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Fisher, Sheehan & Colton, Public Finance and General Economics

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NOTE TO READERS

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CURRENT PROJECT UPDATES

MISSOURI MERGER CASES: LOW-INCOME OUTREACH

As Missouri's Empire District Electric Company and St. Joseph Light and Power Company move to merge with one of that state's largest utilities, UtiliCorp, one condition of any state regulatory approval of the merger should be implementation of a Benefits Outreach and Screening Software (BOSS) initiative.

Through the BOSS software, now called Chronicles, the customer service personnel of a merged UtiliCorp/EDE/SJLP can help low-income payment-troubled customers identify those public benefit programs for which they are eligible, according to FSC testimony filed on behalf of the state Department of Natural Resources.

The BOSS Capabilities

BOSS is a computer software screening tool that allows a utility to help its low income-consumers respond to inability-to-pay problems. BOSS not only reduces the complexity and time required to identify assistance programs for which utility customers may be eligible, but also greatly increases the ability of customer assistance representatives to ensure that eligible low-income utility customers (or those with special needs) obtain all the services to which they are entitled. BOSS has the capability to:

1. Screen low-income households for potential eligibility for a wide array of community resources, volunteer services, employment and job training opportunities, and utility assistance programs;

2. Print a resource eligibility report for each person, which report lists the programs for which that person is eligible, telephone numbers of the contact person, addresses, times to apply, and required documentation; and

3. Use scanning technology to store brochures and other agency forms so that information about any agency is available at any site.

Indeed, in some places, FSC said, BOSS can generate completed applications to selected benefits programs for those persons identified as potentially eligible and electronically transfer the application data to the appropriate agency for processing. In some places, also, BOSS can use scanning technology to scan client documents (such as birth certificates) into the system and transfer the scanned image along with the completed application to the appropriate agency.

The Benefits of Boss to Utilities

Assuring that low-income consumers have ready access to all benefits to which they are entitled is one way to help those consumers pay their utility bills, both current and past-due. Consumers who gain access to additional household resources are more likely to pay current bills and to reduce their arrears. One Edison Electric Institute (EEI) staffperson cites the Earned Income Tax Credit (EITC) as an example of this phenomenon. The EEI staffperson noted that the EITC, a tax credit available to the working poor, "can be a vital supplement to families that have difficulty affording basic energy services." He reports that in a 1993 Gallup survey of callers to New Jersey's EITC Hot Line, more than 90 percent of EITC recipients used the money to pay household bills. Approximately a quarter used part of the refund to pay utility bills, and a third paid overdue bills.

Other utilities have successfully participated in the implementation of BOSS in their service territories. In October 1996, Public Service Electric and Gas agreed to implement the BOSS system for its New Jersey service territory. In addition, GPU is implementing BOSS throughout its Pennsylvania service territory.

Implementation of BOSS at a merged UtiliCorp is merited as a response to customer harms created by a utility merger.

BOSS as a Response to Merger-Induced Harms

Implementation of the BOSS software will help to address the problems arising from increased consolidation and standardization arising from the utility merger, FSC said. Such an initiative is needed to offset the harms of the merger because an effective strategy to deal with low-income payment troubles depends on flexibility, integration and personalization.

Flexibility refers to the ability to customize both the types of response and the degree of response to individual circumstances. Not all low-income customers have the same inability-to-pay. To respond to a welfare family, a working poor family, a recently unemployed laborer, and a retired widow on Social Security in the same fashion is not likely to be as effective and efficient as being able to respond to individual circumstances. Flexibility is an important component of a strategy to deal with low-income payment troubles.

Integration refers to the ability to call upon different resources to deal with a customer's specific inability-to-pay problems. In addition to recognized state and national energy assistance resources such as LIHEAP, various local communities have local energy assistance available through churches, local governments, and the like. In addition, other resources may be available. For example, households with earned income may take advantage of the Earned Income Tax Credit; renters may take advantage of rent assistance programs. To the extent that program integration increases, the ability to match specific resources with specific problems is enhanced.

