

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 01-G-1054 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures--Appeal by Consolidated Edison Company of New York, Inc., of the Informal Decision Rendered in Favor of St. Raphael's Roman Catholic Church, filed in C 26358 (169382).

COMMISSION DETERMINATION
(Issued and Effective February 10, 2006)

This is an appeal by Consolidated Edison Company of New York, Inc. (Con Edison or the utility) to the Commission from an informal review decision dated June 29, 2001, in favor of St. Raphael's Roman Catholic Church (complainant or St. Raphael).¹ The utility disputes the informal review officer's decision that complainant, as a religious institution, was not precluded by a provision of the utility's tariff from receiving gas service under Con Edison's Service Classification (SC) No. 2, a nonresidential rate, because it was receiving electric service from the utility at a residential rate, and directed the utility to rebill complainant's gas account under SC No. 2 for six years, with interest on the overpayment. For the reasons stated below, we reverse the informal review decision.

BACKGROUND

Complainant has long received Con Edison electric and gas service at the utility's residential rates (SC No. 1 for electricity, and SC No. 3 for gas). Until 1976, the utility's SC No. 2, General, was available for "[a]ny use of gas by any Customer." Beginning in 1976, the tariff was amended to make

¹ Complainant has been represented throughout this complaint proceeding by Urac Corporation, a consultant.

SC No. 2 applicable for "[a]ny use of gas by any Customer except where the Customer is eligible for service under Service Classification Nos. 1 or 3."² SC Nos. 1 and 3 are gas rates for residential customers, for which religious organizations and certain other customers may also qualify pursuant to Public Service Law §76.³

This tariff change resulted from the adoption of a gas rate design proposal in January 1976 for the immediate purpose of providing temporary rate relief pending resolution of the company's request for permanent increased rates.⁴ The Commission chose to provide part of the interim relief by means of increasing the minimum charge and the remainder by increasing all block rates, after the minimum, for all firm classifications, with the temporary increase in the blocks being allocated among the firm classes in proportion to the proposed distribution in the permanent case."⁵ However, this proposal would give SC No. 2 customers "a lesser increase than the other firm classifications," with the result that "there could be a lower charge per Ccf in S.C. No. 2 than S.C. Nos. 1 and 3,"

² See P.S.C. No. 8 - Gas, 9th Revised Leaf No. 30 (effective 1/16/76) and P.S.C. No. 9 - Gas, Leaf No. 230, Revision 0 (effective

³ Since 1999 the prohibition on receiving service at SC No. 2 has also applied to customers eligible for SC No. 14, the utility's Natural Gas Vehicle Service. See, e.g., P.S.C. No. 9 - Gas, Leaf No. 230, Revision 0 (effective 3/1/99). As this version of the tariff provision also shows, language was added at some point to provide that the applicability of SC No. 2 was "subject to the requirements of this Service Classification, the Company's Sales and Transportation Operating Procedures, and the other applicable provisions of this Rate Schedule."

⁴ Case 26868, Con Edison Gas Rates, Order Granting Interim Rate Relief (issued January 2, 1976), 16 NY PSC 1.

⁵ Id., 16 NY PSC 5.

and (since any gas customer was free to take SC No. 2), SC Nos. 1 and 3 customers could have opted to be charged under SC No. 2 instead.⁶ The migration of customers that might result "would cause the company to receive lower revenues than would be anticipated and the temporary rates would not produce the temporary revenues needed."⁷ To prevent this result, the Commission directed the utility to "file an amendment to its tariff modifying the applicability clause in S.C. No. 2 to preclude such cross-overs and restricting S.C. No. 2 to usage other than permitted under S.C. Nos. 1 and 3."⁸ Subsequently the Commission directed Con Edison to adopt a similar rate design for permanent rates,⁹ and the amendment barring customers eligible for SC Nos. 1 and 3 from taking gas under SC No. 2 remained in effect unchanged for almost a quarter century (see page 5, infra).

