May 30, 2007)

ELIZABETH H. LIEBSCHUTZ, Administrative Law Judge:

On April 5, 2007 New York State Electric & Gas Corporation (NYSEG or the Company) filed revised tariff pages designed to implement a new commodity supply service for calendar year 2008. While the tariff leaves have an effective date of January 1, 2008, NYSEG requests a Commission decision on its proposal before September 1, 2007.

Under the December 15, 2006 Order on Rehearing in NYSEG's most recent electric delivery rate case, Case 05-E-1222, the Commission directed NYSEG to indicate on or before September 1, 2007 whether NYSEG intends to offer fixed price commodity service for calendar year 2008. NYSEG's response to that directive depends on the decision on this pending proposal. If this new proposal is accepted, the new supply service would supersede the fixed price supply option previously ordered by the Commission in Case 05-E-1222. If NYSEG's proposal is not accepted, that result will inform the Company's choice whether to offer a fixed supply option for calendar year 2008.

Pursuant to Notice issued April 26, 2007, the parties convened for a procedural conference on May 14, 2007. This ruling addresses the issues raised at the conference regarding the procedures and schedule necessary and appropriate for consideration of NYSEG's proposal.

PARTIES' POSITIONS

As directed by the Notice, the parties had previously circulated and discussed proposed procedures and a schedule for considering NYSEG's filing. The Company and Staff jointly propose the following schedule:

Collaborative Starts	Tuesday, May 29, 2007
First Report to Judge Liebschutz on Progress	Friday, June 8, 2007
Target Date for Agreement in Principle	Friday, June 22, 2007
Second Report to Judge Liebschutz on Progress	Friday, June 22, 2007
Agreement and Statements in Support Filed	Tuesday, July 10, 2007
Statements in Opposition Filed	Thursday, July 19, 2007

If no Agreement in Principle by Friday, June 22, 2007:

Initial Briefs Filed	Tuesday, July 10, 2007
Reply Briefs Filed	Thursday, July 19, 2007

Staff and NYSEG believe either alternative allows for Commission consideration at the August 22, 2007 session.

Multiple Intervenors and the New York State Consumer Protection Board (CPB) support the proposed procedure and schedule. Nucor Steel Auburn does not appear to object specifically, but raises some questions regarding the scope of issues to be considered in the case, which might affect its position regarding the procedure. The Public Utility Law Project (PULP) generally supports the schedule, while indicating some concerns about the confidentiality restrictions inherent in the settlement negotiation process. The Small Customer Marketer Coalition and Retail Energy Supply Association (SCMC/RESA) suggest that the scope of issues to be considered in this matter,

including issues relating to hedging practices and retail access policies in response to Commission directives in other cases, may be too broad to address in the limited time frame of the proposed schedule.

Direct Energy Services asserts that the Company's filing represents a "major change" under PSL §66(12)(c). It has no objection to entering into negotiations with all parties in an attempt to resolve all the issues raised by NYSEG's filing. In the event that all issues are indeed settled, Direct Energy has no objection to proceeding in accordance with the schedule outlined by Staff and the Company. However, in the event that an agreement is not reached (or, at least, that Direct Energy does not support any agreement reached), Direct Energy would then insist upon the full array of procedures, including suspension of the tariff leaves and evidentiary hearings, designed to address major rate case filings.

Staff notes that, if the Company's filing is considered to be a major rate change, then the filing is not compliant with the Commission's Policy Statement on Test Periods in Major Rate Proceedings, as well as other requirements set forth in the Commission's regulations at Title 16 of the New York Code of Rules and Regulations and other practices and procedures that have been developed through Commission orders and policies over the years. Some parties expressed concern that the collaborative phase of the proceeding will be wasted if the process fails to comply with requirements for a major rate change. Other parties conversely express the view that it would be a waste of time to resolve the status of the filing now if all of the issues can be substantively addressed relatively quickly through a collaborative process.

