

DM 04-080

OFFICE OF CONSUMER ADVOCATE

**Petition for Declaratory Ruling
Regarding Customer Funds Paid to CashPoint Network Services, Inc.**

Order Granting Relief in Part

ORDER NO. 24,331

June 4, 2004

I. BACKGROUND AND PROCEDURAL HISTORY

The Office of Consumer Advocate (OCA) instituted this proceeding before the New Hampshire Public Utilities Commission (Commission) on behalf of residential ratepayers, seeking declaratory relief on an expedited basis with respect to certain funds paid by utility customers to a third-party agent that is the subject of a bankruptcy petition filed by its creditors. At issue is CashPoint Network Services (CashPoint), the subject of an involuntary petition filed in the U.S. Bankruptcy Court for the Southern District of New York on April 22, 2004.

According to the OCA, CashPoint operated a number of payment points within New Hampshire at which customers of various businesses, including some public utilities, could make bill payments that would be electronically transmitted to the billing companies. The Commission issued a consumer alert on May 4, 2004, warning utility customers that funds remitted to CashPoint might not reach their utility. The Commission advised customers to contact their utility to verify that payments already made to CashPoint had been received by their utilities and credited to their accounts. The consumer alert noted that among the New Hampshire utilities that had previously received customer payments through CashPoint were Verizon New Hampshire (Verizon), EnergyNorth Natural Gas, Inc. d/b/a KeySpan Energy Delivery New

England (KeySpan), Public Service Company of New Hampshire (PSNH) and Granite State Electric Company (GSEC).

The OCA petition averred that it learned from the Commission's consumer affairs division that an undetermined number of New Hampshire utility customers had made payments at CashPoint locations (which involved automated teller machines (ATMs) or retail establishments) that had not been forwarded to the utilities in question. Invoking RSA 374:2 and 374:3, the OCA requested that the Commission make certain determinations with respect to CashPoint that would have the effect of requiring the utilities to credit customers with any payments made through CashPoint, regardless of whether the funds actually reached the utilities.

On May 11, 2004, the Commission issued an order of notice asking for comments on the OCA petition. The Order of Notice waived, in part, the ten day period for filing objections in accordance with N. H. Admin. Rule Puc 203.04 (g) and also waived, in part, the fourteen day notification requirement of N.H. Admin. Rules Puc 203.01 (a). On May 14, 2004, comments were filed by GSEC, KeySpan, Verizon, PSNH, Northern Utilities (Northern), and Unitol. On May 17, 2004, Comcast Phone of NH (Comcast) filed comments.

II. POSITIONS OF THE PARTIES

A. Office of Consumer Advocate

The OCA asks the Commission to determine that by accepting customer payments via CashPoint the utilities in question created an agency relationship with CashPoint such that, for purposes of utility bill payment, funds tendered by customers to CashPoint should be deemed to have been tendered to the utilities themselves. According to the OCA, this agency relationship arises out of the written contract between CashPoint and the utility or, in the absence

of such a contract, an implied agency was effectuated when the utility began accepting payment through CashPoint. The OCA requests that the Commission determine that payments to CashPoint be deemed a payment to the utility, that the risk of any loss of funds as a result of the bankruptcy be vested in the utilities and that any utility receiving reasonable evidence that a customer payment was made to CashPoint must credit the payment to the customer's account. According to the OCA, it is important that the Commission act expeditiously so as to clarify that it is the utilities (rather than customers) which must pursue recovery of any unremitted CashPoint funds in the bankruptcy proceeding. The OCA also notes that, on a more long-term basis, it is appropriate for the Commission to take up the issues raised here in Docket No. DM 03-176, the Commission's pending investigation into utility billing practices.

B. Granite State Electric Company

According to GSEC, CashPoint is not an authorized payment agent of the Company but some GSEC customers may have made payments using the CashPoint system in the past. GSEC contends that it has no contractual obligation to honor any unreceived customer payments made through the CashPoint but will nevertheless do so upon receipt of evidence of payment from the affected customer.

GSEC objects to the OCA's request for a determination that an implied agency relationship existed between CashPoint and any New Hampshire utilities. GSEC argues that, under New Hampshire law, an implied agency relationship only exists when a principal manifests to a third party that: (1) the principal has authorized the purported agent to act on the principal's behalf; (2) the purported agent has consented to act on the principal's behalf; and (3) there is an understanding that the principal will exert some control over the purported agent's

actions. For this proposition, GSEC relies on *Herman v. Monadnock PR-24 Training Council, Inc.*, 147 N.H. 754, 758 (2002) and *Patterson v. Tirollo*, 123 N.H. 623, 627 (1990). GSEC further posits that its relationship with CashPoint meets none of the above standards and that, accordingly, no implied agency relationship exists between CashPoint and GSEC.

