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

[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 HEFPA replaced parts of the Transportation Corporations Law ("TCL"), which was repealed.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. Richy,* 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.

[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]

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]

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[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.

[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

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

[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).

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

[14] 16 NYCRR § 11.3(a)(4)(v).

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]

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.

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[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.*

[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 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."

[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).

* * *

> [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:

(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]

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[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.

[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).

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]

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

(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]

[29] 16 NYCRR § 11.3(b)(1).

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

[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).

(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]

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

[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.

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

[37] PSL § 31(4);16 NYCRR Part 230.

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 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]

[38] 16 NYCRR § 98(g).

[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).

3. Termination of Service

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.

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.

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[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."

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 bill[45]

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

(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]

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

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[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.*

[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.*

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

(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

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[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).

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]

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

[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).

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]

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 Dwellings[59]

3.2.1 Notice of Termination No utility may terminate electric, gas or steam service to an entire multiple dwelling[60] 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 termination. During cold weather (November 1st to April 15th), 30 days notice must be given for termination of heat-related service; and;

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[57] 16 NYCRR § 11.4(a)(3)(ii).

[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 habitibility. (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.

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

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[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.

[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]

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

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[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).

[67] PSL § 52.

[68] PSL § 38(1).

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]

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

[69] RPL § 235-a(1).

[70] PSL § 33(5); 16 NYCRR § 11.7(d).

[71] 16 NYCRR § 11.7(e).

[72] PSL § 33(2).

residential or commercial rate. The utility must keep a record of two-family dwellings that are not separately metered.[73]

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.

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

[73] 16 NYCRR § 11.8(a).

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

[75] PSL § 34(2); 16 NYCRR §§ 11.8(c).

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 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]

(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

[76] 16 NYCRR § 11.8(d)(2).

[77] PSL § 34(3)(b).

[78] *Id.*

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

[80] RPL § 235-a.

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

[82] PSL § 32(3)(a)-(c).

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]

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

[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).

[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]

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

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

[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.

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]

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]

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

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

[91] 16 NYCRR § 11.5(a)(5) and (6).

[92] PSL § 53.

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]

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

[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).

[95] PSL § 32(3)(b)..

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

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, 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]

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[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).

[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 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:

> 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

[101] 16 NYCRR § 11.5(c)(2).

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

[103] 16 NYCRR § 11.5(c)(1).

[104] *Id.*

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

(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]

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

[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.

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

[108] 16 NYCRR § 11.5(c)(2)(ii).

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]

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]

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

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[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).

[112] 16 NYCRR § 11.7(a)(4).

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 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]

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

[113] 16 NYCRR § 11.7(g)(2)(i).

[114] *Id.*

[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.

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 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]

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

[117] 16 NYCRR §§ 11.8(h).

[118] 16 NYCRR §§ 11.8(g).

[119] 16 NYCRR §11.5(c)(2)(iii).

[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).

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, 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]

[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).

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

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]

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.

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[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).

[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

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.

[128] 16 NYCRR § 11.5(c)(5).

[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.

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[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 complaint[137] to both the utility and to the PSC, to restore service pending reinstitution of new termination procedures that comply with the law.[138]

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:

[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.

[139] 16 NYCRR § 11.10(b).

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

[141] 16 NYCRR § 11.10(a).

(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]

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

(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]

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[142] 16 NYCRR § 11.10(c).

[143] 16 NYCRR § 11.10(d)(1).

[144] 16 NYCRR § 11.10(d)(2).

[145] 16 NYCRR § 11.10(d)(3).

[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).

(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]

(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]

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,

[150] 16 NYCRR § 11.10(d)(8).

[151] 16 NYCRR § 11.10(d)(9).

[152] 16 NYCRR § 11.10(d)(10).

[153] 16 NYCRR § 11.10(d)(11).

[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).

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.

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

[157] 16 NYCRR § 11.10(a)(4).

[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).

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 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]

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

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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."

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 x 15% = $75);

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 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]

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) Determine the cost of ½ of one month's billing. If the previous year's annual billings totaled $1,440, then the one-month average is $120 ($1,440 ÷ 12 = $120). One-half of one month's average billing is $60 ($120 ÷ 2 = $60).

(3) The standard down payment is therefore $75 (15% of the arrears), because it is greater than ½ of one month's average billing ($60).

[168] *Id.*

[169] 16 NYCRR § 11.10(c)(2)(ii).

[170] 16 NYCRR § 11.10(a)(1).

[171] 16 NYCRR § 11.10(c)(1).

[172] 16 NYCRR § 11.10(e).

(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.

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:

173 16 NYCRR § 11.10(e)(2)(i).

174 16 NYCRR § 11.10(e)(3).

- 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.

6. **Security Deposits** No electric or gas corporation or municipality may require a new residential customer, other than a seasonal[175] 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.

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]

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179 PSL § 36(1).

180 16 NYCRR § 11.12(d)(2).

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).

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 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.

[184] 16 NYCRR § 11.12(d)(3).

[185] 16 NYCRR § 11.12(h).

[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

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

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[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).

[191] PSL § 41(1); 16 NYCRR § 11.14(a).

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

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

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]

[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).

[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).

[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).

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]

7.2 Meters and tampering[199]

7.2.1 Meter testing and inspection

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

[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. 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.

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

[201] 16 NYCRR § 92.7.

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

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[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).

[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.)

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

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[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] *Castenada*, 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 . . . ."

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:

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]

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

[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.

[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

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 shared utility meters,[221] complaint handling procedures,[222] and residential water service[223] are addressed in separate chapters of the PULP Law Manual.

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or theft of services.

[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).

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

[222] PSL § 43; 16 NYCRR § 11.20.

[223] PSL § 50.

9. Municipal Electric Service

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

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

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[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.

[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.

[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

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

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

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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 complaint procedures.

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

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 NYPAs resolution of the complaint, he or she may take legal action.

MUNICIPAL ELECTRIC UTILITIES SUPPLIED AND REGULATED BY NYPA	RURAL ELECTRIC COOPERATIVES SUPPLIED AND REGULATED BY NYPA	MUNICIPAL ELECTRIC UTILITIES PARTIALLY SUPPLIED BY N.Y.P.A. BUT REGULATED BY PSC
Greenport	Delaware	Akron
Lake Placid	Oneida-Madison	Andover
Marathon	Ostego	Angelica
Mayville	Steuben	Arcade
Sherrill		Bath
Solvay		Bergen
Tupper Lake		Boonville
Watkins Glen		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

UTILITY COMPLAINT HANDLING PROCEDURES OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION

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

New York's Utility Project
P.O. Box 10787
Albany, NY 12201
1-877-669-2572

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COMPLAINT HANDLING PROCEDURES

1. Introduction

The complaint handling procedures are the administrative procedure adopted by the New York Public Service Commission (PSC) to review the consumer service actions taken by any regulated utility. Complaint procedures exist for electric, steam and gas utility customers, as well as for telephone and water utility customers. This chapter addresses the general procedures and practice of making and pursuing a complaint.233

Consumer complaints typically involve disputes regarding bill amounts, deposit requests, negotiation of deferred payment agreements, service problems, and the failure of a utility to comply with the substantive protections extended to utility customers by statute and/or regulation. Upon reaching the Department of Public Service, the administrative complaint procedures potentially involve three levels of investigation: (1) an initial complaint; (2) an informal hearing or informal review; and (3) a formal appeal to the Public Service Commission.

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233 16 NYCRR Part 12, Consumer Complaint Procedures. 16 NYCRR § 12.0 provides that the complaint procedures are applicable to any "gas corporation, electric corporation, gas and electric corporation, steam corporation, municipality, or any entity that, in any manner sells or facilitates the sale, furnishing or provision of gas or electric commodity to residential customers, including energy services companies [ESCOs] and owners of submetered residential buildings; provided, however, that the term [utility] does not include any municipality that is exempt from commission regulation by virtue of section 1005(5)(g) of the Public Authorities Law."

2. Initial Complaint

2.1. When to Make a Complaint

Before contacting the PSC, the customer must first make a complaint to the utility.234 The utility must not terminate service for nonpayment while the complaint is pending, provided the customer pays the undisputed portions of the bill(s).235 After the utility has investigated the complaint and reported its results to the customer, the customer may then file a complaint with the PSC whenever he or she believes that the matter has not been resolved satisfactorily by the utility. The PSC will not accept customer complaints where resolution has not first been attempted at the utility.236

PSC regulations do not impose time constraints upon the filing of an initial complaint.237 When a customer faces impending termination of service, or has already been disconnected, necessity dictates its own time constraint. A utility may terminate a customer's gas or electric service 15 days after mailing a final termination notice.238 To maintain service for customers facing an impending termination, complaint must be filed *before* the scheduled termination date.

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234 See 16 NYCRR § 12.1(a), "Any utility customer may file a complaint . . . when the customer believes he or she has not obtained a satisfactory resolution of a dispute with a utility. . . ." For rules related to billing disputes and other complaints to utilities, see 16 NYCRR §§ 11.20 (complaints to the utility); 14.19 (complaint handling procedures – water corporations); 143.8 (electric corporation billing dispute procedures); 275.8 (gas corporation billing dispute procedures); 434.8 (steam utility billing dispute procedures); 533.9 (water utility billing dispute procedures); 600.8 (telephone billing dispute procedures); and 609.16 (telephone complaint-handling procedures).

235 16 NYCRR § 11.20.

236 16 NYCRR § 11.20.

237 16 NYCRR §12.0 *et seq.*

238 PSL § 32(2)(d); 16 NYCRR § 11.4(a)(1)(v). Telephone customers may have their outgoing service suspended 8 days after the mailing of a termination notice, and both incoming and outgoing service may be terminated after 13 days of mailing such notice. 16 NYCRR § 600.3(a)(2) and (b)(2).

A *pending* complaint stays the utility from terminating service for nonpayment.239 A condition of continued service while the complaint is pending is that the customer must pay undisputed portions of the bill(s) for service.240

2.2 How to Make an Initial Complaint to the Utility

An initial complaint to a utility can be made orally, by telephone or in person, or in writing. As a practical matter, oral complaints should be confirmed in writing. It is important to record dates, names and telephone numbers of utility and PSC representatives who are contacted by phone or in person, and the complaint case number assigned, if any. A written complaint is done in the form of a letter. A sample complaint letter appears at the end of this chapter. The letter should state the relevant facts, a concise summary of the issues, indicating what is and what is not in dispute, and should provide references, whenever possible, to appropriate statutory and regulatory authority.

Both oral and written complaints should include, where appropriate, a request for continued service (connection or reconnection), a request for an investigation, and a request for a written determination from the utility.241 The utility should be informed when a customer is a vulnerable person (see Home Energy Fair Practices Act [HEFPA] chapter and Telephone chapter), or applying for or receiving public assistance in any form.

239 16 NYCRR § 11.20 and § 14.19(a)(2). *See Brooklyn Union Gas Co. v. Mac Gregor's Custom Coach, Inc.*, 122 Misc.2d 287, 292, 471 N.Y.S.2d 470 (N.Y. Civ. Ct., Kings County 1983).

240 16 NYCRR 12.3(b).

241 The utility has no obligation to provide a written report of its investigation unless the complainant makes a written request for it. 16 NYCRR § 11.20.

2.3 How to Make an Initial Complaint to the PSC

If dissatisfied with the utility's decision, or if the utility does not cooperate in resolving a dispute, the customer should file an initial complaint with the Department of Public Service Offices of Consumer Services in New York City, Albany or Buffalo. The initial complaint can be filed by telephone, in writing, or in person.242 To file a complaint by telephone, call:

HELP LINE 1-800-342-3377

EMERGENCIES 1-800-342-3355

The addresses for filing a written complaint are:

Office of Consumer Services
New York Public Service Commission
3 Empire State Plaza
Albany, NY 12223-1350

Office of Consumer Services
New York Public Service Commission
Ellicott Square Building
295 Main Street- 8th Floor, Room 814
Buffalo, NY 14203

Office of Consumer Services
New York Public Service Commission
90 Church Street
New York, NY 10007-2919

2.3.1 Helpline

The Helpline is staffed from 8:30 am to 4:30 pm. The Helpline staff will assign a complaint number, which should be retained for future inquiries. Complaints filed by telephone with the Helpline should be confirmed in writing.

2.3.2 Emergency

The emergency number listed above is the PSC "Hotline."243 The PSC designee

242 16 NYCRR § 12.1(b).

243 The Hotline is a toll free number staffed from 9:00 am to 9:00 pm each business day. PSL § 48.

answering calls to the hotline is authorized to order the reconnection, continuation or initiation of residential gas, electric or steam service whenever (i) a *reasonable question* regarding the circumstances of a termination or refusal of service exists; (ii) a dispute with regard to a utility charge or service is pending; or (iii) the health or safety of a person is involved.[244] When contacting the Hotline, an advocate should give the PSC's designee relevant information, emphasizing facts demonstrating the emergency and how a person's rights were violated. Request an explanation if the PSC designee refuses to authorize reconnection, continuation or initiation of service and then ask for a supervisor and repeat the initial request.

2.3.3. Written Complaints

Like an initial complaint to a utility, an initial complaint filed with the PSC should state the relevant facts, the issues involved, and any appropriate references to statutory or regulatory authority. The PSC's complaint handling regulations state that the customer is responsible for providing the PSC with any facts that the customer has to support the complaint.[245]

Advocates should request any tests, inspections or information which could aid their client's case. A common test in cases involving bill disputes is a "fast meter" test.[246] An inspection is usually requested in cases where diversion of service or a shared meter is suspected. Advocates should also request a copy of the utility's submission in response to the complaint, for the results of any tests or inspections, and for the opportunity to respond to this information

244 PSL §23(3), PSL § 48, and 16 NYCRR § 11.21.

245 16 NYCRR § 12.1(c).

246 *See*, PSL § 67(2), (3) for electric and gas meters; PSL § 67-a for commercial customer meters; PSL § 89-d for water meters, and 16 NYCRR § 12.1(d). See also the Meter & Backbilling section of the HEFPA chapter.

before a decision is made. Customers and their representatives may review and copy their complaint files. Customers who state that they are unable to pay for reproduction costs are entitled to receive one free copy of their file.[247]

2.4 Effect of Filing an Initial Utility or PSC Complaint

Once an initial complaint is filed with a utility or with the PSC, the utility may not terminate a customer's service for nonpayment of a disputed bill, so long as the complaint is pending and for an additional 15 days after its resolution by either the utility or the PSC, [248] or for a longer period that the PSC may establish.[249] As a condition of continued service, the utility may ask the customer to pay or enter into a deferred payment agreement for any amounts, including current charges that are not in dispute.[250] If a deferred payment agreement is necessary on the undisputed portion of a bill and the utility requires a down payment or periodic payments that are higher than a customer can afford, the customer should not enter into the agreement and the plan should be contested. In cases of residential gas and electric customers, payment of undisputed arrears should be explored under Social Services Law § 131-s and the Home Energy Assistance Program.[251]

2.4.1 Complaint Processing and Initial Decision

Upon the filing of an initial complaint with the PSC, the agency must investigate and

247 16 NYCRR § 12.2(b).

248 PSL § 43(1)(c); 16 NYCRR 11.20; 16 NYCRR 12.3(a); 16 NYCRR 14.19; 16 NYCRR 143.8(c); 16 NYCRR § 275.8(c); 16 NYCRR § 434.8(c); 16 NYCRR § 533.9(c); 16 NYCRR § 609.16.

249 PSL § 43(1)(c); 16 NYCRR 11.20

250 *Id*.

251 See PULP chapters, "Public Assistance For Energy and Utility Costs," and "PULP Winter Extra 2007-2008."

respond to the complaint.252 At every stage in the proceeding, the burden of proof is on the utility,253 and it is required to submit information relevant to the complaint.254 After obtaining necessary information, the PSC staff member makes an initial decision based on his or her factual findings, applicable law, rules, orders, opinions and tariffs.255 The customer must be notified of the decision, the reasons for the decision, and what actions must be or may be taken by the customer or the utility. The PSC staff may communicate its decision by telephone, but must inform the customer in writing of the right to obtain the decision in written form.256

3. Informal Hearing and Review

Within 15 days after the PSC's initial decision is mailed or personally communicated, the customer, if dissatisfied, may request an informal hearing or informal review.257 An informal hearing may be conducted by telephone conference call if the customer requests, otherwise, the customer and/or his or her representative258 and a representative of the utility appear before an informal hearing officer at the PSC office where the complaint was filed.259 An informal review is a further review of the complaint by a PSC staff person who did not previously work

252 16 NYCRR § 12.1(e).

253 PSL § 42(2)(b).

254 "The submission should explain its actions in the disputed matter and the extent to which those actions were consistent with the utility's procedures and tariff, commission rules, regulations, orders and opinions, and applicable State laws. 16 NYCRR § 12.1(c).

255 16 NYCRR § 12.4(a).

256 16 NYCRR § 12.4(b).

257 16 NYCRR § 12.5(a)(1).

258 "The customer may be represented by a person of his or her choice or may request that the commission's Office of Consumer Services assign an advocate, free of charge, if available." 16 NYCRR § 12.5(c)(3).

259 16 NYCRR § 12.6(a)(1).

on the complaint. Neither the customer nor the utility need be present. The PSC staff member reviews the complaint record and makes an independent decision, and provides the decision and an explanation of the reasons for the decision, in written form, to the customer and the utility.260

In almost every case, an informal hearing is preferable to an informal review. The informal review is less rigorous than informal hearing. In addition, an informal hearing requires both sides to appear before a hearing officer and thus, provides a better opportunity for a settlement of the customer's complaint.

3.1 How to Request an Informal Hearing or Review

A request for an informal hearing or review can be made by telephone, in person, or in writing, within 15 days after the initial decision was mailed or personally communicated, and must explain the basis for the request.261 After receiving a request for an informal hearing or review, the PSC is required to notify the parties in writing, at least 10 days before the informal review or hearing will be held, that (i) an informal review will be conducted, or (ii) the date, time and location of the informal hearing; and (iii) a request that certain documents be brought to the hearing or provided to the reviewer.262

A request for an informal hearing must be granted, unless the relief sought by the customer cannot be granted by an informal hearing officer.263 Examples of relief beyond the

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260 16 NYCRR § 12.6 (b).

261 16 NYCRR § 12.5(a)(1).

262 16 NYCRR § 12.5(c).

263 16 NYCRR § 12.5(a)(2).

power of the informal hearing officer include amendments to laws, regulations or tariffs, modifications of rate structures, and matters outside the scope of the PSC's regulatory authority. Denials of informal hearing requests on grounds of lack of authority may be appealed to the Commission.264

3.2 Description of an Informal Hearing and Parties' Rights

An informal hearing is a procedure in which both the utility and the customer, together with the customer's representative, appear and are provided with an opportunity to present their dispute before an impartial member of the PSC staff who has had no previous contact with the complaint.265 Customers may represent themselves, or be represented by counsel or another person of their choice. The Office of Consumer Services may also assign an advocate, free of charge, to assist the customer in preparing and presenting the complaint at the hearing, if an advocate is available.266 The following rights are afforded to all parties to an informal hearing:

(1) to obtain information relevant to the complaint by requesting it from the hearing officer or from the utility. A list of witnesses who are expected to testify, for example, can be obtained by this process;

(2) to examine the complaint file before the hearing;

(3) to present evidence and arguments, and to challenge the other party's evidence and ask questions of the other party;

(4) to have the commission tape-record the hearing, provided the customer consents to the recording. The recording is retained for at least 4 months after the hearing and either party may review it or make a copy of it at its own expense;

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264 *Id*.

265 16 NYCRR § 12.6.

266 16 NYCRR § 12.7(a)(1).

(5) to have an interpreter at the hearing. If the customer is unable to obtain their own interpreter, they may request the Commission to provide one. The request must be made at least 5 days before the hearing.267

At the informal hearing, it is important that every part of the customer's case be put into the record. It is therefore useful to prepare a list of every relevant fact and every document in support of the complaint. Then, at the hearing, the items on the list can be checked off as they are put into the record. Always ask to have the hearing tape-recorded.

It is also important to request that the utility make its presentation first. If the utility fails to submit factual evidence on the issues raised in the complaint, move for summary disposition based upon the utility's failure to present a *prima facie* case. If the hearing continues and the utility fails to submit evidence on an issue relevant to the complaint, at the close of the hearing, move for summary judgment based on the utility's failure to meet its burden of proof.

At the end of the hearing, the record may be kept open with an offer to submit additional information, documents or written arguments which may aid the hearing officer in reaching a favorable determination. The regulations provide for such additional submissions to be presented within 15 days after the hearing. The hearing officer may extend the time for such additional submissions and must provide the utility with an opportunity to respond.268

3.3 Burden of Proof

As previously noted, throughout all stages of the complaint handling procedures the

267 16 NYCRR § 12.7(a)(2)-(6).

268 16 NYCRR § 12.8(c)

burden of proof is on the utility.[269] While the statute addresses the burden of proof directly,[270] the regulations do not. Instead, a section of the regulations that specifies procedures for submissions on complaints makes the customer responsible for providing facts in support of the complaint, but requires the utility to provide "copies of bills, billing statements, field reports, written documents, or other information in the possession of the utility which may be necessary to make a decision on the complaint."[271] The utility is also required to "explain its actions in the disputed matter and the extent to which those actions were consistent with the utility's procedures and tariff, commission rules, regulations, orders and opinions, and applicable State laws."[272]

HEFPA expressly places the burden of proof on the utility, "except as otherwise provided by the commission for good cause. . . ."[273] Since a utility complaint proceeding is a civil dispute, to meet its burden of proof, it is likely that the utility must establish all key points of its claim or position by a preponderance of the evidence.[274]

3.4 Adjournments

If the customer is unable to attend an informal hearing at the scheduled time, or if the representative requires additional time to prepare, an adjournment can be obtained without

269 PSL § 43(2)(b).

270 *Id.*

271 16 NYCRR § 12.1(c).

272 *Id.*

273 PSL § 43(2)(b).

274 *Ward v. NY Life Ins. Co.*, 225 N.Y. 314, 322 (1919) ("The rule in any civil case is that the plaintiff must establish his claim by a fair preponderance of evidence.").

difficulty. However, if a second adjournment is needed, the requesting party must provide "reasonable justification for the postponement."275 The hearing officer may deny an adjournment if the officer determines that "reasonable justification" was not given, and may substitute an informal review for the informal hearing.276

3.5 Failure to Appear at Hearing

If the customer or the utility fails to appear for a scheduled hearing, without good cause, the hearing officer is authorized to accept information from the attending party and to render a decision on the complaint.277

3.6 Description of an Informal Review and Parties' Rights

An informal review is a process that does not require the presence of any party. It entails a further review of an initial complaint by a PSC staff member who has had no previous contact with the complaint. The staff member reviews the complaint record and makes an independent decision, then provides both the customer and the utility with a written statement that explains the reason for the decision.278

The following rights are afforded to parties to an informal review:

(1) to examine the complaint file;

(2) to present evidence and written arguments and to examine and submit responses to the evidence and written arguments of the

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275 16 NYCRR § 12.9(a).

276 *Id.*

277 16 NYCRR § 12.10.

278 16 NYCRR § 12.6(b). An informal review is less rigorous than the review obtained at an informal hearing. Only on rare occasions will this procedure be a desirable option.

other party;

(3) at the customer's request, to have the Commission assign an advocate, free of charge, if available, to assist the customer in preparing a submission;

(4) to have access to relevant information in the possession of the other party. A request for such information may be made directly to the other party, or through the staff person presiding over the review.279

3.7 The Decision Rendered Upon Informal Hearing or Review

Following an informal hearing or review, a written decision is issued. The decision must summarize the positions and arguments of the customer and the utility, the facts as established, the reasons for the decision and, where appropriate, include a statement of what actions must be taken by the parties.280 The decision must also notify the parties of the right to appeal and the time by which the appeal must be filed.281

4. Formal Appeals

4.1 How to File an Appeal

A party dissatisfied with the decision rendered upon informal hearing or review may appeal from that decision to the Public Service Commission, within fifteen (15) days after the decision was mailed.282 The appeal must be in writing and mailed to:

Office of the Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

279 16 NYCRR § 12.7(b)(1)-(4).

280 16 NYCRR § 12.12(a).

281 16 NYCRR § 12.12(b).

282 16 NYCRR § 12.13(a).

4.2 Requirements for Filing an Appeal

The appeal must be in writing and may be based only on one or more of the following grounds:

(1) The hearing officer or reviewer made a mistake in the facts of the case or in the interpretation of laws or regulations, which affected the decision;

(2) The hearing officer or reviewer did not consider evidence, presented at the hearing or review, which resulted in an unfavorable decision; and

(3) New facts or evidence, not available at the time of the hearing or review, have become available which would have affected the decision on the complaint.[283]

4.3 Effect of Filing an Appeal

When an appeal is filed, the PSC will notify both parties of its receipt of the appeal. The PSC assigns a staff member who has not previously worked on the complaint to review all papers submitted in connection with the appeal. The staff member then makes a recommendation to the PSC.[284]

The regulations authorize the PSC to uphold, change, reject or remand the decision to the informal hearing officer or reviewer for additional consideration. If there is a factual or legal dispute, the PSC may order a formal evidentiary hearing on the complaint, or make such other decision as it deems appropriate.[285] The PSC Secretary will notify the utility and the customer in writing of the agency's decision and action.[286]

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283 16 NYCRR § 12.13(b).

284 16 NYCRR § 12.14(a).

285 16 NYCRR § 12.14(b).

286 16 NYCRR § 12.14(c).

5. Judicial Review and Cases

5.1 Generally

Adverse PSC decisions on appeal may be reviewed by the courts in a proceeding pursuant to New York Civil Practice Law and Rules (CPLR) Article 78. An Article 78 proceeding must be commenced within four months of the date of the PSC decision.[287] Judicial review does not automatically stay any scheduled or to-be-scheduled termination.[288] Thus, if the customer seeks to stay termination pending the decision in the Article 78, the action should be commenced and a stay of enforcement of the decision under review should be requested within the 15 days.[289]

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287 CPLR § 217.

288 The automatic stay of termination mandated by PSL § 43(1)(c) and 16 NYCRR § 12.3(a) is effective for only 15 days after the PSC's final decision is mailed or personally communicated to the customer or the customer's representative.

289 CPLR § 7805.

A Model Letter and Form Complaint to PSC
Regarding Failure to Negotiate
an Affordable Deferred Payment Agreement

[DATE]

Office of Consumer Services
New York Public Service Commission
3 Empire State Plaza
Albany, NY 12223-1350

OR

Office of Consumer Services
New York Public Service Commission
Ellicott Square Building
295 Main Street- 8th Floor, Room 814
Buffalo, NY 14203

OR

Office of Consumer Services
New York Public Service Commission
90 Church Street
New York, NY 10007-2919

Dear Office of Consumer Services Representative:

Please consider this letter as a complaint, pursuant to Public Service Law § 43, and provide a written determination on the issues raised.

ISSUE

This complaint alleges that Consolidated Gas & Electric ("CG&E") has violated the Home Energy Fair Practices Act ("HEFPA") as follows:

> The company has refused to negotiate a deferred payment agreement (DPA) tailored to the customer's financial circumstances, as required by 16 NYCRR § 11.10(a)(1)(i).

FACTS

1. The customer owes $300 arrears to CG&E for electric and gas service.

2. CG&E offered the customer a *standard* deferred payment agreement on March 1, 2008, which required a down payment.

3. The customer cannot afford a down payment as evidenced by the attached copy of the New York Social Services Form 3596 (Exhibit A).

4. The customer cannot afford installments of more than $10 per month as evidenced by Exhibit A.

5. On April 1, 2008, I made a formal complaint to CG&E. A copy of the complaint letter is attached as Exhibit B.

6. On April 22, CG&E's Customer Services Representative refused, in sriting, to offer a DPA with no down payment. See Exhibit C.

LEGAL ARGUMENT

Public Service Law § 37 requires that no utility shall terminate service to a residential customer because of arrears, unless the utility first offers the customer a DPA. It further provides that DPAs must be "fair and equitable, considering the customer's financial circumstances." The minimum terms of such an agreement are described in 16 NYCRR 11.10(a)(1)(iii) as installments as low as $10 per month with no down payment, when the customer demonstrates financial need for such terms.

Since this customer has shown that his financial circumstances do not allow for any down payment and that he cannot afford installments greater than $10 per month, the company has not negotiated a DPA with this customer in good faith.

