

The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 20-58-E

June 14, 2021

Inquiry of the Department of Public Utilities into Establishing Policies and Practices for Electric and Gas Companies Regarding Customer Assistance and Ratemaking in Connection with the State of Emergency Regarding the Novel Coronavirus (COVID-19) Pandemic.

ORDER CLARIFYING THE TERM OF THE SERVICE SHUT-OFF MORATORIUM

I. SUMMARY

By this Order, the Department of Public Utilities (“Department”) determines that the current moratorium prohibiting investor-owned gas, electric, and water distribution companies from shutting off utility service to residential customers, as duly established by the Chairman and ratified by the Department pursuant to its authority under G.L. c. 25, § 4B (“Section 4B”), shall appropriately remain in place through its set termination date of June 30, 2021. Further, in the exercise of our superintendence authority pursuant to G.L. c. 164, § 76 and G.L. c. 165, § 4, we find that the public interest supports continuation of the moratorium through its established termination date of June 30, 2021.

II. INTRODUCTION

On March 10, 2020, pursuant to St. 1950, c. 639 and G.L. c. 17, § 2A, Governor Baker declared a state of emergency in Massachusetts related to the COVID-19 pandemic (“State of Emergency”). Executive Order No. 591. Subsequently, on March 24, 2020, Governor Baker granted the Chairman of the Department authority pursuant to Section 4B to take necessary action to assure public safety and welfare through the priority restoration or continuing availability of gas, electric, and water utility services. The same day, the Chairman issued an Order prohibiting investor-owned gas, electric, and water distribution companies from shutting off utility service, or threatening to shut off utility service, to any customers for non-payment of bills until the State of Emergency is lifted or further communication is provided by the Department (“Shut-Off Moratorium”). Chairman's First Set of Orders under G.L. c. 25, § 4B (March 24, 2020).

Following a series of Orders issued pursuant to Section 4B, on February 26, 2021, the Chairman issued an Eighth Set of Orders extending the Shut-Off Moratorium. Specifically, the Chairman issued the following directives to the investor-owned gas, electric, and water distribution companies: (1) until July 1, 2021, or until the companies receive further communication under Section 4B, not to shut off gas, electric, or water service to any of their residential customers for failure to pay a bill or any portion of a bill; (2) until July 1, 2021, or until the companies receive further communication under Section 4B, all communications to residential customers that discuss the shut off of gas, electric, or water service for failure to pay a bill or any portion of a bill the companies issued to a customer shall state that residential shutoffs for nonpayment shall not occur until or after July 1, 2021 and shall list all payment and repayment programs and debt-forgiveness options available to residential customers; and (3) at least five business days before communications are sent to any residential customers, the companies shall email the Department the model or template for all communications to residential customers under item (2) above.¹ Chairman's Eighth Set of Orders under G.L. c. 25, § 4B (February 26, 2021). The Commission has ratified the Chairman's Eighth Set of Orders, prescribing that the Shut-Off Moratorium will extend through June 30, 2021. Ratification of the Chairman's Eighth Set of Orders under G.L. c. 25, § 4B (April 6, 2021).

On May 28, 2021, Governor Baker issued an Order terminating the State of Emergency effective June 15, 2021 and rescinding most remaining COVID-19 restrictions. Order Announcing the Termination of the March 10, 2021 State of Emergency and Rescinding

¹ Specifically, the model or template shall be emailed to the Director of Consumer Division and the General Counsel.

COVID-19 Executive Orders Issued Pursuant to the Massachusetts Civil Defense Act,

Executive Order No. 69, Governor Charles D. Baker (May 28, 2021).

III. SHUT-OFF MORATORIUM

On April 6, 2021, before Governor Baker issued an Order terminating the State of Emergency effective June 15, 2021, the Commission ratified the Chairman's Eighth Set of Orders and prescribed that the Shut-Off Moratorium will extend through June 30, 2021. Ratification of the Chairman's Eighth Set of Orders (April 6, 2021). Accordingly, from April 6, 2021, residential customers and the investor-owned gas, electric, and water distribution companies reasonably anticipated that the Shut-Off Moratorium would remain in place until June 30, 2021. With Governor Baker's intervening Order terminating the State of Emergency effective June 15, 2021, the Department recognizes the need to clarify the term of the Shut-Off Moratorium to alleviate possible confusion among residential customers and the investor-owned gas, electric, and water distribution companies.

