

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on January 31, 2001

COMMISSIONER PRESENT:

Maureen O. Helmer, Chairman

CASE 00-G-0996 - In the Matter of Criteria for Interruptible Gas
Service.

ORDER ADOPTING PERMANENT RULE

(Issued and Effective January 31, 2001)

INTRODUCTION

We have ordered jurisdictional gas utilities to revise their procedures to help ensure that their interruptible customers are prepared for the possibility that their gas service could be interrupted.¹ We required that customers have a certain supply of alternative fuel as a condition of receiving interruptible gas service and that customers not in compliance with the terms of service for interruptible service be charged a higher rate. Seven entities² have filed petitions for rehearing

¹ Case 00-G-0996, In the Matter of Criteria for Interruptible Gas Service, Order Directing Utilities to File Revised Interruptible Gas Service Tariffs (issued August 24, 2000), p. 1 (Interruptible Gas Service Order).

² Consolidated Edison Company of New York, Inc., and Orange and Rockland Utilities, Inc., jointly (Con Edison); KeySpan Energy Delivery New York, and KeySpan Energy Delivery Long Island, jointly (KeySpan); Independent Power Producers of New York, Inc. (IPPNY), Multiple Intervenors (MI); the Indeck Companies (Indeck); the American Forest and Paper Association (Forest and Paper Association, or Association); Finch, Pruyn & Company, Inc. (Finch).

of that order.³

STORAGE REQUIREMENTS

The Interruptible Gas Service Order requires that certain customers have either a seven or ten day supply of replacement fuel on hand as of November 1 of each year and that if the customer lacks sufficient storage to hold either seven or ten days' supply, utilities must require those customers to enter the heating season with filled tanks and arrangements for replenishment during the winter period to the extent required by the order.⁴

Finch asks that we clarify that all of a customer's different replacement fuels be considered in determining a customer's existing fuel storage capacity. It claims as well that it is difficult to determine what a specific five, seven or ten day supply should be for customers whose fuel usage can vary dramatically and that we should clarify that a single day's supply equals the customer's average daily gas consumption as measured over the previous three heating seasons and then converted, as appropriate, to the unit of measurement for the alternate fuel.

Finch next questions what would constitute sufficient arrangements for replenishing fuel. It claims that our order implicitly could require a customer to purchase a significant quantity of fuel, which could cost hundreds of thousands of dollars. It also claims that it is unclear what we meant when we determined:

If physical plant constraints or availability
of oil make compliance with the order

³ Inasmuch as the petitions are asking us to modify a rule issued on an emergency basis they will be treated as comments on how the permanent rule should be read and applied prospectively.

⁴ Interruptible Gas Service Order, p. 14.

excessively burdensome, we encourage utilities and interruptible customers to seek staff authorized innovative solutions that vary from this order but do not jeopardize safety or reliability.⁵

It requests that the Commission clarify that if a customer's compliance costs would exceed \$10,000, that customer would be exempt from the rule.

Finch's arguments are not persuasive. Number 2 fuel oil has different characteristics than number 6 fuel oil, so we need not consider all the customer's fuels as replenishment fuels, as Finch suggests. True substitutes, on the other hand, may be considered in computing replacement capacity. The proposal to exempt customers if compliance costs exceed \$10,000 ignores the burden those customers place on the distribution system and is rejected. The reference to "innovative solutions" was meant to make clear that we were open to alternative approaches to achieving our reliability goals. Finally, the proposal to use a three year average to compute replacement supply is reasonable so long as the customer can show, to the utility's satisfaction, that the three year average is representative of current consumption.

MI, IPPNY, INDEK and Finch, among others, argue that the order's storage requirements could prove burdensome, especially for contract customers whose usage patterns are significantly different than those of smaller end-users.

Electric generators may only operate a few hours per day during periods of peak winter demand. However, those periods generally coincide with peak gas demand. Requiring 10 days of storage in these instances may be unnecessary. But the

⁵ Finch's Petition for Rehearing, p. 18, quoting Interruptible Gas Service Order, p. 14.

economics of the electricity industry may be such that a customer would stay on gas service while paying the \$25 to \$45/per dth higher rates imposed when a customer fails to leave the gas system as required. In order to impose the minimum burden possible while fostering reliability, we will allow, for this year, an alternative where contract customers' storage capacity would be reduced to three days supply, but the charge for continuing to use gas would be raised uniformly to \$100/per dth. This alternative should mitigate the commentors' concerns that our storage requirement was onerous. The higher rate should not be a problem if they in fact comply with the terms of interruptible service.

The Interruptible Gas Service Order limited the required storage inventory for contract customers with contracts that permit modification through Commission action for five days until we reviewed the contracts. It is now late in the season, so we will continue the five day requirement for the balance of the winter, for customers not adopting the 3 day supply option.

Staff should investigate the usage patterns of contract customers and report back so that we may review the conditions of service for this class and act in time for parties to comply before next winter.