Therefore, the company should immediately offer the customer a DPA with no down payment and $10 per month installment payments, and it must not terminate service.

Thank you for your attention and consideration.

Very truly yours,

Josephine Lawyer, Esq.
Everywhere Legal Services

NEW YORK SHARED METER LAW

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

New York's Utility Project
P.O. Box 10787
Albany, NY 12201
1-877-669-2572

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NEW YORK SHARED METER LAW

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NEW YORK SHARED METER LAW

I. Introduction

A "shared meter" is a utility meter that measures gas, electricity or steam service to a tenant's dwelling, and to areas outside the dwelling, with the tenant paying for service to both areas.290 Simply put, residential tenants whose utility meters measure consumption inside *and* outside their homes, have a shared meter. Service outside tenants' dwellings may include service to equipment that is used for the benefit of the building.291 For example, a hot water heater or furnace may be located inside a tenant's apartment, but provide hot water and heat to other apartments or common areas of the building. Conversely, the hot water heater or furnace may be located outside the tenant's apartment, but the gas and electric service used to fuel and power them is connected to the tenant's meters.

Shared meter conditions may arise accidentally, as a result of electrical wiring or gas pipes being attached to a tenant's meter when a building is renovated or when systems are upgraded. Shared meter conditions may also be created intentionally, when someone in the building deliberately connects his or her usage to the meter serving another tenant. Shared meter conditions frequently arise in buildings that are converted from single family homes to

290 New York Shared Meter Law, N.Y. Pub. Serv. Law § 52(1)(b). Hereinafter, "PSL." For the purpose of the Shared Meter Law, a "dwelling" is "any building or structure or portion thereof which is occupied in whole or part as the home, residence or sleeping place of one or more human beings, including any equipment located outside such building or structure or portion thereof which is under the exclusive use and control of the occupant, and is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of one or more human beings." PSL § 52(1)(c).

291 PSL § 52(1)(c).

apartments, when separate meters are not installed for each apartment. The Shared Meter Law requires owners of rental dwellings to eliminate any shared meter condition, or to place the utility service in the owner's name.[292] The provisions of the Shared Meter Law may not be waived by owners, tenants or utilities.[293]

II. Notice to Owners and Tenants

The Shared Meter Law requires every utility[294] to provide annual notice to tenants and owners that summarizes the requirements of the law. The notice must be approved by the Public Service Commission ("PSC" or "Commission") and mailed separately from the utility's bill for service. Every utility must also implement an outreach program, approved by the PSC, to advise customers of the protections of the Shared Meter Law.[295]

III. Investigation of Shared Meter Conditions

Any utility customer in a rental dwelling who suspects that their utility meter is measuring service to an area outside their dwelling may file a written or oral complaint with the utility. Upon receipt of the complaint, the utility must notify the building owner in writing that a shared meter complaint has been received and that the utility is required to investigate the

292 PSL § 52(2)(a).

293 PSL § 52(3)(a).

294 For purposes of the Shared Meter Law, a "utility" is "any gas, electric and steam corporation and/or municipality providing service to residential customers." PSL § 52(1)(d).

295 PSL § 52(9).

complaint.296 The notice must also apprise the owner of his or her responsibilities under the shared meter law. If the tenant contacts the wrong utility, the utility that received the complaint must notify the proper utility.297

Upon receipt of a tenant customer's complaint, the utility must undertake an investigation of the shared meter condition. The investigation may include testing, examination of piping, wiring, meters and heating equipment, review of billing records, and preparing an estimate of the gas, electricity or steam used in inside and outside the shared meter customer's dwelling.298 Owners who refuse the investigating utility's reasonable requests, or who do not cooperate with the utility by providing access to common areas in the building, will receive a determination that a shared meter condition exists.299 The utility will suspend its investigation entirely if the complaining tenant refuses to cooperate by providing access to the dwelling unit or refuses other reasonable requests made by the investigating utility.300 In either case, the utility will not be liable for any subsequent claims for monetary damages made by the owner or the tenant customer.301

Within thirty (30) business days of the date the utility received the tenant's complaint, owner's request or other information triggering the investigation, it must must make a written

296 Investigations may also be prompted upon request of an owner, or upon the utility's receipt of information indicating that a shared meter condition may exist. PSL § 52(4)(a).

297 PSL § 52(4)(a).

298 *Id.*

299 PSL § 52(4)(c).

300 *Id.*

301 *Id.*

determination on the investigation302 If the utility fails to make a written determination within 30 business days, the tenant or owner may contact the Commission, which will investigate the shared meter condition and issue a written determination.303 The determination must be provided to the complaining tenant, the owner, any other tenants receiving service through the shared meter, and to any other utilities providing service through the shared meter.304 The determination provided to the building owner must also state whether separate metering, rewiring or repiping is possible, and must describe how the shared meter condition can be eliminated.305 The contents of the notice to all parties must include:

- a description of the areas outside the dwelling that are served by the shared meter;
- the nature of the uses of the utility service used outside the dwelling;
- the proportional amount of service measured on the shared meter that is provided to the tenant's dwelling and the areas outside the dwelling; and
- the availability of Commission complaint handling procedures and the Commission's address and telephone number for filing objections to the determination.306

If the owner or tenant is dissatisfied with the utility's determination, they may use the Commission's complaint handling procedures to seek review and a written determination of the Commission.307 A complaint, either written or oral, must be made to the Commission within 45

302 PSL § 52(4)(b).

303 PSL § 52(4)(d).

304 *Id.*

305 PSL § 52(4)(a).

306 PSL § 52(4)(b).

307 PSL § 52(4)(d). See PULP Law Manual Chapter entitled, "*Complaint Handling Procedures*."

days of receipt of the utility's determination. The Commission will issue a written determination and has the authority to apportion charges for utility service measured by a shared meter between the owner, the shared meter customer, and any third party.308

IV. Owners' Responsibilities under the Shared Meter Law

A. Elimination of Shared Meter Condition

Within 120 days of a determination that a shared meter condition exists, the owner must have either (i) eliminated the condition by rewiring or repiping as needed; (ii) entered into an agreement with the tenant for apportionment of the shared meter charges,309 or; (iii) established an account in the owner's name for all shared area charges.310 The latter two remedies are more fully described below.

1. Apportionment Agreement in Lieu of Eliminating Shared Meter Condition

There are three circumstances under which the owner is not obligated to eliminate the condition, but may instead enter into a written agreement with the tenant (and any third parties, such as other affected tenants) for apportionment of the cost of the shared meter service. The three circumstances are: (1) the existence of a legal impediment; (2) extraordinary cost; or (3) minimal use.311 Each will be described below.

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308 *Id.*

309 PSL § 52(5)(a).

310 PSL § 52(2)(a).

311 PSL § 52(2)(b)(i).

a. Legal Impediment

A legal impediment is defined by the Shared Meter Law as a restriction which prevents separate metering, rewiring or repiping. Legal impediments may arise from zoning ordinances, landmark or historic preservation regulations, or other legal restrictions.312

b. Extraordinary Cost

To determine whether the cost to eliminate a shared meter condition is "extraordinary," a qualified professional must prepare an estimate of the required work.313 The cost is extraordinary if:

- it exceeds four months rent; or
- it exceeds two months rent, provided the amount of utility service used outside the tenant's dwelling is less than 20% of the average total monthly consumption shown on the meter for the preceding 12 months.314

c. Minimal Use

Minimal use is defined as:

- less than 10% of the total monthly consumption measured on the meter, based on the average monthly consumption for the preceding 12 months; or
- 75 kilowatt hours per month of electricity; five therms per month of gas, or one pound per hour per month of steam;
- whichever is greater.315

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312 PSL § 52(1)(g); 16 NYCRR § 11.30(c).

313 A "qualified professional" means "a person who is permitted to install or repair gas, steam or electric equipment, including rewiring or repiping, by the local code of the municipality where the meter in question is located." 16 NYCRR § 11.30(b).

314 PSL § 52(1)(f); 16 NYCRR § 11.30(a).

315 PSL § 52(2)(b)(i); 16 NYCRR § 11.30(d).

Owners who are not required to physically eliminate a shared meter condition due to a legal impediment, extraordinary cost or minimal use, may enter into a mutually acceptable written agreement with the shared meter tenant and any third parties (such as other affected tenants) to apportion the shared meter charges so that in the future, the complaining tenant pays only for service to their dwelling and third parties pay for their own usage.316 A copy of the executed agreement must be provided to all parties and to the utility.317 If the owner and tenant are unable to reach a mutually acceptable agreement, the Commission may apportion the charges for service to the tenant and order a remedy.318

Any written agreement for apportionment of the cost of shared meter service entered into before October 24, 1991 (when the original Shared Meter Law became effective) remains effective until the lease or the rental agreement expires. Upon the complaint of a shared meter tenant or an affected third party that the terms of an agreement entered into before October 24, 1991 are unfair or unreasonable, the Commission will review the agreement and assist the parties in negotiating a mutually acceptable written agreement.319

2. Establishing Account in Owner's Name

If the owner is not required to physically eliminate a shared meter condition due to a legal impediment, extraordinary cost or minimal use, i.e., if the shared meter condition is not

316 *Id.*

317 PSL § 52(2)(c)(i).

318 PSL § 52(4)(d); 16 NYCRR § 11.30(d).

319 PSL § 52(2)(b)(ii).

physically eliminated by repiping or rewiring, the owner must establish an account in his or her name for all future utility service measured by the shared meter, including all shared area charges.320 The owner's account will also be billed for the following charges, whichever is most recent:

- all shared area charges measured through the shared meter for six years before: (i) the shared meter was discovered, or (ii) the shared meter determination was made; or
- all shared charges from the first day of the tenancy, or;
- all shared charges from the date the shared meter condition began, or;
- all shared charges from the 60th day after the owner knew or should have known that third parties were involved; or
- all shared charges from the date the owner assumed title to the dwelling.321

V. Utility Confirmation of Remedial Action

Within 120 days of the utility's written shared meter determination, the utility must confirm that the owner has eliminated the shared meter condition by rewiring or repiping, or has remedied the condition by entering into a written agreement to apportion charges and established the shared meter account in the owner's name.322 If the owner has not taken the appropriate remedial action, the utility must establish an account for the shared meter in the owner's name and bill the owner for the appropriate previous consumption shown on the shared meter and for future consumption.323 The Commission can grant the owner a 90-day extension of time to

320 PSL § 52(2)(a)

321 PSL § 52(2)(a).

322 *Id*.

323 PSL § 52(5)(b).

comply with the requirements of the Shared Meter Law if circumstances beyond the owner's control prevented the owner from eliminating the shared meter condition, establishing an account in his or her name, or entering into a written agreement to properly apportion the charges.324

VI. Refunds, Cancellation of Charges, Credits and Owner Billing

Within 120 days of the shared meter determination, the utility must refund to the shared meter tenant all shared area charges already paid, and it must cancel all shared area charges billed but unpaid,325 for the period during which the shared meter condition existed or six years, whichever is shorter.326 These charges are then billed to the owner.327

If the shared meter determination was not issued in response to an owner's request for a shared meter investigation, then the utility must also bill the owner for an additional assessment, referred to by the PSC as the "12-month bill," *i.e.*, the amount of twelve months estimated service on the shared meter (inclusive of all usage measured).328 If the owner believes the 12-month bill is unduly burdensome and unfair, he or she may petition the PSC for an adjustment, but any resulting adjustment will not reduce the bill to less than 25% of the original 12-month bill.329

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324 *Id.*

325 PSL § 52(5)(c).

326 PSL § 52(1)(h).

327 PSL § 52(5)(d).

328 *Id.*

329 PSL § 52(5)(d). *See also*, *Commission Determination on Rehearing*, Matter of a Commission Designee's Determination Pursuant to PSL Section 52 – Cross Rehearing Petitions by Mr. Francis Farley and Mr. Patrick Guzzi of the Designee's Determination Rendered in Favor of Mr. Patrick Guzzi and Consolidated Edison Company of New York, Inc., Case 02-E-0303 (Issued and Effective August 16, 2002) (The determination of whether a 12-month

If charges for utility service to a third party were billed to the shared meter, the utility must credit the shared meter customer for the third party's estimated charges.330 If the shared meter tenant received any payments from the owner or from a third party for the shared utility service, the tenant must return a proportional amount of the refund to those parties.331

If the shared meter condition affected a third party who received service on the shared meter, the utility will bill the third party for its portion of the charges.332 The Public Service Law establishes a right of action for owners and shared meter customers against third parties, to recover charges billed to their respective utility accounts, upon a demonstration of the existence of third party involvement.333

VII. Tenant – Owner Relationship After the Investigation

Owners may not seek recovery from tenants of the shared charges that the owner was required to pay as a result of the shared meter determination. Nor can the owner bill the tenant for any future charges owner may incur as a result of the shared meter remedies.334 The owner may increase future rents "to the extent otherwise permitted by law,"335 but may not directly bill the tenant for electricity, because the owner is not authorized by the Commission to sell

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bill is "unduly burdensome and unfair" is made by comparing the amount of the 12-month bill (which includes all charges measured by the shared meter) against the shared area charges over the 12 month period. Where the 12-month bill is more than six times the annual estimate of shared area charges, it is unduly burdensome and unfair).

330 PSL § 52(5)(c).

331 PSL § 52(6)(b).

332 PSL § 52(5)(e).

333 PSL § 52(7).

334 PSL § 52(6)(a).

335 *Id*.

electricity.

The Public Service Law also expressly reserves the rights of a shared meter customer "to seek and obtain relief for payments made for service not provided to his or her dwelling."[336] One possible way to obtain such relief is for the tenant to assert a claim under Real Property Law § 235-a, which allows a tenant who makes lawful payments to a utility pursuant to PSL §§ 33 and 34 (governing termination of service to two-family and multiple dwellings) to deduct utility payments from rent obligations.

336 PSL § 52(11).

REPLEVIN (SEIZURE OF UTILITY METERS)

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

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REPLEVIN OR SEIZURE OF UTILITY METERS

1. Introduction

Replevin is an ancient procedure[337] which permits a court to determine which of the parties to a legal action has a superior right to possession of the personal property in dispute. In New York State, replevin is codified in Article 71 of the Civil Practice Law and Rules (CPLR) and entitled *Recovery of Chattel*. Chattel is generally defined as any personal property which has a monetary value.

Utilities use replevin to remove an electric or gas meter resulting in the termination of the electric or gas service previously provided through the meter. Because electricity and gas have become necessities,[338] protecting a customer's right to possession of the utility meter is as important as protecting the utility customer's right to utility service. They are, in reality, the same thing. At its "best", replevin will permit seizure of a utility meter after notice and a full hearing. At its "worst," the customer's first notice of the action will be when the marshal or sheriff appears to remove the meter. Replevin is an effective and efficient pre-trial process by which a utility achieves termination of service.

2. Procedure

Replevin is set apart from an ordinary action to recover a debt (the customer owes the utility for service delivered and billed) because it allows a utility to obtain an Order from the Court permitting it to direct a marshal or sheriff to seize the meter

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[337] The Statutes of Marlborough, 52 Hun. III, c.21(1267).

[338] "[Utilities are] necessary to sustain life in today's world ... and the discontinuance of gas and electric work tremendous hardships on the users of these essentials..." *Consolidated Edison of New York, Inc. v. Powell*, 77 Misc.2d 475, 354 N.Y.S.2d 311, 315 (Sup. Ct. N.Y. Co. 1974).

before the underlying action has been resolved. Thus, the earlier an advocate intervenes on behalf of a client in the replevin process the better the chances of success. There are two points at which an advocate is likely to come into contact with the process. The first is at the beginning of the process when the utility makes an application to the proper court for an order permitting it to replevy or seize the meter. The second is after the Order of Seizure has been issued and a Notice of Impending Seizure is served upon the customer advising that the meter is about to be removed.

There is a third possible intervention point. Under certain extraordinary circumstances, a utility may secure an *ex parte* order of seizure that will commence the action by authorizing a sheriff or marshal to seize the meter and serve the Summons and Complain (bearing the index number and the date of filing with the clerk of the court), at the same time.[339] Obviously, intervention at this point will be necessary in order to restore utility service. However, the primary damage already will have occurred. Because the burden of proof, placed on the utility, is to demonstrate that the customer is going to remove or destroy the meter, this is an unusual scenario.

3. Application For An Order

In order to replevy or seize a meter, a utility must apply for an order of seizure from the court.[340] However, the statute is silent regarding notice to the person whose meter is to be seized and regarding the timing of the application. The statute is

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[339] CPLR §7102(c)(7). "if the plaintiff seeks an order of seizure without notice, [the supporting affidavit shall state] facts sufficient to establish that unless such order is granted without notice, it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value."

[340] CPLR §7102(c).

very clear, however, that the application for the order of seizure be supported by an affidavit from an individual with personal knowledge of the facts that "shall clearly identify the chattel to be seized" and shall further state

- that the plaintiff is entitled to possession of the meter by virtue of the facts set forth,
- that the named defendant no longer has a legal right to continue in possession of the meter,
- that an action has or has not been commenced to recover the meter and, if an action has been commenced, state full details as to the status of the action,
- the value of the meter or meters sought to be recovered,
- the location of the meter and facts sufficient to establish its presence at that location, in the event a breaking and entering may be necessary to recover the meter,
- that there is no defense to the seizure known to plaintiff and
- if the order of seizure is sought without notice, facts sufficient to show that the meter will be lost to the jurisdiction due to the giving of notice.[341]

Ordinarily, it is at this point that a defendant is notified of the utility's intention to seize the meter. A copy of the application and the affidavit usually is mailed to the customer whose meter is to be seized.[342] As a rule, this notification is often

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[341] Given the realities of utility service, it is unlikely that facts could be alleged to meet the burden of proof mandated by this requirement. Nevertheless, it should not be taken for granted that such an order will never be issued.
CPLR § 7102(c).

[342] CPLR 7102(d)(3) was added to the statute in 1978 to include "a requirement that ... a defendant must be placed on notice of a pending application for an order of seizure." *Consolidated Edison Company of New York Inc., v. Wyns*, 152 Misc.2d 360, 361, 576 N.Y.S.2d 765 (Civ. Ct. Kings Cty. 1991).

ignored by the customer because it does not appear to be an official court document and, in most cases, is mailed by the utility and not by an attorney.

The notice of the utility's application for an Order of Seizure should include a date and place for the customer's appearance before the court to contest the utility's application. If the customer does not appear, either in person or by affidavit (preferably both), the "hearing" could take place without the customer. The issuance of an Order of Seizure under those circumstances is greatly increased.

It is likely that the customer, at this time, in addition to receiving the application for the Order of Seizure, will also have been served with a Summons and Complaint which represents the underlying action to recover the utility meter.[343] A proper response would require service and filing of an affidavit in opposition to the utility's application, and a Notice of Appearance and Answer. Clearly, there will be much duplication between the two documents. However, failure to appear in the underlying action could result in a default judgment regardless of the outcome of the utility's application for an Order of Seizure.

4. Notice

An "application" is required for a utility to obtain an order of seizure. As noted above, the waters are muddied in terms of how this "application" is to be handled procedurally. This area of ambiguity, caused by this "pre-judgment remedy" not being included in Article 60 of the CPLR with other pre-judgment remedies, ultimately may be advantageous to the low-income

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[343] CPLR §§7102(a) and (b).

consumer.

Any application for an order to seize a meter that is not made in conformity with the requirements of traditional New York State motion practice should be treated as a motion made with no notice and subjected to the rigorous scrutiny that a court should apply to any *ex parte* application.[344] Notice to a party to an action or proceeding should contain the date and time that the application will be presented to the court and should allow the defendant sufficient time to respond to the allegations.[345] Thus, any failure of the utility to serve proper notice or to obtain personal jurisdiction over the customer should be a priority in any defense to an action to seize a meter.[346]

5. Opposition

In preparing the low-income customer's affidavit in opposition to the utility's application to seize a meter, it is important to remember that the Court is not required to issue an order of seizure merely because a utility has met the minimum requirements of the statute. In fact, the Court's latitude is extensive when making this determination.[347]

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[344] *Consolidated Edison Co. of N.Y., Inc. v. Haymer*, 139 Misc.2d 95, 96, 527 N.Y.S.2d 941 (App. Term, 1st Dept. 1988); *Consolidated Edison Co. of N.Y., Inc. v. Church of St. Cecilia*, 125 Misc.2d 744 (Civ. Ct. N.Y. Co. 1984).

[345] CPLR 2214 requires service of moving papers at least eight days before the motion is noticed to be heard.

[346] "The Constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983 (1972).

[347] "The legislature saw fit to afford the court ... substantial discretion in determining whether to grant orders of seizures ...." *Consolidated Edison Company of New York v. Haymer*, 527 N.Y.S.2d 941, 942, 139 Misc.2d 95 (App. Term, 1st Dept. 1988). The Appellate Term was acknowledging the language change adopted by the Legislature in 1978. Until that time the statute required that the Court, upon presentation of the proper papers,

This flexibility, in conjunction with the serious nature of the proceeding, creates opportunities for opposition based on equity as well as on the law and the facts. It is in this context that the utility's affidavit in support of the application should be thoroughly examined. Opposition papers that clearly set forth the utility's failure to comply with the requirements of the statute, should demonstrate the superficiality of the application, and document any failure to allege specific facts. In addition, the papers should make clear the choice which the utility is proposing. They seek to take possession of a customer's electric or gas meter which provides that family with a necessity of life.[348]

It is settled state policy "that the continued provision of gas, electric and steam service without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest."[349] To facilitate continuous service, the Legislature enacted Social Services Law §131-s and Public Service Law §65-b which provide assistance when a threat of termination exists. A utility should not need to use the replevin procedure as a normal adjunct of its collection procedures when less drastic means such as helping the customer access the emergency utility payment program (SSL §131-s) may exist. Since seizing a meter terminates utility service, the public interest of this state

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"grant an order directing the sheriff ... to seize the chattel ...." The statute now reads that the Court "may grant an order ...."

348 "Replevin is a drastic remedy. When it involves breaking and entering into someone's home, especially to remove what is most likely the home's sole source of heat and cooking fuel, it is even more so." *Brooklyn Union Gas Company v. Richy, et al.*, 475 N.Y.S.2d 981, 982, 123 Misc.2d 802 (Civ. Ct. Kings Cty. 1984).

349 Public Service Law §30 (the Home Energy Fair Practices Act §§30-52).

requires that a court carefully and thoughtfully exercise its authority, and permit such an action only as a last resort.[350]

One area of investigation within the confines of the utility affidavit concerns its compliance with the protections afforded residential customers of utilities in the Home Energy Fair Practices Act (HEFPA - see fn 13) and the regulations issued by the Public Service Commission pursuant to that statute.[351] HEFPA provides that no termination of utility service shall occur until certain notices have been given and procedural steps taken.[352] It is essential, therefore, that the facts set forth in the utility's affidavit contain, at a minimum, allegations setting forth facts to demonstrate that the utility has complied with the termination requirements of HEFPA.[353] The utility's affidavit should contain an allegation as to whether the meter to be seized services a residential or non-residential premises. If the premises are residential, the affidavit must allege, inter alia, that (i) a fifteen day notice of termination has been served, (ii) a deferred payment agreement was offered, (iii) more than twenty days had elapsed from the date payment was due before the fifteen day termination notice was issued.

It is not enough for the utility to re-state the requirements of the CPLR. The affidavit must be made by someone with personal knowledge of the underlying facts and must contain more than conclusory allegations.[354] It is insufficient for the utility

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[350] "[T]he courts have been careful to attempt to insure that any requested seizures comport fully with constitutional due process requirements." *Id.* at 982

[351] 16 NYCRR Part 11.

[352] *See*, HEFPA pages 1-45.

[353] *Consolidated Edison Company of New York, Inc. v. Branley*, N.Y.L.J. Jan. 25, 1989, p. 25 (Civ. Ct. N.Y. Co.).

[354] *Consolidated Edison Company v. Branley*, N.Y.L.J. Jan 25, 1989, p. 25 (Civ. Ct. N.Y. Co.).

to attempt to meet the requirements of this section of the CPLR by alleging facts "on information and belief". It is unacceptable for the utility to merely state that it has sufficient data upon which to conclude what the facts are.

The utility's failure to provide an affidavit in support of the application which affords minimal due process information renders the application defective and would require the denial of the application.[355]

No examination of the affidavit in support of the application would be complete without a review to determine its factual accuracy. Is money owed? Is the money sought for non-payment, late payment or partial payment of bills for service? Is the money sought for failure to abide by the terms of a deferred payment agreement? Is the money sought as a security deposit? Is the alleged location of the meter correct? Is the amount of money sought correct? Is there a dispute currently before the Public Service Commission (e.g., shared meter situation)? Has the current status of this dispute been alleged? Any inaccuracy in any allegation of fact should be challenged and the utility put to its proof.[356]

The purpose of the affidavit in support of the application for an Order of Seizure is to convince the court that the utility will probably succeed on the merits. Even if the affidavit is facially sufficient, however, the court is not required to grant the application but, rather, <u>may</u> grant the order. Therefore the advocate can challenge the affidavit procedurally, factually and equitably to convince the court not to exercise its discretion.

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[355] "[T]he Civil Court, when presented with these ex parte applications ..., must carefully scrutinize the papers to insure that all of the requirements of the Statute have been met." *Consolidated Edison Company of New York, Inc. v. Pearson*, 474 N.Y.S.2d 230, 233, 123 Misc.2d 598, (Civ. Ct. N.Y. Co. 1984) and *Brooklyn Union Gas Co. v. Richy*, 123 Misc.2d 802, (Civ. Ct. Kings Co. 1984)

[356] In seeking Court permission to seize a meter, the utility has "the burden of establishing the grounds for the order." CPLR §7102(d)(1).

6. Affirmative Defenses

Affirmative defenses are available to a person whose meter the utility seeks to seize. Some of the affirmative defenses available include, but are not limited to, partial payment, overcharges, transferred arrears from another account, shared meter situations. Any of these circumstances should also be brought to the attention of the court in opposing the application for an Order of Seizure.

It is through affirmative defenses and the affidavit in opposition to the utility's motion that an appeal may be made to the court's equitable jurisdiction in refusing to grant the application to seize the utility meter. Factors such as family size, DSS responsibility to provide assistance,[357] composition, need for the utility service (i.e., gas heat in winter, etc.), causes for the non-payment, partial payment, efforts to secure public assistance, are all important in this regard. If there are pending PSC proceedings involving the customer, the court may decide to deny seizure even where the Court has concurrent jurisdiction to decide the matter.[358]

7. Undertaking

In addition to a supporting affidavit, the utility must post an undertaking before the court may issue an Order of Seizure.[359] The difficulty is establishing the value of the meter. Clearly, the value of the meter should not be measured by the

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[357] *Consolidated Edison v. McClain*, 87 Misc.2d 776 (City Ct. Mt. Vernon 1976).

[358] *Castillo v. Wenk*, N.Y.L.J. June 10, 1987, p. 15 Col. 2 (App Term 9th Jud. Dist.), court should have deferred to agency proceeding. Cf. Guggenheim Museum

[359] CPLR §7102(e) requires that a utility post an undertaking or bond equal to not less than twice the value of the chattel sought to be

utility's cost of replacing it but by the cost to the customer of surviving without the utility service that is rendered through the meter.[360] In short, it is essential to emphasize the seriousness of the result in estimating what the value of the meter should be for purposes of establishing an indemnification acceptable to the court. Once again, this issue also goes to the court's discretion in determining whether to issue the Order of Seizure.

8. Notice Of Impending Seizure

Thus far, it has been presumed that a utility properly applied for an order to seize a customer's meter. The utility will have given notice, hopefully in the form of a Notice of Motion with proper supporting papers, to the customer as to the existence of the action. As discussed above, the customer opposing replevin should file with the appropriate court clerk's office at any time prior to the date of the hearing (as set forth in the utility's papers) an affidavit and/or other papers (Notice of Appearance and Answer) in opposition to the utility's application for an order of seizure.

On the hearing date, the customer could, but is not required to, meet with a representative of the utility and attempt to resolve the dispute; *e.g.*, pay the bill, arrange a deferred payment agreement, seek public assistance. If this step does not settle the matter or if this step, for whatever reason, is not taken, the customer has a right to a hearing before a judge. At this judicial

recovered.

