

RIGHTS OF
RESIDENTIAL GAS AND ELECTRICITY CONSUMERS

Home Energy Fair Practices Act (“HEFPA”)

New York’s Utility Project Law Manual
6th Edition 2013

New York’s Utility Project
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TABLE OF CONTENTS

1.	Introduction: Sources of Law	HEFPA-1
2.	Applications for Utility Service	HEFPA-3
2.1	Oral and written applications.....	HEFPA-3
2.2	Timing of service	HEFPA-5
2.3	Denial of service.....	HEFPA-7
2.4	Prior arrears	HEFPA-7
2.5	Line extensions for new hook-ups.....	HEFPA-9
3.	Termination of Service	HEFPA-10
3.1	General Procedures Applicable to All Residential Terminations	HEFPA-11
3.1.1	Grounds for Termination	HEFPA-11
3.1.2	Notice of Termination.....	HEFPA-11
3.2	Termination of Service to Entire Multiple Dwellings.....	HEFPA-14
3.2.1	Notice of Termination.....	HEFPA-14
3.2.2	Contents of Notice	HEFPA-15
3.2.3	Rights of Occupants of Multiple Dwellings.....	HEFPA-15
3.3	Termination of Service to Two-Family Dwellings	HEFPA-17
3.3.1	Contents of the Notice	HEFPA-18
3.3.2	Rights of Occupants.....	HEFPA-18
3.4	Special Procedures for Termination of Service to Vulnerable Populations.....	HEFPA-19
3.4.1	Medical Emergencies.....	HEFPA-19
3.4.2	Elderly, Blind or Disabled Customers	HEFPA-22
3.4.3	Cold Weather Periods	HEFPA-24
3.4.4	Special Rules in Cities of More than One Million People	HEFPA-28
3.4.5	Nonheat-Related Service: Neglect or Hazardous Situations During the Cold Weather Period	
4.	Reconnection of Service	HEFPA-31
5.	Deferred Payment Agreements	HEFPA-32
5.1	DPA Content	HEFPA-33
5.2	DPA Down Payments.....	HEFPA-34
5.3	DPA Procedure.....	HEFPA-35

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS

Home Energy Fair Practices Act (“HEFPA”)

New York’s Utility Project - 6th Edition, December 31, 2013

5.4	Late Fees and Interest Charges.....	HEFPA-35
5.5	Negotiated DPAs.....	HEFPA-36
5.6	Standard DPAs	HEFPA-37
5.7	Customer duties and defaults.....	HEFPA-38
6.	Security Deposits	HEFPA-39
6.1	Deposit amount and duty to serve	HEFPA-41
6.2	Interest and disposition.....	HEFPA-42
7.	Meters and Back billing	HEFPA-42
7.1	General rules	HEFPA-42
7.2	Meters and tampering	HEFPA-44
7.2.1	Meter testing and inspection	HEFPA-44
7.2.2	Meter tampering and back billing	HEFPA-45
7.2.3	Proof of meter tampering	HEFPA-45
7.2.4	Criminal implications of meter tampering	HEFPA-46
8.	Miscellaneous Provisions.....	HEFPA-47
9.	Municipal Electric Service.....	HEFPA-49

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
New York’s Utility Project - 6th Edition, December 31, 2013

RIGHTS OF RESIDENTIAL GAS, WATER AND ELECTRICITY CONSUMERS

Home Energy Fair Practices Act (“HEFPA”)

1. Introduction: Sources of Law

State Statutes, Agency Regulations and Court Decisions. In 1981, the New York State Legislature enacted the Home Energy Fair Practices Act (“HEFPA”), which established a comprehensive set of statutory rights and protections for residential electric and gas customers.¹ It has been referred to as a utility service bill of rights, designed “to insure continued utility service as part of the public weal.”² In 1986, the Legislature extended HEFPA protection to consumers served by large private water companies.³ In 1995, the Legislature enacted the shared meter law as part of HEFPA.⁴ In 2002, the Legislature enacted the Energy Consumer Protection Act (“ECPA”), which

¹ Public Service Law (hereinafter “PSL”), Article 2, §§ 30-52. HEFPA replaced parts of the Transportation Corporations Law (“TCL”), which was repealed. HEFPA does not apply to customers of rural electric cooperatives, and does not apply to municipal electric utilities if they receive most of their power from the New York Power Authority (“NYPA”). NYPA has adopted regulations similar, but not identical to HEFPA.

² *Brooklyn Union Gas Co. v. Richey*, 123 Misc.2d 802, 804, 475 N.Y.S.2d 981, 983 (N.Y. Civ. Ct. Kings County, 1984).

³ PSL § 50.

⁴ PSL § 52.

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

clarified that HEFPA protections apply to the transactions between residential customers and so-called energy service companies (“ESCOs”).⁵

⁵ Energy Consumer Protection Act of 2002. *See*, PSL § 30; 16 NYCRR § 11.1.

HEFPA is implemented and interpreted principally through New York Public Service Commission (“PSC”) regulations,⁶ and PSC orders, and is administratively enforced through PSC complaint and emergency Hotline procedures. Although the PSC resolves utility complaints and disputes, utilities also must establish their own complaint handling procedures to reduce the need for PSC intervention.⁷ The PSC has indicated it may revoke an ESCO’s eligibility to provide electric or gas commodity if an excessive number of legitimate complaints are brought against it. The PSC also evaluates complaint metrics for utilities it actively regulates, and may establish performance incentives or sanctions to address a high complaint rate.⁸

⁶ 16 NYCRR Part 11, §§ 11.1-11.39. Other parts of the PSC regulations address various aspects of the relationship between utilities and their customers. These include 16 NYCRR Parts 90-105 and 136-145 (electric service), and 225-232 and 270-277 (gas service). They address subjects including: meter testing (Parts 92, 226 and 228); residential submetering (Parts 96 and 231); contents of bills (Parts 140 and 273); interest on customer overpayments (Parts 145 and 277); insulation standards (Part 233) (upheld in *Matter of Oil Heat Institute of Long Island, Inc. v. Public Serv. Comm’n*, 91 Misc.2d 109, 397 N.Y.S.2d 315 (Sup. Ct. Alb. Co., 1977); and non-residential termination and complaint procedures (Parts 143 and 275). These will not be examined in detail here.

⁷ PSL § 32.2 requires utilities, when terminating services, to notify customers of the utilities’ complaint procedures, in addition to those of the PSC.

⁸ The PSC publishes complaint statistics at www.dps.state.ny.us/ocs_stats.html.

Only a few reported court decisions have arisen from the HEFPA law and its accompanying

regulations. The issues addressed include:

- Residential customer termination protections;⁹

⁹ *Brooklyn Union Gas Co. v. Richy*, 123 Misc.2d 802 (N.Y.C. Civ. Ct. Kings Co., 1984) (holding that utility’s affidavits in support of its request for writs of replevin contained hearsay and fact allegations based on “information and belief,” and were insufficient to show its compliance with HEFPA termination procedures); *Consol. Edison Co. v. Jones*, 111 Misc.2d 1, (N.Y.C. Civ. Ct. N.Y. Co., 1981) (holding that utility’s affidavit in support of its request for a writ of replevin failed to allege whether defendant customer’s account was commercial or residential, and therefore alleged no facts relevant to compliance with HEFPA termination procedures).

- Residential customer application protections;¹⁰
- The validity of a municipal ordinance requiring gas service pipe to be installed on private property by a licensed plumber, which conflicted with Public Service Law provisions that require utilities, upon a request for service, to extend and install new service lines to buildings on private property.¹¹

The PSC’s HEFPA regulations (16 NYCRR Part 11) implement the statute and their detailed provisions govern "the rights, duties and obligations of [utilities] subject to the jurisdiction of the commission . . . their residential customers and applicants for residential service."¹² They will be a focus of this chapter.

2. Applications for Utility Service

¹⁰ *Fordham-Coleman v. Nat’l Fuel Gas Distrib. Corp.*, 42 A.D.3d 106, 112 (4th Dep’t 2007), *appeal denied*, 42 A.D.3d 975 (4th Dep’t 2007), discussed *infra*.

¹¹ *Consol. Edison Co. of N.Y. v. City of New Rochelle*, 140 A.D.2d 125, 532 N.Y.S.2d 521 (2d Dept. 1988) (holding that the municipality’s requirement imposed additional regulations in an area where the Legislature had evinced its intent to preempt the field).

¹² 16 NYCRR § 11.2(a).

2.1 Oral and written applications

Applications for residential electric or gas

service may be made orally or in writing.¹³ An oral application for service can be made by telephone and is deemed complete when applicants provide their name, address, telephone number and the address or account number of any prior account.¹⁴ Utilities may require reasonable proof of an applicant’s identity when taking oral applications.¹⁵ Applicants may be requested, but are not required, to supply a social security number and must be informed that disclosure of a social security number is voluntary.¹⁶ In the event an applicant cannot validate their identity orally, submission of photo identification in person, by mail, electronically, or by fax may be necessary.¹⁷

¹³ PSL § 31(1) and 16 NYCRR § 11.3(a)(1).

¹⁴ 16 NYCRR § 11.3(a)(4)(v).

¹⁵ *Id.*

¹⁶ PSC Case No. 96-M-0706, *Memorandum and Resolution Adopting Amendments to 16 NYCRR Part 11* (Feb. 17, 1998), (“While social security numbers, voluntarily obtained, are one common method to validate identity, it is not and should not be the only one. Companies should not rely solely on any one form of identification. Companies should make every effort to accept a wide range of identifications such as driver’s licenses, non-driver identification cards, Resident Alien Cards and public assistance registration numbers. . . .”) *Id.* at 5.

¹⁷ *Id.*

A utility may require a written application *only if*:¹⁸

- (1) there are arrears at the premises to be served and service was terminated for non-payment or is subject to a final notice of termination;
- (2) there is evidence of meter tampering or theft of service;
- (3) the meter has advanced and there is no customer of record;
- (4) the application is made by a third party on behalf of the person(s) who would receive service; and
- (5) the utility notifies the applicant of the written application requirement and the basis for it, within 2 business days after the oral request. The utility's notice may be oral or written.

¹⁸ *Id.*

A written application may require reasonable proof of identity and “reasonable proof of the applicant’s responsibility for service at the premises to be supplied.”¹⁹ Reasonable proof of identity, such as a driver’s license or credit card, may be used to validate the applicant’s name and prior address.²⁰ An applicant may show when he or she became responsible for utility service by providing a copy of a lease, deed, bill of sale or other documentation.²¹ An applicant can be any household member, and need not be the person listed on a lease.

Customers who move within the same utility's service territory and request service within 60 days “shall be eligible to receive service at the different dwelling, and such service shall be considered a continuation of service in all respects,” and any existing DPAs will be honored, provided the prior service was not terminated for nonpayment, meter-tampering or theft of services.²²

2.2 Timing of service Eligible applicants must receive service within 5 business days of the completed oral or written application, unless the applicant specifies a later time, or the utility is precluded from acting by adverse weather conditions, public safety concerns, a labor strike, inability to gain access, incomplete construction of applicant’s facilities, or when the applicant does not pay, or

¹⁹ 16 NYCRR § 11.3(a)(4)(v)(d).

²⁰ 16 NYCRR § 11.3(a)(4)(v).