STATUTORY AND CONSTITUTIONAL ISSUES

State Administrative Procedure Act

1. Emergency SAPA Comment Period

Finch notes that the 30 day period for seeking rehearing of the Commission's order pursuant to Public Service Law Section 22 ended on September 25, but that interested parties had until October 30 to submit comments on the order pursuant to the State Administrative Procedure Act (SAPA). From this it concludes that "a serious quandary of due process has been created ... it is not clear which set of interested persons will be given due process under these unusual circumstances ..."⁶

The circumstances are not that unusual and there is no quandary. Any action taken on an emergency basis pursuant to Section 202(6) of SAPA could have a comment period that extends beyond the deadline for rehearing petitions in the Public Service Law. There is, however, no valid due process issue. Parties have had an opportunity to comment pursuant to SAPA and the shorter time frame for rehearing does not bar other parties from filing comments or bar us from considering them.

Finch next argues that "this procedural and due process confusion is compounded by the fact that we required LDCs to file compliance tariffs within 10 days of the order."⁷

There is no confusion. We often require compliance filings before receiving or acting on rehearing petitions. In the event rehearing is granted, utilities are simply required to change their tariffs accordingly.

⁶ Finch's Petition for Rehearing, p. 4.

⁷ Id.

2. Statutory Basis for The Rule

Finch notes that Section 202(6)(d)(i) of SAPA requires that the Commission cite the statutory authority under which the rule is adopted. It argues that the cited section - Public Service Law (PSL), Section 66(12) - only allows the Commission to require the utilities to file schedules showing their rates. Further, Finch claims that we lack authority on our own motion to require utilities to modify tariffs and adjust rates because some customers might not behave in accordance with the terms of current tariffs. Finch contends that the word "file" simply means submit and that Section 66(12) does not support the Commission's action here.

Finch's strained construction of the statute would eviscerate regulation in New York. Section 66(12) provides us ample authority to require utilities to file tariffs and to authorize rate changes.

3. Duration of the Emergency Rule

The Forest and Paper Association argues that SAPA contemplates that emergency rules will be of limited duration and that our order provides no indication that its requirements are temporary in nature. It states that although styled as an emergency action pursuant to SAPA, the order does not identify the specific date the emergency rule will expire as required by the statute. It claims that by attempting to adopt permanent tariff requirements on an emergency basis the order violates SAPA and is thus procedurally defective.

Emergency conditions may require that an agency act promptly. The fact that, under SAPA, the rules may thereafter be made permanent refutes any implication that SAPA emergencies are meant to be of limited duration.

4. Regulatory Impact Statements

The Forest and Paper Association asserts that the order is defective because it fails to include a regulatory impact statement, a regulatory flexibility analysis and the name address and phone number of an agency representative from which the regulatory impact statement, regulatory flexibility analysis and a rural flexibility analysis may be obtained.⁸

The impact statements are not required because the order falls within SAPA, Section 102(2)(a)(ii)'s definition of a "rule."⁹ Adoption of rules under this section does not require preparation of such impact statements. SAPA, § 202-a(5)(b).

5. Notice of Filings

Finch asserts that it should have been served with gas utility tariff filings pursuant to the Commission's requirement that "a document filed in a proceeding to which there are other parties shall at the same time be served on each such party."¹⁰ The order was the result of a rulemaking for which the applicable SAPA procedures were followed. Our procedural regulations, which contemplate hearings before administrative law judges, do not require that the filings be served on Finch. Finch had the right to submit comments on a

⁸ Forest and Paper Association, p. 14, citing SAPA Section 202(6)(d).

⁹ This section defines "rule" as the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor, or evaluations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.

¹⁰ Finch's Petition for Rehearing, p. 5, citing 16 NYCRR Section 3.5(f).

rulemaking. It did so and those comments were considered. There is no obligation for companies to serve compliance filings on other entities unless the Commission so directs. Finally, all such filings are available for public inspection.

The Public Service Law

1. The Need for Evidence

Finch asserts that the record contains no evidence that interruptible customers' compliance with the Commission's order would foster the Commission's goals. Finch claims that because the rule is not based upon evidence and incorrectly presumes that storage capability would result in compliance with interruption requests, the order is invalid as a matter of law. It cites cases for the proposition that agency determinations may not be based on speculative inferences and that a mere scintilla of evidence is not sufficient to support an agency's findings. Finch argues that the Commission's failure to consider and analyze evidence for the imposition of new costs on interruptible customers is fatal to the order because PSL Section 66(12) requires utilities to prove that rates are just and reasonable.

In order to withstand judicial review, agency action must be within the agency's statutory authority, consistent with the State and Federal Constitutions, rational or , if the action followed statutorily mandated hearings, supported by substantial evidence. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974); Matter of 125 Bar Corp. v. State Liquor Authority, 24 N.Y. 2d 174,178 (1969) [wherein the Court held that the rational basis test "is often indistinguishable from that of substantiality of the evidence ..."]; Boston Edison Co. v. Federal Energy Regulatory Comm'n, 885 F.2d 962, 964 (1st Cir. 1989).