[360] In *Con Ed v. Powell, supra*, p. 316, the Court suggested that the surety "should be in an amount that would compensate [the defendant] for loss of his life supporting utility service" in the event he prevails in the action. The current practice of posting a surety of $500.00 was "found to be inadequate on its face." *Con Ed v. Church of St. Cecilia*, 125 Misc.2d 744, 749 (Civ. Ct. N.Y. Co. 1984). It was also found "clearly inadequate when considering the substantial potential liability to a person who is unlawfully deprived of utility services." *Con Ed v. Alston*, 441 N.Y.S.2d 802, 804 (Civ. Ct. Bronx Co. 1981).

intervention, the utility has the burden of showing that it is probable it will be ultimately successful on the merits and that the facts are as set forth in the affidavit. The customer has a right to dispute any such presentation on the part of the utility and should raise such factual issues and legal issues as may show the affidavit in support of the application to be insufficient, legally or equitably, for the issuance of the order of seizure.

Presuming that either the customer failed to appear and contest, or that the court found in favor of the utility in its application, an Order of Seizure will be issued to a marshal or a sheriff. Current practice requires that the marshal or sheriff advise the customer, by mail, of the Order of Seizure and of the intent to execute the Order at the end of seven days. After the expiration of the seven day notice, the marshal or sheriff may break into the premises, if not given access, and seize the meter.

If a customer did not receive the application for an Order of Seizure, it is at the service of this second required notice that an customer may have an opportunity to intervene in order to prevent the seizure of the meter. The first line of defense at this point is the failure of the utility to properly serve and notify the customer concerning the initial application to the court pursuant to CPLR §7102.

Once the issue of the jurisdiction of the court over the customer (personal jurisdiction) is resolved in favor of the customer, the issues should then revert to the same issues as discussed above with reference to the application for the Order of Seizure.

9. Conclusion

Replevin, or Seizure of a Utility Meter, is a relatively complex and involved legal proceeding which entails the interrelation and interweaving of many different statutes and a substantial amount of caselaw. Advocates should always be conscious of the ultimate result of the seizure of a utility meter - termination of utility service. Thus, advocates should always be looking for defenses, both legal and equitable, that attack not only the consequence of the proceeding but also attack the procedural, substantive, legislative and constitutional propriety of the proceeding itself.

RIGHTS OF NEW YORK HEATING FUEL CUSTOMERS

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

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RIGHTS OF NEW YORK HEATING FUEL CUSTOMERS

I. Introduction

More than 2.5 million households in New York heat their homes with home heating fuels.361 "Heating fuel" is defined in New York State regulations as follows:

> No. 2 distillate fuel oil, No. 4 blended fuel oil, No. 6 residential fuel oil, kerosene, liquid propane gas, or any other fuel, other than natural gas or electricity, used for heating residential buildings.362

In 1976, the New York Legislature enacted a new "Energy Law" chapter to the state statutes, abolishing the state Atomic Energy Council and transferring all of its powers to the State Energy Office ("SEO"), which was created by the new law.363 In 1980, the SEO enacted regulations to protect heating fuel customers faced with fuel delivery cutoffs for nonpayment364 that were enforced by the SEO Commissioner. In 1995, the Legislature abolished the SEO and transferred its functions to the New York State Energy Research and Development Authority ("NYSERDA")365 and to the New York State Consumer Protection Board ("CPB").366

Customers who have disputes with a home heating fuel dealer that they are unable to successfully resolve with the company may complaint to the CPB. The CPB has offices in Albany at 5 Empire State Plaza, Suite 2101, Albany, NY 12223-1556, and in New York City at

361 New York State Consumer Protection Board, *Home Heating With Oil and Propane*) (March 2007) (hereinafter "CPB March 2007").

362 9 NYCRR § 7870.1(h).

363 New York Consolidated Law Service, Energy Note (2008).

364 9 NYCRR § 7870.1, *et seq*.

365 Energy Law § 67 *et. seq*.

366 Ch. 83 §§ 50 – 53, 1995 N.Y. Laws, LEXIS 1995 N.Y. ALS 83,

1740 Broadway, 15th Floor, New York, NY 10019. The toll-free number is 800-697-1220. Complaints may also be filed on-line at the CPB website: www.nysconsumer.gov .367 The CPB has no express authority to make administrative adjudications of customer disputes with home heating fuel distributors. Compliance with these procedures is enforced by the New York Attorney General, upon referral from the CPB.368 Civil penalties for noncompliance are forfeited to the People of the State of New York, and cannot exceed $1,000 per violation or three times the profit received from each violation, whichever is greater.369

The procedures described below provide far fewer protections than those afforded to residential customers of gas and electric service under the Home Energy Fair Practices Act ("HEFPA"). For example, although public utilities must provide gas or electric service to eligible applicants within 5 business days of application[370] and are subject to payment of a $25 per day fine to the applicant if they fail, without good cause, to provide timely service,[371] home heating fuel distributors have no obligation to sell fuel to any applicant and they may refuse to do so in some situations, for example, if the applicant has a poor credit history.

Home heating fuel distributors are not required to offer customers deferred payment agreements, allowing customers to pay outstanding fuel charges over a period of time to prevent delivery cutoff.372 Although public utilities cannot terminate residential service during the two-week period encompassing Christmas and New Year's Day, and may only terminate between

367 CPB March 2007.

368 Energy Law § 5-119(2).

369 Energy Law § 5-119(1).

370 PSL § 31(5); 16 NYCRR § 11.3(a)(4)(i-iv).

371 PSL § 31(5); 16 NYCRR § 11.3(c).

372 *See*, *e.g.*, PSL § 37.

8:00 am and 4:00 pm Monday through Thursday, providing those days are not public holidays,[373] there are no such restrictions on home heating fuel distributors. The procedures that home heating fuel distributors must follow before cutting off delivery of fuel allow short notice, contain no protections for elderly, blind or disabled customers, and make no special provisions to allow for continuation of fuel delivery service in cases of medical emergency.

II. Notice of Refusal, Suspension or Termination of Heating Fuel Deliveries

During the heating season (November 1st through April 15th), home heating fuel distributors must comply with emergency procedures before cutting off delivery to customers for nonpayment.[374] For purposes of the emergency procedures, a "distributor" is "any person, firm, partnership or corporation delivering heating fuel to customers for consumption in residential buildings located within New York State."[375]

The notice requirements vary, depending on the type of delivery the customer takes. *Automatic delivery* is made under contract with the distributor. The distributor determines when fuel is needed and makes a regularly scheduled delivery automatically, without obtaining a separate request or authorization from the customer.[376] A *will-call account* is an arrangement for the sale of fuel without a contract. Will-call customers call the distributor to request a delivery and pay cash on delivery.[377]

Both types of customers may designate a third party (such as a friend, relative or social

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373 PSL § 32(4).

374 9 NYCRR § 7870.3.

375 9 NYCRR § 7870.1(e).

376 9 NYCRR § 7870.1(a).

377 9 NYCRR § 7870.1(o).

services agency) to receive notice of automatic or will call delivery cutoffs.378 Distributors are required to contact customers annually, on or before November 1st, to update their third party notification preferences.379 For new customers, distributors must collect third-party notification information when new accounts are established.380

A. Written and Telephone Notice to Automatic Delivery Customers

A distributor must give three calendar days written notice to an automatic delivery customer before suspending or terminating regularly scheduled deliveries.381 The written notice must:

$ Inform the customer of the cutoff and the reason for it;382

$ Inform the customer that financial assistance may be available from a local department of social services ("LDSS");383 and

$ Provide the customer with the name, address and telephone number of the LDSS for the county in which the residential building is located.384

In addition to written notice, the distributor must make at least three attempts to notify the automatic delivery customer of a cutoff by telephone, at least three calendar days before the suspension or termination takes effect.385 In the telephone communication, the distributor must:

$ Inform the customer of the cutoff and the reason for it;386

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378 9 NYCRR § 7870.2(a)

379 9 NYCRR § 7870.2(a)

380 *Id.*

381 9 NYCRR § 7870.4(a).

382 9 NYCRR § 7870.4(b)(1).

383 9 NYCRR § 7870.4(b)(2)

384 *Id.* The regulations provide a list of the LDSS by county, attached as ***Appendix A***.

385 9 NYCRR § 7870.5 (b).

386 9 NYCRR § 7870.5(c)(1).

- Ask whether the building is out of fuel and if it is not, ask when the customer anticipates fuel will be needed;387

- Ascertain whether the building is a one- or two-family house or a multiple dwelling; 388

- Ask whether the customer wishes to designate a third-party designee to be notified of the cutoff;389

- Ask whether the customer is unable to protect himself or herself and all other inhabitants of the building from health and safety risks caused by a cutoff, by getting fuel from another source or by securing adequate alternative shelter;390

- Inform the customer that (i) if the affected building is a multiple dwelling, (ii) if the customer is unable to obtain fuel from another source, or (iii) if the customer is unable to secure adequate alternative shelter, then the distributor must notify the customer's third-party designee and the LDSS;391 and

- Inform the customer that financial assistance may be available from the LDSS; and provide the customer with the name, address and telephone number of the LDSS for the county in which the residential building is located.392

If the distributor cannot contact the customer by telephone, it must notify the customer's third-party designee and the LDSS.393

B. Telephone Notice to Will-Call Customers

Heating fuel distributors must notify will-call customers of suspension or termination of deliveries when the customer telephones to request a delivery.394 In the telephone notification, the distributor must obtain and impart the same information as required for automatic delivery

387 9 NYCRR § 7870.5(c)(2).

388 9 NYCRR § 7870.5(c)(5).

389 9 NYCRR § 7870.5(c)(7).

390 9 NYCRR § 7870.5(c)(4).

391 9 NYCRR § 7870.5(c)(3).

392 9 NYCRR § 7870.5(c)(6).

393 9 NYCRR §7870.5(b). *See*, "Notice to Third Party Designees" and "Notice to Local District Social Services Offices," *infra*.

394 9 NYCRR § 7870.5(a).

customers, above.[395]

C. Notice to Third-Party Designees

Home heating fuel distributors are required to contact each customer annually, on or before November 1st, to determine whether the customer wishes to designate a third party (such as a friend, relative or social services agency) to receive notice of delivery cutoffs.[396] For new customers, distributors must collect third-party notification information when the new accounts are established.[397]

If customers have designated third-parties to receive notices of cut-off, the distributor must notify the designee[398] by telephone, on the same day the distributor attempts telephone notification to the customer.[399] The distributor must make two attempts to notify the designee by telephone.[400] If the designee is reached, the distributor must identify the name and address of the customer, and provide the designee with the same telephone notification that the customer is required to receive.[401]

D. Notice to Local District Social Services Office

Distributors who plan delivery cutoffs to residential buildings must also notify the LDSS under the following circumstances:[402]

395 9 NYCRR § 7870.5(c).

396 9 NYCRR § 7870.2(a)

397 *Id.*

398 9 NYCRR §7870.6(a).

399 9 NYCRR § 7870.6(b).

400 *Id.*

401 9 NYCRR § 7870.6(c).

402 9 NYCRR § 7870.7(a). For a list of LDSS offices by county, see ***Appendix A***.

- If distributor's records, or its contact with the customer or the third-party designee indicate that a cutoff will involve a severe or hazardous health situation;403
- Attempts to notify the customer by telephone have been unsuccessful;404 or
- If the residential building affected is a multiple dwelling.405

If an emergency exists (defined by the regulations as "a situation in which an occupied residential building is currently without heating fuel or is anticipated to be without heating fuel within 48 hours"406) the distributor must notify the LDSS by telephone immediately,407 or by messenger on the same day the distributor attempts to give telephone notice to the customer.408 In notifying the LDSS, the distributor must provide the following information:

- The name and telephone number of the customer and of any third-party designee;
- Whether the building is a one- or two-family house or a multiple dwelling;
- The reason for the fuel cutoff and the type of fuel;
- Whether contact with the customer or the customer's third-party designee indicates that a severe or hazardous health situation is involved;
- The date on which the customer is expected to require a supply of heating fuel; and,
- Whether the building is currently without fuel or is anticipated to be without fuel within 48 hours.409

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403 9 NYCRR § 7870.7(a)(1). A "severe or hazardous health situation" is defined by the regulations as "a situation in which a customer is unable to protect himself or herself, and all other inhabitants of the residential building for which the customer is purchasing fuel, from danger to health or safety caused by a cutoff, by obtaining heating fuel from another source or by securing adequate alternative shelter." 9 NYCRR § 7870.1(k)(1).

404 9 NYCRR § 7870.7(a)(2).

405 9 NYCRR § 7870.7(a)(3). A "multiple dwelling" is defined by the regulations as "any residential building or structure, or portion thereof, which is either rented, leased, let or hired out to be occupied, or is occupied, as the temporary or permanent residence or home of three or more families living independently of each other." 9 NYCRR § 7870.1(i).

406 9 NYCRR § 7870.1(f).

407 9 NYCRR § 7870.7(b)(1).

408 9 NYCRR § 7870.7(b)(2).

409 9 NYCRR § 7870.7(c)(1) – (3).

When a distributor notifies the LDSS of a cutoff, the LDSS must investigate the customer's circumstances and take appropriate steps, including providing financial assistance to eligible customers and providing or arranging for other forms of assistance that may be available from the LDSS or from other government agencies.410 The customer must cooperate with the LDSS in providing documentation – applicants for emergency assistance who cooperate but lack required eligibility information may still be granted short-term assistance until verification can be obtained or until they are determined to be ineligible.411

The LDSS must meet the emergency needs of home fuel heating customers who are already recipients of Temporary Assistance. Same day interviews must be granted and interviews may be completed over the telephone.412 Payments made for non-utility fuel deliveries for Temporary Assistance recipients are always subject to recoupment.413

Households who do not receive Temporary Assistance and households receiving SSI may receive emergency fuel assistance in an amount limited to the cost for fuel to meet the emergency.414 These households are not required to sign repayment agreements as a condition of receiving assistance.415

E. Notice to an Emergency Agency

If the distributor cannot contact the LDSS by telephone after two attempts, it must

410 9 NYCRR § 7870.9(a).

411 New York State Office of Temporary and Disability Assistance ("OTDA") 2002 ADM 2.

412 *Id.*

413 *Id.*

414 OTDA-4357-EL, Temporary Assistance Payments to Meet Utility and Non-Utility Emergencies, Dec. 20, 2005.

415 *Id.*

contact an "emergency agency."416 An emergency agency is defined by the regulations as "the municipal or county agency or private organization for a municipality or county. . . ."417 If initial attempts to contact the emergency agency are unsuccessful, the distributor must continue to call until it reaches the emergency agency.418 In notifying the emergency agency, the distributor must provide the same information notification that it would give the LDSS.419

When an emergency agency receives notice of a cutoff from a distributor, it must "take any reasonable action as if immediately necessary on a temporary basis to prevent loss of life or serious danger to public health."420 The emergency agency is also charged with notifying the appropriate LDSS by telephone on the next business day following its receipt of notification from a distributor, to advise the LDSS of the circumstances and to describe the temporary actions it has taken to prevent loss of life or danger to public health.421

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416 9 NYCRR § 7870.7(b)(1).

417 9 NYCRR § 7870.1(g). The regulations provide a list of emergency agencies by county, attached as ***Appendix B***.

418 9 NYCRR § 7870.8(a).

419 9 NYCRR § 7870.8(b).

420 9 NYCRR § 7870.9(b)(1).

421 9 NYCRR § 7870.9(2).

APPENDIX A

LIST OF MUNICIPAL AND COUNTY SOCIAL SERVICES AGENCIES FOR NOTICE OF REFUSAL, SUSPENSION OR TERMINATION OF HEATING FUEL DELIVERIES MUNICIPAL DISTRICT OFFICES

New York City - multifamily dwellings:
Department of Housing Preservation and Development
Basic Operations Division
125 Church Street, 2nd Floor
New York, NY 10007
212-566-7332

New York City - other:
Department of General Social Services
250 Church Street
New York, NY 10013
212-533-6393

DSS COUNTY DISTRICT OFFICES

Albany County
40 Howard Street
Albany, NY 12207
Fuel Unit 518-471-5923

Allegany County
Allegany County Court House
Belmont, NY 14813
716-268-7612 Ext.276

Broome County
36-38 Main Street
Binghamton, NY 13905
607-772-2832

Cattaraugus County
265 No. Union Street
Olean, NY 14760
716-372-0030

Cayuga County
County Office Building
160 Genesee Street
Auburn, NY 13021
315-253-1355

Chautauqua County
Hall R. Clothier Health & Soc. Serv. Building
Mayville, NY 14757
716-753-4374

Chemung County
203-209 William Street
Elmira, NY 14901
607-737-2874

Chenango County
County Office Building
Norwich, NY 13815
607-355-4568

Clinton County
30 Durkee Street (Mail-P.O. Box 990)
Plattsburgh, NY 12901
518-563-4560 Ext.357

Columbia County
610 State Street
Hudson, NY 12534
518-828-9411

Cortland County
133 Homer Avenue
Cortland, NY 13045
607-753-9681 Ext.40

Delaware County
126 Main Street
Delhi, NY 13753
607-746-2325

Dutchess County
County Office Building
14 Academy Street
Poughkeepsie, NY 12601
914-431-5000 Ext.237

Erie County
95 Franklin Street, 8th Floor
Buffalo, NY 14202
716-846-8642

Essex County
Essex County Court House
Elizabethtown, NY 12932
518-873-6301; 716-284-3067

Franklin County
Franklin County Court House
Malone, NY 12953
518-483-6767

Fulton County
County Building
Johnstown, NY 12095
518-762-4671 Ext.48

Genesee County
3837 West Main Road
Batavia, NY 14020
716-344-2580

Greene County
465 Main Street
Catskill, NY 12414
518-943-3200

Hamilton County
Hamilton County Court House
Lake Pleasant, NY 12108
518-548-3462

Herkimer County
County Office Building
Herkimer, NY 13350
315-867-1222

Jefferson County
175 Arsenal Street
Watertown, NY 13601
315-785-3141

Lewis County
Stowe Street, P.O. Box 193
Lowville, NY 13367
315-376-3536

Livingston County
Livingston County Campus
Building No. 3
Mt. Morris, NY 14510
716-658-2801 Ext.20

Madison County
Wampsville, NY 13163
315-366-2211 Ext.219

Monroe County
111 Westfall Road, Rm. 660
Rochester, NY 14620
716-442-4000 Ext.2613

Montgomery County
County Office Building
Fonda, NY 12068
518-853-3491

Nassau County
Administration Building
900 Ellison Avenue
Westbury, NY 11590
516-535-2064

Niagara County
100 Davison Road (P.O. Box 506)
Lockport, NY 14094
716-284-3067

Oneida County
County Office Building
800 Park Avenue
Utica, NY 13501
315-798-5021; 315-798-5059

Onondaga County
Onondaga County Civic Center
421 Montgomery Street
Syracuse, NY 13202
315-425-2793

Ontario County
120 North Main Street
Canandaigua, NY 14424
716-394-1440

Orange County
Quarry Road, Box Z
Goshen, NY 10924
914-294-9361

Oswego County
County Office Building
Spring Street
Mexico, NY 13114
315-963-7271

Orleans County
Route 31
Albion, NY 14411
716-589-5676

Otsego County
County Office Building
197 Main Street
Cooperstown, NY 13326
607-547-4292

Putnam County
50 Main Street
Brewster, NY 10509
914-279-7185

Rensselaer County
133 Bloomingrove Drive
Troy, NY 12180
518-283-2000

Rockland County
Building L
Sanatorium Road
Pomona, NY 10970
914-623-1155; 354-0200 Ext. 3130

St. Lawrence County
Harold B. Smith County Office Building
Judson Street
Canton, NY 13617
315-379-2150; 315-379-2174

Saratoga County
Saratoga Municipal Center, Bldg. A
Ballston Spa, NY 12020
518-885-5381

Schenectady County
487 Nott Street
Schenectady, NY 12308
518-382-3468

Schoharie County
Professional Building
Schoharie, NY 12157
518-295-8173/34

Schuyler County
County Office Building
Watkins Glen, NY 14891
607-535-4965, 2780 and 2789

Seneca County
R.D. No. 3, Box 179
County Road 118
Waterloo, NY 13165
315-568-9854

Steuben County
County Home, Box 631
Bath, NY 14810
607-776-7611

Suffolk County
Box 2000, 10 Oval Drive
Hauppauge, NY 11787
516-348-4000 Ext. 4375

Sullivan County
Box 231 (Infirmary Road)
Liberty, NY 12754
914-292-4900 Ext. 28

Tioga County
Box 394, Rt. 38
Owego, NY 13827
607-687-5000 Ext. 64

Tompkins County
108 East Green Street
Ithaca, NY 14850
607-274-5289

Ulster County
Ulster County Office Building
244 Fair Street
Kingston, NY 12401
914-331-9300

Warren County
Warren County Municipal Center
Lake George, NY 12845
518-792-9951

Washington County
6 Church Street
Granville, NY 12832
518-642-2800 Ext. 23

Wayne County
16 Williams Street
Lyons, NY 14489
315-946-9733

Westchester County
150 Grand Street
White Plains, NY 10601
914-682-2469

Wyoming County
466 North Main Street
Warsaw, NY 14569
716-786-3111

Yates County
County Office Building
P.O. Box 257
Penn Yan, NY 14527
315-436-4451

APPENDIX B

LIST OF MUNICIPAL AND COUNTY EMERGENCY AGENCIES FOR NOTICE OF REFUSAL, SUSPENSION OR TERMINATION OF HEATING FUEL DELIVERIES

New York City Single Dwelling
NYC Human Resources Administration
(212) 483-1193

New York City Multiple Dwelling
NYC Housing Preservation & Development
(212) 960-4800

COUNTY AGENCIES

Albany County
Red Cross
(518) 462-7461

Allegany County
DSS Answering Service
(716) 593-1864

Broome County
Red Cross
(607) 722-1240

Cattaraugus County
Office for the Aging
(716) 372-0303

Community Action
(716) 938-2021 or 945-5114

Cayuga County
DSS
(315) 253-1333

Chautauqua County

Sheriff
(716) 753-2131

Chemung County
DSS Answering Service
(607) 737-2077

Chenango County
Sheriff
(607) 334-2000

Clinton County
Community Action (Ad Hoc Committee)
(518) 561-8800

Columbia County
Sheriff
(518) 828-3344

Cortland County
Sheriff
(607) 753-3311

Delaware County
Sheriff-Delhi
(607) 746-2336

Dutchess County
Red Cross
(914) 471-0200

Erie County
Sheriff
(716) 846-6300

Essex County
Sheriff
(518) 873-6321

Franklin County
State Police - Malone
(518) 483-5000

Fulton County Sheriff
(518) 762-3151

Genesee County
Nursing Home
(716) 344-0584

Greene County
Sheriff
(518) 943-3300

Hamilton County
Child Protective
(518) 548-3113

Herkimer County
DSS Staff:
(315) 866-7036
(315) 866-6875
(315) 823-4545

Jefferson County
Sheriff
(315) 785-3050 Ext. 3175

Lewis County
Sheriff
(315) 376-3511

Livingston County
Sheriff
(716) 243-1212

Madison County
Sheriff
(315) 366-2311

Monroe County
Child Protective
(716) 461-5690

Montgomery County
Sheriff
(518) 853-4312

Nassau County
DSS Emergency Number
(516) 542-3143

Niagara County
CPS Answering Service
(716) 284-8332

Oneida County
Sheriff
(315) 736-0141

Onondaga County
Volunteer Center
(315) 474-7011

Ontario County
Sheriff
(716) 394-4560

Orange County
Sheriff
(914) 294-6166

Orleans County
Sheriff
(716) 589-5527

Oswego County
Sheriff
(315) 343-5490

Otsego County Sheriff

(607) 547-2500

Putnam County
Sheriff
(914) 225-5523

Rensselaer County
DSS Switchboard
(518) 283-2000

Rockland County
DSS Energy Unit:
(914) 623-1115

St. Lawrence County
Sheriff
(315) 379-2222

Saratoga County
Sheriff
(518) 885-6761

Schenectady County
DSS Answering Service
(518) 382-3470

Sheriff
(518) 382-3300

City Police
(518) 374-7744

Schoharie County
Sheriff
(518) 295-8114

Schuyler County
Sheriff
(607) 535-2767

Seneca County

Sheriff
(315) 539-9241

Steuben County
Civil Defense
(607) 776-3333

Suffolk County
DSS Answering Service
(516) 348-4000

Sullivan County
DSS Answering Service
(914) 292-6444

Tioga County
Sheriff
(607) 687-1010

Tompkins County
County Dispatch
(607) 273-8000

Ulster County
Sheriff
(914) 338-3640

Warren County
Sheriff
(518) 792-9921

Washington County
Sheriff--Salem
(518) 854-7487

Sheriff--Hudson Falls
(518) 747-4623

Wayne County
Sheriff
(315) 946-9711

Westchester County
DSS Answering Service
(914) 592-3791

Wyoming County
Sheriff
(716) 786-2255

Yates County
Sheriff
(315) 536-4438

NEW YORK TRUTH IN HEATING LAW

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

New York's Utility Project
P.O. Box 10787
Albany, NY 12201
1-877-669-257

NEW YORK TRUTH IN HEATING LAW

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NEW YORK TRUTH IN HEATING LAW

I. Introduction

The Truth in Heating law was enacted by the New York Legislature in 1980 and became effective January 1, 1981.422 It was intended to encourage sellers of residential properties and landlords whose tenants pay directly for heating and cooling expenses to make their buildings more energy efficient, and to provide prospective buyers and tenants information that would allow them to more accurately estimate energy costs.423

Generally, the law requires sellers and landlords to furnish prospective buyers and tenants of residential structures with either a complete set of heating and/or cooling bills,424 or a summary of the bills, for the life of the residential structure425 or for the preceding two years, whichever is shorter.426 The specific provisions of the Truth in Heating law are the subject of

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422 NY Energy Law § 17-103.

423 9 NYCRR § 7835.1(b).

424 The regulations define "heating and/or cooling bills" as "all bills rendered by a retail vendor for energy used for space heating and/or air conditioning in a residential structure, including any bills where the cost of energy used for space heating and/or air conditioning is not differentiated from the costs of energy used for any other purpose." 9 NYCRR § 7835.2(b).

425 The "life of the structure" is "the period of time, beginning on the first day that utility services were provided to the residential structure for initial occupancy, to the time that a prospective purchaser or lessee requests the heating and/or cooling bills." 9 NYCRR § 7835.2(d).

426 Energy Law § 17-103(1)(a) & (c); 9 NYCRR § 7835.3(a); 7835.4(a). A "residential structure" is "a one- or two-family dwelling or a single unit of a multiple dwelling, including an individual condominium unit or cooperative unit, which is offered for sale or rental on or after January 1, 1981, by any person; provided, however, that any such dwelling or unit shall not be considered a residential structure if the dwelling has never been occupied; and provided further, that a single unit of a multiple dwelling shall not be considered a residential structure if the owner or lessee thereof is not responsible for the direct payment of both heating and cooling bills." 9 NYCRR § 7835.2(i). Under this definition, it is likely that the seller or lessor of a cooperative or condominium apartment, where heating and cooling costs are part of a monthly "maintenance" payment, would not be required to furnish bills for heating and/or cooling costs to prospective buyers or tenants.

this chapter.

II. Truth in Heating for Prospective Tenants

The Truth in Heating law requires landlords to furnish heating and cooling bills only to *prospective lessees* (tenants).427 The regulations implementing the law define a "prospective lessee" as "any person who inquires about renting a residential structure which has been offered for lease, sublease or assignment to the general public."428 Therefore, landlords have no obligation under the Truth in Heating law to furnish such information to current tenants. Prospective tenants should therefore request heating and cooling cost information *before* they sign a lease or orally agree to lease an apartment.429

Landlords who rent residential dwellings where the tenant is responsible for paying the heating and/or cooling bills are required to furnish prospective tenants immediately, upon oral or written request,430 "a complete set of heating and/or cooling bills, or a summary of heating and/or cooling bills, for the life of the structure or for the preceding two years, whichever is shorter."431 The heating and/or cooling bills, or a summary of them, must contain the following information:

427 Energy Law § 17-103(1)(a).

428 9 NYCRR § 7835.2(f).

429 Current tenants may be able to obtain records of <u>their</u> billing history from the utility or other fuel vendor. Utilities make such data available on their websites. Thus, prospective tenants might compare energy costs of a new apartment with costs of their current apartments.

