CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

WILLIAM STARK — SC18-60

Plaintiff,

-against- — DECISION AND ORDER

CONSOLIDATED EDISON CO. OF NEW YORK, INC.,

Defendant.

ARTHUR ADELMAN, — SC18-61

Plaintiff,

-against-

CONSOLIDATED EDISON CO. OF NEW YORK, INC.,

Defendant.

Appearances:
Plaintiffs *Pro Se*
Defendant *Alexander Aviles, Esq., Assistant General Counsel, Con Edison*

These are two identical claims for damages for price gouging under General Business Law §396-r. The Court consolidated the trial since, with the

exception of the individual damages, the claims are identical. Plaintiffs are neighbors. They lost their electrical power otherwise supplied by defendant because of snow and wind storm. Because of the power outage, plaintiffs, who had previously purchased natural gas-fed generators, used natural gas to provide power to generators that supplied electricity to their respective homes. This case poses several intriguing issues under General Business Law 396-r.

General Business Law 396-r

GBL §396-r was enacted in L.1979, c. 730, § 1, eff. Nov. 5, 1979 and says,

> Price gouging. 1. Legislative findings and declaration. The legislature hereby finds that during periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances, some parties within the chain of distribution of consumer goods have taken unfair advantage of consumers by charging grossly excessive prices for essential consumer goods and services. In order to prevent any party within the chain of distribution of any consumer goods from taking unfair advantage of consumers during abnormal disruptions of the market, the legislature declares that the public interest requires that such conduct be prohibited and made subject to civil penalties.

New York's law was the first state law explicitly directed at price gouging and was enacted in response to increases in home heating oil prices during the winter of 1978–1979. It was designed to protect consumers from

unconscionable price increases involving essential goods or services during emergencies. Governor's Approval Message #156, Nov. 5, 1979. The law was introduced in the Legislature on November 2, 1979 and signed by the Governor just three days later. Accordingly, there is little legislative history.

New York's law initially applied to retailers offering "consumer goods and services vital and necessary for the health, safety, and welfare of consumers" at an "unconscionably excessive price," and applied during an emergency declared by the governor. In *Matter of State of New York v Strong Oil Co.*, 87 AD2d 374, 451 NYS2d 437 [2nd Dept 1982], the Court found that, with respect to home heating oil, the law was pre-empted since, during the time of the alleged violation, there was a valid and pervasive Federal program in effect with respect to the market and prices of heating oil that both pre-empted and was in conflict with the New York law and thus rendered the New York law unconstitutional with respect to heating oil prices.

When is GBL §396-r applicable?

GBL §396-r(2) say it applies "During any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers . . .." The statute provides that "For purposes of this

section, the phrase "abnormal disruption of the market" shall mean any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, . . ." Here, it is undisputed that there was a "stress of weather" from the snow and wind event. Thus, to prove a violation, the plaintiff must prove a change in the market. This begs the question of what is the market? The statute does not define the relevant market for determining what must be disrupted. *See, e.g., U.S. v. E. I. du Pont de Nemours & Co.,* 353 US 586 [1957](determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected.) Plaintiffs argue the market is electricity, whether generated by the public utility or a private natural gas-fed generator.

Once "abnormal disruption of the market" is found, the Court must determine whether or not the market is one for "consumer goods and services vital and necessary for health safety, etc." The Courts have already determined that electricity is a consumer service necessary for health, safety, etc. In *People v Two Wheel Corp.*, 71 NY2d 693, 530 NYS2d 46 [1988], the Court of Appeals said, "for

many consumers, electrical power is a necessity, not a mere convenience. For example, one consumer bought a generator from respondents to power a nebulizer to treat her 4 ½–year–old son who suffers from chronic asthma. Others suffered from health problems that made it difficult for them to venture out repeatedly to buy fresh food or ice. Electricity to power their refrigerators and freezers was necessary within the meaning of the statute.

Furthermore, the statute provides its own evidence that electricity is considered by the Legislature to be essential: "failure or shortage of electric power" is prominent among the calamities that trigger the price-gouging prohibition. If a power failure or shortage is the cause of a market disruption, the purchase of a generator is precisely the kind of transaction that the statute was designed to regulate. The situation is ripe for overreaching by the merchant, who enjoys a temporary imbalance in bargaining power by virtue of an abnormal level of demand, in terms of both the number of consumers who desire the item and the sense of urgency that increases that desire."

