PUBLIC SERVICE COMMISSION
EXEC. SEC. ALBANY NY

national fuel

2007 NOV 28 PM 2:36 Comments
07-G-0299
GIW
OGC

November 28, 2007

Hon. Jaclyn A. Brilling
Secretary
Public Service Commission
Three Empire State Plaza
Albany, NY 12222-1350

Re: Case 07-G-0299, Capacity Planning and Reliability
Compliance filing of National Fuel Gas Distribution Corporation
Response to Comments submitted by Hess Corporation and US Energy Savings

Dear Secretary Brilling:

On September 28, 2007, National Fuel Gas Distribution Corporation ("Distribution" or the "Company") filed amendments to its tariff, P.S.C. No. 8 – GAS, designed to comply with the Commission's *Order on Capacity Release Programs* issued in Case 97-G-0299 on August 30, 2007 ("Order"). The Order directed utilities, including Distribution, to implement a mandatory capacity release program for ESCOs serving retail customers. Distribution's filing implemented the Order as follows:

- The Company's former elective upstream capacity option, which enabled ESCOs to "bring their own capacity" to the Distribution retail market, was replaced with a new mandatory upstream capacity requirement.

- The filing initially provided that ESCO-supplied capacity would be grandfathered at the volumetric level as of September 1, 2007. In a subsequent filing, Distribution increased the grandfathering allowance to "the highest individual Supplier load requirement for September 2007, October 2007 or November 2007, instead of the initial proposed cutoff date of September 1, 2007."

- Local production supplies allowed as a replacement for pipeline capacity were authorized to continue and not count against the ESCO's allowance for grandfathered upstream capacity (including storage).

Distribution timely filed its compliance tariff thirty days prior to the effective date, Order at 15, and served it on ESCOs doing business in the Company's service territory. On October 30 and 31, US Energy Savings and Hess Corporation respectively filed comments in response to Distribution's compliance filing. US Energy Savings ("ES") argues that by grandfathering ESCO capacity at customer load levels as of

September 1, 2007, Distribution's filing failed to comply with the Order because it established a threshold level based on "current customer volumes rather than the current level of ESCO secured 'capacity'." ES comments at 3. Hess Corporation ("Hess"), for its part, contends that the Company's compliance filing is wrong because, as described by Hess, the Company's tariff establishes a procedure that "would reduce grandfathered capacity on an annual basis." Both ESCOs' comments are addressed below.

Response to ES

ES's comments focus on Distribution's September 28 filing, which proposed that ESCO capacity would be grandfathered at customer load as of September 1, 2007. Subsequent to the September 28 filing, Staff of the Department of Public Service requested that Distribution increase the amount of grandfathered capacity to the highest load requirement for September, October or November 2007. Distribution complied and filed further revisions on October 30, 2007. Although ES acknowledges the October 30 accommodation, which was proposed by Staff and crafted by Distribution for ESCOs' benefit, it is apparently not enough for ES. ES instead wants the grandfathering threshold set at "the level of capacity previously secured by the ESCO in compliance with all effective utility directives designed to meet its reliability obligations for the 2007-08 winter heating season." ES comments at 3.

At the outset, ES's proposal is time-barred because it should have been raised in a petition for rehearing of the Order. Stated otherwise, ES's complaint is more with the merits of the Order than with Distribution's compliance filing, which merely implements the Order. ES argues that Distribution's compliance filing is "in error" because the Company "mistakenly interpreted the Order to allow . . . grandfathering of load not capacity, even if an ESCO had demonstrated capacity to serve an anticipated increase in load over the entire winter." ES comments at 4. The Order says no such thing. While it may be correct that the Order focuses on "capacity" instead of "load," that is beside the point.

The Order focuses on "existing capacity" or "capacity at current levels," Order at 9 (emphasis added), and not, as ES seems to believe, capacity projections designed to meet future load. Relying on its July 1 capacity demonstration for the winter period, ES attempts to rewrite the Order by inflating the grandfathering allowance to accommodate its business plan. Even if ES's contention had some merit, it is not what the Order says. Thus Distribution's compliance filing is not "in error," as ES argues. Instead, Distribution's filing, initially and as modified at Staff's request, complies with the Order.[1] ES should have sought relief by filing for rehearing of the Order, and its

---

[1] Indeed, Distribution believes that Staff's suggested change to its initial compliance filing for a September 1 "current level" threshold is already more generous than the level directed in the Order.