²¹ Comment to 16 NYCRR § 11.3(a)(4)(v)(d). The “responsibility for service” requirement does not exist in the governing statute, PSL § 31. The customer need not be the tenant named in the lease.

²² PSL § 31(3); 16 NYCRR § 11.3(a)(5). PSL § 32 does not authorize terminations for meter-tampering or theft of services.

does not agree in writing to pay, line extension costs if applicable and required.²³ If the utility fails to provide service within 5 days without good cause, it must pay a \$25 per day fine to the applicant.²⁴

A utility may potentially be liable for far more than \$25 per day, if failure to provide utility services in accordance with HEFPA results in death of the applicant. In *Fordham-Coleman v. National Fuel Gas Distrib. Corp.*, a current gas customer who requested her service be terminated at her apartment in mid-November and transferred to a new apartment the following day, through a series of administrative mistakes by the utility, remained without gas service at the new residence. The applicant was found dead in her new apartment in mid-February – the cause of death, according

²³ PSL § 31(5); 16 NYCRR § 11.3(a)(4)(i-iv). The PSC may require applicants for service to buildings located more than 100 feet from utility lines to pay material and installation costs for their portion of pipes, conduits, wires or other facilities that must be installed. PSL §31(5).

²⁴ PSL § 31(5); 16 NYCRR § 11.3(c). This remedial provision has been narrowly construed in some PSC decisions which have denied the statutory penalty. The statutory penalty for wrongful denial of service has been held by the Court of Appeals to apply even where the customer has his own generator and was not “actually suffering from the lack of service,” casting doubt on the narrow reading by the PSC. See *Tismer v. New York Edison Co.*, 228 N.Y. 156 (1920). Cf., *Westridge v. Con Edison*, Case 93-E-0998 (Nov. 13, 1996) (“rules establishing penalties for the failure to supply service on request, as penalties, must be strictly construed[.] [P]enalties may be inapplicable, depending on the particular circumstances, when the customer was not actually suffering from the lack of service.” *Id.* p. 5-6. Accord, *Allen v. Jamestown*, Case 04-E-0486, (May 19, 2006).

to the coroner, was hypothermia. The trial court granted the utility’s motion for summary judgment.

The Appellate Division reversed and reinstated causes of action for wrongful death and punitive damages. In allowing the case to go forward, the Appellate Division stated:

“The Legislature has recognized that discharging those [HEFPA] obligations in the provision of residential gas service ‘is necessary for the preservation of the health and general welfare and is in the public interest’ . . . [I]t is undisputed that decedent froze to death in her unheated residence and that her residence was unheated because National Fuel failed to provide her with gas service.”

* * *

[N]ational Fuel failed to discharge its obligation to decedent under the Public Service Law . . . by failing to respond in a timely manner to her original request for gas service . . . [for] erroneously treating [her] as a new customer. . . and [leading] her to believe that activation of her gas service was contingent upon her satisfaction of a 1997 judgment or qualification for direct payment by DSS.²⁵

2.3 Denial of service A utility may deny residential service if:

²⁵ *Fordham-Coleman v. Nat’l Fuel Gas Distrib. Corp.*, 42 A.D.3d 106, 112, 834 N.Y.S.2d 422, 427-28 (4th Dep’t 2007), *appeal denied*, 42 A.D.3d 975, 838 N.Y.S.2d 456 (4th Dep’t 2007). The parties settled before trial. National Fuel Gas Distribution Corp. 10-K, Sept. 30, 2007. See PULP article, “Lawsuit Involving Death of Velma Fordham Settled by National Fuel,” December 4, 2007, *available at*, <http://pulpnetwork.blogspot.com/2007/12/lawsuit-involving-death-of-velma.html>.

- (1) the applicant owes money for *residential* service provided to a prior account in *his or her* name.²⁶ Applicants with outstanding arrears are entitled to service under certain conditions, however, which are discussed in *Section 2.4, Prior Arrears, infra*.
- (2) the applicant seeks seasonal or short-term service and has failed to post a lawfully required deposit.²⁷

If the applicant does not fit into either one of these two categories, the utility must provide service.²⁸

An application not approved in 3 business days is deemed denied.²⁹ The utility must give the applicant prompt written notice of the denial within 3 business days. The notice must provide the following:

- (1) state the reasons(s) for the denial;
- (2) specify what the applicant must do to qualify for service; and
- (3) advise the applicant of the right to an investigation and review by the PSC, and provide the telephone numbers for the PSC and its Hotline.³⁰

²⁶ PSL § 31(1); 16 NYCRR § 11.3(a)(2).

²⁷ PSL § 36(1); 16 NYCRR § 11.3(a)(3).

²⁸ 16 NYCRR § 11.3(a)(1) and (2).

²⁹ 16 NYCRR § 11.3(b)(1).

2.4 Prior arrears Applicants with outstanding arrears for residential service provided to a prior account in their name are entitled to service if:

³⁰ PSL § 31(2); 16 NYCRR § 11.3(b)(2).

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

- (1) full payment of the arrears on the prior account is made;³¹
- (2) the applicant agrees to pay the arrears under a deferred payment agreement (“DPA”), the down payment for which cannot exceed the lesser of half the balance due or the amount for three months service;³² See *Section 5, Deferred Payment Plans, infra*.
- (3) the applicant receives public assistance (“PA”), supplemental security income benefits (“SSI”) or additional State payments under the Social Services Law, or is an applicant for such assistance and the utility receives a payment from, or is notified by the Social Services Department of the applicant's eligibility for utility payments, for service due to a prior account in the applicant's name, together with a guarantee of future payments to the extent authorized by the Social Services Law.³³
- (4) the applicant has a pending billing dispute for the service provided to a prior account and is paying the undisputed amount(s).³⁴
- (5) the PSC or its authorized designee directs the utility to provide service.³⁵

³¹ PSL § 31(1)(a); 16 NYCRR §11.3(a)(2)(i).

³² PSL § 31(1)(b); 16 NYCRR § 11.3(a)(2)(ii).

³³ PSL §§ 31(1)(c) and 65-b; 16 NYCRR § 11.3(a)(2)(iv).

³⁴ PSL § 43(1); 16 NYCRR § 11.3(a)(2)(iii).

³⁵ PSL § 23(3); 16 NYCRR § 11.3(a)(2)(v). The PSC’s Emergency Hotline number is 800-342-3355.

Neither the Public Service Law nor PSC regulations allow utilities to deny service to an applicant because arrears at a location were in someone else's name, even if the applicant lived (or owns property) at the address where the service was rendered or is a legal or blood relative to the person in whose name the prior account was held. For example, an applicant may not be denied service based on the arrears of a spouse, sibling, parent or roommate. Furthermore, there is no requirement that spouses both be named as customers of record.³⁶ In essence, HEFPA eliminated barriers to service based on the debts of others, and clarified the statutory right to utility service for the *individual*.

2.5 Line extensions for new hook-ups Utilities must provide service to new residential customers within 100 feet of gas or electric transmission lines.³⁷ Most applicants for new service are allowed up to 600 feet of free overhead electric line to their residential building (500 feet of overhead distribution line and 100 feet of service line).³⁸ The applicable regulations define "residential building" as including mobile homes, but not vehicles used as a residences.³⁹ The structure must be enclosed and designed for permanent residential occupancy.

A line extension applicant has the choice of paying any extra costs in a lump sum or in installments. If the costs are not paid in full, the applicant must sign an agreement to inform any

³⁶ See generally, PSL § 30, *et seq.*; 16 NYCRR § 11 *et seq.*

³⁷ PSL § 31(4); 16 NYCRR Part 230.

³⁸ 16 NYCRR § 98(g).

prospective, subsequent purchaser that the property is subject to a utility surcharge.⁴⁰ New York Real Property Law requires a seller to give written disclosure of utility surcharges and their terms of payment before accepting a purchase offer.⁴¹

3. Termination of Service

³⁹ 16 NYCRR § 98.1(f).

⁴⁰ 16 NYCRR § 98.3(f).

⁴¹ The disclosure must state, "This property is subject to an electric, gas and/or water utility surcharge." It must also state the type and purpose of the surcharge, the amount of the surcharge and whether the surcharge is payable on a monthly, yearly or other basis. RPL § 242(2)(a). Failure to disclose permits a prospective or actual purchaser to recover actual damages for losses. RPL § 242(2)(b).

Terminations of residential electric and gas service are governed by the Public Service Law and the PSC regulations implementing the statutes.⁴² A utility’s noncompliance with the law or the regulations will invalidate the termination process, render termination unlawful, and is grounds for a complaint to the utility and to the PSC for appropriate relief, e.g., restoration of service pending issuance of a proper termination notice.⁴³

Common termination issues include:

- the timing of the notice of termination;
- proper service or posting of the notice;
- whether a written deferred payment plan was offered, and
- the applicability of special rules concerning vulnerable persons or cold weather.

⁴² PSL §§ 32-34 and 46; 16 NYCRR §§11.4 - 11.8. An ESCO seeking to terminate commodity supply must also comply with the Public Service Law and PSC regulations. 16 NYCRR § 11.4(a). ESCOs must notify the distribution utility that commodity supply has been terminated request the utility to suspend distribution service. The ESCO’s notification must demonstrate its compliance with the HEFPA termination procedures. The distribution utility is not required to duplicate all HEFPA procedures before terminating distribution, but it must determine whether the customer qualifies for special protections. *See*, 16 NYCRR § 11.4(b) and accompanying Comment.

⁴³ See PULP Law Manual chapter entitled, “Complaint Handling Procedures.”

Termination procedures may be divided into four categories: (1) general procedures; (2) special procedures; (3) procedures for multiple dwelling terminations; and (4) procedures for two-family dwelling terminations.

3.1 General Procedures Applicable to All Residential Terminations

3.1.1 Grounds for Termination A utility is authorized to terminate residential gas or electric service for four reasons:⁴⁴

- (1) Nonpayment of charges for service rendered during the preceding 12 months.

Three exceptions allow termination *after* 12 months:

- (a) where there was a billing dispute during the 12 month period;
- (b) where a delay in termination was not the fault of the utility or was due to the customer's culpable conduct; or
- (c) where it is necessary to adjust an estimated bill⁴⁵

- (2) Nonpayment of amounts due under a deferred payment agreement.⁴⁶

⁴⁴ A utility may disconnect service to a residence when an emergency situation threatens the health or safety of a person, the surrounding area or the utility's distribution system. Service must be restored promptly before terminating for any other reason. PSL § 46; 16 NYCRR § 11.18.

⁴⁵ PSL § 32(2)(a); 16 NYCRR § 11.4(a)(1)(i).

⁴⁶ PSL § 32(2)(b); 16 NYCRR § 11.4(a)(1)(ii). See *Section 5, Deferred Payment Agreements, infra*.

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

- (3) Failure to pay or agree in writing to pay equipment and installation charges relating to initiation of service.⁴⁷

- (4) Failure to pay a lawfully required security deposit.⁴⁸

⁴⁷ PSL § 32(2)(c); 16 NYCRR § 11.4(a)(1)(iii).

