



National Fuel

October 8, 2010

Hon. Jaclyn A Brilling, Secretary to the Commission
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223

Re Case 07-G-0141 - Request by PUSH Buffalo for Active Party Status

Dear Secretary Brilling:

National Fuel Gas Distribution Corporation ("Distribution" or "the Company") has learned of a request by PUSH Buffalo ("PUSH") for active party status in the above-captioned proceeding.

For all of the reasons expressed in the accompanying "Response Of National Fuel Gas Distribution Corporation To Push Buffalo Request For Active Party Status," PUSH's request should be denied.

If the Commission is inclined to permit PUSH to intervene in any formal proceeding, PUSH should be permitted to become an active party in Case 07-M-0548, the Energy Efficiency Portfolio Proceeding ("EEPS") – where PUSH's conservation proposals can be given a full airing in the appropriate proceeding to hear them - and not in the Company's last rate case, which is now merely a vehicle for review of programs and initiatives adopted in that case.

Respectfully submitted,

Michael W. Reville

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 07-G-0141 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of National Fuel Gas Distribution Corporation for Gas Service

CASE 07-M-0548 - Proceeding on Motion of the Commission to Establish an Energy Efficiency Portfolio Standard

RESPONSE OF
NATIONAL FUEL GAS DISTRIBUTION CORPORATION
TO PUSH BUFFALO
REQUEST FOR ACTIVE PARTY STATUS

By letter dated September 29, 2010, People United for Sustained Housing (“PUSH”), a community activist group, moved to be added to the “list of Active Parties” in Case 07-G-0141.¹ For the reasons that follow, National Fuel Gas Distribution Corporation (“Distribution” or the “Company”) requests that if the Commission is inclined to permit PUSH to press its claims in a formal proceeding, Active Party status should be granted in Case 07-M-0548, because that proceeding, not this case, is a proceeding better equipped to address the generic, statewide, policy-level issues raised by PUSH with respect to energy conservation and efficiency programs.

Background

Distribution filed a proposal on June 28, 2010 to extend, for the fourth year beginning December 1, 2010, its Conservation Incentive Program (“CIP”). CIP is Distribution’s conservation program in compliance with the generic, statewide conservation and efficiency program template adopted through the Energy Efficiency Portfolio Proceeding (“EEPS”), Case 07-M-0548. Like other programs of its kind, CIP includes an appliance rebate component, an outreach and education component, a low-income weatherization program and provisions for measurement and verification. The CIP annual budget is approximately \$10 million.

¹ PUSH did not serve its request on Distribution. Distribution learned about PUSH’s request after discovering it on the Commission’s web site. To the extent necessary, this filing is also submitted in response to the Commission’s *Notice Encouraging Additional Comments* issued in Case 07-G-0141 on October 1, 2010.

PUSH is an activist organization involved primarily in community organizing and low-income housing rehabilitation in one neighborhood located near its offices on the west side of Buffalo. For the past ten months, PUSH has been involved in a public campaign attempting to coerce Distribution into funding PUSH's housing rehabilitation efforts in the neighborhood it serves. PUSH and its allies filed comments in this proceeding asking the Commission to shift the established focus of CIP by allocating the funding to low-income weatherization, and increasing the per-unit expenditures for low-income weatherization - all consistent with PUSH's efforts to rehabilitate low-income housing in the neighborhood where PUSH focuses its activities. Although PUSH's motion does not set forth PUSH's intentions for Case 07-G-0141, its intentions for Distribution's CIP are described in its filed comments and in its numerous statements to the media.²

PUSH's campaign initially sought to persuade National Fuel, Distribution's parent corporation, to fund, with shareholder monies, PUSH's housing rehabilitation program. Apparently, PUSH later learned of CIP and shifted its focus to extracting funds from the CIP program to finance its rehabilitation projects and other programs. More specifically, PUSH contends that funds for residential and commercial rebates – funds contributed to CIP by all of the Company's customers - should, instead, be re-allocated solely into low-income weatherization and housing rehabilitation. PUSH also seeks to shift outreach and education funding into the same housing rehabilitation and weatherization programs it administers in Buffalo. PUSH has enlisted the support of like-minded groups in other parts of the state who, in comments, have articulated the same arguments advanced by PUSH and others directed at the substance of CIP's programs adopted pursuant to the EEPS.

