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July 16, 2007

By Hand Delivery

Hon. William Bouteiller
Administrative Law Judge
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Proceeding on the Motion of the Commission as to the Rates, Charges,
Rules and Regulations of National Fuel Gas Distribution Corporation
for Gas Service
Case 07-G-0141

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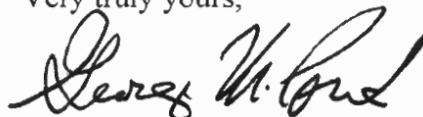
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COMMISSION
EXECUTIVES-ALBANY

Dear Judge Bouteiller:

Enclosed please find the Opposition of Direct Energy Services, LLC to the Motion of National Fuel Gas Distribution Corporation to Strike a Portion of the Testimony of Direct Energy Witness Chris Kallaher in this proceeding.

Copies of this filing have been served on all parties on the Commission's Official Service List via first-class mail.

Very truly yours,



George M. Pond
Attorney for Direct Energy Services, LLC

GMP:cam

cc: Hon. Jaclyn Brilling (5 copies) ✓

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission
as to the rates, charges, rules and regulations
of NATIONAL FUEL GAS DISTRIBUTION
CORPORATION for gas service.**

CASE 07-G-0141

**OPPOSITION OF DIRECT ENERGY SERVICES, LLC
TO MOTION TO STRIKE A PORTION OF THE
TESTIMONY OF DIRECT ENERGY
WITNESS CHRIS KALLAHER**

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Dated: July 16, 2007

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission
as to the rates, charges, rules and regulations
of NATIONAL FUEL GAS DISTRIBUTION
CORPORATION for gas service.**

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CASE 07-G-0141

**OPPOSITION OF DIRECT ENERGY SERVICES, LLC
TO MOTION TO STRIKE A PORTION OF THE
TESTIMONY OF DIRECT ENERGY
WITNESS CHRIS KALLAHER**

Direct Energy Services LLC (Direct Energy) submits this Opposition to the Motion of National Fuel Distribution Corporation (NFG) to Bar the Receipt into Evidence of a Portion of the Testimony of Direct Energy Services Witness Chris Kallaher (the Motion) pursuant to Rule 3.6 (d) of the Commission's Procedural Rules, 16 N.Y.C.R.R. § 3.6 (d) (2007).

INTRODUCTION

NFG's Motion seeks to exclude from the record a portion of Mr. Kallaher's rebuttal testimony filed in this proceeding on June 28, 2007. According to NFG, this portion of Mr. Kallaher's rebuttal testimony improperly responds to testimony submitted by NFG witness Meinl, to which responses were due on June 7, 2007. In addition, NFG also urges the Commission to strike this testimony on the ground that it is factually flawed. Both these claims are wholly without merit.

What NFG fails to acknowledge in its Motion is that the challenged portions of Mr. Kallaher's testimony represent a clear and direct response to the testimony of Consumer Protection Board (CPB) witness Dr. Douglas Elfner filed on June 7, 2007. Because Mr. Kallaher's testimony properly responds to Dr. Elfner's testimony, and because the question of whether Mr. Kallaher's testimony is factually correct must be resolved at the hearing in this proceeding and not in an unsworn evidentiary motion, NFG's Motion must be rejected.

BACKGROUND

The facts that form the basis of NFG's Motion are simple and are not in dispute. On June 7, 2007, CPB witness Elfner filed testimony in this proceeding stating, in pertinent part, that:

[T]he role of the Commission in fostering competitive retail energy markets should be restricted to eliminating impediments inherent in, or resulting from, the historic system of monopoly franchises and regulation. It is not the job of regulators to develop - and ratepayers should not be required to pay for - long-term programs aimed at reducing costs or risks to businesses that would be present in any competitive environment, whether regulation ever existed or not.

(Elfner Direct, pp. 24-25).

In response to this testimony, Mr. Kallaher submitted rebuttal testimony on June 28, 2007 stating, in pertinent part, that:

Q Do you have a response to Dr. Elfner's statement regarding consumer's funding of long-term competition related programs?

