STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 00-M-0504- Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities.

STATEMENT OF POLICY ON FURTHER STEPS TOWARD COMPETITION IN RETAIL ENERGY MARKETS

Issued and Effective: August 25, 2004

TABLE OF CONTENTS

TABLE OF CONTENTS Page

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COMMISSIONERS PRESENT:

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(Issued and Effective August 25, 2004)

BY THE COMMISSION:

PREFACE

The policy statements issued today[1] set forth our goals and visions for the further development of robust retail energy competition in New York and provide a flexible framework for us to analyze and respond to evolving market conditions and thereby to facilitate market development as required. Our policies have been guided by the successes and challenges experienced in this and other states, and especially by the promising level of success that has been achieved in New York without most of the serious difficulties others have encountered. Much of the credit for that success is due to the flexible administrative course to restructuring the market that New York alone has taken. Credit for our successes must also go to consumers willing to take a chance on new providers, new providers willing to take a chance in a developing market, and the cooperation and creative input of

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[1] Case 00-M-0504, Statement of Policy on Further Steps Toward Competition in Retail Energy Markets and Statement of Policy on Unbundling and Order Directing Tariff Filing.

our utilities and last, but by no means least, our experienced and dedicated Staff.

In this Policy Statement, we review the development of competitive markets in New York, and conclude that we have in many ways been highly successful. We have a workably competitive wholesale market, and a retail market for the largest usage customer classes that has attracted most of the electric and gas load. We have created and implemented the infrastructure for the market by establishing electronic data interchange standards and uniform business practice (UBP) requirements and have equalized the protections available for consumers from the utilities and the energy services companies.

However, we acknowledge that there is much work remaining to be done. Migration rates for small customers have lagged those of larger users, and competitive suppliers continue to adjust to changes in wholesale and retail markets. Suppliers have not yet begun to offer the variety of price and service packages that we anticipate will occur in a more mature market, especially to mass market customers. Therefore, in these Policy Statements, we reaffirm our commitment to fostering competition whenever possible through steady progress in retail access program design and incentive ratemaking.

Our vision for the future of the markets is also set forth in this Policy Statement. We begin by acknowledging our public charge to ensure the provision of safe and reliable energy at just and reasonable rates. The vision also sets forth our conclusion that one of the most efficient and powerful tools we can use to meet the statutory requirements is competitive markets. Finally, our vision acknowledges the need to adjust the degree and focus of our regulatory oversight efforts as market dynamics replace the need for governmental controls. While our vision statement is not as prescriptive as some parties proposed, our experience suggests that markets rarely develop in the precise manner envisioned by regulatory authorities. We find it sufficient to conclude that competitive markets are in the public interest, and, if they continue to develop robustly, there may be no need for the utilities to remain in any competitive fields in the future.

We also discuss below various strategies that could be especially productive in increasing participation in the competitive markets. The retail access model at Orange and Rockland Utilities has been a highly successful voluntary migration program. In addition, gradually increasing the exposure of a customer class to spot market pricing has produced significant migration results by providing increased opportunities for a variety of ESCO offerings. We also find that auctions would be a useful approach to migrate large numbers of customers, but we reserve the right to approve the use and details of any auction proposal. Finally, we emphasize again the continuing need for outreach and education for the public and strongly encourage the utilities, the ESCOs, and our Staff to increase their efforts in this area.

The companion Policy Statement and order on rate unbundling also constitutes a landmark effort. It is one of the first efforts to accurately quantify a fair utility competitive rate against which the ESCOs can compete, and it sets forth our guidelines for calculating these rates in future cases. In addition, we are ordering Consolidated Edison Company of New York, Inc. (Con Edison) to implement these rates for electricity, with the implementation for other utilities and services scheduled in accordance with individual rate plans.

Together, the policies we are adopting are expected to further stimulate market development, bringing the benefits of competition to more New Yorkers, while fulfilling our rate, safety, and reliability obligations under the law.

PROCEDURAL HISTORY

This proceeding was instituted in March 2000: "to address the future of the competitive natural gas and electricity markets and the role of the regulated utilities in such markets; to identify and suggest actions to eliminate obstacles to the development of such markets; and to provide recommendations regarding provider of last resort and related issues."[2] The instituting order reviewed the progress made in opening energy markets in New York State but noted that some issues could be fully resolved only after retail markets had begun to develop.[3] We said that our purpose in this case was to "refine our concept of the mature competitive retail energy markets (especially the future role of the regulated utilities) and to identify and remove obstacles to its achievement."[4]

We also emphasized that the proposals and solutions offered in this proceeding must be consistent with our established values and principles:

1. The benefits of competition, including increased customer choice, should be available to all customers as soon as possible.