Once an abnormal disruption of the market for consumer goods is found, no party within the chain of distribution of such consumer goods or services or both shall sell or offer to sell any such goods or services or both for an amount

which represents an unconscionably excessive price. That is a question of law. GBL §396-r(3). The Court must base its determination on any of the following factors: (i) that the amount of the excess in price is unconscionably extreme; or (ii) that there was an exercise of unfair leverage or unconscionable means; or (iii) a combination of both. In *People v. Chazy Hardware, Inc*., 176 Misc2d 960, 675 NYS2d 770 [Sup. Court, Clinton County 1998], the seller had previously computed its price for generators by adding its *customary* average margin of 28% profit to its cost. After an ice storm, the seller raised its markup on generators to approximately 93% and 59%. The Court found these increases unconscionably excessive. Even a small increase in price may be unconscionably excessive under price gouging law if the excess was obtained through unconscionable means. *People v Beach Boys Equip. Co*., 273 AD2d 850, 709 NYS2d 729 [4th Dept 2000] (the amount charged by seller was not attributable to additional costs imposed by its suppliers. Seller charged $1,200 for the generators it paid $1,000 for that retails for $550, and that the supplier purchased for $480. Other retailers in the trade area charged less than one half of that price.) A gas price increase markup from 83¢ per gallon to 97¢ and price increase from $2.73 per gallon for regular 87 octane fuel to $3.60 immediately following Hurricane Katrina was found unconscionably excessive. *People v Wever Petroleum, Inc*.,14 Misc.3d 491, 827 N.Y.S.2d 813 [Sup Ct, Albany County 2006].

Under GBL §396-5(3)(b), to prove a prima facie case, the evidence shall include:

(i) the amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market or
(ii) the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area.

Plaintiffs each offered evidence showing that the cost of the natural gas they used was more than the cost of electricity. In fact, due to the bulk pricing of electricity where the cost of electricity rises the less used, plaintiff Adelman's electricity bill increased by 38 cents even though his usage declined by 11Kw.

The issue here is complicated by two factors: (1) the regulated nature of the defendant's price structure & (2) the use of prices for different products. Defendant is public utility regulated by the Public Service Commission (the "PSC"). The PSC may, by order, fix just and reasonable prices, rates and charges for gas or electricity to be charged by such corporation or person, for the service to be furnished. Public Service Law §72. Pursuant to Public Service Law §§65 & 66, electric utilities have a tariff or rate schedule filed with the Public Service

Commission (PSC). The tariff is the State approved contract setting forth the terms and conditions between the utility (Con Edison in the instant case) and its customers. Once accepted by the PSC, the tariff schedule takes on the force and effect of law and governs every aspect of the utility's rates and practices; neither party can depart from the measure of compensation or standard of liability contained therein. Public Service Law, §66 (12). All applicants for electric service from Con Edison accept the terms and provisions in Con Edison's tariff Con Edison's tariff, pursuant to CPLR 4540(d), is prima facie evidence and must be accepted by the Court in rendering any decisions regarding the supply of electricity. *Lee v. Consolidated Edison Company of New York*, 98 Misc2d 304 413 NYS2d 826 [App Term 1st Dept, 1978]. Thus, as long as defendant did not deviate from the published tariff, the Court cannot inquire into its reasonableness or unconscionability. Here, plaintiffs concede that defendant charged the same prices for its electricity and natural gas both before and after the weather event.

Here, the plaintiffs do not argue that defendant charged any price other than what is set forth in the tariff. Since defendant is the sole source for electricity in the franchise area, there is no other electricity readily available in the trade area except through self-generation through, for example, solar, wind, or propane generation.

The plaintiffs complain that the disruption in the electricity market caused them to purchase natural gas. Under GBL §396-5(3)(b), plaintiffs must show, either a gross disparity between the price of natural gas measured by the price at which such consumer goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market, or the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area. The price of electricity is irrelevant to proving a prima facie case. Since natural gas sold by the public utility was fixed by tariff, its price should have been the same during the entire period before, during and after the disruption, absent the issuance of a new tariff and it is conceded it was.

Who can sue under GBL §396-r

GBL §396-r, by its terms, does not provide for a private right of action. If a law does not explicitly provide for a private cause of action, recovery may be had under the statute only if [the] legislat[ure] intent[ed] to create such a right of action. *Brian Hoxie's Painting Co. v. Cato–Meridian Cent. School Dist.*, 76 NY2d 207, 557 NYS2d 280 [1990]. *See also, People by Schneiderman v. Credit Suisse Securities (USA) LLC* , ___ NY3d ____, 2018 WL 2899299, 2018 N.Y. Slip Op. 04272 [June 12, 2018] (the Martin Act [GBL §352] does not create a private right of action in favor of parties injured by prohibited fraudulent practices