A Generally speaking, Direct agrees with Dr. Elfner that competitive suppliers should bear the operational costs and risks inherent in operating in a competitive market. Direct does, however, take a more expansive view of what constitutes a transitional program. Successfully restructuring a market that has been heavily regulated for a century will require a number of incremental changes that will serve to eliminate barriers to competition. As this iterative process

unfolds, new barriers are revealed and, as those barriers are identified, they must be addressed. Latent discovery of barriers to the development of a fully competitive market should not be confused with the continuation of programs that have served their purpose and should be discontinued at this time.

(Kallaher Rebuttal at 2).

The portion of Mr. Kallaher's testimony that NFG seeks to exclude from the record in this case immediately follows this paragraph and provides a description of a latent barrier to entry resulting from the fact that customers seeking to initiate service with the utility are only offered the option to receive commodity service from the utility, as well as several programs that have been adopted by NFG to address that problem such as NFG's ESCO referral program, sometimes referred to as the "Discounted Retail Access Transportation Service" or "DRS") and the "ESCO Introduction" program proposed by Mr. Kallaher in his direct testimony. In addition, Mr. Kallaher also provided an example of a customer-funded retail market development program which is no longer needed, the elimination of which Direct Energy supports. NFG does not seek to exclude the latter portion of Mr. Kallaher's testimony from the record in this case.

ARGUMENT

I. MR. KALLAHER'S TESTIMONY REPRESENTS CLEAR REJOINDER TO DR. ELFNER'S TESTIMONY AND, AS SUCH, MUST BE RECEIVED INTO EVIDENCE IN ITS ENTIRETY

The facts in this case clearly demonstrate that Mr. Kallaher's rebuttal was directly responsive and limited to issues raised in Dr. Elfner's testimony concerning the retail competition programs that should be retained and those that are no longer needed. By using examples to highlight the distinction contained in Dr. Elfner's testimony, Mr. Kallaher effectively rebutted Dr. Elfner's testimony regarding the discontinuation of a number of programs that are, in Dr. Elfner's view, a subsidy to competitors.

It is significant that NFG's Motion makes no effort whatsoever to contend otherwise. Indeed, NFG's Motion contains no discussion whatsoever of the distinction drawn by Dr. Elfner between the types of retail competition programs that should be retained and the types of such programs that should now be eliminated.

Instead, NFG contends that Mr. Kallaher is precluded from including in his rebuttal testimony any discussion of whether NFG's ESCO referral program should be eliminated. According to NFG, any discussion of this issue in rebuttal testimony is improper because NFG witness Meini addressed the expiration of that program in his initial testimony, as to which responsive testimony was due on June 7, 2007. According to NFG, it will be unfairly prejudiced if Direct Energy is allowed to address this issue in rebuttal testimony, since NFG will then be "deprived [of] the right to respond to testimony that should have been filed on June 7, 2007."¹ In support of this claim, NFG characterizes Mr. Kallaher's statement that he is responding to Dr. Elfner as an "artifice."²

A strikingly similar contention was rejected by the Commission in 2005 in a rate case proceeding involving Central Hudson Gas & Electric Corporation (Central Hudson).³ In that case, CPB had filed a request for rehearing of a Commission decision approving an ESCO referral program for Central Hudson. When the Public Utility Law Project of New York, Inc. (PULP) filed a response in support of CPB's rehearing petition that provided additional grounds for overturning the Commission's adoption of that

¹ Motion at 3.

² *Id.*

³ Case 05-E-0934 *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Central Hudson Gas & Electric Corporation for Electric Service*. Order Denying Rehearing Petitions And Motion To Strike (Issued and Effective December 20, 2006).

program, Central Hudson moved to strike PULP's response. Like NFG in this case, Central Hudson argued that the contentions made by PULP in that response could have been made in a rehearing petition but were not, and that it would be prejudiced if the Commission allowed PULP to make those arguments in a response, since Central Hudson would have no opportunity to respond to those new claims.

