07-G-0141 brief
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EXECUTIVE DEPARTMENT
STATE CONSUMER PROTECTION BOARD

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Mindy A. Bockstein
Chairperson and Executive Director

VIA HAND DELIVERY

August 27, 2007

Hon. Jaclyn Brilling
Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, NY 12223

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

Dear Secretary Brilling:

In accordance with 16 NYCRR § 4.8(a), enclosed please find twenty-five copies of the *Reply Brief of the New York State Consumer Protection Board*. The original has been delivered to the presiding officers. All parties currently listed on the Active Parties List in this case have been served via electronic mail, and hard copies have been sent by first-class mail to those parties who did not consent to electronic service.

Respectfully submitted,

David L. Prestemon
Intervenor Attorney

cc: All Parties

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

REPLY BRIEF

OF THE

NEW YORK STATE CONSUMER PROTECTION BOARD

Mindy A. Bockstein
Chairperson and Executive Director

Douglas W. Elfner
Director of Utility Intervention

David Prestemon
Intervenor Attorney

Dated: August 27, 2007
Albany, New York

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STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

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REPLY BRIEF OF THE

NEW YORK STATE CONSUMER PROTECTION BOARD

This Reply Brief submitted by the New York State consumer Protection Board ("CPB") addresses four subject matters: (a) various issues raised by Multiple Intervenors ("MI") concerning the Conservation Incentive Program ("CIP") proposed by National Fuel Gas Distribution Corporation ("NFGD"); (b) the position of the Department of Service Staff ("DPS Staff")" concerning the sharing of revenues from capacity release and off-system sales transactions; (c) the support of MI and DPS Staff for retention of the tariff provision known as the "No Harm, No Foul Rule;" and (d) the proposal from DPS Staff for an increase in the minimum charge applicable to residential customers. The fact that we do not respond to all of the positions presented in parties' initial briefs with which we have previously disagreed should not be construed as a change of view on our part, but rather an indication of our assessment that those arguments were adequately addressed in our initial brief.[1]

1 "Initial Brief of the New York State Consumer Protection Board," filed August 15, 2007 ("CPB I.B.").

Conservation Incentive Program

MI argues that adoption of a utility-specific CIP for NFGD is premature and should await the generic determinations expected from the Public Service Commission ("PSC" or "Commission") in late 2007 or early 2008 as a result of the Energy Efficiency Portfolio Standard Proceeding.[2] The Commission does not share this view.

In the EPS Order, the Commission pointed out that it "has approved or is considering funding natural gas efficiency initiatives in several proceedings," and has adopted a one-year program for Consolidated Edison "to ensure that natural gas efficiency measures are in place for the coming heating season."[3] It went on to note that "[o]ther pending rate cases also include consideration of more aggressive utility-administered natural gas efficiency programs."[4] If the PSC had any desire to hold those efforts in abeyance, it would have said so and given some guidance to the parties in those cases, including this one which was then pending.

Furthermore, both DPS Staff and the CPB have recommended that details of the CIP be refined in a collaborative proceeding to be scheduled for the spring of 2008. If MI's prediction for the timing of an order in the EPS Proceeding is correct, that collaborative will offer an excellent opportunity for incorporation of the Commission's generic findings into the NFGD CIP.

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2 "Initial Brief of Multiple Intervenors," August 15, 2007, pp. 29-30 ("MI I.B."). The proceeding is Case 07-M-0548, Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, and was initiated by "Order Instituting Proceeding" issued May 16, 2007 ("EPS Order").

3 EPS Order, pp. 13-14.

4 EPS Order, p. 14.

Additionally, MI contends that there has been no demonstration that the CIP, as proposed, would be cost effective.[5] It cites testimony by DPS Staff's Gas Efficiency Program Panel to the effect that rate payer money should not be expended without "some demonstration of the actual level of usage reduction produced by the program efforts."[6] In that passage, however, the Panel was addressing the quality of measures proposed for evaluating program effectiveness after the fact, not the prediction of results in advance. The CPB agrees entirely that adequate evaluation procedures are essential,[7] but that need arises, in part, from the fact that success is not entirely predictable, particularly where, as here, we are trying to change long-ingrained behavior patterns concerning the use of energy.