⁴⁸ 16 NYCRR § 11.4(a)(1)(iv). Although PSL § 32(2) does not authorize termination on this ground, PSL § 36(1) permits utilities to require seasonal, short term and delinquent customers to post security deposits as a “condition of service.” PSL § 36(1); 16 NYCRR § 11.12(d)(1)-(2). See *Section 6, Security Deposits, infra*.

3.1.2 Notice of Termination Before a utility may terminate service to a residential customer, it must send a final notice of termination no less than 15 calendar days before the termination date shown on the notice.⁴⁹ The final notice may not issue unless a minimum of 20 days have elapsed since the date payment was due.⁵⁰ Thus, the earliest a termination may occur is 35 days (20 + 15) after the payment due date.

Notice contents. The final termination notice must, at a minimum, state clearly:⁵¹

- (1) the earliest date termination may occur;
- (2) the reasons(s) for termination, total owed and how termination may be avoided;
- (3) the utility's address and telephone number;
- (4) the availability of utility complaint handling procedures;
- (5) a PSC-approved summary of the HEFPA protections together with a notice that eligible customers should contact the utility; and

⁴⁹ PSL § 32(2)(d); 16 NYCRR § 11.4(a)(1)(v).

⁵⁰ PSL § 32(2)(d); 16 NYCRR § 11.4(a)(3)(iii). A utility may specify a payment due date that is no earlier than the date the bill is personally served or 3 days after it is mailed. 16 NYCRR § 11.4(a)(3)(iii).

⁵¹ PSL § 32(2)(d); 16 NYCRR § 11.4(a)(ii).

- (6) a statement in conspicuous, attention attracting size type conveying the following information: "THIS IS A FINAL TERMINATION NOTICE. PLEASE BRING THIS NOTICE TO THE ATTENTION OF THE UTILITY WHEN PAYING THIS BILL."

Deferred Payment Agreement. At least 7 calendar days (10 if mailed) before the scheduled termination date, a utility must serve a written offer of a deferred payment agreement (“DPA”) upon the customer. (DPAs are not available to any customer whom the PSC determines has the resources to pay the bill.)⁵² However, before making this offer, the utility must make reasonable efforts to contact the customer by phone, mail or in person to negotiate a DPA tailored to the customer's financial circumstances. A DPA that is fair and equitable given a customer's fiscal constraints, in all likelihood, will be more favorable than a DPA prepared by the utility alone.⁵³

Special Rules. The utility must record all payments on the day received, or process them so that termination does not occur.⁵⁴ At the time of termination, if a customer offers full payment of the amount that forms the basis for the termination, the utility's field representative must accept payment and shall not terminate service.⁵⁵ If a subsequently dishonored check is issued in response to a notice of termination or to a utility representative to prevent a termination, it will not constitute payment and the utility need not issue additional notice before terminating service.⁵⁶

⁵² PSL § 37(1).

⁵³ PSL § 37; 16 NYCRR §§ 11.10(a)(1) and (a)(5). See *Section 5, Deferred Payment Agreements, infra*.

⁵⁴ 16 NYCRR §§ 11.4(a)(6).

⁵⁵ 16 NYCRR § 11.4(a)(7).

⁵⁶ 16 NYCRR § 11.4(a)(8).

Where a customer has supplied the utility, in writing, an alternate address for mailing, before it may terminate service the utility must either: (i) mail duplicate 15 calendar day termination notices to the service address and to the alternate mailing address, or (ii) send a 15 calendar day termination notice to the alternate mailing address and personally notify an adult living at the service address, or notify an adult resident at the service address by telephone or by posting a conspicuous notice of termination at the premises where service is rendered.⁵⁷

⁵⁷ 16 NYCRR § 11.4(a)(3)(ii).

Termination of a residential customer’s service may only occur between 8:00 am and 4:00 pm, Monday through Thursday, provided such day or the following day is not a public holiday or a day that the utility's main business office is closed. Service may not be terminated during the two-week period encompassing Christmas and New Year's Day.⁵⁸

3.2 Termination of Service to Entire Multiple Dwellings⁵⁹

3.2.1 Notice of Termination No utility may terminate electric, gas or steam service to an entire multiple dwelling⁶⁰ anywhere in New York, for nonpayment of bills by the owner, person or entity to whom or which the last preceding bill was rendered unless it has:

- (1) served written notice of its intent to terminate service by personal service upon the owner and upon the superintendent or other person in charge of the building, either 15 days (if served personally) or 18 days (if served by mail) before the intended

⁵⁸ PSL § 32(4); 16 NYCRR § 11.4(a)(4).

⁵⁹ Termination refers to a utility-initiated termination. HEFPA does not apply in situations where a lease or rental agreement requires the landlord to furnish utility service, but the landlord intentionally terminates such service. In these cases, the landlord may be subject to criminal penalties (RPL § 235) and tenants may bring an action to recover damages under a theory of breach of warranty of habitability. (RPL § 235-b). HEFPA is applicable when a landlord required to furnish utility service causes the discontinuance of that service by failure or refusal to pay the charges. (RPL § 235-a(2)).

⁶⁰ A “multiple dwelling” is “a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other.” Multiple Dwelling Law (“MDL”) § 4. The Public Service Law incorporates this definition by reference, but does not require that the building actually be subject to the Multiple Dwelling Law.

termination. During cold weather (November 1st to April 15th), 30 days notice must be given for termination of heat-related service; and;

- (2) posted a written notice of termination in the multiple dwelling's public areas, at least 15 days before the intended termination (30 days during the cold weather period for heat-related service); and
- (3) mailed written notice of its intent to terminate service to each occupant of the multiple dwelling at least 18 days before the intended termination (30 days during the cold weather period for heat-related service); and;
- (4) mailed notice to specified public officials. The notice must be repeated to most of these officials between 2 and 4 days before service is scheduled to be terminated.⁶¹

3.2.2 Contents of Notice The written notice to the occupants must contain the intended service termination date, the amount due for service, and a notice of the procedures required to avoid termination, including the name and telephone number of a utility representative who is available to meet with occupants to work out a mechanism to avoid termination, if the owner fails to make required payments. The notice shall also advise the occupants that the PSC is available to help

⁶¹ PSL § 33; 16 NYCRR § 11.7(a). Notice must be given to the local health officer and director of the local department of social services. If the multiple dwelling is located in a city or village, notice must be given to the mayor or manager. If the multiple dwelling is located in a town, notice must be given to the town supervisor and to the county executive of the county in which the multiple dwelling is located, or if there is no county executive, then to the chairperson of the county's legislative body. If the multiple dwelling is located in New York City, notice must be given to the Department of Housing Preservation and Development.

them negotiate a payment agreement with the utility, and of tenants' rights under RPL §235-a to offset certain utility payments against rent.⁶²

⁶² 16 NYCRR § 11.7(b).

3.2.3 Rights of Occupants of Multiple Dwellings

If occupants of a

multiple dwelling make timely payments for current service, a utility may not terminate for the failure of the owner, person, firm or corporation responsible for the utility bills to make such payments.⁶³

When occupants of a multiple dwelling elect to make payments to prevent termination, a utility may not require them to pay anything more than the current charges incurred by the owner/customer. In this context, "current charges" are defined as the amount properly billed the owner for utility service used only during the most recent service billing period covered by the first bill rendered *on or after* the date when the termination notice is issued.⁶⁴ The "current charges" *may not* include any arrears for earlier billing periods that may appear on the bill.⁶⁵ The occupants may deduct the utility payments they make from their future rent payments.⁶⁶

⁶³ 16 NYCRR § 11.7(b).

⁶⁴ 16 NYCRR § 11.7(5)(c).

⁶⁵ PSL § 33.5; 16 NYCRR § 11.7(c). PSL § 33(5) allows multiple dwelling occupants to pay not more than two months of arrears.

⁶⁶ RPL § 235-a(1).

In the past, utilities prevailed upon tenants in small multiple dwellings to place service in their names. It was not a good idea at the time and is probably now against public policy if it creates a shared meter situation.⁶⁷ If multiple dwelling occupants are billed as an association, the utility may seek to bill them at a commercial instead of a residential rate.⁶⁸ More importantly, the liability is the owner's. The tenants may maintain service more simply by paying the owner's bill for current service and deducting the respective contributions from rent.⁶⁹

⁶⁷ PSL § 52.

⁶⁸ PSL § 38(1).

⁶⁹ RPL § 235-a(1).

If occupants in a multiple dwelling cannot reach an agreement with the utility to prevent the termination of service, they may contact the PSC, which will attempt to negotiate such an agreement with the utility. If necessary, or if 25% of the occupants in a multiple dwelling sign a written request, an authorized PSC designee must arrange a meeting with occupant representatives, the utility and the owner, and attempt to reach agreement.⁷⁰ The PSC's designee may stay a threatened termination if the occupants are making good faith efforts to arrange to pay the current bills.⁷¹

Twice a year, the department charged with enforcing the Multiple Dwelling Law prepares or revises a list of all multiple dwellings in its jurisdiction and provides a copy to the utilities in its jurisdiction.⁷²

3.3 Termination of Service to Two-Family Dwellings

A two-family dwelling is one that is designed and legally occupied by two families independent of each other, regardless of whether the utility bills the dwelling for service at a residential or commercial rate. The utility must keep a record of two-family dwellings that are not separately metered.⁷³

⁷⁰ PSL § 33(5); 16 NYCRR § 11.7(d).

⁷¹ 16 NYCRR § 11.7(e).

⁷² PSL § 33(2).

⁷³ 16 NYCRR § 11.8(a).

When the utility knows that a single meter measures utility service to both units of a two-family dwelling, it must comply with the following procedures before terminating service:⁷⁴

- (1) Give notice of termination 15 days before the scheduled termination (30 days during the cold weather period), either by mail or personal service, to the owner of the premises or to the recipient of the last, preceding service bill, and to the occupant of each occupied unit; and
- (2) Where possible, post a copy of the notice of its intent to terminate service in a conspicuous place at or within the dwelling.

⁷⁴ PSL § 34(1); 16 NYCRR §§ 11.8(b), (f) and (g).

3.3.1 Contents of the Notice The notice must include the following information: the intended termination date, the amount due, the special protections are available for occupants, the availability of PSC staff for advice, the steps required for occupants to make payment or actions they may take to avoid termination of service, and their rights to deduct utility payments that they make to prevent termination from their future rent payments, under Real Property Law §235-a.⁷⁵

3.3.2 Rights of Occupants Where service is not metered separately, any occupant of a two-family dwelling may prevent termination of service by:

- (1) Paying current charges. In this context, “current charges” are: if billing is monthly, an amount not to exceed the amount due for billed service provided during the two months preceding the termination date; and if billing is bi-monthly, an amount not to exceed the most recent bill for service.⁷⁶ In no event shall such payments include bills more than two months in arrears.⁷⁷

An occupant who chooses to pay current charges is not liable for future bills rendered for service.⁷⁸ Future bills continue to be issued to the customer of record, with a copy

⁷⁵ PSL § 34(2); 16 NYCRR §§ 11.8(c).

⁷⁶ 16 NYCRR § 11.8(d)(2).

⁷⁷ PSL § 34(3)(b).

⁷⁸ *Id.*

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

to be sent to any occupant upon request.⁷⁹ Any payments made by the occupant may be set off against her or his rent.⁸⁰

⁷⁹ PSL § 34(3)(b); 16 NYCRR §§ 11.8(d)(2).

