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NOTE TO READERS

ON-LINE DELIVERY

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CURRENT PROJECT UPDATES

Colorado Utility Settles Merger Case with Low-Income Intervenors

Public Service Company of Colorado (PSCO) has reached a settlement of merger-related issues involving low-income consumers concerning its proposed merger with Northern States Power Company. Low-income consumers were represented by the Colorado Energy Assistance Foundation (CEAF) and Catholic Charities, both of Denver.

The settlement of the PSCO merger proceeding pending before the Colorado public utilities commission provides for the following:

o An agreement by PSCO to make a contribution of $4.75 million to CEAF over a six year period. CEAF provides energy assistance and energy efficiency assistance to low-income Colorado residents.

o An agreement to provide 20 computers to Catholic Charities and/or other agencies designated by CEAF over a two year period. In addition, PSCO will fund telephone lines and internet access for each computer during the same time period. PSCO will provide training on how these agencies can use PSCO-supplied equipment to access the PSCO home page to help negotiate payment terms for low-income consumers.

o An agreement to pay CEAF an amount equal to eight percent of any bill credits PSCO might be required to pay for failing to maintain designated service quality standards, the use of which funds will be limited to energy assistance for low-income PSCO customers.

- o An agreement to fund a low-income energy efficiency program at a rate of $2.6 million per year through the year 2006. In addition, the level of the annual contribution will be indexed after the year 2000 to the Denver-Boulder Price Index. Funds can be used for any purpose allowed by the U.S. Department of Energy's Weatherization Assistance Program.

- o Finally, PSCO agreed to continue to make annual reports on low-income payment troubles through the year 2009, even though its obligation to make such reports was to expire at the end of 2001. These reports include information on termination of service, payment agreements, households in arrears, PUC complaints, energy efficiency and rate affordability program impacts, and related matters.

The settlement came in light of testimony provided by FSC finding that the merger would disproportionately affect low-income households. According to FSC's testimony, the low-income programs were necessary to ensure that the company "passed on" merger-related benefits to low-income consumers.

According to FSC, traditional merger analysis holds that merger-related efficiencies are only relevant in an inquiry into the legitimacy of a merger to the extent that they: (1) are "merger-specific," and (2) are likely to be "passed on" to consumers in the form of lower prices. The FSC testimony addressed the second half of this inquiry: the "passing on" requirement. The passing-on requirement was first formally described by the Federal Trade Commission's 1984 decision in American Medical International and has been articulated time and again since.

Without a specific low-income energy program, FSC said, low-income consumers would have received a disproportionately small share of the merger savings. FSC noted that two major areas of merger savings that PSCO identified involved cost reductions associated with capital investment in information systems and reduced labor expenses in the area of customer service. Over $96 million in savings were attributed to those two areas alone.

PSCO proposed to "share" the savings generated by the merger with customers through the mechanism of a rate freeze. This mechanism, in effect, would have allocated merger savings back to individual customers on a per unit of energy (kWh or ccf/therms) basis. The low-income issue arose because of the difference in the way in which merger savings were generated and the way in which those savings were distributed. Information system savings, as well as customer service savings, are a function of the number of customers on the PSCO system, FSC noted. The savings were distributed, however, based on the energy consumption.

"If you have residential savings. . .that are produced on the basis of numbers of customers, and if you then distribute those benefits on the basis of units of energy consumption, there will be a disproportionate distribution of benefits to high use customers," FSC said. That distribution harms low-income consumers. It is universally found, FSC said, that low-income customers use less energy on a per household basis than do average residential customers.

The settlement with CEAF and Catholic Charities allayed the FSC concerns about passing on the merger benefits.

More information on the PSCO merger settlement can be obtained from Jeff Ackerman or Karen Brown at CEAF (303-825-8750).

PENNSYLVANIA LOW-INCOME GAS PROGRAMS

The Pennsylvania Office of Consumer Advocate (OCA) has settled a series of cases before the Pennsylvania public utility commission involving the move of Pennsylvania's natural gas industries to a competitive retail choice environment. Two major low-income issues have been presented by the OCA through testimony prepared by FSC.

First, Pennsylvania's natural gas utilities have agreed to substantially expand their rate affordability programs. In Pennsylvania, utilities have offered pilot Customer Assistance Programs (CAPs) to their low-income payment-troubled customers. These programs offer substantial discounts to consumers who live with annual incomes at or below 150% of the federal Poverty Level and who are "payment-troubled." Payment-troubled is defined in different ways by different companies. Companies agreeing to substantially expand their programs include:

- Columbia Gas, which agreed to expand its program from 1,000 to 22,000 customers.

