

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

- CASE 98-M-1343 - In the Matter of Retail Access Business Rules.  
CASE 99-M-0631 - In the Matter of Customer Billing Arrangements.  
CASE 03-M-0117 - In the Matter of the Implementation of  
Chapter 686 of the Laws of 2002.

ORDER ON PETITIONS FOR REHEARING AND CLARIFICATION

Issued and Effective: December 5, 2003

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STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on November 25, 2003

COMMISSIONERS PRESENT:

William M. Flynn, Chairman  
Thomas J. Dunleavy  
James D. Bennett  
Leonard A. Weiss  
Neal N. Galvin

CASE 98-M-1343 - In the Matter of Retail Access Business Rules.

CASE 99-M-0631 - In the Matter of Customer Billing Arrangements.

CASE 03-M-0117 - In the Matter of the Implementation of Chapter  
686 of the Laws of 2002.

ORDER ON PETITIONS FOR REHEARING AND CLARIFICATION

(Issued and Effective December 5, 2003)

BY THE COMMISSION:

INTRODUCTION

On June 20, 2003, the Commission issued an Order<sup>1</sup> implementing amendments (Chapter 686 of the Laws of 2002) (hereafter Chapter 686) to the Home Energy Fair Practices Act (HEFPA; Public Service Law (PSL), Article 2) and requiring pro-ration of partial payments made by retail access customers who receive a consolidated bill. The HEFPA amendments require energy service companies (ESCOs) to comply with the HEFPA provisions, with the exception of the obligation to provide

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<sup>1</sup> Case 99-M-0631, et al., Order Relating to Implementation of Chapter 686 of the Laws of 2003 [sic 2002] and Pro-ration of Consolidated Bills (issued June 20, 2003) (hereafter June 20 Order).

service. They also authorize ESCOs to request suspension of delivery service upon certain conditions.<sup>2</sup>

Following the June 20 Order, several utilities requested an extension of the 75-day deadline to implement the payment pro-ration requirements of the June 20 Order. In our Order Extending Deadline,<sup>3</sup> we granted the extension request and required that pro-ration be implemented within 60 days of this Order. Several parties filed petitions seeking a reconsideration of the August 15 Order and a further delay in the implementation of pro-ration. In addition, at the request of several ESCOs, we extended the filing deadline set forth in the June 20 Order for a number of submissions required of the ESCOs.<sup>4</sup>

The following parties, representing the interests of ESCOs, distribution utilities, the City of New York, and consumer groups, submitted petitions and replies for rehearing and clarification of our June 20 and August 15 Orders: Advantage Energy, Inc. (Advantage Energy); American Association of Retired Persons (AARP); Consolidated Edison Company of New York, Inc. (Con Edison); Energy Cooperative of New York, Inc. (ECNY); KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (together, KeySpan); National Energy Marketers Association (NEM); National Fuel Gas Distribution Corporation (NFG); New York City Human Resources Administration (NYC HRA); New York State Electric and Gas Corporation and Rochester Gas &

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<sup>2</sup> As used in this order, "termination" refers to ending an ESCO's provision of commodity service; "suspension" refers to a customer's loss of delivery service at the request of an ESCO; and "disconnection" refers to a customer's loss of delivery service due to the non-payment of distribution utility charges.

<sup>3</sup> Case 99-M-0631, et al., Customer Billing Arrangements, Order Extending Deadline (issued August 15, 2003), Confirming Order (issued August 20, 2003)(hereafter August 15 Order.)

<sup>4</sup> Case 99-M-0631, et al., supra, Order Extending Deadline (issued September 18, 2003), Confirming Order (issued October 22, 2003).

Electric Corporation, jointly, (together, NYSEG/RG&E); Niagara Mohawk Power Corporation (NMPC); North American Energy (NAE); Orange and Rockland (O&R); Small Customer Marketer Coalition (SCMC); Strategic Energy, L.L.C. (Strategic Energy); and Total Gas and Electric (TG&E). A Notice of Proposed Rule Making concerning the petitions was published in the State Register on August 27, 2003, in accordance with requirements of State Administrative Procedure Act (SAPA) §202(1). In response to the SAPA notice, NEM and NYSEG/RG&E filed additional comments. We also address the petition for rehearing filed by Con Edison of our February 19, 2003, Order Modifying Payment Application Method.<sup>5</sup>

In this order, we clarify various provisions of our pro-ration policy and deny the petitions seeking a further delay in its implementation. We also clarify several requirements relating to the implementation of the HEFPA amendments. We begin with a discussion of pro-ration issues and conclude with issues concerning HEFPA implementation.

#### PRO-RATION ISSUES

##### General Policy on Pro-ration

The June 20 Order required a billing party to pro-rate<sup>6</sup> partial payments on consolidated bills.<sup>7</sup> Pro-ration, we stated, would provide ESCOs and distribution utilities with an equitable

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<sup>5</sup> Case 99-M-0631, supra, Order Modifying Payment Application Method (issued February 19, 2003) (February 19 Order).

<sup>6</sup> The term pro-rate for the purposes of this Order means the allocation of customer payments to categories of charges, including arrears and current, and the pro-ration of the customer's payment within each of those categories. Current charges refer to charges related to the provision of commodity and delivery services that appear on the customer's bill for the first time, and may include, as discussed later, security deposits and late payment charges.

<sup>7</sup> In the vast majority of cases, pro-rating payments is required when the amount submitted is less than the total bill (i.e., a partial payment). However, pro-rating a customer's overpayment will also be required as discussed infra.

division of partial payments and would facilitate the continuation of service to customers who might otherwise be subject to service termination.

NYSEG/RG&E asserts that HEFPA provides for pro-ration in limited circumstances and that the Commission departed from the HEFPA statute in establishing a broader policy on pro-ration. NEM and SCMC disagree. They claim that residential customers receiving a consolidated bill would be at risk of service termination, a result incompatible with HEFPA's objectives, if a portion of any partial payment is not applied to ESCO charges. SCMC further argues that ESCOs and distribution utilities each have an equal right to any customer payment. NEM contends that pro-ration of partial payments is more equitable than the existing payment allocation rules that discriminate in favor of utility charges.

Under our general supervisory powers, we have the authority to determine the manner in which utility companies (including utilities under PSL Article 2) will apply customer payments under consolidated bills. Chapter 686 does not limit this authority merely because it requires pro-ration in certain specified circumstances. Our general policy on pro-ration, which has been under consideration since well before the HEFPA amendments became effective<sup>8</sup> and is considerably broader than the mandatory pro-ration provisions of the statute, recognizes that both the utility and the ESCO provide an essential service, and, as such, both entities are equally entitled to payment for services rendered. This policy also places utility full-service customers and those purchasing energy supply from ESCOs on similar footing regarding the application of partial payments and may help ESCOs reduce uncollectible expenses. Accordingly, our pro-ration policy furthers the purposes of HEFPA and facilitates the development of competitive markets.

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<sup>8</sup> See Case 99-M-0631, supra, Notice Requesting Comments (issued November 13, 2001).

Application to Non-Residential Customers

Con Edison requests that pro-ration only apply to residential customers and not to non-residential customers, because, it contends, an ESCO is only authorized under the HEFPA amendments to suspend delivery service to residential customers (PSL §32(5)(a)).<sup>9</sup> If non-residential customer partial payments are not wholly applied to utility current charges, non-residential customers will become subject to an increased risk of delivery service disconnection, according to Con Edison. It acknowledges that pro-ration addresses an ESCO's financial concerns because it allocates payments to both the commodity and delivery components of energy bills, but it nevertheless opposes the policy.

In response, SCMC states that the goal of our policy is to allocate partial payments more equitably between ESCOs and distribution utilities and to eliminate the existing biased priority in favor of the utilities. SmartEnergy states that we considered and rejected Con Edison's claims about increased risks for non-residential customers in the February 19 Order, and Con Edison has provided no new information warranting a change in our determination.

As we stated in the June 20 Order, our pro-ration policy reduces the likelihood that a customer's service would be terminated and provides ESCOs and distribution utilities with an equitable division of partial payments. Con Edison's focus on the continuation of service for non-residential customers overlooks our second objective—a more equitable application of payments for supply and distribution services. With respect to Con Edison's claim that pro-ration would expose commercial customers to any higher risk of service termination, retail competition was not developed to provide customers the opportunity to avoid paying for commodity service simply because

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<sup>9</sup> This request is similar to that made in the petition dated March 21, 2003, which Con Edison filed for reconsideration of the February 19 Order; accordingly, we will decide both petitions here.

the commodity is being supplied by an ESCO. If a full-service commercial customer makes a partial payment to the utility, the customer would be at the same risk of disconnection as a retail access customer purchasing commodity from an ESCO and making a partial payment on a consolidated bill with pro-ration. In neither case is the utility paid in full, and, accordingly, there is no increased risk of disconnection by the utility. Our policy fairly balances the equities, levels the playing field between ESCOs and utilities, and is in the public interest. Con Edison's petition for reconsideration of our February 19 Order is therefore denied.

Exceptions to Pro-ration

KeySpan proposes exceptions to the requirement to pro-rate residential customer partial payments relating to deferred payment agreements (DPAs), budget billing agreements, and security deposit requirements. It argues that payments for these items should be remitted directly to the entity imposing the charges.<sup>10</sup> It also proposes the full application of payments directly to the party with arrears that may give rise to a loss of service. It argues that these exceptions will lessen customer confusion and avoid the need for utilities to increase amounts sought under DPAs, security deposits, or budget agreements to cover extra up-front costs. On the other hand, Con Edison proposes allocation of payments to security deposits before payment of arrears because, it asserts that the failure to pay a security deposit may result in a loss of service.

SCMC opposes these proposals. It asserts that HEFPA requires pro-ration of payments under DPAs. With respect to budget billing, SCMC claims that a large number of customers will opt for a budget plan from both ESCOs and distribution utilities, rendering the pro-ration of customer payments an equitable approach. It also points out that the pro-ration policy mirrors the application of payments made by customers who

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<sup>10</sup> Budget billing charges and DPA charges must appear on consolidated bills, but security deposit charges may be billed separately, if they are not included in a DPA.

receive both commodity supply and distribution service from a utility. It agrees with KeySpan, however, that security deposits should not necessarily fall within the ambit of pro-ration.