For the reasons that follow, if PUSH is to be granted Active Party status at all, it should not be granted Active Party status in Case 07-G-0141.

² PUSH also has repeatedly publicized an audience it received with Chairman Brown and DPS Staff at which PUSH articulated its demands for Distribution and the Commission. See, e.g., Mark Sommer, "PUSH persists in calls for reform by National Fuel on conservation," *The Buffalo News* September 30, 2010.

A. PUSH's Interest in Distribution's Program Raises Issues of Generic Import That Should Be Addressed in the Energy Efficiency Portfolio Proceeding

If the Commission determines that PUSH is entitled to Active Party status, then Distribution submits that Active Party status should be granted for PUSH in Case 07-M-0548 – the EEPS proceeding - and not in case 07-G-0141. PUSH's demands on Distribution go beyond Distribution's local CIP and involve issues addressed in the EEPS and reserved for future consideration. Hypothetically, were the Commission to grant PUSH's request to "re-purpose" CIP's low-income component from a weatherization program to a program to fund comprehensive housing rehabilitation and reconstruction, together with other demands of PUSH regarding employment and wages, CIP would no longer conform to the statewide model and would violate the criteria for EEPS funding established in prior orders.³ For this reason, PUSH's issues should not be addressed in the relative obscurity of Distribution's CIP, but should, instead, be openly addressed before the broad range of interests involved in the EEPS, under the standards established in EEPS, and with the guidance of Staff experienced in, and assigned to EEPS.

1. PUSH's Demand for Funding Is a Matter for the EEPS

In comments submitted in response to Distribution's request to extend CIP, PUSH demands that CIP funding currently dedicated to an appliance rebate program be re-allocated to low-income weatherization. PUSH Comments at 1-2. Comments submitted by a PUSH ally, Public Accountability Initiative ("PAI") further argue that not only should more funds be allocated to low-income weatherization, more should be spent on each weatherization project. PAI Comments at 2.⁴

Ultimately what PUSH seeks is funding for itself. PUSH is very active in housing rehabilitation projects in Buffalo, and PUSH appears to utilize weatherization funding as a means of accessing funds for larger rehabilitation projects. Examples include a highly-publicized "net-zero" house rehabilitation

³ PUSH's demands for wage standards and contractor hiring preferences likely go beyond the Commission's jurisdiction. Because they have been presented by PUSH only as naked demands, without further explanation, Distribution reserves its right to provide a more informed response, should the need arise at a later date.

⁴ PAI states, "The per-unit cost of insulation in the Low Income Usage Reduction Program (LIURP) is far below typical insulation costs."

costing, so far, in excess of \$300,000, and other projects costing between \$70,000 and \$166,000 per unit.⁵ These projects stand in dramatic contrast to Distribution's low-income weatherization program, administered by NYSERDA under its EmPower program, which spends, on average, \$3200 per unit.

Nowhere in PUSH's comments, or the comments of its supporters or allies, is there any analysis or even a simple statement regarding the effectiveness of the programs for which it seeks funding, using the standards adopted in EEPS – or, indeed, any standards whatsoever. In the EEPS proceeding the Commission developed detailed and exhaustive analyses to support energy conservation and efficiency measures using established methods for measurement of economic and environmental impacts. Every program funded by ratepayer surcharges is required to meet the same basic test:

Measures that are not cost effective on a stand-alone basis, and measures that do not contribute directly to achieving the Commission's electricity or gas usage reduction targets, should also not be funded by EEPS resources. Each type of measure to be installed must be cost effective on a stand-alone basis such that the type of measure has a total resource cost (TRC) value of at least 1.0 prior to inclusion of program administrative and evaluation, measurement, and verification costs. Further, program administrators should determine that each project as a whole will be cost effective after inclusion of all program administrative and evaluation, measurement, and verification costs. The determination of total resource benefits must be based on avoided costs, carbon reduction per unit values, and all other inputs and assumptions in effect at the time benefit/cost analyses are performed.

