

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

CASE 08-G-0872 - In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures--Appeal by Port Washington Water District of the Informal Decision Rendered in Favor of Econnergy Energy Company, filed in C 26358 (726870).

COMMISSION DETERMINATION  
(Issued and Effective September 19, 2008)

The Commission received an appeal by Port Washington Water District (Port Washington or the customer<sup>1</sup>) from a decision dated June 16, 2008, denying the customer an informal hearing regarding a billing dispute with Econnergy Energy Company (Econnergy).<sup>2</sup> A hearing was denied because Econnergy, as a competitive energy services company (ESCO), is not subject to regulation under Article 4 of the Public Service Law (PSL),<sup>3</sup> and because Port Washington, as a nonresidential customer of an ESCO, is not entitled under the PSL or the Commission's regulations (16 NYCRR Part 12) to review by the Commission of a complaint against an ESCO. For the reasons discussed below, we uphold the denial of an informal hearing.

BACKGROUND

By letter dated October 11, 2007, Port Washington asked the Department of Public Service's Office of Consumer Services (OCS) to direct Econnergy to respond to prior letters sent to the ESCO seeking refunds with interest of alleged overbilled amounts on two accounts.

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<sup>1</sup> The customer is represented by Utility Check Ltd., a consultant.

<sup>2</sup> Two subsequent requests for reconsideration of the denial were rejected. See p. 4, infra.

<sup>3</sup> Article 4 consists of "Provisions Relating to Gas and Electric Corporations; Regulation of Price of Gas and Electricity."

OCS answered by letter dated October 17, 2007, in effect stating that whether the Department of Public Service "has any jurisdiction" regarding disputes between a commercial customer and an ESCO depended on the terms of the customer's contract with the ESCO, and that if it stated that "the PSC does not resolve disputes or that disputes need to be resolved by arbitration," OCS would be unable to assist the customer. The customer then provided a copy of a letter from Econnergy (dated November 22, 2004), stating that Port Washington's "application has been received and is being processed," and a copy of Econnergy's "Terms and Conditions-NY Residential," which the customer indicated were provided to it with the November 22, 2004 letter. The dispute resolution provision of those Terms and Conditions specified that if a dispute was not resolved within 45 days, "it may be submitted by either party to the DPS pursuant to its complaint Handling Procedures."<sup>4</sup>

By undated letter mailed November 16, 2007, OCS informed Port Washington that Econnergy agreed to provide a refund of \$1,302.94. By letter dated November 27, 2007, the customer responded that it was dissatisfied with the refund offered and sought a total of \$2,489.30, and therefore requested an informal hearing and a requirement that the ESCO provide its refund calculations. (Econnergy had sent the refund offer directly to the customer on October 30, 2007, rather than to the consultant, and the customer accepted the refund on November 4, 2007, before the consultant objected to it.) By letter dated January 28, 2008, Staff issued an initial decision concluding that the ESCO had resolved the matter.

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<sup>4</sup> The November 22, 2004 letter from Econnergy included language urging Port Washington to "[f]eel free to contact our Customer Support team . . . with any questions or corrections regarding your account."

The customer requested an informal hearing. Further efforts by Staff to resolve the matter between the parties failed. By letter dated April 7, 2008, OCS acknowledged Port Washington's request for an informal hearing, indicated that the only issue to be decided was "dissatisfied with rates," and requested that Econnergy provide additional information in advance of the scheduling the informal hearing. By letter dated April 9, 2008, Econnergy responded. This response included a copy of Terms and Conditions that would be in effect for commercial customers and were mailed to those customers in March 2004, and a copy of Terms and Conditions that would be in effect for commercial customers and were mailed to those customers in September 2007; neither the March 2004, nor the September 2007 Terms and Conditions provided for the Department of Public Service to resolve disputes between Econnergy and nonresidential customers.