2. Safe and reliable energy supplies and services, provided in a manner that preserves environmental values, should be available to all New Yorkers on reasonable terms.

3. Consumer protection issues, including those associated with Public Service Law §30 et seq. (the Home Energy Fair Practices Act (HEFPA)), and other public policy programs, including low-income assistance programs, must be addressed.[5]

With respect to process, we instructed our Office of Hearings and Alternate Dispute Resolution (OHADR) to "structure

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[2] Case 00-M-0504, Order Instituting Proceeding (issued March 21, 2000), ordering clause 1.

[3] Developments in recent years in the energy markets demonstrate that some issues may not be recognized or will not be known in advance as the transition to competitive markets continues. Thus, flexibility is required in the oversight of the market. We should maintain the ability to change direction, adopt new policies, or abandon established ones should circumstances so require. The greatest benefit of the administrative approach to energy market restructuring undertaken in New York is that it provides this needed flexibility.

[4] Order Instituting Proceeding, supra, p. 2.

[5] Id., p. 4.

the proceeding in a manner that will achieve comprehensive results as efficiently as possible."[6]

The Administrative Law Judges[7] conducted the proceeding as a broadly-based collaborative, inquiring into the issues identified in our initial order, and examining additional issues as further defined throughout the proceeding. The proceeding included three phases: information gathering, analysis of policy options, and litigation where consensus could not be obtained.[8] Numerous parties volunteered to serve on committees and subcommittees, and a number served as committee chairs,[9] contributing long hours doing research and writing reports; planning and presenting material at subcommittee, committee, and plenary meetings; attending Executive Committee meetings; and coordinating all these activities among the various committees and subcommittees. The result of these broad-based efforts is the report, dated April 3, 2001, entitled "Concepts, Issues, and Views of the Future: Report on the Parties' Collaborative Efforts," with a set of Appendices dated February 15, 2001 (together, the April 3 Report). All of the material facts, allegations, and analyses deemed important by any of the parties up to that point were reflected in the April 3 Report.

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[6] Id., p. 5.

[7] The Administrative Law Judges assigned to this proceeding were Jeffrey E. Stockholm and Joel A. Linsider. Joining them as a hearing officer was then-Chief of Residential Advocacy Michael Corso. As used in this Order, the term "Judges" refers to these three case managers.

[8] A more detailed description of the process is contained in the report and appendices prepared by the parties ("Concepts, Issues, and Views of the Future: Report on the Parties' Collaborative Efforts" (April 3, 2001)), and more detail can be obtained on the case web site at http://www.dps.state.ny.us/00m0504/00m0504).

[9] The organizations that volunteered individuals to serve as committee co-chairs during the proceeding included Amerada Hess Corporation (Hess), Consolidated Edison Company of New York (two chairs), New York State Consumer Protection Board, Department of Public Service, New York State Energy Research and Development Authority, Niagara Mohawk Power Corporation (two chairs), Public Utility Law Project, and the Small Customer Marketer Coalition.

The April 3 Report contains a detailed description of the facts gathered and the analyses performed by the parties, but it does not contain consensus recommendations on either the long-term vision of the competitive markets or the more immediate steps that should be taken to foster the development of the energy markets.[10] During the proceeding, Staff of the Department of Public Service (Staff) circulated two straw proposals and met with the parties to determine whether a consensus on the issues could be reached.[11] Despite the best efforts of the parties,

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[10] The parties developed a consensus statement on low-income programs (April 3 Report, p. VII-38, discussed infra). In addition, broad-based support was apparent for unbundling rates, and that effort began in a separate track of this proceeding (Case 00-M-0504, Proceeding Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities - Unbundling Track, (hereafter Unbundling Track) Order Directing Expedited Consideration of Rate Unbundling (issued March 29, 2001)). The parties generally agreed as well that equivalent consumer protections were required concerning ESCO and utility services. Consumer protections regarding ESCO security deposits and prepayment plans were adopted at our January 23, 2002 session (Order on Rehearing Petition and Motions, issued and effective January 24, 2002).

