

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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CASE 00-M-0504 - 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 :
: :
: :
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**BRIEF OF
THE NATIONAL ENERGY MARKETERS ASSOCIATION**

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Dated: Washington, DC
February 15, 2001.

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This Brief is submitted by The National Energy Marketers Association (NEM) in the above-referenced proceeding. The Procedural Ruling of the Administrative Law Judges in this proceeding dated January 11, 2001, invited parties to submit briefs addressing, "whether utilities may be directed by the Commission to cease providing commodity to customers and whether the Commission may require customers to be switched from a utility's commodity service to that of an ESCO." A reasonable, perhaps compelling interpretation of the Commission's enabling legislation and regulatory authority would grant the Commission the authority to order monopolies to stop performing and/or to stop charging for non-monopoly products, services, information and technology, and to do so by a date certain.

**The Commission's Enabling Legislation
was Intended to Protect the Public Against Monopoly Actions and Pricing**

The Cullen and Dykman brief (C&D Brief) referenced in the January 11, 2001, procedural ruling is a well-written analysis of the history of NYPSC regulation of the utilities "obligation" to "supply gas" and to "provide residential service" upon request to citizens of New York. The C&D Brief states that the actual meaning of these terms is unclear and offers its opinion that these terms should be interpreted

to prohibit the Commission from directing the utilities to stop providing competitive commodity-related services. It bases its opinion on the facts of the industry as it existed in 1907, and general rules of statutory construction and judicial interpretation of administrative law. It also recognizes the great deference courts give to the interpretation of enabling legislation by the agency charged with implementation of the statute, and the expertise that is legally presumed to reside therein.

NEM submits that the same well settled principles of administrative law and statutory construction compel an opposite conclusion. Administrative law requires that the intended meaning of the utilities "obligation" to "supply" gas and to provide residential "service," must be read in the context of the overriding purpose of the statute and the resulting regulations. NEM submits that the entire context of the enabling statute and all regulations promulgated thereunder to date serve one overriding public purpose. That purpose, simply stated, is to protect consumers from monopoly actions and pricing. In this context, all of the Commission's authority, including its authority to establish just and reasonable rates has evolved. The C&D Brief's parsing of word phrases produces a result contrary to the overriding purpose of the statute, and its description of the operative facts and circumstances that existed in 1907 misses the point.

In 1907, natural gas as a commodity was virtually worthless. Indeed, it was only the operative fact that pipelines were constructed to bring/transport/deliver the natural gas into the city that made this a fuel source of any economic or commercial value. But for transportation/delivery, natural gas could not then and cannot now be used, and natural gas wells were then and are today shut in.

To avoid multiple pipelines tearing up the streets of NY and to protect customers who only had one pipeline to rely on to "supply" gas and/or to provide "service," an entire system of rules and regulations to protect the public was developed. In

this context, the word "supply" not the phrase "supply gas" is operative, and it is a verb not a noun. NEM submits that the obligation of a utility is essentially to deliver/transport gas to customers without abusing its market power because of its monopoly status as the sole source of delivery/transportation. In this context, the word "supply" is properly interpreted as a verb to mean, "deliver" or "transport." Additionally, the action of "providing residential service" also means to connect and deliver/transport to residential consumers subject to the same Commission authority to protect residential consumers from market power abuses and/or unjust and unreasonable rates.

NEM is mindful that a distribution monopoly must perform services related to maintaining the integrity of its pipeline system so that it may continue to provide transportation/delivery "service" and thereby continue to "supply" gas and, in so doing, maintain the public safety. But the competitive products, services, information and technologies that are involved in the merchant function or commodity supply functions are clearly separate businesses that do not require cost-based rate of return regulation. Indeed, the entire purchase gas adjustment mechanism that insures that cost of service based regulations do not apply to the commodity function, supports this analysis.

Given the overriding purpose of the enabling legislation to protect the public from monopoly actions and pricing, it is completely reasonable, even compelling to interpret the statute in a manner that limits the operations of monopolies to solely monopoly functions. Additionally, given the overriding purpose of the statute and the Commission's rate making authority thereunder, it is also reasonable, even compelling for the Commission to have the authority to order monopolies to stop performing and/or to stop charging the public for non-monopoly products, services, information and technologies after a date certain. To parse word phrases to reach an opposite conclusion is not a reasonable interpretation of either the

statute or the regulations under well-settled principles of administrative law and statutory construction.

**The Commission Has the Rate Making Authority to Order Monopolies
to Stop Charging the Public for
Non-Monopoly Products, Services, Information and Technologies**

As noted, utilities do not receive a regulated cost-based rate of return for the natural gas commodity, rather only for its delivery/transportation ("supply"/"service"-related) assets. No party to this proceeding disputes that the Public Service Commission has broad authority to set just and reasonable rates.¹² Developing and implementing regulations that separate competitive products services, information and technology from monopoly services and permit meaningful price competition for competitive services is a proper exercise of the Commission's just and reasonable rate making authority and is clearly in the public interest. Therefore, ordering monopolies to stop charging for non-monopoly products, services, information and technology would properly be included in the Commission's authority to set just and reasonable rates for monopoly services.

Additionally, regardless of whether a court would parse the statutory word phrases in the manner advocated by the C&D brief, it is abundantly clear that the Commission has the authority to set shopping credits and back-out rates that protect consumers who wish to shop for competitive services. In this context, it is completely appropriate and within the Commission's statutory authority to implement back-out rates that provide consumers with shopping credits equal to the full costs of the gas commodity function and related competitive products, services, information and technology historically included in the utilities' fully bundled rates. The public interest is clearly served by constructing back-out rates that equal the fully embedded costs or, at a minimum, the long run avoided costs of competitive services, because failure to do so will force customers to pay for

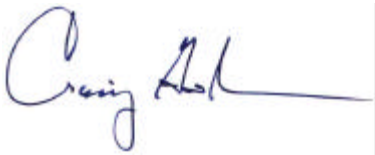
¹ N.Y. Pub. Serv. Law Section 66.

these costs twice, once to the competitive supplier and once to the utility that is no longer supplying these services. Indeed, for utilities to continue to collect such amounts when they do not provide these services should be considered per se unjust and unreasonable.

Conclusion

In conclusion, if back-out credits are equal to fully embedded costs, utilities will be encouraged to exit the merchant function without being forced to do so. Consequently, C&D's parsing of the statute contained in the referenced brief would be moot. The Commission clearly has the authority to set rates in a manner that incent a monopoly to stop performing and/or to stop charging for non-monopoly products, services, information and technologies. NEM submits that such authority also includes the authority to order utilities to stop performing and/or to stop charging for competitive products, services, information and technologies by a date certain.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Craig Goodman", followed by a vertical line.

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