⁸⁰ RPL § 235-a.

- (2) Applying for service in occupant’s own name, thus making the occupant liable for future payments. The occupant may not be an agent of the recipient of the last, preceding service bill. There are two potential problems with this option. First, the tenant becomes responsible for service; second, if the meter registers service to two apartments, the responsible tenant creates a "shared meter," which is against public policy.⁸¹

3.4 Special Procedures for Termination of Service to Vulnerable Populations

HEFPA requires the PSC to provide special safeguards against utility service terminations in the following three situations: (1) in medical emergencies; (2) to elderly, blind or disabled customers; and (3) in cold weather periods.⁸² Generally, in cases of medical emergency, termination of utility service is forestalled. In the other two circumstances, the utility may eventually terminate service after complying with specific procedural requirements. When utility service must be restored or continued pursuant to these special procedures, the customer remains liable for the costs of service and must make reasonable efforts to pay.⁸³

⁸¹ PSL § 52(2). See PULP Law Manual chapter entitled, *Shared Meter Law*.

⁸² PSL § 32(3)(a)-(c).

⁸³ 16 NYCRR § 11.5(a)(7) (medical emergencies); §11.5(c)(2)(ii)(b) (cold weather suspected serious impairment situations), §11.5(c)(5) (cold weather neglect or hazardous situations).

3.4.1 Medical Emergencies A utility must continue or restore utility service in cases of medical emergency at the premises where utility service is to be terminated.⁸⁴ A medical emergency exists when a resident at the customer's premises suffers from a serious illness or a medical condition that severely affects his or her well-being.⁸⁵ A utility customer may invoke the protections of the medical emergency rules by following these procedures:⁸⁶

- (1) Obtaining an initial certification of medical emergency from a doctor or local health board official.
- (2) The initial certification may be oral (by telephone) or in writing. If made orally, it will be effective for 5 business days, but will lapse if written certification is not provided within that time.
- (3) The doctor's or health board official's written certification must be signed and prepared on letterhead stationery and include:
 - (i) the certifying entity's name and address and State registration number;
 - (ii) the name and address of the utility customer and nature of the serious illness or medical condition; and

⁸⁴ PSL § 32(3)(a); 16 NYCRR § 11.5(a).

⁸⁵ 16 NYCRR § 11.5(a)(2).

⁸⁶ 16 NYCRR § 11.5(a)(3).

- (iii) an affirmation that the illness or condition exists or will be aggravated by the absence of utility service;
- (4) The certification is effective for 30 days from the time that the utility receives the oral or written certification, whichever is earlier.
- (5) The utility must notify the customer in writing that it received initial certification, and must provide information about renewal certificates.

Renewal. The certificate may be renewed, for 30 days provided:

- (a) a medical doctor or health board official states in writing (i) the expected duration of the emergency, (ii) the nature of the emergency or why the absence of service would aggravate the emergency; and
- (b) the customer demonstrates an inability to pay charges for service.⁸⁷

⁸⁷ PSL § 32(3)(a); 16 NYCRR § 11.5(a)(4).

The customer must demonstrate an inability to pay for utility service by submitting a PSC-approved form statement of financial hardship, before the initial certificate expires. The form requires the customer to disclose assets, income, expenses and other relevant financial information.⁸⁸

Chronic cases and life support systems. If a doctor or local board of health certifies a case as chronic, the renewed certificate is effective for 60 days, unless the PSC approves a longer period.⁸⁹ If the case involves a life-sustaining device, such as a ventilator or dialysis machine, and provided the customer demonstrates an inability to pay, the certification remains effective until it is terminated by the PSC.

Utilities must send all customers an annual mailing with a form that they may return to notify the utility if any resident uses life support equipment. Utilities are required to maintain a current list of customers who use life support, to include them in system-wide emergency plans, and to identify the meters of such customers.⁹⁰

⁸⁸ 16 NYCRR § 11.5(a)(4). If the utility and customer disagree on the ability to pay, the customer may utilize the PSC Complaint Handling Procedures.

⁸⁹ 16 NYCRR § 11.5(a)(4). The rules do not specify the procedure to obtain such approval. The advocate should try contacting the PSC’s Consumer Services Division. If initial contact with the PSC is by phone, the advocate should follow-up with a written request.

⁹⁰ PSL § 65(11); 16 NYCRR § 11.5(a)(5).

Termination after certificate expiration. A utility must give 15 days notice before terminating service, either after the certificate of medical emergency expires, or after the utility determines that the customer can pay the charges.⁹¹

⁹¹ 16 NYCRR § 11.5(a)(5) and (6).

Submetered customers. Because landlords who sell submetered electric service to tenants are “utilities” within the scope of HEFPA, they are also subject to the requirements related to life support equipment.⁹²

3.4.2 Elderly, Blind or Disabled Customers In addition to the general procedures applicable to all residential terminations, a utility must follow special procedures before terminating or refusing to restore service to customers who are identified as blind, disabled or 62 years of age or older.⁹³ However, such protections only apply if all the remaining household residents are blind, disabled, age 62 or older, or age 18 or younger.⁹⁴

⁹² PSL § 53.

⁹³ PSL § 32(3)(b); 16 NYCRR § 11.5(b)(1). The regulations define disability by reference to Executive Law §292(21), which provides: “The term ‘disability’ means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment. Blindness is defined in the PSC regulations as “central visual acuity of 20/200 or less in the better eye with the use of a correcting lens, or, limitation in the fields of vision such that the widest diameter of the visual field

subtends to an angle no greater than 20 degrees.”

⁹⁴ 16 NYCRR § 11.5(b)(1).

When these circumstances are known, the utility must diligently try to contact an adult resident at the premises by telephone or, if unsuccessful, in person, at least 72 hours before terminating service, to devise a plan to prevent termination and to pay the bills.⁹⁵ Payment may be accomplished through a DPA, or by payment or guarantee of payment by any governmental or social welfare agency or private organization.⁹⁶ If no plan to secure payment can be reached, the utility must notify the local department of social services (“LDSS”) and provide the customer's name, address and termination date, so that the LDSS may assist in developing a plan for the customer. The utility must continue the service for at least 15 business days after it makes the referral, unless it is notified by the LDSS that acceptable payment or other arrangements have been made.⁹⁷ The customer may also seek help from the PSC to develop a payment plan.⁹⁸

In cases where service has already been terminated, and the utility is thereafter notified that the customer is entitled to the elderly, blind or disabled protections, the utility is required to make a diligent effort to contact an adult resident at the customer’s premises, by telephone or in person,

⁹⁵ PSL § 32(3)(b)..

⁹⁶ PSL § 32(3)(b); 16 NYCRR § 11.5(b)(2).

⁹⁷ 16 NYCRR 11.5(b)(2). Department of Social Services regulations require that the LDSS, upon receiving a such a referral from the utility, to (i) identify whether the person referred is a recipient of public assistance; (ii) where the utility has contacted the customer but no plan has been devised to prevent termination, the LDSS sends a letter to the referred household explaining how it may apply for emergency assistance, and identify the date by which such application for assistance must be made, in order to prevent utility service termination; (iii) ensure that support services are involved to coordinate emergency assistance applications. 18 NYCRR § 394.3(e).

⁹⁸ 16 NYCRR § 11.5(b)(2).

within 24 hours of its receipt of such notice. When it makes the contact, it must follow the pre-termination procedures outlined above (devise a DPA or refer to LDSS).⁹⁹

Even when a utility has properly terminated service, it is still required to make a diligent effort to contact an adult resident at the elderly, blind or disabled customer’s premises within 10 days following the service termination, to determine whether alternative arrangements for utility service have been made. If no arrangements are in place, the utility must try again to devise a plan to restore service and arrange for the payment of bills.¹⁰⁰

⁹⁹ 16 NYCRR 11.5(b)(3).

¹⁰⁰ 16 NYCRR § 11.5(b)(4).

3.4.3 Cold Weather Periods Cold weather periods begin November 1st of each year and end on April 15th of the following year.¹⁰¹ The Public Service Law requires the PSC to establish special procedures for utilities to comply with in supplying heat-related utility service during cold weather periods.¹⁰² These procedures vary, depending on whether a customer is directly responsible for the utility bill, or whether they are a resident of a multiple dwelling unit or two-family house.

First, each utility must identify residential households within its service territory whose utility service is *heat-related*.¹⁰³ *Heat-related service* is provided under a rate classification applicable to residential space heating, or to the service necessary to start or operate the primary heating system. Heat-related service also includes a safe, supplemental electrical heating device (space heater), provided the residential customer informed the utility in writing within the last 12 months that such a

¹⁰¹ 16 NYCRR § 11.5(c)(2).

¹⁰² PSL § 32(3)(c); 16 NYCRR § 11.5(c).

¹⁰³ 16 NYCRR § 11.5(c)(1).

device is needed because the third party (e.g., landlord) who controls the primary heating system provides inadequate heat.¹⁰⁴

Heat-Related Service to Single Family Dwellings Before a termination during the cold weather period, every utility must observe, at a minimum, the following procedures:

¹⁰⁴ *Id.*

The utility must try to contact the customer or an adult resident at the customer’s premises, by telephone or in person, at least 72 hours before the intended termination, to determine whether the termination is likely to cause a serious impairment to the health or safety of any resident.¹⁰⁵ The utility must repeat this attempt at the time of termination.¹⁰⁶

If the utility learns that a resident is likely to suffer a serious impairment to health or safety, it may not terminate heat-related service until:

- (a) it notifies the LDSS commissioner orally, and provides written notice within 5 days, that a resident is likely to suffer a serious impairment to health or safety as a result of termination; and

¹⁰⁵ 16 NYCRR § 11.5(c)(2)(iii) provides guidance as to when a person may suffer a serious impairment and offers indicators of serious impairment as follows: (a) age, infirmity or mental incapacitation; (b) use of life support systems; (c) serious illness; (d) physical disability or blindness; and (e) any other factual circumstances which indicate severe or hazardous health situations.

¹⁰⁶ 16 NYCRR § 11.5(c)(2)(i). The regulations also specify attempts during business and non-business hours (6 pm - 9 pm weekdays or 9 am - 5 pm weekends). If telephone contact is unsuccessful, the utility must make an onsite, personal visit. The utility may not allow an apparent language barrier to be an obstacle to pre-termination communication.

- (b) the LDSS, following its investigation, informs the utility that the reported condition is not likely to result in a serious impairment to health or safety, or that an alternative means for protecting the person's health or safety has been devised.¹⁰⁷ (A utility may use its discretion whether to terminate the service if it does not receive any report from the LDSS within 15 business days after its written referral to the LDSS.)¹⁰⁸

¹⁰⁷ 16 NYCRR § 11.5(c)(2)(ii)(a) & (b).

¹⁰⁸ 16 NYCRR § 11.5(c)(2)(ii).