Finally, MI complains that the program is simply too large when compared to the interim plans approved for Consolidated Edison and KeySpan.[8] The CPB does not agree that the appropriate size for NFGD's program can be determined through comparison with other utilities. The Commission itself stated in its EPS Order that it is necessary to recognize the "unique characteristics and imperatives of each participant's infrastructure, customer base, and service territory."[9] The Company's proposal should be considered on its individual

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5 MI I.B., p. 29.

6 MI I.B., p. 29, n. 36, citing Tr. 873.

7 See Dr. Elfner's testimony at Tr. 604

8 MI I.B., p. 29

9 EPS Order, p. 12.

merits, with any final determination as to size in this proceeding subject to re-examination by the parties in the proposed collaborative.

Revenue Sharing – Off-System Sales and Capacity Release

All of the proposals made by DPS Staff, the CPB and NFGD for the sharing of revenues from off-system sales and capacity release between ratepayers and the Company have two basic components. The first deals with the formula for splitting the revenue. The second concerns the mechanism through which ratepayers will receive credit for their share.

For the sharing formula, the CPB recommended that the first $2 million in net revenues earned by NFGD be credited to ratepayers, and that any additional revenues be split on an 80% ratepayer, 20% Company basis. NFGD urges that the CPB proposal be approved.[10] Staff opposes, saying that it favors an 85%/15% sharing ratio from "dollar one," that is, with no initial earnings band in which ratepayers receive all the revenue.

Staff's proposal would have produced a worse outcome for ratepayers than the CPB's in every year since 2001. It will generate a better result in the future only if NFGD brings in more that $8 million in net revenues from off-system sales and capacity release.[11] Over the period from 2001 through 2006, however, the Company averaged $5.3 million, and its best year was $7.4 million.[12]

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10 "Initial Brief on Behalf of National Fuel Gas Distribution Corporation," August 15, 2007, p. 157, ("NFGD I.B.").

11 Staff formula: 85% of $8 million = $6.8 million.
CPB formula: $2 million + 80% of $6 million = $6.8 million

12 CPB I.B., p. 11.

Consequently, ratepayers are substantially better off under the CPB's proposal unless the Company significantly improves its performance. Receiving 80% of a significant improvement is much better than getting 85% of nothing.

Why does DPS Staff favor a position that appears to take money out of ratepayers' pockets? The only reason they give for rejecting the formula agreed upon by the CPB and the Company is that 85%/15% sharing is in accord with Commission policy. (St B p. 84)[13] As Dr. Elfner pointed out, however, the Commission has no such policy. It never suggested that the sharing formula it devised 13 years ago was somehow definitive. On the contrary, the Commission called it a "placeholder" and said that the subject should be re-examined in future rate cases.[14] Conducting that re-examination in this case clearly demonstrates that the CPB's proposal is a better deal for all concerned.

For the second element of revenue sharing proposals, the mechanism for giving ratepayers the benefit of their share of revenues, the CPB recommended that the first $2 million earned be credited to the Cost Mitigation Reserve ("CMR"), which would be used to offset utility expenses that would otherwise be borne by ratepayers. The 80% customer share of revenues in excess of that $2 million would then be flowed back through the GAC to reduce gas costs.

DPS Staff correctly noted that the pipeline capacity and storage used to generate off-system sales and capacity release revenues are paid for primarily by firm sales customers, while the potential uses of funds in the CMR are not

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13 "Initial Brief of the Department of Public Service Staff," August 15, 2007, p. 84, ("Staff I.B.").

14 CPB I.B., p. 12.

clearly defined. This could result in a form of cross-subsidy if a substantial portion of the earnings from gas supply assets were used for the benefit of non-sales customers.

What matters to the CPB is that the first $2 million of off-system sales and capacity release revenues be credited to ratepayers. We have no objection to a modification of our original proposal that would preserve that objective while assuring that the primary beneficiaries are firm-sales customers. This could be accomplished by returning the $2 million through the GAC, or by specifically defining the uses for funds in the CMR.[15]

No Harm, No Foul Rule[16]

At its core, the tariff provision known as the "No Harm, No Foul" rule ("Rule"), is a measure for the promotion of retail access that is subsidized by customers. Pursuant to the policy direction recently given by the Commission in Case 07-M-0458, it is time to "determine the need to continue [such] programs," because they "may have outlived their usefulness," and continued "[s]ubsidizing of competitors could impede [the] proper functioning of a competitive market."[17]

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15 As we noted in our Initial Brief (CPB I.B. p. 26), use of CMR funds to offset the surcharge that both the CPB and DPS Staff recommended for recovery of CIP costs may be a reasonable option. That decision should, however, be made in the context of the collaborative that the CPB and DPS Staff recommended be undertaken to finalize the size and scope of the CIP.