430 Energy Law § 17-103(c); 9 NYCRR § 7835.4(a). The law contains no requirement that the landlord offer this information voluntarily; the prospective tenant must request it.

431 Energy Law § 17-103(1)(c)/ 9 NYCRR § 7835.4(a).

1. address of the residential structure;[432]
2. name and address of retail fuel vendor and/or utility services;[433]
3. time period covered;[434]
4. type, quantity and cost of all fuel[435] and/or utility services consumed during the period reported. When summary information is provided in lieu of actual bills, the summaries must supply, in the case of fuel, the per-unit cost and, in the case of utilities, the quantity consumed and the total cost for the most recent billing period;[436]
5. A statement indicating whether the fuel and/or utility services were used for purposes other than heating and/or cooling;[437]
6. A statement indicating whether additional sources of energy, such as solar, wind or wood, contributed to the heating and/or cooling needs of the residential structure;[438]
7. A statement of when the residential structure was unoccupied, if it was unoccupied for any period of time encompassed by the bills being provided for 30 days or longer;[439] and
8. Where a summary instead of actual heating and/or cooling bills is provided, the landlord must sign the summary and indicate whether it is based on retail vendor records or records of the former tenant.[440]

Landlords may not charge any fee to prospective tenants for providing the above information,[441] nor may they disclose, without consent, the names of former tenants who may

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432 9 NYCRR § 7835.4(d)(1).

433 9 NYCRR § 7835.4(d)(2).

434 9 NYCRR § 7835.4(d)(3).

435 "Fuel" is defined in the regulations as "any grade of oil, coal, propane, bottled gas, or other fossil fuel." Therefore, these regulations would not apply to renewable fuels such as wood or pellets.

436 9 NYCRR § 7835.4(d)(4).

437 9 NYCRR § 7835.4(d)(5).

438 9 NYCRR § 7835.4(d)(6).

439 Energy Law § 17-103(d); 9 NYCRR § 7835.4(d)(7).

440 9 NYCRR § 7835.4(e).

441 Energy Law § 17-103(1)(f); 9 NYCRR § 7835.4(f).

be listed on the bills.442 Cooling bills need only be furnished where the cooling equipment will remain with the residential structure.443

When landlords do not have complete sets of heating and/or cooling bills, they must furnish prospective tenants all available records, indicating which time periods and/or fuel or utility vendors are not covered by the incomplete records.444 Landlords must also make a written request to the retail fuel vendors or utilities that served the building for a complete set of the bills or a summary of them, and provide these to the prospective tenant.445 *See*, "Responsibilities of Retail Fuel Vendors and Utilities," *infra*.

III. Truth in Heating for Prospective Buyers

The Truth in Heating law requires sellers of residential structures, within fifteen (15) days of a written request from a prospective buyer, to furnish the prospective buyer with:

1. A complete set of heating and/or cooling bills, or a summary of them, for the life of the structure or for the preceding two years, whichever is shorter;446
2. A statement of the type and areas of insulation installed by the seller;447 and,

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442 Energy Law § 17-103(1)(f).

443 9 NYCRR § 7835.4(a). Cooling bill availability may be limited, in instances where window air conditioners that remain in a dwelling unit were powered by electricity from a utility account in the former tenant's name. In such event, retail vendors have an obligation to supply records of the cost and quantity of utility services delivered to the structure (9 NYCRR § 7835.5, discussed *infra*), but such costs may vary widely from tenant to tenant depending upon energy efficiency of appliances, family size and lifestyle, and conservation measures.

444 9 NYCRR § 7835.4(c).

445 9 NYCRR § 7835.4(b).

446 Energy Law § 17-103(1)(a); 9 NYCRR § 7835.3(a).

447 Energy Law § 17-103(1)(b)(1)(i). "Insulation" includes, but is not limited to "any type of material permanently placed within or contiguous to a wall, ceiling or floor of a room or building for the purpose of reducing heat transfer and thus the energy requirements for heating and cooling the building." Energy Law § 17-103(1)(b)(1)(iii).

3. A statement of the type and areas of insulation installed by any previous owner, if known.448

However, sellers need not honor a prospective buyer's request if the request is first made *after* the purchase contract is signed, or if, during the fifteen day period, the seller signs a purchase contract with another person.449 Prospective buyers should therefore request heating and cooling cost information *before* they sign a purchase contract.

The heating and/or cooling bills, or a summary of them, furnished by sellers to prospective buyers must contain the following information and be provided to prospective buyers without cost: 450

1. address of the residential structure;451
2. name and address of retail fuel vendor and/or utility services;452
3. time period covered;453
4. type, quantity and cost of all fuel and/or utility services consumed during the period reported. When summary information is provided in lieu of actual bills, the summaries must supply, in the case of fuel, the per-unit cost and, in the case of utilities, the quantity consumed and the total cost for the most recent billing period;454
5. A statement indicating whether the fuel and/or utility services were used for purposes other than heating and/or cooling;455

448 Energy Law § 17-103(1)(b)(1)(ii).

449 Energy Law § 17-103(1)(a) & (b)(2); 9 NYCRR § 7835.3(b)(1) & (2).

450 Energy Law § 17-103(1)(f); 9 NYCRR § 7835.3(g).

451 9 NYCRR § 7835.3(e)(1).

452 9 NYCRR § 7835.3(e)(2).

453 9 NYCRR § 7835.3(e)(3).

454 9 NYCRR § 7835.3(e)(4).

455 9 NYCRR § 7835.3(e)(5).

6. A statement indicating whether additional sources of energy, such as solar, wind or wood, contributed to the heating and/or cooling needs of the residential structure;456
7. A statement of when the residential structure was unoccupied, if it was unoccupied for any period of time encompassed by the bills being provided for 30 days or longer;457 and
8. Where a summary instead of actual heating and/or cooling bills is provided, the seller must sign the summary and indicate whether it is based on retail vendor records or on the seller's records. Upon prospective buyer's request, seller must make available for inspection both types of records.458

When sellers do not have complete sets of heating and/or cooling bills, they must furnish all available records, indicating which time periods and/or fuel or utility vendors are not covered by the incomplete records.459 Sellers must also make a written or oral request460 to the retail fuel vendor or utility for a complete set of the bills or a summary of them, and provide these to the prospective buyer.461 *See*, "Responsibilities of Retail Fuel Vendors and Utilities," *infra*.

IV. Responsibilities of Retail Fuel Vendors

Retail fuel vendors, including utilities, must maintain records of the cost and quantity of fuel or utility services delivered to residential structures in New York for at least two years.462 They are required to furnish complete sets of heating and/or cooling bills, or a summary of them,

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456 9 NYCRR § 7835.3(e)(6).

457 Energy Law § 17-103(d); 9 NYCRR § 7835.3(e)(7).

458 9 NYCRR § 7835.3(f).

459 Energy Law § 17-103(1)(e); 9 NYCRR § 7835.3(d).

460 If the seller must request records on accounts not titled in seller's name, a written request may be required by the retail fuel vendor or utility. 9 NYCRR § 7835.3(c).

461 Energy Law § 17-103(1)(e); 9 NYCRR § 7835.3(c).

462 Energy Law § 17-103(2)(a); 9 NYCRR § 7835.5(a).

for the two preceding years (or shorter time during which fuel or utilities were provided) within 10 days of a seller's or landlord's request.463 The retail vendor does not need the consent of current or former tenants or prior owners to deliver copies of the bills or summaries of them, provided that the documents contain no information regarding the tenants' or owners' account.464

Retail vendors may charge the seller a $5 fee for providing duplicate copies of heating and/or cooling bills or summaries thereof.465 The information provided must include:

1. address of the residential structure;466
2. name and address of retail fuel vendor and/or utility services;467
3. time period covered;468 and,
4. type, quantity and cost of all fuel and/or utility services consumed during the period reported. When summary information is provided in lieu of actual bills, the summaries must supply, in the case of fuel, the per-unit cost and, in the case of utilities, the quantity consumed and the total cost for the most recent billing period.469

V. Penalties for Violations

The Energy Law chapter to New York state statutes, which contains the Truth in Heating law, was enacted by the Legislature in 1976 and created the State Energy Office ("SEO").470 In

463 Energy Law § 17-103(2)(b); 9 NYCRR § 7835.5(b).

464 Energy Law § 17-103(2)(b).

465 Energy Law § 17-103(2)(c); 9 NYCRR § 7835.5(e).

466 9 NYCRR § 7835.5(c)(1).

467 9 NYCRR § 7835.3(c)(2).

468 9 NYCRR § 7835.5(c)(3).

469 9 NYCRR § 7835.5(c)(4).

470 New York Consolidated Law Service, Energy Note (2008).

1981, the SEO enacted regulations implementing the Truth in Heating law,[471] which were enforced by the SEO Commissioner. In 1995, the Legislature abolished the SEO and transferred its functions to the New York State Energy Research and Development Authority ("NYSERDA")[472] and to the New York State Consumer Protection Board ("CPB").[473]

Prospective buyers or tenants who are unable to obtain Truth in Heating information may complain to the CPB. The CPB has offices in Albany at 5 Empire State Plaza, Suite 2101, Albany, NY 12223-1556, and in New York City at 1740 Broadway, 15th Floor, New York, NY 10019. The toll-free number is 800-697-1220. Complaints may also be filed on-line at the CPB website: www.nysconsumer.gov . The CPB has no express authority to make administrative adjudications of Truth in Heating law disputes. Compliance with the Truth in Heating law is enforced by the New York Attorney General, upon referral from the CPB.[474]

Civil penalties imposed upon sellers, landlords or retail vendors for noncompliance with the Truth in Heating law are forfeited to the People of the State of New York, and cannot exceed $100 per violation.[475] A seller or landlord who knowingly provides false or inaccurate information to prospective buyers or tenants will be deemed in violation of the law.[476] Sellers and landlords will not be in violation of the law if they are unable to provide the required

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471 9 NYCRR § 7835.1, *et seq*.

472 Energy Law § 67 *et. seq*.

473 Ch. 83 §§ 50 – 53, 1995 N.Y. Laws, LEXIS 1995 N.Y. ALS 83.

474 Energy Law § 5-119(2).

475 Energy Law § 17-103(3)(a); 9 NYCRR § 7835.6(a).

476 9 NYCRR § 7835.6(g).

information due to the retail vendor's failure to supply the necessary records.[477] A seller or landlord's failure to furnish heating and/or cooling bills or a summary of them, as required by the law, will not affect legal title to or possession of any residential structure, nor will it permit any buyer or tenant to avoid any obligations he or she may have under a purchase contract or lease.[478] A prospective buyer's claim for penalties against a seller is not permitted in a small claims court action brought by a prospective buyer against a seller for damages and penalties arising out of a cancelled purchase contract.[479]

477 Energy Law § 17-103(3)(a); 9 NYCRR § 7835.6(b) & (c). Sellers will not be in violation provided they requested the records from the retail vendor or utility within five days of prospective buyers' requests. Landlords will not be in violation provided they requested the records from the retail vendor or utility within five days of being notified that the structure was to be vacated.

478 Energy Law § 17-103(3)(b); 9 NYCRR § 7835.6(f).

479 *VanDeCarr v. Hahn*, 16 Misc. 3d 1135A (Clifton Park J. Ct. 2007).

RIGHTS OF RESIDENTIAL TELEPHONE CUSTOMERS

The Telephone Fair Practices Act ("TFPA") and Other Consumer Protections for Telecommunications Customers

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

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RIGHTS OF RESIDENTIAL TELEPHONE CUSTOMERS

I. Introduction

The main body of regulations governing residential telephone service, the Telephone Fair Practices Act ("TFPA"),480 was adopted by the Public Service Commission ("PSC" or "Commission") in 1984, amended in 1997, and is codified at 16 NYCRR Part 609. The TFPA rules provide uniform protections to residential telephone consumers regarding application rights, suspensions, terminations, reconnections, deferred payment agreements ("DPAs"), medical emergency rights, and complaint procedures. TFPA rules do not apply to cellular telephone companies or to long distance telephone customers who do not use the billing and collection services of local exchange companies ("LECs").481 Portions of TFPA are currently under review by the Commission as part of its consideration of intermodal competition.482

Eight years after the initial adoption of TFPA rules, the PSC adopted new rules in 16 NYCRR Part 606 to govern billing and collection services provided by LECs. The 1992 rules, and the Settlement Agreement in a court case arising from them,483 achieved the technological and billing separation of basic local telephone services from other non-basic LEC services and

480 The TFPA rules are similar the Home Energy Fair Practices Act ("HEFPA"), the statute governing the provision of residential electric, gas, and steam service. In many areas, however, such as deferred payment agreements, the details of TFPA and HEFPA are very different. *See*, PULP Law Manual chapter on HEFPA, entitled, "Rights of Residential Gas and Electricity Customers."

481 Consumer protections involving all telecommunications services are governed by the Federal Communications Commission ("FCC") and are addressed later in this chapter.

482 *See*, Case 06-C-0481.

483 *AT&T Communications of New York, Inc., et al. v. Public Service Commission*, No. 1559-92 (N.Y. Sup. Ct., Albany County), Settlement Agreement, July 1, 1992; approved by PSC August 7, 1992.

from third party services, such as long distance toll service provided by interexchange carriers ("IXCs"). They also modify the applicability of the TFPA rules.

II. The Telephone Fair Practices Act

1. Applicability of TFPA

TFPA regulations generally govern the following services:

(1) Local residential telephone service of a LEC (*e.g.*, Verizon);

(2) IntraLATA and InterLATA toll service, unless IntraLATA presubscription is offered and selective IntraLATA access is available.484

TFPA applies only to "residential service" normally provided to customers in private homes or apartments, including any part of a customer's residence used for domestic purposes and not for substantial occupational purposes.485 A "residential customer" is one "who is supplied directly by a telephone corporation with residential service at a dwelling for his or her residential use pursuant to an application for service made by such person or third party on his or her behalf."486 A person requesting service who is not an "existing" residential customer and who requests basic local service at a dwelling for residential use is considered to be an applicant.487

2. Basic Local Service

By definition, basic local service includes:

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484 16 NYCRR §609.2(e). Long distance companies not using the billing and collection services provided by local telephone companies are wholly exempt from TFPA, but are subject to applicable non-TFPA customer protection rules, protections contained in the company's filed tariffs, and the jurisdiction of the FCC.

485 Hotels and motels actually used for transient occupancy generally are not considered residential.

486 16 NYCRR §609.2(b).

487 16 NYCRR §609.2(c).

(1) customer access line, including any usage bundled in this charge;

(2) local measured service;

(3) local measured units;

(4) locality rates (if any);

(5) mileage (if any);

(6) late payment charges on local exchange service;

(7) subscriber line charge;

(8) taxes and surcharges prorated to reflect only the taxes and surcharges associated with local exchange service;

(9) nonpublished service;

(10) touchtone;

(11) local exchange service restoration charge;

(12) non-sufficient funds check charge for local exchange service or any part of local exchange service;

(13) service order charge for local exchange service;

(14) construction charges for local exchange service (if any); and

(15) intraLATA toll service and interregional calls unless intraLATA prescription is offered and selective intraLATA access is available.488

3. Application For Service

Under TFPA, an application for residential service may be made orally or in writing.489 In most instances, an oral application is sufficient. An oral application is complete when the applicant's name, address and, if applicable, the address of a prior account or a prior telephone number, are provided.490

488 16 NYCRR §609.2(e).

489 16 NYCRR §609.3(a)(1).

490 16 NYCRR §609.3(a)(6) Applicants are not required to provide their Social Security number as a condition of service.

A telephone corporation may require a written application if there are arrears on an account at the premises to be served or if the application is being made by a third person who will not be the customer. If a telephone corporation requires a written application, it must inform the applicant no later than three business days following the request, and it must indicate the basis for the requirement.491

A written application may require the information in an oral application, and reasonable proof of the applicant's identity and responsibility for service at the premises.492 A written application containing the required information is deemed complete when it is received by the company.493

A completed oral or written application for local residential service will be considered approved unless it is denied within three business days. If timely denied, it must include the reason(s) for the denial, the requirement for an advance payment or deposit, and state exactly what the applicant must do to qualify. The applicant must also be informed of its right to an investigation or review by the Commission in cases of denials or requests for advance payments or deposits.494

491 16 NYCRR §609.3(a)(7).

492 A comment to 16 NYCRR §609.3(a)(7) states that a telephone corporation may seek a copy of a lease (if any), deed, bill of sale, or other documentation to establish the applicant's identity, residence, and responsibility for service.

493 16 NYCRR §609.3(a)(7).

494 16 NYCRR §609.3(b).

If the denial of service and the required notification are made orally to the applicant, the telephone corporation must provide a written notice of denial to the applicant, upon request, at the address specified by the applicant. If oral notification is not given to the applicant within three business days due to the applicant's unavailability, the telephone corporation is required to send written notification immediately.495

Upon receipt and acceptance of the completed oral or written application, a telephone corporation must provide service within five business days or at a later date when specified by the applicant.496 The only exceptions to the five-day service provision rule are in cases where the extension of service is precluded by strikes, law, considerations of public safety, non-payment of or refusal to agree to pay for reasonable charges for material and installation costs, or physical impediments (*e.g.*, adverse weather, no access to premises).497 Carriers must make reasonable efforts to eliminate these conditions.498 The Commission, however, may direct extension of service within 24 hours or less.499

If a residential customer moves to a different dwelling within the service territory of the same telephone corporation and within twelve months requests residential service at a new residence, it is considered a continuation of service in all respects, including any deferred payment

495 16 NYCRR §609.3(b)(3).

496 16 NYCRR §609.3(a)(5).

497 16 NYCRR §609.3(a)(5)(i)-(iv).

498 16 NYCRR §609.3(a)(5).

499 16 NYCRR §609.3(a)(5)(v).

plan, unless the customer was terminated for non-payment more than ten days prior to the new request for service.500

Applications where the applicant has reportable charges or has been terminated for non-payment in the past six months can be denied if the applicant fails to pay a lawfully required security deposit or make an advance payment.501 Reportable charges are defined in TFPA as any charges for local service which are unpaid 45 days from the date of the bill for the charges, provided that the bill was mailed within six business days of the date of the bill. Charges which are the subject of a DPA under which the customer is making the agreed-upon payments are not reportable charges. The failure to make an agreed-upon payment will make the entire unpaid balance of the deferred payment agreement a reportable charge. Charges which are the subject of a pending billing dispute are not reportable charges during the pendency of the dispute or for 15 days after its resolution.502

When an applicant has outstanding arrears for residential basic local service provided to a prior account in his name, the application must still be approved if: (1) the applicant makes full payment of arrears for basic local service;503 (2) the applicant agrees to make payment for basic local arrears under a DPA, not to exceed three months;504 (3) the applicant has a pending billing

500 16 NYCRR §609.3(a)(8).

501 16 NYCRR §609.3(a)(3).

502 16 NYCRR §609.2(d).

503 16 NYCRR §609.3(a)(2)(i).

504 In order to qualify for a deferred payment agreement for the prior service arrears, the applicant must have been a customer for at least three months and service must not have been terminated for nonpayment during that period if the amount due was not subject to a previous deferred payment arrangement. 16 NYCRR §609.4(a)(2). *See, e.g.,*

dispute for such prior service and has paid any required amounts pursuant to the dispute procedure; or (4) the PSC or its authorized designee directs the provision of service.505

Although the rules provide for continuation of service to existing customers in arrears in medical emergencies, they do not address the situation of similarly situated applicants for service. A petition was filed with the PSC in 1989 by PULP and Legal Assistance of the Finger Lakes, seeking a rule requiring service upon certification of an applicant's medical emergency, despite the existence of arrears. Telephone companies subsequently modified their procedures to provide service to applicants in such situations, and the PSC did not issue the requested rule.

4. Suspension or Termination of Service

4.1 Notice

Under TFPA rules, "suspension" means the interruption of outgoing service only and "termination" means the interruption of both outgoing and incoming service.506 Blocking of non-basic service, optional features, and long distance service is a "suspension" subject to TFPA procedures under the billing and collection rules, but under a court and PSC-approved settlement of a lawsuit, long distance service billed by a local corporation is not subject to TFPA if customers

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AT&T Communications of New York, Inc., et al. v. Public Service Commission No. 1559-92 (N.Y. Sup. Ct., Albany County), Settlement Agreement, July 1, 1992; approved by PSC August 7, 1992.

505 16 NYCRR §609.3(a)(2)(iv).

506 16 NYCRR §609.2(f) and (g).

have selective access to other long distance carriers and the service is billed in a separate payment allocation category.507

Under the TFPA rules, a telephone corporation may suspend or terminate residential service if a customer:

(1) fails to pay charges that were due during the preceding six months, or in excess of six months if there was a billing dispute or when the customer's culpable conduct was the cause of the late billing. In these cases, the carrier must start billing not more than two months after resolving the billing dispute, the end of the event which caused the company to delay, or delays caused by the customer's culpable conduct; or

(2) fails to pay the amounts due on a DPA; or

(3) fails to pay or agree to pay equipment or installation charges for initiation of service; or

(4) fails to pay a lawfully required security deposit.508

The 1992 billing and collection rules now allow disconnection of basic local service only for nonpayment of charges for basic local service. Nonpayment of charges for other services no longer justify termination of basic local service, but may result in denial or blocking of service from a provider who has not been paid.509 For example, if the applicant has paid, or makes arrangements to pay, for basic local service, but still owes money for long distance service or IntraLATA toll charges, only the unpaid service can be "blocked." The customer will also be offered an opportunity to maintain full service with a down payment and a DPA for all charges

507 16 NYCRR §606.4(c); *AT&T v. PSC*, *supra*, Settlement Agreement, p. 8, para. 10(d). Before any long distance blocking is initiated due to nonpayment, however, companies must attempt to contact the customer by telephone as required by TFPA. *Id.*

508 16 NYCRR §609.4(a).

509 16 NYCRR §606.4(a). Under 16 NYCRR §606.4(d), should blocking of nonbasic services become necessary, it may not restrict the customer's ability to access emergency services by dialing 911 or the operator.

due for all services. If a customer defaults on a DPA that includes charges other than for basic local service, the DPA must be restructured to include only basic local charges, and partial payments made under the DPA must be re-credited to basic local service.510

A notice of termination or suspension must be served upon the customer, or mailed to the customer at the premises served or to an alternative mailing address if applicable, at least eight days prior to the suspension date and at least 20 days prior to the termination date shown on the notice.511 (Note: some telephone companies do not use the suspension procedures, but use only terminations.)

A notice of termination or suspension may not be sent until the 25th day after the date of the bill. The date of the bill is not necessarily the date the bill is mailed. However, the bill must be mailed within six business days of the date of the bill or the telephone corporation must extend the 25 day period one day for each day beyond the sixth business day. An individual customer may be required to present documentation, such as the postmarked date on the envelope, in order to get the extension.512 A termination or suspension notice must clearly provide:

(1) the earliest date on which suspension or termination of service may occur;

(2) the reason for the action and how it may be avoided, including the total amount needed to be paid to avoid suspension or termination;

(3) the address and telephone number of the telephone corporation;

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510 *AT&T v. PSC*, *supra*, Settlement Agreement p. 7, para. 8. *See also* 16 NYCRR §606.5.

511 16 NYCRR §609.4(c)(1).

512 16 NYCRR §609.4(c)(2).

(4) specific information advising the customer of the availability of complaint handling procedures;

(5) the availability of a DPA, highlighted in the notice;

(6) a summary of the protections available under TFPA; and

(7) a message printed boldly on the face of the notice specifically stating that the document is a final disconnection notice.513

4.2 Time to Suspend or Terminate

Residential telephone service may only be suspended or terminated between 8:00 a.m. and 7:30 p.m., Monday through Thursday and between 8:00 a.m. and 3:00 p.m. on Friday, unless that day is, or is followed by, a public holiday or a day on which the corporation's main business office is closed. Further, service cannot be suspended or terminated from December 23 through December 26 or December 30 through January 2.514

Telephone service may be suspended or terminated following a determination that a customer's facility is abandoned or is being used without the customer's permission after five days' notice to the customer. However, the five-day advance notice period is waived when mailings are returned by the post office or when a new customer advises the corporation that he has moved into the location.515

On the day any suspension or termination for non-payment is scheduled, the corporation must verify that the account is indeed delinquent and that no payments have been received.516 It

513 16 NYCRR §609.4(b).

514 16 NYCRR §609.4(d).

515 16 NYCRR §609.4(e).

516 16 NYCRR §609.4(f)(1).

is important that a customer indicate that a payment is being made specifically to keep service on because any payment, known by the telephone corporation to be made in response to a termination notice, must be posted to the customer's account on the date it is received or processed in whatever manner that will ensure that suspension or termination will not occur.517 If the payment was made by a check which is subsequently dishonored, the corporation must make at least two attempts within 24 hours to contact the customer, one outside of business hours, before suspending or terminating service unless the customer has, within the previous 12 months, submitted a check for payment which was subsequently dishonored. After being contacted, the customer is to be given an additional 24 hours in which to pay the bill before suspension or termination of service occurs.518

4.3 Voluntary Third Party Notice

A residential customer may designate a third party to receive a copy of all notices relating to suspensions and terminations and other credit notices sent to the customer if the third party so agrees in writing. The telephone corporation must inform the third party that agreement to receive such notices does not constitute acceptance of any liability on the third party for service provided to the customer. The telephone corporation must promptly notify the customer of the third party's cancellation or refusal to accept receipt of such notices.519

5. Special Procedures for Medical Emergencies, Elderly, Blind,

517 16 NYCRR §609.4(g).

518 16 NYCRR §609.4(h).

519 16 NYCRR §609.6.

and Disabled Customers

Special pre-termination procedural protections are provided to customers with household members who have a medical emergency or are elderly, disabled, or blind. In particular situations the telephone corporation must restore telephone service when arrears to the company remain unpaid.

5.1 Medical Emergencies

A medical emergency exists when the customer or someone at the residence suffers from a serious illness or medical condition which severely affects the resident's well-being and the absence of telephone service would create serious risk of inaccessibility of emergency medical assistance or assistance relating to medical care, or professional advice.[520] A telephone corporation cannot suspend, terminate, or refuse to restore basic local service for non-payment of monthly bills while a medical certification is in effect.

A telephone corporation may require certification by a medical doctor or local board of health official that a medical emergency exists at the residence.[521] An initial certification of a medical emergency may be made by telephone as long as written certification[522] is provided to the telephone corporation within five business days. This certification must be submitted on the stationery of the doctor or local board of health and include:

(1) the name and address of the doctor or the local board of health;

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520 16 NYCRR §609.5(a)(2).

521 16 NYCRR §609.5(a)(1).

522 A faxed certification from a medical doctor that a medical emergency exists saves time and is usually acceptable.

(2) the doctor's state registration number;

(3) the name and address of the seriously ill person;

(4) the nature of the serious illness or medical condition;

(5) any service beyond basic local service which may be necessary to reach the customer's doctor because of the medical condition; and

(6) an affirmation that the customer suffers from a serious illness or medical condition and affects the patient's well-being and that the absence of telephone service would create a serious risk of inaccessibility to emergency medical assistance, assistance relating to medical care, or professional advice.523

The initial certification is effective for 30 days from the time the telephone corporation receives oral or written certification, whichever occurs earlier.524 The initial medical certificate may be renewed if the medical condition is likely to continue beyond the expiration date of the initial certificate. In order to obtain a renewal:

(1) a medical doctor or qualified local board of health official must provide a written statement to the telephone corporation indicating the expected duration of the medical emergency and explain either the nature of the medical emergency or the reason why absence of telephone service will create a serious risk of inaccessibility to emergency medical assistance or assistance relating to medical care or professional advice, and

(2) the customer must demonstrate an inability to pay the charges for service, which may include submission of a form required by the telephone corporation before any certificate renewal. Within five days of submission of the form, the telephone corporation must determine if the customer's liquid assets and current income are insufficient to pay telephone bills after taking into consideration the customer's other necessary and reasonable expenses including food, shelter, medical, and other such necessities.525

523 16 NYCRR §609.5(a)(3). A form Medical Letter is available from PULP.

524 *Id*.

525 16 NYCRR §609.5(a)(4).