Personalized contact is important to identifying individual needs and crafting an appropriate response to those needs. The federal REACH program (administered as part of the federal LIHEAP program), in particular, has taught that individual contact to identify and address family

needs is an important component to reaching beyond the immediate energy crisis and dealing with the ability of a low-income household to become self-sufficient. REACH is the Residential Energy Assistance Challenge Option Program. Funded with federal LIHEAP dollars, REACH is a competitive grant program designed to provide funds for states to adopt holistic approaches to reduce low-income energy burdens and to promote household self-sufficiency.

BOSS was but one component of a comprehensive Community Energy Partnership which the Missouri Department of Natural Resources offered as a response to the UtiliCorp/EDE/SJLP merger. More information on the complete Missouri DNR proposal can be obtained by writing mergers@fsconline.com. More information on the Chronicles software can be obtained by writing or calling the Portsmouth Group, Inc. in Washington D.C. or by writing georgerose@portsmouthgroup.net.

NEW HAMPSHIRE ELECTRIC ASSISTANCE: PROGRAM ADMINISTRATION

A move from the delivery of rate affordability benefits based on energy burdens to the delivery of benefits as a straight percentage discount off a utility bill has not been found to be a necessary or effective administrative cost reduction strategy.

In an analysis prepared for the New Hampshire public service commission, FSC found that this result has obtained because: (1) the delivery of benefits is not the program component that generates the bulk of a program's administrative costs subject to reduction; and (2) a move to a less effectively targeted program creates its own administrative costs and impedes the reduction of administrative costs in more productive areas.

FSC's conclusions were reached after undertaking a review of a series of low-income rate affordability evaluations to determine whether structuring rate affordability benefits as a percentage discount, rather than as a percentage of income burden, has been found to have a substantive impact on the administrative

cost of low-income utility assistance programs.

The evaluations that were reviewed all involved programs from Pennsylvania utilities, so differences in the regulatory regime under which they operate would not be a factor driving program differences. In addition, the evaluations examined programs incorporating different approaches to delivering their universal service benefits, so that the impacts of how such differences might affect the complexity of administration could be considered. Finally, the evaluations were performed by a variety of evaluation firms --any work performed by FSC was excluded-- so that no particular perspective could be said to color the various conclusions.

The companies involved with the FSC review included Columbia Gas (PA); National Fuel Gas (PA); PECO Energy Company; Equitable Gas Company; and the Philadelphia Gas Works.

Of the five programs examined, three based their benefits on energy burdens (as does the New Hampshire EAP), while two provided rate discounts based on usage, but unrelated to affordability.

Program Effectiveness and Administration

The findings of FSC's New Hampshire review included:

1. The method for delivering benefits to low-income customers is not the most expensive part of program administration. In each of the programs, the primary program complexity and expense lay in program recruitment and program intake, not with the determination or delivery of benefits.

2. Program effectiveness cannot be divorced from the cost of program administration. While it is often said that a rate affordability's "process" issues can and should be assessed apart from a program's "impacts" or effectiveness, FSC found, a program's effectiveness can not be entirely divorced from program administration.

This is true because a program's administrative

costs become less on a per participant basis as the length of time a program participant remains in the program increases. Indeed, participant "acquisition" costs have been found to be fully amortized within the second full year of participation. After having reached that cross-over point, the benefits generated by program participation do not go to offset acquisition costs, but instead create system savings, thus redounding to the benefit of nonparticipants.

In the less effective affordability programs, either the cross-over point is never reached, or the length of time when net benefits arise to the program after the cross-over point was reached was minimized.

3. Finally, FSC found that a program's *ineffectiveness* creates its own administrative costs, that would not exist in a program that more effectively addressed inability-to-pay. These costs include not only the costs associated with program removal, but include the recruitment and intake costs for program participants who would "take the place" of the exited participant in a fixed number participant program. Moreover, to the extent that the program is designed explicitly to reduce the costs associated with nonpayment, the *ineffectiveness* of the delivery of program benefits has been found to impede the achievement of those benefits.

Cost-Cutting Recommendations

Given these findings, FSC recommended that specific program design decisions other than changing the structure of benefit delivery can significantly ease program administration and reduce program administrative costs. Amongst the recommendations advanced were:

1. One of the primary program cost cutting mechanisms has been the elimination of in-person application processes. Processes that involve mail-in applications, for example, reduce the front-end cost of the program. Some programs require personal applications for first-time applicants, while providing for a mail-in recertification process.