"response" to Distribution's compliance filing is really nothing more than a thinly disguised attempt to seek rehearing by another means.

ES contends, essentially, that it was not notified of an approaching mandatory capacity requirement prior to its July 1, 2007 capacity demonstration to Distribution. The fact is, however, that ES received notice of upcoming, fundamental changes to Distribution's capacity rules well in advance of July 1, 2007, and appears to have ignored those notices, forging ahead with its capacity plan on the mistaken assumption that it would be business as usual on Distribution's system for winter, 2007-08. The first public notice that things were likely to change came on April 11, 2007, when the Commission published notice of Staff's White Paper on Capacity Planning and Reliability ("White Paper"). See, Order at 1. Even if, as we assume, ES had not been paying attention to the business of the Reliability Collaborative, Distribution, itself, issued notice of its own proposed mandatory capacity program, which mirrored Staff's recommendation in the White Paper, beginning with a web posting and e-mail notification to ES and other ESCOs on May 31, 2007. In that notice, the Company said that marketer-supplied capacity would no longer be accepted beyond a stated threshold, and that "this notification is provided as a courtesy and reminder to enable marketers to plan accordingly." Public notice of the capacity filing was published in newspapers throughout Distribution's service territory on June 18 and 26, 2007.[2] In addition, the Commission published notice of the same filing in the New York State Register on June 6, 2007. Finally, in Distribution's rate case filed in January 2007, the Company proposed a mandatory capacity program that was submitted for an effective date, following the usual suspension period, of late December 2007.

All of this public and targeted notice preceded the July 1 reporting date cited by ES. It appears, however, that ES decided to proceed with its business plan regardless.

Now ES asks the Commission to expand the grandfathering exception after the fact because ES ignored the multitude of notices sent by the Commission and Distribution, directly to ES and other ESCOs, and decided to proceed with its business plan as if nothing would change. No other marketer has initiated a similar request for such preferential treatment, and no other marketer has indicated that it was caught unawares.[3] On this basis alone, ES's request should be rejected as that of an ESCO that made an informed business decision to proceed with its capacity election even though it knew, or should have known, that a cap was about to be imposed on voluntary capacity. Notice requirements, faithfully observed by Distribution and the Commission, either mean something or they do not.

---

[2] Publication was repeated on July 5 and July 10, 2007.

[3] Distribution received a letter from Empire State Natural Gas expressing support for ES's and Hess's filings.

ES's proposal should also be rejected on the merits. To begin with, the Order adopts a mandatory capacity model as a general rule for New York's gas utilities. Grandfathering of ESCO voluntary capacity is an exception to that general rule. The mandatory capacity rule is an expression of what is arguably the Commission's highest mission: "to ensure the continued reliability of the natural gas system in New York State." Order at 1. Like any exception, it is to be construed narrowly. Shaw v. New York State Dep't of Education, 24 A.D. 3d 1086 (3d. Dep't 2005). ES is concerned that unless it gets what it wants, it "would then suffer severe economic harm as it would be unable to use the capacity it secured for the entire period."[4] ES Comments at 6. Assuming, arguendo, that ES's concern were credible, the Commission's interest in protecting the reliability of the natural gas system would nonetheless prevail, and ES has not shown otherwise.

As it happens, however, ES's concern about being "unable to use the capacity it secured" appears to lack credibility. ES has several options for contracted capacity in excess of its currently grandfathered allowance. First, it can utilize the capacity to serve other Distribution transportation customers not subject to the new mandatory capacity release rules (generally those industrial and large commercial customers with annual consumption in excess of 5,000 mcf). Similar customers exist on neighboring utilities and as a general matter, capacity deliverable to Distribution's system can reach neighboring markets. ES can also utilize capacity release (temporary or permanent) to effectively sell the capacity to another ESCO serving these same markets. ES can also bundle the capacity with gas supply and sell gas to other ESCOs at various delivery points. In other words, ES has plenty of options to utilize its capacity or mitigate its capacity costs through other means.