If the telephone corporation determines that the customer does not have a financial hardship, it must provide the customer with a written notice of such determination and of the customer's right to a review of the determination by the PSC or its designee. The suspension or termination is stayed pending the review. Normally, the renewed medical emergency certificate is effective for 30 days. However, in cases that are certified by the medical doctor or qualified local board of health official as "chronic," the renewed certificate is effective for 60 days or such longer period as approved by the PSC or its designee.526

After expiration of a certificate of medical emergency or a determination of no financial hardship, a telephone corporation must send the customer a final notice of suspension or termination at least eight days prior to suspension and 20 days prior to the date of termination.527

Even though service may not be terminated for nonpayment, the customer remains liable for telephone service while a medical emergency certificate is in effect, and conventional collection remedies other than termination can be pursued by the telephone corporation. A reasonable effort should be made to pay charges for such service. The PSC is available to assist customers in working out a payment schedule in order to avoid the accrual of substantial arrearages while the medical emergency exists.528

526 *Id*.

527 16 NYCRR §609.5(a)(5).

528 16 NYCRR §609.5(a)(6).

5.2 Provisions for the Elderly, Blind, or Disabled

Special procedures must be followed by the telephone corporation prior to suspending, terminating, or refusing to restore residential service to a customer known or identified to be blind, disabled, or age 62 or older where all remaining residents of the household are age 62 or older, 18 or younger, or blind or disabled.[529] In such cases, the telephone corporation must wait an additional 20 days after the date of termination or suspension as stated on the termination or suspension notice before suspending or terminating service. Further, the company must make a diligent effort to contact an adult resident at the customer's premises by telephone or, if unsuccessful, in person, at least eight days prior to the date suspension or termination may occur in order to arrange a payment plan.[530]

If a telephone corporation is notified that a customer is blind, disabled, or age 62 or older after telephone service has already been suspended or terminated, it must restore service within 24 hours and cannot then terminate service for an additional 20 days. The telephone corporation must also make a diligent effort to contact, in person, an adult resident at the customer's premises within 24 hours of such notification or as soon thereafter as practicable to arrange a payment plan.[531]

6. Reconnection of Service

529 16 NYCRR §609.5(b)(1).

530 16 NYCRR §609.5(b)(2).

531 16 NYCRR §609.5(b)(3).

A customer's residential service must be restored following suspension or termination within 24 hours (unless prevented by circumstances beyond the telephone corporation's control or when the customer requests otherwise) if:

(1) the arrears for basic local service have been paid in full;

(2) the conditions that warranted suspension or termination have been eliminated;

(3) the customer has entered into a deferred payment agreement for local service with or without a downpayment;

(4) the corporation has received notice that a serious impairment to health or safety exists for which telephone service is necessary, with all doubts to be resolved in favor of reconnection; or

(5) the PSC or its designee so directs.532

If the telephone corporation is prevented from reconnecting service for reasons beyond its control, service must be reconnected within 12 hours after these circumstances have ceased to exist.533

7. Deferred Payment Agreements

A residential customer who has been:

(a) an existing customer for three months, and

(b) whose basic local telephone service has not been terminated for nonpayment during that period for arrears owed on that person's account

must be offered a DPA before a telephone corporation can suspend, terminate, or refuse to restore the customer's residential service. If the customer has a medical emergency or is blind, disabled,

532 16 NYCRR §609.7(a). The requirements relating to the restoral of basic local service are in the Settlement Agreement in *AT&T v. Public Service Commission, supra.*

533 16 NYCRR §609.7(b).

or elderly, he is exempt from these eligibility criteria. However, if the PSC or its designee determines that the customer has the resources to pay, a DPA need not be offered.[534]

In the notice of termination, a telephone corporation must advise the customer of the availability of a DPA. Further, an offer of a DPA must be mailed to the customer at least six days prior to termination or suspension of service and must state:

(1) the total amount of arrears;[535]

(2) the downpayment, if any, and;

(3) the size of each installment payment and when they are due.

The notice must state in conspicuous, bold print that the customer may obtain the assistance of the PSC in reaching an agreement.[536]

If service has been terminated, the offer of a DPA must be made at the time the customer requests reconnection. A new DPA need not be offered to a customer who is in default on an existing DPA. A customer, however, may have his existing DPA renegotiated once in a 24 month period if a demonstration can be made that the customer's financial circumstances have changed significantly for reasons beyond his control.[537]

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534 16 NYCRR §609.8(a).

535 The billing and collection rules (16 NYCRR §606) require statements to show the amounts due in each category of service, and provide that partial payments will be credited in the order of basic local first, local company charges second, IntraLATA toll third, and IXC toll and other services fourth. These "buckets" are subject to a potential streamlining in the Commission's Comp III Proceeding. *See*, Case 06-C-0481.

536 16 NYCRR §609.8(a).

537 *Id*.

The TFPA provisions for DPAs are significantly different than those provided under HEFPA. The requirements of a TFPA DPA are as follows:

(1) a DPA obligates the customer to make timely payments of current charges for basic local service along with the agreed upon periodic deferred payments;

(2) a DPA can be for no amount greater than $150, unless either the PSC (or its designee) directs, or the telephone corporation agrees, to a larger amount;

(3) the duration of the DPA must be for no less than five months unless the customer agrees otherwise;

(4) a DPA may require a downpayment, of which the ceiling is the lesser of one-fifth of the deferred amount or three months of the customer's average billing for basic local service plus the difference, if any, between the amount of arrears and the deferred amount.[538]

The guidelines on which the terms of the DPA should be based are as follows:

(1) the periodic payments may be made on a weekly, monthly, or longer basis, at the convenience of the parties;

(2) when a customer cannot reasonably make the downpayments described above, the telephone corporation must voluntarily offer plans requiring a lesser (or no) downpayment;

(3) in those cases where a DPA is amended, the new terms should reflect the changed circumstances of the customer as much as is reasonable and possible.[539]

Eligible customers may voluntarily waive the right to the above limitations on the downpayment, but the telephone corporation cannot require or solicit the customer to give such a waiver.[540]

538 16 NYCRR §609.8(b).

539 16 NYCRR §609.8(c).

540 *Id*.

If a telephone corporation determines that a residential customer has the resources to pay his bill and, thus, that a DPA should not be offered, it must notify the customer and the PSC (or its designee) of the reasons for refusing to offer a DPA. The PSC, in accordance with 16 NYCRR §609.16, must then determine whether the customer indeed has the resources to pay his bill. The telephone corporation must stay any further suspension or termination actions and restore service until the PSC (or its designee) makes its determination.541

8. Security Deposits

A telephone corporation may not require an applicant or current customer to post a security deposit as a condition of receiving service unless the customer or applicant:

(1) Is a short-term, seasonal, or delinquent customer.542

- (a) A *short-term customer* is a person who requires service for a specified period of time that does not exceed one year.543
- (b) A *seasonal customer* is a person who receives service periodically each year, intermittently during the year, or at other irregular intervals.544
- (c) A *delinquent customer* is an existing residential customer who accumulates two consecutive months of arrears without making reasonable payments (defined as one-half of the total arrears prior to the due date of the second bill). The telephone corporation must request a security deposit within two months of such failure to pay.545

541 16 NYCRR §609.8(d).

542 16 NYCRR §609.9(a).

543 16 NYCRR §609.2(i).

544 16 NYCRR §609.2(h).

545 16 NYCRR §609.2(k).

(2) Had telephone service terminated for non-payment during the preceding six months.546

(3) Has reportable charges with another telephone corporation.547

(4) Does not give a telephone corporation to which he is applying for service permission to determine the existence of reportable charges or if the customer has been terminated for non-payment during the preceding six months on a previous or current account with other local telephone corporations,548 or

(5) Fails to provide reasonable proof of identity.549

If a telephone corporation intends to require a deposit from an existing residential customer, it must first provide the customer with a written notice at least 10 days prior to the assessment of the deposit. Such notice must inform the customer of the amount of the deposit and the arrears, as well as advise him that the failure to make a timely payment will require the customer to pay a deposit.550 If a deposit is permitted from a delinquent customer or an applicant for telephone service, the customer must be permitted to pay such deposit in installments over a six month period.551

A telephone corporation cannot require a security deposit from:

(1) a person known to the corporation to be a recipient of public assistance, Supplemental Security Income, or additional State payments;552 nor

546 16 NYCRR §609.9(a)(3).

547 16 NYCRR §609.9(a)(4).

548 16 NYCRR §609.9(a)(5).

549 16 NYCRR §609.9(a)(6).

550 16 NYCRR §609.9(a)(2).

551 16 NYCRR §609.9(b).

552 16 NYCRR §609.9(c)(1).

(2) a person known to the corporation to be aged 62 or older unless such customer has had service terminated for nonpayment of bills within the past six months. If a deposit is required from such a customer, the company must allow the customer to pay it in installments over a 12 month period.553

An authorized deposit must be for a reasonable amount not greater than two times the average monthly bill for basic local service for a calendar year.554 Each telephone corporation holding customer deposits must give a statement to each depositor when (and as) the deposit is applied to an unpaid bill showing the amount of the deposit (including interest accrued and the period covered) and the balance of the bills remaining unpaid or the balance of the deposit and interest remaining to the depositor's credit.555

A customer is entitled to a refund of the deposit if he is non-delinquent for one year or ceases to be a customer.556 The refund can be credited to the customer's account or refunded to the customer, at the election of the depositor.557 When the deposit is paid in installments, the date for the one-year period commences on the date of receipt of the first installment.558 Interest must be paid on the deposit at a rate set annually by the PSC.559

553 16 NYCRR §609.9(c)(2).

554 16 NYCRR §609.9(d).

555 16 NYCRR §609.9(f).

556 16 NYCRR §609.9(g)(1).

557 16 NYCRR §609.9(g)(3).

558 16 NYCRR §609.9(g)(4).

559 16 NYCRR §609.9(e). On November 8, 2007, the Commission revised the deposit rate, effective January 1, 2008. The customer deposit rate for investor-owned utilities is 3.75% and the rate for municipally owned utilities is 2.05%. This rate remains unchanged.

A summary of these deposit requirements must be maintained by the telephone corporation and the corporation must let customers know of its availability.560 Also, each telephone corporation holding customer deposits must keep adequate records with respect to each deposit.561

9. Backbilling

A telephone corporation may not charge for previously unbilled service nor upwardly adjust a bill for service supplied more than 24 months prior to the backbilling or billing adjustment unless culpable conduct of the customer caused or contributed to the late or inaccurate billing.562 In instances where backbilling is permissible, the telephone corporation must:

(1) explain the reasons for delay in the billing;

(2) advise the customer that service cannot be suspended or terminated for non-payment of charges billed in excess of six months after the provision of service; and

(3) allow payment to be made under an installment plan. The installments in such a plan must be tailored to the customer's ability to pay and must be for a period of time of at least one month for each month the billing was late, unless otherwise agreed to by the customer. If requested by the customer, an explanation of the late billing and installment plan will be provided in writing. An adjustment to increase previously rendered bills more than six months after the time service was provided must be made within four months of the final resolution of the billing dispute.563

560 16 NYCRR §609.9(h).

561 16 NYCRR §609.9(i).

562 PSL §118(2); 16 NYCRR §609.10.

563 16 NYCRR §609.10.

10. Late Payments

Telephone companies are permitted to impose late payment charges, fees, interest, or other charges on residential bills not paid within the time permitted. Such charges must be approved by the PSC.[564] For residential customers on fixed incomes, the telephone corporation must give them the opportunity to make payments on a reasonable schedule, adjusted for the customer's periodic receipt of income.[565]

11. Bill Contents

Under TFPA, each residential telephone bill must contain, in clear and understandable form and language:

(a) the name, address, and account number of the customer;

(b) the name of the telephone corporation;

(c) the telephone number of the telephone corporation's business office which may be contacted to discuss the bill;

(d) the amount owed for the latest period;

(e) the date by which payments for the latest period may be paid without a late-payment charge;

(f) the late payment charge for late-paid bills, if any;

(g) credits from past bills;

(h) any amounts owed and unpaid from previous bills;

(i) credits and charges which are adjustments to past bills due to service and/or rate increases;[566] and

564 16 NYCRR §609.11(b).

565 16 NYCRR §609.11(a).

566 16 NYCRR §609.12(a).

(j) a statement of how the bill may be paid.567

In addition, all bills must include an itemized listing of the services being subscribed to and their monthly rates. Further, an identification of those services which are not necessary for basic service must be included with each new customer's first bill, each existing residential customer's first bill after a change in service, and semiannually for all customers. New customers will be allowed 60 days to change their type or grade of service, or both, and to cancel any optional non-basic services without incurring any cancellation or nonrecurring charges other than the original service connection and monthly charges for the period service was used.568

Telephone corporations are not prohibited from providing pertinent messages and information on the bill, provided such information does not interfere with the presentation of the required information.569

12. Notification Requirements

12.1 Annual Notification of Rights

Every telephone corporation must, at the time service is initiated to a residential customer and at least annually thereafter, provide residential customers with a plain language summary of their rights and obligations under TFPA, or inform customers that such a summary is available and how it can be obtained from the company. At a minimum, the summary must include the following:

567 16 NYCRR §609.12(b).

568 16 NYCRR §609.12(c).

569 *Id.* Note that additional requirements have been ordered by the FCC under its Truth-in-Billing rules.

(1) a description of the complaint-handling procedures available at the telephone corporation and the Commission. (Such notice must clearly state the means by which a complaint can be made to the company and must also advise the customer that, if after contacting the telephone corporation, the customer remains dissatisfied, he may contact the Commission. The notice must further state that Commission Staff is available to give assistance in such matters, and must also specify an appropriate address for the Commission.);

(2) the rights and obligations of residential customers relating to payment of bills, termination of service and reconnection of service;

(3) a description of special protections afforded the elderly, blind, and disabled, and persons with medical emergencies;

(4) a request that residential customers who qualify for the protections afforded to elderly, blind, and disabled, and persons voluntarily so inform the utility;

(5) the right of a customer to designate a third party to receive copies of all notices relating to suspension and/or termination of service or other credit notices;

(6) appropriate forms that customers claiming the protections for elderly, blind, and disabled, and persons with medical emergencies may fill out and return; and

(7) a description of the customers' rights in regard to deferred payment plans and the holding and demanding of security deposits by the telephone corporation.570

12.2 Notices in Telephone Directories.

The opening pages of each directory published by the telephone corporations must contain a conspicuous notice advising customers that, should any utility fail to resolve their complaints regarding service or billing disputes to their satisfaction, they may refer their problems to the Commission's Consumer Services Division and include the appropriate address and telephone number for the Consumer Services Division.571

570 16 NYCRR 609.13(a).

571 16 NYCRR 609.13(b). The Consumer Services Division is now known as the Office of Consumer Services.

12.3 Billing Information in Non-English Language.

Every telephone corporation providing service to a county where, according to the most recent Federal census, at least 20 percent of the population regularly speaks a language other than English, must include in its telephone directories in such county a notice in both English and such other language which describes the contents of the telephone corporation's bill. At least once a year, every telephone corporation must mail to all residential customers in such county a notice in both English and such other language which describes the contents of the telephone corporation's bill.572

13. Emergency Disconnections

A telephone corporation may disconnect residential service to a customer when an emergency threatens the health and safety of a person, the surrounding area or the telephone distribution system. In such circumstances, the corporation will restore the service as promptly as feasible and not disconnect for any other reason prior to restoration.573

14. Inspection and Examination of Equipment

A telephone corporation employee may enter any premises supplied with telephone service by the telephone corporation to examine the corporation's telephone equipment or wires to ascertain any service-affecting problems on a non-holiday workday between 8 a.m. and 6 p.m., or at such other reasonable times as requested by the customer. A photo-identification badge signed

572 16 NYCRR 609.13(c).

573 16 NYCRR §609.14.

by the president or vice-president of the telephone corporation must be shown.574 This rule does not apply to the inspection and examination of telephone equipment where an emergency may threaten the health and safety of a person, the surrounding area, or the telephone corporation's distribution system.575

A telephone corporation employee may not enter any locked premises supplied with telephone service by the telephone corporation to examine the corporation's telephone equipment or wires without the permission of the person lawfully in control of the premises, nor use any manner of force to perform the inspection or examination, except in the case of an emergency which may threaten the health and safety of a person, the surrounding area, or the telephone corporation's distribution system, or where authorized by court order.576

15. Telephone Corporation Complaint Handling Procedures

A residential customer who has a service problem or billing issue must first make a complaint to the telephone corporation. The telephone corporation must provide a simple system in which a customer's complaint may be accepted and processed. The telephone corporation must promptly investigate the complaint and report its results to the customer. Upon request, this oral report can be in writing, which must be sent within five business days after the request to the customer. If an oral report can not be given due to the unavailability of the complainant, either a letter requesting that the customer call the telephone corporation or a written copy of the report

574 16 NYCRR §609.15(a).

575 16 NYCRR §609.15(b).

576 16 NYCRR §609.15(c).

must be sent no later than two business days after the results of the investigation are determined. If a letter requesting the customer to call is not responded to in five business days, a written copy of the report must be sent to the customer no later than the seventh business day after the letter was sent to the customer. 577

The telephone corporation must inform the customer of the availability of the PSC's complaint handling procedures in the event that the dispute is resolved in whole or in part in the corporation's favor. A customer's service may not be suspended or terminated for nonpayment of disputed amounts while a complaint is pending before the company or the PSC or for 15 days after its resolution, unless otherwise provided by the Commission or its designee. A customer must pay the undisputed portion of the bill as a condition of continued service during the pendency of the dispute.578

Further details on the complaint handling process are discussed in the next section.

16. Waiver

The TFPA rules contain a waiver provision, which allows the PSC to waive sections of TFPA "for good cause shown."579 In addition, telephone companies may have somewhat different procedures which apply to particular circumstances that may not be explicitly covered by the TFPA rules. Advocates should check with the PSC in any case where a utility asserts it has a waiver of a TFPA provision, and should consult the telephone corporation's tariff with respect to

577 16 NYCRR §609.16.

578 *Id.*

579 16 NYCRR §609.17.

any procedure which, while not violating TFPA, may appear to be unreasonable or otherwise questionable.

III. Complaint Handling

In addition to TFPA, the Commission has established a streamlined, electronic mechanism for consumers to file complaints against service providers, but complaints will not be formally lodged against a carrier until it has had an opportunity to resolve the issue.580 For example, some consumer complaints turn out to be erroneous, such as a long distance problem being brought to a local exchange carrier, and are vetted prior to being assessed on the carrier.

1. The Role of the Office of Consumer Services

The Commission's Office of Consumer Services ("OCS") receives consumer complaints via its toll-free telephone number, in writing, or over the Internet. After OCS completes entering the details of a complaint, it forwards the complaint to the utility by fax or e-mail. In an effort to ensure that utilities fulfill their obligation to provide effective customer service, OCS will first ask the utility to contact the customer and resolve the concern directly. If the complaint is related to the provision of service, the utility should contact the customer within two business hours. If the complaint is related to billing or another matter, the utility should contact the customer by the close of the following business day.

580 Complaints affect a carrier's ability to meet its minimum service quality requirements and negatively impact it being able to garner a Commendation Award from the Commission. Complaint statistics for each company are tracked by the Commission and are posted on its website to assist customers in choosing providers.

Should the utility not contact the customer with its initial acknowledgement, does not provide its response within two weeks, or the matter remains unresolved after the customer receives a response, the customer can contact OCS to escalate the matter. At this point, the complaint is considered a "true complaint" and will be counted against the utility. OCS will then further investigate the matter and notify the customer in writing or by telephone of the decision and the reasons for the decision.

If the initial decision is believed to be wrong, the customer can request an informal hearing. This request may be in writing and made within 15 days of the initial decision. The customer may then be asked to submit certain documents to support his or her position. If the customer and the utility are unable to settle the complaint, the hearing officer will make a decision on the complaint and notify the customer in writing of the decision. If the customer believes that the informal hearing officer's decision was wrong, it can be appealed within 15 days of the decision to the Commission. The appeal must be in writing and must contend that there was an error made by the hearing officer that affected the decision or that evidence not previously available would affect the decision. The Commission will make a decision on the appeal and notify the customer in writing of its decision.

OCS can be contacted by telephone Monday through Friday at 800-342-3377 from 8:30am to 4:00pm or via the Internet (24 hours a day) at www.dps.state.ny.us by clicking the Consumer Assistance Link. The mailing address is Office of Consumer Services, Department of Public Service, Three Empire State Plaza, Agency Building 3, Albany, NY 12223-1350. For complete

information on the OCS complaint and review process, see the PULP Law Manual chapter entitled, "Utility Complaint Handling Procedures of the New York Public Service Commission."

2. Limitations on Complaints

The Commission will not hear complaints against wireless or Voice over Internet Protocol ("VoIP") providers because it currently lacks jurisdiction over these technologies. Complaints against these types of providers should be directed to the FCC (along with other interstate carriers, such as IXCs) or can be brought to the attention of the state Attorney General.

However, even among wireline providers, both incumbents and competitive LECs, there are limitations as to what the PSC can do. Back in 1997, a New York Telephone customer brought suit against the company for charging for calls in whole minute increments, meaning that if a two minute call went into the next minute by only one second, the customer would be charged for a three minute call. The Appellate Division supported the state Supreme Court's decision to dismiss the complaint under the "filed rate doctrine."581 The filed rate doctrine states that when a company in a regulated industry files its service rates with the regulatory agency and the agency approves those rates, the rates are deemed to be fair and reasonable. Accordingly, even if a carrier's marketing activities or customer service representations would have a customer believe that rates charged would be different than what would be indicated by the filed rates, there is no remedy for customers, provided the rates were properly approved. As the *Porr* court held, "all of the plaintiff's common-law claims must be dismissed because they are barred by the Public Service

581 *Porr v. NYNEX Corporation*, 230 A.D.2d 564 (2nd Dep't 1997).

Law, which gives the PSC the exclusive authority to determine intrastate telephone rates."582 This holding was upheld seven years later when an AT&T customer complained that she had been told by an AT&T representative that rates would not increase as long she remained a customer. The court stated "[u]nder the filed rate doctrine, the plaintiff is presumed to have had knowledge of this [tariffed rate] information, and so could not have been misled by the representative's alleged comments."583

In 2004, the United States Supreme Court handed down a major opinion regarding the application of the federal antitrust laws to incumbent local exchange carriers. The case, *Verizon v. Trinko*, determined that the New York-based customer of a competitive provider, AT&T, could not bring an antitrust action against the incumbent, Verizon, for its alleged failure to fill its rivals' orders on a nondiscriminatory basis. Trinko had filed a class action suit alleging that Verizon had completed its competitor's requests slower than orders for its own customers as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of CLECs in violation of §2 of the Sherman Act. The Court found that the complaint alleged there was a breach of an incumbent LEC's duty under the Telecom Act to share its network with competitors, but that this does not state a claim under §2 of the Sherman Act.584 Any remedy for

582 *Id.,* at.230 A.D.2d 576.

583 *Doyle v. AT&T Corporation*, 304 A.D.2d 521, 522 (2nd Dep't 2003).

584 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 US 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004).

discriminatory performance by the incumbent in making its facilities available will need to be brought by the competitor.

IV. Truth-in-Billing

In addition to the Commission's specific regulations regarding billing practices, the FCC has issued numerous orders regarding customer bill contents, known as Truth-in-Billing.585

The Commission initially adopted the Truth-in-Billing rules to improve landline consumers' understanding of their telephone bills. Among other things, §64.2401 of the FCC's Rules require that the telephone company's bill must:

(1) be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered;

(2) identify the service provider associated with each charge;

(3) clearly and conspicuously identify any change in service provider;

(4) contain full and non-misleading descriptions of charges;

(5) identify those charges for which failure to pay will not result in disconnection of the customer's basic local service; and

(6) provide a toll-free number for customers to call in order to lodge a complaint or obtain information.586

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585 *See, e.g., First Report and Order and Further Notice of Proposed Rulemaking*, In the Matter of Truth-in-Billing and Billing Format, CC Docket No. 98-170, FCC 99-72 (Released May 11, 1999); *Order on Reconsideration*, In the Matter of Truth-in-Billing and Billing Format, CC Docket No. 98-170, FCC 00-111 (Released March 29, 2000); and *Report and Order and Second Further Notice of Proposed Rulemaking*, In the Matter of Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, CC Docket No. 96-45, CC Docket No. 98-171, CC Docket No. 90-571, CC Docket No. 92-237, NSD File No. L-00-72, CC Docket No. 99-200, CC Docket No. 95-116, CC Docket No. 98-170, FCC 02-329 (Released December 13, 2002).

586 47 CFR §64.2401.

The FCC also determined that all telecommunications providers should use standard labels on bills when referring to line item charges relating to federal regulatory action, such as universal service fees, subscriber line charges, and local number portability charges. These Truth-in-Billing requirements were extended to wireless carriers in 2005.587 This wireless component was brought before the United States Supreme Court on appeal, where certiorari was denied on January 22, 2008.588

Issues regarding bills and their contents may be raised at either the PSC or FCC (for landline carriers), but only at the FCC for wireless providers.

V. Taxes and Surcharges

The PSC has issued an *Advisory Notic*e regarding how it wants taxes and surcharges to appear on customer bills, including differentiating between which line items are "taxes" and which are "surcharges." While the document is considered to be official Commission action, these are not specific requirements, but merely recommended actions.589 Carriers that do not follow the recommendations in the *Advisory Notice* will be contacted by Commission Staff.

1. Application/Computational Issues

587 *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, In the Matter of Truth-in-Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, CC Docket 98-170, CG Docket No. 04-208 (Released March 18, 2005).

588 See, *National Association of State Utility Consumer Advocates and National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, No. 05-11682, 11th Cir., July 31, 2006.

589 *Advisory Notice*, Proceeding on Motion of the Commission to Examine the Application of Taxes and Surcharges to Customer Bills by Telecommunications Carriers, Case 05-C-1455 (Issued November 6, 2006).

A list of all appropriate taxes and surcharges, a range of rates, how each is applied, and the statutory authority behind each was included in the Advisory Notice. This Appendix has been posted on the PSC's web page. Carriers were reminded that Commission-approved tariff charges, such as the Presubscribed Interexchange Carrier Charge, should not appear as a tax or surcharge.

2. Customer Notice

The Commission strongly recommended that "companies include thorough and detailed descriptions of all taxes, surcharges and other fees on their web-sites, including the purpose of each item, and routinely remind customers (on bills or bill inserts) that this information is available."[590]

3. Improper Tariffs

The Commission also recommended "that each carrier carefully evaluate the propriety of their individual billing charges based on this notice, and consider bundling any such tax or surcharge into basic rates."[591]

4. Inclusions on Customer Bills

4.1 State and Local Sales Tax

State and local sales taxes are defined as taxes paid by consumers and directly submitted to appropriate state, county, or city authorities. City school district taxes are also collected under sales tax law provisions. The state sales tax rate is four percent in New York and the county sales tax rates are capped at three percent, but counties can seek legislative approval for higher rates.

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590 *Id.*, at p. 2.

591 *Id.*

City school taxes are allowable up to three percent. An additional 0.375 percent MTA Tax Surcharge (*See:* Section 4.8) applies in the New York Metropolitan area and may be bundled with the state or local sales tax. Calls to entertainment and information services, such as those dialed using 500, 700, 800, or 900 telephone numbers, are taxed at an additional five percent.

The sales taxes are applied to all intrastate services, including all surcharges, except the E-911 Surcharge.592

4.2 Federal Excise Tax

The Federal Excise Tax was introduced in 1898 by the Federal government as a temporary tax to support the nation's efforts in the Spanish-American War. At that time, the three percent tax on long distance service was considered to be a luxury tax since primarily only the wealthiest people owned telephones. The tax revenue from the Federal Excise Tax went directly into the Federal General Fund. The tax was eliminated in 2006 for all telephone providers (landline and wireless) by the U.S. Treasury after five federal appeals courts declared it unlawful and should no longer appear on customer bills. A refund mechanism for customers was established for 2006 tax returns.

4.3 E-911 Surcharge

The purpose of the E-911 surcharge is to pay for the cost of the "Universal Emergency Number" so that all citizens throughout the United States can request emergency assistance. Consumers do not pay this fee in order to be provided with E-911 service. As a result, a consumer

592 *See,* N.Y. Tax Law, §1101 *et seq.* (State Sales Tax and additional tax on entertainment/information services), §1201 *et seq.* (city school district taxes), and §1109 *et seq*. (MTA Surcharge on Sales Tax).

has access to E-911 whether or not the locality in which the consumer lives has imposed the monthly charge on their phone bill. There is no per-call charge for calling 911. The rate can not exceed 35 cents per access line per month on the consumers of every landline service provider within each municipality imposing the surcharge, other than the City of New York. The City has been authorized to impose a monthly charge of up to one dollar. The Surcharge can not be imposed on more than 75 exchange access lines per customer per location. Lifeline customers, public safety agencies, and any municipality which has enacted a local law regarding E-911 are exempt from this Surcharge.