GSEC states that it shares the concerns raised by the OCA relative to CashPoint's bankruptcy and the risk of lost or mismanaged customer payments when such payments are being handled by third party payment service providers. GSEC suggests the Commission work with the various parties and any other appropriate authorities to develop an appropriate regulatory structure regarding the handling of payments made via third party payment service providers.

B. KeySpan Energy Delivery New England

KeySpan stated that it would credit customers for payments made through CashPoint payment outlets upon receipt of evidence of payment from the affected customer. KeySpan further stated that it would not disconnect the gas service of any customer for non-payment of a bill if KeySpan was aware that the payment was made at a CashPoint outlet.

KeySpan argues that there is no basis for determining that CashPoint is either an express or implied agent of KeySpan or that KeySpan has any obligation to credit customers for attempted payments made via CashPoint payment outlets. KeySpan avers that it has no contractual relationship with CashPoint in New Hampshire and, as such, views CashPoint outlets as unauthorized payment centers. Additionally, KeySpan states that it has no control over a customer's choice to use third party payment services, such as those provided by CashPoint, and

that the acceptance of payments from those third party payment services chosen by the customer in no way creates an agency relationship between KeySpan and the third party.

Accordingly, KeySpan urges the Commission to reject the reasoning set forth in the OCA's petition and also suggests that, because KeySpan has agreed to honor customer payments made at a CashPoint outlet but not transmitted to the company, the petition is effectively moot, at least as it would pertain to KeySpan.

C. Verizon New Hampshire

Verizon argues that the statements in the petition are unsupported and insufficient as a matter of law to establish the existence of an agency relationship. Citing *Herman v. Monadnock PR-24 Training Council*, 147 N.H. 754, 758-59 (2002), Verizon asserts that the necessary elements to establish agency under New Hampshire law are: (1) authorization from the principal to act on behalf of the agent, (2) the agent's consent to so act; and (3) the understanding that the principal is to exert some control over the agent's actions. According to Verizon, if no evidence is presented to show that an element of control exists, then there is no agency relationship under New Hampshire law. Verizon further notes that the existence of such a relationship is a question of fact rather than law.

Verizon also informed the Commission that it will credit the accounts of customers for payments made via a CashPoint payment outlet but not received by Verizon. Verizon urges the Commission not to grant the relief requested by the OCA, arguing that the legal assumptions outlined in the petition are unsupported and that, because Verizon has voluntarily chosen to honor customer payment made via CashPoint outlet, no order compelling it to take the steps outlined in the petition is necessary or appropriate.

D. Public Service Company of New Hampshire

PSNH also states that it will voluntarily credit customer accounts for verified payments made by its customers via a CashPoint outlet prior to the date of CashPoint's bankruptcy filing. Additionally, PSNH avers that it will take no collection action with respect to the amounts owed nor will any late payment charges be assessed as a result of the payments not being received by PSNH prior to the respective due dates. As a result, PSNH believes that the relief requested by the OCA is moot as it pertains to PSNH.

PSNH states that it has no contractual relationship with CashPoint and, as such, argues that the CashPoint service is no different from any one of a number of bill paying services which a customer may choose to use, such as on-line bill payment services offered by many banks. PSNH reasons that customers choose for their own convenience, to use third parties such as CashPoint for bill paying services. Therefore, according to PSNH, to the extent any agency relationship exists, either express or implied, it is between the customer and CashPoint. PSNH states that it is required by law to accept electronic fund transfers by third parties on behalf of its customers. Therefore, according to PSNH, the fact that funds have been accepted from CashPoint simply demonstrates PSNH's compliance with its legal obligations and does not establish an agency relationship between PSNH and CashPoint. PSNH agrees with the suggestion of the OCA that policies concerning third party payment agents should be addressed in Docket No. DM 03-176.

E. Northern Utilities, Inc.

Northern opposes the petition, arguing that the OCA failed to meet the standards necessary for the Commission to issue a declaratory ruling. Northern relies on *Delude v. Town*

of *Amherst*, 137 N.H. 361 (1993) and *Silver Brothers, Inc. v. Wallin*, 122 N.H. 1138, (1982) for the proposition that a declaratory ruling cannot be issued unless a “present legal or equitable right” and “an adverse claim that is ‘definite and concrete touching the legal relations of parties having adverse interests’” have been demonstrated. According to Northern, the relief requested by the OCA is based on a hypothetical set of facts that does not entitle the OCA to a declaratory ruling. Northern further contends there is no set of facts or law supporting a ruling that an implied agency relationship existed at any time between Northern and CashPoint.

