D.T.E 99-84

Investigation by the Department of Telecommunications and Energy on its own Motion to Establish Guidelines for Service Quality Standards for Electric Distribution Companies and Local Gas Distribution Companies Pursuant to G.L. c. 164, \S 1E.

ORDER ON MOTION FOR CLARIFICATION BY JOINT UTILITIES

I. <u>INTRODUCTION</u>

On June 29, 2001, the Department issued an Order regarding service quality ("SQ") standards and penalties to be included in performance-based regulation ("PBR") plans for gas and electric distribution companies pursuant to G.L. c. 164, § 1E. Service Quality Standards for Electric Distribution Companies and Local Gas Distribution Companies, D.T.E. 99-84 ("June 2001 Order"). The Department finalized SQ guidelines and included penalty offsets and customer service guarantees as required elements of gas and electric distribution companies' SQ plans. June 2001 Order, Att.1.

Nine gas and five electric distribution companies¹ ("Joint Utilities") submitted a joint motion for clarification regarding the penalty offsets and the customer service guarantees on July 19, 2001 ("Joint Utilities Motion"). Massachusetts Electric Company and Nantucket Electric Company (collectively "MECo") expressed support for the Joint Utilities requested clarifications on July 20, 2001 ("MECo Letter"). Finally, on July 19, 2001, the Utility Workers Union of America ("UWUA") requested clarification on the benchmark for staffing levels ("UWUA Letter"). In this Order, therefore, we address (1) the penalty mechanism including

The local gas distribution companies are: Bay State Gas Company; Blackstone Gas Company; Boston Gas Company; Colonial Gas Company; NSTAR Gas Company (formerly, Commonwealth Gas Company); Essex Gas Company; Fall River Gas Company; Fitchburg Gas and Electric Light Company; and North Attleboro Gas Company. The electric distribution companies are: NSTAR Electric (including Boston Edison Company; Cambridge Electric Light Company; and Commonwealth Electric Light Company); Fitchburg Gas and Electric Light Company; and Western Massachusetts Electric Company.

the terms of (a) the offset feature, (b) the odor call SQ measure, and (c) customer service guarantees; and (2) the benchmark for staffing levels.

II. <u>STANDARD OF REVIEW</u>

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous so as to leave doubt as to its meaning. <u>Boston Edison Company</u>, D.P.U. 92-1A-B at 4 (1993); <u>Whitinsville Water Company</u>, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. <u>Boston Edison Company</u>, D.P.U. 90-335-A at 3 (1992), <u>citing Fitchburg Gas & Electric Light Company</u>, D.P.U. 18296/18297, at 2 (1976).

III. <u>PENALTY MECHANISM</u>

A. Offset Credits

To provide a safeguard against the probability of a distribution company² being subject to a SQ penalty for random variations in performance, the Department incorporated an offset feature to the penalty mechanism. June 2001 Order at 28. This feature allows a distribution company that is subject to a penalty for deficient performance in one SQ measure to apply its superior performance in a second SQ measure as an offset against the penalty, up to the monetary penalty level. <u>Id.</u> The Department emphasized that the offset credits being approved

The term "distribution company" refers to gas and electric distribution companies unless otherwise noted.

only reduce monetary penalties and have no value if there are no monetary penalties to be offset. <u>Id.</u>

The Joint Utilities request clarification regarding "whether and how offsets that are earned, but not used, in a given year can be applied against penalties incurred in a subsequent year" (Motion at 3). The Joint Utilities assert that clarification is necessary to indicate that the penalty-offset system established by the Department allows utilities to carry over penalty offsets for use in subsequent years (id. at 3). The Joint Utilities reason that because MECo's rate plan settlement in Massachusetts Electric Company/Eastern Edison Company, D.T.E. 99-47 (2000) allows MECo to offset penalties and rewards in subsequent years, all SQ plans should incorporate this feature (id. at 5, n.4). MECo endorses the Joint Utilities' requested clarification. (MECo Letter at 1).

The Department's June 2001 Order at 28 explicitly states that "excess offset credits would have no value." To allow a distribution company to carry over unused offset credits to following years would give value to the offset credits, contrary to the explicit language of our Order.

The reliance of the Joint Utilities and MECo on MECo's rate plan settlement in D.T.E. 99-47 is misplaced. MECo's rate plan settlement explicitly stated that the service quality plan is subject to modification upon the SQ guidelines established by the proceeding in D.T.E. 99-84, and the Department made it clear that the SQ guidelines to be established in D.T.E. 99-84 may vary significantly from those being approved as part of the rate plan settlement. D.T.E. 99-47, at 31-32. Moreover, the Department previously has noted that

settlement differs from adjudication in that a settlement may be founded on a less-than-full record or may achieve results that would differ from those reached through adjudication.

