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THE BROOKLYN UNION GAS COMPANY d/b/a KEYSpan ENERGY DELIVERY NY
One MetroTech Center
Brooklyn, NY 11201

November 11, 2002

Honorable Janet Hand Deixler, Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Dear Secretary Deixler:

Transmitted herewith for electronic filing are the following tariff leaves issued by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York ("KeySpan" or "Company") to become effective February 11, 2003:

First Revised Leaf No. 138.2
Second Revised Leaf No. 138.28
First Revised Leaf No. 138.29
First Revised Leaf No. 138.30
First Revised Leaf No. 138.31
Second Revised Leaf No. 138.32
Fifth Revised Leaf No. 138.33
First Revised Leaf No. 138.34
First Revised Leaf No. 138.35

To Schedule for Gas Service, P.S.C. No. 12.

The Company also attaches a notice pursuant to the State Administrative Procedure Act. The objective of these tariff revisions is to correct and clarify the existing leaves, as explained in the attached letter (Attachment I), which the Company filed in response to a dispute resolution claim filed by an ESCO operating in its service territory. KeySpan wishes to implement pro rata sharing of payments with qualifying ESCOs in a manner that does not compromise customer rights, and believes these revised tariff leaves would accomplish that objective.

The Commission will note that the Company has provided at leaves 138.31 and 138.32 that pro rata sharing of payments with eligible ESCOs will commence no later than 90 days from Commission approval of revised leaf 138.2. At leaf 138.2, KeySpan has proposed a definition of pro rata with respect to application of partial customer payments, *i.e.*, utility arrears, ESCO arrears, utility current charges, ESCO current charges. The Company is aware that there are at least two other approaches for defining pro rata in this context. For a particular application of payments scheme to be programmed in the Company's billing system, it must be defined specifically and unambiguously. Accordingly, the 90-day window following the Commission's Order approving a definition of pro rata will give the Company an opportunity to program its billing system to prorate payments consistent with the Commission's directives. A different application of payments scheme may require a different implementation timeframe.

Any questions regarding this filing may be directed to me or to Nancy Cianflone at (718) 403-3073 and (718) 403-2505, respectively.

Very truly yours,

Catherine L. Nesser

ATTACHMENT I

By electronic and overnight mail

October 28, 2002

Honorable Janet Hand Deixler,
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Uniform Business Practices Dispute Resolution Claim filed by Total Gas & Electric

Dear Secretary Deixler:

By this letter, KeySpan Energy Delivery New York ("KeySpan" or the "Company") responds to the complaint dated October 15, 2002 filed on behalf of Total Gas & Electric Company ("Total"), an ESCO operating in the Company's service territory, pursuant to the Commission's Uniform Business Practices ("UBP"). In addition, the Company attaches draft tariff leaves that it prepared to address the issues raised by the Total dispute.

The Company prepared these draft tariff leaves before receiving Total's dispute resolution claim.

Following the October 2nd meeting with Commission Staff referred to by Total, KeySpan offered to work with Total to draft a joint petition for declaratory action seeking the Commission's resolution of the issues presented. Total seemed receptive to that idea, but the Company heard nothing further before receiving the dispute resolution complaint.

Essentially, Total complains that KeySpan has refused to accede to Total's request to engage in pro rata sharing of partial customer payments. Total maintains that it is afforded this right pursuant to the Company's tariff, which was filed in compliance with the October 27, 2000 Interim Gas Restructuring Settlement Agreement, approved by the Commission in Case 99-G-1469, "Order Establishing Interim Rate Plan" (December 26, 2000) ("Interim Agreement"). The Interim Agreement expired June 30, 2001. KeySpan does not dispute that pro rata sharing of payments for ESCOs participating in either consolidated billing option was intended by the expired Interim Agreement. However, because of an

oversight in drafting, Total is incorrect in its assertion that it is entitled to pro rata sharing of payments pursuant to the Company's existing tariff. The Company believes there are substantive issues for the Commission to determine before Total or any ESCO can be permitted to pro rata sharing of customer payments. KeySpan wishes to resolve this dispute over its tariff by filing revised leaves that would afford Total the right to pro rata sharing of payments in a manner that duly protects customers' rights under the Home Energy Fair Practices Act, at Public Service Law Section 30, *et seq.* ("HEFPA").

The Interim Agreement

Section D of the Interim Agreement, entitled Billing Issues, included the following provision:

In general, customer payments will be allocated first to the utility portion of the combined bills. However, a Marketer shall have the additional option of receiving pro rata sharing of customer payments in partial payment situations (where payments are less than the current amount due) if the Marketer agrees contractually with the utility to abide by the same due dates, requirements of notice of termination and final notice, the availability of deferred payment agreements (DPAs) for delinquent customers (but not previously disconnected customers), and late charge limits as if the Marketer's charges were utility charges.

This language (the "pro rata payment provision") was repeated verbatim under Sections D(1)(b), "One Bill Option (Utility-Provided)" and D(1)(c), "One Bill Option (Marketer- Provided), but was not further defined. It is the Company's recollection that the intent of the Interim Agreement was to permit ESCOs whose charges were presented on the same bill as the Company's charges, whether they were acting as billing agent or opting for KeySpan's single bill option, with the choice of assuming certain consumer protections applicable to utilities in exchange for a more favorable application of payments than was otherwise available pursuant to the UBP. Beyond this conceptual understanding, however, the pro rata payment provision of the Interim Agreement was the subject of little discussion or consideration in light of the other, more immediate issues addressed in the Interim Agreement.

The Interim Agreement addressed a comprehensive range of issues that absorbed the parties' attention, including, as examples, heating bill credits and marketer incentive payments to facilitate competitive commodity markets, stranded capacity costs, and the funding of transition balancing accounts. These issues were thoroughly analyzed and discussed in the course of negotiations, and were fully explained in

the Interim Agreement. The pro rata payment provision was not. At that time no ESCO was requesting or even expressing a specific interest in qualifying for pro rata payment application. Whatever the reasons, issues such as what "pro rata" meant, how it should be verified that ESCOs were offering customers the requisite protections, and whether customers would have to consent to pro rata application of their payments received little or no attention.

The Tariff

In its compliance filing implementing the Interim Agreement, the Company filed its tariff, particularly leaves 138.28 and 138.32. KeySpan included the pro rata payment provision from the Interim Agreement in the tariff, but the tariff, like the Interim Agreement, did not elaborate as to what the provision meant or how it would be implemented in practice. Inadvertently, the Company placed the pro rata payment provision in the Billing Agency section of the tariff only, rendering it unavailable where the ESCO was presenting its charges for inclusion in KeySpan's single bill. Copies of the tariff filing in compliance with the Interim Agreement were served on all parties to the proceeding. To the Company's knowledge, no party commented on the compliance filing. The Commission approved KeySpan's compliance filing, and the tariff went into effect. While the Interim Agreement expired on June 30, 2001, the tariff leaves filed in compliance remain in effect.

Although the tariff took effect immediately following the Commission's approval, and the Interim Agreement did not explicitly allow for lead time to begin pro rata sharing of payments upon a qualifying ESCO's request, KeySpan did not program its billing system to prorate partial customer payments. As a practical matter, some lead-time was required following the Commission's approval of the compliance filing to allow for the necessary programming of the Company's billing system. KeySpan acknowledges that had it set out to program the billing system to prorate consolidated billing customer payments even in the absence of an ESCO request, it would have noticed at least some of the lapses in the Interim Agreement sooner. Programming is literal, and could not progress without a clear definition of how payments would be prorated. However, at the time, the Company did not divert programming resources from other retail access projects such as the electronic bulletin board to program an application in which

no ESCO had expressed interest.

The discrepancies in the tariff did not come to the Company's attention until it received its first request for pro rata sharing of customer payments, from Total in September of 2002, nearly two years from the date the Interim Agreement was finalized and over a year following its expiration. Total claimed to be affording its customers the requisite HEFPA protections, but is on KeySpan's single bill. Because it is not the billing agent, Total does not qualify for pro rata payments pursuant to the Company's tariff.