and that "a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute."); *Matter of East Ramapo Cent. Sch. Dist. v King*, 130 AD3d 19, 11 NYS3d 284 [3rd Dept 2015], *aff'd on other grounds*, 29 NY3d 938, 51 NYS3d 2 [2017] (there was no private right of action in the Individuals with Disabilities Education Act (20 USC §1400 *et seq*.) that would permit a School District to bring a claim respecting the District's practices for placing students with disabilities); *Pasternack v. Laboratory Corp. of America Holdings*, 27 NY3d 817, 37 NYS3d 750 [2016] (The FAA does not provide a private right of action for violations of FAA drug testing regulations); *Matter of Subway Surface Supervisors Assn. v New York City Tr. Auth.*, 22 NY3d 1182, 986 NYS2d 408 [2014] (Civil Service Law §115, which sets forth the State's policy of "equal pay for equal work", provides no private right of action); *Cruz v. TD Bank*, 22 NY3d 61, 979 NYS2d 257 [2013] (the Exempt Income Protection Act (CPLR 5222) does not give rise to a private right of action); *Schlessinger v. Valspar Corp*., 21 NY3d 166, 969 NYS2d 416 [2013] (General Business Law provision relating to termination of service contracts did not create private right of action); *Matter of Stray from the Heart, Inc. v. Department of Health & Mental Hygiene of the City of N.Y*., 20 NY3d 946, 958 NYS2d 674 [2012] (Animal Shelters and Sterilization Act did not create a private right of action permitting lawsuit by

animal rescue organization); *Metz v. State of New York*, 20 NY3d 175, 958 NYS2d 314 [2012] (Navigation Law provisions concerning inspection of public vessels did not create private right of action in favor of parties killed or injured when tour boat capsized); *City of New York v. Smokes–Spirits.Com, Inc*., 12 NY3d 616, 883 NYS2d 772 [2009] (public health statute precluding shipment of cigarettes into New York State did not create a private right of action permitting City to sue noncompliant cigarette retailers); *McLean v. City of New York*, 12 NY3d 194, 878 NYS2d 238 [2009] (Social Services Law provision requiring registration of family day-care homes created no private right of action); & *Hammer v. American Kennel Club*, 1 NY3d 294, 771 NYS2d 493 [2003] (Agriculture and Markets Law statute precluding animal cruelty did not create a private right of action in favor of dog owner).

The Courts have consistently found that there is no private right of action under GBL §396-r, and any potential claim of price gouging under General Business Law §396–r can only be brought by the Attorney General. *Americana Petroleum Corp. v Northville Indus. Corp*., 200 AD2d 646, 606 NY2d 906 [2nd Dept 1994]; *Atlantic Gas & Wash LLC v 3170 Atl. Ave. Corp*, 37 Misc3d 1226(A), 964 NYS2d 57 [Sup Ct Kings County 2012]; & *275 Clinton Avenue Housing Corp. v. Approved Oil Co. of Brooklyn, Inc.*, 55 Misc3d 1205(A), 55 NYS3d 695

[Civil Ct, Kings County 2017].

Accordingly, the plaintiffs lack standing to sue under GBL §396-r.

In providing the parties with substantial justice according to the rules and principles of substantive law (UCCA 1804, 1807; *see Cosme v Bauer*, 27 Misc 3d 130(A), 2010 NY Slip Op 50638(U) [App Term, 9th Jud Dist April 8, 2010]; *Ross v Friedman*, 269 AD2d 584 [2nd Dept 2000]; & *Williams v Roper*, 269 AD2d 125 [1st Dept 2000]) and under a fair interpretation of the evidence (*see Claridge Gardens v. Menotti*, 160 AD2d 544 [1st Dept 1990] with this Court having had the opportunity to observe and evaluate the testimony and demeanor of the witnesses and to evaluate the credibility of the witnesses, (*Nobile v. Rudolfo Valetin Inc.*, 21 Misc3d 128[A], 2008 N.Y. Slip Op 51962[U] [App Term, 9th and 10th Jud Dists 2008] (*see also, Vizzari v. State of New York*, 184 AD2d 564 [2nd Dept 1992]; *Kincade v. Kincade*, 178 AD2d 510, 511 [2nd Dept 1991]; & *Rotem v. Hochberg*, 28 Misc3d 127(A), Slip Copy, 2010 WL 2681875 (Table) [App Term, 9th and 10th Jud Dists , 2010]), the Court finds that plaintiffs lack standing and have not proven their claims. Defendant's motion to dismiss based on defendant's tariff is denied as the Court need no reach that issue.

Accordingly, it is,

ORDERED and ADJUDGED that the claims of the plaintiffs be and hereby are dismissed.

September 6, 2018

_____
JOSEPH L. LATWIN
Rye City Court Judge

ENTERED

_____
Mary Jo Garrity

Appeals
--An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the Rye City Court Clerk's office. A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken. CPLR § 5515.
--Pursuant to UCCA § 1701 "Appeals in civil causes shall be taken to" the appellate term of the supreme court, 9th Judicial District.
-- An appeal as of right from a judgment entered in a small claim or a commercial claim must be taken within thirty days of the following, whichever first occurs:

1. service by the court of a copy of the judgment appealed from upon the appellant.
2. service by a party of a copy of the judgment appealed from upon the appellant.
3. service by the appellant of a copy of the judgment appealed from upon a party. Where service as provided in paragraphs one through three of this subdivision is by mail, five days shall be added to the thirty-day period prescribed in this section. UCCA § 1703(b).

Exhibits
Exhibits will be held for 30 days by the Clerk. After that time, they may be destroyed, if not picked up or arrangements for their return are not made.