STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

CASE 95-G-0756 - In the Matter of the of the Rules and Regulations of the Public Service Commission, Contained in 16 NYCRR, in Relation to Complaint Procedures--Appeal by Tower Owners, Inc. of the Informal Decision Rendered in Favor of The Brooklyn Union Gas Company, filed in C 26358 (773683)

COMMISSION DETERMINATION ON REHEARING
(Issued and Effective September 23, 1998)

This is a request for Rehearing by Tower Owners Inc. (Tower Owners or Complainant), to the Commission from a determination of complainant's appeal issued on March 12, 1997, which upheld an informal hearing decision rendered July 19, 1995. The hearing officer upheld a gas penalty charge against Tower Owners, Inc. A copy of our prior determination is attached. On rehearing complainant makes essentially the same arguments that were made on appeal. Although Tower Owners acknowledges use of gas service during an interruption period, complainant argues that the penalty provision should not be enforced because: (1) it is not applicable in exigent circumstances; (2) Brooklyn Union's agent gave the necessary permission to consume the gas; (3) a strict liability interpretation of the tariff language is unduly harsh; and (4) Brooklyn Union may waive its penalty provisions.

According to the complainant, after notifying Brooklyn Union of the equipment breakdown, it took immediate action to repair its failed equipment. Tower Owners maintains that the penalty provisions do not apply in the circumstances of the instant case but rather are intended to address scheduled repairs and maintenance.

Tower Owners' claim that the penalty provision is not applicable during emergency situations is unpersuasive. In the absence of written permission, the tariff language explicitly allows at most only a four-hour period for the consumer to make necessary repairs without incurring a penalty. In addition, other provisions clearly require the customer to "install and maintain at all times a sufficient standby alternate fuel supply and dual-fuel equipment...," and "be solely responsible for the service, maintenance, repairs, and upkeep of all dual-fuel equipment...."

With respect to the apparent authorization to consume the gas while repairs were being undertaken, Tower Owners reiterates its argument that it relied on the statements and actions of Brooklyn Union's agent, who, it claims, manually overrode the controls to switch the heating system back to gas and, once the repairs were completed, switched it back to oil. Because the agent had the power and capability to manually override the oil heating system, and restore gas heat, the complainant believes that the requirement for written authorization was waived and Brooklyn Union should be estopped from denying the validity of such authorization or waiver.

In support of its position, Tower Owners cites Hallock v. State which found "[e]ssential to the creation of apparent authority are words or conduct of the principal, communicated to a third party that gave rise to the appearance and belief that the agent possesses authority to enter into a transaction." Additionally, the complainant cites Greene v. Hellman for the proposition that "[a]parent authority may exist in the absence of authority in fact and if established, may bind one to a third party with whom the purported agent had contracted even if . . . the third party is unable to carry the burden of proving that the agent actually had authority."

Neither of these holdings is applicable in the instant case. Brooklyn Union's agent acted in compliance with the tariff, which states that, if the interruption would create a danger or threat to health or safety, the company shall have the option to leave the consumer on gas and to charge the penalty rate for such consumption (see footnote p. 2). Not only is this language set forth in the tariff but, in addition, a copy of it was sent to Tower Owners at the beginning of the heating season along with a cover letter emphasizing the customer's responsibilities and the penalty for failure to comply. In view of the expressed language in the tariff, the actual notification provided by mailing a copy of the tariff to the complainant, and the agent's compliance with that language, it would be unreasonable to conclude that Tower Owners was uninformed as to the agent's authority and that the agent's actions created apparent authority that would relieve Tower Owners of its contractual obligations.

In its third line of reasoning, the complainant argues the imposition of a penalty in the absence of a showing of negligence or wrongdoing would essentially hold it to a strict liability standard for which there is no legal justification. The rationale behind strict liability, Tower Owners asserts, is as follows:

> [Strict liability] has found expression where the defendant's activity is unusual and abnormal in the community, and the danger which it threatens to others is unduly great-and particularly where the danger will be great even though the enterprise is conducted with every possible precaution. The basis of the liability is the defendant's intentional behavior in exposing those in his vicinity to such a risk. The conduct which is dealt with here occupies something of a middle ground. It is conduct which does not so far depart from social standards as to fall within the traditional boundaries of negligence-usually because the advantages which it offers to the defendant and to the community outweigh even the abnormal risk; but which is still so far socially unreasonable that the defendant is not allowed to carry it on without making good any actual harm which it does to his neighbors.

According to Tower Owners, the rationale has no application to the facts at hand.

We view the penalty provision as a contract term grounded on sound principles. Brooklyn Union can sell gas at a substantial discount during off-peak periods because it need not provide distribution capacity and volumes of gas to the interruptible customers during peak periods. To insure effective compliance, SC No. 6B customers agree to a charge of nine times the tailblock rate if they fail to switch over to an alternate fuel when the temperature drops to a predetermined level. Consequently, Tower Owners' tort related argument is rejected.

Tower Owners' fourth argument i.e. that Brooklyn Union may waive its penalty provisions was addressed previously. Tower Owners claims that the tariff's four-hour grace period can be extended without written authorization because in some circumstances the complainant believes that it would be impossible to obtain written authorization from Brooklyn Union, for example, at night or on a weekend. The complainant claims that there is nothing in the tariff or the New York Code of Rules and Regulations that would prohibit Brooklyn Union from waiving a penalty provision in its tariff. However, as we noted, a utility is bound by law (see, for example, 66(12)(d) of the Public Service Law) to bill in accordance with its tariff.

Finally, the complainant requests an opportunity to present oral argument because it believes that our decision contains factual findings that rest on conjecture, are not supported by substantial evidence, and is erroneous as a matter of law. We disagree. The fact that Tower Owners violated the

relevant tariff restrictions is clear beyond any doubt and the penalty imposed was that set forth in the tariff. In its petition, the complainant does not even offer any specific explanation of why we should conclude our decision is based on erroneous facts. Consequently, the complainant has not justified any further proceedings, and its request for oral argument is denied.

In order to assure that all aspects of the case have been properly addressed, staff has thoroughly reviewed the entire complaint file. We determine that the gas penalty charge was properly applied. Thus we affirm our prior determination to uphold the hearing officer's determination. Therefore complainant's request for rehearing is denied.