By letter dated June 16, 2008, the supervisor of OCS's Informal Hearing Unit informed Port Washington that an informal hearing would not be held because Econnergy, as a competitive energy service company, was not subject to Commission jurisdiction under PSL Article 4, and because Port Washington, as a nonresidential customer, was not entitled to the protections of PSL Article 2. As a result, the letter stated, Econnergy "will not participate in any further review under the Public Service Commission's 16 NYCRR Part 12 Consumer Complaint Procedures of your client's prior bills." The letter also said that since the Commission has not asserted jurisdiction over nonresidential complaints against ESCOs, "we cannot compel them to participate in our Informal Hearing Process." Finally, the letter advised the customer to utilize the dispute resolution guidelines in "the enclosed commercial energy sales agreement," which it quoted as stating:

In the event of a billing dispute or a disagreement involving any essential element of this Agreement the

parties will use their best efforts to resolve the dispute. . . . If the dispute is not resolved within 45 days, it may be submitted to a court of competent jurisdiction within the State of New York.

The signature page of the customer's application to Econnergy was provided, along with Econnergy's "New York Commercial Terms and Conditions" including the above-quoted language on "Dispute Resolution," in effect at the time the customer signed the agreement on November 18, 2004.

By letter dated June 18, 2008, Port Washington objected that the June 16, 2008 letter "did not address the fact that Econnergy did not provide the customer with the same Terms and Conditions that it sent to your for review." The customer enclosed a copy of the version of the Terms and Conditions it states it received (which begins, "TERMS AND CONDITIONS-NY Residential") and argued that having given the customer Terms and Conditions providing for dispute resolution by the Commission, "Econnergy does not have the option of *switching* those Terms and Conditions."

By letter dated June 24, 2008, the supervisor of the Informal Hearing Unit adhered to his position, telling the customer that Econnergy stated it had supplied service to the customer under a "Commercial Energy Sales-Agreement." Copies of additional documents and e-mailed information received by Staff were provided to the customer with this letter. By letter dated July 2, 2008, the customer reiterated the same argument made in its June 18, 2008 letter, and this argument was again rejected by letter dated July 11, 2008, from the supervisor.

POINTS ON APPEAL

By letter dated July 21, 2008, Port Washington appeals from the denial of an informal hearing, arguing that it is entitled to such a hearing because Econnergy had provided the customer with Terms and Conditions permitting the customer to

refer a dispute for resolution under the Commission's consumer complaint procedures.

DETERMINATION

The issue in this case is whether the Commission's complaint procedures, including the right to request an informal hearing or review, are available to a nonresidential customer regarding a complaint against an ESCO. For the reasons explained below, we uphold the denial of an informal hearing in this case and conclude that the Commission's complaint procedures (16 NYCRR Part 12) are not available to nonresidential customers of ESCOs with regard to disputes with the ESCOs.

The customer asserts that the Terms and Conditions of service provided by Econnergy to Port Washington in November 2004, in connection with the ESCO's agreement to provide electric supply service to this nonresidential customer, specified that a dispute, if not resolved by the parties' own efforts within 45 days, "may be submitted by either party to the DPS pursuant to the Complaint Handling Procedures," and argues that is, therefore, entitled to the benefits of those procedures including an informal hearing.

Since 1981, the Home Energy Fair Practices Act (PSL Article 2) has required that the Commission and gas and electric utility corporations and municipalities provide specified consumer protections to residential applicants and customers with respect to their gas and electric service from such providers. When ESCOs were permitted to begin supplying electric and gas supply service to retail customers in New York, the Commission "initially determined that HEFPA need not apply to ESCOs" and instead "required ESCOs to provide more limited customer protections as conditions for their use of distribution utility facilities to deliver their gas or electricity and

directed distribution utilities to file tariffs to implement the requirements.”<sup>5</sup>

The Commission viewed the full HEFPA protections as unnecessary for residential ESCO customers because it anticipated that only distribution utilities would be permitted to terminate a residential customer’s electric and gas service and that only such utilities would have the responsibility to serve all customers and provide enhanced protections to elderly, blind, and disabled consumers and during medical emergencies and cold weather periods.<sup>6</sup> However, effective June 18, 2003, the legislature enacted amendments<sup>7</sup> to HEFPA that (as a corollary to requiring distribution utilities, under certain circumstances, to terminate a residential customer’s distribution service for nonpayment of charges owed to an ESCO) required ESCOs and the Commission—with respect to residential customers of ESCOs<sup>8</sup>—to comply with most HEFPA provisions.<sup>9</sup> The Commission’s rules providing consumer protections to residential applicants and customers of energy utilities (16 NYCRR Part 11) were therefore

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<sup>5</sup> Cases 99-M-0631, et al., Customer Billing Arrangements, et al., Order (issued June 20, 2003), p. 4.