By letter dated June 2, 2000, complainant requested that Con Edison transfer its gas service to SC No. 2, and rebill the gas account at that rate for the preceding six years, with interest applied to the overpaid amount. The utility responded, by letter dated July 17, 2000, that "the electric and gas service must be billed either on a residential rate or a non-residential rate" and electric service could not be billed on a residential rate while gas was billed on a nonresidential rate. The utility also provided a comparison of the cost of the complainant's gas and electric service at the residential and nonresidential rates, showing that it was

⁶ Id., 16 NY PSC 6.

⁷ Id.

⁸ Id.

⁹ Case 26868, Con Edison - Gas Rates, Opinion No. 76-10 (issued May 20, 1976), 16 NY PSC 473, 484-491.

less expensive to have both services billed at residential rates than it would be to have both billed at nonresidential rates.¹⁰

On August 4, 2000, St. Raphael made a complaint to the Department of Public Service's Office of Consumer Services (OCS) contesting the utility's assertion that because complainant received residential electric service, it also must receive residential gas service. By letter dated March 13, 2001, OCS issued an initial decision upholding the utility's position; the grounds were that the applicability provision of the utility's SC No. 2 gas service classification precluded a customer from taking service at that rate who was eligible for SC No. 3 gas service, and that it was undisputed that complainant was so eligible.

By letter dated March 16, 2001, complainant requested an informal review. After the parties submitted their written positions, an informal review decision was issued on June 29, 2001. According to the informal review decision, no provision in Con Edison's electric or gas tariff stated that a religious customer had to either take both gas and electric service under residential rates or take both gas and electric service under nonresidential rates. The informal review officer noted that Con Edison's gas tariff barred customers who are "eligible" to take service under a residential rate from taking service under a nonresidential rate. However, she found that the "use of the word 'eligible' in the tariff makes it unclear how the utility makes the determination that an account is 'eligible' for a rate

¹⁰ The utility compared the cost of gas and electric charges for the period of December 17, 1999 to June 16, 2000, at residential rates (SC No. 1 for electric; SC No. 3 for gas), totalling \$20,704.11, to the cost of service if billed at nonresidential rates for both electric (SC No. 9) and gas (SC No. 2), which totalled \$24,453.15, a difference of \$3,749.04.

under the eligibility provision as it is written."¹¹ She also found that by permitting the customer to be billed on the more advantageous nonresidential rate for gas service only if the customer agreed to be billed for electric service on the less advantageous nonresidential rate, the utility was "taking away the customer's right under PSL 76 to be billed for electricity at a rate 'not higher than domestic'."¹² Therefore, the utility was directed to rebill complainant's gas service for a six-year period, with interest, on the SC No. 2 rate.

Effective October 1, 2004, the tariff provision at issue in this case was amended to except religious organizations and other customers protected by PSL §76 from the prohibition on receipt of SC No. 2 gas service by customers eligible for service at SC Nos. 1 and 3 (or at SC No. 14).¹³

POINTS ON APPEAL

On appeal, the utility asserts that the informal review decision is erroneous as a matter of law because the tariff did indeed require the utility to bill complainant for gas under SC No. 3 if complainant continued to receive electricity at a residential rate, and makes the following arguments:

¹¹ Informal review decision, p. 3.

¹² Id.

¹³ Since then the tariff has provided that SC No. 2 applies to "Any use of gas by any Customer except where the Customer is eligible for service under Service Classifications Nos. 1, 3, or 14 . . . provided however, that religious organizations, community residences that are supportive living facilities or supervised living facilities, and veterans' post or halls eligible for service under SC 1 or 3 may elect to take service under this Service Classification." [Emphasis added.] P.S.C. No. 9, Leaf No. 230, Revision 7 (effective 10/1/2004).