We reject KeySpan's contention regarding pro-ration of DPA payments. PSL §37(1) requires pro-ration of residential customer payments made under DPAs.<sup>11</sup> Customer payments on bills containing amounts due under budget billing agreements (or similar payment agreements with commercial customers) must also be pro-rated under our general policy. While we agree with SCMC that there is a reasonable likelihood that customers will have budget billing agreements with both ESCOs and distribution utilities, even in the absence of such circumstances the allocation of partial payments under our policy remains reasonable.

Security deposits, however, are usually required either to commence service (non-residential customers) or to continue service (all customers). Security deposits, in the case of continuing service, may fall into either the category of current or arrears charges on the customer bill depending on the date the billing party billed for the security deposit and the timeliness of the customer's payment and should be allocated and pro-rated accordingly. Where, however, the customer's failure to pay the security deposit results in a termination, suspension, or disconnection notice, payment made pursuant to that notice is not to be pro-rated because failure to pay the deposit would result in the loss of service.<sup>12</sup>

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<sup>11</sup> We recognize that a non-residential (commercial) customer may also have a DPA with the utility, and thus any payment made by a non-residential customer, under our general policy on pro-ration, shall be pro-rated, to the extent that both the ESCO and the utility have DPAs.

<sup>12</sup> If payment of the security deposit is arranged through a DPA, pro-ration is required by the statute.

Alternative Payment Method

KeySpan and SCMC request elimination of the Uniform Business Practices (UBP) provision (UBP §9.J.4.a.) that allows a customer to authorize an alternative payment method to our general pro-ration policy. SCMC states that removal of this provision is required to conform to the HEFPA mandate requiring pro-ration of payments in certain instances. KeySpan asserts that, because pro-ration limits a customer's risk of service disconnection, customers would compromise their rights by intervening. The change requested was adopted in the recent UBP revisions, and the petitions on this issue are denied as moot.<sup>13</sup>

Arrears Subject to Pro-ration

NFG proposes that the pro-ration of customer payments apply only to arrears arising after the effective date of Chapter 686 (June 18, 2003). NYSEG/RG&E proposes that the pro-ration of payments only apply to arrears arising after the required date for implementing pro-ration. SCMC and TG&E propose that the pro-ration of payments apply to and include all prior balances existing as of the date for implementation of pro-ration. They assert that such a policy is equitable, practical, and reasonable, would provide ESCOs a fair share of customer payments, and would avoid ESCO terminations for non-payment. They also note that the application of the pro-ration policy to all arrears would avoid the need to segregate past due amounts into those subject to and those not subject to the pro-rata allocation of customer payments.

In response, NYSEG/RG&E and O&R oppose pro-rating amounts accumulated prior to the date pro-ration is begun. They argue that it is probable that pre-existing ESCO arrears arose without the customer receiving ESCO HEFPA protections and, thus, the ESCO is not entitled to pro-rationing for pre-existing balances.

For the reasons stated by SCMC and TG&E, partial payment pro-ration to outstanding arrears will be required for

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<sup>13</sup> Case 98-M-1343, Uniform Business Rules, Order Adopting Revised Uniform Business Practices (issued November 21, 2003).

consolidated bills issued on or after the payment pro-ration effective date, regardless of the date upon which the arrears accrued. This is the most effective and reasonable method of implementing pro-ration. The arguments to the contrary of NYSEG/RG&E and O&R are based on the premise that our pro-ration policy depends solely on the HEFPA amendments, which it does not. Accordingly, the petitions for rehearing on this issue are denied.

Pro-ration after Delivery Service Suspension

The June 20 Order determined that HEFPA requires pro-ration of a customer's payment after the customer's delivery service is suspended at the request of an ESCO (PSL §32(5)(c)). Con Edison, NYSEG/RG&E, and KeySpan support this decision. SCMC disagrees, arguing that the statute directs pro-ration of customer payments after an ESCO terminates commodity service to the customer, which is likely to occur before the ESCO's suspension of delivery service. Because PSL §32(5) pertains to activities that must be undertaken after termination of service, SCMC concludes that PSL §32(5)(c) also requires pro-ration after termination and not just after suspension.

The statute only requires the pro-ration of payments following suspension (or in the event of a DPA), and our broader pro-ration policy, including exceptions, will apply in all other cases. As we previously noted, our pro-ration policy is intended to apply to all partial payments, unless pro-ration would place the customer at a greater risk of losing utility service. For example, where an ESCO has terminated commodity service and has notified the customer of the impending suspension of delivery service, the pro-ration of a customer's partial payment intended to curtail suspension could result in the loss of service. Assuming the distribution utility has not served a disconnection notice for its arrears, the customer's payment should first be applied to the arrears set forth in the ESCO's suspension notice, which, if not paid in full, will result in the loss of service. As the purpose of HEFPA is to maximize the availability of utility services to residential customers, neither the statute nor our pro-ration policy should

be implemented in a manner that places customers at risk of losing those services.

End of Pro-ration Rights

UBP §9.J.6. provides that a non-billing party's account is considered inactive once the last bill issued for service is paid or 23 days have passed after the issuance of the bill, whichever is sooner. The UBP also provides that the billing party is not required to apply payments to an inactive account. Based on these provisions, KeySpan proposes that a billing party not be required to bill for the arrears of an ESCO that terminates commodity service, unless the ESCO requests suspension of delivery service within the 23-day period. The company asserts that this policy would carry out the intent of HEFPA to minimize loss of utility service for customers. NFG requests that the utility carry arrears from a terminating ESCO for a short period, such as 90 days, which it says is consistent with typical industry collection cycles.

SCMC maintains that pro-ration must apply to all customer payments after termination of service and must continue until the arrears are fully paid. It asserts that the 23-day limitation on pro-ration implied by the UBP provisions is contrary to PSL §32(5)(a)(vi) which grants the ESCOs up to one year to institute a request for suspension of delivery service. NEM urges no cut-off date for the inclusion of ESCO arrears on consolidated bills.

In response to SCMC, NYSEG/RG&E argues that, once a customer's commodity supply is terminated, the customer is inactive and the customer's arrears become debt, which is not subject to pro-ration. It asserts that utilities collecting debt on behalf of an ESCO would raise concerns about the application of the Fair Debt Collections Act. Additionally, NYSEG/RG&E claims that PSL §31 imposes upon utilities an obligation to provide service to any residential customer, if the customer agrees to pay arrears owed to the utility. SCMC's proposal would give ESCOs the same right as the utilities to collect past due amounts, it opines, but without the PSL §31 obligation to serve. KeySpan, supported by NYSEG/RG&E, further

argues that the pro-ration of payments to ESCO arrears after termination would not carry out the purpose of Article 2 to maximize the availability of service.

HEFPA provides that an ESCO may seek suspension of a residential customer's delivery service within one year from the date that an ESCO terminates its commodity service. It also provides that customer payments must be pro-rated after suspension of delivery service or where the customer is making a payment pursuant to a DPA. We will require pro-ration of residential customer payments to address the arrears of a terminating ESCO for the longer of: one year from the termination of commodity service by the ESCO; or, until all arrears are paid in full if the ESCO suspends the residential customer's service within one year of commodity termination or the customer is paying the ESCO arrears under a DPA.<sup>14</sup> Pro-ration of non-residential customer payments between the terminating ESCO and the utility will end after termination of commodity supply, as specified in the Uniform Business Practices.

In addition, we will require that the billing party continue to include outstanding arrears on its bills so long as the billing party is issuing a bill to the customer and payments on those bills are subject to our pro-ration policy.<sup>15</sup> For example, if the residential customer received a consolidated

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<sup>14</sup> We recognize that there could be multiple ESCOs on the consumer's bill and that pro-ration could take place between more than two parties, such as the terminating ESCO, the utility, and a new ESCO.

<sup>15</sup> It is not necessary, of course, to continue to bill an individual who is no longer a customer (e.g., more than 60 days have passed since the disconnection of delivery services). If a person becomes a new applicant for service and had left the system with arrears owing to both the utility and an ESCO, the utility and ESCO arrears must be paid in accordance with 16 NYCRR §11.3 before service will be provided. The utilities, therefore, must keep records of ESCO arrears previously carried on consolidated bills and associated with utility arrears.

bill from the ESCO who terminated service (i.e., ESCO single bill) the utility or new ESCO rendering a bill to the customer must include on its bill the arrears of the terminating ESCO and payments must be pro-rated in accordance with the terms of this Order. This policy will help ensure that ESCO arrears giving rise to the termination of commodity service are satisfied, thereby reducing the risk that the ESCO will subsequently request suspension of delivery service for residential customers.

Alternative Draft of UBP Pro-ration Provision

Con Edison proposes a redraft of UBP §9.J.4.a. addressing several issues, including the possibility that the arrears owed to multiple non-billing parties may remain on a customer's consolidated bill. It also requests an exception to our pro-ration policy, if a balance due is referred to a collection agency. SCMC urges the rejection of Con Edison's requests and its alternative draft, asserting that Con Edison does not recognize that the entire customer payment is subject to pro-ration. NEM argues that Con Edison's alternate draft would increase billing complexity and would treat retail access and utility customers differently.

Con Edison's redraft of UBP Section 9.J.4.a. allows a billing party to retain any overpayment for credit against the future services of the billing party alone, contrary to our pro-ration policy.<sup>16</sup> Con Edison's redrafted UBP provision is therefore not acceptable. In addition, Con Edison's request to except from pro-ration customer payments received as a result of the efforts of a collection agency is not acceptable. Neither the utility nor the ESCO should be allowed to avoid the requirement of pro-ration (either pursuant to the statute or under our policy) by sending the customer's account to a collection agency. The net proceeds received from a collection agency by a distribution utility or an ESCO should be pro-rated

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<sup>16</sup> The billing party may retain overpayments for future credit to the customer's account, but the application of the overpayments must conform to our pro-ration policy.

as though the proceeds were the result of a direct customer payment.

Date for Implementing Pro-ration

The June 20 Order required distribution utilities and ESCOs issuing consolidated bills to begin pro-ration of customer payments on September 3, 2003. In petitions for rehearing, several utilities raised objections to that deadline arguing that the requisite computer programming changes were complex and could not be made until various clarifications of our pro-ration policy are provided. In response to these objections, our August 15 Order extended the deadline for implementing pro-ration to 60 days from the date of this Order. On September 15, 2003, Con Edison, O&R, and NMPC jointly filed a petition for rehearing requesting a further delay of unspecified length. On September 26, 2003, TG&E and the SCMC filed replies in opposition to the extension request.