As the Court of Appeals has recently explained:

... our cases establish that the standard for review of all PSC rate determinations ... is one of flexibility. Repeatedly, we have held that the PSC's determinations in setting just and reasonable rates "are entitled to deference and may not be set aside unless they are without rational basis or without reasonable support in the record" (Matter of Rochester Tel. Corp. v Public Serv. Commn., *supra*, at 19; see also, Matter of Abrams v Public Serv. Commn., 67 N.Y.2d 205, 212, 218, 501 N.Y.S.2d 777, 491 N.E.2d 1193; Matter of New York State Council of Retail Merchants v Public Serv. Commn., 45 N.Y.2d 661, 672, 412 N.Y.S.2d 358, 384 N.E.2d 1281; Matter of Niagara Mohawk Power Corp. v Public Service Commn., 69 N.Y.2d 365, 369, 514 N.Y.S.2d 694, 507 N.E.2d 287; Matter of Campo Corp. v Feinberg, 279 A.D. 302, 307, 110 N.Y.S.2d 250, *aff'd* 303 N.Y. 995, 106 N.E.2d 70).¹¹

Our order is a rational approach to a significant problem.

2. Regulation of Nonjurisdictional Entities

Indeck argues that the Public Service Law gives the Commission no authority to regulate heating oil markets or to order the purchase of fuel by nonjurisdictional end use customers. It claims that the order has not demonstrated a nexus between natural gas reliability problems and the proposed fuel oil purchase and storage requirements. Indeck also notes that the express terms of the proposed rule refer to spikes in home heating oil prices and argues that the Commission's alleged after-the-fact attempts to cast oil price spikes as a natural gas reliability issue cannot mask the basic fact that the purpose of the proposal is to assert jurisdiction over nonjurisdictional markets.

¹¹ New York Telephone Co. v Pub. Serv. Comm'n., 95 N.Y.2d 40, 48 (2000).

Indeck next refers to a June 14, 2000 letter from Chairman Helmer to New York local distribution companies that stated that the utilities' interruptible tariffs had to be strengthened because there was a concern that the actions of some interruptible gas customers exacerbated the spikes in oil prices and the depletion of oil inventories. Indeck concludes that it was clear that the Commission was concerned primarily with heating oil price spikes rather than natural gas reliability.

Turning to the order, Indeck notes that we stated that "many of the oil dependent interruptible customers were forced to go into the already constrained spot oil market in an attempt to purchase oil in order to switch to alternate fuel during the ongoing interruptions."¹² It argues that this and other sections of the order demonstrate that the rule's real purpose is to mitigate heating oil price spikes.

Next, Indeck asserts that there is no evidence or specific instances of misconduct by interruptible customers to support the "extraordinary and unwarranted assumption" that interruptible customers unable to obtain alternative fuel will necessarily choose to remain on the local distribution company's system and thus violate the serving utility's tariff. Furthermore, it argues that even if some customers did improperly remain on the system, the Commission has failed to substantiate its conclusion that such actions in fact constitute a significant threat to the reliability of natural gas service. It claims the Commission's conclusion that there may not be enough gas for all is unsupported speculation that cannot justify the rule. Indeck goes on to criticize the various

¹² Indeck's Petition for Rehearing, p. 6, quoting Interruptible Gas Service Order, p. 2.

operational aspects of the rule, noting that the burden of the proposed regulation falls almost exclusively on gas customers, most or all of whom are nonjurisdictional entities, and the rule institutes a system of de facto regulation over fuel oil purchases and storage.

Turning to an analysis of the Public Service Law, Indeck argues that we have only those powers conferred upon us by the Legislature and that the statute gives us no authority over heating oil transactions or prices. IPPNY raises many of the same points and argues that, based upon inquiries to its members and its own knowledge, no penalties were levied last year and no gas fired generator disobeyed any LDC direction to interrupt gas service last year. Finch, the Forest and Paper Association, and KeySpan all make similar arguments.

We have authority to determine the terms and conditions of interruptible gas service, and must also ensure that service is safe and adequate. In reviewing utilities' plans for meeting their winter load, we review utility capacity portfolios and evaluate the reasonableness of measures taken to meet expected demands. The ability of the utility to call upon resources and facilities used to serve interruptible customers is a critical element ensuring that service is safe and adequate.

Interruptible customers who are not in fact interruptible pose a grave danger to that system. Customers that want interruptible service, therefore, must be prepared to satisfy the terms and conditions of that service.

The connection between gas reliability and the ability to be interrupted is clear. Further, the courts have recognized

the Commission's broad authority to ensure the reliability of service.¹³

There were more than 1,100 instances last year where utilities billed interruptible customers for not complying with interruption requirements, and the impact of those events on system reliability cannot be ignored. Non-complying interruptible customers statewide pose a serious threat to the gas distribution system, and simply requiring that they abide by the terms of the service they agreed to is hardly arbitrary action. Indeed, our duty to ensure the provision of safe and adequate service to firm customers requires such action.

3. The Rational Basis for the Commission's Action

IPPNY asserts the order is arbitrary because there is no study or investigation that supports a finding that any electric generator contributed in any way to price spikes in home heating oil markets across the state or in the Northeast last winter. It argues that if we cannot demonstrate that electric generating facilities are causing reliability problems in gas systems we cannot apply the minimum storage requirements and the higher rates to them. IPPNY adds that the order is arbitrary because it will apply to future gas service contracts without a nexus to system reliability needs and will greatly increase the future costs of securing gas transportation.

