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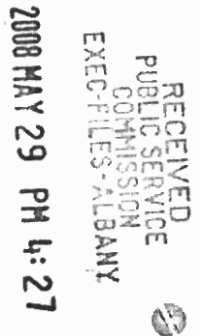
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Comments  
06-G-0059  
OGC  
G+W

May 29, 2007

**VIA HAND DELIVERY**

Honorable Jaclyn A. Brilling  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350



Re: Case 06-G-0059 – In the Matter of Issues Associated with Gas Curtailment

Dear Secretary Brilling:

Multiple Intervenors, an unincorporated association of approximately 50 industrial, large commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby files an original and five copies of this letter as its Reply Comments in response to the “Order Commencing Additional Proceedings” (“March 2007 Order”) issued by the New York State Public Service Commission (“Commission”) on March 26, 2007, in Case 06-G-0059, *In the Matter of Issues Associated With Gas Curtailment*. Multiple Intervenors received comments from the following parties: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., KeySpan Energy Delivery of New York and Long Island, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, National Fuel

Gas Distribution Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation (collectively, "Joint Utilities").

Although the Joint Utilities agree that curtailment should be a last resort, they seek in their Comments to require an energy service company ("ESCO") or customer to maintain its delivery requirement to the utility's city gate through curtailment periods, even if the ESCO's customer is not consuming gas.<sup>1</sup> The Joint Utilities state that "having the right to divert all third-party gas may help these LDCs to protect their distribution systems and/or to maintain service to residential customers in curtailment situations."<sup>2</sup> Multiple Intervenors does not dispute that service to residential and human needs facilities should be maintained to the extent possible. However, for the reasons set forth below, the Commission should clarify that: (i) all curtailments will be limited in scope and duration and issued only under emergency circumstances where the physical and/or operational integrity of the gas system is threatened; and (ii) if, *arguendo*, the Commission grants LDCs the authority to confiscate third-party gas supply during periods of curtailment, compensation for confiscated gas should be based upon the higher of the customer's actual contract price or 125% of the highest per Mcf market price during the calendar month when the gas was confiscated.

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<sup>1</sup> Joint Comments at 9.

<sup>2</sup> *Id.* at 6.

**A. Multiple Intervenors Agrees that Any Curtailments Must Be Limited in Scope and Duration**

In their Comments, the Joint Utilities state that “[u]tilities should be required to implement curtailment only as a last resort.”<sup>3</sup> In particular, the Joint Utilities state that all mutual aid, contractual and other non-curtailment supply management tools, OFOs, interruption of contractually-interruptible load, and supply acquisition should be utilized “before a utility declares a curtailment.”<sup>4</sup> Multiple Intervenors agrees that curtailment of any firm customer is a drastic remedy, and the Commission should maintain strict guidelines governing the application and duration of curtailments. Therefore, in addition to the guidelines proposed by the Joint Utilities, the following criteria should be included in the Commission’s curtailment guidelines:

1. curtailments of core customers, a category that includes firm transportation customers,<sup>5</sup> should occur only under emergency conditions where the physical and

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<sup>3</sup> Joint Comments at 9.

<sup>4</sup> *Id.* at 9-10.

<sup>5</sup> Case 93-G-0932, *Proceeding to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market – Short-Term Curtailment Procedures – Petition for Rehearing*, Opinion 94-26, “Opinion and Order Establishing Regulatory Policies and Guidelines for Natural Gas Distributors” (December 20, 1994) at 1, 15; “Order Adopting Short-Term Curtailment Procedures” (December 3, 1996) at 1 n. 1.

operational integrity of the gas system is threatened<sup>6</sup> and only after customers with lesser service priority have been curtailed;