Separately, the procedural conference also addressed the status of the Company's pre-filed testimony, which was submitted with the tariff filing. The Company expressed a desire to cite to this material, either in a statement of support of an agreement or in a brief in the event the matter is contested. Constellation New Energy asserts that, in fairness, the Company's pre-filed materials should have the same status as comments

submitted by other parties during the process and should not be treated as sworn testimony or other evidentiary material that has been subjected to cross-examination. Constellation notes that, with that caveat, it does not see the need for evidentiary hearings in this matter and would be content with a paper comment process. Multiple Intervenors and CPB agree that a comment process suffices and that the Company's pre-filed materials should be treated the same as comments submitted by all other parties.

SCMC/RESA express discomfort with admitting all materials into the record and according them equal weight. They note that the Company has proffered a substantial quantity of testimony, including survey analysis and expert opinion, and that such a volume of material is going to be considered regardless of whether it is called "comments" or "testimony." The Company's materials, SCMC/RESA asserts, could likely outweigh whatever comments are submitted by other parties who have not had an opportunity to prepare complete testimony. Staff and Multiple Intervenors both assert that the discovery responses received from other parties can be treated as evidentiary material as an admission, and that such materials can be attached to parties' briefs to support their arguments.

DISCUSSION

The parties are to be commended for their efforts to reach a consensus on the procedure and schedule to be followed in this case. Their suggestion to begin with collaborative settlement negotiations is unopposed and is accepted as a constructive means of addressing the issues raised by NYSEG's filing. As we discussed at the procedural conference, such negotiations can and should commence without regard to the resolution of the status of the filing as a major rate change and the status to be accorded the pre-filed testimony submitted by the Company. NYSEG has duly filed a Notice of Impending Settlement Negotiations under 16 NYCRR §3.9, and negotiations were scheduled to commence May 29, 2007 and continue on May 30,

2007, with further dates to be developed by the parties as appropriate.

While the parties are thus negotiating, however, the issue as to whether NYSEG's tariff filing represents a "major change" under the Public Service Law must be resolved. The parties raised thoughtful arguments for and against a finding of major rate case status at the procedural conference. Admittedly, however, the parties had not researched the issue thoroughly and were not in a position to support their statements with citations to legal authority. This ruling sets forth my preliminary view, formed without the benefit of such legal research and briefing by the parties. Parties are invited to provide support either for the tentative position sketched out here or for positions to the contrary, as described in more detail below.

PSL §66(12) sets forth procedural rules that govern a utility filing for a change in a "rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service."[1] A "major change" is thereafter defined as "an increase in the rates and charges which would increase the aggregate revenues of the applicant more than the greater of three hundred thousand dollars or two and one-half percent."[2] PSL §66(12)(f) requires the Commission to hold a hearing concerning the propriety of the change proposed by the utility if such a change is a major change. Pending such a hearing, the Commission may suspend the filed rate schedule for 120 days beyond the date it would ordinarily take effect. If the hearing cannot be concluded within that initial suspension period, the Commission may extend the suspension for a further period not to exceed six months.

Here, NYSEG has proposed tariff changes in its commodity service for residential and small commercial and industrial customers that propose a new formula for calculation of the fixed price rate, change the provisions for sharing gains

[1] PSL §66(12)(b).

[2] PSL §66(12)(c).

or losses on the cost of goods sold under the fixed price rate, and eliminate the current variable hedged default rate, making the fixed rate the default and only service available. For larger customers, NYSEG has further proposed to accelerate the schedule for converting customers to mandatory hourly pricing, proposing that all customers whose demand exceeds 500 kW be put on hourly pricing.

Under the plain wording of PSL §66(12), it would appear that NYSEG's filing does indeed propose a change "in a rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service," within the meaning of PSL 66(12)(b). Therefore, this filing should be governed by PSL 66(12). Whether NYSEG's proposed change is a "major change" depends on the revenue impact of the proposal. No such revenue impact has been supplied by the Company or any other party, other than the general statement made by counsel for Direct Energy at the hearing that the proposal represents a change worth "a hundred million dollars on the table."[3]

