



National Energy Marketers Association

STATE OF MARYLAND

PUBLIC SERVICE COMMISSION

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION ON ISSUES RELATING TO RETAIL GAS SALES SERVICE

The National Energy Marketers Association (NEM) hereby submits comments on the discontinuance of retail gas sales by investor-owned utilities in Maryland pursuant to the, "Requests for Briefs on Legal Issue," issued October 5, 2001. These comments relate specifically to the Commission's authority to either order or authorize the utilities' exit from non-monopoly functions.

The National Energy Marketers Association (NEM) is a national, non-profit trade association representing both wholesale and retail marketers of energy and energy-related products, services, information and technologies throughout the United States. NEM's membership includes: small regional marketers, large traditional international wholesale and retail energy suppliers (as well as wind and solar power), billing and metering firms, Internet energy providers, energy-related software developers, risk managers, energy brokerage firms, information technology providers and both manufacturers and suppliers of advanced distributed generation. Our membership has both affiliated and unaffiliated companies.

This regionally diverse, broad-based coalition of energy and technology firms have come together under the NEM auspices to forge consensus and to help eliminate as many issues as possible that would delay competition. NEM is committed to working with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement restructuring of natural gas markets.

NEM offers the following comments with respect to the Commission's authority to order or

authorize the utilities to exit non-monopoly functions pursuant to existing statutes.

I. Statutory Grant of Authority

The Commission has been given a broad grant of authority in accomplishing its objectives pursuant to Section 2-112 of the Public Utility Companies Article of the Annotated Code of Maryland.¹ The Commission's authority to affect the public service companies ability to render a service pursuant to a franchise, right or permit is set forth in Section 5-103 of the Public Utility Companies Article as follows:

- (a)(1) The Commission may require a public service company to continue any service that the public service company renders to the public under any franchise, right, or permit, after any applicable expiration date.
- (2) Unless authorized by the Commission, a public service company may not discontinue or abandon a service under a franchise, right, or permit.
- (3) The Commission may authorize a public service company to discontinue or abandon a service under a franchise, right, or permit if the Commission finds that the present or future public convenience and necessity allows the discontinuance or abandonment. (emphasis added).
- (4) Denial of authorization to discontinue or abandon a service under a franchise, right, or permit does not preclude subsequent reapplication.

The constructs within which the public service companies may operate a franchise are set forth in Section 5-202 of the Public Utility Companies Article providing that:

Without prior authorization of the Commission, a public service company may not:

- (1) assign, lease, or transfer a franchise or a right under a franchise;
- (2) enter into any agreement or contract that materially affects a franchise

¹ Section 2-112 of the Public Utility Companies Article of the Annotated Code of Maryland provides that:

- (a) To the full extent that the Constitution and laws of the United States allow, the Commission has jurisdiction over each public service company that engages in or operates a utility business in the State and over motor carrier companies as provided in Title 9 of this article.
- (b) (1) The Commission has the powers specifically conferred by law.
(2) The Commission has the implied and incidental powers needed or proper to carry out its functions under this article.
- (c) The powers of the Commission shall be construed liberally. (emphasis added).

- or a right under a franchise; or
- (3) abandon or discontinue the exercise of a franchise or a right as a whole or in part.²

NEM argues that the clear and unambiguous language of the above-referenced statutes grant the Commission sufficient authority to limit utility franchise services to those natural monopoly functions that the Commission was created to regulate. Additionally, it is also clear that the Commission has ample authority to require utilities to exit or discontinue the sale of products, services, information and technologies that can be competitively rendered by unregulated entities.

Section 5-103(a) of the Code requires that the, "present or future public convenience and necessity" dictate removing the utilities from performing a service. NEM asserts that such condition is clearly satisfied. State economic regulation of the true distribution monopoly function reduces costs to society by eliminating unneeded duplication and by preventing utilities from extracting monopoly profits on products, services, information and technologies that are available from the competitive marketplace at competitive prices. Therefore by definition, limiting regulation to the natural monopoly function, while permitting robust competition in all other functions, products, services and technology, should maximize benefits of innovation, encourage price competition and provide higher quality service, while minimizing the economic distortions inherent in monopoly economics. Clearly, the public interest is not served by charging monopoly prices for competitive services. Retaining the utility as the default provider of energy supply and other competitive services long term in a restructured environment will present a major barrier to the development of competitive markets. The structure and pricing of default services are critically important issues in determining whether consumers will receive the benefits of meaningful price competition. When states mandate the selection of incumbent utilities for all consumers who fail to make timely supplier elections and set a non-competitive price for default service, it perpetuates

² Annotated Code of Maryland, Public Utility Companies Article § 5-202.

the same non-competitive energy services that restructuring is designed to replace. NEM asserts that these economic impacts clearly constitute a "present or future public convenience and necessity" that warrant a Commission order requiring the utilities to exit non-monopoly functions.