The broad mission of the Department is to regulate in the public interest. Zachs v. Department of Public Utilities, 406 Mass. 217, 223 (1989); Lowell Gas Light Company v. Department of Public Utilities, 319 Mass. 46, 52 (1946) (the function of the Department is the protection of the public interest). Further, the Department has previously recognized the need for regulatory action to ensure that jurisdictional utilities and customers are insulated from the financial impacts of the COVID-19 pandemic. Order on the Customer Assistance Plan from the First Report of the Customer Assistance and Ratemaking Working Group, D.P.U. 20-58-B at 13; D.P.U. 20-58-A at 5; Order Opening Inquiry and Establishing Working Group, D.P.U. 20-58, at 1-3 ("NOI"). For the last year, residential customers and

companies have been operating under the Shut-Off Moratorium rather than under the Department's ordinary billing and termination regulations. 220 CMR 25.00. Considering the longevity of the Shut-Off Moratorium and the intervening termination of the State of Emergency, the Department finds that failing to appropriately clarify the term of the Shut-Off Moratorium would produce confusion among residential customers and companies, the potential for disparate response among companies, and the unintended and inappropriate consequence of disparate treatment among residential customers.

IV. ANALYSIS AND FINDINGS

With this Order, the Department determines that the Shut-Off Moratorium shall remain in effect through its currently set termination date of June 30, 2021. The Department finds that the plain language of Section 4B and the Department's broad supervisory authority exercised in the protection of the public interest, together with the proximity of the end of the State of Emergency and the end of the Shut-Off Moratorium, support continuance of the Shut-Off Moratorium through its established termination date of June 30, 2021.

Pursuant to Section 4B, when a state of emergency is declared by the Governor, the Governor may authorize the Chairman of the Department to take such action that the Chairman may consider necessary to assure public safety and welfare through the priority restoration or continuing availability of gas, electric, and water utility services. G.L. c. 25, § 4B. Section 4B provides that any Orders issued by the Chairman shall expire within 30 business days unless ratified by the Commission prior to the 30-day expiration, and that such ratification must prescribe an end date for each Order. G.L. c. 25, § 4B. As described above, on March 24, 2020, following Governor Baker's March 10, 2020 State of Emergency declaration, the Governor

granted the Chairman authority to act under Section 4B. The same day, the Chairman duly issued an Order instituting the Shut-Off Moratorium, which preceded a series of Orders issued by the Chairman under Section 4B, culminating in the Chairman's Eighth Set of Orders issued on February 26, 2021. Chairman's Eighth Set of Orders (February 26, 2021). On April 6, 2021, within 30 business days, the Commission duly ratified the Chairman's Eighth Set of Orders and provided that the Shut-Off Moratorium and related directives shall be effective until and including June 30, 2021. Ratification of the Chairman's Eighth Set of Orders (April 6, 2021).

Section 4B is silent concerning the effect of an intervening end of a state of emergency on actions taken by the Chairman of the Department. Further, there is no Massachusetts case law interpreting Section 4B, and Massachusetts case law interpreting the Governor's emergency powers is not well developed.² In the absence of controlling case law, Massachusetts courts often examine the plain meaning of statutory language and draw upon canons of construction to discern the intent of the Legislature. Commonwealth v. Hamilton, 459 Mass. 422, 432 (2011), quoting 2A N.J. Singer, Sutherland Statutory Construction § 47:16, at 352–353 (7th ed. 2007) (describing interpretive maxim of noscitur a sociis, i.e., "it is known by its associates"); Banushi v. Dorfman, 438 Mass. 242, 244 (2002). See also Black's Law Dictionary 631, 1224 (10th ed. 2014). The Massachusetts Supreme Judicial Court ("SJC") employs two well-defined principles when assessing the legality of an administrative agency's properly promulgated regulations. Goldberg v. Board of Health of Granby, 444 Mass. 627, 633 (2005). First, the SJC