If the utility terminates service during the cold weather period without first making the required contact with the customer *and* the customer does not contact the utility by 12 noon on the following day for reconnection, the utility *must* immediately make an on-site visit to the customer's home to determine whether there is continued occupancy and whether the continued lack of utility service may cause a serious impairment to health or safety. If the utility so determines, it must immediately restore service and refer the matter to the LDSS.¹⁰⁹ If no personal contact can be made and there are no reasonable grounds to believe the premises are vacant, the utility must immediately refer the case to the local LDSS.¹¹⁰

If a utility decides to terminate service during the cold weather period because of an unsafe condition or because of meter tampering, it must observe the same procedures set forth above under Heat-Related Service to Single Family Dwellings.¹¹¹

¹⁰⁹ The regulation requires the utility to comply with subparagraph (iii) which is the indicators of a serious impairment. The reference should probably be to the requirement to refer the case to the LDSS, subparagraph (ii).

¹¹⁰ 16 NYCRR §§ 11.5(c)(2)(iv). PSC rules also require an annual survey by November 1st of heat-related residential accounts terminated in the past year and not restored (dormant accounts) to determine whether the former customer or a resident is likely to suffer a serious impairment health or safety without utility service. 16 NYCRR § 11.5(c)(4). The procedures that LDSS must follow are at 18 NYCRR § 394.1 and in Social Services Administrative Directive No. 93 ADM-26 (Sept. 1993).

¹¹¹ 16 NYCRR § 11.5(c)(3).

Heat-Related Service to Multiple Dwellings. Before terminating service to an entire multiple dwelling during the cold weather period, the utility must follow the same procedures outlined above in Section 3.2, Termination of Service to Entire Multiple Dwellings, but it must provide the required written notices at least 30 days before the intended termination.¹¹²

¹¹² 16 NYCRR § 11.7(a)(4).

The utility must also give each occupant at least 10 days written notice of an intended termination which advises them to contact the utility immediately, if any occupant has a serious illness or medical condition that is likely to result in a serious impairment to health or safety from the loss of heat-related service.¹¹³ If an occupant so notifies, the utility must conduct an on-site interview to confirm, and must refer cases of likely serious impairment to the LDSS.¹¹⁴

For at least 15 business days after referral to the LDSS, the utility must continue heat-related service to the multiple dwelling or otherwise provide heat to the person likely to suffer a serious impairment. The utility may not thereafter terminate heat-related service to the entire dwelling during the cold weather period unless (a) it otherwise provides heat to the person likely to suffer a serious impairment, (b) the LDSS informs that appropriate alternative arrangements to preclude a serious impairment to health or safety have been made, or (c) the LDSS informs that the claim of impairment

¹¹³ 16 NYCRR § 11.7(g)(2)(i).

¹¹⁴ *Id.*

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

is without merit.¹¹⁵ In the event that (a), (b), or (c) above occur, the utility may terminate service after giving at least 5 days written notice to the occupants.¹¹⁶

¹¹⁵ 16 NYCRR § 11.7(g)(2)(ii).

¹¹⁶ 16 NYCRR § 11.7(g)(2)(ii). The notice must advise that occupant may seek further review by the PSC.

Heat-Related Service to Two-Family Dwellings. During cold weather periods, before heat-related service to a two-family dwelling in or outside of New York City may be terminated, the utility must comply with either the requirements applicable to single-family dwellings or the requirements applicable to multiple dwellings.¹¹⁷ In addition, any notices required must be provided at least 30 days before the intended termination date.¹¹⁸ The criteria for utility field personnel to use as general standards in determining whether a person is likely to suffer a serious impairment to health or safety are (a) age, infirmity or mental incapacitation; (b) use of life support systems; (c) serious illness; (d) physical disability or blindness; and (e) any other factual circumstances which indicate severe or hazardous health situations.¹¹⁹

3.4.4 Special Rules in Cities of More than One Million People

In cities of more than one million persons (New York City), a utility must provide written notice to each occupant at least 10 days before the earliest termination date, directing them to contact

¹¹⁷ 16 NYCRR §§ 11.8(h).

¹¹⁸ 16 NYCRR §§ 11.8(g).

¹¹⁹ 16 NYCRR §11.5(c)(2)(iii).

the New York City Heatline,¹²⁰ if any occupant in the apartment has a serious illness or medical condition that would result in a serious impairment to health or safety by loss of heat-related service.¹²¹

¹²⁰ (212-331-3150). This Hotline is open Monday - Friday, 9 am to 5 pm. See, http://pubadvocate.nyc.gov/services/help_paying_bills.html (last visited Nov. 23, 2007). In a procedure different from that of the PSC Hotline, which deals with continuation of utility service, the NYC Heatline takes information about private landlords (but not about City properties), and may pressure the landlord to pay the utility bill. According to the Heatline, the City may subject the landlord to a fine, enforceable in Housing Court, or, in extreme cases, provide the heating fuel or replacement furnace and bill the landlord.

¹²¹ 16 NYCRR § 11.7(g)(1)(i).

In New York City, the Human Resources Administration (HRA) notifies the utility that it has received a claim that loss of heat-related service is likely to cause a serious impairment to health or safety. The utility must then continue service to the building for at least 15 business days from the date of the HRA's oral or written notice.¹²² Thereafter, the utility must continue heat-related service to the dwelling during the cold weather period unless it is informed by the HRA that appropriate alternative arrangements have been made to preclude serious impairment to health or safety, or that the claim is without merit. At that point, the utility may terminate service after giving at least 5 days written notice to the occupants.¹²³

Where heat-related service has already been properly terminated, the utility must restore service if it is notified by HRA that a serious impairment to health or safety is likely to result.¹²⁴

3.4.5 Nonheat-Related Service: Neglect or Hazardous Situations During the Cold Weather Period

PSL § 32(3)(c) requires a utility or municipality to continue service during the cold weather period when (1) a service termination will likely cause a serious impairment to health or safety and (2) the utility customer, because of mental or physical problems, is unable to manage their own resources or to protect themselves from neglect or hazardous situations without help from others. In such cases,

¹²² 16 NYCRR §11.7(g)(1)(ii).

¹²³ 16 NYCRR § 11.7(g)(1)(ii). The notice must advise that occupant may seek further review by the PSC.

¹²⁴ 16 NYCRR § 11.7(g)(1)(iii).

there is no distinction between heat-related and nonheat-related service. Utilities are required to continue to provide “service” and “utility service” to these residential customers.¹²⁵

Once a utility has been notified of a situation as described above, it must extend the protection of PSL § 32(3)(c) to that customer and notify the LDSS. If there is any doubt whether termination will cause a potentially serious impairment, it must be resolved in favor of continued service.¹²⁶

¹²⁵ PSL § 32(3)(c)(ii); 16 NYCRR § 11.5(c)(5).

¹²⁶ PSL § 32(3)(c); 16 NYCRR § 11.5(c)(5). *See Brooklyn Union Gas Co. v. Richy*, 123 Misc.2d 802, 804-805 (N.Y.C. Civ. Ct. Kings Co. 1984).

New York Department of Social Services regulations require the LDSS to respond to suspected serious impairment to health and safety, neglect, hazard and dormant account referrals as follows:¹²⁷

- (1) Identify whether the customer referred is a recipient of public assistance;
- (2) Attempt in-person contact to devise a plan to prevent termination. If in-person contact cannot be achieved, and the utility has contacted the customer but no plan has been devised to prevent termination, the LDSS sends a letter to the referred household explaining how it may apply for emergency assistance, and identify the date by which such application for assistance must be made, in order to prevent utility service termination;
- (3) Send the letter described in (2), above to the referred household, whenever (a) the utility has not contacted the household before terminating service; (b) there is no suspicion or verification of a suspected serious impairment or a neglect or hazardous situation; or (c) the account is dormant.
- (4) Report back to the utility orally (within 15 business days) and in writing (within 30 business days), but only in cases where serious impairment to health or safety is likely to result, or in neglect or hazardous situation referrals.
- 5) Assist the household to make timely application for emergency assistance to resolve the termination threat or to restore service.

¹²⁷ 18 NYCRR § 394.1(f); Department of Social Services Administrative Directive No. 93-ADM-26 (Sept. 1993).

While the LDSS’ investigation is pending, the utility must continue service for at least 15 business days from the date referral was made, unless the LDSS notifies it that acceptable payment or other arrangements have been made.¹²⁸

4. Reconnection of Service

¹²⁸ 16 NYCRR § 11.5(c)(5).

A utility must reconnect terminated residential utility service within 24 hours (unless it is prevented from doing so by circumstances beyond its control or the customer requests otherwise) in the following situations:¹²⁹

- (1) the customer pays the full amount of arrears that were the basis for the termination;
- (2) the utility and the customer agree on a DPA and any down payment that the DPA requires;¹³⁰
- (3) the PSC or its designee direct reconnection;
- (4) the utility receives a commitment of a direct payment or written guarantee of payment from the LDSS where the customer resides;¹³¹ or
- (5) the utility is on notice that a serious impairment to health or safety is likely to result if service is not reconnected. Doubts as to whether reconnection of service is required for health or safety reasons must be resolved in favor of reconnection.

¹²⁹ PSL § 35(1); 16 NYCRR § 11.9(a). ESCOs are subject to the same rules. 16 NYCRR § 11.9(b).

¹³⁰ See *Section 5, Deferred Payment Agreements, infra*.

¹³¹ See PULP 2007 - 2008 “Winter Extra” on the Home Energy Assistance Program (“HEAP”) and “Social Services Law § 131-s.

In restoring service to a customer who wishes to pay arrears, a utility may only require payment of the charges that were the basis of the termination. It may not withhold reconnection for nonpayment of any charges which did not form the basis for termination. Instead, these arrears should be part of the DPA, unless the customer elects to pay them immediately.¹³² The PSC issued an order with respect to one New York utility, that low-income customers (those receiving PA of any kind including SSI, HEAP, Food Stamps, Medicaid) are exempt from reconnection charges for reconnection of service to the same customer at the same address within 12 months of termination.¹³³

If the utility fails or neglects to reconnect service within 24 hours without good cause, it must pay the customer \$25-\$50 per day, or partial day, depending on the situation. The burden is on the utility to show good cause.¹³⁴

5. Deferred Payment Agreements

A deferred payment agreement (“DPA”) is a written agreement to pay outstanding utility charges over a specific period of time.¹³⁵ Controversies often include whether a DPA was offered, and if so, the reasonableness or affordability of the payment terms.

¹³² 16 NYCRR § 11.9(a)(comment). “A utility may not insist on a down payment in excess of one-half of the arrears which formed the basis for the disconnection or 3 months’ billing, whichever is less.”

¹³³ Order, issued and effective December 14, 1994, in Cases 93-E-1123, 93-E-0785 and 93-G-0786 concerning Long Island Lighting Co. tariff filings.

¹³⁴ PSL § 35(2); 16 NYCRR §§ 11.9(a)(3); 11.9(a)(3)(b)(2).

¹³⁵ 16 NYCRR § 11.10(a)(1).

Before a utility may terminate, deny an application for service, or refuse to reconnect service because of arrears, it must first offer a DPA to the residential applicant or customer.¹³⁶ Failure to offer a DPA before terminating service to a customer makes the termination unlawful, and is grounds for a complaint¹³⁷ to both the utility and to the PSC, to restore service pending reinstatement of new termination procedures that comply with the law.¹³⁸

¹³⁶ PSL § 37(1); 16 NYCRR § 11.10(a)(4).

¹³⁷ See PULP Law Manual chapter entitled, “Complaint Handling Procedures.”

¹³⁸ A utility may not terminate, disconnect or suspend service for nonpayment while a complaint is pending, nor for 15 days after the complaint is resolved by either the utility or the PSC. 16 NYCRR § 11.20.