As an alternative, Northern asks that the Commission maintain the status quo, i.e. require utilities not to disconnect customers who demonstrate they made payments via CashPoint payment outlets. Northern advised the Commission that it is committed to maintaining service to those customers affected by CashPoint’s failure to transmit payments made by customers.

F. Unitil Energy Systems, Inc.

Unitil indicated that it does not oppose the petition but requests that relief be limited to those instances where a utility has established a business relationship with a third party payment service for the purpose of collecting customer payments and the customer has made a confirmed payment to the third-party payment service. Unitil agrees that, in such instances, the utility should bear the risk of non-payment, not the customer.

UES does not support the OCA’s request that the Commission find the existence of an implied agency arrangement, arguing that the OCA has not produced evidence that would support such a determination. According to UES, relying on *Daynard v Ness*, 290 F.3d 42, 56 (1st Cir. 2002) (citing *Restatement (Second) of Agency* §8B (1958)) a finding of implied agency requires a determination of whether a utility caused a belief that a third party was acting as its

agent or whether the utility, knowing of such belief and that others might change their position because of it, took reasonable steps to notify customers of the actual facts. UES agrees with the OCA that policies concerning third party payment agents should be addressed in Docket No. DM 03-176.

G. Comcast Phone of New Hampshire

Comcast states that it will not disconnect the service of a customer who has demonstrated that the reason for non-payment resulted from the CashPoint bankruptcy. According to Comcast, this accommodation will allow it the time needed to determine if payments made via a CashPoint outlet but never received by Comcast will, in fact, be remitted by CashPoint in accordance with the instructions of its customers. Comcast further contends this will also permit customers to make alternative arrangements for payment of any outstanding, unpaid bills should CashPoint not remit the payments in question.

Comcast opposes the petition, arguing that the claims made by the OCA fail as a matter of New Hampshire law. According to Comcast, citing *Carrier v. McIlarky*, 141 N.H. 738, 739, (1997), the question of whether an agency relationship has been established is one of fact. Comcast further posits that the necessary factual elements to establish agency involve: (1) express or implied authorization from the principal that the agent shall act for him or her; (2) the agent's consent to so act; and (3) the exercise by the principal of control over the agent's actions.

Comcast suggests that the only agency relationship created was between the customer and CashPoint, not between Comcast and CashPoint. According to Comcast, it had never authorized CashPoint on its behalf, CashPoint had never consented to act on Comcast's behalf, and Comcast had no control over CashPoint's actions. In the absence of evidence that

one party exercised control over the other, Comcast argues that there can be no agency relationship.

III. COMMISSION ANALYSIS

All of the state's electric and gas utilities, as well as the incumbent local exchange carrier serving the majority of New Hampshire telephone customers, have affirmatively stated an intention to credit customers with any sums paid by customers to CashPoint but not received by the utility as a result of the CashPoint bankruptcy proceedings. Exercising our plenary authority over utilities pursuant to RSA 374:3 and recognizing the obligation of utilities to provide just and reasonable service pursuant to RSA 374:1, we note the companies' willingness to honor payments that are verified by receipts. We will accept this resolution provided all payments for which valid receipts are produced are credited to customers regardless of the date on which payments were made. This comports to a significant extent with the relief requested by the OCA. We also anticipate that third party billing issues will be considered in DM 03-176.

In light of the foregoing, we need not determine whether CashPoint was an agent of the utilities for which it has received payments. Nor is it necessary for us to reach the preliminary question of whether the OCA has demonstrated an entitlement to a declaratory judgment in these circumstances. In essence, and as pointed out by KeySpan and PSNH, the remainder of OCA's petition is rendered moot by virtue of the approach developed by the utilities that have appeared in this proceeding.

While it is possible that CashPoint received payments in connection with other New Hampshire utilities that were not remitted to such utilities in light of the bankruptcy proceedings, we are aware of no such situations. Should we learn of any, the Commission's

Consumer Affairs Division is authorized to assist affected customers in the first instance. We would, of course, take up any individual situations that cannot be resolved by the consumer affairs department to the satisfaction of the customers in question. Any such questions are properly reserved for another day.

Based upon the foregoing, it is hereby

ORDERED, that the Commission will take no action on the petition of the Office of Consumer Advocate for a declaratory judgment but will grant alternative relief as described more fully herein.

By order of the Public Utilities Commission of New Hampshire this fourth day of June, 2004.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary