

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission as to  
the Rates, Charges, Rules and Regulations of  
National Fuel Gas Distribution Corporation for  
Gas Service.

Case 07-G-0141

NEW YORK STATE CONSUMER PROTECTION BOARD'S  
BRIEF OPPOSING EXCEPTIONS

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Albany, New York

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On September 28, 2007, the presiding Administrative Law Judge ("ALJ") issued a Recommended Decision ("RD") in this proceeding. On October 18, National Fuel Gas Distribution Corporation ("NFG" or "Company"), the Staff of the Department of Public Service ("DPS Staff"), Multiple Intervenors ("MI") and the Consumer Protection Board ("CPB") filed briefs taking exception to various aspects of that decision.

The CPB hereby submits its opposition to certain exceptions. Our failure to address any specific exception should not be construed as support for it, but rather our view that either no further discussion is required or we expect the matter to be adequately addressed by other parties.

**Return on Equity**

NFG excepts to the conclusion of the RD that the appropriate cost of equity for the Company is 9.4%. That number was derived through application of the methodology set forth in the Recommended Decision in the Generic Finance

Proceeding,<sup>1</sup> with one significant exception. Rather than the two-thirds/one-third weighting of the results of Discounted Cash Flow (“DCF”) and Capital Asset Pricing Model (“CAPM”) methodologies called for by the Generic Finance RD, the ALJ In this case chose to give each result equal weight.

NFG’s principal contention is that the DCF methodology is “inherently unreliable” and should play a diminished role in calculating ROE.<sup>2</sup> Barely two weeks ago, in a case involving Orange and Rockland Utilities, Inc., the Public Service Commission (“PSC” or “Commission”) rejected this notion and reaffirmed the methodology set forth in the Generic Finance RD.<sup>3</sup> Specifically, the PSC said that it would “continue to endorse the annual DCF model,”<sup>4</sup> and would “accord two-thirds weight to the DCF result and one-third to the CAPM result as ... in past decisions.”<sup>5</sup>

The Commission also addressed the contention that the CAPM should be given greater weight under current market conditions. It cited a number of uncertainties that weighed against such a modification of the Generic Finance methodology, and concluded that:

Given concerns such as these, we are not now inclined to deviate from our long-held view that the CAPM methodology should not be

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<sup>1</sup> Case 91-M-0509, Proceeding on Motion of the Commission to Consider Financial Regulatory Policies for New York State Utilities, (“Generic Finance RD”).

<sup>2</sup> “Brief on Exceptions of National Fuel Gas Distribution Corporation,” October 18, 2007, pp. 9, 14 (“NFG BOE”).

<sup>3</sup> Case 06-E-1433, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Electric Service, “Order Setting Permanent Rates, Reconciling Overpayments During Temporary Rate Period, and Establishing Disposition of Property Tax Refunds,” issued October 17, 2007 (“O&R Order”).

<sup>4</sup> Id. at 11.

<sup>5</sup> Id. at 14.

entitled to more than one-third of the weight in our ROE calculation.<sup>6</sup>

Coincidentally, in the O&R Order, the Commission calculated the appropriate ROE to be 9.1%, precisely the return that we suggested would have been calculated for NFG had the RD not modified the usual weighting of the DCF and CAPM models.<sup>7</sup> This is a clear indication that application of the Generic Finance methodology to NFG produces a recommended ROE that is reasonable in the current market.

The Company's exceptions to the methodology used in the RD to calculate ROE should be rejected, while the CPB's exception to the RD's equal weighting of the DCF and CAPM should be accepted.

### **No Harm, No Foul Rule**

The RD found that the operation of the "no harm, no foul" rule, "appears to be inequitable" because the efforts of larger marketers to stay in balance effectively shields smaller marketers from responsibility for their imbalances.<sup>8</sup> In an effort to accommodate the interests of both groups of suppliers, the ALJ recommended that two pools be created, one for small marketers and one for large, each with its own no harm, no foul rule. This recommendation would retain the rule's protection from imbalance cashouts, while removing the potential for

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<sup>6</sup> Id. at 15.

<sup>7</sup> "New York State Consumer Protection Board's Brief on Exceptions," October 18, 2007, p. 5.

<sup>8</sup> RD 74.

“gaming” by small marketers that even DPS Staff conceded was a potential problem with the existing rule.<sup>9</sup>

Nevertheless, both DPS Staff and the Company excepted to the RD’s compromise resolution of the competing arguments for and against retention of this rule, arguing that the creation of two separate pools would be administratively burdensome<sup>10</sup> or impractical.<sup>11</sup> DPS Staff concluded from this that the rule should be retained without modification. NFG, on the other hand, suggested a different compromise: retain the rule but reduce the imbalance tolerance from 10% to 5%, making gaming substantially riskier.<sup>12</sup>

The purpose of imbalance cashouts is to promote load management by gas suppliers. NFG has argued that the no harm, no foul rule in its current form subverts that objective, in part, by giving smaller marketers the ability to ignore their imbalances with impunity. No one has presented a convincing argument to the contrary. Under the circumstances, the status quo is inadequate. Some effort to close the existing loophole should be made. While the CPB continues to prefer the Company’s original call to rescind the rule, we would also support its

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<sup>9</sup> RD 73.

<sup>10</sup> DPS Staff “Brief on Exceptions,” October 17, 2007, p. 28.

<sup>11</sup> NFG BOE, p. 46.

<sup>12</sup> Id.

revised position in favor of a reduction in the imbalance tolerance to 5%. This is a step in the right direction.<sup>13</sup>

If the Company's 5% proposal is adopted, however, there must also be an adjustment made to the rates paid by customers served under Service Class 13D. As DPS Staff testified, the current 10% imbalance tolerance for this rate class is supported by no-notice storage held by NFG, the cost of which is recovered by the Company through the balancing charges paid by SC13D customers. (Tr. 525-526) If the tolerance level is lowered, it should be possible to reduce this storage capacity, or divert it to a different use, permitting a proportionate reduction in the balancing charge.

It should be noted that the contention of Multiple Intervenors that improving balancing requirements will make the SC 13D service class unattractive for gas suppliers includes no citation, because there is no support at all for that proposition in the record.<sup>14</sup> It is equally likely that marketers – or at least the more competent among them – will continue to provide service, and customers' rates will be reduced. The Company's proposal should be adopted.

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<sup>13</sup> We note that this is not an unprecedented suggestion. National Grid currently has a 5% tolerance for daily imbalances during the winter months, and at other times when available storage capacity falls below defined limits. PSC No. 219 – Gas, Niagara Mohawk Power Corporation, Rule 29.2.4, Leaf 118, effective September 1, 2003.

<sup>14</sup> MI BOE, p. 24.

## **CONCLUSION**

The recommendations made herein should be adopted by the Commission.

Respectfully submitted,

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Chairperson and Executive Director

Douglas W. Elfner  
Director of Utility Intervention

David Prestemon  
Intervenor Attorney

Dated: Albany, New York  
November 2, 2007