A utility need not offer a DPA to any customer whom the PSC determines is able to pay their bill, nor to any customer who has defaulted on an existing, signed DPA, unless certain conditions exist.¹³⁹ If the customer rejects a proffered utility DPA on financial grounds, the utility may require the customer to complete a confidential, financial disclosure form to document assets, income and expenses. The disclosed information is confidential.¹⁴⁰

5.1 DPA Content The DPA must be signed by the utility and the applicant or customer.¹⁴¹ In addition, the DPA must:

- (1) specify the payment terms, including down payment, if any;¹⁴²
- (2) state that the utility must offer an affordable DPA and that the DPA should not be signed if the applicant or customer is unable to pay under its terms;¹⁴³
- (3) state that alternate terms may be available if financial need is shown, including a waiver of any down payment and installment payments as low as \$10 per month;¹⁴⁴

¹³⁹ 16 NYCRR § 11.10(b).

¹⁴⁰ 16 NYCRR § 11.10(a)(1)(ii). See DSS Form 3596.

¹⁴¹ 16 NYCRR § 11.10(a).

¹⁴² 16 NYCRR § 11.10(c).

¹⁴³ 16 NYCRR § 11.10(d)(1).

¹⁴⁴ 16 NYCRR § 11.10(d)(2).

- (4) state that PA and SSI recipients may receive help from a local district social services office;¹⁴⁵

¹⁴⁵ 16 NYCRR § 11.10(d)(3).

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS

Home Energy Fair Practices Act (“HEFPA”)

PULP - 5th Edition, September 3, 2008

- (5) provide telephone numbers to reach the utility and the PSC if the applicant or customer is unable to pay under the DPA, or to discuss the DPA, and for further customer assistance;¹⁴⁶
- (6) state that signing and returning the DPA together with any required down payment within the prescribed time will avoid termination of service;¹⁴⁷
- (7) specify a date 6 or more business days after the utility sends out the DPA, by which the signed DPA and any required down payment must be received in order to prevent termination;¹⁴⁸
- (8) state the utility's policy if a signed DPA is not returned;¹⁴⁹
- (9) state the total amount due, the amount of any required down payment, and the exact amount and due date of each installment;¹⁵⁰
- (10) warn that defaulting on the DPA may lead to termination;¹⁵¹

¹⁴⁶ 16 NYCRR § 11.10(d)(4).

¹⁴⁷ 16 NYCRR § 11.10(d)(5).

¹⁴⁸ 16 NYCRR § 11.10(d)(6).

¹⁴⁹ 16 NYCRR § 11.10(d)(7).

¹⁵⁰ 16 NYCRR § 11.10(d)(8).

¹⁵¹ 16 NYCRR § 11.10(d)(9).

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

- (11) inform the applicant or customer of their right to immediately enroll in a budget billing plan, explain the plan and provide a telephone number where additional information may be obtained;¹⁵²
- (12) inform the applicant or customer of their right to an amended DPA, in the event there is a significant change in their financial circumstances outside of their control.¹⁵³

¹⁵² 16 NYCRR § 11.10(d)(10).

¹⁵³ 16 NYCRR § 11.10(d)(11).

5.2 DPA Down Payments

A down payment may be required as part of a DPA.

The maximum down payment is the greater of up to 15% of the arrears, or one-half of one month’s average usage.¹⁵⁴ If the amount of arrears covered by the DPA is less than the cost of half of one month’s average usage, the down payment amount may be up to 50% of the arrears.¹⁵⁵

5.3 DPA Procedure

A utility may postpone a scheduled termination for up to 10 days to negotiate a DPA, provided the customer is clearly notified of the postponement.¹⁵⁶ The utility must offer the customer a written DPA by providing two copies of the proposed DPA signed by the utility, and specifying the payment terms. The utility must offer the DPA under the following circumstances:¹⁵⁷

- (1) when a termination of utility service to a residential customer is scheduled. In this event, the DPA must be offered at least 7 calendar days before the earliest termination date (10 days if the DPA is sent by mail);
- (2) when an applicant must pay arrears in order to receive new service or to be reconnected; and
- (3) when a termination is scheduled to occur because the customer defaulted on a previous DPA.

¹⁵⁴ PSL §§ 31 and 37 set a statutory maximum of a down payment no more than half the arrears or three months’ usage.

¹⁵⁵ PSL § 37(1). 16 NYCRR § 11.10(c)(2)(ii).

¹⁵⁶ 16 NYCRR § 11.10(a)(3).

¹⁵⁷ 16 NYCRR § 11.10(a)(4).

5.4 Late Fees and Interest Charges A utility may not charge interest or late fees on the accrued arrears that comprise the amount due in a DPA. The application of late payment charges to amounts covered by a DPA is prohibited by statute.¹⁵⁸ However, utilities may assess a 1.5% per month charge on DPA installments if the customer fails to pay such installments on a timely basis.¹⁵⁹

5.5 Negotiated DPAs Before sending a written DPA to any eligible applicant or customer, the utility must make "reasonable efforts" to contact the applicant or customer by phone, mail or in person, to try to negotiate a DPA.¹⁶⁰ The utility must negotiate in good faith, to reach a payment agreement that is fair and equitable in light of the customer's/applicant's financial circumstances.¹⁶¹ The PSC regulations explicitly provide that the negotiated DPA must allow installment payments as low as \$10 per month with no down payment required, if the

¹⁵⁸ PSL § 42.2. In a December 2007 order applicable to all electric and natural gas utilities and large water companies in the state, the PSC reiterated its ruling that late payment charges may not be assessed on DPA balances. Case No. 99-M-0074, *Order Rejecting Late Payment Charges and Denying Petitions for Rehearing* (Dec. 21, 2007).

¹⁵⁹ PSL § 42.1.

¹⁶⁰ 16 NYCRR § 11.10(a)(1).

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

customer's/applicant's financial condition merits such terms.¹⁶² A utility must also renegotiate an existing DPA if the customer demonstrates that their financial condition has changed significantly due to circumstances beyond their control.¹⁶³ If the customer is unable to negotiate a fair and equitable DPA with the utility, he or she may seek assistance from the PSC and, if necessary, a written determination.¹⁶⁴

¹⁶¹ 16 NYCRR § 11.10(a)(1)(i).

¹⁶² 16 NYCRR § 11.10(a)(1)(iii).

¹⁶³ 16 NYCRR § 11.10(a)(5).

¹⁶⁴ PSL § 43(2), 16 NYCRR § 11.10(a)(7); (d)(4). *See* PULP Law Manual chapter, "Complaint Handling Procedures."

5.6 Standard DPAs If a negotiated DPA is not achieved, the utility must provide a written "standard" DPA.¹⁶⁵ If mailed, the DPA must be sent at least 10 days before the earliest termination date.¹⁶⁶

The standard DPA requires a down payment of up to 15% of the total amount covered by the DPA, or the cost of one-half of one month's average bill, whichever is greater.¹⁶⁷ If the amount of arrears is small, however, and totals no more than one-half of one month's average bill, the down payment may be up to one-half the arrears.¹⁶⁸ The standard DPA monthly installments may be up to one-half of one month's average billing, or 10% of the balance owed (after subtracting the down

¹⁶⁵ 16 NYCRR § 11.10(a)(1); 16 NYCRR § 11.10(a)(4).

¹⁶⁶ 16 NYCRR § 11.10(a)(4)(i).

¹⁶⁷ 16 NYCRR § 11.10(c)(2)(ii). For example, to calculate the down payment for a DPA to repay \$500 in arrears:

- (1) Determine 15% of the total arrears ($\$500 \times 15\% = \75);
- (2) Determine the cost of $\frac{1}{2}$ of one month's billing. If the previous year's annual billings totaled \$1,440, then the one-month average is \$120 ($\$1,440 \div 12 = \120). One-half of one month's average billing is \$60 ($\$120 \div 2 = \60).
- (3) The standard down payment is therefore \$75 (15% of the arrears), because it is greater than $\frac{1}{2}$ of one month's average billing (\$60).

¹⁶⁸ *Id.*

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

payment), whichever is greater.¹⁶⁹ Even if the applicant or customer has received a “standard DPA” from the utility, he or she may still negotiate a DPA with different terms, based on financial circumstances.¹⁷⁰

¹⁶⁹ 16 NYCRR § 11.10(c)(2)(ii).

¹⁷⁰ 16 NYCRR § 11.10(a)(1).

5.7 Customer duties and defaults Under either a standard or negotiated DPA, the customer must pay current bills, plus the DPA installment payments.¹⁷¹ A customer’s default on a DPA triggers the following actions:¹⁷²

- (1) The utility must send a reminder notice at least 8 calendar days before a final termination notice is sent;
- (2) The reminder notice must inform the customer, in conspicuous, bold type, that:
 - (a) the terms of the DPA may be met by making the necessary payment within 20 calendar days of the date payment was due, and if such payment is not sent, a final termination notice may issue;
 - (b) a new DPA can be negotiated if the customer’s financial circumstances have changed;
- (3) If by the 20th calendar day after payment was due, the utility has still not received payment and a new DPA has not been negotiated, the utility may demand full payment of the outstanding charges and send a final termination notice. The notice must inform the customer, in conspicuous, bold type, that:
 - (a) a new DPA can be negotiated if the customer’s financial circumstances have changed and advise the customer to contact the utility at a specified telephone number to determine whether a new DPA is available;
 - (b) public assistance may be available from an LDSS, and provide contact information for the appropriate agency, but inform the customer that before public assistance is available, the customer will generally be required to make certain financial disclosures to the utility, which will be used to evaluate eligibility for a new DPA.

¹⁷¹ 16 NYCRR § 11.10(c)(1).

¹⁷² 16 NYCRR § 11.10(e).

The utility is not required to offer a new DPA unless the customer can demonstrate inability to make payment based on changed financial circumstances,¹⁷³ or unless the terms of original, negotiated DPA were more demanding than those of a standard DPA.¹⁷⁴

In cases where a customer defaults on a DPA, or has difficulty in making the required payments, PULP recommends advocates review the DPA for its initial and current reasonableness and affordability. Factors to consider include:

- whether the agreement was written and signed by the utility and the customer;
- the source, amount and regularity of household income;
- household energy needs and usage (*e.g.*, seasonal cold weather, elderly or infant occupant, poorly weatherized dwelling);
- the extent of actual negotiations to tailor a DPA to the customer's financial circumstances; and
- the disparate bargaining power in favor of the utility and pressure on the customer to sign a DPA to avoid immediate termination.

¹⁷³ 16 NYCRR § 11.10(e)(2)(i).

¹⁷⁴ 16 NYCRR § 11.10(e)(3).

6. Security Deposits No electric or gas corporation or municipality may require a new residential customer, other than a seasonal¹⁷⁵ or short-term customer,¹⁷⁶ to pay a security deposit as a condition of receiving utility service.¹⁷⁷ Generally, persons known to be receiving needs-based government cash benefits are not required to pay a security deposit as a condition of receiving utility service.¹⁷⁸

¹⁷⁵ A seasonal customer is a person who applies for and receives utility service periodically each year, intermittently during the year, or at other irregular intervals. 16 NYCRR § 11.12(a).