<sup>6</sup> Id.

<sup>7</sup> L. 2002, c. 686.

<sup>8</sup> PSL §53 (added to Article 2 by L. 2002, c. 686) states that for purposes of Article 2, “a reference to a gas corporation, an electric corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers.” Such entities include ESCOs.

<sup>9</sup> ESCOs are not required to comply with the provisions of PSL §31 regarding applications for residential service. See PSL §31(6).

amended to make them applicable to residential customers of ESCOs in 2004.

However, the Commission's regulations providing consumer protections to nonresidential energy utility corporation customers (16 NYCRR Part 13) were not amended to make them applicable to nonresidential ESCO customers.<sup>10</sup> Because of the inapplicability of PSL Article 4 (providing for price regulation of gas and electric utilities) to ESCOs, and the inapplicability of the Part 13 nonresidential consumer protection regulations to ESCO customers, the Commission does not have the statutory authority to resolve price- and billing-related contract disputes between nonresidential customers and ESCOs.

Moreover, the Commission amended the complaint procedures (16 NYCRR Part 12) specifically to make them applicable to complaints by residential ESCO customers against their ESCOs. This was necessary, since the protections provided to residential ESCO customers by the legislature's amendments of PSL Article 2 included PSL §43(1), requiring the Commission to maintain regulations for complaint handling procedures. The amendments added §12.0 to the complaint procedures, which makes Part 12 applicable to "any entity that, in any manner sells or facilitates the sale, furnishing or provision of gas or electric commodity to residential customers, including energy services companies . . ." <sup>11</sup> (emphasis added).

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<sup>10</sup> Nonresidential energy customers retain the benefits of the Part 12 complaint procedures with respect to utility corporations and certain municipalities because 16 NYCRR §13.15(b)(1) and (2) explicitly permit such a customer, if "unable to reach a satisfactory resolution of a dispute with a utility" to make a complaint pursuant to Part 12, which "shall be handled in accordance with the procedures set fort in Part 12 of this Title."

<sup>11</sup> 16 NYCRR §12.0 (effective June 30, 2004).

While this amendment makes the complaint procedures available for review of residential ESCO customers' complaints against those ESCOs, it precludes their use in the case of disputes between nonresidential ESCO customers and their ESCOs.

Pursuant to 16 NYCRR §12.1(a), the "utility customer" who "may file a complaint with . . . the commission relating to his or her . . . service, when the customer believes he or she has not obtained a satisfactory resolution of a dispute with a utility regulated by the commission," does not include a nonresidential customer with regard to a dispute with an ESCO.

Thus the complaint procedures provided by the PSL and 16 NYCRR do not apply to nonresidential customers' complaints against ESCOs. An ESCO contract cannot confer jurisdiction upon the Commission that it does not have. We therefore reject Port Washington's argument that Econnergy was required, with respect to handling of disputes with the customer, to comply with the Terms and Conditions it originally provided to the customer. The denial of an informal hearing in this case was proper and, indeed, Port Washington's complaint should not have been reviewed once it was established that it was a complaint by a nonresidential customer against an ESCO.

#### CONCLUSION

To assure that all aspects of this case have been properly addressed, the case file has been thoroughly reviewed. We determine that the PSL and 16 NYCRR do not apply to nonresidential customers' complaints against ESCOs, and the nonresidential customer's contract cannot provide the Commission with the authority to resolve such complaints. Therefore, the decision denying Port Washington an informal hearing is upheld, and Port Washington's appeal is denied.