

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission  
Regarding Provider of Last Resort  
Responsibilities, the Role of Utilities in  
Competitive Energy Markets, and Fostering the  
Development of Retail Competitive  
Opportunities.

Case 00-M-0504

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NEW YORK STATE CONSUMER PROTECTION BOARD  
BRIEF ON EXCEPTIONS REGARDING  
THE FUTURE OF RETAIL ENERGY MARKETS IN NEW YORK STATE

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Dated: August 10, 2001  
Albany, New York

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INTRODUCTION

The New York State Consumer Protection Board (“CPB”) respectfully submits this Brief on Exceptions regarding the Recommended Decision (“RD”) issued July 13, 2001 in the above captioned proceeding. The CPB commends the Hearing Officers for a thorough and well-reasoned RD that adopts the CPB’s fundamental position that all Energy Service Companies (“ESCOs”) should be required to provide all of the general consumer protections required of utilities under the Public Service Law (“PSL”) and be required to serve customers in a non-discriminatory manner. In our view, these changes are necessary to increase consumer confidence in retail energy markets, achieve movement toward retail competition, and secure the competitive benefits for consumers envisioned by the Public Service Commission (“PSC” or “the Commission”) when it initiated this proceeding. We urge the PSC to adopt the RD on these points. Therefore, the CPB does not except to the RD. Instead, we file this brief

solely to respond to the Hearing Officers' request for additional arguments concerning legal issues.

As we noted previously, the Hearing Officers concluded that all ESCOs should provide all general consumer protections currently provided by utilities and be required to serve all customers that the ESCO chooses to serve without undue discrimination.<sup>1</sup> We agree with this position, for reasons to be discussed below.

The Hearing Officers also stated that

These recommendations necessarily assume that the Commission has the authority to impose these requirements on ESCOs and to enforce them. This legal issue was not addressed by most parties in the case, and we urge them to set forth their positions and arguments during the exceptions phase.<sup>2</sup>

In response to a previous request to address a similar legal issue – whether the Commission has the authority to order utilities to cease providing commodity to customers<sup>3</sup> -- the CPB submitted two lengthy legal briefs supporting that principle so long as the PSC ensures that ESCOs provide safe and reliable service at just and reasonable rates, including full Home Energy Fair Practices ("HEFPA") protections.<sup>4</sup> The issues addressed in those briefs are closely related to the issues in this proceeding.

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<sup>1</sup> RD, at 58.

<sup>2</sup> Id.

<sup>3</sup> Case 00-M-0504, Procedural Ruling, January 11, 2001.

<sup>4</sup> See, Case 00-M-0504, New York State Consumer Protection Board Reply Memorandum of Law Regarding Electric and Gas Utility Provider of Last Resort Commodity Responsibilities, February 16, 2001, at 5; New York State Consumer Protection Board Reply Brief Regarding Electric and Gas Utility Provider of Last Resort Commodity Responsibilities, April 4, 2001, at 2.

Accordingly, this presentation relies heavily on the information previously provided in those briefs.

### SUMMARY

The PSC's power to restructure the electric industry was validated in Energy Ass'n of New York State v. Public Serv. Comm'n of the State of N. Y., 169 Misc.2d. 924, 653 N.Y.S.2d. 502 (Albany County 1996), mot. for clar. den., Order issued April 18, 1997 in Index No. 5830-96, aff'd 273 A.D.2d. 708, 710 N.Y.S.2d. 662 (2000), lv. to app. den. 95 N.Y.2d. 765, 716 N.Y.S.2d. 640 (2000). Such authority exists under the Commission's enabling legislation for the electric industry, and, by implication, for the gas industry as well.

The entire approach of the PSL has generally been to grant broad powers to the PSC to provide for safe and adequate service at just and reasonable rates. PSL § 65(1). Specific PSC decisions are then tested against the statutory and constitutional parameters of Abrams v. Public Serv. Comm'n, 67 N.Y.2d. 205, 212, 501 N.Y.S.2d. 777, 492 N.E.2d. 1193 (1986) (rational basis test), and Federal Power Commission v. Hope Natural Gas, 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944) (end result test). See also Statutes, §§ 96, 97, 321, 341 (McKinney's, Book 1, 1971), and Matter of Bath and Hammondsport R.R. v. NYS Dep't of Env'tl. Consv., 73 N.Y.2d. 434, 450, 541 N.Y.S.2d. 732, 539 N.E.2d. 560 (1989).