(1) While a religious organization is entitled to be billed at rates no greater than those charged domestic customers, such a customer must identify itself to the utility as a qualifying religious customer to receive residential rates. The fact that certain religious customers choose not to so identify themselves or choose to revoke their status as religious customers (and may then receive gas and electric service at nonresidential rates) does not mean that the utility's gas tariff provision (in effect until October 1, 2004) must not be implemented in a case where a customer has identified itself as religious by receiving and continuing to receive residential electric service.¹⁴

(2) The Commission's determination (issued July 27, 2000) in Case 97-G-0430, Appeal by St. Joseph's R.C. School of the Informal Decision in Favor of Long Island Lighting Company, (referred to as Saint Joseph), does not compel, and is not consistent with, the result reached in the informal review decision in the instant case. The Commission found no gas (or electric) tariff language supporting the position of the Long Island Lighting Company in Saint Joseph. However, in the current case, Con Edison's gas tariff did contain have specific language supporting Con Edison's position that a customer who qualified for residential service was, therefore, eligible for gas service at the SC No. 1 or 3 residential rate and could not, consistent with the gas tariff, receive gas under SC No. 2.

(3) Contrary to complainant's assertions, the utility did not discriminate by granting SC No. 2 gas service to other religious institutions who chose to take nonresidential electric service. Such customers may revoke their qualification for

¹⁴ The utility points out that it provides gas and electric service to a single customer on one account and that the information provided about the customer applies to both types of service.

service on residential rates as "religious" customers and receive both gas and electric service at nonresidential rates (and complainant could have so elected), but the tariff in effect until October 1, 2004, effectively required them to take both gas and electric service at either residential or nonresidential rates.

DETERMINATION

The question raised in this case is whether Con Edison's gas tariff provision in effect until October 1, 2004, precluded a religious institution from obtaining gas service at a nonresidential rate, if that institution was receiving and wished to continue receiving electric service at a residential rate.

The provision reads as a blanket requirement that customers receiving gas service at the SC No. 1 or 3 residential rates should be barred from transferring to SC No. 2. The purpose of the provision was to prevent customers eligible for residential gas service under SC No. 1 or 3 from migrating to SC No. 2, and no exception was made for religious institutions or other customers qualifying for residential rates because of PSL §76. The provision remained unchanged in this respect until October 1, 2004, when language was added to except religious institutions and other customers qualifying for residential rates under PSL §76 from the limitation. From 1976 to October 1, 2004, a religious institution eligible for residential rates was, therefore, precluded from taking gas service under SC No. 2.

Contrary to the informal review officer's decision, this conclusion is consistent with our determination in St. Joseph. In that case, a different utility claimed that language in its electric tariff prevented a religious institution from receiving a nonresidential (interruptible) gas rate, if the customer was also receiving electric service

at a residential rate. In St. Joseph, we found that it was the gas tariff, not the electric tariff, that was relevant to determining limitations on gas service classifications, but that the gas tariff involved did not contain any relevant limitation.¹⁵ In the present case, Con Edison's gas tariff did, until October 1, 2004, include an explicit statement that, without an exception for customers eligible for residential rates pursuant to PSL 76, generally barred all customers eligible to take gas under the residential firm rates, SC No. 1 or 3, from taking gas under SC No. 2.

The informal review decision also relied on complainant's argument that the utility was improperly using its tariff for one service to determine a customer's rights under a separate tariff. The informal review decision (page 3) states, "the Commission has ruled that each service, gas, electric and steam is provided under different tariffs and as such the utility cannot relate one to the other for rate purposes." In fact, the 1992 Commission determination referred to states:

The utility's tariffs for gas, electricity and steam are separate and distinct, and there is no foundation from which to generalize that a Commission decision interpreting the electric tariff similarly extends to any gas tariff."¹⁶

Obviously, neither Con Edison's position nor our conclusion here relies on language in the utility's electric tariff or on the improper extension of a Commission determination interpreting

¹⁵ St. Joseph, p. 9. We also found that the applicable electric tariff did not "state [on its face] or implicitly require that religious institutions may not receive nonresidential electric rates."