The E-911 Surcharge is a flat fee paid by the consumer. The surcharge is required to be collected by the service provider and to be added to and stated separately in its billings to the customer.593

4.4 Municipal Surcharge

This Surcharge recovers telephone company expenses associated with municipal revenue taxes, which apply to calls originating and terminating within the village or municipality. The Surcharge can not exceed one percent except in Buffalo, New York City, and Yonkers, where the rate may not exceed three percent. Statements attached to tariff schedules indicate the surcharge percentage for each village or municipality.

593 *See,* N.Y. County Law §§301 through 307. This requirement does not address the E-911 surcharge that appears on wireless telecommunications service bills and imposed pursuant to County Law §308 and §309, and note that the authority for that surcharge is different from the authority granted to localities in County Law §303.

The Municipal Surcharge applies to all local charges, LNP Surcharge, FCC Line Charge and Federal USF Surcharge.[594]

4.5 New York State Gross Revenue Tax Surcharge

This Surcharge recovers telephone company expenses associated with mandated New York State Transportation and Transmission Corporation Franchise Taxes (Section 184 Tax) and Excise Taxes on Telecommunications Services (Section 186-e Tax). The Commission has established maximum rates for this Surcharge, which vary according to the type of service provided and whether or not the carrier is principally engaged in local telephone business. For telephone corporations, including resellers, principally engaged in local telephone business, the maximum rates[595] are as follows:

- Services provided for resale -- 0.3764%
- IntraLATA toll and regional calling -- 2.8273%
- All other services -- 2.9405%.

For telephone corporations, including resellers, not principally engaged in local telephone business, the maximum rate is 2.5641 percent and applies to all of these services.

This Surcharge is generally applied to all services except the E-911 Surcharge. Technically, companies are not required to pay Section 184 Taxes on interstate and international calls and services; however the Surcharge is not bifurcated in this manner. Since the 184 Tax is very small compared to the 186-e Tax, which is levied on interstate and international services, the

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594 *See,* N.Y. General City Law, §20-b and N.Y. Village Law, §5-530.

595 Companies are allowed higher surcharge levels upon showing their inability to recover their costs based on the established Commission-approved levels.

amount of over-collection is minimal. Companies may file tariffs that provide for separate 184 and 186-e Tax Surcharges to more precisely collect the appropriate taxes.[596]

4.6 FCC Subscriber Line Charge ("SLC")

The FCC instituted this charge[597] as it developed its access charge regime after the break-up of AT&T in 1984, and caps the maximum price that a company may charge. This is not a government tax or surcharge, and it does not end up in the government's treasury. The SLC recovers some of the costs of the local network formerly recovered through interstate toll charges. While only ILECs are required to collect the SLC, the FCC explicitly affirmed the right of CLECs to impose a SLC on their customers. Thus, CLEC SLC rates are not capped in the same manner as ILEC SLCs.

A SLC for a primary residential line and a single-line business is currently capped at $6.50 per month per line. The cap for non-primary residential lines is $7.00 per month per line. Only one residential line is deemed to be the primary line. A cap of $9.20 per month applies to multi-line business users. CLECs are not required to apply these rates. This charge is a flat fee and is added to and stated separately in billings to the customer.[598]

4.7 Federal Universal Service Fund Recovery Charge

596 *See,* N.Y. Tax Law, §184; §186-e.

597 The Subscriber Line Charge is also known as FCC Charge for Network Access, Federal Line Cost Charge, Interstate Access Charge, Federal Access Charge, Interstate Single Line Charge, or Customer Line Charge.

598 The interstate charge was approved by the FCC under §47 USC §201, Docket No. CC 80-286.

The FCC, as directed by Congress, developed the Federal Universal Service Fund ("USF"), which provides funding for low income services, schools and libraries, and high cost rural service. All telecommunications companies are required to pay a specific percentage of their interstate and international revenues into the USF to support these programs.

The FCC calculates the quarterly percentage of the interstate and international revenue ("contribution factor") based on the ratio of total projected quarterly costs of the universal service support mechanism to contributors' total projected collected end-user interstate and international revenues, net of projected contributions. For example, the percentage for the fourth quarter of 2009 is 12.3 percent.[599] The quarterly percentage can be found on the FCC web site at www.fcc.gov.

Accordingly, the USF charge is a flat fee on the interstate and international revenues on a customer bill which may not exceed the FCC quarterly percentage.[600]

4.8 MTA Tax Surcharge

This Surcharge recovers telephone company expenses associated with the mandated New York State temporary metropolitan transportation business tax surcharge (Section 184-a Tax), and applies to customers located in the New York metropolitan area only.

The Commission previously established maximum rates for this Surcharge, which vary according to the type of service provided and whether the carrier is principally engaged in local

599 *Public Notice*, Proposed Fourth Quarter 2009 Universal Service Contribution Factor, CC Docket No. 96-45, DA 09-2042, Released September 14, 2009.

600 *See*, 47 CFR §54.709(a).

telephone business. For telephone corporations, including resellers, principally engaged in local telephone business, the maximum rates are as follows:

- Services provided for resale -- 0.1277%
- IntraLATA toll and regional calling -- 0.6890%
- All other services -- 0.73%.

For telephone corporations, including resellers, not principally engaged in local telephone business, the maximum rate is 0.5986 percent and applies to all of these services.

This Surcharge is generally applied to all services except the E-911 Surcharge. Technically, companies are not required to pay Section 184-a Taxes on interstate and international calls and services; however the surcharge is not bifurcated in this manner. Since the 184-a Tax is very small, the amount of over-collection is minimal.[601]

4.9 Local Number Portability Surcharge

Local Number Portability ("LNP") is a service that provides residential and business telephone customers with the ability to retain, at the same location, their existing local telephone numbers when switching from one local telephone service provider to another. LNP was mandated by the Telecommunications Act of 1996. In July 1996, the FCC issued a ruling in CC Docket No. 95-116 that LNP must be in place nationwide by January 1, 1998. Since each state is responsible for implementation of LNP, timetables vary; the specifics of the implementation vary as well.[602]

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601 *See,* N.Y. Tax Law §184-a.

602 LNP was extended to wireless providers in 2003 and VoIP providers in 2007. *See: Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, CC Docket No. 95-116, FCC 03-284 (Released November 10, 2003) and *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers, Local Number Portability Porting Interval and Validation Requirements, IP-Enabled Services, Telephone Number*

The FCC allows, but does not require, local telephone companies to pass certain costs of implementing and maintaining long-term number portability on to their customers. Additional information can be found on the FCC web site at www.fcc.gov.

For a period of five years from the date of LNP implementation, a local telephone company may recover its costs. The FCC allows ILECs to recover only costs directly related to providing long-term telephone number portability, which keeps the charges passed on to consumers, if any, as small as possible. Because the FCC neither regulates the rates nor dictates the maximum amount carriers can charge their customers, carriers may choose to recover their costs of providing long-term telephone number portability in any lawful manner consistent with their obligations under the Telecommunications Act of 1996.

Accordingly, the LNP charge is a fee on a customer's bill that varies by ILEC. This fee is based upon the ILECs internal costs of implementing long-term telephone number portability.603

4.10 Other Common Charges

The following charges are specific line items for services rendered but are not defined as a tax or surcharge. Therefore, they are taxable and may have surcharges applied to them. These charges are not mandated by state or federal authorities and are therefore not charged separately by all telephone companies. It should also be noted that some charges are specifically not allowed

Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Final Regulatory Flexibility Analysis, Numbering Resource Optimization, WC Docket No. 07-243, WC Docket No. 07-244, WC Docket No. 04-36, CC Docket No. 95-116, and CC Docket No. 99-200, FCC 07-188 (Released November 8, 2007).

603 *See,* 47 CFR §52.33.

as a separate line item for the intrastate portion of bills, such as Regulatory Recovery Fees, but may be allowed as an interstate charge.

(a) Presubscribed Interexchange Carrier Change Charges

The Presubscribed Interexchange Carrier ("PIC") Change Charge is a one-time charge imposed when customers presubscribe to their carrier of choice, which gives them the ability to make toll calls without having to dial an access code. The charge applies each time a customer requests a change, and separate charges may be imposed for changes to intraLATA and interLATA/interstate changes. Rates vary, but most are five dollars or less.

(b) Intrastate Access Recovery Charge

The Intrastate Access Recovery Charge recovers costs long distance carriers incur to connect to the local telephone network which are higher in New York State than the national average. The use of this charge allows long distance carriers the ability to offer uniform toll rates throughout the country. Rates vary from company to company as do the names given for this charge. The rates are included in each company's New York intrastate tariffs.

(c) Carrier Cost Recovery Charge

The Carrier Cost Recovery Charge (or Regulatory Recovery Fee) recovers national costs associated with various federal regulatory fees and programs. Rates vary from company to company as do the names given for this charge. Similar charges to recover New York State costs are not allowed.

4.11. Cramming

Cramming is the addition of charges onto a customer's local telephone bill for services or merchandise without the individual's authorization. This started to become a major issue in the mid- to late-1990s when a customer would place a call to an information service number (a "900" number) or participate in a sweepstakes contest and unknowingly be enrolled in some service or product. The company providing the service or merchandise then would arrange for the billing through the local telephone company.

Through a collaborative effort between the Commission and New York's incumbent local telephone carriers, "Cramming Core Guidelines" were agreed to in February 1999. The Guidelines state that the carriers agree:

1. Cramming is the submission or inclusion of unauthorized, misleading, or deceptive charges for products or services on customers' local telephone bills.
2. To provide local telephone bills to residential customers that include charges in a clear and understandable form and language.
3. To fully adjust charges on local telephone bills which meet the definition of cramming in these guidelines.
4. To address cramming issues through third-party billing and collection agreements.
5. To provide outreach and customer education as it applies to cramming.604

The FCC's Truth-in-Billing Rules, among other things, are intended to stop cramming from occurring. Because a customer's local telephone company may include charges incurred for another company's service on the bill, the company sending the bill must identify the service

604 The Cramming Core Guidelines were formally adopted by the Commission and apply to all local exchange carriers in its CLEC-to-CLEC Migration Guidelines. *Order Adopting Phase II Guidelines*, Proceeding on Motion of the Commission to Examine the Migration of Customers Between Local Carriers, Case 00-C-0188 (Issued and Effective June 14, 2002).

provider associated with each charge. If a bill contains charges in addition to basic local service, it must distinguish between charges for which non-payment will result in disconnection of basic local service and charges for which non-payment will not result in disconnection. Telephone companies must also display, on each bill, one or more toll-free numbers that can be called to ask about or dispute any charge on the bill.605

Cramming complaints can be brought either to the PSC or FCC, but the local telephone provider should be approached first to provide them with an opportunity to correct the problem. Also, since the Truth-in-Billing rules have been extended to wireless providers, the FCC's anti-cramming rules apply to wireless as well.

VI. Slamming

The practice of changing a customer's telephone service – local or long distance – without permission is known as slamming. Should a slamming occur, the customer may call the slamming company to request that the problem be remedied. If the customer has not yet paid, he or she should tell the slamming company that the first 30 days of service will not be paid for. The customer may also call the authorized company to inform them of the slam and to request reinstatement to the same calling plan he or she had before the slam and that all "change of carrier charges" must be removed from the customer's bill. Complaints can also be filed with the appropriate government agency, either the FCC or the PSC.

If a customer has been slammed, and the bill of the slamming carrier has not been paid:

- The customer does not have to pay for service for up to 30 days after being slammed;

605 *See,* 47 CFR §64.2401.

neither the authorized telephone company nor the slamming company.

- The customer must pay any charges for service beyond 30 days to the authorized company, but at that company's rates, not the slammer's rates.

If the customer has paid the telephone bill and then discovers that he or she has been slammed:

- The slamming company must pay the authorized company 150 percent of the charges it received from the customer.
- Out of this amount, the authorized company will then reimburse the customer 50 percent of the charges paid to the slammer. (For example, if a customer was charged $100 by the slamming company, that company will have to give the authorized company $150, and the customer will receive $50 as a reimbursement.)
- The subscriber also has the option of asking the authorized carrier to re-rate the unauthorized carrier's charges.

As a result, with these rules, the FCC has taken the profit out of slamming and protected consumers from illegal charges.[606] The rules also give states the option to become the primary forum for administering the liability rules and resolving slamming complaints. New York did so via a letter to the FCC and re-iterated its concern over fraudulent practices like slamming and cramming in its *Comp III Statement of Policy*.[607] Accordingly, slamming complaints against local exchange carriers or intrastate long distance carriers can be brought to the PSC or the FCC

606 *See:* 47 CFR §§64.1100-1190 for the FCC's slamming rules.

607 *Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings*, Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services, Case 05-C-0616 (Issued and Effective April 11, 2006).

and slamming complaints against interstate long distance carriers or wireless providers can be brought to the FCC.[608]

VII. Wireless Consumer Protections

The rules detailed above, especially TFPA, were written and approved in an age where incumbent LECs controlled the marketplace. While competitive LECs are regulated in much the same manner as ILECs, wireless carriers are exclusively regulated by the FCC.[609] However, the FCC has, by and large, exercised a hands-off approach when it comes to wireless consumer protections. As a result, CTIA, the wireless industry association, has crafted a voluntary code of consumer protections for its members. Signatories to the CTIA Consumer Code have voluntarily pledged to uphold the following principles:

(1) Disclose rates and terms of service to consumers
(2) Make available maps showing where service is generally available
(3) Provide contract terms to customers and confirm changes in service
(4) Allow a trial period for new service
(5) Provide specific disclosure in advertising
(6) Separately identify carrier charges from taxes on billing statements
(7) Provide customers the right to terminate service for changes to contract terms
(8) Provide ready access to customer service
(9) Promptly respond to consumer inquires and complaints received from government agencies

608 Note that customers can select a different IntraLATA toll provider (regional long distance) and InterLATA toll provider (both in-state and interstate long distance) and can place a block on each so that any changes in providers can only occur with the customer's permission.

609 NY Public Service Law §5(6) suspends cellular services from PSC jurisdiction pending the outcome of a proceeding that regulation of cellular is in the public interest.

(10) Abide by policies for protection of customer privacy

Since this is a voluntary code, there is no enforcement by the FCC. However, five wireless carriers have received from the FCC Eligible Telecommunications Carrier ("ETC") status for New York and, as a result, can offer Lifeline service and have agreed to abide by these principles.[610] Nextel, for example, in requesting ETC status pledged that it would follow the CTIA Consumer Code and the commitments laid out in the FCC's *Virginia Cellular Order*, including:

(1) annual reporting of progress towards build-out plans, unfulfilled service requests, and complaints per 1,000 handsets;

(2) specific commitments to provide service to requesting customers in the area for which it is designated, including those areas outside existing network coverage; and

(3) specific commitments to construct new cell sites in areas outside its network coverage.

Nextel made these additional promises to the FCC: (1) that it offers and will continue to implement E-911 access; (2) that it will comply with any minimum usage requirements required by applicable law (Nextel also stated that local usage is included in all of its calling plans); (3) that it will provide access to interexchange services, and is not required to offer equal access to those services; (4) that it offers the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services (Nextel stated that it intends to provide the supported services using its existing network infrastructure); and (5) that it is committed to specific methods to advertise the availability of the supported services and the charges for the services using media of general distribution.[611]

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610 Nextel Partners, Sprint PCS, Verizon Wireless, TracFone, and Virgin Mobile.

611 *Order*, In the Matter of Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners, Petition for Designation as on Eligible Telecommunications Carrier in the state of Alabama, Petition for Designation

Accordingly, many of the consumer protections expected from LECs, such as termination rights, DPAs, and protections for medical emergencies, the elderly, blind, and disabled, do not apply to wireless services. The PSC will not handle complaints against wireless providers and these will need to be addressed to the FCC or the state Attorney General.612

As previously stated, the Truth-in-Billing rules were extended to wireless providers in 2005. It was expected that competition among providers would prove to be a sufficient safety net for wireless customers, as they can "vote with their feet" and change carriers. Wireless LNP has made this transition easier; however, with the constant merging of wireless providers, there are fewer and fewer options for customers which have been wronged by a wireless carrier.

VIII. VoIP Consumer Protections

Interconnected VoIP service613 falls into two categories. The first is offered by cable television providers and employs the digital coaxial cable network to provide service to all users connected to the public switched network. It is a "fixed" service, not unlike traditional wireline service. The second type of VoIP service is the "nomadic" Vonage model which employs telephone equipment connected to computers which, especially when that computer is a laptop,

as on Eligible Telecommunications Carrier in the state of Florida, Petition for Designation as on Eligible Telecommunications Carrier in the state of Georgia, Petition for Designation as on Eligible Telecommunications Carrier in the state of New York, Petition for Designation as on Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania, Petition for Designation as on Eligible Telecommunications Carrier in the state of Tennessee, and Petition for Designation as on Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, DA 04-2667 (Released August 25, 2004).

612 The General Consumer Complaint Form is available on the New York State Attorney General's web page at www.oag.state.ny.us/complaints/complaints.html#Forms.

613 That is, VoIP services which are interconnected with the public switched network, as opposed to those types of VoIP services that can only be used to reach other users of the same VoIP service and not the general public.

can be located anywhere. Both use Internet protocol in their networks and convert the calls back to analog for each end user of the conversation. Since the FCC has been unable to distinguish when a VoIP call is either intrastate or interstate, it has assumed exclusive jurisdiction over interconnected VoIP.[614] It has not, however, gone so far as to deem VoIP a telecommunications service, but has applied much telecom regulation to VoIP.

614 *Memorandum Opinion and Order*, In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, FCC 04-267 (Released November 12, 2004). Note that on June 30, 2004, a federal court issued an injunction against the PSC preventing it from enforcing its decision to enforce some telecom regulations on Vonage. *Vonage Holdings Corporation v. New York State Public Service Commission*, 2005 U.S. Dist. LEXIS 33121, 04 Civ. 4306 (December 14, 2005).

For example, interconnected VoIP providers must contribute to the federal Universal Service Fund,[615] must provide access to 911,[616] must provide access to the relay service for the deaf,[617] and must provide LNP.[618]

Accordingly, interconnected VoIP providers must collect the E-911 Surcharge and the USF Surcharge. In New York, they must collect sales tax on the intrastate portion of its service from its customers (if it can be determined; if not, the customer must pay sales tax on the entire amount

615 *Report and Order and Notice of Proposed Rulemaking*, In the Matter of Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, and IP-Enabled Services, WC Docket No. 06-122, CC Docket No. 96-45, CC Docket No. 98-171, CC Docket No. 90-571, CC Docket No. 92-237, NSD File No. L-00-72, CC Docket No. 99-200, CC Docket No. 95-116, CC Docket No. 98-170, WC Docket No. 04-36, FCC 06-94 (Released June 27, 2006).

616 *First Report and Order and Notice of Proposed Rulemaking*, In the Matters of IP-Enabled Services and E-911 Requirements for IP-Enabled Service Providers, WC Docket Nos. 04-36 and 05-196, FCC 05-116 (Released June 3, 2005). The Commission has proposed requiring interconnected VoIP providers to offer E-911 access as well. *See: Notice of Proposed Rulemaking*, In the Matter of Wireless E911 Location Accuracy Requirements, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling, 911 Requirements for IP-Enabled Service Providers, PS Docket No. 07-114, CC Docket No. 94-102, WC Docket No. 05-196, FCC 07-108 (Released June 1, 2007).

617 *Report and Order*, In the Matters of IP-Enabled Services, Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, The Use of N11 Codes and Other Abbreviated Dialing Arrangements, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, FCC 07-110 (Released June 15, 2007).

618 *Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking*, In the Matter of Telephone Number Requirements for IP-Enabled Services Providers, Local Number Portability Porting Interval and Validation Requirements, IP-Enabled Services, Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Final Regulatory Flexibility Analysis, Numbering Resource Optimization, WC Docket No. 07-243, WC Docket No. 07-244, WC Docket No. 04-36, CC Docket No. 95-116, CC Docket No. 99-200, FCC 07-188 (Released November 8, 2007).

billed, interstate and intrastate),619 and may collect the LNP surcharge, if needed. However, TFPA does not apply to VoIP. Complaints would need to be brought to the FCC or state Attorney General.620

IX. New Developments

The Commission launched its so-called "Comp III" proceeding in June 2005 to revamp its telephone regulations in light of intermodal competition (wireless and VoIP). Since these intermodal competitors were not subject to any of the same regulations as LECs, the Commission wanted to examine the full panoply of regulations on LECs to see if any could be modified. While the final order did do some tweaking, very little has changed -- in fact, many of the directives have never even been fully implemented.621

The Comp III *Statement of Policy* talks about extending the TFPA provisions to VoIP and wireless, but does not explain how it will get past the Vonage injunction or Section 5(6) of the Public Service Law. It would also like to see these intermodal competitors voluntarily offer blocking options (such as to "chatlines" and 900 services). A Consumer Report Card was to be implemented which would provide comparison information on the Commission's web page about different types of carriers (LEC, wireless, and VoIP) and, even though industry meetings took

619 *Taxation of Internet Telephony*, New York State Department of Taxation and Finance, Office of Tax Policy Analysis, Technical Services Division, NYT-G-07(2)C and NYT-G-07(3)S, Sales Tax, June 20, 2007.

620 The Internet-Related Complaint Form is available on the New York State Attorney General's web page at www.oag.state.ny.us/complaints/complaints.html#Forms.

621 *Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings*, Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services, Case 05-C-0616 (Issued and Effective April 11, 2006).

place to discuss the proposal, no such guide has been implemented. The proceeding remains open, but attention has been directed to areas within the PSC's control -- applying Comp III changes to regulated utilities.

The PSC has launched a follow-up proceeding to Comp III to examine its current billing and collections rules and TFPA.622 As mentioned previously in footnote 56, the Commission has a proposal on the table to change its partial payment rules. Currently, unless the customer dictates how its partial payment should be applied, carriers must first apply the payment to basic local service and then, if any money remains, apply the remainder to local company charges second, IntraLATA toll third, and IXC toll and other services fourth.623 Should the proposal be approved, there would only be two such "buckets." One for basic local service and one "as determined by the telephone corporation." Such a change would provide much more discretion for the telephone company, but could result in more service blockages where, for example, the company chooses to apply payments to IXC toll rather than IntraLATA toll if the customer owes money for IntraLATA toll.

The same proceeding is looking to make subtle changes to TFPA as well. Notices for termination or suspension would be permitted to be sent electronically (in addition to regular mail) should the customer agree. In addition, it would be clarified that late payment charges, service restoral charges, and dishonored check charges could not be applied to Lifeline customers,

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622 *See, Notice Concerning Service Quality and Consumer Protection Regulations*, Proceeding on Motion of the Commission Providing for the Examination of Service Quality and Consumer Protection Regulations, Including Parts 602, 603, and 609, Case 06-C-0481 (Issued April 21, 2006).

623 16 NYCRR §606.5.

customers with serious illnesses, or customers that have notified the company of amounts in dispute. Further, late payment charges could not be assessed on customers under quarterly billing plans or deferred payment agreements.

Any action regarding consumer protections for intermodal competitors, that is, wireless and VoIP services, will have to come from the national level. In fact, the U.S. Congress is stepping into the issue regarding consumer protections and wireless services. Senators Amy Klobuchar (D-MN) and Jay Rockefeller (D-WV) introduced legislation on September 6, 2007 to protect cell phone users. The bill, entitled "The Cell Phone Consumer Protection and Empowerment Act of 2007" would require wireless service providers to share simple, clear information on their services and charges with customers before they enter into long-term contracts. There would also be a 30-day window in which a customer could exit a contract without early termination fees and face pro-rated termination fees for the remainder of the contract. A major provision of the legislation would require wireless providers to distinguish between legitimate taxes and surcharges and other charges which are created by the carrier to help pay operating costs.

X. Conclusion

While TFPA has provided some protections for consumers for many years, since it does not apply to the intermodal competitors, customers of the fastest growing service technologies are not covered. In the very near future, the majority of telephony users will have no recourse for actions taken by, for example, their VoIP provider which would have been covered if the provider was a LEC. Consumers may need to look to the Federal government for assistance.

PROTECTIONS FOR WATER CUSTOMERS

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

New York's Utility Project
P.O. Box 10787
Albany, NY 12201
1-877-669-2572

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PROTECTIONS FOR WATER CONSUMERS

1. Introduction

The law governing the rights of water consumers depends upon the type of water supplier: municipal, and large or small water companies. Large private water companies are governed by the Public Service Law (PSL), and the Public Service Commission (PSC) has established certain protections for water consumers and certain duties for water providers.[624]

Municipally owned water suppliers are not governed by the Public Service Law. Municipal suppliers, nevertheless, must comply with the statutes which created them.[625] More importantly, municipal water consumers have certain constitutional rights which municipal water suppliers, as governmental entities, may not abridge. Advocates may expect an increased caseload in this area, since, as water rates continue to increase, the number of clients with water-related problems can be expected to rise accordingly.[626]

2. Private Water Suppliers

2.1 Introduction

[624] A large private water company has gross annual revenues of over $250,000. PSL §50; 16 NYCRR §§14.1 and 14.2(a).

[625] For example, the supplier may be a public authority, created under and governed by the Public Authorities Law, and may have adopted rules and regulations with provisions similar to HEFPA (*e.g.*, Suffolk County Water Authority).

[626] Municipal water systems face the same problems which lead to rising costs as do privately owned water companies: aging plant, federal Safe Drinking Water Act compliance, pollution problems and overdrawn water supplies.

Public assistance recipients are entitled to a water or sewer allowance payment if they are responsible for paying it directly to the water service provider. However, the total of the recipient's rent and water service allowance may not exceed his or her maximum shelter benefit. 18 NYCRR §352.3(b). *See* 94 ADM-20, p. 11.

Privately owned water supply companies are governed by the PSL and are regulated by the Commission.[627] Initially, the Home Energy Fair Practices Act (HEFPA) did not cover water suppliers, but in 1986, HEFPA was amended to include water companies with gross annual revenues of at least $250,000.[628] Although smaller water companies are exempt from HEFPA, they still must comply with the requirements set out in 16 NYCRR Part 533,[629] which does not apply to residential customers covered by Part 14.[630] Additionally, small private water companies must comply with PSL §§116, 117 and 118 governing service terminations to multiple dwellings, customer security deposits, payment agencies, backbilling and the refund of overpayments.

2.2 Large Private Water Companies

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627 "[Article 4-B] shall apply to the sale, furnishing and distribution of water for domestic, commercial and public purposes, [excluding] bottled water." PSL §89-a.

According to PSC staff, the PSC regulates over 450 water companies. Some of the larger water utilities it regulates are:

County Knolls	N.Y. American (West. Co.)
Fisher's Island	N.Y. Water (Long Island)
Jamaica Water	Owego Water
Kiamesha Water	Seacliff Water
Long Island Water	Spring Valley
New Rochelle Water	South County

628 PSL §50; 16 NYCRR Part 14.

629 Notices of discontinuance and complaint procedures.

630 16 NYCRR §533.1.

Public Service Commission rules implement PSL §50, which extends HEFPA coverage to PSC regulated water companies, except to the small water companies. These rules are codified at 16 NYCRR Part 14, and generally parallel those for electric and gas service.

Applications. Large water companies must provide service, generally within five business days, to applicants unless there are amounts owing for service to a prior account in the applicant's name, or there are unpaid charges for which the applicant is "legally responsible," or the applicant fails to pay a properly requested security deposit.[631] If the applicant owes the utility for prior service, the applicant must either pay the balance owed, or enter into a deferred payment agreement, unless the amounts owed are disputed and the customer has paid all undisputed charges.[632] If the water utility accepts a service application but fails to provide service within five business days, and none of the exceptions which excuse delay pertains, it must pay the applicant $25 per day for each day service is not supplied.[633]

An application for service may be made orally or in writing. However, the utility may require a written application only if service to the previous customer at the premises to be served was terminated for non-payment within the prior twelve months; the current account is subject to a final termination notice; there is evidence of meter tampering; the meter has advanced during

[631] 16 NYCRR §14.3(a)(3).