Case 07-M-0548 et al., *Order Approving Certain Commercial and Industrial, Residential, and Low-income Residential Customer Energy Efficiency Programs with Modifications* (issued January 4, 2010) at 13-14 (footnote omitted). TRCs for housing rehabilitation projects within the range of costs experienced by PUSH are demonstrably far below the minimum threshold of 1.0. If PUSH's other objectives are included in program administration costs – such as wage requirements and hiring preferences⁶ – the TRC value would fall even lower, automatically disqualifying the projects from funding under EEPS and Distribution's

⁵ Daniel Robinson, "Buffalo Home to Produce All Its Own Energy, Attempt Carbon Neutrality," *WNED AM-970 News* (September 16, 2010); Mark Sommer, "PUSH wins grant for green rehab," *The Buffalo News* (September 12, 2009).

⁶ PUSH Comments at 2. See also, Rod Watson, "National Fuel clueless about community," *The Buffalo News* (September 9, 2010). Mr. Watson's column noted that "The group wants National Fuel to match the \$10 million with its own money, put three-quarters of the fund into weatherizing low-income homes and put poor people to work at living wages by doing the weatherization through the Green Jobs for Buffalo training program."

CIP. If PUSH is going to make its case for funding, it will have to surmount these hurdles and it must do so in the EEPS case, and not here.

The generic EEPS is also the correct forum for consideration of the radical re-allocation of low-income weatherization funding that PUSH would impose on Distribution's CIP. The question of establishing a suitable low-income funding allocation was addressed on the merits in at least two orders, beginning with the Commission's *Order Establishing Energy Efficiency Portfolio Standard and Approving Programs* (issued June 23, 2008). In that order the Commission articulated a "policy decision that 20% of the residential fast-track programs should be oriented toward low-income customers." (p. 40). The Commission also acknowledged, however, that the question of establishing a "definitive target" required "further development," and reserved the matter for "the next phase of the EEPS proceeding." (*Id.*, n. 24). In a later order, the Commission explicitly withheld additional funding for low-income programs in order to "maintain a policy that favors balance." Case 07-M-0548, *Order Establishing Targets and Standards for Energy Efficiency Programs* (issued May 19, 2009). Obviously, PUSH's agenda would destroy that balance. Again, however, although the Commission did not foreclose consideration of greater funding for low-income programs, the Commission determined that due to the sizable amount of federal stimulus and other funds directed to home weatherization, additional funding then and currently through EEPS would be uneconomic and impractical.⁷

PUSH's policy-level generic issues cannot be addressed in the narrow confines of a proceeding for the renewal of Distribution's CIP. Granting PUSH Active Party status in Case 07-G-0141 to pursue its agenda for re-allocation of CIP funding into PUSH's housing rehabilitation program would be contrary to the Commission's program requirements established in the EEPS proceeding and applicable to Distribution's CIP. For that reason, if the Commission believes that PUSH is entitled to Active Party status to pursue its agenda, Case 07-M-0548 is the appropriate forum where PUSH's issues and

⁷ In the same order the Commission noted that the Department of Housing and Community Renewal (DHCR) "has received an allocation of \$394,686,513 in federal stimulus funds to support the Weatherization Assistance Program as well as an additional \$36.9 million in its annual weatherization allowance." Order at 16. Distribution observes that PUSH's focus on the Company's CIP for housing rehabilitation and weatherization funds is rather severely misplaced, and respectfully requests that the Commission should consider recommending to PUSH that it seek its funding through DHCR instead of the Company or the Department of Public Service.

programs can be adequately evaluated and considered under the standards that govern EEPS programs, including those administered by Distribution and its contractors through CIP.