[11] Straw Proposal 2 (hereafter SP2) is set forth as Appendix B.

agreement could not be reached. Accordingly, briefing schedules on legal and policy issues were established.[12]

In addition to the foregoing procedures, a variety of outreach mechanisms were used to gather information from the public and from other interested parties who were not directly participating in the proceeding. That effort began in the summer of 1999 with discussions held across the State with interested parties. Those discussions culminated in a November 1999 Report,[13] which ultimately led to the order instituting this proceeding.

A separate committee of the parties planned and coordinated public input and outreach efforts.[14] Existing market research was reviewed; roundtables, forums, and focus groups with residential and business customers were undertaken; surveys of low-income advocates and municipal officials were completed; and new primary research consisting of a substantial telephone survey

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[12] Briefs were received from The Attorney General of the State of New York (Attorney General); Association for Energy Affordability and Pace Energy Project (AEA); Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. jointly (Con Edison); Consolidated Edison Solutions (Con Edison Solutions); Consumer Protection Board (CPB); Dynegy Marketing and Trade (Dynegy); 1st Rochdale; Joint Brief of the Small Customer Marketer Coalition, Amerada Hess Corporation, TXU Energy Services and Smartenergy, Inc. (Active Marketers); Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KeySpan); Multiple Intervenors (MI); National Fuel Gas Distribution Corporation (NFGDC); National Energy Marketers' Association (NEM); New York Energy Service Providers Association (NESPA); New York State Electric & Gas Corporation (NYSEG); New York State Energy Research and Development Authority (NYSERDA); Niagara Mohawk Power Corporation (Niagara Mohawk); Public Utility Law Project (PULP); Rochester Gas & Electric Corporation (RG&E); Staff of the Department of Public Service (Staff); Texas Eastern Transmission Corporation (Texas Eastern); Utility Workers Union of America, AFL-CIO, Local 1-2 and International Brotherhood of Electrical Workers, Local 97 (Unions); and Westchester County (Westchester).

[13] Stakeholder Views on Competition: From Transition to the End-State, a copy of which is available on the case web site at www.dps.state.ny.us/00m0504/00m0504/Stakeholder.htm.

[14] April 3 Report, Section VIII.

was conducted by a nationally recognized research firm.[15] This public outreach and input effort is one of the most ambitious ever undertaken in our proceedings.

The Judges also made extensive use of the internet, collecting a large amount of information on a case-specific web site. Among other materials, the web site contains: plenary meeting agendas and presentations; committee and Executive Committee minutes, meeting agendas, report drafts, and meeting schedules; bibliographies of relevant Commission opinions and orders and professional articles; and copies of all rulings and notices in the case.[16] Communication among the parties, the Committees, and the Judges took place using the Internet. We commend the parties for their innovative use of technology and for the substantial efforts all contributed to this complex undertaking.

On July 13, 2001, the Judges' Recommended Decision (RD) was issued. The Judges reviewed the current status of the wholesale and retail energy markets and the development of retail markets elsewhere, and recommended the adoption of a long-range vision of the retail markets for New York. They also generally endorsed the Staff proposal for guiding the transition to

[15] The Center for Research & Public Policy was chosen for the study based on its prior experience in energy restructuring matters and following a comprehensive competitive bidding process. Funding for the research was provided through NYSERDA (April 3 Report, pp. VIII-6 through VIII-14 and Appendix VIII-C).

[16] www.dps.state.ny.us/00m0504/00m0504.

competitive markets and recommended the adoption of guiding principles to assist that transition.[17]

Briefs on Exceptions were filed by Active Marketers, the Attorney General, the City of New York, Con Edison, Con Edison Solutions, CPB,[18] Dynegy, KeySpan, KeySpan Energy Services, Inc.,[19] MI, NEM, NESPA, NFGDC, NYSEG, Niagara Mohawk, PULP, RG&E, Staff, Texas Eastern, the Unions, and Westchester. Briefs replying to the exceptions were received from Con Edison Solutions, CPB, Con Edison, Dynegy, Active Marketers, KeySpan, KeySpan Energy Services, MI, NFGD, NESPA, Niagara Mohawk, NYSEG, PULP, RG&E, Staff, Texas Eastern, and the Unions.