The Commission rejected Central Hudson's contentions out of hand, ruling that PULP's filing was a proper response to CPB's rehearing request and that Central Hudson could not claim prejudice as a result of an authorized filing:

As both PULP and Staff correctly observe, 16 NYCRR 3.7 calls for "responses" to a motion for rehearing to be filed within 15 days and does not limit the scope of such responses. The Company is not prejudiced by PULP's Response because it was timely and did not request additional relief beyond that identified in the rehearing petition that it supports.⁴

This Commission precedent applies with equal force to NFG's Motion in this proceeding. Because Mr. Kallaher's rebuttal testimony was a proper response to the testimony of Dr. Elfiner, the mere fact that the issues raised therein could also have been raised in earlier testimony does not make that testimony improper rebuttal.⁵ Moreover, because that testimony was proper rebuttal, NFG is precluded from claiming any prejudice resulting from its filing. Accordingly, NFG's motion to exclude portions of Mr. Kallaher's testimony from the record in this proceeding must be rejected.

⁴ *Id.*, slip op. at 38-39 (footnote omitted).

⁵ In the *Central Hudson* case, the Commission also found that "the Company offers no precedent for its argument that parties may not support others upon rehearing." *Id.*, slip op. at 39. NFG similarly fails to offer any precedent to support its contention that otherwise proper rebuttal testimony may be stricken simply because the statements made therein could also be construed as an unauthorized response to the testimony of the utility's witnesses. The fact that the Commission has never adopted such an unsound rule is hardly surprising, as it would provide a fertile field for motions to strike by NFG and other utilities.

II. NFG HAS MISCHARACTERIZED MR. KALLAHER'S TESTIMONY IN ITS MOTION

In an attempt to bolster its claim that Mr. Kallaher's rebuttal testimony is procedurally improper, NFG incorrectly construes Mr. Kallaher's reference to "a latent discovery" of a barrier to entry to mean that the existence of that barrier to entry "just dawned on" Mr. Kallaher at the time he was preparing his rebuttal testimony.⁶ Importantly, the phrase "just dawned on", which appears in quotes in NFG's Motion, does not appear anywhere in Mr. Kallaher's rebuttal testimony.

Moreover, this description seriously mischaracterizes Mr. Kallaher's rebuttal testimony. Mr. Kallaher's point was not that *his* awareness of this barrier to entry arose late in *this proceeding*, but rather that *the Commission's* awareness of this barrier arose late in the Commission's *overall process of moving from regulation to competition in retail markets*. Mr. Kallaher went on to explain that, as a result, this barrier was not expressly addressed in any of the programs previously adopted by the Commission to facilitate retail access. When understood in this context, Mr. Kallaher's remarks: (1) are directly responsive to Dr. Elfner's testimony concerning which retail access programs should be continued and which such programs can now be eliminated; and (2) provide no support for NFG's suggestion that Mr. Kallaher has tacitly admitted that he should have raised those issues at an earlier point in this proceeding.

III. THE COMMISSION HAS BROAD DISCRETION TO RECEIVE EVIDENCE AND THE INCLUSION OF MR. KALLAHER'S TESTIMONY WILL PROVIDE A MORE COMPLETE RECORD

The Commission should also reject NFG's Motion because Mr. Kallaher's testimony will provide for a more complete record. First, it addresses the concept of an

⁶ Motion at 2.

ESCO Introduction Program in response to the testimony of CPB witness Dr. Elfner. Notably, “[o]ne of the distinguishing features of administrative adjudication is the relaxed rules of evidence (see, Borchers and Markel, New York State Administrative Procedure and Practice, West’s New York Practice Series, p. 46); however, “[i]rrelevant or unduly repetitious evidence or cross-examination may be excluded” (see, SAPA 306 [1]).

Mr. Kallaher’s testimony should be received into evidence in its entirety as the Commission has broad discretion to consider any evidence that it deems acceptable for inclusion in the record. The contents of the Kallaher rebuttal should properly be received into evidence as it addresses issues presented by CPB witness Dr. Elfner with factual assertions made by no other witness in this proceeding. The timing of those factual assertions with respect to the testimony of any other witness in this proceeding is immaterial and compromises no substantial right of confrontation held by any party thereto.