¹⁷⁶ A short-term customer is a person who requires service for a specified period of time that does not exceed one year. 16 NYCRR § 11.12(a). A customer who is a “month-to-month” tenant with no lease, or who has a lease that is for a period of less than one year, is not a short-term customer and utilities may not require such customers to post security deposits. “[T]he term of a lease as mandated by a landlord is a poor indicator of the period of time for which a customer ‘requires’ utility service, and, accordingly, lease terms alone should not be used to characterize a customer as ‘short term’ under the statute and rules” PSC Case No. 03-M-0772, *Order on Residential Security Deposits* (Mar. 25, 2004).

¹⁷⁷ PSL § 36(1); 16 NYCRR § 11.12(b). Former customers who have not had utility service in their own names within the past 60 days are considered new customers and may not be assessed a security deposit, even if they owe arrears on the former account. PSC Case No. 03-M-0772, *Declaratory Ruling on Petition of Niagara Mohawk Power Corp. for Authorization to Request Security Deposits* (Nov. 16, 2004).

¹⁷⁸ PSL § 36(1), and SSL § 131-j.

A utility may require a deposit from a current residential customer as a condition of service if the customer is delinquent in paying utility bills.¹⁷⁹ Before a utility may assess a security deposit, it must first give the customer at least 20 days written notice that failure to make timely payments will permit the utility to demand a security deposit.¹⁸⁰ For the purpose of a security deposit, a delinquency occurs if a customer:

- (1) accumulates two consecutive months of arrears without making reasonable payment (defined as one-half of the total arrears) before the time that a late payment charge would accrue (20 days after payment is due), or fails to make a reasonable payment on a bimonthly bill within 50 days after payment is due. In either event, the utility must request a deposit within two months of such failure to pay; or
- (2) had utility service terminated for nonpayment during the preceding six months.

¹⁷⁹ PSL § 36(1).

¹⁸⁰ 16 NYCRR § 11.12(d)(2).

Notwithstanding this exception to the "no deposit rule," a utility may not require a security deposit if the customer is a recipient of PA, SSI, additional State payments,¹⁸¹ or is 62 years of age or older.¹⁸² Additionally, no security deposit may be assessed against a customer who has entered into a DPA to satisfy the arrears on which the security deposit is based.¹⁸³

6.1 Deposit amount and duty to serve Delinquent customers assessed a security deposit may pay the deposit in installments over a period of up to 12 months.¹⁸⁴ The amount of the deposit cannot exceed twice the average monthly bill for a calendar year.¹⁸⁵ In the case of electric or

¹⁸¹ 16 NYCRR § 11.12(f), and SSL § 131-j.

¹⁸² PSL § 36(3); 16 NYCRR § 11.12(g). A deposit may be required from a customer 62 years of age or older if the customer's service was terminated for non-payment of bills within the preceding six months, or if the customer or applicant is a bad credit risk according to standards set by the PSC. PSL § 36(3).

¹⁸³ PSC Case No. 03-M-0772, *Declaratory Ruling on Petition of Niagara Mohawk Power Corp. for Authorization to Request Security Deposits* (Nov. 16, 2004).

¹⁸⁴ 16 NYCRR § 11.12(d)(3).

¹⁸⁵ 16 NYCRR § 11.12(h).

gas space heating customers, a deposit may not exceed twice the estimated average monthly bill for the heating season.¹⁸⁶

A utility must continue service to a customer, or extend service to an applicant who disputes the deposit requirement.¹⁸⁷ However, while the complaint is pending, current bills for service rendered must be paid. If the dispute involves only the amount of the deposit, the applicant or customer must pay a "reasonable" amount as a deposit, pending resolution of the dispute.¹⁸⁸

Customers whose debts to a utility are the subject of a bankruptcy can have their obligations discharged, but the bankruptcy court may require them to make a deposit. It is PULP’s position that a customer in such circumstances should be required to pay no more than a “delinquent” customer would be required to pay under HEFPA.

¹⁸⁶ *Id.*

¹⁸⁷ 16 NYCRR §§ 90.10 (electric) and 225.10 (gas).

¹⁸⁸ *Id.*

6.2 Interest and disposition Customers required to post security deposits are entitled to interest on the amount deposited at a rate set annually by the PSC.¹⁸⁹ The accumulated interest must be paid to the customer when the deposit is returned. If the deposit has been held for one year, the interest must be credited to the customer on the first billing for utility service rendered after the end of the year. If the customer has not been delinquent in the payment of bills during the one year period, the deposit must be refunded promptly.¹⁹⁰

7. Meters and Back billing

¹⁸⁹ PSL § 36(3). 16 NYCRR §§ 90.3 (electric) and 225.3 (gas), and § 91.1 (municipal utilities). The 2008 rates are 3.75% for deposits with investor owned utilities and 2.05% for deposits with municipally owned utilities. Letter from John Stewart, Acting Director, Office of Accounting, Finance and Economics, Public Service Commission (Nov. 9, 2007).

¹⁹⁰ 16 NYCRR § 11.12(h).

7.1 General rules No utility may bill a residential customer for gas or electric service rendered more than six months before the utility mailed the customer its first bill for that service, unless the utility's failure to bill earlier was not due to its own neglect, or was due to the customer's culpable conduct.¹⁹¹ If the customer remains liable for amounts owed more than six months before the bill was mailed, and was not culpable for the delay, the utility must explain the reason for the late billing and notify the customer in writing of their right to pay the adjusted bill in monthly installments tailored to their financial circumstances.¹⁹² The installment plan may require a down payment of the lesser of up to one-half of the amount due, or three months' average billing.¹⁹³

A utility may not adjust upward a bill previously rendered to a residential customer (*e.g.*, to correct estimated bills) more than 12 months after the service to which the adjustment pertains was rendered, unless one or more of the following conditions exist:

- (1) the incorrect billing was a result of customer's culpable conduct;
- (2) the incorrect billing was *not* a result of the utility's own neglect;
- (3) the adjustment is necessary to adjust a budget or levelized payment plan; or

¹⁹¹ PSL § 41(1); 16 NYCRR § 11.14(a).

¹⁹² PSL § 41(1); 16 NYCRR § 11.14(a). Note, however, that neither the Public Service Law nor PSC regulations contemplate installment payment agreements for amounts owed which accrued during the six month period.

¹⁹³ PSL §41(1).

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

- (4) there was a dispute between the utility and the customer concerning the charges for service during the 12 month period.¹⁹⁴

¹⁹⁴ PSL § 41(2); 16 NYCRR § 11.14(b). *See also, Consol. Edison Co. of N.Y., Inc. v. Gallagher*, 244 A.D.2d 447; 664 N.Y.S.2d 125 (2d Dep’t 1997) (holding that unpaid bills upon which termination was based that were more than 12 months old, were proper under PSC law and regulations because they were the subject of continued billing disputes between the parties during the 12-month period that preceded termination).

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

If one of the above-listed conditions is present, the utility may back bill beyond the 12- month period.¹⁹⁵ When back billing for any allowable period will result in an increase of over \$100, and provided the back billing is not a result of the customer’s culpable conduct, the utility must notify the customer that he or she has a right to pay the adjusted bill in regular monthly installments tailored to his or her financial circumstances over a reasonable period of time.¹⁹⁶

A utility may not issue a bill for previously unbilled service, or increase a bill previously sent to a residential customer more than 24 months from the time the service was provided, unless the customer's culpable conduct caused or contributed to the utility's failure to render a timely or accurate billing.¹⁹⁷ When under-billing results from a customer’s culpable conduct, a utility may back bill for a period of up to six years.¹⁹⁸

¹⁹⁵ PSL § 41(2); 16 NYCRR § 11.14(b).

¹⁹⁶ PSL § 41(2); 16 NYCRR § 11.14(c). There is an exception for back billed amounts resulting from billing disputes. These amounts must be paid within four months of the final resolution of the dispute. 16 NYCRR § 11.14(c).

¹⁹⁷ 16 NYCRR § 11.14(e). *Gansevoort Holding Corp. v. Consol. Edison Co. of N.Y., Inc.*, 167 A.D.2d 648, 562 N.Y.S.2d 871 (3rd Dept. 1990) (holding that utility has right to collect underbilled amounts from a commercial customer when the customer prevented actual meter readings).

¹⁹⁸ This policy has been enunciated in PSC decisions, but no such regulation exists. *See*, PSC Case 03-E-0058, *Vetromile v. Con Edison* (Dec.

7.2 Meters and tampering¹⁹⁹

7.2.1 Meter testing and inspection

14, 2007) (“the culpable conduct of the complainant caused the utility’s failure to bill correctly and warrants backbilling for a six-year period”); PSC Case 92-G-1167, *Julie and Jack Laundromat, Inc. v. Bklyn Union Gas* (Nov. 17, 1994) (citing the PSC’s six-year backbilling policy established in *Kahn v. NYSEG*, (Jan. 13, 1986), *Robert Reynolds*, No. E503698 (Oct. 20, 1989) and *Donald Johnson*, No. 959005 (July 15, 1991).

¹⁹⁹ Meter tampering issues may also involve violations of the Shared Meter Law, PSL § 51. See the “Shared Meters, Diversion and Theft of Services” chapter of this Manual.

Electricity and gas meters used for billing customers must be tested by a meter testing facility certified by the PSC or its designee.²⁰⁰ All new electricity meters must be tested and adjusted to as near to 100% accuracy as possible.²⁰¹ Gas meters used to provide domestic gas service must be tested at least once every seven years.²⁰² Both electricity and gas meters must be inspected, at least once, in response to a consumer complaint.²⁰³

7.2.2 Meter tampering and back billing A utility may back bill a customer who tampered with the meter. The Public Service Law requires that all similarly situated customers be charged the same amount for utility service. Therefore, if a utility did not bill a customer the full amount for utility service used, the utility would effectively be giving that customer a discount, thereby violating Public Service Law § 65(2), which provides that utilities may not charge one customer more than another for the same type of service.²⁰⁴

Where the evidence of tampering is circumstantial and there is no evidence that the meter recorded less than 100% of the connected energy load, the PSC has a rational basis to make a finding

²⁰⁰ 16 NYCRR §§ 92.1; 92.2 (electricity); 16 NYCRR §§ 226.2(c); 226.4 (gas).

²⁰¹ 16 NYCRR § 92.7.

²⁰² 16 NYCRR § 226.81.

²⁰³ 16 NYCRR § 92.9; PSL § 67(3) (electricity); 16 NYCRR § 228.2; PSL § 67(3) (gas).

²⁰⁴ *Matter of Timm v. N.Y.S. Public Serv. Comm'n*, 144 A.D.2d 139, 534 N.Y.S.2d 466 (3rd Dept. 1988), *appeal dismissed*, 74 N.Y.2d 713 (1989).

of meter tampering and to calculate and bill the amount due for service received as a result of meter tampering.²⁰⁵

²⁰⁵ *Estrella v. Bradford*, 146 Misc.2d 48, 549 N.Y.S.2d 569 (Sup. Ct. Albany Co., 1989). The circumstantial evidence of tampering consisted of the seal on the meter cover had been removed, an internal seal had been cut giving access to the meter dials, the seal wire had been reinserted to make it look intact, and the customer’s energy load had dropped dramatically. *See also, Matter of Capital Props. Co. v. Public Serv. Comm’n*, 91 AD2d 726, 457 N.Y.S.2d 635 (holding that where utility failed to transfer a customer’s account to its new, computerized billing system, which resulted in the meter not being read and no billing for over 5 years, “the basic premise determinative of the issues here is that a utility must charge and collect by law *full* compensation for electricity used as set by its rate schedule. Any deviations from such legal obligation are in contravention of law. . . .” *See also*, PSL § 65(2)).