2. Some programs have eliminated the recertification process for customers whose income is not likely to generate substantive changes over time. One program simplification process that has been adopted, for example, is to allow senior citizens and disabled individuals (neither of whose income is likely to change over time) to be placed on a longer recertification period.

3. Cross-cutting program coordination has been found to be an effective means by which to reduce administrative costs. Establishing categorical eligibility (e.g., allowing for the automatic enrollment of participants in other programs having eligibility criteria equal to or stricter) as well as coordination of intake and income certification (e.g., sharing application forms and/or intake staff) have been found to be effective mechanisms to reduce program administration costs.

More information on the administration reviews provided by FSC to the New Hampshire PSC can be obtained by writing: publications@fsconline.com.

THE ECONOMICS OF CHALLENGING ABUSIVE MOBILE HOME PARK ACTIONS: TO SEEK DAMAGES OR RESTITUTION?

The economics of litigation often counsel for pursuing restitution as a remedy to abusive consumer practices rather than seeking a remedy in the form of "damages."

The issue presented itself to FSC recently through the listing practices engaged in by a mobile home park with respect to the sale of mobile homes on-site by existing park tenants. FSC identified at least two unreasonable and deceptive practices engaged in by the mobile home park in their listing practices. The park engaged in a knowing inclusion of unenforceable lease terms regarding the forced removal of mobile homes more than ten years old. The park further provided dual representation of the mobile home park and the existing tenant seeking to sell a home on-site, thus violating the fiduciary

obligations of undivided service and loyalty.

Profit Maximizing and the Incentive/Litigation Model

According to FSC, a profit-maximizing mobile home park management will undertake any activity that promises to return an adequate return over cost. In determining what qualifies as a "cost," costs to third parties are counted only to the extent that they can be brought home to the park management. A cost borne completely by a third party is not "counted."

Applying this reasoning, FSC said, a mobile home park's management will decide to do what the market leads them to *want* to do, so long as the park's management is willing to pay the market-determined economic costs associated with those activities. The mobile home park, in this framework, will limit its activities to those for which the revenue stream exceeds the sum of: (1) the direct costs of the activity, *plus* (2) the consequential costs brought home to it through litigation (*i.e.*, third party "damages").

The Conceptual Limits to Damages

Not all costs to third parties will be factored into the calculation, FSC said. In estimating the expected value of the damages likely to be brought home via litigation, an economically rational mobile home park manager will reason as follows. There is some probability that an injury will result to tenants as a result of the proposed activity and that those injured will become cognizant of their injury, some outside the applicable statute of limitation, and some not. Of those aware of having live claims, some will sue and some will not. Of those suing some will prevail and some will not.

This calculation says that the mobile home park's liability-related expenses are virtually certain to be less than the total losses imposed on the park tenants. Only if the three probability terms (that the injury is discovered within the period of the statute of limitations; that those identifying the injury sue; that those who sue will prevail) are *all* 1.0, and assuming further that the damages

awarded through the litigation fully compensate the litigant for the damages experienced, will the full costs of the mobile home park's actions be passed on to the park.

Clearly, this full pass-through of costs is unlikely, FSC said. Under this formulation, the damages that will become the responsibility of the mobile home park are limited by several factors. Some consumers will not become aware of their injury. Some consumers will become aware of their injury outside the applicable statute of limitations. Some consumers who become aware of their injury in a timely fashion will still choose not to sue. Some consumers who choose to sue will not prevail in their litigation. Some consumers who prevail will not be awarded the full scope of the damages which they experience.

As a result, the mobile home park's liability-related expenses will be less than the total losses imposed on mobile home park tenants.

Putting Numbers into an Illustration.

To illustrate these results, FSC assumed that a mobile home park pursues a conscious policy of "cost-effectively" threatening to force all mobile homes more than ten years old to relocate from the park upon their sale by anyone other than a park employee. As a result, the mobile home park profits by \$2.0 million over a ten year period through tenants listing the home which they wish to sell on-site with the park rather than with an outside agency.