- Peoples Natural Gas, which agreed to expand its program from fewer than 1,000 to 12,000 customers.

- Equitable Gas, which agreed to expand its program from 4,900 to 10,000 customers.

- National Fuel Gas, which agreed to expand its program from 4,000 to 7,000 customers.

In addition to expanding their programs, Pennsylvania's natural gas utilities have agreed to drop a program eligibility requirement that the OCA's office asserted was unlawfully discriminatory. Through FSC testimony, OCA challenged requirements that customers have a minimum one-year residency in a company's service territory before becoming eligible for the CAP. Such a minimum residency requirement was justified, the companies asserted, to prevent customers from moving into their service territory exclusively to take advantage of the rate discount programs.

According to FSC's testimony, however, such minimum residency requirements disproportionately and adversely affected customer classes protected by the federal Fair Housing Act and Equal Credit Opportunity Act. Pennsylvania statistics demonstrated that households of color, households receiving public assistance, and households with female heads of household moved disproportionately frequently. Minimum residency requirements thus disproportionately disqualified such customers from receiving the benefits of the rate discount programs.

In addition, OCA asserted that the minimum residency requirements unlawfully impedes a customer's right to mobility. A long line of cases has found such an infringement to be unlawful. Pennsylvania's natural gas utilities have agreed to drop the minimum residency requirement.

CURRENT PROJECTS

LIHEAP Integration

Nearly 20 states that have adopted electric and/or natural gas restructuring legislation (or regulatory decisions) have also adopted new mechanisms to support low-income energy assistance programs. These new state initiatives present opportunities for both cooperation and conflict with the U. S. Department of Health and Human Services' (HHS) Low-Income Home Energy Assistance Program (LIHEAP) and the U.S. Department of Energy's Weatherization Assistance Program (WAP).

As a result of these new programs, the LIHEAP Advisory Committee on Managing for Results convened a symposium to consider how to maximize the opportunities for cooperation and minimize the potential for conflict between LIHEAP and the new state low-income energy assistance programs. That symposium, chaired by FSC's Roger Colton, was designed to help address federal policy, as articulated in the federal Government Performance and Results Act (GPRA), that coordination among federal programs with related responsibilities is essential to efficiently and effectively meet national concerns.

In a paper subsequently prepared for the HHS Office of Children and Families (OCF), FSC laid out a ten step roadmap for what LIHEAP offices can and should do to promote program integration where appropriate.

1. LIHEAP offices should <u>identify existing program linkages</u> and assess whether these current linkages provide opportunities for

program integration with a new energy assistance program created by electric and/or natural gas restructuring legislation.

2. LIHEAP offices should identify and articulate the natural synergies that are inherent in LIHEAP, low income energy assistance programs created through electric/natural gas restructuring statutes, and U.S. Department of Energy weatherization assistance.

3. LIHEAP offices should identify potential program conflicts that are possible in the absence of program linkages and specify the conflict resolution mechanisms that arise from program linkages.

4. LIHEAP offices should identify the potential increase in the delivery of direct dollars of benefits resulting from program linkages.

5. LIHEAP offices should identify the program components where linkage might occur. Program linkages can occur in any of the following program areas: funding; oversight; administration; outreach; or program delivery.

6. LIHEAP offices should identify the existing administrative capacities of alternative program structures. The administrative capacity should consider the program processes involving intake, outreach, and delivery of program benefits.

7. LIHEAP offices should identify all risks to the LIHEAP program that would not exist in the absence of program linkages.

8. LIHEAP offices should identify all barriers that would impede program linkages.

9. LIHEAP offices should document the desired outcomes of existing and proposed programs. "Outcomes" measure program results (e.g., reduced service disconnections, reduced heat-or-eat decisions). They are to be distinguished from (1) activities, which measure the things that programs "do" (dollars delivered, households served); and (2) outputs, which measure the things that programs produce (reductions in home energy burden, reductions in energy consumption).

10. LIHEAP offices should assess the compatibility of program goals of programs for which program linkages are a possibility.

A copy of the complete LIHEAP integration report can be obtained by sending an e-mail to publications@fsconline.com.

The Knowing Inclusion of Unenforceable Mobile Home Park Lease Terms

The knowing inclusion of unenforceable lease terms for residents of mobile home parks is an unfair and deceptive practice under state Unfair and Deceptive Acts and Practices (UDAP) consumer protection statutes, according to a recent analysis prepared by FSC.

An example of such an unenforceable lease term involves the threatened forced removal of mobile homes more than ten years old. Such a lease term would provide, for example, that a mobile home which is ten years old (or older) may not, once it is sold, remain in the park in which it is located.