7.2.3 Proof of meter tampering The law creates a presumption that the person who accepts or receives utility service that has been intentionally diverted or intentionally prevented from being properly metered and billed, does so with knowledge of the tampering.²⁰⁶ In a criminal case, the presumption must still be proven beyond a reasonable doubt.²⁰⁷

For advocates involved in meter tampering cases, in addition to the indicia of meter tampering reported in the cases cited above, factors to consider include:

1. The location of the meter and the identity of persons who have access to it;
2. The number of building occupants;
3. The frequency of utility meter reading or inspections. Should the utility have known earlier that there was tampering, which may have been performed by someone else?
4. Is an increase or decrease in usage seasonal or due to a change in the customer's occupancy?
5. The number and types of appliances, and the nature of usage (heating, lighting, cooking, etc.)

²⁰⁶ Penal Law §§ 165.15; 165.15(4); 165.15(6). *People v. Casteneda*, 92 Misc.2d 687, 689; 400 N.Y.S.2d 702, 703 (N.Y.C. Crim. Ct. Bronx County 1977).

²⁰⁷ *Casteneda*, 92 Misc.2d at 691; 400 N.Y.S.2d at 704. (“A presumption merely provides a method whereby certain facts are deemed to be prima facie proof of other facts. . . [and] cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed . . .”)

7.2.4 Criminal implications of meter tampering

The Penal Law

§165.15 makes theft of services (tampering with electrical or other utility services) a class A misdemeanor. In addition, theft of utility service constitutes larceny and a defendant in a meter tampering case may be convicted of both crimes.²⁰⁸

8. Miscellaneous Provisions

In addition to the specific HEFPA provisions summarized in the preceding sections of this chapter, HEFPA also contains several other consumer-oriented provisions. These include:

²⁰⁸ *People v. McLaughlin*, 93 Misc. 2d 980, 986; 402 N.Y.S.2d 137, 141 (Sup. Ct. Queens County 1978).

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS

Home Energy Fair Practices Act (“HEFPA”)

PULP - 5th Edition, September 3, 2008

3. budget or levelized payment plans, based on the customer's recent 12 months experience, or, if none, then on estimated future usage;²⁰⁹
4. meter reading and estimated bills;²¹⁰
5. voluntary notice to third-party before termination of service;²¹¹
6. late payment and other charges;²¹²
7. requirements for the form and content of bills, and annual notification to customers of their rights and obligations;²¹³
8. utility designation of payment agencies;²¹⁴
9. the inspection of utility apparatus;²¹⁵

²⁰⁹ PSL § 38; 16 NYCRR § 11.11. Customers age 62 years and older may pay quarterly if their average annual bill is \$150 or less. Under utility tariffs, budget plan amounts may be adjusted to reflect price changes.

²¹⁰ PSL § 39; 16 NYCRR § 11.13.

²¹¹ PSL § 40. This provision may be useful to disabled and elderly customers. The party receiving the notice does not become liable for the bill.

²¹² PSL § 42; 16 NYCRR § 11.15.

²¹³ PSL § 44; 16 NYCRR §§ 11.16 and 11.17. At the request of a customer, a utility must send its messages in English and in such non-English language as is appropriate according to the most recent Federal census population data.

²¹⁴ PSL § 45. Under this provision, utilities may permit customers to pay their bills to a payment agent.

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

²¹⁵ PSL § 47; 16 NYCRR § 11.19. Utility agents must carry a photo-identification card and written authority from a specified officer of the utility corporation. Inspections must be on a non-holiday between 8 am and 6 pm, except for emergencies or where there is evidence of meter tampering or theft of services.

10. residential disconnections in emergencies;²¹⁶
11. an emergency Hotline to the PSC for residential customers to call regarding (1) service initiation, (2) service termination or (3) service reconnection, or (4) for questions regarding termination or refusal of service when the health and safety of a person is involved;²¹⁷
12. residential steam service rights and responsibilities;²¹⁸ and
13. the PSC has reserved the right, for good cause shown or upon its own motion, to waive any requirement of 16 NYCRR Part 11, except where the waiver is precluded by the Public Service Law or other applicable law.²¹⁹

Additionally, customers are entitled to interest on overpayments caused by an erroneous utility billing that is not refunded within 30 days of the overpayment.²²⁰ Protections concerning

²¹⁶ PSL § 46; 16 NYCRR § 11.18. Grounds for disconnection: an emergency threatening the health or safety of a person, the surrounding area, or the utility's distribution system. Service must be restored as soon as feasible, and must be restored before it may be terminated for any other reasons.

²¹⁷ PSL § 48; 16 NYCRR § 11.21. The statute requires the PSC to establish a toll-free number, staffed from 9 AM to 9 PM each business day. The number is 1-800-342-3355.

²¹⁸ PSL § 49; 16 NYCRR Part 400. These are "substantially comparable" to those for electric and gas customers.

²¹⁹ 16 NYCRR § 11.22.

²²⁰ 16 NYCRR §§ 145 (electric utilities); 277 (gas utilities); 435 (steam utilities); 534 (water utilities).

shared utility meters,²²¹ complaint handling procedures,²²² and residential water service²²³ are addressed in separate chapters of the PULP Law Manual.

9. Municipal Electric Service

²²¹ PSL § 52; 16 NYCRR §§ 11.30; 11.37.

²²² PSL § 43; 16 NYCRR § 11.20.

²²³ PSL § 50.

Municipal utilities exist under the authority of General Municipal Law Article 14-A. Notwithstanding PSL §30, the PSC’s regulations implementing HEFPA do not apply to any municipality that is exempt from PSC regulation by virtue of Public Authorities Law (PAL) §1005(5)(g).²²⁴ HEFPA governs municipal gas utilities.²²⁵

Municipal electric utilities that receive substantially all of their power from the New York Power Authority (“NYPA”) are excluded from HEFPA coverage.²²⁶ At present, municipal electric utilities subject to PSC authority include Akron, Andover, Angelica, Arcade, Bath, Bergen, Boonville, Brocton, Castile, Churchville, Endicott, Fairport, Fishers Island, Frankfort, Freeport, Green Island, Greene, Groton, Hamilton, Holley, Ilion, Jamestown, Little Valley, Massena, Mohawk, Penn Yan, Philadelphia, Plattsburgh, Richmondville, Rockville Centre,

²²⁴ Laws of 1939, chapter 870.

²²⁵ PSL §30.

²²⁶ 16 NYCRR § 11.2. The New York Power Authority (“NYPA”) is a state-owned electric power utility that operates power generating facilities and transmission lines and sells power to community-owned electric systems and rural electric cooperatives.

Rouses Point, Salamanca, Sherburne, Silver Spring, Skaneateles, Spencerport, Springville,
Theresa and Wellsville.²²⁷

²²⁷ These municipalities may receive some NYPA electricity, but are not receiving substantially all of their power from it. A list of electric utilities regulated by the PSC is available at <http://www.dps.state.ny.us/electricu.html>.

To the extent that the PSC regulates municipal utilities,²²⁸ HEFPA, the PSC HEFPA rules, and relevant parts of PSC regulations are operative.²²⁹ Both the Third and Fourth Departments of the New York Supreme Court, Appellate Division, have held that HEFPA does not apply to municipalities that obtain electric power from the NYPA and resell it to residential consumers.²³⁰

In recent years, many municipal electric utilities have come under PSC jurisdiction, because they no longer receive most of their power from NYPA. In some situations, they may have practices that are inconsistent with HEFPA, such as deposit requirements. The annexed table identifies municipal and rural electric cooperatives, and their respective regulatory agency according to their power source.

The NYPA regulations address the services and practices of municipalities that obtain power from it. These regulations include customer service protections which are similar to, but not as comprehensive as, HEFPA.²³¹ These

²²⁸ 16 NYCRR Parts 90-105 and 136-145 (electric service), and 225-232 and 270-277 (gas service).

²²⁹ See, e.g., 16 NYCRR Parts 91 (municipal utility consumer deposits), 138 (municipal electric bills and penalties) and 272 (municipal gas bills and penalties). However, as noted in the Introduction to this section, the PSC HEFPA regulations prevail over any inconsistent provisions in these other parts. 16 NYCRR § 11.2(a).

²³⁰ *Lathrop v. Village of Bath*, 112 A.D.2d 749, 492 N.Y.S.2d 247 (4th Dept. 1985), *appeal withdrawn* 67 N.Y.2d 648 (1986). *Accord*, *Niagara Mohawk Power Corp. v. Public Service Comm’n*, 153 Misc.2d 530, 581 N.Y.S.2d 700 (Sup. Ct. Albany County 1992).

²³¹ For example, there are no comparable regulations concerning application, budget plans and backbilling, annual notification of rights and

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

regulations are found at 21 NYCRR Parts 451 (deposits), 452 (resale rates), 457 (late payment charges) and 459 (procedures for discontinuance).

complaint procedures.

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

According to NYPA, complaints about municipal electric service should first be made directly to the utility at the address and telephone number on the bill. If a complaint is not resolved, the utility refers the complaint to the NYPA.²³² NYPA investigates the complaint with both the utility and the customer and encourages the utility to resolve the issue. According to NYPA sources, the number of customer complaints is very small – only about 5 per year. If the customer is dissatisfied with NYPA’s resolution of the complaint, he or she may take legal action.

²³² NYPA can be contacted by writing: New York Power Authority, Mailroom - 10-B, 123 Main Street White Plains, NY 10601-3170, or by telephone, 914-390-8127.

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS

Home Energy Fair Practices Act (“HEFPA”)

PULP - 5th Edition, September 3, 2008

<p>MUNICIPAL ELECTRIC UTILITIES SUPPLIED AND REGULATED BY NYPA</p>	<p>RURAL ELECTRIC COOPERATIVES SUPPLIED AND REGULATED BY NYPA</p>	<p>MUNICIPAL ELECTRIC UTILITIES PARTIALLY SUPPLIED BY N.Y.P.A. BUT REGULATED BY PSC</p>
<p>Greenport Lake Placid Marathon Mayville Sherrill Solvay Tupper Lake Watkins Glen</p>	<p>Delaware Oneida-Madison Ostego Steuben</p>	<p>Akron Andover Angelica Arcade Bath Bergen Boonville Brocton Castile Churchville Endicott Fairport Fishers Island Frankfort Freeport Green Island Greene Groton Hamilton Holley Ilion Jamestown Little Valley Massena Mohawk Penn Yan Philadelphia Plattsburgh Richmondville Rockville Center Rouses Point Salamanca Sherburne Silver Spring Skaneateles Spencerport Springville Theresa Wellsville Westfield</p>

RIGHTS OF RESIDENTIAL GAS AND ELECTRICITY CUSTOMERS
Home Energy Fair Practices Act (“HEFPA”)
PULP - 5th Edition, September 3, 2008

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