Con Edison, O&R and NMPC argue that a further extension of the deadline is warranted because more than 60 days is required to accommodate extensive computer system reprogramming and necessary changes to credit and collection processes necessary to implement pro-ration. Con Edison in its petition for rehearing of the June 20 Order, argues that additional time is needed to implement the extensive system changes required for pro-ration and other HEFPA provisions. It estimates that system changes will take no less than 180 days from the issuance of this Order. KeySpan states that it will be in a better position to evaluate its ability to comply with the deadline for pro-ration after issuance of this Order.

SCMC and TG&E urge rejection of these requests. According to the ESCOs, we provided the utilities with more than sufficient time to implement the new pro-ration policy, which was announced in the June 20 Order. The ESCOs also note that no other utilities have joined the request of Con Edison, O&R and NMPC, implying that the current schedule is workable. SCMC further argues that the specific concerns described in the petition are unrelated to the pro-ration of partial payments, and that the utilities can, at a minimum, proceed with the

implementation of pro-ration for non-terminated customers. TG&E requests the severance of pro-ration from other complex issues, if required, to avoid further delay. It is concerned that continuing the financial burden of the current utility-payment-first policy into another winter season will further degrade the ESCOs' uncollectibles.

The billing parties could and should have been working on the necessary changes to their computer and other systems since at least June 20. It is essential, as customers begin facing ESCO-initiated suspensions, that their payments be equitably distributed between the ESCO and utility and that their bills accurately reflect the crediting of their payments. Further delaying the implementation of pro-ration would be a disservice to the customer and would result in continued unfairness to the ESCOs. Therefore, the petitions for rehearing of the August 15 Order, and the requests for extensions of time in the petitions for rehearing of the June 20 Order are denied.

Staff is directed to closely monitor the billing parties' progress, plans and time-frame for implementing pro-ration and to report to us before the end of the year on any difficulties in meeting our requirements.

#### Summary of Pro-Ration and Payment Priority

##### A. Pro-Ration

All customer payments to a billing entity, including amounts received by the billing or non-billing entity from collection agencies, of less than the total amount<sup>17</sup> due shall be pro-rated unless pro-rating the payment would increase the risk of a customer losing service. For example, payments made specifically to avoid the termination of commodity service or the suspension or disconnection of delivery service shall not be pro-rated.

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<sup>17</sup> We also require pro-ration for any customer overpayments as discussed herein.

B. Priority

A partial payment shall be pro-rated among ESCOs and the distribution utility in each of the following categories and in the following order of priority:<sup>18</sup> payments made specifically to avoid termination or commodity service suspension or disconnection of delivery service; DPAs<sup>19</sup> (including installment and current charges); arrears; and current charges (not associated with a DPA).<sup>20</sup> If only one party has charges in a category, those charges should be satisfied before any funds are pro-rated within a lower priority category of charges.

HEFPA ISSUES

Application of HEFPA to Service Discontinuances

A. Returning a Customer to Utility  
Commodity and Delivery Service

Strategic Energy asserts that the return of an ESCO customer<sup>21</sup> to utility service does not constitute a termination under HEFPA and therefore does not require the ESCO to follow full HEFPA termination procedures. It argues that returning the customer to utility bundled service does not interrupt the flow of electricity and merely constitutes a change in service provider, not service termination. The customer is not harmed.<sup>22</sup> NAE states that a requirement that ESCOs comply with HEFPA procedures for terminating a customer for non-payment prior to switching the customer back to the utility is not in conformance

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<sup>18</sup> The payment priority applies to residential and non-residential customers alike.

<sup>19</sup> DPAs may be arranged by the utility or ESCO with residential customers (16 NYCRR §11.10) and non-residential customers (subject to 16 NYCRR §13.5).

<sup>20</sup> See Appendix A, modifications to the UBP, Section 9.J.4.

<sup>21</sup> For the discussion of HEFPA issues, the term "customer" refers only to residential customers.

<sup>22</sup> Strategic Energy emphasizes that the ESCO may choose to recover damages from the customer under its contract.

with the statute. NFG recommends exempting an ESCO from HEFPA compliance if it transfers the customer to the distribution utility and waives its rights to request suspension of delivery service and receive pro-rated payments. NFG asserts that, under this approach, customers would continue to obtain the benefit of HEFPA protections because the distribution utility is required to comply with HEFPA disconnection procedures.

NYC HRA disagrees with Strategic Energy's proposal because it would result in depriving ESCO customers of the protections required by the HEFPA amendments and is contrary to the purpose of the amendments - to provide ESCO customers with the same statutory protections afforded customers who purchase commodity and delivery service from utilities. NYSEG/RG&E states that, under any interpretation of the circumstances described by Strategic Energy, the ESCO is terminating service as a result of non-payment and is required to comply with HEFPA termination procedures.

AARP states that the NFG proposal conflicts with the HEFPA amendments, which require HEFPA procedures for any termination of residential utility service, and that an ESCO is required to use HEFPA procedures to alter its relationship with a customer. NEM claims that NFG's proposal is flawed because it results in the inability of ESCOs to receive pro-rated payments. NEM also asserts that an ESCO should not be required to sacrifice receipt of payment for the product it has already provided.

HEFPA requires ESCOs to provide HEFPA protections when terminating a customer for non-payment. There is no distinction between termination of service to a customer for non-payment and returning the customer to bundled utility service for non-payment. NFG's request to exempt an ESCO from HEFPA compliance under certain circumstances would conflict with the statutory requirement that ESCOs comply with HEFPA provisions when terminating service to customers for non-payment. Further, no opportunity is provided to the Commission to waive these HEFPA provisions (PSL §53).

B. Voluntary Discontinuance of ESCO Service

SCMC claims that it makes little sense for an ESCO to follow HEFPA termination procedures for a customer who voluntarily discontinues ESCO supply and returns to utility bundled service or transfers to another ESCO.<sup>23</sup> For these customers, it proposes that the Commission allow ESCOs to seek suspension of distribution service without the need to comply with HEFPA termination procedures.

AARP, in its response (p. 3), states: "Under no circumstances may a customer ever be subject to a suspension of service without receiving the full process accorded under HEFPA, including notice and offering of a DPA." It asserts that any other result would conflict with the objective of Chapter 686 to provide the same HEFPA customer protections to all residential customers. NYSEG/RG&E states that, when a customer voluntarily leaves an ESCO, the ESCO can no longer terminate service to that customer and cannot satisfy a condition precedent for its right to request suspension of delivery service. It claims that SCMC's argument is a sham because it is intended to expand ESCOs' rights to suspend delivery service in circumstances not permitted by HEFPA.

ESCOs are required to comply with HEFPA in terminating commodity service as a condition of being able to request suspension of delivery service. That termination process includes offering the customer a DPA (if the customer is eligible) and notifying the customer that non-payment may lead to service suspension. Neither of these protections are provided by the voluntary act of the customer changing commodity suppliers. Accordingly, in order to seek suspension of a customer's delivery service an ESCO must terminate the customer's commodity contract in accordance with HEFPA procedures, whether the customer has voluntarily changed commodity suppliers or not.

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<sup>23</sup> SCMC asserts that these customers may fail to recognize that they have binding contracts with the ESCO and usually outstanding balances.

We reject NYSEG/RG&E's claim that an ESCO cannot terminate a customer who voluntarily switches commodity suppliers while owing a balance to the ESCO. The obligation for payment under the contract between the customer and ESCO remains in effect because of the presence of arrears, and thus, the ESCO retains its rights pursuant to HEFPA under such circumstances, including the right to terminate service.

C. Utility-Initiated Disconnection

NMPC seeks clarification regarding a distribution utility's right to issue its own final disconnection notice in all cases as part of the administration of its responsibilities under HEFPA and the common law. NYSEG/RG&E requests clarification that it may disconnect delivery service to non-paying customers even though the customers have paid all ESCO charges.

Chapter 686 did not alter the right of a utility to disconnect its service to a residential customer due to non-payment of utility charges, provided it fully complies with the requirements of HEFPA. The absence of ESCO arrears has no bearing on this question, and, in any event, it is unlikely that a customer will have arrears with the utility and not with the ESCO, given our policy on pro-ration of customer payments.

D. Termination of Commodity Service by an ESCO

Prior to terminating their customers' commodity service, ESCOs must comply with PSL §32. That section requires ESCOs to offer a DPAs to their customers, to provide notice of the charges that must be paid to avoid termination, and to comply with procedures for special needs customers and cold weather periods. An ESCO terminating a customer must also provide the customer a notice of the termination that informs the customer that suspension of delivery service may occur (PSL §32(5)(b)).

1. ESCO Suspension Warning When Terminating Commodity Service

Con Edison requests that an ESCO's notice terminating commodity service state that the customer's delivery service is subject to suspension only if the ESCO intends to request

suspension. KeySpan supports Con Edison's request that ESCOs may not threaten suspension of utility service if they have no intention of requesting a suspension. It maintains that this is a long-standing Commission policy applicable to distribution utilities and that the same policy should be made applicable to ESCOs. SCMC takes issue with this recommendation because ESCOs' intentions to request suspension of service is not a pre-condition listed in the statute and the utilities' proposal ignores the fact that suspension is available for up to one year after termination occurs (PSL §32(5)(b)).

HEFPA requires the terminating ESCO to state in its termination notice that suspension of delivery service may occur. It does not permit the notice to exclude this suspension information based on the ESCO's intentions.

2. ESCO Commodity Termination  
Notice to the Distribution Utility

Con Edison states that an ESCO, when it terminates commodity service, only needs to provide in its notice to the distribution utility the amount of arrears and a statement that the ESCO is terminating its service. Con Edison argues that this is the only information it needs to respond to customer inquiries and to pro-rate payments, and that the information regarding termination is communicated through the electronic data interchange (EDI) process. It states that an ESCO is required to provide the distribution utility with the statutorily required information about its termination process only when it initiates a suspension process.

We agree with Con Edison that ESCOs are not required by Chapter 686 or HEFPA to make any demonstration to the utilities as to the consistency of their termination procedures with HEFPA at the time of termination. Information establishing the ESCOs' compliance with HEFPA termination procedures is only required to be submitted to the utilities for ESCO-initiated suspension of delivery service.

E. ESCO-Initiated Suspension of Delivery Service

The June 20 Order finds that ESCOs have the right to seek suspension upon satisfying the requirements of HEFPA;

distribution utilities may rely on ESCO representations that they complied with HEFPA; and distribution utilities must follow HEFPA procedures prior to suspending delivery service, including the issuance of suspension notices and the determination of the eligibility of the customer for special protections.