On January 14, 2004, the Secretary issued a Notice Seeking Comments (January Notice) in this proceeding that solicited the parties' comments on a proposed vision statement for the future of energy markets and on 14 questions designed to address new issues and changed circumstances since the issuance of the RD. Twenty-six parties submitted initial comments and

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[17] The Judges recommended the adoption of the following principles:

1. The provision of safe, adequate, and reliable gas and electric service at just and reasonable rates should be the primary goal, having priority above all others.
2. Where possible all services and products should be provided by competitive markets and not by regulated utilities.
3. The regulation of rates, services, and competitive market activities should be appropriate for the status of the transition (with greater scrutiny being exercised at the outset, and less as the dominant players lose the ability to exercise market power) and for the status of the service provider (with greater scrutiny being exercised over those with greater market power) (RD, pp. 62-64).

[18] The CPB's brief addressed various legal issues as requested in the RD, but otherwise endorsed the RD and took no exceptions.

[19] The brief of this energy services company (ESCO), an affiliate of KeySpan, also included a motion to intervene as an active party. That motion is hereby granted.

fifteen parties submitted reply comments,[20] all of which are summarized in Appendix C.

PURPOSE OF POLICY STATEMENT

In this Policy Statement, we set forth our view of the markets as they exist today and our vision of the competitive markets of the future. We discuss as well a variety of transition issues -- how to get from "here" to "there" -- and note the continued need for various public benefit programs. We begin with a consideration of the procedural concerns that some parties have raised, and we conclude by noting our legal authority to take the steps we contemplate.

This document should not be seen as the last word on retail access issues. It is, rather, the next step in an evolving and predictably unpredictable process, intended to provide guidance at this stage of market development. While we cannot predetermine with great specificity the best competitive outcome and ensure under all circumstances that it is achieved, we can and should guide the process on the basis of our informed judgment about where energy markets in New York should go and how they should get there. We here set forth that judgment and chart a path for the next steps toward competitive markets.

The parties' collaborative efforts, guided by the Judges, generated a remarkable compendium of pertinent information. Similarly, the RD dealt with a wide array of issues and offered numerous recommendations, many of which are the subject of exceptions. Finally, the number and range of comments received in response to the January Notice was also substantial. In a document such as this, we cannot and need not discuss all of the individual documents or the exceptions in full, though we have considered them carefully and commend them to readers for the important and informative background and ideas they provide. Accordingly, the Judges' recommendations and the parties' exceptions, as well as the comments responding to the January

[20] In addition, Staff filed a reply to the initial comments concluding that further responses were unnecessary.

Notice, are adopted herein only to the extent we do so explicitly.

PROCEDURAL ISSUES

KeySpan argues that the process prior to the RD was flawed in a number of ways. It contends that the April 3 Report produced by the parties should not be considered evidence nor is it balanced. The report, according to KeySpan, cannot provide a foundation for the recommendations in the RD nor for Commission policy determinations.

NFGDC contends that the process was inadequate and alleges that the utilities thought the process unfair because the legal issues were not resolved before policy issues were considered. NFGDC excepts to the conclusion that the process was adequate.

NYSEG joins NFGDC in criticizing the decision to schedule briefs on legal issues at the end of the proceeding. According to NYSEG, this damaged the collaborative process which, in its view, ultimately broke down. The process had fundamental procedural defects, according to NYSEG, including a lack of notice, inadequate guidance, and Staff's alleged misleading of the parties in its presentation of Straw Proposal 2 (see Appendix B).

In contrast, Con Edison expressed the view that the RD's recommendations were appropriate and consistent with the nature of the record developed. Staff expressed the opinion that the case was professionally guided and allowed for a thorough airing of complicated issues among many diverse parties.

We have reviewed the collaborative process established by the Judges as well as the detailed complaints raised by NYSEG, KeySpan and NFGDC. We conclude that, while any process might be improved, the collaborative approach, designed by the Judges and significantly influenced by the parties themselves, was thorough, fair, and balanced. Further, the record developed, consisting of the April 3 Report and Appendices and more recently, the comments in response to the January Notice, contains a well balanced exposition of the variety of views, positions, and factual allegations which the parties desire to have considered in this policy proceeding. Accordingly, we conclude that the record as a whole creates substantially more than an adequate basis on which policy determinations can be made for the future of retail energy competition, and the exceptions challenging the process and resulting record are denied.