NYSEG is hereby directed to submit an analysis of how the Company's proposal would affect its revenues for 2008. To conduct such an analysis, the Company should assume no change in the relative proportion of residential and small commercial and industrial customers who obtain service from an ESCO versus service from NYSEG. Under the Company's proposal, all customers who currently receive commodity service from NYSEG, whether the default service or the fixed price option, would, in the future, receive the new fixed price service. The Company should also assume a constant price for wholesale energy and capacity, so that its analysis isolates the impact of its proposed changes without regard to market changes. Given those assumptions, what would be the revenue impact of the change in calculating the fixed price rate, the change to make it the sole choice for NYSEG supply service for residential and small commercial and industrial customers, and the change in rates for customers with

[3] Transcript of Procedural Conference, May 14, 2007 at 46.

demand greater than 500 kW? Such revenue impact should be expressed both in dollars and as a percentage change from what revenues would otherwise be. The Company should provide its revenue analysis to the undersigned and all parties by June 5, 2007. With that submission, the Company is invited to provide any alternative calculation it desires and to argue why its alternative is a better calculation for evaluating a change under PSL §66(12).

Again, based solely on a plain reading of the statute, if the Company's filing meets the definition of a major change, it appears to me that the Commission is required to hold a hearing but need not necessarily suspend the tariff leaves. Suspension appears to be merely permissive, as a means of accomplishing the hearing, which is required. Moreover, it appears that the hearing is designed to ensure that the Commission fully considers the filing and assesses the propriety of the change. Consequently, it does not appear to be a procedural right afforded for the benefit of the utility, for example, or any other party, such that it could be waived by that party. However, the parties are invited to submit briefs, if they so desire, challenging this preliminary conclusion. In such briefs, the parties should address whether the Commission must hold a hearing if all parties or any particular party waives the hearing requirement. Moreover, must the hearing be an evidentiary-type hearing? Alternatively, could the hearing requirement in PSL §66(12) be met by a public statement hearing or a notice and comment process?

Furthermore, parties are free to challenge my preliminary conclusion that the Commission need not necessarily suspend these tariff leaves if the Commission can conclude its examination, including the conducting of an evidentiary hearing, prior to the January 1, 2008 effective date of the tariff leaves. Alternatively, the Commission could exercise its right to the initial four-month suspension period without resorting to the second, six-month period. Again, however, parties are free to brief any interpretation to the contrary.

It is my preliminary belief that the characterization of NYSEG's supply service filing as a major change within the meaning of PSL §66(12) does not doom the filing to rejection or substantial delay in this proceeding. There is no question that the utility has not submitted the sort of analysis of sales and cost of service required by 16 NYCRR §61.3 or the forecasted rate year tied to a historic test period as required by the Commission's Policy Statement on Test Periods in Major Rate Proceedings. However, I am inclined to think that, upon a showing that such requirements would not be particularly applicable, helpful, or necessary for consideration of this matter, the Commission could, by order, waive these requirements, either in a preliminary order or in its final order on the merits in this proceeding. Consequently, NYSEG could supplement its filing by seeking such a waiver from the Commission. Again, parties are invited to submit briefs outlining their legal analysis and conclusions to the contrary.

In summary, I am inclined to find that NYSEG's filing is a major change within the meaning of PSL §66(12) on the assumption that the revenue impact of the changes proposed here does meet the threshold set forth in PSL §66(12)(c). Therefore, I would be inclined to set a schedule that includes evidentiary-type hearings on the proposal. Such hearings could consider the propriety of a joint proposal reached through settlement negotiations or they could consider contested matters raised in the absence of a settlement or by those opposing a settlement. Such hearings need not be particularly lengthy or extensive, given the relatively narrow focus of the proposal and the issues raised therein. Moreover, parties would be free to adopt or otherwise reference all or portions of the record developed in Case 05-E-1222, to the extent relevant.

With the inclusion of hearings as part of the process for consideration in this case, my inclination is to find that the case can go forward based on the materials filed by the Company on April 5, 2007, without the need for supplementary testimony or exhibits to develop a fully forecasted rate year or to analyze sales or the cost of service. Staff and intervenor

parties should be afforded the opportunity to put in responsive testimony for consideration at a hearing.