¹³ Leroy Fantasies v Swidler, 44 A.D. 2d 266 (2d Dept. 1974)[order requiring restriction of gas service to a non-jurisdictional restaurant within the authority of the Public Service Commission], Public Service Comm'n v. Jamaica Water Supply Col., Inc., 42 NY 2d 880 (1978)[dividend restriction justified because of Commission's obligation to assure reliable service.] Dara Gardens v. Public Service Commission [where the Appellate Division upheld a Commission determination authorizing an increased rate to insure that gas was available.]

IPPNY fails to appreciate that reliability of gas service requires protective actions to be taken before, not after, an incident occurs. Prudent planning requires that all customers, regardless of end use, be prepared to abide by the terms of a utility tariff. And, as discussed in the previous subsection, there is a rational basis for our action here.

Finch states that "perhaps the burdensome oil storage rule fails to accomplish its stated purpose because the true purpose of the rule is to insulate the utilities from responsibility and potential liability for appropriate management of their own supply-demand relationships, their purchasing decisions, their curtailment decision making, and the execution of their service interruption plans."¹⁴

There is no basis for Finch's allegation. Utility procurement practices are reviewed to ensure that the utilities provide reliable service economically. Interruptible service is a keystone to meeting this requirement.

The Forest and Paper Association asserts that there is no nexus between the failure of interruptible customers to cease taking service during the winter of 1999-2000 and a significant threat to the safety and reliability of service on any utility's system. It states that the order shows no instances of non-compliance and does not demonstrate an increase in reliance on fuel oil spot markets during interruptions. Turning to our statement that certain interruptible customers did not discontinue taking gas when directed to do so last winter, the Association claims that we failed to discuss the breadth of the problem or a need to burden all interruptible shippers with new alternate fuel requirements as if they too would otherwise violate their obligations to interrupt gas service.

¹⁴ Finch's Petition for Rehearing, p. 11.

The failure to comply with utilities' requests for customers to stop taking gas service is unacceptable. Although such failure may be the consequence of a series of warm winters, customer behavior patterns need to be addressed. A continuation or later recurrence of cold weather last winter could have eventually threatened utility service at the end of the heating season.

Constitutional Issues

1. Commerce Clause

Indeck asserts that the order violates the Commerce Clause of the Constitution. It cites Pike v. Bruce Church, Inc.,¹⁵ as holding that state regulation may be invalid under the Commerce Clause even if it does not discriminate in favor of local interests when "the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits."

Applying the first prong of Pike, Indeck claims the order serves no "legitimate local purpose" because the regulation of heating oil markets and nonjurisdictional end users violates both state and federal law. It argues that the order does not show any rational connection between the ultimate fuel purchase and the storage requirements and the reliability of natural gas systems.

Turning to the second prong of Pike, the burden on interstate commerce, Indeck states that the proposed rule would not only necessarily affect interstate electricity, gas, and fuel oil markets but would also interfere with exclusive federal authority to regulate the interstate transportation of gas and electricity. It claims that many of the entities are non-

¹⁵ Indeck's Petition for Rehearing, p. 13, quoting Pike v. Bruce Church, Inc., 397 U.S.137 (1970).

utility power producers that are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission and that the order would impose severe and unlawful burdens on those facilities. For example, it states that the requirement that generators incur millions of dollars in unneeded oil purchases or add costly new oil storage equipment will severely hamper their interstate operations. It argues that the cost of arranging for a five to ten day supply of fuel oil could be so significant that some generators would be forced to remove their dual fuel capability and shut down their facilities. Indeck claims that the proposed rule could reduce its ability to produce electricity and also interfere with the interstate transportation and use of gas. Finally, it claims that the order places serious burdens on the interstate commerce of fuel oil by requiring companies to stockpile vast quantities of the substance.

The order advances the State's vital interest in assuring the reliability of the State's natural gas distribution system. Indeck needs to show that the burden on interstate commerce is "clearly excessive" in order to prevail, and it has not done so. Applying Pike's first prong, the legitimate local purpose here is compelling: the integrity of the natural gas distribution system - used among other things to heat homes in winter - is of paramount concern to the state. Utilities need to be able to plan to supply their customers and they must be able to interrupt services to customers that have opted for that service. There is only anecdotal evidence concerning the second prong of Pike, the burden on interstate commerce. The order does not interfere with the federal government's authority over the interstate transportation of gas, as Indeck claims, and its impact on generators' operations is speculative. Its effect on interstate commerce is minimal, if any. Because the order

fosters a significant state goal, while burdening commerce only minimally, if at all, it does not violate the Commerce Clause.

2. Supremacy Clause

Indeck claims that the Federal Power Act has granted FERC exclusive jurisdiction over qualifying facilities and that any state role is limited. It argues that Section 202(e) of the Public Utility Regulatory Policies Act exempts qualifying facilities from "state laws and regulations respecting the rates or respecting the financial organizational regulation of electric utilities or from any combination of the foregoing."¹⁶ It states courts have consistently protected facilities from state encroachments, striking down on preemption grounds state laws and regulations that imposed undue burdens on the qualifying facilities. It argues that the order is preempted because it would allow the Commission to control the operational decisions of qualifying facilities by mandating specific alternative fuel requirements and imposing penalties for non-compliance and because it would require qualifying facilities to install additional equipment. On the latter point, it cites as an example a requirement to add or expand fuel oil tanks which it asserts could be inconsistent with the qualifying facilities' permitted equipment or interfere with facility operations as certified by FERC.