[632] 16 NYCRR §14.3(a)(3).

[633] 16 NYCRR §14.3(d).

the previous twelve months without a customer of record; or the application is made by a third party.[634]

Denial of application. If a utility denies an application for water service, due to the existence of an unpaid security deposit, unpaid prior bills or amounts for which the applicant is "legally responsible," it must so notify the applicant in writing within three business days of receipt of the completed application for service. Any application which is not denied within three business days is deemed to be accepted.[635] The notice of denial of an application must explicitly state the reason(s) for the denial, the steps the applicant must take to qualify for service, and the right to appeal the application denial to the PSC.[636]

Deferred payment agreements. Large water companies must offer a written deferred payment agreement (DPA) to a customer or applicant:

> at least 5 calendar days (8 if by mail) prior to a shut-off for nonpayment,
>
> when reconnection of service is requested after a shut-off for nonpayment,
>
> when payment of outstanding bills is a prerequisite to acceptance of a service application, or
>
> when it issues a backbill for more than $100 and the customer's culpable conduct did not cause or contribute to the original underbilling.[637]

[634] 16 NYCRR §14.3(b).

[635] 16 NYCRR §14.3(c)(2).

[636] 16 NYCRR §14.3(c).

[637] 16 NYCRR §14.10(a)(1) and (2).

A DPA need not be offered to a seasonal or short-term customer, a customer who has broken an existing deferred payment agreement, or a customer the Commission determines has the resources to pay the unpaid charges.[638]

The amount which can be included in a DPA is limited to the equivalent of two years' average billing, unless otherwise agreed to by the utility and the customer.[639] While the deferred payment agreement rules set out certain standard guidelines for DPA's (*e.g.*, downpayments of the larger of 20 percent or one month's average billing), the rules also explicitly state that the utility must negotiate in good faith in order to arrive at a DPA which the customer is able to pay, considering his or her financial circumstances,[640] and that payments may be as low as $10 per month, with no downpayment, if the customer's circumstances so warrant.[641]

If a customer defaults on a DPA, the utility must send a reminder notice notifying the customer that he or she must pay the amounts owing on the DPA within 20 days of the date payment was originally due, or a final termination notice will be sent.[642] If the customer can show a change in financial circumstances that makes the existing DPA unaffordable, a

[638] 16 NYCRR §14.10(b).

[639] 16 NYCRR §14.10(d).

[640] 16 NYCRR §14.10(a)(3).

[641] 16 NYCRR §14.10(c)(3).

[642] 16 NYCRR §14.10(f)(1).

renegotiated DPA will be available. If the customer's circumstances have not changed, and the amount owing on the DPA is not paid within 20 days of the original due date, the DPA will be considered broken, and the utility may then terminate service, after giving the required termination notice.[643]

Termination and notice. A water utility may terminate service for failure to pay charges for service used during the preceding twelve months. However, the utility must not terminate service to any person it knows receives public assistance, and payment for service is to be made directly by the department of social services (DSS).[644] Service may, for others, be terminated for failure to pay charges which are more than twelve months old if there was a billing dispute pending during the preceding twelve month period; if there was an excusable utility delay; if the customer's culpable conduct caused the delay in billing; or if changes are necessary to correct earlier issued estimated bills. Termination is also permitted for failure to pay amounts due:

under a deferred payment agreement,

for installation or equipment charges, or

for a required deposit.[645]

The utility must send the customer a final termination notice before it may terminate

643 16 NYCRR §§14.10(f)(2) and 14.4.

644 PSL §89-b(3-c); 16 NYCRR §14.4(a)(2).

645 16 NYCRR §14.4(a)(1).

service. The notice must contain certain specific information, including

> the total amount the customer must pay to avoid termination,
>
> the procedures for bringing a complaint to the utility and the Commission,
>
> a summary of the customer's HEFPA rights,
>
> any reconnection charge that may be required if service is shut off, and
>
> notice of the possibility of assistance from DSS if the customer is a public assistance recipient.[646]

The final notice of termination cannot be issued until at least 20 days from the payment due date.[647] The utility must then wait at least 18 days from the date the termination notice was mailed, or at least 15 days from the date the notice was personally served on the customer, before terminating service.[648] A utility may not terminate service on the basis of a "stale" termination notice; that is, the utility may not terminate service more than 60 days after issuance of a termination notice unless it issues a new termination notice or updates the original notice.[649]

The rules also address the utility's obligation to ensure rapid posting of payments, the acceptance of payment or entry into a deferred payment agreement at the time of termination,

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[646] 16 NYCRR §14.4(b)(1).

[647] 16 NYCRR §14.4(b)(2).

[648] 16 NYCRR §14.4(c). *Cf.* PSL §89-b(3-a).

[649] 16 NYCRR §14.4(c)(5).

and the process for handling dishonored checks.[650] The utility retains the power to suspend, curtail or disconnect service in certain situations involving

(a) tampering,

(b) after notice to the occupant when there is no customer of record, and

(c) emergencies.[651]

Prohibited times. Termination of service is permitted only on Mondays through Thursdays, from 8:00 a.m. to 4:00 p.m., provided that day or the following day is not a public holiday, is not a day on which the utility's main business office is closed, and is not a day the offices of the Commission are closed.[652] Also, a water utility may not terminate service during the two week period encompassing Christmas and New Year's Day.[653] *Special termination protections*. Special procedures must be employed for termination of service under circumstances involving (a) medical emergencies; (b) elderly, blind or disabled customers; and (c) heat related water service during the cold weather period. These procedures generally track the procedures required under HEFPA for gas and electric utilities.[654] For example, the utility

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[650] 16 NYCRR §14.4.

[651] 16 NYCRR §14.4(g).

[652] 16 NYCRR §14.4(c)(3). *Cf.* PSL §89-b(3-b).

[653] 16 NYCRR §14.4(c)(7).

[654] 16 NYCRR §14.5. Before it may terminate service, the water utility must assure communication with the customer by making an onsite personal visit, if telephone contact is unsuccessful, and must take steps to overcome any language barrier. 16 NYCRR §14.5(a).

must make a diligent effort to contact the customer 72 hours before termination, try to arrange a payment plan, notify the local DSS before terminating service in some situations, and arrange for prompt post-termination follow-up in some cases.[655]

Heat related water service is defined as "water service which is necessary for the on-going operation of a customer's primary heating system,"[656] and can include steam or hot water based systems which require the periodic, though not necessarily continuous, addition of water to operate. In addition, the rules allow a customer to designate a third party to receive copies of all termination or credit action notices that are sent to the customer.[657]

Multiple and two family dwellings. The HEFPA water regulations contain a set of requirements to be followed when service is to be terminated to a multiple dwelling,[658] or to a two family dwelling,[659] where service is provided through one meter and is the responsibility of the landlord. The multiple dwelling rules[660] provide virtually identical procedures to those that

655 16 NYCRR §14.5(c)(2 and 3) (elderly, blind and disabled residents), and (b)(2 and 3) (cold weather and heat related water service).

656 16 NYCRR §14.2(b)(15).

657 16 NYCRR §14.6.

658 16 NYCRR §14.7.

659 16 NYCRR §14.8.

660 16 NYCRR §14.7.

are applicable to small water companies,[661] and to electric and gas utilities.

The utility must provide notice to the occupants of each unit of the multiple dwelling (by mail and posting on the premises) of the impending termination of service, in addition to providing notice to the customer of record and certain public officials.[662] The notice must state certain specified information, including notice of the occupants' right to pay the utility directly and deduct such payments from their rent pursuant to Real Property Law (RPL) §235-a.[663] In order to maintain service, occupants need pay only current charges to the utility. These are the charges for the billing period covered by the first bill rendered *on or after* the termination notice is posted.[664] If the occupants find they cannot reach an agreement with the utility to prevent termination, they may contact the PSC. The PSC may stay a threatened shut-off if it believes the occupants are making a good faith effort to arrange to pay current charges.[665]

Additional protections exist regarding the termination of heat related water service to multiple dwellings during cold weather periods, such as the requirement that all notices be

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[661] PSL §116, and 16 NYCRR §533.8.

[662] 16 NYCRR §14.7(a)(1). Notice to the local public officials must be repeated between four and two business days before termination.

[663] 16 NYCRR §14.7(a).

[664] 16 NYCRR §14.2(b)(11). *See also* 16 NYCRR §14.7(b).

[665] 16 NYCRR §14.7(b)(2 and 3).

provided at least 30 days before termination.[666]

Somewhat simplified procedures are applicable in cases of two-family dwelling shut-offs, when the utility is aware (*i.e.*, a resident has so informed the utility) that the dwelling is a two-family dwelling served by one meter.[667] The notice requirements are basically the same as those for multiple dwellings, and the procedures for physical termination incorporate by reference some but not all of the procedures that are generally applicable under 16 NYCRR §14.4(c) and (d).

Reconnection. Barring circumstances outside the utility's control, a utility must reconnect service that has been disconnected for non-payment within 24 hours after:

> the customer has paid, or has entered into a deferred payment agreement for, the full amount of charges that were the subject of the termination; or
>
> the utility is on notice that a serious impairment to health or safety will result from continued lack or water service (any doubt is to be resolved in favor of reconnection); or
>
> the Commission directs the utility to reconnect service.[668]

If the utility fails to reconnect service within 24 hours, and the failure to reconnect is not due to an excusable delay as determined by the Commission, the utility must pay the customer $25 for

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[666] 16 NYCRR §14.8(d)(1).

[667] 16 NYCRR §14.8.

[668] 16 NYCRR §14.9(a). *See also Matter of Goldman v. N.Y. Telephone*, 50 Misc.2d 309, 270 N.Y.S.2d 528 (Sup. Ct. Kings Co., 1966) (pre-HEFPA Article 78 proceeding requiring utility to reconnect telephone service following termination due to the criminal misconduct of a relative, not the customer's own misconduct).

each day, or partial day, service is not restored. The penalty is increased to $50 for cases involving medical emergencies, elderly, blind or disabled customers, heat related service during the cold weather period, and cases of serious impairment to health or safety.[669]

Security deposits. A known recipient of public assistance, SSI or additional state payments may not be required to post a security deposit. Further, customers who are elderly, blind or disabled may be required to post a deposit only if they had service terminated for nonpayment in the preceding six months.[670]

Security deposits may be required only from customers who are seasonal, short-term or temporary customers; customers who are delinquent in payment (persons who made two or more consecutive late payments within a twelve month period); and customers who have had service terminated for nonpayment within the preceding six months.[671] Except for short-term, temporary and seasonal customers, the deposit can be paid in installments over an unspecified period, based on the financial circumstances criteria used to negotiate deferred payment agreements.[672]

Complaints. Among the complaint handling procedure requirements is the prohibition on termination of service for all amounts in dispute, during the pendency of a complaint before the

[669] 16 NYCRR §14.9(c).

[670] 16 NYCRR §14.11(a)(2).

[671] 16 NYCRR §§14.11(a)(1) and 14.2(b)(13).

[672] 16 NYCRR §§14.11(a)(3) and 14.10(a)(3).

utility and for 15 days after the resolution of the complaint by the utility.[673] Additionally, service cannot be terminated during the pendency of a complaint before the Commission, or for 15 days after resolution thereof, for failure to pay amounts in dispute. Customers must pay all undisputed charges during the pendency of a complaint, however, or service may be terminated.[674]

Miscellaneous. The HEFPA water rules also cover meter reading obligations, estimated bills and procedures where there is no ready access to the meter;[675] back bills;[676] late payment charges;[677] required contents of bills;[678] routine notification requirements;[679] emergency disconnection of water service;[680] and inspection of utility equipment.[681]

[673] 16 NYCRR §14.19.

[674] 16 NYCRR §14.19.

[675] 16 NYCRR §14.12.

[676] 16 NYCRR §14.13.

[677] 16 NYCRR §14.14.

[678] 16 NYCRR §14.15.

[679] 16 NYCRR §14.16.

[680] 16 NYCRR §14.17.

[681] 16 NYCRR §14.18.

The HEFPA water rules make no provision for levelized billing plans, as the HEFPA statute would require (PSL §38), based on the Commission's finding that such billing plans are not "relevant" to water customers, in light of the need for conservation of water, and the conservation-inducing price signals associated with seasonal water price variations.

2.3 Small Private Water Companies

While not subject to HEFPA, small private water companies are governed by PSC regulations at 16 NYCRR Parts 500 - 585; Part 533 concerns termination and complaint procedures.

Termination and notice. The disconnection rules require at least 15 days written notice (18 days if mailed) of a proposed termination of service, and require that the termination notice contain information on the procedures available for making a complaint to the water company. Water service may not be terminated on the weekend, holidays, or days when the water company offices are not open for business.[682]

If the owner or landlord fails to pay bills for service and the entire multiple dwelling is scheduled for service termination, procedures analogous to the HEFPA multiple dwelling shut-off procedures apply. All *occupants* of a multiple dwelling scheduled for service termination must be mailed notices of the impending shut-off at least 18 days before the scheduled shut-off

[682] 16 NYCRR §533.3.

date.[683] In addition, notices must be posted in public areas of the multiple dwelling at least 15 days before the termination is scheduled to take place.[684] Water companies must continue service when the tenants of a multiple dwelling pay current charges for water service. "Current charges" are only those charges covered by the first bill issued *on or after* the notice of termination — occupants are not required to pay arrears for earlier billing periods that may appear on the bill.[685] Tenants who pay water charges directly to the utility, where the landlord failed to pay, are permitted to deduct such payments from their rent under RPL §235-a.

Security deposits. New customers can be required to provide a security deposit up to an amount equal to an estimated two months worth of service.[686] If the customer has not become delinquent in payment after the deposit has been held for a period of one year, the deposit must be returned to the customer (the rules do not define "delinquent" for deposits for water customers). Regardless of whether the customer is delinquent, the water company must provide the customer with interest on the deposit held (currently, 5.75% annually).[687]

Bill adjustments. Small private water companies may not bill previously unbilled service

683 PSL §116 and 16 NYCRR §533.8.

684 16 NYCRR §533.8(a)(3).

685 16 NYCRR §533.8(b) and (c).

686 PSL §117; 16 NYCRR Part 510.

687 16 NYCRR §510.3; *N.Y.S. Register*, October 12, 1994, pages 55-56, and January 4, 1995, p. 49.

or upwardly adjust a previously issued bill 24 months from the time service was rendered. (Note the contrast with HEFPA, which has a six month limit on issuing the first bill and a twelve month limit on bill upward adjustments).[688] The statute contains a general exception for cases where the customer's culpable conduct resulted in the need to issue a back bill or upwardly adjust a previously rendered bill.[689]

Bills may be paid to authorized payment agencies (as allowed under HEFPA). In addition, the Commission has authority to order refunds of past overcharges, and require that a customer be provided with a refund if he or she becomes eligible for a lower rate because of a change in the character of service taken.[690]

Complaint procedures. The Commission's rules prohibit the termination of service, or the mailing of a termination notice, during the pendency of a complaint (whether to the company or the Commission), but the customer must pay any amounts that are not disputed.[691] If, after investigating a complaint, the company finds the complaint to be without merit, it must forestall the service termination an additional five days after personal service of its notice of determination of the complaint (eight days if mailed). It must also inform the customer of the

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[688] PSL §41(1) and (2).

[689] PSL §118(2).

[690] PSL §118(1) and (3).

[691] 16 NYCRR §533.9(a).

Commission's complaint handling procedures.[692] The customer may avail himself of the Commission's procedures, and service may not be terminated during the *pendency* of the complaint at the Commission nor for 15 days after notice of the Commission's final resolution of the complaint.[693]

3. Municipal Water Utilities

3.1 Introduction

Most New York State residents are served by municipal water systems, operated by cities, towns, counties or villages. These are not regulated by the Public Service Commission, and there is no independent regulatory body to which consumers can turn for help. The courts are the only remedy for municipal water consumers to obtain relief from unreasonable or arbitrary actions of municipal water systems, after appeal to the municipal water provider itself. Federal and State constitutional protections and principles of administrative law must be relied upon in challenging unreasonable or arbitrary acts and practices of municipal water providers. While establishing some minimum due process protections, constitutional challenges are not a complete substitute for comprehensive consumer service regulation.

Low-income tenants face a number of problems in obtaining and maintaining water service. Municipal water providers often fail to notify tenants of an impending shut-off, and

[692] 16 NYCRR §533.9(b). See Complaint Handling Procedures.

[693] 16 NYCRR §533.9(c).

sometimes demand that tenants pay the unpaid bill of the landlord or of a previous occupant before service is restored.[694] These types of problems have been successfully resolved through the federal courts (although actions in New York State courts are available as well), generally on constitutional grounds. A more peculiar problem once faced by tenants on Long Island, and which may face tenants in some upstate areas, is the refusal of the municipal water supplier to accept applications for service from tenants under any circumstances, due to local rules limiting water service to building owners.

The balance of this section will discuss the various constitutional principles which have been relied upon in challenging municipal water system actions. This section is organized into three main sub-sections covering the most commonly encountered problems, namely, termination of service, denial of applications for service due to arrears, and refusal to accept applications from certain categories of customers.

4. Termination of Service

A frequently encountered problem in the low income community is the threat of termination of service due to arrears. Many times the customer of record and the water consumer threatened with the shut-off of service are the same individual. But it is also common that the consumer is a tenant in a building for which the landlord or building owner is

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[694] *See Subin v. City of N.Y.*, 132 Misc. 426, 427, 229 N.Y.S.2d 628 (N.Y.C. Municipal Ct., 1928) ("Where a property owner is forced to pay a water tax by a threat to shut off the supply, it is a payment under compulsion," and may be recovered by the payor if wrongfully assessed), cited in *Monroe v. Niagara Mohawk Power Corp.*, 88 Misc.2d 876, 879, 388 N.Y.S.2d 1003 (Utica City Ct., 1976).

responsible for the water service. Most courts have found that not only must a municipal water service customer be provided with notice of an impending shut-off and opportunity for a hearing, but also that a tenant whose landlord has failed to make payments for water service is entitled to advance notice before water service is terminated.

The practices of a municipality, village, town or county that provides water service constitute "state action" under the Fourteenth Amendment,[695] and may be challenged in state or federal court through a §1983 action against the employees, officers or trustees of the municipal system if the acts and practices complained of deprive the water consumer of a constitutionally protected right.[696]

5. Protectable Property Interest

A customer, who has a right to municipal water service under contract or law, has a property interest right to continued service that is subject to the Due Process clause of the

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[695] *Craft v. Memphis Light, Gas & Water*, 534 F.2d. 684, 687 (6th Cir. 1976), *aff'd on other grounds Memphis Light, Gas & Water v. Craft*, 436 U.S. 1 (1978); *Davis v. Weir*, 497 F. 2d 139, 143 (5th Cir. 1974); *Koger v. Guarino*, 412 F.Supp. 1375, 1383 (E.D. Pa. 1976), *aff'd* 549 F.2d 795 (3rd Cir. 1977).

[696] 42 USC §1983 reads, in pertinent part, as follows:

> "Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is important to note that §1983 is a procedural or remedial statute and creates no substantive rights. Thus, §1983 provides a remedy only when a plaintiff can show a violation of a federal statutory or constitutional right. *See*, M. Schwartz and J. Kirklin, *Section 1983 Litigation* (New York: John Wiley & Sons, 1986), page 8.

Fourteenth Amendment.[697] Tenant consumers who are not customers of the municipal water system, thus have no contractual basis to claim a protectable property interest. Some courts have, nonetheless, found a statutory basis for their entitlement to water service, and thus a protectable property interest in the continuation of service.

In *Koger v. Guarino*,[698] the District Court did not cite to specific statutory provisions but found a protectable property interest based upon a finding that "although the defendants are not constitutionally obligated to establish and maintain water service for the benefit of their citizens, once having done so, a user has a legitimate claim of entitlement to continued service absent sufficient cause for termination consistent with the procedural protections of the Due Process Clause." In effect, what the government chooses to give, it may not arbitrarily or unreasonably taken away.

The courts in both *Koger* and *Davis* found that the ultimate user had a protectable property interest to continued water service, requiring due process for tenant consumers whose landlords were the actual customers of record.[699] In an Oregon case, the federal district court

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[697] *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 11 (1978), *affirming* 534 F.2d 684 (6th Cir. 1976), and citing Tennessee State law as creating the property interest: "The availability of such local law remedies is evidence of the State's recognition of a protected interest." 436 U.S. at 11.

Accord DiMassimo v. City of Clearwater, 805 F.2d 1536, 1540 (11th Cir. 1986) ("we hold that the district court was correct in holding that pretermination notice to the tenant is necessary to prevent the City from destroying rights granted by state law.").

[698] 412 F.Supp. 1375, 1386 (E.D. Pa. 1976), *aff'd* 549 F.2d 795 (3rd Cir. 1977).

[699] *Accord Lamb v. Hamblin*, 57 F.R.D. 58 (D. Minn. 1972).

held that because state law required landlords to supply water, the municipality's termination violated the tenants' right to due process of law because it deprived them of a statutory right to injunctive relief against the landlord.[700] Also, depending on the nature of the municipal water supplier (*e.g.*, town, village, city, county) there may be a specific statutory provision to support a claim of entitlement to water service.[701]

6. Extent of Due Process Requirements

Once the protected interest and right to due process are established, it is necessary to define the extent of the process due by the municipality, and whether such due process must be afforded prior to terminating service. The District Court in *Koger v. Guarino* made it clear that the potential loss of water service is so severe a loss that substantial due process must *precede* any termination of water service. The Court stated that:

> ... an urban home without water and sewage is not fit for human habitation. Indeed, water is an absolute necessity of life and we cannot envision any more

But cf. Sterling v. Village of Maywood, 579 F.2d. 1350 (7th Cir. 1978), *cert. den.* 440 U.S. 913 (1979), (no protectable property interest in the continuation of water service absent a right to service under statute or contract); and *Coughlan v. Starkey*, 845 F.2d 566, 570 (5th Cir. 1988) ("mere receipt of the water for several years could not unilaterally create a legitimate claim for entitlement," especially since the consumer did not apply or pay for water service).

[700] *Turpen v. City of Corvallis*, 36 F.3d 978 (9th Cir. 1994).

[701] Both the Village Law (§11-1116, 11-1118) and the Town Law (§198(c)) permit the termination of water service only for failure to pay water charges or violation of duly adopted rules. These statutes are analogous to the provision of Tennessee decisional law relied upon by the Supreme Court in *Memphis Light v. Craft* in finding a protectable property interest to continued water service.

Rights to continued service may also be specifically set out in water authority charters or in the rules of the municipal supplier. Advocates should investigate those possibilities where no statutory provision exists.

> serious individual consequences than those which flow from its deprivation.[702]

In discussing the loss of utility service in general, the U.S. Supreme Court stated that:

> ...[such] service is a necessity of modern life; indeed the discontinuance of water or heating for even short periods of time may threaten health and safety. ... Although utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.[703]

The *Koger*, *Davis* and *Turpen* courts found that a pre-termination notice must be provided not only to the customer of record but must also be given to the water user. Thus, where a landlord's failure to pay precipitates a threatened shut-off, the municipal water provider must give pre-termination notice to the landlord *and* the tenant. Notice to both parties — the "customer" and the "consumer" — allows either to take whatever actions may be necessary to continue uninterrupted water service. Either the landlord can dispute, pay or agree to pay the bill, or the tenant can obtain service in his own right, take action against the landlord or take steps to mitigate the consequences of the impending shut-off.

In *Memphis Light v. Craft*, the Supreme Court required that there be a pre-termination hearing in cases involving threatened shut-off of utility service.[704] Rejecting the municipal

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[702] *Koger v. Guarino, supra* at 1388.

[703] *Memphis Light v. Craft, supra* at 44-45.

[704] 436 U.S. 1, 21-22 (1978):

> In these circumstances, an informal administrative remedy ... constitutes the process that is `due.'

utility's assertion that pre-termination injunctive relief was sufficient to protect consumers, the Court stated:

> Equitable remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit. An action in equity to halt an improper termination, because it is less likely to be pursued and less likely to be effective, even if pursued, will not provide the same assurance of accurate decision making as would an adequate administrative procedure.[705]

Although particular procedures have been found to be adequate or inadequate under particular circumstances,[706] no general rule has been enunciated regarding the precise form for a pre-termination hearing of water service.[707] At a minimum these decisions can be read to require adequate pre-termination notice of available procedures, which must at least provide a pre-termination meeting with an municipal water supply official who has the power to order continuation of service, adjust bills determined to be incorrect or otherwise remedy the

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> Because of the failure to provide notice reasonably calculated to apprise [the customers] of the availability of an administrative procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, [the municipal utility] deprived [the customers] of an interest in property without due process of law.

[705] *Memphis Light v. Craft, supra* at 21.

[706] *See*, e.g., *Memphis Light v. Craft, supra*; *Bronson v. Consol. Edison Co. of New York, Inc.*, 350 F.Supp. 443 (SDNY 1975); *Freeman v. Hayek*, 635 F.Supp. 178 (D. Minn. 1986). *Compare Limuel v. So. Union Gas Co.*, 378 F.Supp. 964, 969 (W.D. Tex. 1974) (six due process rights outlined) *with Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. den.* 409 U.S. 1114 (1973) (five day written notice is sufficient).

[707] While the District Court in *Palmer v. Columbia Gas*, 342 F. Supp. 241 (N.D. Ohio, 1972), *aff'd* 479 F.2d 153 (6th Cir. 1973), set out certain minimal requirements, including the requirements that an impartial company management official hear a complaint and that the response to a complaint be in writing, that case involved a *private* gas utility providing heating service. While gas heating service is analogous to water inasmuch as both services are essential to life, the *Palmer* decision is not dispositive as to due process requirements applicable to municipal water suppliers.

situation.[708] A written response to a complaint must also be provided in order for the complainant to avail himself of any appeal process and judicial review.

A court has also indicated that there is little or no need for a pre-termination hearing for non-customer tenants (as contrasted with pre-termination notice which has been required for customers threatened with shut-off). The rationale is that there is no dispute between utility and customer as to the amount of the bill, but only a potential dispute between the landlord and tenant as to who must pay. A water company has no authority to resolve such disputes.

7. Denial of Applications for Service

7.1 Introduction

One of the more common problems encountered by low income water consumers is the refusal of the municipal water supplier to accept applications for service from tenants due to a third party's arrears owed at the premises. In some instances the arrears are owed by the landlord, while in other circumstances, arrears are owed by a previous occupant of the dwelling. The practice of municipal water suppliers of refusing applications for service due to the arrears of third parties may be challenged on equal protection grounds. The courts have held that such practices violate the Equal Protection clause.[709]

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[708] *See Memphis Light v. Craft, supra* at 47.

[709] *Cf. Sterling v. Village of Maywood*, 579 F.2d. 1350, 1356 (7th Cir. 1978), *cert. den.* 440 U.S. 913 (1979), ("[W]e conclude that defendants very well may have deprived plaintiff of a constitutionally protected entitlement to water service when they rejected summarily her efforts to reinstate her water service. She must be given an opportunity to prove her allegations.").

The most lenient test applied by the courts under the Equal Protection clause, the "rational basis" test, requires that classifications be reasonable, not arbitrary, and rationally related to a legitimate governmental objective. A more stringent standard, the "compelling state interest" test, is applied if the classification itself is suspect (*e.g.*, it is based on race or religion), or if the right affected by the classification is a "fundamental right", defined as one explicitly provided for in the Constitution or necessarily implied from its provisions.

7.2 Refusal to Provide Service Based on Debts of Others

The most common instance of denial of service due to a third party's arrears is the refusal to provide water service to tenants because of the landlord's failure to pay a prior bill for service.[710] Such a refusal creates two classes of applicants: those whose address is encumbered with pre-existing debt that is not their own, and those whose residence is not so burdened.

The leading case on this issue is *Davis v. Weir*,[711] which challenged a municipal utility's refusal to provide service to the tenant, Willie Davis, unless he agreed to pay an outstanding bill owed by the landlord for service at Mr. Davis' address. He was current in his own rent, which included water charges, but his water was shut off without prior notice.

The U.S. Court of Appeals found the municipal utility's practice unconstitutional on equal protection grounds, stating

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[710] Of course, one person is no more responsible for paying another's water bill than the municipality is for paying the consumer's credit card bill.

[711] 497 F.2d 139 (5th Cir. 1974), cited in *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 18 fn. 21 (1978).