2. economic considerations should never be the basis for a curtailment;<sup>7</sup>
3. as circumstances permit, LDCs initially should seek voluntary curtailments of core customers to alleviate the emergency situation;
4. if involuntary curtailments are necessary, the LDC's curtailment procedures should take into account the impact of the curtailment on the customer's plant and equipment (e.g., some lower level of gas service may be critical to protect equipment or the safety of employees);
5. curtailments should be limited in scope and duration as necessary to alleviate the emergency and the LDC should provide periodic updates to curtailed customers so that they can plan accordingly;
6. curtailments should be localized to the extent possible; and<sup>8</sup>

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<sup>6</sup> In fact, the Commission itself has stated that "it is hard to envision a short-term curtailment or interruption that is due to other than force majeure circumstances." (Case 93-G-0932, *supra*, "Order Clarifying Short-Term Curtailment Procedures" (June 3, 1997) at 4.

<sup>7</sup> See Case 97-G-1380, *In the Matter of Issues Associated with the Future of the Natural Gas Industry and the Role of Local Distribution Companies*, "Order Concerning Reliability" (December 21, 1999) at 11 (stating that "[e]conomic considerations should not be a basis for declaring [an Operational Flow Order]").

<sup>8</sup> While Multiple Intervenors agrees that short-term curtailments may extend for several hours, they should not be allowed to extend for days or months. Curtailments of that duration are not "short-term" and, instead, require a longer-term approach.

7. after 24 hours, the LDC should be required to implement a curtailment plan that spreads the burden of the curtailment among as many similarly-situated core customers as possible.

Despite their statements that curtailment should be a “last resort,” the Joint Utilities claim that they should be permitted to exercise independent judgment as to when a curtailment is required. However, the Commission should not grant the utilities unbridled authority to declare curtailments. The Commission previously has recognized the necessity to restrain the LDCs authority to declare a curtailment. In a December 21, 1999 Order in Case 97-G-1380, the Commission adopted an August 5, 1999 report of the Communication Working Group that stated as follows:

A short-term curtailment situation is a more catastrophic event requiring the LDC to invoke interruption of gas flow to similar types of end use customers irrespective of whether they are receiving sales or transportation service.<sup>9</sup>

The Commission also has stated that “it is hard to envision a short-term curtailment or interruption that is due to other than force majeure circumstances.”<sup>10</sup> If the definition of short-term curtailments is unduly expanded beyond *force majeure* events, the Commission would open the door to short-term curtailments based on economic or non-emergency

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<sup>9</sup> Case 97-G-1380, *supra*, Order Concerning Reliability (December 21, 1999) at Attachment A, p. 14.

<sup>10</sup> Case 93-G-0932, *Proceeding to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market – Short-Term Curtailment Procedures – Petition for Rehearing*, Order Clarifying Short-Term Curtailment Procedure (June 3, 1997) at 4.

circumstances. Such an expansion would provide the LDCs with far too much discretion and seriously erode the rights of firm transportation customers.

In considering the issues in this proceeding, Multiple Intervenors urges the Commission to be cognizant of the fact that gas service is essential to the operations of large core customers and, by extension, the welfare of their employees, surrounding communities and the State itself. As established in its Initial Comments, many members of Multiple Intervenors are firm transportation customers and, therefore, qualify as core customers, as defined by the Commission. These customers have made plant investment decisions based on the security of that categorization. Thus, the Commission should not adopt any position here that would undermine, or reverse, the core status of firm transportation customers. To do otherwise could force plant shutdowns and result in significant economic losses, including job losses.

**B. The Utilities Already Possess Adequate Tools to Respond to Constrained Operational Situations**

In their Comments, the Joint Utilities claim that having the right to divert all third-party gas *may* help LDCs to maintain service to residential customers.<sup>11</sup> As set forth below, the LDCs already possess adequate tools to deal with operational constraints without confiscating gas from core customers.

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<sup>11</sup> Joint Comments at 6 (*emphasis added*).