16 DPS Staff opposes rescission of this rule primarily on the grounds that it serves as an alternative to imbalance trading for daily balancing. We refuted that contention in our initial brief (CPB I.B. pp. 15-16) and will not repeat our arguments here.

17 Proceeding on Motion of the commission to Review Policies and Practices Intended to Foster the Development of Competitive Retail Energy Markets, "Order on Review of Retail Access Policies and Notice Soliciting Comments," issued April 24, 2007, p. 6.

The primary effect of the Rule is to permit unregulated suppliers that lack the competence or the willingness to commit the resources necessary to keep their loads in balance an opportunity to compete on even terms with suppliers who have both. That opportunity is provided by capacity that is paid for entirely by customers. Because of the Rule, there is no incentive for suppliers to compete to achieve greater efficiency in load management and, therefore, no pressure to narrow the imbalance tolerance band and reduce its cost to customers.

A simple example may make the impact of the Rule clearer. Assume that the total SC 13D load is 10,000 Mcf, or 10 MMcf, and one or two suppliers control 60%. Under the Rule, the entire class will be in balance if deliveries are anywhere between 9 and 11 MMcf, and no supplier, no matter how out of balance they may be, will be cashed out.

Under this scenario, if the dominant suppliers are exactly in balance, delivering 6 MMcf, the entire tolerance band inures to the benefit of the smaller suppliers. They can deliver as little as 3 MMcf or as much as 5 MMcf, a plus or minus 25% tolerance band around their 4 MMcf load! Even if the large marketers are out of balance by the maximum permitted 10%, the remaining suppliers retain the expanded tolerance band, but shifted in the direction opposite that of the larger suppliers' imbalance.[18]

Given this latitude, why would a smaller supplier hire an expert load manager when a reasonable "guesstimate" is likely to be good enough? Why

[18] For example, if the large marketers are 10% long, delivering 6.6 MMcf. The remaining suppliers will not be cashed out if they deliver between 2.4 and 4.4 MMcf, a tolerance band of plus 10% or minus 40%

would that supplier deliver a few extra Mcf in a high-priced market to improve its balancing position if it is unlikely to fall outside its very broad tolerance band? It is completely unreasonable to suggest that profit-motivated businesses do not recognize and take advantage of the leeway the Rule affords them.

MI complains that eliminating the Rule could create a situation in which some unfortunate supplier will be cashed out even though NFGD's system as a whole is in balance and the Company incurs no penalties.[19] This is a little like a landlord trying to avoid a citation for failing to maintain smoke alarms by arguing that there was no fire. The purpose of these rules is to enforce behavior, not compensate victims. All ratepayers benefit when suppliers behave well.

Minimum Charge for Residential Customers

DPS Staff recommends that the minimum charge for residential customers be raised by \$1.40 if the Commission orders a reduction in NFGD's rates, and by \$3.30 if it authorizes an increase. Implicit in this recommendation is the determination that a movement of approximately one-quarter of the distance between the current charge of \$13.54 and Staff's estimate of \$19.12 for customer-related costs is the minimum required to satisfy the Commission's policy of gradually eliminating intra-class cross-subsidies.[20] Given the relatively small disparity between the charge and the cost in this case, the CPB considers that position reasonable.

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19 MI I.B., p. 71-72

20 Staff I.B., p. 54.

The other half of the DPS Staff's recommendation, however, causes an anomalous result if the rate increase approved by the Commission is small. For residential customers, the difference between a $1 rate decrease and a $1 rate increase is a 235% increase in the minimum charge. That is simply too much for low-usage customers for whom the minimum charge is a dominant component of their bills.

The CPB has recommended a minimum charge increase of $1.86, one-third of the difference between the current charge and customer-related costs as calculated by Staff. This proposal exceeds Staff's assessment of the minimum increase required, but limits the maximum bill impact for low-usage customers. It is a reasonable compromise which should be adopted by the Commission.

Conclusion

The CPB recommends that the Commission adopt the positions that we have advocated and explained above.

Respectfully submitted,

Mindy A. Bockstein

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