The order is not preempted by federal law. Setting the conditions for intrastate interruptible gas service does not amount to setting the rates of qualifying facilities. Indeck has several options. It can take firm gas service or not take gas service at all. To the extent it values interruptible gas

¹⁶ Indeck's Petition for Rehearing, p. 19, quoting 16 U.S.C.824 A-3(e).

service, it must abide by conditions of that service, which also provide for alternatives to the construction of new tankage.

OPERATIONAL ISSUES

Interruption for Reasons Other Than Reliability

In the Interruptible Gas Service Order the Commission stated that "we take this opportunity to restate our view that interruptions are to be for reliability reasons only; economic bases do not support interruptions of customers."¹⁷

KeySpan claims that our statement fails to recognize the nature of fully interruptible gas sales and transportation service. KeySpan claims that the Commission incorrectly implied that we have previously set forth this view of the interruptibility of service, when, in fact, KeySpan states that the Commission has taken the opposite view of interruptibility, which KeySpan favors. It argues that the Commission required it to show cause why it had not interrupted certain interruptible transportation customers for economic reasons.¹⁸

We will clarify our order and require that a utility shall interrupt service to interruptible customers for reliability reasons or if selling gas to interruptible customers would impose cost burdens on firm customers.¹⁹ Additionally, interruptible customers should not have service interrupted so

¹⁷ Interruptible Gas Service Order, p. 13.

¹⁸ KeySpan's Petition for Rehearing, p. 4, citing Case 29538, Sales to Interruptible and Temperature Controlled Customers at Prices Below The Incremental Cost of Gas, Order to Show Cause (issued March 3, 1987) and Cases 28947, et al., The Brooklyn Union Gas Company-Gas Rates, Opinion No. 87-27 (issued December 16, 1987).

¹⁹ We recognize that unique circumstances may arise that would warrant a utility departing from these guidelines.

that the utility may make off-system sales. First, because the system was built to serve on-system customers, they should have priority over off-system customers. Further, because of the longer period of time it takes to recall off-system volumes to serve system needs, serving on-system interruptible customers before off-system loads provides for greater system reliability.²⁰

Interruptible service should be priced in a non-discriminatory manner, such that customers are interrupted by the utility for reasons consistent with this order. To avoid imposing costs on firm customers, while continuing to provide interruptible service to the extent possible, innovative pricing methodologies, including but not limited to making intra-month interruptible rate changes and employment of hedging techniques, should be pursued.

For both interruptible sales and transportation service, the company should interrupt only the amount of load needed to insure system reliability. If interruptible transportation customers' supplies arrive at the citygate, service to the customer should be interrupted only for distribution system reliability reasons.

KeySpan next argues that our view of interruptibility is inconsistent with tariff provisions the Commission has approved for KeySpan and for other companies which do not limit interruption to reliability situations. KeySpan claims as well that the limitation on interruptibility is inconsistent with PSL Section 65(1). Its argument is that, if it is required to limit its ability to interrupt customers, it would need to increase the rate for that service because the service would then have a

²⁰ Where limited by existing meters, LDCs may consider the installation of daily meters.

higher priority and would be more valuable in the marketplace. It argues that unless the rates for the higher priority service were raised, the price of the service would be inconsistent with PSL Section 65(3), which prohibits a gas corporation from making or granting any undue or unreasonable preference or advantage to any person, corporation or locality. KeySpan cites as well PSL Section 66-e, which requires gas corporations to maintain least cost gas purchasing practices. It states that if the companies cannot interrupt fully interruptible service for economic reasons they will be forced to obtain additional supplies on a long term basis that could increase costs.

KeySpan has provided no basis for granting rehearing here. Its statutory analysis is unpersuasive. Its interruptible customers, properly defined, impose fewer costs on the system and are thus properly charged a lower rate. Interruptible rates are generally market-based now, usually capped at the lowest firm rate, so KeySpan's claim that it needs to raise those rates to address what it perceives to be a higher priority of service doesn't make economic sense.²¹ As to the Section 66-e argument, the Interruptible Gas Service Order does not prohibit companies from interrupting gas supplies to meet reliability concerns. Additionally, purchases of natural gas, if uneconomic, to keep interruptible customers on line would be grounds for a prudence review.

MI states that members of Multiple Intervenors continue to experience interruptions under circumstances that suggest motivations other than reliability. It argues that in particular, an interruption that is caused by the redirection of

²¹ During periods of "peak" demand the marketplace may set a price for oil higher than a combined gas cost plus the rate margin for firm service.

gas supplied by the LDC to take advantage of shifting market prices is not a valid reason for interruption and that the Commission should clarify unequivocally that an LDC must demonstrate that any interruption is necessary to preserve system operational integrity. It asks that the LDC be required in each such instance to provide the details of system operational problems, such as the volumes of firm throughput, interruptible throughput and system availability, which justify the interruption. Our resolution of the issues raised by KeySpan, discussed above, and our resolution of MI's principles, below, address the issues raised by MI.