Finally, if ES's request for preferential treatment is granted, other ESCOs and Distribution's sales customers will be harmed. If ES is allowed to reserve capacity dedicated to the market for use at ES's discretion when ES chooses to serve the market ("excess grandfathered capacity"), others who actually serve the market end up subsidizing ES. Under the ES proposal, when a customer switches to ES, its upstream capacity requirements would be met through the ES excess grandfathered capacity. Distribution, however, cannot shed its corresponding upstream capacity because the same customers might leave ES and return to sales service or migrate to an ESCO utilizing Distribution's released mandatory upstream capacity. The ESCOs taking Distribution's released capacity and sales service customers would bear the cost of holding capacity to back up the ES's excess grandfathered capacity.

---

[4] ES attempts to create a case that its voluntary capacity election on July 1, 2007 needs to be preserved "to improve the efficiency and reliability of the Company's system." ES's position does not enhance reliability. If adopted, it would enhance ES's margin *at the expense* of system reliability.

<u>Response to Hess</u>

Hess overstates the effect of Distribution's compliance filing by describing it as being designed to "reduce grandfathered capacity over time." Hess refers to a section of Distribution's compliance filing that provides for a reduction in the ESCO's grandfathered capacity allowance if the ESCO's peak requirement quantity during the past thirteen months is less than the then-existing grandfathered level. As explained by Distribution in the transmittal letter accompanying its compliance filing,

> A marketer's GUTC[5] level will not increase, but it can decrease if a marketer so elects by means of (a) marketer acquiescent (sic) to customer attrition; or (b) an explicit marketer election. Order at 5, 8-9. With respect to customer (or load) attrition, the instant tariff revisions provide that the marketer's GUTC would be reviewed annually on April 1 and reduced if the marketer's load requirements (as defined in the tariff) are lower than the marketer's existing GUTC."

The Company's filing complies with the Order's requirement that grandfathered capacity continue "indefinitely" unless the marketer "elects to reduce that amount of capacity." Order at 8. If, for example, a marketer's load decreases because of customer or load attrition, the ESCO "elects" to "reduce [its] amount of capacity," by choosing not to replace the load loss by adding new customers. This is in perfect harmony with the Order.

Hess appears to confuse the Commission's use of the word "indefinite" with "in perpetuity," two totally different concepts. Because the Order provides expressly that the grandfathered capacity level can decline, it is by definition, "indefinite," i.e. uncertain or undecided. By no means does the Order create a right in perpetuity, as Hess suggests. Nor can the Commission even create such a right.

As Hess itself recognizes, Distribution's proposed tariff language addresses the "ebbs and flows that the marketers experience in customer load," and reasonably provides for a review of peak day requirements over a thirteen-month period. This both conforms to the Order and is commercially reasonable.

In the Order, the Commission sought to strike a balance between promoting reliability over the long run and protecting ESCOs from unfair economic harm. An ESCO "elects" to reduce its grandfathered allowance if it requests a reduction or acquiesces to a reduction in load either through a drop in enrollment or lower usage per account. It is notable that usage per account continues to fall due to conservation efforts,

[5] "GUTC" is the tariff acronym for Grandfathered Upstream Transmission Capacity allowance.

and may even accelerate if, as planned, the state adopts an energy efficiency portfolio standard designed specifically to reduce energy use.[6] At a minimum, as customer usage falls, and assuming everything else remains the same, ESCO grandfathered levels should also fall proportionately, unless the ESCO, e.g., enrolls additional customers to absorb the unused capacity or otherwise takes deliberate actions to retain its grandfathered allowance as used and useful capacity dedicated to the utility's service territory.

Conclusion

For all of the foregoing reasons, Distribution requests that the Commission reject the requests of ES and Hess for preferential treatment notwithstanding the Order. Distribution's compliance filing should therefore be approved as filed.

Respectfully submitted,

Michael W. Reville (AM)

Michael W. Reville

[6] Case 07-M-0548 - Proceeding on Motion of the Commission Regarding An Energy Efficiency Portfolio, Order Instituting Proeeeding (issued May 16, 2007).