This threat that a tenant may be directed to remove a mobile home is particularly acute given the technical and economic immobility of a mobile home. Once placed, a sited mobile home tends to be permanent for a variety of technical and economic reasons. As a result of these factors, the only real option that an existing tenant has to a sale of his or her home in a park is to sell the home as scrap to be removed from the park. The scrap value of a home is generally but a fraction of the resale value of the home. Therefore, if a serious potential can be raised that this risk will be realized, the tenant has an incentive to act to avoid the risk. By creating the risk, therefore, the mobile home park creates the incentive to avoid the risk.

The fact that a 10-year provision is unreasonable and unenforceable does not eliminate its value to the mobile home park.

10-Year Removal Provisions are Unreasonable

According to FSC, there can be little question but that a 10-year removal provision is substantively unreasonable for several reasons. The useful life of a mobile home is far greater than 10 years. A commonly accepted useful life for a mobile home today is in the range of 40 to 50 years. Even within the realm of financing, while mobile home loans do not extend out to the 30 years of a mortgage for a stick built home, it is not uncommon for a mobile home loan to extend for 20 years. Moreover, the useful lives of mobile homes have increased in recent years.

In addition, some mobile home parks have strict regulations concerning the maintenance and upkeep of mobile homes in the park. As a result, both the physical appearance and the useful life should, at a minimum, be in the higher ranges of mobile homes overall. It would not be reasonable to determine as a matter of policy that mobile homes under such circumstances would become unacceptable in from 1/4th to 1/5th of their expected useful life.

The Risks to a Tenant

A mobile home park 10-year regulation at least presents the risk that, if ordered to remove a mobile home from the mobile home park, the tenant would be forced to scrap the home before the loan is repaid and well before the home reaches the end of its useful life. Avoiding this risk would be a powerful incentive to have the tenant take certain actions desired by the mobile home park owner/operator, including: listing the sale of the home with the mobile home park operator; hiring park personnel to provide "repairs" necessary to "maintain" or "upgrade" the appearance of the older home; buying new skirting from the mobile home park operator; and related activities.

The perception of risk is heightened to the extent that the tenants in a mobile home park are unable to absorb that risk. As the incomes of mobile home park tenants decrease, and as the proportion of total household assets represented by the mobile home increases, the risks --real and perceived-- faced by the provisions cited above increase as well. Low-income and fixed-income consumers, as well as those for whom their home is their major asset, can least afford to run afoul of a 10-year removal regulation.

It is for these reasons that the forced removal of homes after a certain age is frequently explicitly prohibited by state law. This prohibition does not prevent the inclusion of the lease term in mobile home park leases, however, FSC noted.

Why Include an Unenforceable Provision?

The mobile home park can include such terms for a variety of economic reasons. The primary rationale is that little may be lost and much might be gained from such terms. At the most, if a tenant learns of his or her rights and a dispute arises, the mobile home park might gain an advantage not otherwise obtainable, such as an immediate capitulation by the tenant or an offer of settlement. If the tenant does not learn of his or her rights, the mobile home park gains the advantage of the implicit enforceability of the written lease terms.

What is happening in this latter instance is that the mobile home park is taking advantage of the tenant's ignorance of the law. By including an unenforceable lease term, the mobile home park is misleading the tenant into believing the park is not ignorant. According to FSC, this involves a conscious decision on the part of the park. The decision is based on the usual assumption that a written lease provision is enforceable. Including the lease provision is thus providing implicit misinformation.

The bluff generally works because the mobile home park knows more about the lease terms than does the tenant and exploits this difference. The mobile home park regularly engages in similar transactions and has reason to know the applicable law. The tenant is an occasional consumer of leases and presumably does not. It is the knowledge (or at least good bet) that the tenant is ignorant that would induce the mobile home park to include the term in the first place. And it is the tenant's knowledge that he or she is ignorant, and his or her belief that the mobile home park is not, that would motivate the tenant to rely upon the implicit assertion of the enforceability of the term.

Including Unenforceable Terms is Unlawful

It is because of this disparity in knowledge, and disparity in bargaining position, that the knowing inclusion of unenforceable lease terms in the landlord/tenant context has seen substantial regulatory and judicial limitations created on the practice in recent years.

It is for these reasons, FSC concluded, also, that the knowing inclusion of unenforceable lease provisions in mobile home park leases -- the FSC analysis examined 10-year removal provisions in particular -- are violations of state UDAP statutes, whether or not the provision is ultimately enforced.

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