1. Requirement that Distribution Utilities Follow HEFPA Procedures for ESCO-Initiated Suspensions

Con Edison, NFG, and NYSEG/RG&E oppose the requirement that a distribution utility fulfill HEFPA protections including the issuance of additional suspension notices to the customer, if necessary, when it suspends delivery service at the request of an ESCO. Con Edison claims that the requirement is redundant and likely to engender customer confusion. It argues that the HEFPA amendments require an ESCO to comply with all HEFPA requirements before terminating commodity service and that the statute imposes no more than a ministerial responsibility upon a utility. According to Con Edison, the only responsibility a utility has is to determine whether some hardship would qualify the customer to delay or avoid the physical discontinuance of service. NYSEG/RG&E proposes that, if the ESCO sends a notice requesting suspension in sufficient time for the utility to suspend delivery service within 60 days, no additional HEFPA notice is required. It states that this is consistent with current practice allowing a distribution utility to discontinue service within 60 days of the utility's notice, with no additional notice required. KeySpan argues that it is wasteful and confusing to a customer to require a distribution utility to discharge all HEFPA protections before executing suspension requests, if the ESCO recently terminated commodity service. KeySpan argues that the Con Edison proposal to require ESCOs to follow HEFPA procedures to the point of suspension and the NYSEG/RG&E proposal to exempt the distribution utilities from compliance with HEFPA termination procedures if the ESCO has terminated commodity service within the past 60 days are both reasonable and it urges adoption of both of them. NFG states that ESCOs must perform all suspension functions because only an

ESCO can comply with the requirement to negotiate a DPA as a means to avoid termination or suspension. NYSEG/RG&E also opposes the requirement in the June 20 Order that a distribution utility notify the ESCO of any delay or impediment in implementing suspension of delivery service. However, KeySpan agrees that it is necessary to inform the ESCO of any delay.

NEM argues that the utilities are trying to impose as much of the HEFPA costs as possible onto ESCOs. It proposes a return to the model used to provide HEFPA protections before enactment of Chapter 686—the exemption of ESCOs from compliance with HEFPA and the provision of full HEFPA protections by distribution utilities. In NEM's view, this would minimize the ESCOs' costs of HEFPA compliance. SCMC maintains that the ESCOs and distribution utilities each have HEFPA responsibilities. It argues that distribution utilities have an affirmative obligation to inform ESCOs of any impediment to suspension because the statute requires distribution utilities to apply best efforts to institute suspension promptly.

Based on the comments received, we are modifying the requirements in the June 20 Order relating to the procedures that distribution utilities are required to follow for ESCO-initiated suspensions of delivery service. Distribution utilities are not required to duplicate all HEFPA procedures, such as suspension notices, negotiation of DPA payments, or other related tasks, when effectuating ESCO-initiated suspensions. However, we require the distribution utilities to make determinations as to whether customers qualify for special protections under PSL §32(3) and 16 NYCRR §11.5 and to collect from customers, if possible, at the time of suspension the amounts necessary to avoid suspension.<sup>24</sup> Requiring both the

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<sup>24</sup> The utility personnel performing the suspension need only collect the amount owed to the suspending ESCO, because the general policy on pro-ration does not require that such a payment be pro-rated. If the ESCO and utility are suspending/disconnecting service simultaneously, the full amount due both parties would be required to avoid suspension/disconnection.

ESCOs and the distribution utilities to make determinations of the need for special protections is necessary, in our view, to ensure that the customers in the greatest of need of protection do not lose service without the requisite statutory review. We also believe it vital to provide customers the opportunity to pay distribution utility personnel at the time of suspension to avoid the loss of service. Failure to provide this opportunity would be contrary to the goal of providing the same HEFPA protections to ESCO customers that utility customers now enjoy.

## 2. Timing of Suspension Notices

In its argument against utility duplication of HEFPA protections, KeySpan acknowledges that, because HEFPA allows the ESCOs to request suspension of delivery service within one year after termination of commodity service, it is reasonable for us to conclude that, at some point, too much time has elapsed since HEFPA protections and notices were provided to the customer.

We agree with KeySpan. Because utilities are not required to issue suspension notices, an ESCO requesting suspension of delivery service after the expiration of more than 60 days from the date of the original suspension notice to the customer or when suspension of delivery service does not occur within 60 days from the date of the suspension notice to the customer, the ESCO must send another customer suspension notice (containing updated payment information) or inform the utility that it no longer seeks to suspend service.<sup>25</sup> In order that ESCOs may be able to issue timely suspension notices, we require distribution utilities to inform ESCOs as soon as reasonably practical, that suspension did not take place within these

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<sup>25</sup> When the ESCO seeks suspension of delivery service, two notices are required: (1) a notice to the customer stating that the customer's service is subject to suspension after 15 days, and providing the amount to be paid to avoid suspension, the amount to be paid to resume service after suspension and, if different, the amount necessary to end suspension; and (2) a notice to the utility requesting suspension of the customer's delivery service and certifying that the provisions of PSL §32(5)(a) have been satisfied.

periods, and the next date on which it is estimated that suspension could occur.

3. Special Needs Customers

Con Edison states that ESCOs are responsible for determining whether a customer is entitled to special protections under HEFPA (PSL §32(3)) when commodity service is terminated and when delivery service is suspended. It requests that we establish requirements for the provision to ESCOs by distribution utilities of personal and confidential customer information relating to the customer's qualification for these special protections. NEM expresses concern about the higher degree of ESCO risk associated with special needs customers. TG&E requests that the utilities be directed to provide ESCOs all available information concerning special needs customers to enable ESCOs to implement HEFPA protections for these customers. Con Edison submits that no adverse impacts on special needs customers will occur if ESCOs fulfill their obligations under HEFPA.

ESCOs are required under HEFPA to determine whether a customer subject to termination or suspension qualifies for special protections pursuant to PSL §32(3) and 16 NYCRR §11.5. Implicit in this requirement is that ESCOs will take steps to identify new and existing customers eligible for these special protections. Thus, an ESCO that identifies a customer eligible for HEFPA special protections and chooses to go forward with termination or suspension is required to follow all procedures set out by PSL §32(3) and 16 NYCRR §11.5. In light of the independent ESCO obligations to identify special needs customers, we see no need at this time to require the distribution utilities to transmit customers' private information to the ESCOs absent the customers' prior consent to said transmission.

4. Simultaneous Termination  
and Suspension by ESCO

Con Edison states that the June 20 Order implies that an ESCO must complete its termination process before the utility

implements the ESCO's request to suspend delivery service. It asserts that a better interpretation of the HEFPA amendments would be to permit termination and suspension to occur at the same time and to require ESCOs to continue commodity supply until the utility executes the suspension request. NMPC and SCMC agree.

HEFPA provides that suspension can take place coincidental to termination (PSL §32(5)(b)). Con Edison's proposal that an ESCO continue commodity supply until delivery suspension occurs is not supportable because HEFPA does not require an ESCO to continue commodity supply until a distribution utility executes an ESCO-initiated suspension. While simultaneous termination and suspension may be feasible in some cases, and we expect the utilities to make a good faith efforts to accomplish it, we will neither require the ESCO to provide commodity service up and until suspension nor the utilities to suspend service within 15 days of the ESCO's termination/suspension notice. Once the 15-day notice period has passed without suspension of delivery service, the distribution utility will be responsible for providing commodity to the customer until the suspension is accomplished.<sup>26</sup>

#### 5. Assignment of Receivables

PSL §32(5) requires an ESCO requesting suspension of delivery service to include a statement in its notice to the distribution utility that it "has not assigned its right to obtain payment of the arrears to an entity that is not a utility for purposes of this article" (PSL §32(5)(a)(v)). NFG proposes a prohibition against ESCO assignment of such rights during a pending request for suspension of service, without first rescinding the request. SCMC opposes adoption of this restriction. It maintains that the PSL imposes this obligation upon an ESCO and there is no need to impose additional restrictions.

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<sup>26</sup> The customer always has the option to obtain commodity service from another ESCO, which would eliminate the distribution utility's obligation to provide it.

SCMC also requests approval of a provision that would be inserted in a written agreement between an ESCO and a lending institution that the right to obtain payment of arrears remains with the ESCO. SCMC argues that approval of this provision would avoid any question that conveyance of a lien in receivables by an ESCO to a lending institution constitutes an assignment of the right to obtain payment of arrears to a non-utility. It states that to obtain access to capital and financing, ESCOs may need to securitize financial obligations by conveying liens in their receivables to lending entities, potentially through a variety of financial instruments.

KeySpan and NYSEG/RG&E oppose SCMC's request. NYSEG/RG&E states that approval of the provision suggested by SCMC would create a fiction that allows an ESCO to circumvent the prohibition and that the clarification SCMC seeks requires an amendment to HEFPA.

We conclude that an ESCO is responsible for arranging its business affairs, including contractual provisions with lending institutions, to enable it to comply with HEFPA provisions relating to suspension of delivery service.<sup>27</sup> We express no opinion on the adequacy of the language proffered by SCMC and see no reason to review the hypothetical in the context of rehearing petitions. We also note that assigning collection rights while a suspension request is pending, as NFG posits, would violate HEFPA unless the suspension request is withdrawn.

#### 6. One-Year Limitation

PSL §32(5)(a)(vi) and the June 20 Order provide that an ESCO may request suspension of a non-paying customer's delivery service within one year after its termination of commodity service, assuming the customer receives a consolidated

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<sup>27</sup> We assume that the utility will make a good faith effort to work with ESCOs regarding the issue of pledging customer accounts to non-utilities and compliance with PSL §32(5)(a)(v). If the parties are unable to come to a resolution of the issue, the dispute resolution procedure contained in the UBP is available to assist in resolving any disputes.

bill. TG&E suggests that the ESCO has the right to suspend delivery service for terminations that take place from the date of the June 20 Order or for one year prior to the adoption of HEFPA regulations. SCMC states that, if rules are adopted more than one year after the June 20 Order, ESCOs will be precluded from seeking suspension of accounts terminated more than one year before adoption of the HEFPA rules and, thus lose their right to suspension. It requests tolling of the one year period established in the HEFPA amendments (PSL §32 (5)(a)(vi) for suspensions of delivery service until the adoption of HEFPA rules.

HEFPA does not provide the opportunity to toll the requirement of PSL §32(5)(a)(vi) during the regulatory process to implement the necessary rules and regulations required by PSL §32(5)(a)(i). In addition, PSL §53 prohibits us from waiving any provision of the statute. We intend to proceed as quickly as possible after the issuance of this Order to issue for comment, in accordance with SAPA requirements, draft regulations to implement HEFPA.