THE CURRENT STATE OF THE MARKETS

The Judges expressed considerable overall skepticism about the degree to which fully competitive energy markets had developed as of mid-2001. They found that the only workably competitive retail market[21] was the commodity market for large non-residential gas customers. The wholesale gas commodity market, in the RD's view, was workably competitive but the market for gas pipeline capacity was not; and workably competitive retail electric markets (which the RD argued depends, in turn, on corresponding workably competitive wholesale markets) were likely to require at least three to four years to develop for large customers and longer to develop for small gas and electric customers. Among the factors identified as impeding the development of workable competition in the electricity market were the absence of supply or demand elasticity, the potential for the exercise of market power, and the difficulty of providing real-time pricing information to customers. As a general matter, the Judges warned against removing utilities from markets before they become workably competitive.

Several parties question the Judges' views of the state of the market. Energy service companies (ESCOs)[22] suggest they

[21] We are using the term "workably competitive markets" to mean retail and wholesale markets, uninfluenced by the potential or actual exercise of market power, where customers have a variety of supplier choices and the choice of a number of different products and services.

[22] We have defined the term "ESCO" as "an entity that can perform energy and customer service functions in any competitive environment, including provision of energy and assistance in the efficiency of its use." (Case 94-E-0952, Competitive Opportunities, Opinion No. 97-5 (issued May 19, 1997), p. 2, n. 1).

understate the degree of competition already in place, while utilities believe them too optimistic about when workably competitive markets will emerge.

In our view, the 2001 RD understates the degree to which competitive markets have now developed, though not necessarily to the degree the ESCOs argue. In the three years since the RD's issuance, barriers to competition that had been obstacles at that time (e.g., lack of widespread electronic data interchange (EDI), need for revised Uniform Business Practices (UBPs) including revisions to consolidated billing practices concerning payment priorities, and lack of HEFPA-type consumer protection from ESCOs) have either been resolved or are well on their way to resolution.[23] Furthermore, nearly 100% of the State's largest gas customers and more than 60% of the large time-of-use commercial and industrial statewide utility electricity load is now being supplied by ESCOs. In each major service territory, there are at least three ESCOs providing electricity and five providing gas service; most service territories have many more.[24] Because markets have continued to develop, selected service classes are now ripe for more aggressive approaches to complete the transition to fully competitive markets.

With respect to electricity, recent developments suggest a more optimistic view of the development of both the wholesale and retail markets than that taken in the RD. Some demand elasticity now exists, as shown by the success of the demand side load management programs, and demand elasticity is likely to increase with the implementation of further programs of this type and the installation of advanced meters. In addition, a number of improvements have been made since the issuance of the RD and are continuing to be made to the wholesale market

[23] EDI is being used by ESCOs in all utility territories; HEFPA protections are now available to residential customers served by ESCOs; and the UBP is updated to reflect these changes.

[24] In addition, there are now three Meter Service Providers and five Meter Data Service Providers that are serving retail customers. Further, there are a number of competitive metering pilots that are planned or underway.

structure to mitigate or eliminate the exercise of market power. Limited wholesale price volatility in upstate New York suggests that the supply is adequate and, therefore, the wholesale electric energy market is workably competitive in that region. Reports by some ESCOs suggest that, due in part to the adoption of market power mitigation measures, the downstate retail market is also workably competitive, at least for large customers.

Market power concerns at the wholesale level are being addressed and resolved by the New York Independent System Operator (ISO) and FERC, and wholesale electric energy prices in New York, for the most part, can be considered to be unaffected by the exercise of market power. But until forward energy markets mature, residential customers and possibly some small commercial customers may continue to need some regulatory protection against market volatility, whatever its causes. We consider this further, below, in the context of hedging.

For all these reasons, it appears to us that, contrary to the views expressed in the RD, efforts to accelerate the development of retail electric markets now for all service classes are likely to result in success. New York's deliberate approach that encourages step-by-step preparation of a proper infrastructure to support long-term competitive markets has now put the state in a position to make more rapid progress in transforming energy markets. That deliberate approach still requires that we carefully examine market conditions by customer service class and by utility territory before deciding on how best and how aggressively to assist the development of the market.[25]

With respect to natural gas, the RD reasonably describes the current situation: the wholesale gas commodity market is workably competitive, while the retail gas commodity market is workably competitive only for larger customers. The matter is more complex, however, with respect to pipeline capacity.

[25] See Appendix B.