Furthermore, NEM asserts that all market participants should be afforded certainty with respect to the future of the competitive gas market in Maryland in order to properly allocate their resources and form their business plans. A positive and clear pronouncement from the Commission that utilities should exit non-monopoly functions by a date certain will allow market participants to comport themselves in a more efficient manner. These resource planning and allocation considerations also constitute a "present or future public convenience and necessity."

II. Specific Grant of Authority to Order/Authorize Discontinuance of Retail Gas Sales Service

The Request for Briefs on Legal Issue raised the question of whether a specific grant of statutory authority is necessary for the Commission to order the utilities' exit of non-monopoly functions. NEM asserts that the Commission clearly possesses the requisite authority under the statutes as currently written.

The Electric Customer Choice and Competition Act is instructive on this point. Section 7-510 of the Electric Choice law imposes an affirmative obligation on the utilities to provide standard offer service until July 1, 2003.³ The Commission's authority to order the electric utilities to exit non-monopoly functions pursuant to Section 5-103 necessitated the legislative pronouncement on standard offer service. The legislature has not enacted an affirmative obligation with respect to gas utilities rendering of retail gas sales service. Therefore, NEM asserts that the Commission's authority to order the gas utilities to exit non-monopoly functions pursuant to Section 5-103 remains unrestricted, and no additional grant of authority from the legislature is necessary.

These conclusions are entirely consistent with the introduction of gas choice in the state. Gas choice has been phased in through the use of pilot programs and not pursuant to a proscribed statutory structure. In fact, the recently enacted laws pertaining to gas choice are limited to issues of supplier licensing and consumer protection.⁴ The Commission's approval of the gas choice pilot programs, in the absence of a pre-existing statute defining the structure of the competitive gas retail market, demonstrates the breadth of its' authority. In approving the gas choice pilot programs, the Commission exercised its authority to authorize the gas utilities to discontinue providing retail gas sales service "in part"⁵ with respect to the customers in those pilot programs. Therefore, NEM asserts the Commission should exercise its extant authority and order that the gas utilities exit this function "in whole."⁶

III. Retail Gas Sales Service is a Competitive Service

NEM has developed recommendations entitled, "*National Guidelines for Unbundling and Restructuring the Natural Gas Distribution Function,*" and, "*National Guidelines for Designing and Pricing Default Energy and Related Services,*" copies of which were attached to NEM's Comments on Issues Relating to the Retail Gas Market in Maryland dated September 14, 2001.⁷ The recommendations set forth in the NEM Policy Guidelines are important supplemental considerations to the current inquiry pertaining to the Commission' authority to order the utilities to exit non-monopoly functions. NEM submits that in a restructured environment the utilities' historical obligation to serve should be converted into an obligation to connect and deliver. Therefore, while the utilities should and will continue to provide transportation or distribution service for all customers, it is not necessary or

3 Annotated Code of Maryland, Public Utility Companies Article § 7-510.

4 Natural Gas Supplier Licensing and Consumer Protection Act of 2000, Public Utility Companies Article §§ 7-601 to 7-607.

5 See Public Utility Companies Article Section 5-202(3) stating that a public service company must have prior Commission authorization to, "abandon or discontinue the exercise of a franchise or a right as a whole or in part." (emphasis added).

6 See id.

7 The full text of NEM's "National Guidelines for Unbundling and Restructuring the Natural Gas Distribution Function," is available at <http://www.energymarketers.com/Documents/FinalGasUnbundlingPaper.pdf>. The full text of NEM's "National Guidelines for Designing and Pricing Default Energy and Related Services," is available at <http://www.energymarketers.com/Documents/FinalDefaultPaper.pdf>.

desirable to establish the utilities, on a long-term basis at least, as the default provider of energy supply and related products and services. The sooner the competitive market can efficiently super-aggregate small customers, the sooner true price competition can begin. For the foregoing reasons, NEM asserts that the Commission authority to order the utilities to exit non-monopoly functions is clearly and unambiguously set forth in the statutes as currently written. Therefore, NEM recommends that the Commission issue an order setting forth a date certain by which utilities should exit non-monopoly functions in order to provide market participants with requisite certainty in formulating business plans to enter and compete in the Maryland gas market and to provide consumers with the benefits of a fully open, competitive market. NEM reiterates our commitment to working with the Commission and the other stakeholders to devise fair and effective ways to promote the competitive restructuring of Maryland's natural gas markets.

Sincerely,

Craig G. Goodman, Esq.
President,
National Energy Marketers Association
3333 K Street, NW
Suite 425
Washington, DC 20007
Tel: (202) 333-3288
Fax: (202) 333-3266
Email: cgoodman@energymarketers.com
Website-www.energymarketers.com

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