The issue presented here is whether existing legislation furnishes adequate authority to empower the Commission to order ESCOs to provide all consumer protections currently offered by utilities. We believe it does.

## **I. THE STATUTORY FRAMEWORK**

### **A. Service Responsibilities.**

The service obligations imposed on monopoly corporations are described in the PSL and the Transportation Corporations Law ("TCL"). For residential customers, the PSL provides:

Every gas corporation, electric corporation or municipality shall provide residential service upon the oral or written request of an applicant....

PSL § 31(1).

For all other customers, the TCL states:

Except in the case of an application for residential utility service pursuant to article two of the public service law, upon written application of the owner or occupant of any building within 100 feet of any main of a gas corporation or gas and electric corporation, or a line of an electric corporation or gas and electric corporation, appropriate to the service requested, and payment by him of all money due from him to the corporation, it shall supply gas or electricity as may be required for lighting such building....

TCL § 12.

Until recently, electric and natural gas service has been available pursuant to exclusive franchises that require service to be provided, while protecting regulated utilities against competition.

### **B. Public Policy.**

For residential customers, the PSL provides:

It is hereby declared to be the policy of this state that the continued provision of gas, electric, and steam service to

residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is the public interest.

PSL § 30.

The PSL also provides that:

Every gas corporation, every electric corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.

PSL § 65(1).

#### C. PSC Jurisdictional Powers.

To ensure that the above-described service responsibilities and public policy objectives are accomplished by entities under its jurisdiction, the Commission is given "...powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter," (PSL § 4(1)); general jurisdiction over "...manufacture, conveying, transportation, sale or distribution of gas...and electricity for heat, light or power, to gas plants and to electric plants and to the persons or corporations owning, leasing, or operating the same," (PSL § 5(1)(b)); and jurisdiction to encourage

...all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.

PSL § 5(2)

Further, the Commission is given powers of "general supervision" over electric and gas corporations, as well as their facilities for rendering service (PSL § 66(1));

investigative powers, as well as the power to order improvements, including distribution and supply (PSL § 66(2)); power to "...examine and investigate the plants and methods employed in manufacturing, delivering, and supplying gas or electricity," (PSL § 66(3)); power over utility "...methods, practices, regulations and property employed by them in the transaction of their business," including the power to order investigations (PSL § 66(5)); power to approve rates, charges, rules and regulations of the utilities (PSL § 66(12)); power to order "...classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use and upon any other reasonable consideration," and authority to order changes that are "just and reasonable" (PSL § 66(14)). Finally, the PSC can establish rates as well as

...order such improvement in the manufacture, conveying, transportation, distribution or supply of gas, in the manufacture, transmission or supply of electricity, or in the methods employed by such person or corporation, as will in its judgment be adequate, just and reasonable. (PSL § 72)

Traditionally, these statutes have been interpreted as granting the PSC sufficient authority to carry out the purposes of the PSL without requiring specific legislation to achieve those objectives. The Energy Association case, discussed below, validates the PSC's approach to meeting its statutory responsibilities.

## II. SERVICE OBLIGATIONS UNDER THE STATUTORY SCHEME.

### A. The Historic Service Requirement.

Historically, utility service responsibilities have generally been met by regulated electric and gas corporations.<sup>5</sup> The service provided was bundled; the utility corporation provided and maintained the electric service lateral or gas pipe to the customer's business or premises, and supplied the commodity. The idea of separating the two functions, with the utility providing the wires and pipes, and someone else (such as an ESCO) supplying the commodity, would have been deemed illegal until quite recently. In fact, a relatively early case, now effectively overruled by the Energy Association case, noted that:

I hold, therefore, that a contract for the supplying of electric current, by a corporation not subject to the regulation of the provisions of the Public Service Law, is ultra vires, against public policy, and void.

8284 Corporation v. Garey, 137 Misc. 197, 242 N.Y.S. 413, 415 (New York Municipal Ct. 1930)

### B. Recent Restructuring Litigation.

Recent case law concerning restructuring in New York supports a different and more expansive view of the use of the PSC's powers to achieve its objectives.

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<sup>5</sup> See PSL §§ 2(3), 2(10), 2(11), 2(12), 2(13), 2(23), 2(24), and 31(1); TCL §§ 2(1), 3, 4, 5, 10, 11, and 12.

1. The Energy Association Case.

In the Energy Association case, the Court examined the PSC's legislatively delegated powers to accomplish electric utility restructuring, including by implication, requiring ESCOs to provide consumer protection measures.