2. PUSH's Issues Cannot Be Addressed in Case 07-G-0141 Prior To Termination of the Current Program Year for CIP

CIP expires on November 30, 2010. Distribution filed its request for renewal of CIP on June 28, 2010, anticipating approval prior to CIP's expiration, and leaving sufficient time to notify the public – over one million residents - of material program changes, if any. Staff assigned to Distribution's filing has acknowledged the need for timely approval, and to Distribution's knowledge, has been diligently addressing the filing toward that end. PUSH, which filed its comments after the close of the SAPA comment period,⁸ has requested that the Commission suspend CIP until Distribution meets with PUSH representatives and accedes to PUSH's demands. PUSH's request to suspend CIP is unjustified and totally lacking in support. Moreover, if the Commission were to address the merits of PUSH's demands for re-allocation of CIP funding from rebate programs to low-income weatherization and housing rehabilitation in case 07-G-0141, there is little chance that CIP could be timely renewed or implemented. This would throw the Company's program into disarray and leave the Company's customers, participating vendors and contractors completely in the dark as to the likelihood that the rebate program for energy efficient appliances would continue on track. This concern alone should be sufficient reason to transfer PUSH's request for active party status to Case 07-M-0548, where the merits of PUSH's demands can be fully addressed, in the context of the EEPS, without jeopardizing timely renewal of CIP.

B. PUSH's Request for Active Party Status Is Facially Insufficient

PUSH cannot be made an Active Party without some showing of interest in the proceeding and some right to intervene. 16 N.Y.C.R.R. § 4.3 states:

⁸ Distribution acknowledges that PUSH staged a media event on September 2, 2010 at the Buffalo offices of the Commission at which PUSH representatives vocalized their demands regarding CIP. Mark Sommers, "PUSH Seeks Action Against National Fuel," *The Buffalo News* (September 3, 2010).

Parties

(a) Only the parties to a proceeding may present evidence or testimony and cross-examine witnesses.

(b) (1) Parties to a proceeding shall include the applicant, petitioner, or complainant, if any; the affected utility company or certificate holder (even if not the applicant or petitioner); trial staff; appearing agencies; and other persons permitted by statute or regulation or by the presiding officer to intervene.

* * *

(3) To avoid unnecessary duplication, the presiding officer may require parties with similar interests to consolidate their presentations.

(c) (1) Any person may ask the presiding officer for permission to intervene. Permission will be granted if the intervention is likely to contribute to the development of a complete record or is otherwise fair and in the public interest.

First, PUSH neither asked permission to intervene nor did it make any claim that its intervention will "contribute to the development of a complete record or is otherwise fair and in the public interest." This is not a matter of a customer, unsophisticated in the means of government procedure, requesting the Commission's help. PUSH's representative is a lawyer with an abundance of experience in government and regulatory affairs. PUSH's letter seeking active party status is procedurally infirm and should be denied on that basis, alone.⁹

Second, PUSH's request appears to be limited to obtaining "all relevant and pertaining documents as they arise." PUSH is extremely adept with computer media and can monitor the Commission's web site for all documents pertaining to Case 07-G-0141. If PUSH wants to intervene at a later date, PUSH would be "free to resubmit its request at such time as it is able to articulate how it will be affected by this proceeding, how it intends to contribute to the record, or why it is otherwise fair and in the

⁹ PUSH has not sought reasonable discourse or collaboration with Distribution. PUSH's conduct has included unauthorized entry to Distribution facilities, harassment and intimidation of employees and customers and intentional disruption of business activities. PUSH's actions were most disruptive at the Company's Customer Assistance Center in downtown Buffalo, where Distribution provides face-to-face, walk-in services to dozens of customers daily. There, on September 17, 2010, PUSH protesters marched into the office, paraded around chanting slogans and blocking customer access to Company representatives, and did not leave until Buffalo Police officers threatened them with arrest. This kind of conduct is, by all accounts, PUSH's *modus operandi* and there is no reason to believe that it would not be repeated unless PUSH explicitly agrees to refrain from similar disruptions at Distribution facilities. At a minimum, such an agreement should be a condition of PUSH's participation in any Commission proceeding.

public interest to grant its request for party status.” Case 10-E-0362, *Ruling On Schedule and Other Procedural Matters* (issued October 5, 2010).

C. Conclusion

For all of the foregoing reasons, Distribution respectfully requests that PUSH’s motion to intervene in Case 07-G-0141 be denied. In the alternative, if the Commission is inclined to accept PUSH’s request to intervene, the public interest would be better served if PUSH’s request were granted for Case 07-M-0548, where the generic, statewide policy issues raised by PUSH can be addressed on the merits, and on notice to parties and interests likely to be affected by the outcome.

Respectfully submitted,



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Dated: October 8, 2010
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