The Need for Interruptible Gas Service Principles

MI comments that the maintenance of continued reliable and affordable natural gas service to large transportation customers is essential to the economic viability of those customers and the ability of New York to attract and retain businesses. It claims that the lack of rules establishing the criteria for the declaration and the operation of a valid interruption has resulted in fragmentary communications and the implementation of potentially invalid service interruptions. It requests that we clarify our interruption policy through the adoption of a definitive set of rules, applicable to all gas utilities which would include, at a minimum, the following principles:

1. Interruption should occur only under emergency circumstances where there is an imminent operational problem on the gas distribution system. "The LDC should be required to provide customers with all of the reason(s) for the specific operational problem necessitating the interruption and an estimate of the duration. For example, if an LDC claims that the interruption is due to a lack of available capacity on the distribution

system to serve firm customers, it should be required to provide the throughput figures for firm customers, as well as the system availability figures, to justify the interruption. Similarly, if the interruption is due to an interruptible transportation customer's inability to get gas to the city gate, the LDC should specify when the shortage began and the reasons for the shortage."²²

2. Economic consideration should never be the basis for an interruption.
3. LDCs should initially seek to correct any operational problem through other options including, among other things, voluntary curtailments.
4. If an interruption becomes necessary the LDC should provide the customer with as much advanced notice as possible.
5. The LDC should respond to reasonable requests for information by parties and should provide the information within 24 hours after the declaration of an interruption and customers should be permitted to verify any factual claims made by the utility.
6. Interruption should be limited in duration as necessary to alleviate the emergency and the LDC should provide periodic updates to interrupted customers so they can plan accordingly.
7. The LDC should be required to provide throughput information on their websites including a daily forecast for firm and interruptible service, with hourly updates; the system's anticipated high and low MMcf demand for firm and interruptible service; as well as the

²² MI's Petition for Rehearing, p. 5.

available system capacity, and the actual throughput from the prior day. (MI notes that LDCs in other jurisdictions including California provide this information).

Some of MI's requests to codify interruptible principles are an unwarranted intrusion on operations of gas operations; the provision of the throughput information as explained in item 7, for example, could well be unduly burdensome for the more than 5,000 interruptible customers, and we will not require it. Other aspects of the principles are reasonable and we will require an abbreviated version of the principles sought by MI: LDCs shall provide as much notice as possible and explain the basis for the interruption. Additionally, we shall require that LDCs notify the Director of the Office of Gas and Water whenever they invoke interruptions of service to their customers, or take other actions, such as the issuance of an Operational Flow Order, which affect system reliability or service.

Replenishment of Oil Supplies

The Interruptible Gas Service Order provided that "[I]f an individual customer elects, and such election is verifiable by the utility, to shut down an operation during critical periods the conditions of this order would not apply."²³

Con Edison asks that the Commission confirm:

(1) that this statement does not relieve any interruptible customers from their obligations to meet the reserve requirements established by utility tariffs; and (2) that this determination is limited in its application to the situation where a customer has fully met the applicable reserve requirement and then exhausts both its fuel inventory and its entitlement

²³ Interruptible Gas Service Order, p. 7.

to purchase fuel or energy, as applicable, from an alternate fuel or energy supplier during an extended interruption.²⁴

Con Edison argues that a customer in a position to shut down operations for a day or two (but no more) on the expectation of resuming operations on gas thereafter may find itself one or two days later, when the gas interruption is continuing, unable to procure fuel supplies on a timely basis and therefore be forced to demand gas service from the utility. It argues that customers must have an obligation to replenish their reserves and not simply elect to shut down.

Con Edison pleads in the alternative that if we do not reverse our determination, we provide that before its implementation, interested parties be given a reasonable opportunity to identify, develop and test the equipment, procedures and communication protocols necessary to implement the policy. It argues that:

All aspects of a customer's shutting down operations in lieu of switching to an alternate fuel must be fully explored prior to its implementation. Among other issues raised by such a program are whether the customer had met its reserve requirement obligations prior to the interruption of service and fully exhausted its reserves prior to shutting down its operations, and how that may be verified; how and by what means the utility can verify that a customer has shut down its operations; what communications and other equipment may be necessary to effectuate this program; and the rate and service implications on customers that are not in compliance with the reserve requirement after the utility resumes gas service.²⁵

²⁴ Con Edison's Petition for Rehearing, p. 2.

²⁵ Con Edison's Petition for Rehearing, p. 3.

Con Edison misconstrues the shut down exemption. The customer must prove to the utility's satisfaction that it can "shut down an operation during critical periods..."²⁶ There is no mention of an election on the customer's part to shut down for a limited period of time. The shut down requirement is intended to mirror the interruptible period prescribed for other customers. The alternative proposed by Con Edison, however, is permissible under the Interruptible Gas Service Order.