The Commission has long recognized the importance of a competitive natural gas market where customers are free to purchase non-utility supply.<sup>12</sup> The Commission has held that the decision of “curtailment priorities of marketer or customer owned gas should be decided among the parties involved, *e.g.*, the marketer and the customer.”<sup>13</sup> Moreover, as the Joint Utilities acknowledge, the ability to declare a curtailment should have no bearing on the ability or authority of an LDC to confiscate gas it does not own.<sup>14</sup> Significantly, the Commission has stated that neither the “Commission or the LDC should be making decisions with respect to redirection of gas among suppliers or to establish curtailment priorities for gas the LDC does not own.”<sup>15</sup> In fact, the Commission has rejected previous LDC attempts to apply curtailment priorities that distinguish between sales and transportation customers. Instead, the Commission directed LDCs to “make clear that its curtailment priorities are for sales gas only.”<sup>16</sup>

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<sup>12</sup> See Case 93-G-0932, *Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market – Long Term Curtailment Plans*, “Approved as Recommended and So Ordered By the Commission” (April 25, 1997) at 3.

<sup>13</sup> *Id.*, at 2.

<sup>14</sup> See Joint Comments at 7. The Joint Utilities have provided no authority authorizing the confiscation of core customer gas for the benefit of other core customers.

<sup>15</sup> *Id.*

<sup>16</sup> See Case 93-G-0932, *supra*, “Approved as Recommended and So Ordered By the Commission” (April 25, 1997) at 3.

Moreover, the utilities already have a number of measures, previously approved by the Commission, that are designed to deal with tight operational situations. It is Multiple Intervenors' position that the current tariff requirements, including the authority of the LDCs to issue a System Alert, OFO, or, where applicable, a short-term curtailment in response to various system conditions, coupled with the LDCs' procurement abilities, provide the utilities with sufficient measures to deal with operational and reliability concerns.<sup>17</sup> The utilities have not demonstrated to the contrary. As NFG acknowledged in its filing letter in Case 06-G-0005, *National Fuel Gas Distribution Corporation Proposed Tariff Amendment, Request for Waiver and Request for Emergency Adoption under SAPA §202(6)*, "operationally, this kind of result [i.e., a curtailment] would be unlikely for most of its service territory."<sup>18</sup>

Finally, transportation customers are required to obtain their natural gas from outside suppliers subject to stringent penalty provisions imposed by the LDC.<sup>19</sup> Similarly, the utilities have an obligation to meet the supply needs of their core sales customers – an obligation that the LDCs have always met. Nevertheless, in their Comments, the utilities are, in effect, requesting the authority to utilize customer gas to backstop their own supply

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<sup>17</sup> Instead of granting the utilities greater discretion, as set forth in Multiple Intervenors Initial Comments, much like electric demand response programs, the Commission should explore the implementation of incentives for firm transportation customers to voluntarily curtail from the system.

<sup>18</sup> Case 06-G-0005, *supra*, NFG Filing Letter, p. 4, n. 4.

<sup>19</sup> See, Case 93-G-0932, *supra*, "Approved as Recommended and So Ordered by the Commission" (issued: April 25, 1997) at 4.



responsibilities. This is clearly contrary to Commission precedent and potentially will have the unintended effect of creating a disincentive for utilities to procure necessary supplies and manage their systems prudently.

**C. If, *Arguendo*, the Commission Grants the LDCs Authority to Confiscate Third-Party Gas, Customers Should be Fairly Compensated for Confiscated Gas and Receive a Rebate on Firm Transportation Charges**

If, *arguendo*, the Commission grants the LDCs authority to confiscate third-party gas supply, which for the reasons set forth above it should not, customers must be fairly compensated for any gas that is confiscated. In addition, if firm transportation service that has been paid for is not provided, such customers should be compensated for the interruption in such service.