#### 7. Indemnification

Con Edison states that liability may arise from an ESCO's direction to suspend delivery service following an ESCO's wrongful termination of commodity supply. It argues that the statute does not give the distribution utility discretion to decline to follow an ESCO's direction, upon satisfaction of certain conditions (PSL §32(5)), and concludes that the utility should be permitted to require indemnification by the ESCO for wrongful suspensions directed by the ESCO. NYSEG/RG&E requests indemnification against liability for wrongful ESCO-initiated suspensions or terminations and for any liability arising from the refusal to suspend or terminate service in certain instances. It asserts that a utility may incur liability, absent any negligence on its part, by acting in a manner that would subject it to customer claims under the contracts between the ESCOs and the customer, if the utility refuses to suspend delivery service when necessary to protect the health, safety, or welfare of a particular customer. KeySpan asserts that it is

not a sufficient answer to the indemnification question to claim that if the utility is not negligent, no liability will arise. It points out that, typically, a distribution utility will have deeper pockets than an ESCO and will most likely be named as a defendant whether there is liability or not. Thus, KeySpan states, indemnification is required for protection against attorney's fees and court costs, even if the distribution utility is successful in obtaining dismissal of the action.

SCMC states that, if the utility believes suspension of delivery service is improper, it may refuse to suspend service and compliance with HEFPA procedures will protect it against liability claims. SCMC urges rejection of this request because new indemnification obligations will act to exacerbate the heavy financial burden on ESCOs and limit their capacity to grow their businesses.

Contrary to Con Edison's view, HEFPA does not compel a distribution utility to execute an ESCO-initiated suspension when circumstances exist to justify the utility's refusal to comply. For example, a distribution utility that determines that an ESCO did not follow HEFPA procedures or failed to provide the requisite affirmation that it complied with the provisions of PSL §32(5)(a), is not required to suspend service. Similarly, a distribution utility that identifies the need for special HEFPA protections is not required to suspend delivery service if those protections have not been provided.

KeySpan is correct that the distribution utility may be named in a suit because of its guaranteed revenue stream from ratepayers and may incur attorney's fees or other costs in its defense. In balancing the potential impact on ESCOs and their ability to continue serving customers against the potential costs the utilities might incur to defend themselves against unjustified claims, we do not find a sufficient basis at this time to require ESCOs to provide indemnification to the distribution utilities for wrongful service suspension. As we gain experience under the new statute, an indemnification requirement may be justified. We are willing to reexamine this

issue if and when circumstances and actual experience justify such a requirement.

NYSEG/RG&E also claims that the June 20 Order incorrectly asserts that if the distribution utility is not negligent in suspending service that it cannot be found liable for negligence if the customer sues. It believes that the use of the term "negligence" in the June 20 Order changed the liability standard applicable to utilities from gross negligence to ordinary negligence, thereby increasing the liability of the utilities.

NYSEG/RG&E is incorrect. We did not intend in our June 20 Order to change in any manner the long established negligence standards which apply to the wide variety of utility activities. Further, assuming arguendo the proper application of the gross negligence standard posited by NYSEG/RG&E, the utility's concerns with potential liability are even further removed.

#### 8. Amount Due to End Suspension

To avoid suspension or restore service, NFG proposes that a customer pay all charges incurred between ESCO termination of commodity supply and the utility's suspension of delivery service. Otherwise, it asserts, an increase in termination and suspension notices will occur as the utilities seek to protect their pro-rata interests in all customer payments.

This issue arises from an exception to our pro-ration policy. If an ESCO seeks suspension of a customer's service, our policy, designed to maximize access to utility services, calls for payments to be first applied to the arrears that form the basis for the threatened suspension. In these circumstances, and assuming the utility is not simultaneously seeking to disconnect service, a customer's partial payment would not be subject to pro-ration until the ESCO arrears identified in the suspension notice are satisfied.

NFG's proposal, that the customer pay both the ESCO charges which form the basis for the threatened suspension and the utility arrears even though a utility is not seeking

disconnection of its service, is contrary to our pro-ration policy and contrary to HEFPA's intent.

Con Edison states that the statutory intent appears to require a customer to pay the full amount due for commodity and delivery charges in order to resume service, so that no separate utility-initiated delivery service disconnection procedure is required to collect the utility's arrears. Con Edison is correct. Customers are required to pay the ESCO arrears and utility arrears as set forth in the suspension notice in order to restore service. PSL §32(5)(c) requires pro-ration of a customer's payment after suspension between the ESCO and utility, and thus the customer must satisfy the debts owing to both the ESCO and the utility (as set forth in the suspension notice) before the reconnection of service. Any charges accrued in excess of the amounts in the suspension notices would continue to be carried as arrears on the customer's bill.

NMPC posits that circumstances could arise where the amount the customer would have paid to the distribution utility for commodity and delivery service is less than the combined amount owed to the ESCO for commodity service and to the utility for delivery service. It assumes that the unpaid amount would remain an obligation of the customer and questions whether the cycle for suspension of service could proceed again based in part on the remaining arrears.

HEFPA allows a customer to end an ESCO-initiated suspension of delivery service by paying the lesser amount of combined utility delivery and ESCO commodity charges or bundled utility commodity and delivery service. We interpret this provision to mean that an ESCO may be required to accept a lesser amount for its commodity service for the purpose of allowing a customer to end suspension of services. The statute does not provide that such a payment is in full satisfaction of the ESCO's charges, and the customer would remain liable for any difference between the total arrears owed and the payment made to avoid suspension (PSL §32(6)). This amount is likely to be small and it remains a charge for services rendered, but the

statute does not allow these remaining arrears to form the basis for a second service suspension.

NMPC also seeks clarification regarding the period the utility will use for calculating the amount the customer would have paid for utility commodity and delivery service. For example, the company asks, should the historic period of the customer's service be used or should bills that have unsatisfied charges be the basis.

The distribution utilities shall propose a method for this calculation that would provide a reasonable bill comparison, consistent with the statutory intent that the customer, to reinstate service, may pay a utility-based charge if it is less than the ESCO-based charge.<sup>28</sup>

9. Resumption of Service

NMPC seeks affirmation that the HEFPA amendments require an ESCO to be willing to honor the balance of its commodity contract if a customer pays arrears that are the basis for termination. We agree with NMPC and note that the requirement of resumption of service by ESCOs would ultimately be governed by the terms of the contract between the ESCO and the customer, which would undoubtedly cover matters beyond payment for services that are the subject of HEFPA.

10. Suspension Fee

The June 20 Order requires distribution utilities to base their charges for ESCO-initiated suspensions on the average embedded cost incurred to disconnect a residential customer's delivery service. It also directs the utilities to calculate this cost based on costs filed in the Unbundling Track of Case 00-M-0504. Con Edison claims that the average cost for utility-initiated disconnection may not be representative of the process used to suspend delivery service at an ESCO's request because the company may be required to follow a process for ESCO-initiated suspensions that is different from the process it follows for utility-initiated disconnections. It requests that

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<sup>28</sup> This situation should not arise, however, if ESCOs provide services to consumers at a lower cost than the utility does.

we permit utilities to impose charges based on the particular activity required in each instance. KeySpan claims that use of cost data from the Unbundling Track effectively denies distribution utilities the reasonable compensation assured by the HEFPA amendments for suspending delivery service at an ESCO's request because the data will be three years old and out of date when ESCO-initiated suspensions will begin to occur. Further, it asserts that its data in the Unbundling Track is not particularly useful for determining the average embedded cost of residential service suspensions because the company's study did not analyze costs that belong to the delivery functions. KeySpan proposes that the utilities use more up to date costs in calculating the average embedded costs of residential service suspensions. NEM submits that mandatory purchase of accounts receivable would temper the contentious issue of determining embedded cost-based suspension charges, noting that any costs under-recovered by this model can easily be recovered from ratepayers in future rate cases.

We reject Con Edison's argument that using average costs to establish a tariff charge for disconnecting service to an ESCO customer is unrepresentative. Average costs have long served as the basis for setting rates, despite the fact that actual costs may vary from situation to situation. In addition, there is no evidence at this time that the distribution utilities' costs of providing this service for ESCOs would vary to any significant extent from the cost they incur, on average, to disconnect service based on the non-payment for services they supplied. If experience demonstrates that there is a significant difference in cost, we are willing to reexamine this issue in the future.

We also disagree with KeySpan's objections that the embedded cost studies in Case 00-M-0504 are too old to be used for these purposes. One of the benefits of using the costs in the company's embedded cost of service study is that the study has separated costs into identified functions, albeit not specifically into costs for service disconnection. Beginning the calculation from those studies will help ensure that costs

are not double-counted and that disconnection fees remain just and reasonable.

Notwithstanding the above, KeySpan or any other utility may perform an updated cost of service study and submit it in Case 00-M-0504. Alternately, an updated study can be submitted when any utility petitions to change its rates, and the suspension charge can be reviewed at that time.

Social Services Law §131-s

A. Eligibility of ESCOs to Receive Payments

Social Services Law (SSL) §131-s provides that, under certain circumstances, the State is responsible for paying a gas corporation, electric corporation, or municipality for a customer's current charges and four months of the customer's arrears, and for guaranteeing future payments. In addition, PSL §65-b prohibits a gas or electric corporation from disconnecting service if the State guarantees payment to prevent the customer's loss of service.

NYSEG/RG&E maintains that ESCOs are not eligible under SSL §131-s to receive direct payments from social services agencies because they are not included within the definition of an electric or gas corporation in PSL Article 1 (PSL §§2(11) and (13)) and are therefore not considered electric or gas corporations under the SSL. It adds that ESCOs are not entitled to payments because they cannot guarantee prospective service as required by the SSL. In the event it is determined that ESCOs may receive social services payments, NYSEG/RG&E proposes a requirement that ESCOs receiving the payments comply with all of the obligations associated with such receipt, including the obligation to continue commodity supply to the customer and to hold remaining arrears in abeyance. NFG states that the HEFPA amendments require an ESCO that receives SSL §131-s payments to continue to supply or to restore commodity service.

NYC HRA disagrees with NYSEG/RG&E in part and asserts that ESCOs may receive payments under SSL §131-s provided that such payments will in fact guarantee service and provide protections against termination. NYC HRA agrees with NYSEG/RG&E

and NFG that ESCOs must comply with all obligations associated with receipt of the payments, including the obligation to continue commodity service and to hold arrears in abeyance.