Recognizing that the Interim Agreement is long expired, Total seeks to demonstrate that it does qualify for pro rata sharing under the existing tariff by extracting the following language from the utility-provided single bill section, which applies to Total:

The Company will provide a single bill option to any ESCO/Marketer who so desires wherein the Company will include the ESCO/Marketer charges on the utility bill. This service shall be provided pursuant to a Billing Service Agreement entered into between the Company and the ESCO/Marketer as provided in the Interim Gas Restructuring Settlement Agreement approved by the Commission in its Order Establishing Rate Plan, issued December 26, 2000 in Cases 99-G-1469, et al.

As required by the Interim Agreement, the Company filed as part of its compliance filing a standard offer consolidated billing services agreement pursuant to which KeySpan would offer a single bill option. The billing services agreement is silent on the issue of pro rata payment application.* This, too, was an inadvertent omission, most likely explained by the fact that at the time the compliance documents were prepared and filed, there were no marketers requesting or inquiring about pro rata payment application. In any case, the billing services agreement can not be used to import the pro rata payment provision into the single bill option under the tariff. It is simply not there.

Proposed Resolution

KeySpan regrets the confusion that the drafting oversights in the tariff have caused. The Company does not seek to rest on a drafting mishap and deny pro rata sharing to an ESCO who might have qualified for pro rata payments under the Interim Agreement. The Company wishes to resolve the confusion by filing new tariff leaves that more closely match the intent of the Interim Agreement that pro rata sharing of payments be available regardless of whether the ESCO is acting as billing agent or participating in the Company's single bill.

KeySpan disputes the invective characterizations of its declining to assent to Total's request for pro rata sharing, including "obstinate," "obstructionist" and "defiant". As

* Total was the first ESCO to sign the Company's consolidated billing services agreement.

Total is well aware, KeySpan has raised legitimate concerns about implementing pro rata application, including most importantly whether and how it can be implemented without infringing on customers' rights under HEFPA. At no time has KeySpan acted in bad faith, either in drafting the tariff or in not immediately acceding to Total's demands. In fact, the Company wishes to honor the commitment it made in the Interim Agreement, to assist this ESCO in taking advantage of the benefits it believes pro rata sharing will provide to its operations, and to safeguard customers' HEFPA rights.

The technical drafting error could easily be fixed by placing the pro rata payment provision in the utility-provided single bill option section of the tariff, as the Company has done in the attached draft tariff revisions. In working internally and with Commission Staff on how the pro rata payment provision could be implemented, however, KeySpan realized that there were also unresolved substantive issues with respect to the pro rata payment provision. Key among these is whether implementation of the pro rata payment provision as written in the Interim Agreement would compromise customers' HEFPA rights without their knowledge or consent. This could occur because partial customer payments would be subject to pro rata sharing by the ESCO and the utility instead of being fully applied to utility arrears. For a customer who is delinquent in payment of utility arrears, this may result in termination of utility service, a termination that HEFPA would not permit if the customer's payment were sufficient to cover utility arrears in the absence of pro rata sharing. HEFPA only permits termination of utility service for nonpayment of utility charges. (Public Service Law Section 32).

The issues that need to be addressed are discussed below, with the Company's proposed resolution. To facilitate the Commission's review, the Company has also attached draft, redlined tariff leaves that would implement its proposals.

Verification of ESCO Protection of Customer Rights

The Interim Agreement provided scant guidance on what process should be used to verify whether ESCOs will afford customers the consumer protections itemized in the pro rata payment provision,

notwithstanding the clear condition that pro rata payments were not available otherwise. It states only that the ESCO must agree contractually with the utility that it will provide customers the required protections.

KeySpan does not believe that the ESCO's contractual agreement with the utility to offer customers the stated protections is sufficient. Not only would monitoring, enforcement and remedies for a breach prove nettlesome, but also the Company does not believe it would be appropriate to interpose itself as the arbiter as to whether customers are being adequately protected by an ESCO. While the Company is willing to accept the ESCO's initial demonstration that it is or is prepared to offer customers the required consumer protections, it believes that whether the ESCO is or is not is ultimately for the Commission to determine. Accordingly, the Company's draft tariff amendments (draft leaves 138.31 and 138.32) provide that documentation that the ESCO is affording the required protections to customers is provided to the Company, but the Commission has an explicit role in determining whether the ESCO is providing and is prepared to continue providing the stated protections to customers.