IV. NFG’s CLAIM THAT MR. KALLAHER’S TESTIMONY IS FACTUALLY UNTRUE SHOULD BE RESOLVED AT THE HEARING RATHER THAN ON THE BASIS OF NFG’S UNSWORN MOTION

In an effort to call into question factual assertions made in Mr. Kallaher’s rebuttal testimony, NFG presents unsworn statements concerning a document that is not part of the record in this proceeding. The short answer to these allegations is that NFG will have ample opportunity to attempt to impeach Mr. Kallaher’s credibility with respect to these statements at the hearing in these proceeding. In such circumstances, it would plainly be improper for the Commission to resolve such contested issues of material fact through a procedural motion.

This is particularly true, where, as here, the motion in question is unsworn and contains no supporting affidavits. Accordingly, to the extent that NFG's Motion seeks to exclude any part of Mr. Kallaher's rebuttal testimony on the ground that it is factually incorrect, that Motion must be rejected as procedurally defective.⁷

CONCLUSION

WHEREFORE, for the foregoing reasons, Direct Energy Services, LLC respectfully requests that the Commission reject the Motion to Bar the Receipt into Evidence of a Portion of Testimony of Direct Energy Services Witness Chris Kallaher of National Fuel Gas Distribution Corporation in its entirety. The rebuttal testimony of Direct Energy witness Kallaher represents clear joinder of issue with the direct testimony of CPB witness Dr. Elfner concerning competition related programs, including the discussion of specific examples of ESCO referral programs such as the proposed ESCO Introduction Program or the DRS. Such testimony was clearly proper, and NFG may not claim to have been prejudiced as a result of such proper rebuttal testimony.

⁷ NFG's contentions in this regard are substantively defective as well. Mr. Kallaher's rebuttal testimony points to service initiation as an impediment that is entrenched in the monopoly franchise structure. The thrust of this testimony is that when customers contact the utility to initiate service, they are not necessarily given a choice of service providers, but rather, placed on firm service. This testimony is clearly responsive to Dr. Elfner's testimony regarding impediments inherent in the monopoly franchise structure.

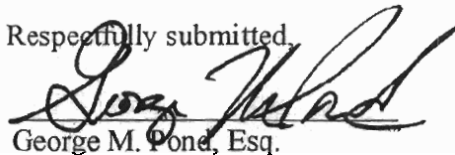
In an attempt to discredit this portion of Mr. Kallaher's testimony, NFG directs the Commission's attention to its Gas Transportation and Operating Procedures Manual ("Manual") (see, NFG Motion, p. 2). Assuming, *arguendo*, that this material were to be considered by the Commission in any respect as a part of its evaluation of NFG's evidentiary motion, it fails to address the issue raised in Mr. Kallaher's testimony. The portion of the Manual referenced by NFG contains, *inter alia*, provision for "Customer Initiated Application[s] for Service" and "Marketer Initiated Application[s] for Service." From these two categories, one can assume that either customers phone the utility to gain firm service, including distribution and supply, or the customer's ESCO initiates service by contacting NFG.

Mr. Kallaher's testimony, however, addressed the issue of the customer contacting the utility directly in his testimony and did not reach the issue of ESCO initiated service. Put most succinctly, Mr. Kallaher opined on the grip inherent in the monopoly franchise of a customer contacting the utility and being automatically placed on firm service. While these factual matters are better left for the hearing room, Direct Energy believes this clarification is necessary at this time in light of NFG's characterization of Mr. Kallaher's rebuttal.

Moreover, NFG's unsworn claims that Mr. Kallagher's rebuttal testimony should be excluded from the record in this case due to certain alleged factual inaccuracies is improper and should not be considered at this time. NFG will be afforded an full opportunity to cross-examine Mr. Kallagher with respect to these factual allegations and, consequently, will not be prejudiced in any way by the rejection of its Motion. Finally, as noted, supra, the Commission has broad discretion to admit evidence in this administrative proceeding in whatever form it deems proper.

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Respectfully submitted,



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Attorneys for Direct Energy
Services, LLC

Dated: July 16, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Opposition of Direct Energy Services, LLC to Motion to Strike a Portion of the Testimony of Direct Energy Witness Chris Kallaher to be served on all parties on the Commission's Official Service List in Docket No. 07-G-0141.

Dated at Albany, New York this 16th day of July, 2007.

A handwritten signature in cursive script, reading "Claudia A. McDowell", written in black ink on a light-colored background.

Claudia A. McDowell