AARP and SCMC argue that the arrears owed to ESCOs must be deemed eligible for payment under SSL §131-s. They state that ESCOs are clearly defined as utilities and gas and electric corporations for the purpose of PSL Article 2 (PSL §§30 and 32(5)(a)(iv)and (v)) and that SSL §131-s applies because payments to ESCOs are needed to prevent shut-offs or to restore service. SCMC further argues that ESCOS are eligible to receive social services payments (PSL §§32(5)(d), 35(1)(d)). SCMC opposes the suggestion, however, that ESCOs comply with all social service rules applicable to distribution utilities. It suggests that ESCOs comply with rules that social services agencies deem relevant and applicable to ESCOs.

HEFPA establishes the ESCO's eligibility to receive payments under SSL §131-s. PSL §§32(5)(a)(iv), and (v) require ESCOs to resume service to residential customers "upon receipt of a direct payment or written guarantee of payment" from local social services officials. Further, PSL §53 defines, for the purposes of HEFPA, a gas or electric corporation as "any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers." Contrary to some commentators' views, ESCOs have the authority to guarantee the continuation of service because HEFPA establishes their right to terminate commodity and to suspend delivery. Therefore, ESCOs can control customers' receipt of service and guarantee its continuation. In accepting payments under SSL §131-s, including four months of arrears, and in guaranteeing future service, ESCOs, like the distribution utilities, must hold any other arrears in abeyance.

#### B. Termination

The June 20 Order interpreted the permissive provisions of PSL §32 (allowing termination of commodity supply) and the mandatory provisions of PSL §§35 and 65-b (mandating service) to require ESCOS to refrain from: (1) terminating a residential customer who is a public assistance applicant or

recipient unless and until the appropriate local social services official denies a request for payment or until the ESCO sales agreement expires and (2) seeking to suspend delivery service to a residential customer who is a public assistance applicant or recipient. SCMC claims that the June 20 Order conveys the impression that an ESCO may not terminate service for a public assistance customer, even though the customer is no longer receiving financial assistance from the State. It requests that we clarify that an ESCO is authorized to terminate commodity service and/or request suspension of delivery service in the event that it is determined that a customer is ineligible for assistance.

A customer that is no longer receiving financial assistance from the State is not a public assistance customer. The discussion in our June 20 Order only applies to residential customers who are receiving or who have applied for state assistance.

C. Pro-ration

NFG requests modification of the June 20 Order to eliminate pro-ration of payments to the extent that it would result in utility receipt of less than what it is entitled to under the SSL. NYSEG/RG&E states that a statutory amendment is required to authorize pro-rata allocation of payments made by the Department of Social Services (DSS) to a customer, and thus, our June 20 Order cannot be implemented. KeySpan asserts that it is not permissible under SSL §131-s to pro-rate payments made by DSS on behalf of a customer. It recommends that the Office of Temporary and Disability Assistance (OTDA), DPS Staff, and other interested parties address this issue in a collaborative session on the implementation of the HEFPA amendments and SSL §131-s. NYC HRA agrees with KeySpan's proposal for a collaborative consideration of the issues relating to pro-ration of SSL §131-s payments. It supports the implementation of SSL §131-s to maintain the ability of social services districts to protect public assistance and other low income customers from disconnection of natural gas and electric service. NEM states

that pro-ration of social services payments is necessary to protect the health and safety of New York consumers.

We support the objective stated by NYC HRA and others, and our Staff is working with OTDA to implement the SSL requirements in a manner that protects the health and safety of public assistance recipients. The questions relating to the pro-ration of SSL §131-s payments depend to a great extent upon specific circumstances, including the timing of the initiation of commodity supply to a public assistance customer, and they raise issues that are worthy of careful consideration by the parties concerned with the interdependent SSL and PSL provisions. As suggested by KeySpan and NYC HRA, interested parties should consider in a collaborative fashion the interdependence of our pro-ration policy with the health and safety policies which underlie §131-s payments and report their recommendations to us. We will not require pro-ration of payments made by OTDA pending the receipt of the parties' recommendations.

#### ESCO Accounts Receivable

##### A. Mandating Distribution Utility Purchase

NEM, supported by ECNY, argues that the most efficient means of providing HEFPA protections to residential customers is to require distribution utilities to purchase ESCO accounts receivable. It argues that this policy would allow ESCOs to avoid costly infrastructure investments when migration rates are low in nascent competitive markets. It asserts that this policy would solve all of the HEFPA implementation issues at the lowest possible cost and would give ESCOs the time to discern whether it is cost effective to install new computer systems for billing or customer care functions. TG&E states that mandating purchase of accounts receivable is necessary to ensure the health and safety of ratepayers due to the customer disruptions and confusion that will result from HEFPA implementation. It urges us to provide assurance to utilities that they may recover any additional bad debt that they may incur as a result of purchasing accounts receivables of ESCOs. AARP generally

supports the purchase of accounts receivable by distribution utilities, provided that it does not result in utility ratepayers assuming ESCO business risks, such as losses due to uncollectibles.

The distribution utilities oppose the proposal.<sup>29</sup> Con Edison asserts that the reasons given by NEM and TG&E - easier and less expensive ESCO compliance and the limitation of ESCOs' HEFPA responsibilities - do not constitute a proper basis for mandating purchase of accounts receivable. It states that the mandate would be tantamount to requiring utilities to provide financing to ESCOs in a form that entails material risks and costs. Con Edison identifies the following risks and costs: operations risks, increased working capital, higher costs and expenses, exposure to bad debt, and risk of recovery of losses. It recognizes that a utility may elect to offer such a program, but argues that a number of legal questions should impede a Commission mandate to purchase ESCO receivables.

NFG maintains that the ESCOs favor the mandate because it will reduce their creditworthiness requirements. NFG further asserts that the mandate will do nothing to minimize the complexity and customer confusion over HEFPA because many ESCOs will continue to issue their own consolidated bills. It contends that utilities purchasing accounts receivable will provide a revenue guarantee to the ESCOs and transform commodity competition into a risk-free business. NFG also argues that if HEFPA burdens are as great as the ESCOs predict, they will encourage ESCOs and utilities to undertake voluntary arrangements for the purchase of accounts receivable.

Distinguishing the voluntary O&R arrangement, NYSEG/RG&E urges rejection of the request to mandate purchase of receivables. It states that the request is beyond our authority because no express or implied authority is provided in the PSL

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<sup>29</sup> Some distribution utilities maintain that the required SAPA notice for this rule making does not include the issue of mandatory purchase of accounts receivable. The SAPA notice relating to this Order does state that the issue is pending.

to mandate the purchase of ESCO receivables. Such a mandate could also raise serious legal questions under the Uniform Commercial Code and the Federal Debt Collection Practices Act.

KeySpan argues that substantial legal questions exist as to the propriety of our making a business decision for distribution utilities. It identifies several difficulties to the implementation of any mandate, including the need for Commission involvement in identifying a prudent discount rate and overseeing negotiations and terms, and the need to set rates that hold utilities harmless from any increased costs that could result from the implementation of the policy. KeySpan also contends that the mandate translates into a subsidy for ESCOs through higher utility costs and rates, which may not be appropriate or desirable.

Several distribution utilities have entered into agreements with ESCOs to purchase their accounts receivable as a means of advancing retail access. These agreements are based upon the independent business decisions of those ESCOs and utilities, and the reasonableness of the agreements is highly dependent on the terms and conditions negotiated between the parties.<sup>30</sup> In our view, the ESCOs and distribution utilities are in the best position to take responsibility for negotiating the business arrangements and contractual terms required for the latter to purchase ESCOs' accounts receivable. While ESCO compliance with HEFPA is required, nothing in the law precludes the ESCOs from negotiating agreements for the purchase of accounts receivable to assist in their implementation of HEFPA requirements.

B. Distribution Utility Collection

O&R, supported by NEM, TG&E and SCMC, requests that we find that a distribution utility that purchases an ESCO's accounts receivable thereby assumes its HEFPA rights and

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<sup>30</sup> It appears that the purchase of accounts receivable, when coupled with other aspects of an aggressive retail access program, may help foster the development of residential retail markets.

responsibilities regarding the accounts of its residential customers. O&R seeks to follow the same collection and termination procedures for every residential account, whether accounts receivable are purchased from an ESCO or not. O&R proposes to terminate the ESCO's commodity service at the same time and according to the same process as it would disconnect its delivery service. This method, O&R contends, provides full HEFPA protections for ESCO customers, fulfills all statutory requirements, minimizes customer confusion, and provides administrative efficiencies. TG&E supports a finding that a utility purchasing an ESCO's accounts receivable may initiate suspension of delivery service for failure to pay for commodity and delivery service.

We agree that a utility that purchases an ESCO's accounts receivable may combine the procedures for termination of the ESCO commodity service and utility delivery service. The combination of the processes, however, should not result in any diminishing of the customer's HEFPA rights.

O&R, supported by NEM, states that a utility purchasing ESCO accounts receivable would be responsible for managing the ESCO's accounts and performing credit and collection activities. It proposes that, as a result, the customer would not have the option provided in HEFPA (PSL §32(5)(d)) of paying the lesser of the sum of ESCO commodity and utility delivery service charges or bundled utility charges to end the suspension of service. AARP states in opposition that purchase of accounts receivable cannot have the effect of eliminating a customer's statutory rights. It maintains that the distribution utility is required to adhere to the provisions of PSL §32(5)(d) whether it purchases the ESCO's accounts receivables or not.

HEFPA allows the customer to pay the lesser of the two amounts identified in the statute, which is clearly intended as a consumer protection. As AARP points out, the distribution utility and ESCO should not have the ability to circumvent this statutory protection. Thus, O&R, or any other distribution utility that purchases accounts receivable, is required to end

suspension based upon the payment of the lesser of the two amounts specified in PSL §32(5)(d).

Multiple Dwellings and Submetering

A. ESCO Compliance with PSL §§33 and 34

PSL §§33 and 34 establish procedures for discontinuance of gas or electric service to an entire multiple dwelling and to two-family dwellings, including the requirement for notices to tenants and an opportunity for tenants to make timely payments of utility bills directly. PSL §32(5)(a) authorizes ESCOs to request suspension of delivery service to such buildings upon compliance with specific conditions and procedures.

Strategic Energy contends that HEFPA explicitly and only requires distribution utilities to comply with the procedures established in PSL §33 applicable to terminating service to multiple dwellings. It points to the use of "public utility company" in the section to support its claim that only traditional utilities, with an obligation to serve and the ability to shut off electricity, are required to follow PSL §33. Strategic Energy states that it is not possible for ESCOs to comply with these procedures because they have no right of entry to post notices. NEM, supported by Strategic Energy, claims that ESCOs would need to make significant investments to identify and track multiple residential dwellings, while utilities are now able to identify these buildings and any separately metered tenants.