The Court noted that:

The overriding issue of this case is the mode to be followed by the People for generation, transmission and distribution of fire, transmogrified in the context of this case into electric energy---monopolistic or competitive, or some gradation in between.

There is no question that the People, acting through their Legislature, have the ultimate right to choose---now and for the future of the Twenty First century and for all times---what that mode shall look like. Nor is there any question but that the Legislature of the State of New York---which is the embodiment of the People of the State of New York---has the right to delegate the necessary choices to the Public Service Commission (PSC) as its action arm, provided that the Legislature promulgates necessary and appropriate guidelines for the exercise of those choices, so that those choices will represent not the purely independent choice of the said PSC, but the intent of the Legislature.

The only question remaining, respecting the several particularized issues of this case, and the authority of the PSC to so act upon, is whether or not the Legislature has properly delegated to the PSC the necessary authority. This court finds that it has. The Public Service Law is a blueprint within which the Public Service Commission is charged with the governance of the energy resources of the State of New York within the guidelines therein set forth.

169 Misc.2d. 924, 927.

The Court's discussion, albeit dicta, provided illuminating insights into its view of deregulation and restructuring issues. The Court affirmed the PSC's "...broad discretion to select the means for achieving the Legislature's goals of just and

reasonable rates and economic, efficient service." 169 Misc.2d. 924, 936, citations omitted. The Court noted as well that "...the Courts have recognized that to introduce competition into a monopolistic marketplace and thus lower prices to consumers is well within the Commission's jurisdiction." Id., citations omitted. Finally, Judge Harris, addressing the potential deregulation of generation as a means of setting market prices, articulated the proper judicial standard that is likely to guide judicial scrutiny of the issue here as well when he noted:

If and when the PSC lightens regulation of generation to accommodate competition, the justifiable issue will be whether such action rationally advances the Legislature's purpose of bringing customers just and reasonable electric service. That is the legislative standard, to be determined in particular cases by PSC expertise, subject to judicial review to guard against arbitrary and capricious decisions.

169 Misc.2d. 924, 936-37.

With regard to the potential PSC mandated sale of generation, Judge Harris also concluded that the PSC had such powers and that they derived from its rate setting authority. 169 Misc.2d. 924, 937. Based on Judge Harris' reasoning, a similar conclusion could be reached requiring ESCOs to provide consumer protection measures.

## 2. The PULP Cases.

In a series of cases challenging various aspects of restructuring, the Public Utility Law Project of New York, Inc. ("PULP") maintained, among other things, that ESCOs were subject to PSC regulation, and thus were required to provide full HEFPA protections. See the Appellate Division's discussion in the Energy Association case,

op.cit., where the PULP cases were collaterally addressed. 273 A.D.2d. 708, 710-11. Ultimately, the Court found that PULP did not have standing to pursue these matters (Id.) and the Appellate Division on several occasions declined to substantively discuss the merits of the HEFPA issues. See Public Utility Law Project of N.Y., Inc. v. Public Serv. Comm'n, 252 A.D.2d. 55, 59, 681 N.Y.S.2d. 396, 398 (3<sup>rd</sup> Dept. 1998) (ruling against PULP on standing, and terming its other contentions regarding HEFPA et al. "academic"), and Public Utility Law Project of N.Y., Inc. v. Public Serv. Comm'n, 263 A.D.2d. 879, 881, 694 N.Y.S.2d. 522, 524 (3<sup>rd</sup> Dept. 1999) (ruling against PULP on standing, and dismissed their legal action with no discussion of the merits of PULP's claims). Thus, since the discussion of the issues raised by PULP in the above cases is dicta, there are no valid precedents determining whether HEFPA requirements can be imposed on ESCOs.

Nonetheless, the HEFPA issues discussed in the PULP cases are relevant in this case. Specifically, in trying to forecast the probable results of litigation regarding the obligation to serve, Judge Keegan noted that consumers choosing an ESCO would have the option of returning to the local gas distribution company under the PSC's March 28, 1996 order. See the Slip Opinion issued April 29, 1997, the decision appealed in Public Utility Law Project v. Public Service Commission, 252 A.D.2d. 55, op.cit., at 7. Judge Keegan also noted that:

These provisions (HEFPA protections) thus insured that residential utility customers -- who had nowhere else to turn - - could obtain service from the monopolistic utilities "without unreasonable qualifications or lengthy delays" (§ 30). Significantly, the PSC Opinion plaintiffs challenge herein absolutely does not alter that assurance, since residential consumers retain the right to continue purchasing as from their LDC safe in the knowledge that they are fully protected

by HEFPA's protections and can continue to receive the service 'without unreasonable qualifications or lengthy delays.' Only those who knowingly choose to forego the extensive HEFPA protections on the purchase of gas in exchange for competition-driven lower gas bills from gas marketers will receive service not covered by HEFPA, but such consumers retain HEFPA protection on the transportation and delivery of the gas to their homes and the right to revert to their LDC for the purchase of gas and the full HEFPA umbrella.