² Governor Baker relied upon St. 1950, c. 693, §§ 5, 6, 7, 8, 8A ("Civil Defense Act") and G.L. c. 17, § 2A in declaring this State of Emergency. Governor's Declaration of Emergency, Governor Charles D. Baker, (March 10, 2020).

determines, using conventional tools of statutory interpretation, whether the Legislature has spoken with certainty on the topic in question, and, if it concludes that the statute is unambiguous, the court gives effect to the Legislature's intent. Goldberg, 444 Mass. 627, 633; Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 646 (2000) (“An agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts”); Massachusetts Hospital Association v. Department of Medical Security, 412 Mass. 340, 346 (1992). Second, if the Legislature has not directly addressed the pertinent issue, the SJC determines whether the agency's resolution of that issue may be reconciled with the governing legislation. Goldberg, 444 Mass. 627, 633, citing Nuclear Metals, Inc. v. Low-Level Radioactive Waste Meeting Board, 421 Mass. 196, 211 (1995). See also Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984) (describing two-part test used in federal courts to ascertain validity of challenged agency regulations). Regulations should not be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate. Briggs v. Commonwealth, 429 Mass. 241, 253 (1999), citing Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595-596 (1992). As a result, a “state administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing,” unless a statute unambiguously bars the agency's approach. Berrios, 411 Mass. 587, 595-596 (1992), quoting A. Cella, Administrative Law and Practice § 747 (1986).

In plain language, Section 4B identifies when the Chairman has authority to act. The Chairman's authority to act is predicated on the Governor's state of emergency declaration.³ Section 4B also, in plain language, addresses the duration of a Chairman's duly authorized action. Any orders issued by the Chairman under said chapter expire within 30 business days unless ratified by the Commission prior to the 30-day expiration, and the ratification must prescribe an end date for each order. Under this State of Emergency, the Commission ratified the Chairman's Eighth Set of Orders and provided that the Shut-Off Moratorium and related directives shall be effective until and including June 30, 2021. An interpretation of Section 4B that understands a Chairman's Orders under Section 4B to immediately dissolve upon dissolution of a state of emergency would be in conflict with the plain language of the statute granting the full Commission authority to prescribe an end date to a Chairman's Order. The Legislature does not condition that authority on the continuation of a state of emergency. It is reasonable for the Department to interpret the statute as intended to grant the Commission such authority notwithstanding a state of emergency's continuation or termination. The statute does not "unambiguously bar" such an interpretation. Further, because of the nexus of a state of emergency and Section 4B, the 30-day effective period for a Chairman's Order is sufficiently short that the continued effectiveness of the terms of a Chairman's Order beyond any intervening end to the State of Emergency would not be disruptive and would allow for useful transition to reinstated practices and policies.⁴

³ Consistently, the Governor's termination of a state of emergency will also terminate the Chairman's authority to act under Section 4B.

⁴ Even though the Commission prescribed the same date as the Chairman's Order, Section 4B does not bar the Commission from prescribing a different date that could be

Our analysis supports continuation of the Shut-Off Moratorium through its currently set termination date of June 30, 2021. In addition, to the extent necessary, the Department exercises its broad superintendence authority over jurisdictional gas and electric companies pursuant to G.L. c. 164, § 76 and over water companies pursuant to G.L. c. 165, § 4 to continue the Shut-Off Moratorium through its currently set termination date of June 30, 2021.⁵ For the foregoing reasons, permitting the Shut-Off Moratorium to expire on short notice due to the intervening termination of the State of Emergency on June 15, 2021, after the Department has already prescribed a set termination date on June 30, 2021, would not be in the public interest. D.P.U. 20-58-A at 6. We find that the termination date of June 30, 2021, as set by the Commission, provides an anticipated and appropriate transition from the customer protections instituted by the Department at the outset of the State of Emergency to expected resumption of normal utility operations. The public interest requires that the Shut-Off Moratorium remain in place through its established termination date of June 30, 2021.