Housatonic Water Works Company, D.P.U. 90-284, at 3, Interlocutory Order on Appeal (August 27, 1991). It would be inappropriate to rely on outcomes reached by settlement as precedent in later proceedings. Massachusetts American Water Company,

D.P.U. 95-118, at 139 (1996).

The Department's interim allowance of the D.T.E. 99-47 settlement terms, pending the outcome of D.T.E. 99-84, was expressly conditioned upon our ability to depart from those terms. D.T.E. 99-47, at 31-32. Neither MECo nor the Attorney General appealed from our expressly conditioned acceptance of the settlement agreement; and in D.T.E. 99-84, we exercised the power we had reserved.

Finally, the Department's finding that excess offset credits have no value and, therefore, cannot be used in subsequent years is consistent with our earlier determination regarding the negative revenue consequences that result from a distribution company's service delinquency in a given year. D.T.E. 99-84, at 44-45 (August 17, 2000) ("August 2000 Order"). The August 2000 Order at 44-45 states that any negative revenue consequences that result from a distribution company's service delinquency in any given year would be confined to that year. The Department noted this limitation distinguishes the SQ penalty formula from the "formulaic-embedding effect at issue in <u>Bell Atlantic Fifth Annual Price Cap Compliance</u>, D.T.E. 99-102, at 4-12 (2000)." <u>Id.</u> at 45. In fact, this outcome is consistent with a careful

reading on G.L. C. 164, § 1E(c), which envisions tying penalties and performance measures to the same "previous calender year."

In the present case, prohibiting gas and electric distribution companies from carrying over excess offset credits also prevents a formulaic-embedding effect. The Department is aware that allowing a distribution company to carry over unused offset credits to following years would increase the risk that exceptional performance in some service categories would mask less than satisfactory performance in other categories, leaving the distribution company revenue-neutral and indifferent to SQ degradations or improvements. Because the initial term of a distribution company's SQ plan will be three years, the Department sees the risk of masking less satisfactory performance as outweighing any benefit to allowing a gas or electric company to carry over unused offset credits to following years.³ Even if allowing a distribution company to carry over excess offsets for use in subsequent years prevents random variations in data from incorrectly penalizing the company, the Department has already recognized the possibility of incorrect penalization by incorporating incentives into the penalty formula. No further adjustments are appropriate.

For all the reasons stated, the Department declines to issue the clarification requested by the Joint Utilities. As we stated above, clarification of previously issued orders is appropriate only when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous so as to leave doubt as to

The Joint Utilities and MECo state that allowing a distribution company to carry over excess offsets for use in subsequent years prevents random variations in data from incorrectly penalizing the company (Motion at 3-4; MECo Letter at 1).

its meaning. D.P.U. 92-1A-B at 4; D.P.U. 89-67-A at 1-2. The Department directs gas and electric distribution companies to submit a SQ plan that does not allow excess offsets credits that are earned, but not used, in a given year to be applied against penalties incurred in a subsequent year.

B. <u>Odor Call Response Time</u>

Rather than requiring gas distribution companies to establish a benchmark based on historical performance data and the standard deviation approach, the June 2001 Order at 39-40 establishes a uniform benchmark for odor call response times. The odor call SQ benchmark requires each distribution company to respond to 95 percent of its odor calls within 60 minutes. June 2001 Order, Att. 1, § VI.B. For each percentage point that a gas distribution company's performance falls below the 95 percent benchmark, the gas distribution company will be assessed a penalty equal to 25 percent of the total penalty allocated to the odor call SQ measure. June 2001 Order at 40. The maximum penalty for this SQ measure is incurred at a performance level of 91 percent. Id. In establishing the fixed, uniform benchmark, the Department stated that public safety issues make it essential that gas distribution companies achieve and maintain a high performance standard for odor call response times. Id. at 39.

The Joint Utilities request clarification regarding the applicability of superior performance in response to odor calls to the offset feature of the penalty mechanism (Joint Utilities Motion at 6). The Joint Utilities claim that the June 2001 Order is silent on the issue of whether a superior performance on this measure could be applied as an offset to penalties incurred in other SQ measures (<u>id.</u>). The Joint Utilities state that there is no rationale for

excluding this performance measure from the overall penalty system that includes offsets, especially since the reliability measure (SAIDI/SAIFI) for electric companies is included (id.).

The Department acknowledges that the June 2001 Order is silent on the issue of whether a superior performance on this odor call SQ measure could be used as an offset. The Order is also silent on the companion issue of whether superior performance in other measures may be used as an offset to inferior performance in the odor call performance measurement. This silence, coupled with the penalty formula unique to the odor call SQ measure, may confuse the distribution companies when drafting their SQ plans. Therefore, it is appropriate for the Department to clarify this matter because our Order is silent as to the disposition of a specific issue requiring determination in the order. D.P.U. 92-1A-B at 4; D.P.U. 89-67-A at 1-2.