The Definition of Pro Rata

In this context, pro rata is not a self-defining term. While Total rails against KeySpan for not immediately acting on its demand for prorated payments in accordance with "explicit" tariff provisions, Total itself is unsure which of three proffered definitions of pro rata was meant as the term was used in the Interim Agreement approved by the Commission.

How pro rata is defined has important implications for the magnitude of the impact on customers' HEFPA rights. While KeySpan believes that any proration of customer payments potentially compromises customers' HEFPA protections, the second of Total's offered approaches, *i.e.*, utility arrears, ESCO arrears, utility current charges, ESCO current charges, is the most protective of customer rights.

Customer Consent

Total goes to some lengths to argue that prorated sharing of customer payments would not violate its supply agreements and has nothing to do with HEFPA. KeySpan disagrees on both counts.

Total goes on at some length on the evolution of the UBP as a living document. It is true that the UBPs have changed to suit changing market conditions, but they have consistently been amended in a manner that was highly protective of customer rights. In any case, the Company does not see how the UBPs are implicated here. Total is not requesting an amendment to the UBP, but a right it argues it is due pursuant to KeySpan's tariff. While KeySpan has not seen Total's supply contracts with its customers, it is not persuaded by Total's reference to a provision that the agreements are subject to present and future laws and orders of governmental authorities that customers have knowingly consented to proration of their payments to the utility. The Company notes that there is no reference in the cited provision to a change in utility tariffs. Putting aside that their statutory rights would have been affected by pro rata sharing, customers will be upset and confused that the application of their payments to which they have become accustomed has suddenly changed without notice or their consent.

Total's argument that HEFPA is not implicated by pro rata sharing of customer payments is also unavailing. The cases cited by Total for the proposition that HEFPA does not apply to the provision of competitive retail service are not relevant to the question of whether pro rata sharing of customer payments would compromise customers' HEFPA rights. No one argues that HEFPA regulates Total or the service Total provides to its customers. But the fact that HEFPA pre-dates the commencement of retail access does not mean that customers forfeit their HEFPA rights when they choose to purchase supply from a competitive provider, which is the unstated import of Total's arguments.

At the heart of the matter is that proration of partial customer payments, by definition, affects the intended timing of HEFPA regulated notices and termination based on a customer's failure to pay, and HEFPA permits termination of utility service only for nonpayment of utility charges. Total denies the truism that

the timing of notices and termination based on nonpayment is affected, and explains with the bewildering analogy that customers subject to pro rata sharing of payments by ESCOs *are no worse off* than they would be if they had not elected to purchase from an ESCO at all. Obviously, this is irrelevant.

As it is unlikely that ESCOs enjoying the benefits of pro rata payments would be accountable for violating customers' HEFPA rights, Total can afford to be dismissive of them. KeySpan can not. Unless the Commission directs otherwise, KeySpan is not willing to implement pro rata sharing with any ESCO without customers' informed, written consent and waiver of their HEFPA protections. Draft tariff leaves 138.31 and 138.32 contain the Company's proposal for implementing pro rata sharing in a manner that assures that customers understand the implications of pro rata sharing and have waived their statutory rights.

Conclusion

KeySpan regrets that it did not recognize the lapses in the Interim Agreement and the discrepancies in the compliance tariff until Total's demand for pro rata sharing of customer payments. As it stands, however, unlike the Interim Agreement, the tariff remains in effect and Total does not qualify for pro rata payment application under that tariff. The Company believes that pro rata sharing of customer payments raises important issues that must be addressed by the Commission. Upon the Commission's determination of these issues, the Company will file the required tariff revisions, undertake the necessary programming to its billing system, and amend the billing services agreement so that pro rata sharing of payments can proceed as soon as possible. KeySpan's proposals herein are intended to revise the tariff so it fulfills the spirit and intent of the Interim Agreement, and to allow ESCOs participating in a single bill option the benefits of pro rata sharing of customer payments in a manner that duly protects customer rights.

Very truly yours,

Catherine L. Nesser

Attachments

cc: Michael Corso
LuAnn Scherer
Thomas Coonan
Kimberly Harriman, Esq.
Michael D'Angelo, Esq.
Usher Fogel, Esq.