Slip Opinion at 25-26, emphasis added.

Judge Keegan also quoted, with approval, a CPB memorandum supporting the original HEFPA legislation regarding "...the public interest in the supply of gas to New Yorkers by regulated monopolies and that such entities have special responsibility to their customers, founded on the necessity of the service they provide to the preservation of the health and general welfare." Slip Opinion at 26, emphasis in original. He then balanced some other arguments (including PULP's definitional contention that the ESCOs were in fact utilities) against the broad power of the PSC to achieve its legislatively mandated ends in a rapidly changing industry, and concluded that the PSC's actions were proper. Slip Opinion at 27-29. He also was persuaded that there was no legal requirement for the PSC to apply HEFPA to ESCOs. Slip Opinion at 23-24, 26-27.

A key element of Judge Keegan's decision was his discussion of the ability of consumers to revert to an LDC with full HEFPA protections. The Hearing Officers' recommendation – that all ESCOs must offer consumer protections, including full HEFPA protections – more than satisfies Judge Keegan's concern. Under the CPB's and Hearing Officers' recommendation, such protections would be available for consumers even if service is not rendered by regulated utilities. Further, while Judge

Keegan concluded that it was not necessary as a matter of law for the PSC to impose HEFPA requirements on ESCOs, he did not find that the PSC could not assert jurisdiction over ESCOs for this purpose.

On the contrary, the PSC could assert such jurisdiction in furtherance of its statutory responsibilities. The Commission has always had considerable latitude in interpreting its legislation, given the technical nature of the rate setting process, and its decisions will not be disturbed unless they are without a rational basis. See Radio Common Carriers of New York, Inc. v. Public Serv. Comm'n, 79 Misc.2d. 600, 360 N.Y.S.2d. 552 (Albany County 1974) (The PSC's view of the applicability of the Public Service Law will not be set aside if supported by a rational basis), Abrams v. Public Serv. Comm'n, *op.cit.*, Matter of New York State Council of Retail Merchants v. Public Serv. Comm'n, 45 N.Y.2d. 661, 412 N.Y.S.2d. 358, 384 N.E.2d. 1282 (1978), and Energy Association v. Public Serv. Comm'n, *op.cit.*

Also, while the PSC has not, to the best of our knowledge, explicitly claimed jurisdiction over ESCOs, the Commission has stated that it could effectively achieve the same result, regarding HEFPA protections, through its power to certify ESCOs.

The Home Energy Fair Practices Act currently affords residential customers certain consumer protections. (fn. omit.) These protections have served to ensure the safety and well-being of New York's utility customers. Because of this law, any provider serving residential customers, whether it be a transmission and distribution company or an energy service company, is obligated to ensure that these customers continue to get basic statutory protections.

During the transition to customer choice, these protections shall continue to apply. (fn. omit.) An agreement to provide customer protections could be a condition of licensing or certifying any energy service company serving residential customers.

Case 94-E-0952, Competitive Opportunities, Opinion No. 96-12, issued May 20, 1996, at 69, emphasis added.

In summary, the PSC has discretion in determining how it will direct utilities and ESCOs to meet their commodity provisioning responsibilities and provide consumer protections. Based on the limited judicial review that we have discussed, which to a considerable extent is based on dicta, we believe that the Commission has ample authority to impose consumer protection requirements on ESCOs.

## CONCLUSION

For the foregoing reasons, the CPB concludes that the PSC has the requisite authority to require all ESCOs to ensure that consumers receive all consumer protections currently provided by utilities and that all customers are served without undue discrimination. If these objectives are realized, the PSL mandates of safe and reliable service at just and reasonable rates would be accomplished.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Adrienne Rhodes', with a long horizontal flourish extending to the right.

C. Adrienne Rhodes, Chairman and Executive Director  
Douglas W. Elfner, Director of Strategic Programs  
Alfred Levine, Intervenor Attorney

Dated: August 10, 2001  
Albany, New York

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