As stated in the June 2001 Order at 39, public safety considerations make it essential for gas distribution companies to achieve and maintain a high performance level for odor response calls. Gas odors can signify a life-or-death situation. The June 2001 Order at 39-40 recognized the seriousness of odor calls by creating a penalty formula unique to the odor call SQ measure. In contrast to the penalty formula for all other SQ measures, the penalty formula for the gas odor call SQ measure excludes a distribution company's historical performance and the use of a deadband. Instead, the gas odor call SQ measure imposes a uniform standard for all gas distribution companies.

We do not agree with the Joint Utilities' argument that odor calls should be treated the same as SAIDI and SAIFI on the basis of all three being indicators of "reliability." Odor call

response time measures the gas distribution company's ability to correct a potential and immediate safety hazard, which goes beyond the need to maintain reliable service. The Department's use of a distinct penalty formula is intended to send a specific public safety signal. Therefore, the Department does not authorize gas distribution companies to use superior performance in other SQ measures as an offset to deficient performance in responding to odor calls.

Nevertheless, the Department recognizes the performance-incentive value in allowing gas distribution companies to use superior performance in the odor call SQ measure as an offset to deficient performance in other SQ performance measures. See Incentive Regulation D.T. E. 94-158, at 4 (1994). The gas distribution companies will have an incentive to make continued improvements in the odor call SQ measure, thereby enhancing customer safety. Therefore, the Department authorizes gas distribution companies to use superior performance in responding to odor calls as an offset for deficient performance in other SQ measures.

C. <u>Customer Service Guarantees</u>

In the June 2001 Order at 38, the Department directed gas and electric distribution companies to implement customer service guarantees for two customer service measures:

(1) failure to keep service appointments; and (2) lack of notification of planned service interruptions. If a gas or electric distribution company fails to keep a service appointment or fails to notify customers of planned service interruptions, those customers affected by the failure will receive a direct payment from the company of \$25.00. <u>Id.</u> The Department also

encouraged gas and electric distribution companies to include additional customer service guarantees as part of their SQ filings. <u>Id.</u>

The Joint Utilities request clarification as to the manner in which customer service guarantees will be incorporated into the SQ penalty mechanism (Motion at 8). The Joint Utilities and MECo contend that the Department's directive to institute customer service guarantees must be consistent with the provisions of G.L. c. 164, § 1E, in that the total of all penalties (those made as part of the customer service guarantees and those associated with the performance measures) cannot exceed the statutory maximum penalty of two percent of a company's annual transmission and distribution revenues (id.; MECo Letter at 2). The Joint Utilities reason that if payments made through customer service guarantees are in addition to the broad-based penalty mechanism provided for in the SQ plan, the "double-penalizing" would be contrary to the Department's intent that customer service guarantees serve as a "complement" to the broad-based penalty mechanism found in the SQ plan (Motion at 9, citing June 2001 Order at 37; MECo Letter at 2). Therefore, the Joint Utilities and MECo request that the Department clarify the June 2001 Order so that any penalties paid out under customer service guarantees are counted as part of the statutory limit for penalties (Motion at 9; MECo Letter at 2).

General Laws c. 164, § 1E(c) authorizes the Department to levy a penalty on any distribution, transmission, or gas company which fails to meet the SQ standards prescribed by the Department, in an amount up to and including the equivalent of two percent of such company's transmission and distribution service revenues for the previous calendar year.

While the June 2001 Order requires customer service guarantees for two service categories, our Order is silent as how payments made under customer service guarantees would apply to the revenue penalties that could be incurred under the broad-based SQ plans. Accordingly, the Department grants the Joint Utilities's request for clarification on this issue. Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous so as to leave doubt as to its meaning. D.P.U. 92-1A-B at 4; D.P.U. 89-67-A at 1-2.

In the June 2001 Order at 37, the Department recognized that customer service guarantees are complementary to the revenue penalty provisions authorized pursuant to G.L. c. 164, § 1E(c). The June 2001 Order at 37 states that a pattern of customer service guarantee payments associated with a particular SQ measure serves to alert utility management to the need for corrective action, thereby averting the imposition of a broad-based penalty for that SQ category in a distribution company's annual filing. The customer service guarantees and broad-based penalty mechanisms are components of the penalty provisions authorized pursuant to G.L. c. 164, § 1E(c), which caps the maximum penalty at two percent of a distribution company's distribution and transmission revenues for the previous calender year. Accordingly, the Department finds that clarification is appropriate. The Department directs each distribution company to submit a SQ plan wherein payments actually made in the previous year under a customer service guarantee program are subtracted from the statutory two percent maximum level of revenue penalty. The remainder shall be available for any revenue penalty

against any distribution company that fails to meet the SQ standards as outlined in the June 2001 Order.