Price of Gas Supplied During Interruptions

Con Edison requests that customers that wish to continue receiving gas in lieu of switching to an alternate fuel be prepared to pay increased prices that are necessary for it to recover any higher costs of providing service during such circumstances. This issue has been resolved. Since Con Edison's petition for rehearing, several utilities, including Con Edison, have been allowed to provide such service.²⁷

Con Edison's Temperature Controlled Customers

Con Edison seeks clarification that temperature controlled customers are not always interrupted before other interruptible customers and there are times when it is able to provide interruptible service below the preestablished cut off

²⁶ Interruptible Gas Service Order, p. 7.

²⁷ Case 01-G-0012, et al., In the Matter of Criteria for Interruptible Service, Order Temporarily Modifying Ceiling Prices For Interruptible Service (issued January 9, 2001). Case 01-G-0022, In the Matter of Criteria for Interruptible Service and Underdelivery Charges, Order Modifying Ceiling Prices for Interruptible Service and Underdelivery Charges (issued January 11, 2001).

temperatures at which temperature controlled customers' equipment automatically switches to alternate fuel usage.

Con Edison's clarification is correct.

Categorization As A Major Oil Storage Facility

Finch requests that the Commission exempt customers from the rule if compliance would subject the customer to regulation as a Major Oil Storage Facility within the meaning of the state's Environmental Conservation Law.²⁸

The order provides for alternatives where on-site storage capacity is not available; we will not grant Finch's proposed exemption.

Definition of Direct Transporter

The Interruptible Gas Service Order provided that "[t]he rule will not apply to direct transporters on interstate pipelines taking service through FERC-approved tariffs or contracts ...".²⁹ Finch argues that a direct transporter should be an entity taking service from an interstate pipeline and not the pipeline itself. It states that if a customer pays another to act as its direct transporter that customer should be deemed exempt as a direct transporter.

The rule applies to local distribution companies that have interruptible service tariffs and to customers taking service under those tariffs. Customers taking service from a pipeline and not the LDC are not subject to the rule.

²⁸ Finch's Petition for Rehearing, p. 14, citing Environmental Conservation Law Section 1001, et seq.; 6 NYCRR Parts 612-614.

²⁹ Interruptible Gas Service Order, p. 5.

Ongoing Replenishment Obligation

Finch sees an inconsistency between two provisions of the order. It states that while the order provides that "customers need not replenish fuel supplies on an ongoing basis to remain in compliance,"³⁰ it also provides that a customer could be compliant at the beginning of a heating season but could become noncompliant over the course of a heating season.³¹ It asks that we clarify that the rule does not require an ongoing replenishment of fuel and that a customer can only become noncompliant in the middle of a heating season by no longer having the requisite storage capacity.

Compliance with the fuel oil requirement at the beginning does not insure continued compliance. If the customer uses that alternative supply during periods of non-interruption, it will need to replenish the fuel up to the minimum levels.

The Rate for Customers That Failed To Switch

The Interruptible Gas Service Order required utilities to develop a rate to be applied to interruptible customers that failed to switch to alternate fuel during interruptions. It required that:

 this rate should be set at ten percent (10%) above the cost of alternate fuel measured from the discovery of non-compliance back to November 1. The rate for interruptible transportation customers found to be in non-compliance should be designed so that it, in combination with an estimate of the customer's gas cost, would exceed the market value of oil. Once the interruptible

³⁰ Finch's Petition for Rehearing, p. 19, quoting Interruptible Gas Service Order, p. 7.

³¹ Finch's Petition for Rehearing, p. 19, citing Interruptible Gas Service Order, p. 9.

customer demonstrates compliance it will revert back to the discounted interruptible rate.³²

On rehearing, Finch questions how the rate is to be calculated.

For example, presume a gallon of oil costs \$1.00, and an equivalent amount of gas cost 75 cents, and that over a period of non-compliance, the customer used the natural gas equivalent of 100 gallons of oil. It is unclear how the rule would be applied. Would the penalty equal "10% above the cost of the alternate fuel," which would mean \$110? Or, based on the provisions set forth on page 10 of the Order, should the penalty equal 100 gallons x (\$1.00-75 cents)x 110%, or \$27.50. The Commission should clarify that the latter application is what it intended.

Moreover, the rule should be clarified to indicate how (and by whom) the cost of fuel would be calculated. Clearly, fuel cost can be measured different ways, using different benchmarks and timeframes. The Commission should select published indices on a certain day of each month, as a proxy for fuel costs. In addition, given that fuel measurement conversions (from decatherms to gallons) will vary based on the grade and composition of the natural gas and the oil, the Commission should publish the appropriate conversion factors. Further, Finch requests that the Commission provide an example of the intended application of its penalty provisions to a hypothetical non-compliant customer.³³

The non-compliance rate is not a penalty as described by Finch. As for its requested clarification the alternative in its hypothetical would be \$110 (119%

³² Interruptible Gas Service Order, p. 15.

³³ Finch's Petition for Rehearing, p. 20.

of the price of alternative fuel). The higher rate does not envision the normal interruptible rate being billed twice. The rate, however, will be set at 130% of the cost of the alternate fuel for the reasons discussed below. We will not set forth a standard because locational variations will exist. When a rate is billed, the utility will be required to set forth the basis for the charge.