> that the Department's discriminatory rejection of new applications for water service based on the financial obligations of third parties fails to pass XIV Amendment muster under the traditional 'rational basis' analysis. Therefore, there is no need to decide whether the Constitution accords citizens a fundamental right to municipal water service.[712]

The Court went on to explain the lack of a rational basis for the municipal utility's practice:

> A collection scheme ... that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. The City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence — water. 'The fact that a *third-party* may be financially responsible for water service provided under a prior contract is an irrational, unreasonable and quite irrelevant basis upon which to distinguish between otherwise eligible applicants for water service.[713]

8. Roommates and Relatives

Other instances of application denials because of another person's arrears involve arrears left unpaid by prior tenants unrelated to the service applicant, and arrears left by a related individual such as an ex-roommate or ex-spouse. The case of unrelated prior tenants is clear-cut and is analogous to the case of landlord arrears. The courts have less frequently faced situations involving former roommates or related individuals. There should be no legal distinction between one spouse not being liable for a municipal water bill in the other's name, and not being liable for

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[712] *Davis v. Weir, supra* at 144. *Cf. Ransom v. Marrazzo*, 848 F.2d 398 (3rd Cir. 1988) (involving only owners and non-tenant occupants taking control of property encumbered by a pre-existing debt and a lien therefore). The Court in *Ransom* specifically noted that it was not addressing the substantively different issue of tenants who are refused water service due to a pre-existing debt of a third party. *Ransom, supra* at 401. The Third Circuit disagreed with both the equal protection and substantive due process reasoning of a number of decisions cited herein, including *Davis*.

[713] *Davis v. Weir, supra* at 144-145 (5th Cir. 1974), quoting *Davis v. Weir*, 359 F.Supp. 1023, 1027 (N.D. Ga. 1971) (Emphasis in original, footnote omitted.)

a phone bill in the other spouse's name.[714]

The District Court in *Romanowski v. Gehl*[715] determined that the tenant was not liable for the bills of the roommate who was the customer of record at the time the bills were incurred and who had vacated the premises. The fact that the tenant had lived at the premises at the time the bills were incurred in the name of her roommate was found to have no bearing on the tenant's liability, since the roommate, not the tenant, had a contractual relationship with the water supplier. The court reasoned further that a roommate situation is not substantively different from that of a tenant whose landlord has incurred arrears at the residence. The tenant-applicant, like the roommate-applicant, benefited from the service while a third party incurred but did not pay bills for service. Just as the tenant cannot be held liable for the bills incurred by the landlord, neither should the roommate be held accountable for bills incurred by a former occupant, even though both the tenant and the roommate have benefited in some way from the service.

9. Refusal to Accept Applications

The validity of a municipal water supplier's refusal to accept applications from certain categories of individuals must be analyzed according to the resulting classifications it creates. For example, in several jurisdictions, municipal water authorities have established rules that do not permit tenants to apply for water service in their own names. Although subsequently

[714] *N.Y. Tel. Co. v. Teichner*, 69 Misc.2d 135, 329 N.Y.S.2d 689 (Dist. Ct. Suffolk Co., 1972).

[715] CIV-83-304E, W.D.N.Y., 1983.

resolved by legislation,[716] the Suffolk County Water Authority had adopted a rule which allowed only building owners to apply for water service, purportedly on the basis of historical problems with unpaid bills of tenants. Similar rules barring tenants from applying for water service exist in a number of municipal water service areas. But, unlike the Suffolk County case, certain upstate municipal utilities operate pursuant to the Village or Town Law in which a lien is created on the property if water bills are unpaid, either by the owner or a tenant.

When a lien exists on the property, the refusal of the water supplier to accept tenant customers should fail the rational basis test. The supplier is protected against unpaid bills by a lien on the property, and can have no legitimate interest in refusing service to tenants.

While a rule limiting service to tenants even without the existence of a lien might fail under the rational basis test, the advocate would be far more likely to obtain a favorable decision from a court if the intermediate standard of review were used or if the rule were found to affect a fundamental right, thereby placing the rule and the classification it represents under the strict scrutiny standard.

The courts have delineated an intermediate test which requires that a classification "serve important governmental objectives" and be "substantially related to achievement of those objectives."[717] This intermediate standard has been applied when a higher level of scrutiny than

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[716] Public Authorities Law (PAL) §1078-a (Chapter 587, Laws of 1987).

[717] *Craig v. Boren*, 429 U.S. 190, 197 (1976).

the "rational basis" test is deemed necessary under the particular circumstances, although no fundamental right is involved. In *Chatham v. Jackson*,[718] the U.S. Court of Appeals, Fifth Circuit, was faced with a challenge to a municipal utility's practice of terminating water service to a *landlord* based on the failure of a *tenant* to pay an overdue water bill. In addressing the equal protection arguments, the Court chose to employ an intermediate standard as a "more satisfactory alternative" to the lenient "rational basis" test or the strict scrutiny of the "compelling state interest" test. The Court upheld the City's practice, finding that a landlord financially benefits from the provision of water service to his property for which he can reasonably be held responsible.

Can a fundamental interest in municipal water service be established in order to obtain strict judicial scrutiny of municipal water system practices? Even if the right to routinely provided municipal services (such as police protection), may not be found to be a fundamental right,[719] it may be argued that a fundamental right is involved when a municipal water system refuses to accept applications from certain categories of individuals, because water is essential to life and good health. If applicable, the municipal water service provides monopoly service, the absence of an alternative supplier, should be noted. It may be argued that individuals have the fundamental right to contract to purchase essential water service, a necessity of life, from a

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[718] 613 F.2d. 73 (5th Cir. 1980).

[719] *See*, e.g., *Mlikotin v. City of Los Angeles*, 643 F.2d 652 (9th Cir. 1981); *Reiff v. City of Philadelphia*, 471 F.Supp. 1262 (E.D. Pa. 1979).

governmental body which has taken for itself monopoly control over the provision of that service. .The existence of a fundamental right would require that the classification be substantially related to, and closely tailored to achieve, a compelling state interest in order to be upheld.

10. Substantive Due Process and Administrative Law

The right to substantive due process is the right to statutes and rules that have "some fair, just and reasonable connection" with "the promotion of the health, comfort, safety and welfare of society."[720] Substantive due process equates with administrative law principles prohibiting arbitrary and capricious acts by governmental bodies. Such a claim has the practical benefit of stating a claim under 42 USC §1983, with possible attorneys fees pursuant to 42 USC §1988.

In *Ingraham v. Wright*, the U.S. Court of Appeals, Fifth Circuit, set forth the test by which statutes and rules are to be measured in relation to substantive due process requirements:

> The plaintiffs' right to substantive due process is ... a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to the object sought to be attained. The test is whether there be a matter touching the public interest which merits instant correction at the hands of the authorities and, if so, that the remedy adopted by the rule-making authorities be reasonably calculated to correct it.[721]

In *Davis v. Weir* and *Koger v. Guarino*, discussed earlier, the courts found that the

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[720] *Patterson v. Carey*, 41 N.Y.2d. 714, 720 (1977).

[721] *Ingraham v. Wright*, 525 F.2d 909, 916 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977), quoting *Sims v. Bd. of Ed.*, 329 F.Supp. 678, 684 (D.N.M. 1971).

municipalities' requirement that tenants pay the landlords' debt also violated substantive due process because the municipality had no legitimate interest in collecting from one person the debts of another.[722] In addition, these courts found no rational relationship between the valid objective of collecting unpaid bills for service and the means to that objective, *i.e.*, requiring a non-liable third party — the tenant — to pay the landlord's bills.

It can be similarly argued that the refusal to provide water service to tenants, as was the case in Suffolk County, violates substantive due process requirements. The water authority in Suffolk had based its rule refusing water service to all but building owners on a desire to reduce uncollected bills. Since some tenants had in the past left unpaid water bills, the water authority reasoned, all tenants should be prohibited from obtaining service except through the auspices of their landlords. The refusal to serve all tenants because of the payment problems of a few is an overly broad response. The practice of excluding tenants as a class from municipal water services, like some zoning restrictions prohibiting sharing of living quarters by unrelated persons, can be characterized as "burning the house to roast the pig,"[723] the classification being so broad as to include far more tenants who would in fact pay service bills than tenants who would default.

Substantive due process and administrative law principles constitute viable grounds on

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[722] *Cf. Ransom v. Marrazzo*, 848 F.2d 398 (3rd Cir. 1988). *Contra DiMassimo v. City of Clearwater*, 805 F.2d 1536, 1541 (11th Cir. 1986) (court rejected *substantive* due process and equal protection arguments).

[723] *McMinn v. Town of Oyster Bay*, 105 A.D.2d 46, 56, 482 N.Y.S.2d 773 (2nd Dept. 1984).

which to challenge the substance of municipal utilities' rules governing water service. The constitutional requirement that such rules be fundamentally fair and neither arbitrary nor unreasonable should be included, whenever possible, in challenges to the acts and practices of municipalities.

11. Conclusion

Private water suppliers are governed by the Public Service Law and PSC rules. Larger private water companies are subject to the provisions of the Home Energy Fair Practices Act, and rules implementing HEFPA, found in 16 NYCRR Part 14. In addition to the protections of HEFPA, the Commission's complaint handling procedures apply to bill or service disputes between customers and water companies, and those procedures provide due process protections.

Municipal water systems, on the other hand, are not subject to regulatory oversight. Municipal utilities often provide inadequate notice, or no notice at all, prior to service termination, and may provide insufficient complaint and hearing procedures through which a customer may dispute a service bill. These inadequacies may be subject to constitutional challenge. Without the existence of a regulatory body governing the acts and practices of municipalities, a consumer's only recourse is to the courts, where a number of challenges to unreasonable or deficient practices and policies have proven successful.

NEW YORK SOCIAL SERVICES LAW § 131-s
THE EMERGENCY UTILITY PAYMENT PROGRAM

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

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Albany, NY 12201
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NEW YORK SOCIAL SERVICES LAW § 131-s
THE EMERGENCY UTILITY PAYMENT PROGRAM

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NEW YORK SOCIAL SERVICES LAW § 131-s
THE EMERGENCY UTILITY PAYMENT PROGRAM

I. Introduction

The U.S. Supreme Court characterized gas and electric energy service as "a necessity of modern life."724 Energy assistance provided by the New York State Department of Social Services ("DSS") and the local departments of social services ("LDSS") is a significant part of the safety net designed in 1981 to protect low-income New Yorkers against the threat of termination and the actual loss of electric and gas utility service.

Before 1981, New York utility customers facing termination of utility service for nonpayment, or who had already been terminated, were caught between the conflicting policies of the DSS and the utilities. State DSS policy was to pay for no more than the last four months of utility service in order to maintain or restore service. Utilities refused to accept less than the full amount of the customers' arrears. In *Rivera v. Berger*, 725 the New York courts ruled that the LDSS must do whatever was necessary, including paying all of the arrears due to a utility, in order to maintain or restore utility service to a public assistance recipient.

In 1981 when the Legislature enacted the Home Energy Fair Practices Act ("HEFPA"), it also enacted Social Services Law § 131-s ("SSL 131-s").726 SSL § 131-s provides for emergency utility payments by LDSS to prevent termination of, or to restore utility service, and

724 *Craft v. Memphis Gas, Light & Water Div.*, 436 U.S. 1, 18 (1978).

725 *Rivera v. Berger*, 89 Misc.2d 586, 390 N.Y.S.2d 537 (Sup. Ct. Westchester County 1976), *aff'd*, 60 A.D.2d 605 (2d Dep't 1977), *appeal dismissed*, 43 N.Y.2d 949 (1978), *lv. denied*, 44 N.Y.2d 642 (1978).

726 The program is codified at Social Services Law § 131-s (SSL § 131-s) and Public Service Law § 65-b (PSL § 65-b). SSL § 131-s was a companion bill to HEFPA, drafted in cooperation with utilities, the state DSS, the Department of Public Service ("PSC"), the Governor's office, members of the legislature and PULP.

limits payment to charges for a period of up to, but not exceeding, the four months immediately preceding application.[727] PSL § 65-b overruled *Rivera v. Berger* by requiring a utility to accept the payment or promise of payment, and to continue or restore utility services, even when the four-month payment did not cover all arrears.[728] Essentially, these two statutes make the LDSS the utility payor of last resort, and provide that no utility may terminate or refuse to restore service to any person who owes money for service delivered to that person if the utility receives or is entitled to receive a direct payment or guarantee of payment from the LDSS. By limiting the payment to charges for the most recent four months, the utilities were given incentive to upgrade their billing practices and not allow large arrearages to accumulate. The implementing regulations are found at 18 NYCRR § 352.5.

II. Eligibility for Emergency Utility Payment Program Benefits

The statutory requirements for an emergency utility assistance payment, in summary, are that the individual seeking assistance must:

(i) be an applicant for ("applicant") or recipient of ("recipient") public assistance, supplemental security income benefits (SSI) or additional state payments;[729]

(ii) have a threatened or actual utility termination;[730]

(iii) have no alternative payment or living arrangements.[731]

A. Public Assistance Applicants

A payment for utility service may be provided to a utility company to prevent shut-off or

727 SSL § 131-s(1).

728 Some refer to the emergency utility payment program established by SSL § 131-s and PSL § 65-b as "Chapter 895 assistance," because the legislation was designated Chapter 895 of the Laws of 1981.

729 SSL §§ 131-s(1); 131-s(2).

730 SSL §§ 131-s(1); 131-s(2)(a).

731 SSL §§ 131-s(1); 131-s(2).

to restore service to public assistance applicants. Upon notification that such a payment will be made, the utility is required to provide service, even if the payment does not fully cover the balance owed. The payment may cover a period of up to, but not exceeding, the four months immediately preceding the month of application.732 If the applicant's gross household income exceeds the public assistance "standard of need,"733 the applicant will be required to sign a repayment agreement to repay the assistance within one year, as a condition of receiving the assistance.734 Under a regulatory eligibility requirement not contained in the statute, an applicant will be denied subsequent § 131-s assistance if previous assistance has not been repaid.735

To be eligible for emergency utility assistance, the applicant does not need to demonstrate eligibility for ongoing public assistance, SSI or additional state payments. The applicant only need demonstrate that no liquid resources are available to pay the arrears which are the subject of the utility termination, and that alternate payment arrangements (*e.g.* a deferred payment agreement) or alternate living arrangements cannot be made.736 The LDSS is not authorized to pay arrears incurred for more than four months preceding the application. An

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732 SSL § 131-s(1). If the applicant has been without service for one month prior to applying for assistance, the LDSS will only be required to pay for three months of service.

733 Defined *infra*.

734 SLL § 131-s(1). *See*, Section III, Repayment Agreements, *infra*.

735 18 NYCRR § 352.5. "Subsequent assistance to continue or restore utility service must not be provided unless any prior utility arrearage payments have been repaid or are being repaid in accordance with the schedule of payments contained in each prior repayment agreement as of the date of application for such subsequent assistance." The administratively added repayment requirement was upheld in *Childs v. Bane*, 194 A.D.2d 221 (3d Dep't. 1993), *appeal dismissed*,83 N.Y.2d 846 (1994), *lv. denied*, 83 N.Y.2d 760 (1994), on grounds that only persons who do not meet the public assistance income guidelines are required to repay – if that person's income "diminishes to a point where he or she becomes entitled to public assistance, he or she may apply for and receive it even though they may have defaulted upon a previously executed repayment agreement." 194 A.D.2d at 225.

736 18 NYCRR § 352.5(e).

applicant for utility service with older arrears should be able to obtain service for a new account without public assistance by entering into a deferred payment agreement if he or she cannot afford to pay all the arrears.737

B. Public Assistance Recipients

For persons already receiving public assistance, a payment for utility service may be provided to a utility company to prevent termination or to restore service. The payment may cover a period of up to, but not exceeding, the four months immediately preceding the month of application,738 but no payment will be made for utility service rendered more than 10 months prior to application.739 Unless the recipient has fully applied his or her public assistance grant to its intended purposes, payments are subject to recoupment by reduction of future monthly public assistance grants.740 Further conditions of the utility payment are:

- the recipient has no funds to pay the utility and payment is needed to prevent termination or to restore service;741
- the recipient must make a written request for an advance allowance for utility services and a written request that his or her monthly assistance grant be reduced by some amount of the advanced allowance that will not cause undue hardship;742
- upon receiving such a utility advance allowance, thereafter, and for so long as the person remains a public assistance recipient, the DSS will make payments directly to the utility during a time that the recipient has been determined unable to

737 *See* PULP Law Manual chapter entitled, "Rights of Residential Gas and Electricity Customers – Home Energy Fair Practices Act ("HEFPA")."

738 SSL § 131-s(2). If the public assistance recipient has been without service for one month prior to applying for assistance, the LDSS will be required to make a payment and may look back for up to ten months to find the most recent four months of service. Unlike an *applicant*, a recipient whose service has already been terminated for some period is entitled to have the LDSS make a payment equal to four months service, even though the LDSS must go back five or more months to find four months of service.

739 SSL § 131-s(2).

740 SSL § 131-s(c). *See*, Section III, Repayment Agreements, *infra*.

741 SSL § 131-s(2)(a).

742 SSL § 131-s(2)(b).

> manage his or her own financial affairs; or, will act as the guarantor of payment for a period not exceeding 2 years.743

The DSS will not pay deposits to gas or electric utilities and public assistance recipients may not be required to pay security deposits as a condition of receiving utility service.744 Nor will the LDSS make payment to a utility for any disputed amounts owed, if the customer has a complaint for such amounts pending with either the utility or the Public Service Commission.745 Any arrears that a public assistance recipient owes to a utility company, in excess of the § 131-s assistance payment, may be reduced to a judgment but are exempt from collection, so long as the person continues to receive public assistance.746 In addition, utilities may not refuse to supply utility service, or refuse to continue supplying utility service, to a person who has applied for or who receives public assistance because of arrears owed, if the utility "receives, or is entitled to receive, a direct payment or receives a guarantee of payment from a social services district."747

C. Additional Requirements Imposed by Regulation

The State DSS also added eligibility requirements that are not expressly provided for in the statute.748 These are:

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743 SSL § 131-s(3)(a),(b). The recipient's fuel-for-heating, HEA and SHEA allowances, as appropriate and as prescribed by regulation, will be removed from the monthly grant when the DSS makes direct payments to the utility. 18 NYCRR § 352.5(f)(5)(i) – (iii). Because the amount removed from the allowances is not necessarily the amount actually charged by the utility, the DSS must determine whether the recipient has been underpaid or overpaid, and must reconcile payments (the amounts withheld from the assistance grants with the utility payments) at least annually, at case closing, or upon termination of the direct payment arrangement. 18 NYCRR § 352.5(f)(7).

744 SSL § 131-j; 18 NYCRR § 352.6(c)(2)(e).

745 SSL § 131-s(5).

746 SSL § 131-s(6).

747 PSL § 65-b.

748 The Department of Social Services' imposition of requirements not found in the statute has previously been litigated. *Robinson v. Perales*, 166 A.D.2d 594 (2d Dep't 1990), *appeal denied* 78 N.Y.2d 851 (1991) (regulation that an applicant for §131-s assistance is ineligible if meter is shared violates the statute because the requirement is neither expressly or impliedly contained in the statute). *But see*, *Stevens v. Perales*, 155 A.D.2d 329 (1st Dep't 1989) (for purposes of § 131-s(2), recipients of medical assistance only are not public assistance recipients).

(i) "Tenant of Record" and "Customer of Record" Requirement

The implementing regulations require that § 131-s assistance be provided only to an individual who is both "tenant of record" and "customer of record."749 Neither of these criteria is found in the statute.750 A "tenant of record" is defined by DSS the individual who has primary responsibility for paying the monthly mortgage or monthly rent for the dwelling unit.751 A "customer of record" is the individual who holds an account in his or her name with a "home energy vendor." The term "home energy vendor" is defined as "an individual or entity engaged in the business of selling electricity, natural gas, oil, propane, kerosene, coal, wood, or any other fuel used for residential heating and/or domestic (lights, cooking, hot water) energy."752

The regulations further provide that if an individual is not the "tenant of record" or "customer of record, they may be considered to meet those requirements if they are the spouse of the tenant and customer of record living in the same household, or if they are the surviving spouse of a deceased spouse who was tenant and customer of record.753

(ii) Shared Meters

Under PSL § 52, shared meters must either be eliminated by re-wiring or, alternatively, utility service must be placed in the owner's name. The owner may enter into a written

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749 18 NYCRR § 352.5(a); *Goodwin v. Perales*, 88 N.Y.2d 383 (1996) ("tenant of record" status criterion is permissible, even though § 131-s does not specifically include it). The "customer of record" criterion has not been challenged.

750 SSL § 131-s.

751 A similar, "tenant of record" requirement in the HEAP program was eliminated in the 2008-09 HEAP plan.

752 18 NYCRR § 352.5(a).

753 18 NYCRR § 352.5(a). By limiting the exception to spouses and surviving spouses, the regulation focuses on factors unrelated to the goal of the statute: to maintain or restore utility service. The marital status of the applicant is not relevant to the accomplishment of any valid state purpose, if all household income is considered in the application process. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 526 (1973), but the New York Court of Appeals upheld the requirement in *Goodwin v. Perales*, *supra*.

agreement with the shared meter customer to apportion the charges. If a utility bill includes costs for service outside the dwelling unit, the LDSS will limit its payment to the proportionate share of the service delivered to the applicant or recipient.754 The regulation provides that the proportionate share is to be determined by the utility company.755

(iii) Balance Owed

The LDSS may not make a payment that exceeds the balance due on the account.756

(iv) Standard of Need

Department of Social Services regulations provide that the public assistance standard of need is determined based on the following factors757 (1) a statewide schedule tied to the number of persons in the household;758 (2) a rent allowance;759 (3) a fuel allowance;760 (4) a home energy allowance and supplemental home energy allowance ("HEA" and "SHEA");761 (5) if applicable, the cost of meals for persons unable to prepare meals at home;762 and (6) special needs occasioned by circumstances such as furniture, furnishings, certain appliances, essential repair of heating equipment, replacement clothing, day care, camp fees, insurance premiums and "*cost of services and supplies already received*."763 However, in defining the standard of need

754 18 NYCRR § 352.5(e); (f)(1).

755 18 NYCRR § 352.5(f)(1).

756 *Id*. This restriction is not found in the statute.

757 18 NYCRR § 352.1 (a) – (c).

758 18 NYCRR § 352.1, Schedule SA-1.

759 18 NYCRR § 352.3(a)(1).

760 18 NYCRR § 352.5(b).

761 18 NYCRR § 352.2 (d) – (f).

762 18 NYCRR § 352.7(3)(c).

763 18 NYCRR § 352.1(c).

for purposes of the § 131-s, the standard of need was truncated to exclude the items listed in (6) above. By eliminating the "*cost of services and supplies already received*" from the standard of need used to determine eligibility for § 131-s energy assistance, individuals who might otherwise have been eligible for a § 131-s grant, rather than a loan, were also eliminated.

III. Repayment Agreements

A. Public Assistance Applicants

Applicants for § 131-s assistance who do not receive, or are not eligible to receive public assistance must sign a repayment agreement as a condition of receiving a payment to continue or restore utility service.764 Specifically, the regulation provides:

> As a condition of receiving such assistance, an applicant not in receipt of recurring public assistance or supplemental security income whose gross household income for the month of application exceeds the public assistance standard of need for the same size household must sign an agreement to repay the assistance within one year of the date of the payment.765

The regulation further defines a "household" for these purposes as follows:

> A household consists of all persons who occupy a housing unit. A house, an apartment or other group of rooms, or a single room is regarded as a housing unit when it is occupied or intended for occupancy as separate living quarters. A household includes related family members and all unrelated persons, if any, such as lodgers, foster children, wards, or employees who share the housing unit. A person living alone, or a group of unrelated persons sharing a housing unit as partners, also constitutes a household.766

The standard of need, by household size, is determined on the basis of six factors enumerated in Section II (C)(iv), Standard of Need, above.767 If an applicant's gross household

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764 *See*, *Childs v. Banes*, *supra* (applicants who do not meet public assistance requirements are required to repay and may receive subsequent assistance without repayment if their income decreases to within income eligibility levels).

765 18 NYCRR § 352.5(e).

766 *Id.*

767 18 NYCRR § 352.1(a) – (c). The public assistance standard of need is determined based on the following factors: (i) a statewide schedule tied to the number of persons in the household (18 NYCRR § 352.1, Schedule SA-1); (ii) a rent allowance (18 NYCRR § 352.3(a)(1)); (iii) a fuel allowance (18 NYCRR § 352.5(b)); (iv) a home energy allowance and supplemental home energy allowance ("HEA" and "SHEA") (18 NYCRR § 352.2(d)-(f)); (v) if applicable, the cost of meals for persons unable to prepare meals at home (18 NYCRR § 352.7(3)(c)); and (vi) special needs occasioned by circumstances such as furniture, furnishings, certain appliances, essential repair of

income exceeds the standard, the applicant must sign a Repayment Agreement to repay the assistance, without interest, within one year.768 The DSS may enforce the repayment agreements "in any manner available to a creditor, in addition to any other remedy the district may have pursuant to Social Services Law."769 The "other remedy" the DSS pursues is refusal of subsequent assistance if there has been a default on a repayment agreement.

The DSS definition of "household" may cause an applicant's gross household income to exceed the standard of need, and changing any SSL § 131-s assistance from a grant to a loan, by its inclusion of "lodgers." A paying lodger or boarder's *income* should not be included in the household's income calculation. This is especially important in view of the increased incidence of home and apartment sharing occasioned by high housing costs, stagnating incomes of lower-income households, and the recent economic downturn.770

B. Public Assistance Recipients

Recipients of public assistance must receive SSL § 131-s assistance as a nonrecoupable grant when it can be documented that they have fully applied their public assistance grant to its intended purposes.771 If they are unable to document proper management and application of their public assistance grants, the § 131-s payment will be treated as an advance allowance

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heating equipment, replacement clothing, day care, camp fees, insurance premiums and cost of services and supplies already received (18 NYCRR § 352.1(c)).

768 *See*, Social Services Administrative Directive 96-ADM-9, appended, for the DSS policy and the Repayment Agreement Form.

769 18 NYCRR § 352.5(e).

770 *See*, *e.g.*, "More Homeowners Taking In Boarders," NEW YORK TIMES, July 16, 2008. In *Mitchell v. Hayt*, No. 88-CV-382 (U.S.D.C., N.D. NY 1988), the Court ruled that income earned by a lodger or boarder may not be included in the household's income calculation for HEAP benefits. Although the rent received from the lodger or boarder is properly part of the household's income, the court held that the boarder's income cannot be included because "such individuals are not part of one economic unit for whom residential energy Is customarily purchased in common. . . ." This issue has not yet been challenged in the SSL § 131-s context.

771 18 NYCRR § 352.5(f)(2).

subject to recoupment.772 The payment is recouped from the household's public assistance grants.773

Because the Home Energy Allowance ("HEA") and Supplemental Home Energy Allowance ("SHEA") are considered to be available for energy costs, public assistance recipients seeking SSL § 131-s assistance seldom can document that they used these allowances for utility bills. Rather, they are given forms to sign, voluntarily requesting an advance allowance and authorizing reduction of their future grants for purposes of recoupment.774

For example, a family of four receiving public assistance and residing in rental housing Albany County would be entitled to a monthly grant of $307 plus HEA of $38.70 and SHEA of $30.775 Their Fuel-for-Heating allowance would be $72,776 and their housing allowance would be $348.777 Their total public assistance grant is $795.70. If the family accrues energy arrears and receives a § 131-s emergency utility payment, their monthly grant may be reduced by 10% ($79.57), or 5% ($39.79) if hardship is substantiated, until the amount of the emergency utility payment is recouped.

772 18 NYCRR § 352.5(f)(3).

773 18 NYCRR § 352.11. "The recoupment must be 10 percent of the household's needs for Family Assistance and Safety Net Assistance. However, where undue hardship is claimed and substantiated, the recoupment must not be less than five percent of the household's needs. Such grant reduction must continue until such time as the amount of the advance allowance is fully recouped."

774 *See*, *Collington v. Perales*, 206 A.D.2d 364 (2d Dep't 1996).

775 SOC. SERV. LAW § 131-a, 18 NYCRR § 352.1(a).

776 18 NYCRR § 352.5.

777 18 NYCRR § 352.3.