Given the relatively narrow focus of the Company's filing and the willingness and desire of Staff and intervenor parties to proceed on a truncated schedule, I propose a schedule along the lines of the following:

Collaborative Starts	Tuesday, May 29, 2007
First Report to Judge Liebschutz on Progress	Friday, June 8, 2007
Target Date for Agreement in Principle	Friday, June 22, 2007
Second Report to Judge Liebschutz on Progress	Friday, June 22, 2007
If settlement reached, Joint Proposal and Testimony in Support Filed; if no settlement, Staff & Intervenor testimony responsive to NYSEG's pre-filed testimony filed	Tuesday, July 10, 2007
Testimony in opposition to Joint Proposal OR rebuttal testimony filed	Thursday, July 19, 2007
Evidentiary hearing commences, either re JP or disputed record	Monday, July 30, 2007
Briefs	Tuesday, August 14, 2007

I emphasis that this schedule is a tentative proposal and that alternative proposals from the parties are welcomed, as described below.

It is likely that I will ask the parties to employ some sort of non-traditional briefing process, to be determined at a later date. For example, briefs may be limited to answers to a series of questions promulgated by me or to a mere list of a party's main points in one-sentence descriptions, followed by citations to the record where such points are set forth or

supported, or some other format that may be developed as this case proceeds.

The schedule set forth here would make it unlikely that the Commission could consider this matter at its regularly scheduled August 22, 2007 session. The timing of a Commission decision would be further affected by a decision to release my recommendation as a formal recommended decision for further briefing through the exceptions process -- a decision that is not made by me but rather by the Commission Secretary. In the course of seeking waivers from the Commission as to the form and scope of this filing as outlined above in this ruling, the Company could simultaneously seek relief from the requirement in the Commission's Order on Rehearing in Case 05-E-1222 that it notify the Commission and all parties regarding its intentions as to commodity supply service by September 1, 2007. Instead, the Company could defer that notification until after the Commission's final order in this proceeding. After all, by virtue of this filing, the Company has already made well known to the Commission and all parties in the prior case its intentions and preferences regarding supply service for 2008. So long as there is a Commission decision in time for implementation and necessary customer outreach and education, strict compliance with the September 1, 2007 deadline contemplated in the other proceeding does not seem to be a critical constraint that should hamper the full development of a record and the allotment of sufficient time for its consideration by the Commission in this proceeding.

NEXT STEPS

Following the submission by the Company of the revenue impact analysis called for by this ruling, all parties are invited to submit briefs with respect to the tentative conclusions set forth herein relating to the status of this case as a major rate change under PSL §66(12) and the procedural ramifications that flow from such a conclusion as outlined above. Parties should further comment on the proposed schedule set forth

herein as an appropriate or convenient means of addressing the statutory requirements or otherwise as appropriate to consideration of NYSEG's filing. In addressing the scheduling milestones and dates in particular, parties are encouraged, as always, to confer with each other and to put forth a consensus schedule based upon the convenience of the participants. Such briefs and comments on a schedule should be submitted by June 14, 2007.

The dates of all filings and submissions of briefs, analyses, comments, testimony etc. called for in this ruling are in-hand dates. In-hand service upon active parties to this proceeding can be met by e-mail service by 4:00 p.m. on the date due, followed by hard-copy service as follows: Active parties have the right to demand receipt of all documents in hard copy before 10:00 a.m. on the following business day. They may elect instead to receive hard-copy service by regular mail, so long as documents are placed in such regular mail on the in-hand date. Alternatively, they may elect to waive receipt of any hard copy and rely solely on the electronic version. Parties should communicate their service preferences by e-mail to all parties sufficiently in advance of the June 5, 2007 deadline for submission of NYSEG's revenue analysis for the Company to arrange to accommodate those preferences in making its June 5 submission.

All documents must be provided to me by e-mail delivery on the "in-hand date" and in hard copy form before 10:00 a.m. on the following business day. Similarly, all documents must be filed with the Commission Secretary by 10:00 a.m. of the following business day. Documents to be delivered

to me and to be filed with the Secretary should not be combined but should instead be separately addressed for delivery to each of us.

(SIGNED) Elizabeth H. Liebschutz