As a result of the mobile home park practice, 150 people lose an average of \$10,000 each (\$1.5 million in aggregate) through the non-sale or below-market-sale of their on-site homes. In the jurisdiction in question, the last day of the third year after injury is the hypothetical statute of limitation.

Of the 150 injuries, 125 are discovered before the statute of limitations intervenes. The 25 discoveries outside the statute of limitations, however, are not actionable, thus resulting in a \$250,000 windfall to the mobile home park (25

tenants x \$10,000/tenant). Of the 125 who discover their injury in time, 100 file actions. Of the 100 actions, 83 result in awards (with a nominal value of \$820,000) resulting in payments in the years 4, 5, 6 and 7. The present value of these awards is \$496,800.

Thus to achieve \$2.0 million in profit, at a loss to the community of at least \$1.5 million, the mobile home park had to pay out less than \$500,000 in damages (\$496,800).

In addition, FSC said, notice that in this illustration, even if the full value of the injuries were to be brought home immediately to the mobile home park (\$1.5 million), the mobile home park policy would still be optimal (resulting in a profit of \$2.0 million). This is one of the critical flaws in a damages approach to addressing abusive commercial activity.

Restitution and Unjust Enrichment

This analysis, FSC said, identifies two problems which need to be confronted in consumer litigation over mobile home park practices: (1) the corporate incentives problem; and (2) the related problem that damages are structurally inadequate in the case where a wrong is being committed and even full payment of compensation would not change corporate policy.

In short, there will be many situations where a reliance on a damages approach will be insufficient both in structural and practical terms to control corporate behavior.

Less well known among remedies within the law, FSC said, is restitution whose invocation opens the gates to a variety of remedies which may be useful in confronting these two problems. Restitution is neither law nor equity, though it contains elements of both. Nor do money remedies in restitution depend on the logic of damages. The unique characteristic of the restitutionary family of remedies is that they focus on the right of injured parties *not* to compensation for their injuries, but on their right to require that the mobile home park wrong-doer disgorge the value of the "unjust enrichment"

which was the goal and/or result of the wrongful conduct.

The General Principle: Unjust Enrichment

A person who receives a benefit by reason of an infringement of another person's interest, or of a loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment. Notice that the purpose of this remedy is not to make the plaintiff as well-off economically as he or she was before being injured. Rather, the purpose of the remedy is to relieve the wrong-doer of any benefit it might have received as a result of its wrongful acts.

Restitution thus appears to fit conceptually with respect to our requirements in the area of incentives as to the mobile home park listing service. It needs to be emphasized that the right of the plaintiff(s) to collect the entire amount by which the mobile home park was enriched does not depend in any way on the magnitude of the damages suffered by the plaintiffs as long as they were in fact wronged "unjustly." So, for example, there is no conceptual problem within the logic of restitution with a plaintiff injured in the amount of \$100, say, to collect, say, all \$1 million in the resultant savings to the mobile home park if such there be. The restitutionary approach would thus overcome the structural inadequacy of the damages problem in cases like the illustration presented above.

Application of the General Principle

Application of the general principle to the mobile home park listing case would result in the need to establish the extent to which the mobile home park has been unjustly enriched by the listing practices. The enrichment, FSC said, would seem to consist of at least the following components:

1. All profits obtained on sales of mobile homes owned by the mobile home park made at the same time that a tenant had an existing sited mobile home for sale;
2. All financing costs foregone arising from the sales of mobile homes owned by the mobile home

park at the same time that a tenant had an existing sited mobile home for sale;

3. All sales commissions charged on the sale of sited mobile homes by existing tenants at the same time that the mobile home park was offering its own new homes for sale;

4. All rents charged for the rental of mobile home park lots associated with new mobile home sales to the extent that those lot rentals exceeded the average lot rental of lots on which sited mobile homes were for sale.

Ultimately, FSC concluded that it would be appropriate for the mobile home park to disgorge any and all revenues generated --or expenses foregone-- from the operation of its mobile home sales in competition with the sale of sited mobile homes by existing park tenants. Moreover, it would be appropriate for the mobile home park to disgorge all revenues generated by the listing of existing mobile homes for sale, which could be attributed to the "voluntary tying" resulting from the intentional inclusion of unenforceable lease terms.