While the Shut-Off Moratorium has prevented the investor-owned gas, electric, and water distribution companies from shutting off service to residential customers, the Department's regulations at 220 CMR 25.00 outline ordinary billing and termination procedures for

further out in time. Nonetheless, because of the nexus stated above, it would not be reasonable to read that the Legislature has granted the Commission authority to keep in effect the terms of a ratified Order for a significant period of time, although prescribed, after the end of a state of emergency.

⁵ The Department's exercise of its supervisory authority extends "to the interpretation and elaboration of the panoply of powers and duties confided to the [D]epartment." Cambridge Electric Light Company v. Department of Public Utilities, 363 Mass. 474, 494 (1973).

investor-owned gas, electric, and water companies and for municipal gas and electric companies. Beginning on July 1, 2021, following the termination of the Shut-Off Moratorium at the end of June 30, 2021, the Department's ordinary billing and terminations procedures applicable to all investor-owned gas, electric, and water companies and municipal gas and electric companies will apply. 220 CMR 25.00.

Even after the Shut-Off Moratorium ends, however, there are numerous protections for residential customers, particularly customers facing financial hardship, that will remain in place. See, e.g., D.P.U. 20-58-B at 13-18; G.L. c. 164, § 124F; 220 C.M.R. 25.00. Consistent with the Chairman's Eighth Set of Orders, the gas and electric distribution companies shall continue to develop and submit to the Department model or template communications for all residential customers that: (1) informs such customers regarding the upcoming termination of the Shut-Off Moratorium; and (2) informs such customers regarding any and all company programs available for customers with arrearages. To the extent practicable, in consideration of the timing for the end of the Shut-Off Moratorium and the resumption of the ordinary billing and termination procedures, the gas and electric distribution companies should consult with the Customer Assistance and Ratemaking Working Group in developing model or template communications.⁶

⁶ The electric and gas distribution companies, which are part of the Customer Assistance and Ratemaking Working Group established in D.P.U. 20-58, include the following: Fitchburg Gas and Electric Light Company d/b/a Unitol; Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid; Boston Gas Company d/b/a National Grid; NSTAR Gas Company d/b/a Eversource Energy; NSTAR Electric Company d/b/a Eversource Energy; Eversource Gas Company of Massachusetts d/b/a Eversource Energy; Liberty Utilities (New England Natural Gas Company) Corp. d/b/a Liberty Utilities; and The Berkshire Gas Company. The other members of the Customer Assistance and Ratemaking Working Group are the following: the Office of the Attorney General; the Department of Energy Resources; the National Consumer Law Center; the

The gas and electric distribution companies shall submit such model or template communications plan to the Department at least five days before sending such planned communications to their residential customers.⁷

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the currently effective prohibition against the shut off of utility service, or threatening to shut off utility service, to residential customers by investor-owned gas, electric, and water distribution companies shall continue through its current term of June 30, 2021, as provided herein; and it is

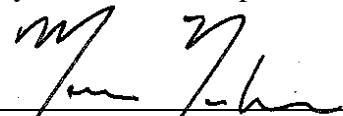
FURTHER ORDERED: That each investor-owned gas and electric distribution company subject to the jurisdiction of the Department under G.L. c. 164 shall comply with the directives contained in this Order; and it is

Low-Income Energy Affordability Network; and the Associated Industries of Massachusetts.

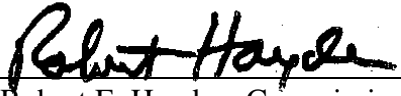
⁷ Specifically, the model or template shall be emailed to the Director of Consumer Division and the General Counsel.

FURTHER ORDRED: That the Secretary of the Department shall send a copy of this Order by electronic means to the distribution list for D.P.U. 20-58 and to the distribution list in receipt of the Chairman's Eighth Set of Orders under G.L. c. 25, § 4B issued on February 26, 2021 and ratified by the Commission on April 6, 2021.

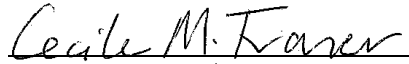
By Order of the Department,



Matthew H. Nelson, Chair



Robert E. Hayden, Commissioner



Cecile M. Fraser, Commissioner

An 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 the 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. G.L. c. 25, § 5.