SCMC requests that, if an ESCO has no right to suspend service to these dwellings, it should not be required to abide by HEFPA termination procedures. SCMC states that it is necessary to view termination and suspension rights as operating in tandem - termination obligations are only imposed if the ESCO has the right to seek suspension of service, and, if no right of suspension is provided, the obligation to adhere to termination procedures is not imposed.

Because HEFPA authorizes ESCOs to suspend delivery service for failure of an owner to pay bills for gas or electric

commodity supply to a multiple dwelling (PSL §32(5)(a)), and because ESCOs are required to comply with HEFPA, they are subject to the requirements of PSL §§33 and 34.<sup>31</sup> ESCOs and distribution utilities are strongly encouraged to coordinate their efforts regarding the termination or suspension of any services to such premises.

B. ESCO Provision of HEFPA Protections -  
Master-Metered Multiple Dwellings

PSL §30 provides that HEFPA applies to the provision of all or any part of the gas or electric service provided to any residential customer by a gas or electric corporation. PSL §53 defines a gas or electric corporation as "any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers." Strategic Energy asserts that an ESCO has no obligation to provide HEFPA protections to owners of multiple dwellings because the owners are not residential customers.

The HEFPA provisions establish protections for service provided directly to residential end-use customers. Thus, HEFPA protections are not available to owners of master-metered multiple dwellings who receive service as commercial customers. However, residents of the multiple dwelling are afforded protections pursuant to PSL §§33 and 34.

C. Entities that Submeter

NMPC seeks a clarification that owners of multiple dwellings who submeter electricity to residential tenants, although required to provide HEFPA protections, do not have any right to seek suspension of delivery service and that NMPC's compliance tariff filings need only state that such entities are obligated to provide HEFPA protections to residential customers.

Those who submeter electricity for sale to residential end-users are utilities within the meaning of Article 2 of the PSL. Accordingly, those entities must provide all HEFPA

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<sup>31</sup> Chapter 686 provides ESCOs the ability to seek a suspension of delivery service only with respect to commercial customers that own multiple and two-family dwellings.

protections. We agree with NMPC that entities that submeter do not have the right to suspend a customer's service for non-payment. PSL §32(5)(a) provides the right of suspension to entities supplying only commodity service and those who submeter supply both commodity and delivery service.

D. Budget Billing to Condominium and Cooperative Associations

PSL §38 requires that budget billing plans be offered to condominium associations or cooperative housing corporations, regardless of whether they are classified as residential or commercial customers. Strategic Energy requests clarification as to whether this provision requires an ESCO to provide budget billing to these entities and expresses concern that the ESCOs may encounter difficulties in identifying and tracking them.

PSL §38 requires ESCOs to offer levelized billing plans to its customers. ESCOs have the responsibility to comply with this provision and to identify eligible customers.

Service Quality Benchmarks and Assessments

Con Edison, KeySpan, and NYSEG/RG&E predict customer confusion and anger over the HEFPA amendments. They assert that it is inequitable to exact service penalties from distribution utilities if customer contacts or complaints increase. They request an expression of willingness to waive penalties for failure to meet the service quality benchmarks established in their various rate plans if they can show that the failure resulted from the implementation of the HEFPA amendments. Con Edison states that the market changes resulting from the HEFPA amendments were not anticipated at the time service quality programs were put in place. It states that the HEFPA amendments should not be the cause of any penalties incurred by utilities making good faith efforts to explain them to customers.

The implementation of HEFPA may cause customer confusion, which may translate into an increase in customer complaints for both utilities and ESCOs. If this occurs, utilities are free to request consideration of these factors on a case-specific basis when we review the results of their service quality programs.

Need for UBP and EDI Revisions

Con Edison identifies several issues relating to HEFPA implementation that may require changes in UBP provisions. These include: timing of ESCO termination and enrollment with the distribution utility or another ESCO; the need to permit a drop due to ESCO termination without prior notice to the utility; changes to ESCO sales agreements referencing the ESCO right to suspend delivery service upon certain conditions; and, additional information that ESCOs may need to obtain from distribution utilities relating to special needs customers. NFG requests that the Commission specify that ESCO termination of commodity service is effective on the next scheduled meter reading date, in accordance with existing UBP parameters.

KeySpan states that it would not be wise to compel compliance with the HEFPA changes until the necessary support systems are in place, particularly when the health and welfare of customers are involved. NMPC seeks clarification that our objective is to require EDI for communications concerning suspension of delivery service. It requests referral as soon as practical to the EDI Collaborative for development of necessary EDI protocols.

With respect to ESCO commodity termination, the UBP provisions are consistent with the HEFPA requirement that the ESCO give the customer and the distribution utility 15-days advance notice of termination. Accordingly, ESCO terminations pursuant to HEFPA do not warrant a modification to existing UBP provisions. However, due to the HEFPA amendments, it will be necessary to amend the UBP and the EDI transaction sets, including procedures for communications relating to ESCO-initiated suspensions of delivery service. In addition, revisions to the UBP and EDI protocols will be required for pro-ration of partial payments on consolidated bills. Nevertheless, HEFPA took effect on June 20, 2003, and it is not possible to delay the implementation of the statutory requirements. Further, the implementation of pro-ration, as soon as possible, is necessary to establish an equitable allocation of payments between ESCOs and distribution utilities. Accordingly, we will

require HEFPA implementation and pro-ration to begin before changes to the UBP and the EDI protocols are finalized. For now, we will require distribution utilities and ESCOs to establish separate, non-UBP procedures and to use non-EDI procedures, as necessary, to implement our pro-ration policy. Staff should initiate immediately a collaborative process to develop any required changes to the UBPs and EDI protocols to allow the effective electronic communication of information and to establish statewide standard procedures.

In one instance, a change to the UBP is essential to implement a determination in this Order. We require that any entity issuing a consolidated bill to post the arrears of a commodity-terminating ESCO for a certain length of time. This requirement conflicts with UBP §9.J.6. That provision authorizes a billing party to stop posting an ESCO's past due balance after payment of the final bill or 23 days after its issuance, whichever occurs sooner. Accordingly, we amend UBP §9.J.6. as set forth in Appendix A to this order.

Fair Debt Collection Practices Act (FDCPA)

KeySpan states that the FDCPA is a complicated statute that defies easy answers. It requests an analysis of the implications that implementation of the HEFPA amendments will have for utilities in light of the FDCP because the federal penalties are severe. NYSEG/RG&E requests clarification that we intend to adhere to the definition of "debt collector" contained in the Act (15 USC §1692a(6)).

The FDCPA may apply to activities of the distribution utilities, because, although they do not engage in collection activities as their principal business, they do regularly engage in these activities as part of their collection of payments from customers. The June 20 Order was not intended to limit the FDCPA, nor was it intended to address the application of that law to the utilities. Utilities and ESCOs engaging in the collection of debt from customers must abide by all applicable federal and State statutes, including the FDCPA.

Definition of ESCO as a Utility

NEM, supported by ECNY, and Advantage Energy express concern relating to the definition of ESCOs as utilities. They state that this concern arises because of the statement in the June 20 Order that utilities are defined in PSL §53 to include ESCOs and distribution utilities. NEM states that the purpose of HEFPA is to protect customers from monopoly actions and pricing. Because ESCOs are not monopolies, it argues, there is no reason to define ESCOs as utilities and impose on them utility obligations, such as price controls and safety regulations. SCMC points out that PSL §53 states that an ESCO is deemed to be a utility corporation only for purposes of PSL Article 2 and that this does not, in any way, confer status as a utility corporation on an ESCO for the purpose of the remaining PSL provisions. NYSEG/RG&E states that NEM misunderstands the basic import of HEFPA. It asserts that HEFPA defines the term "utility" to include ESCOs only for the purposes of HEFPA.

NYSEG/RG&E and SCMC are correct. The June 20 Order addresses the inclusion of ESCOs within the definition of utility only for the purpose of implementing and adhering to the provisions of PSL Article 2.

HEFPA Standards Advisory Group

SCMC states that implementing HEFPA is a complex task, involving numerous questions, concerns, and operational matters. It asserts that the traditional method of resolving issues by submission of a petition and a Commission decision on outstanding issues or operational problems is inadequate to respond to the needs of the parties. It proposes that we establish a HEFPA Standards Advisory Group to resolve questions and issues relating to HEFPA implementation. If our input or direction is deemed necessary by the Group, it would present the matter to us.

NYSEG/RG&E urges rejection of this proposal. It states that the proposal would effectively delegate Commission authority to ESCOs, utilities, and consumer groups, which is not authorized in the PSL.

We have been delegated authority by the State to make the decisions necessary to implement the provisions of the PSL. This authority cannot be delegated to the advisory group proposed by SCMC. In the recently amended UBPs, we established a Staff team and dispute resolution process to expeditiously resolve disputes among distribution utilities, ESCOs, and direct customers. This process should provide a more efficient method to address questions and issues relating to HEFPA implementation.

### Procedural Matters

#### A. Filing Petitions for Rehearing on HEFPA Rules

NYSEG/RG&E proposes that the State enact amendments to HEFPA to resolve the issues it raised in its rehearing petition and the matters discussed in the parties' collaborative sessions. It further states that the timeframe under PSL §22 for filing petitions on matters that may merit rehearing and clarification commence from the date of our order adopting rules and regulations implementing HEFPA. It reserves the right to review and request rehearing of the HEFPA rules and regulations when they become ripe for review.

The adoption of rules published in the New York Code of Rules and Regulations includes procedures established in the State Administrative Procedure Act that provide opportunities for public comment and requests for rehearing. NYSEG/RG&E's right to due process is fully protected. The suggestion that amendments to the law are in order is within the purview of the State Legislature and Executive and will not be addressed here.

#### B. Compliance Timing

##### 1. HEFPA Protections

SCMC requests a delay in ESCO compliance with HEFPA procedures for commodity termination and customer complaints until we adopt final regulations implementing HEFPA. It states that the June 20 Order requires ESCOs to comply with HEFPA procedures for termination of residential commodity service and complaint handling, and further provides that ESCO-initiated suspension of delivery service will not be implemented until the

required regulations are established. SCMC argues that the distinction drawn in the June 20 Order between commodity termination and service suspension is arbitrary, capricious, and without basis in law or fact. It reasons that ESCOs' HEFPA obligations and the right to suspend delivery service are part of a comprehensive statutory solution intended to confer HEFPA protections on ESCO customers, and, accordingly, all of the HEFPA provisions should be effective simultaneously.