¹⁶ Case 90-G-0639, Appeal by 170 West Village Association of the Informal Decision Rendered in Favor of the Consolidated Edison Company of New York, Inc., Commission Determination (issued April 27, 1992).

the utility's electric tariff to apply to its gas tariff. Thus the informal review decision's reliance on the Commission's 1992 determination in Case 90-G-0639 was incorrect.

The remaining issue is whether the utility's implementation of the disputed tariff provision alters our conclusion. The utility states that a religious institution receiving gas and electric service at residential rates could opt to revoke its qualification as a religious customer for such rates, and receive nonresidential gas and electric service; however, the utility contends that such a customer could not revoke its eligibility for residential rates with respect only to gas, but not electric, service. The utility points out that complainant (like other such customers) received both gas and electric service to a single account, and asserts that, as a single customer receiving both types of service (implicitly) to the same premises, complainant had to have the same residential or nonresidential identity for both services.

We conclude that the utility's position was a reasonable reconciliation of, on the one hand, the requirements of PSL §76 and, on the other hand, the tariff's blanket requirement that all customers eligible for SC Nos. 1 or 3 gas service be precluded from taking SC No. 2 gas service. Customers are not "automatically" eligible for residential service pursuant to PSL §76; they must identify themselves as meeting the relevant requirements (whether as a religious institution, community residence, etc.) and not every customer who makes such a request qualifies.¹⁷ Because customers who have

¹⁷ A series of disputes about eligibility for residential rates pursuant to PSL §76 have required resolution by the Commission or the courts. See, e.g., Matter of Rochester Christian Church, Inc. v. Public Service Commission, 55 N.Y.2d 196 (1982); Case 96-E-0300, Appeal by Niagara Mohawk Power Corporation of the Informal Decision Rendered in Favor of the Immaculate Heart of Mary Convent and College, Commission Determination (issued

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established eligibility for residential rates under PSL §76 remain nonresidential customers for whom residential rates are optional, it was reasonable for the utility to conclude that a religious customer could opt to be treated as a nonresidential customer. However, Con Edison's gas tariff (in contrast to the Long Island Lighting Company tariff involved in St. Joseph) did, until October 1, 2004, bar access to the SC No. 2 gas rate if a customer was eligible for SC Nos. 1 or 3. In view of this tariff limitation, it was reasonable for the utility to conclude that insistence by a customer entitled to residential rates pursuant to PSL §76 on maintaining residential electric service demonstrated the customer's eligibility for residential (SC Nos. 1 and 3) gas service and ineligibility for gas service to the same premises under SC No. 2. The informal review officer's reading would have entirely negated the gas tariff's blanket exclusion from SC No. 2 of all customers eligible for service at SC Nos. 1 and 3. We conclude that such a reading would contravene the filed, effective tariff until October 1, 2004.

To assure that all aspects of this case have been properly addressed, the entire complaint file has been thoroughly reviewed by a staff member. We determine that that the utility's gas tariff, until October 1, 2004, prohibited complainant from receiving gas service under SC No. 2 while

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December 2, 1998); Case 95-E-1090, Appeal by Niagara Mohawk Power Corporation of the Informal Decision Rendered in Favor of the Jewish Community Center-Buffalo and Getzville, Commission Determination (issued December 2, 1998); Case 99-E-0547, Appeal by St. Elizabeth Motherhouse of the Informal Decision Rendered in Favor of Niagara Mohawk Power Corporation, Commission Determination (issued April 5, 2002); Case 99-E-0503, Appeal by Niagara Mohawk Power Corporation of the Informal Decision Rendered in Favor of City Mission Society, Commission Determination (issued January 3, 2000).

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simultaneously receiving electric service for the same premises under a residential service classification. For the reasons stated above, we reverse the informal review officer's decision and grant the utility's appeal.