IV. STAFFING REQUIREMENTS

General Laws c. 164, 1E(b) states that, in complying with SQ standards established by the Department, no labor displacements or reductions below staffing levels in existence on November 1, 1997 may take place unless they are part of a collective bargaining agreement or otherwise approved by the Department. In the August 2000 Order at 16, the Department stated that staffing levels will be determined consistent with G.L. c. 164 § 1E(b), primarily by collective bargaining agreements, and on a case by case basis. We reiterated this position in our June 2001 Order. <u>Id.</u>, Att. 1, at 7.

UWUA proposes that the following language be incorporated into the Department's SQ guidelines:

Staffing levels will be established on a company-specific basis. In the event that the company has a collective bargaining agreement with its organized employees that specifies staffing levels and those staffing levels are in compliance with that agreement, the company will be deemed in compliance with G.L. c. 164, § 1E(b) as to those employees, unless the Department determines that those staffing levels will cause service quality and reliability to decline below levels that prevailed on November 1, 1997. In the event that any applicable collective bargaining agreement does not specify staffing levels, and further as to any employees not covered by a collective bargaining agreement, any company that has reduced its employee staffing levels below those prevailing on November 1, 1997 bears the burden of demonstrating that such staff reductions have not disrupted and will not disrupt service quality standards established by the Department.

(UWUA Letter at 4).

In support of its proposal, UWUA contends that not all employees whose positions directly affect SQ are covered by collective bargaining agreements (UWUA Letter at 2). Therefore, according to UWUA, it is a <u>non sequitur</u> to determine staffing levels based on collective bargaining agreements. UWUA also argues that most collective bargaining agreements do not address staffing levels (<u>id.</u>, <u>citing</u> UWUA Reply Comments, September 13, 2000, at 7-8). Thus, the UWUA contends that setting benchmark staffing levels by reference to collective bargaining agreements is inadequate. No other commenter addressed this issue.

UWUA's proposal stems from its concerns that the June 2001 Order, Attachment 1, § IV, links staffing levels solely to collective bargaining agreements and fails to provide adequate assurance that utilities will maintain adequate staffing levels to prevent a deterioration of service from those levels experienced on November 1, 1997. In our August 2000 Order at 16, however, the Department expressly stated that staffing levels will be determined consistent with G.L. c. 164, § 1E(b), on a case by case basis, in addition to collective bargaining agreements. The Department notes, however, that the language of Attachment 1, § IV regarding staffing levels does not track the August 2000 Order verbatim. Therefore, it is appropriate for the Department to clarify this matter because our Order contains language that may be sufficiently ambiguous so as to leave doubt as to its meaning. D.P.U. 92-1A-B at 4; D.P.U. 89-67-A at 1-2.

As stated in our August 2000 Order at 16, staffing levels will be determined consistent with G.L. c. 164 § 1E(b), primarily by collective bargaining agreements, and on a case by case basis. Staffing levels are not linked exclusively to collective bargaining agreements. The

Department directs distribution companies to submit SQ plans with staffing level benchmarks based on staffing levels in existence on November 1, 1997, except as provided by collective bargaining agreements or other statutory provisions.

G.L. c. 164 § 1E(a) mandates benchmarks for "employee staff levels and employee training" as part of each gas or electric company's service quality standards. Subsection (b) of G.L. c. 164 § 1E expands upon this point by noting that compliance with subsection (a) precludes a gas or electric distribution company's reducing its staffing level below the level that existed on November 1, 1997 - unless *either* collective bargaining so permits *or* a distribution company proves in evidentiary hearings before the Department that a staffing level below that of November 1, 1997 will not adversely affect the quality of service required by the Department's § 1E standards.

V. <u>ORDER</u>

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That the joint motion for clarification by the Joint Utilities regarding the offset feature of the penalty mechanism is DENIED; and it is

FURTHER ORDERED: That the joint motion for clarification by the Joint Utilities regarding the offset feature of the odor call SQ penalty formula is GRANTED; and it is

FURTHER ORDERED: That the joint motion for clarification by the Joint Utilities regarding the customer service guarantees is GRANTED; and it is

FURTHER ORDERED: That the motion for clarification by Utility Workers Union of America regarding the benchmark for staffing levels is GRANTED; and it is

FURTHER ORDERED: That the gas and electric distribution companies comply with all the directives in this Order.

By Order of the Department,
James Connelly, Chairman
W. Robert Keating, Commissioner
Paul B. Vasington, Commissioner
Eugene J. Sullivan, Jr., Commissioner
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).