In their Comments, the Joint Utilities state that large commercial and industrial customers are not entitled to the same level of reliability as domestic users, even under firm service classifications.<sup>20</sup> Thus, although the utilities readily charge large commercial and industrial customers for firm transportation service, they apparently are unwilling to provide the service for which these customers contracted. Instead, during curtailment periods, the Joint Utilities want the ability to confiscate gas from large commercial and industrial users for re-direction to domestic users. The Joint Utilities propose to provide the entity whose gas was taken (i.e., marketer or customer) with compensation equal to the market value of a

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<sup>20</sup> Joint Comments at 7.

customer's alternative fuel, if applicable, or the relevant market price on the day(s) of such confiscation.<sup>21</sup> Conversely, the utilities' tariff generally provide that if any utility supplies are consumed by customers during a curtailment period, the utility is entitled to the greater of \$25.00 per Mcf or 125% of the highest per Mcf cost of gas during the calendar month.<sup>22</sup> This lack of symmetry is wholly inequitable.

As discussed in Multiple Intervenors Initial Comments, many members of Multiple Intervenors are firm transportation customers that have made plant investment decisions based on the security of that categorization. Thus, the Commission should not adopt any position here that would undermine, or reverse, the level of service that firm transportation customers receive. The economic impact of a curtailment of a large core customer could easily approach millions of dollars. As such, a customer should be compensated for any customer gas confiscated by the LDC at a rate equal to the higher of the customer's contract price per Mcf or 125% of the highest per Mcf cost of gas in the month that the gas is confiscated.<sup>23</sup>

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<sup>21</sup> *Id.* at 11.

<sup>22</sup> Niagara Mohawk Power Corporation, P.S.C. No.: 219, § 3.3.1, Second Revised Leaf No. 31 (effective: January 1, 2007).

<sup>23</sup> Upon information and belief, title transfers to customers from their ESCOs at the LDC city gate. Thus, in general, the utility should presume that its customer has title to the gas confiscated and payments should be direct to the customer.

In addition, if the Commission creates different levels of firm service within those service classes, as seemingly advocated by the Joint Utilities, firm customers that are subjected to more risk should receive a credit, or a lower rate, on their distribution bill. Such a compensation methodology is necessary to prevent a situation where the customer might be compensated less than they will be responsible for paying to an ESCO.<sup>24</sup> Moreover, it creates an appropriate penalty if the LDCs fail to procure adequate supply for their sales customers. In the absence of such an equitable compensation arrangement, a customer could suffer not only the economic losses associated with not having its gas to run its operations, but also incur or otherwise plan an out-of-pocket financial loss on the amount of gas re-directed for use by others.

For all the reasons stated herein, the Commission should clarify that: (i) all curtailments will be limited in scope and duration and issued only under emergency circumstances where all other options have been exhausted and/or the physical and operational integrity of the gas system is threatened; and (ii) if, *arguendo*, the Commission

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<sup>24</sup> The LDCs proposal to calculate the compensation for confiscated gas upon the market value of a customer's alternative fuel is without merit and should be rejected. The mere presence of alternative fuel equipment should not affect the compensation provided to firm customers whose gas is confiscated. The vast majority of the members of Multiple Intervenors do not maintain dual-fuel capacity, due in large part to economic and environmental considerations. This is precisely why many members pay for firm service on the LDC system – they need to ensure firm delivery. Customers with alternative fuel capability often elect firm gas service because gas is the preferred fuel for economic or environmental reasons. Moreover, the alternative fuel system may be limited operationally or environmentally, requiring the customer to opt for firm service. In any event, firm customers that pay for the reliability of such service should not be compensated for confiscated gas based on an interruptible delivery methodology that has no relation to the economic harm caused by such a taking.

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grants LDCs the authority to confiscate third-party gas supply during periods of curtailment, compensation for confiscated gas should be based upon the higher of the customer's actual contract price or 125% of the highest per Mcf market price during the month that the gas is confiscated.

Please call me if you have any questions.

Very truly yours,

COUCH WHITE, LLP

*James S. King*

James S. King

JSK/sem

cc: **Active Party List (via e-mail and/or U.S. Mail)**

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