Conclusion

The use of restitutionary remedies begin to respond to two problem areas in protecting mobile home park residents against abusive practices: (1) the systematic protection by the legal system of a mobile home park's incentives to do the wrong thing; and (2) the inability of the damage remedy to constrain commercial decision-making.

Restitutionary remedies might prove to be a useful response to these problems. Moreover, the above analysis demonstrates that claims brought in unjust enrichment could strengthen positive incentives by removing the entire gain from the wrongful activity of the mobile home park management. This would be particularly useful in cases where the gains of the wrongdoer exceed the losses of the injured parties.

CURRENT PUBLICATIONS

LOW-INCOME AGGREGATION

"Aggregation" is often viewed as one of the remedies to address the concerns of low-income consumers in a competitive electric industry. Through aggregation, the reasoning goes, low-income customers will be able to pool their purchasing power and exert the same influence that large customers do.

It is not clear, however, that aggregation is a viable option for low-income consumers. Problems exist from the perspective of the consumer, the aggregator, and the power supplier. Remedies to these problems do exist.

In an article published in the May/June issue of the *LEAP Newsletter*, a national publication by the Legislative Energy Assistance Program (LEAP) which tracks electric and natural gas restructuring issues in the states, FSC principal Roger Colton stated that one of the primary impediments to low-income aggregation involves the barriers facing the aggregators themselves.

While no formal research yet exists defining what minimum size an aggregated group must be to be effective, it is becoming increasingly clear that electric competitors are not queuing up to serve aggregated groups of hundreds of low-use customers. The larger the aggregated group of customers must be, the greater the need for a formal administrative structure to service those customers, making it less likely that aggregation will happen.

In addition, aggregation is not a simple endeavor. Several layers of expertise are required, including an expertise: (1) to determine load characteristics for solicitations of proposals; (2) to review RFP responses; (3) to negotiate contracts; and (4) to develop and review contract documents. The Minnesota state LIHEAP office considered whether its network of local agencies delivering LIHEAP benefits could aggregate low-income customers given these activities. The Minnesota report concluded that the LIHEAP agencies had neither the in-house resources to

support aggregation nor the resources to *procure* the necessary expertise.

The FSC article suggested the following public policy choices as appropriate to facilitate low-income aggregation:

1. Enacting a strong community choice bill such as was done in Massachusetts. This legislation allows a local government to aggregate all consumers within its geographic boundaries.
2. Creating a state purchasing pool is a second response to issues involving low-income aggregation. The Connecticut electric restructuring legislation provides that when the state buys electricity for state facilities, any household with at least one member receiving a means-tested public assistance benefit will be allowed to buy electricity at that same price.
3. The creation of an assistance in aggregation program is a third response. Just as many state housing agencies provide legal, technical and administrative support to negotiate housing tax credits, work through bonding requirements, and the like, an office providing aggregation assistance can help draft RFPs, analyze responses, and negotiate contract terms.

Funding a state housing network to provide aggregation assistance could provide similar services. It would provide training on techniques of packaging energy projects; seminars and help to identify specific aggregation opportunities; and assistance in the development of small user aggregation entities.

A copy of the complete LEAP Newsletter article on low-income aggregation can be obtained by writing publications@fsconline.com.

Fisher, Sheehan and Colton, Public Finance and General Economics (FSC) is a research and consulting firm with offices in Belmont (MA), Scappoose (OR), and Iowa City (IA).

FSC specializes in providing economic, financial and regulatory consulting. The areas in which *FSC* has worked include infrastructure financing, public enterprise planning and development, natural resource economics, community economic development, telecommunications, public sector labor economics, planning and zoning, regulatory economics, energy law and economics, fair housing, and public welfare policy.

Fisher, Sheehan & Colton
Public Finance and General Economics
34 Warwick Road, Belmont, MA 02478-2841
617-484-0597 *** 617-484-0594 (fax)
editor@fsconline.com (e-mail)
<http://www.fsconline.com>