NYSEG/RG&E disputes SCMC's claim that ESCO compliance with HEFPA termination and complaint procedures are directly connected to the right to seek suspension of delivery service. This conclusion, according to NYSEG/RG&E, would require an interpretation, unsupported by the HEFPA amendments, that the ESCO right to seek suspension is a condition precedent to ESCO compliance with HEFPA. It asserts that the HEFPA amendments impose requirements upon ESCOs to implement HEFPA protections, and any delay is contrary to the statutory intent and inconsistent with provisions granting ESCOs the right to request suspension. It also notes that the statute requires us to adopt regulations establishing the form and manner of the ESCO notice requesting suspension of delivery service. According to NYSEG/RG&E, since the obligation to adopt regulations became effective on June 18, 2003, the law intended the suspension process to go into effect after the regulations are adopted.

HEFPA does not afford us the opportunity to postpone or temporarily waive an ESCO's compliance with the termination and complaint handling provisions of HEFPA. Further, PSL §32(5)(a)(i) provides that regulations are necessary to establish procedures relating to ESCO-initiated suspensions of delivery service, and those regulations are not yet finalized. Further, the linkage between the implementation of HEFPA protections for consumers and the ESCOs' right to suspend service is not, in our view, explicitly stated or implicitly required by the law, as suggested by SCMC.

## 2. Budget Billing

Con Edison states that ESCO implementation of HEFPA requirements with respect to budget payment plans is

particularly troublesome because it requires utilities to modify their billing systems. It proposes that ESCOs require customers on budget billing to take service through dual billing.

SCMC opposes these requests arguing that it is unfair to require the ESCOs to comply with the statutory termination procedures effective June 18, 2003, while allowing distribution utilities to delay implementation of their obligations. NEM sees only more cost and confusion if Con Edison's approach is adopted.

HEFPA requires ESCOs to provide budget payment options to customers. Additionally, we have previously recognized the importance of providing a consolidated bill option to customers and the need to provide this option to facilitate market development.<sup>32</sup> Therefore, forcing customers to accept a dual bill option if they choose a budget billing plan will not satisfy the billing policies we have previously implemented. We are not now setting a deadline by which the necessary computer and other changes must be in place to provide a consolidated bill to customers who elect budget billing, but we expect all parties to begin efforts immediately to implement this provision of HEFPA. Staff should report to us any difficulty with implementing plans and schedules for providing a single bill for these customers. We may reconsider establishing a date certain for compliance, depending on the parties' progress and plans.

C. Distribution Utility Tariffs

NYSEG/RG&E urges suspension of the requirement that utilities file tariffs in compliance with the June 20 Order, pending the development and adoption of the HEFPA rules. This issue is moot because the distribution utilities have filed tariff changes in response to the June 20 Order. The tariffs were made effective upon filing on a temporary basis. Any distribution utility that needs to modify its tariff filings due to the issues clarified in this Order is directed to file such tariffs within 30 days of this Order.

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<sup>32</sup> Cases 99-M-0631, supra, Order Providing for Customer Choice of Billing Entity (issued March 22, 2000).

D. Social Services Systems

NYC HRA requests that HEFPA implementation be designed to ensure the continued operation of the automated systems and links used by social services agencies to work with ESCOs and utilities to assure continuation of service for vulnerable New Yorkers. Distribution utilities and ESCOs are directed to work closely with governmental agencies, like NYC HRA, to ensure that the systems that currently service special needs and other vulnerable customers are not disrupted by the implementation of Chapter 686.

CONCLUSION

For the reasons set forth above, the petitions for rehearing and clarification of our February 19 Order, June 20 Order, and August 15 Order are granted to the extent set forth herein, and are otherwise denied.

The Commission orders:

1. Each gas corporation, electric corporation, and municipality providing residential gas or electric service is directed to file upon 30 days notice tariff revisions in accordance with the discussion in the body of this order to become effective on a temporary basis 60 days after the date of this order, revise any operating procedures necessary to implement this order, and serve copies of the revised tariffs and procedures on all parties in this proceeding. The tariff revisions shall not become effective on a permanent basis until approved by the Commission.

2. Each gas corporation, electric corporation, and municipality is directed to file upon 30 days notice tariff revisions setting forth a proposed method to calculate the alternate payment amount to end the suspension of a customer's delivery service under Public Service Law §32(5)(d) to become effective on a temporary basis 60 days after the date of this order and to serve copies of the proposed calculation method on all parties to this proceeding. The tariff revisions shall not

become effective on a permanent basis until approved by the Commission.

3. Changes to Uniform Business Practices Sections 9.J.4. and 9.J.6. set forth in Appendix A are adopted in accordance with the discussion in the body of this order and made part of the Uniform Business Practices. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., KeySpan Energy Delivery New York, KeySpan Energy Delivery Long Island, National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation are directed to file upon 30 days notice revised tariffs incorporating the changes to the Uniform Business Practices adopted as an addendum to their tariffs and to change the text of their tariffs and operating procedures as necessary.

4. The requirements of Public Service Law §66(12)(b) and 16 NYCRR §720-8-1 relating to newspaper publication of the tariff amendments directed by Ordering Clauses 1, 2 and 3 are waived.

5. The petition for rehearing of the August 15 Order filed by Consolidated Edison Corporation of New York, Inc., Orange and Rockland Utilities, Inc. and Niagara Mohawk Power Corporation is denied.

6. The petition for rehearing of the February 19 Order filed by Consolidated Edison Corporation of New York, Inc. is denied.

7. The petitions for rehearing and clarification of the June 20 Order are granted to the extent set forth herein, and are otherwise denied.

8. These proceedings are continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING  
Acting Secretary

Proposed Amendment of  
Uniform Business Practices

## SECTION 9.J.

## 4. Application of payments

a. The billing party<sup>1</sup> shall [pro-rate] allocate customer payments to [charges not in dispute] the following categories of charges on the bill or contained in a notice that are not in dispute in this order of priority of payment: (1) amounts owed to avoid termination, suspension or disconnection of commodity or delivery service; (2) amounts owed under a DPA, including installment payments and current charges; (3) arrears; and (4) current charges not associated with a DPA. The billing party shall pro-rate payments to the charges within each category in proportion to each party's charges in that category. After satisfaction of the charges in a category, assuming available funds, the remainder of the payment shall apply to the next highest category according to the priority of payments and in the same manner as described above until the payment is exhausted. [calculate the fractional share of payments allocated to each party by multiplying the payment by a fraction, the numerator of which is the amount of arrears owed to each party and the denominator of which is the sum of such arrears owed to the both parties and multiplying the remaining payment amount by a fraction, the numerator of which is the amount of current charges owed to the party and the denominator of which is the sum of current charges owed to both parties; provided that the priority of allocation shall result in application of payments as necessary to assure continuance of service and avoid termination or suspension of service.]

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<sup>1</sup> Distribution utilities supplying delivery service for both natural gas and electricity to customers receiving consolidated bills shall apply the receipts to the separate services in accordance with their regular procedures. Where a consolidated bill displays delivery charges for separate gas and electric distribution utilities, the customer's payments shall be first prorated between the utility accounts in accordance with the amount each is due compared with the total amount due both distribution utilities.

b. The billing party may retain any payment amounts in excess of the amounts due as prepayments for future charges or return the excess amounts to customers. The billing party shall, in a timely manner, combine any excess payment amounts with the customer's payment on the next bill, and allocate and pro-rate the sum as set forth in 9.J.4.a.<sup>2</sup> [For customers using deferred payment or budget plans, the billing party shall apply amounts in excess of the amount due, including the deferred or budget installment payment, to the balance of any outstanding deferred charges or credit the amounts as additional payments under the customer's budget plan.]

c. When the billing or non-billing party enters into a multi-month payment agreement with a customer or waives any charges, that party shall notify the other party of such action.

d. The billing party shall hold payments received without account numbers or enough information for the billing party to identify the accounts and attempt to obtain information to identify the payer. If sufficient information is not obtained to identify the account information prior to the next bill, the billing party shall present the unpaid amount and late charge, if applicable, on the bill. If the customer contacts the billing party to inquire about the late charge and the lack of payment credit, the billing party shall resolve the matter and reverse the late charges. The billing party shall notify the non-billing party of the matter and its resolution and then allocate payments as necessary to balance the account.

## 5. Multiple Account Payment Processing

Processing of a single customer payment for multiple accounts requires proactive action on the part of the billing party and the non-billing party to apply payments correctly. The parties shall set forth arrangements for multiple account payment processing in a Billing Services Agreement.

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<sup>2</sup> Where the customer elects to make a charitable donation, such as funding a low income program, satisfaction of the donation shall be made prior to allocation and pro-ration of the customer's excess payment.

## 6. Non-billing Party's Balance

a. Except as provided in Section 9.J.6(d), when a final bill is issued, the billing party shall maintain a current and past due balance for each account of the non-billing party until payment of the last bill issued for service provided by the non-billing party or 23 days after issuance of such bill, whichever is sooner. After such time, the account shall be considered "inactive."

b. Except as provided in Section 9.J.6(d), [Following] a customer's change to a new ESCO, the billing party shall continue to receive and apply a customer's payments for the active account of the prior ESCO. If the customer does not pay the outstanding balance owed to the prior ESCO on or before 23 days after the final bill containing the prior ESCO's charges is issued, the billing party shall notify the ESCO and report the balance due.

c. With regard to a new distribution utility/ESCO relationship following a change of ESCOs or a change in a distribution utility, the new billing party shall, upon request of the new non-billing party, bill for the balances that may exist at the time of the change. The new billing party may include the arrears on current bills or in a separate bill if its billing system is not capable of accepting prior charges. If a change of providers occurs, a distribution utility is not required to post any arrears of the prior ESCO on consolidated bills issued after the final billing of its charges, unless the arrears become the property of the new ESCO and it provides documentation of its property right to the distribution utility.

d. Upon ESCO termination of the commodity supply of a residential customer due to failure to pay charges, the billing party shall maintain a current and past due balance for the account of the terminating ESCO for one year from the date of termination by the ESCO. In the event that the terminating ESCO seeks suspension of delivery service within one year of the termination, or the residential customer has a DPA, the billing party shall maintain a current and past due balance for each account of the terminating ESCO until the arrears are paid in full.