Facility Inspection

The Interruptible Gas Service Order required an on-site inspection of a random sampling of the utilities' interruptible customers.³⁴ On rehearing Finch asks that at least one week's notice be provided prior to inspection and that the LDCs' inspection should be limited to a visual confirmation of alternate fuel storage capacity and actual fuel on hand.

We see no need to set standards as suggested by Finch. The Order specifically calls for utilities and interruptible customers to work cooperatively. The method of verification is left to the utility.

Disposition of The Refund

We required that the difference between the traditional interruptible rate and the higher alternative rate paid by non-compliant customers be refunded to gas customers and not be retained or shared by the utility.³⁵ Finch argues that we should clarify that the difference collected from non-compliant customers should be refunded to only interruptible customers because firm customers would not be hurt under the rule. It

³⁴ Interruptible Gas Service Order, p. 15.

³⁵ Interruptible Gas Service Order, p. 10.

also requests that the payments be refunded quarterly and appear as a bill credit to interruptible customers based on an interruptible customer's relative usage of the LDC's system during the period in which the higher charge was collected.

KeySpan, on the other hand, asserts that the allocation of the difference between the regular rate and the higher rate for noncompliance violates the order approving the merger of Brooklyn Union Gas Company and Long Island Lighting Company.³⁶

³⁶ KeySpan argues this provision of the Merger Order must be applied in determining the disposition of the revenues:

Basic Rate Structure.

On the Rate Effective Date, Brooklyn Union's base Core Service sales rates will include its distribution margin only. Accordingly, at that time, the gas costs recovered in Brooklyn Union's current base Core Service sales rates will be "rolled out" of base rates into the GAC. Net revenues associated with sales and transportation services to on-system non-core interruptible customers currently being made under SC Nos. 5A (Interruptible Sales), 11(Interruptible Transportation) and 18(Non-Core Transportation) are reflected in the 1997 revenue requirement used to develop Core Service Rates. Moreover, effective on the Rate Effective date, 40 cents per Dth of fixed gas costs currently reflected in the GAC applicable to Core Service sales will be allocated to Temperature Controlled Service sales customers. Hence, the final design of Core Service rates for fiscal year 1997 and thereafter will reflect (i) the revenue reduction described in section V.B.2 of this Agreement, (ii) the reflection in base rates of \$5.5 million in net revenues from on-system interruptible sales and transportation service that otherwise would have been reflected as a credit in GAC,

(continued...)

Utility tariffs should prevail here. Interruptible revenues are generally returned to firm customers because firm customers shoulder the economic burden of paying a utility's cost of service. No valid argument has been made to credit bills of customers who are already receiving a discounted service.

The intent of the order is to achieve compliance without providing utilities with windfall revenues or encouraging their overreaching in assuring compliance. This circumstance was not contemplated when we established rates for KeySpan and Keyspan should not profit from that circumstance.

Effective Date of The Higher Rate

We required that upon finding that a customer was not compliant, the higher alternative rate be billed back to

(iii) the reallocation of \$13.728 million (34.319 million dth times 40 cents) of fixed costs of gas to the Temperature Controlled Service sales classed (and the concomitant reallocation of non-gas cost revenue responsibility to Core Service sales classes), (iv) the roll-out of the base cost of gas reflected in base Core Service sales rates in to the GAC, and (v) the interclass and intraclass reallocation of revenue responsibility described in this subarticle V.C.

KeySpan's Petition for Rehearing, p. 12, citing Case 97-M-0567, Petition of Long Island Lighting Company and the Brooklyn Union Gas Company for Authorization under Section 70 of the Public Service Law to Transfer Ownership to An Unregulated Holding Company And Other Related Approvals, Order Adopting Terms of Settlement Subject to Conditions and Changes (issued February 5, 1998).

November 1 and until the point the customer comes into compliance with the tariff requirements.³⁷

The Forest and Paper Association argues that if a shipper is compliant in November and December and becomes non-compliant on January 1 requiring it to pay the higher rate for November and December would be unfair.

We will modify the order to provide that the higher rate is effective for the billing period during which the noncompliance becomes known, and for any subsequent periods during which the noncompliance continues. In order to provide an incentive for compliance, we will increase the rate from 110% of the cost of alternative fuel to 130% of the cost of alternate fuel.

Ambiguities In The Order

Finch had stated in its original comments, that the proposed rule contained several ambiguities, and the Interruptible Gas Service Order stated that we expected utilities to respond to the comments and clarify the ambiguities in their filings.³⁸

On rehearing, KeySpan asks that we identify the ambiguities pointed out by Finch and those that should be clarified by the utilities.

Finch has commented extensively on the ambiguities in its petition for rehearing and we discuss those issues above. They should be resolved as discussed there.

Conclusion

The proposed rate in this case is modified as discussed in the foregoing order. Additionally, we direct our

³⁷ Interruptible Gas Service Order, p. 10.

³⁸ Interruptible Gas Service Order, p. 11.

office of Gas and Water to review the structure of utilities' interruptible rates and related issues.

It is ordered:

1. The petitions for rehearing in this case are denied, except to the extent granted above.
2. The Interruptible Gas Service Order is modified and clarified as more fully described in the body of this order.
3. This proceeding is continued.

(SIGNED)

Commissioner