The Judges regarded the market for pipeline capacity as not workably competitive. That oversimplifies the matter. Currently, the condition of the pipeline capacity market differs from region to region within the State, by market segment, and by season of the year. Pipeline capacity serving the downstate market, as a general matter, is very tight. Typically, these are long haul pipelines from the production regions to the citygate. Capacity serving the upstate market consists of upstream and intermediate pipelines. There currently is capacity available in the upstream capacity market, while the intermediate capacity market is tight. These conditions, moreover, may be affected by variations in the level of demand; for example, the New York City market can be highly liquid during the summer, when firm customer demand is relatively low. However, the most important factor to increasing the availability of pipeline capacity is the approval and construction of new pipeline expansion projects. We have supported and will continue to support the addition of pipeline capacity to serve New York. Overall, these markets seem to be moving toward workable competition. However, the pace of that movement and their anticipated arrival at a competitive state cannot be predicted. Despite the uncertainties and complexities, however, our task is to continue doing what we can to promote the development of competition in the pipeline capacity markets and doing what we must to provide customers with just and reasonable rates and safe and adequate service during the market transition.

A major success in the residential market that has also become apparent since the issuance of the RD is the utility purchase of accounts receivable to simplify ESCO operations and reduce ESCO overheads. One successful application of this concept is Orange and Rockland's Switch and Save program (described in detail in Appendix D). Approximately 1/3 of Orange and Rockland's gas and electric mass market customers have switched to non-utility providers, which makes this one of the most successful competitive offerings in the nation. Among the program's features is the utility purchase of ESCO accounts receivable without recourse,[26] simplifying ESCO program administration and eliminating the need for ESCOs to perform credit checks.

ESCOs in the program agree to offer a guaranteed discount to participating customers for a two-month period and to take all residential and small commercial customers that are referred to it by the utility, thereby lowering the ESCOs' customer acquisition costs. Customers that call the company for any service question (e.g., billing inquiry) are asked if they would be interested in taking part in this program, which offers guaranteed savings for the first two months. This sign-up process is simple for customers and many decide to participate. Orange and Rockland has found that customers that sign up for the program usually remain with the ESCO beyond the initial two month period. This program has proven to be highly successful for moving both electric and gas mass-market customers.

In comments responding to the January Notice, some utilities expressed a willingness to consider a Switch and Save approach, and the ESCOs generally supported this initiative. We view the Switch and Save program as a good transitional model that will help residential customers get acquainted with obtaining energy supply from a non-utility provider. In the long run, however, we believe that ESCOs should no longer need the support of the utilities to provide customer care services and should ultimately provide all customer services associated with the provision of commodity. In the meantime, we strongly encourage that purchase of ESCO accounts receivable, especially when used with a Switch and Save approach, be considered in upcoming rate cases and during the course of current rate plans for utilities that agree to do so, because it has proven to be a model that works extremely well in jump-starting the energy market for residential and small commercial customers.

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[26] When receivables are purchased "without recourse," it means that the utility cannot subsequently bill the ESCO for amounts that it could not collect from customers. A discount on the receivables purchase may be used to account for uncollectible amounts.

The market migration of non-residential electric customers has also made significant strides since the RD was issued. On a statewide basis as of August 2001, about 37% of the large time-of-use customer load had migrated. As of May, 2004, that migration has increased to 62% of the utilities' total commodity load. Programs designed to help commercial and industrial customers evaluate their energy supply options have proven to be highly successful and should be continued. These include the Market Match program, which provides information about price offers from various suppliers based on the individual customer's usage patterns, and the Market Expo program, which involves a forum where customers have an opportunity to hear from and speak with a number of ESCOs all in one location where it is easy to obtain information and sign up on the spot.

VISION

Models

The parties extensively examined several potential models of the future state of the retail markets in the collaborative. The RD rejected the adoption of any particular model and recommended adopting a vision in which commodity markets will be fully competitive and there will be no need for utilities to provide commodity. The RD also envisioned all utility functions, other than delivery service, would be open for competition; competition being fostered by the Commission wherever it appears feasible; and utilities ultimately departing any market that becomes competitive.

We share the Judges' view that robust competition, where feasible, should be our long-range vision. In the best of all worlds, all retail functions (except delivery) now provided by utilities would be competitive. To that end, all potentially competitive utility functions will be opened to competition, and, subject to the requirements of the Public Service Law and Transportation Corporation Law,[27] regulated utilities should be

[27] These laws now require utilities to provide service upon request, and, unless amended, would prevent the utilities from completely exiting the provision of utility service.

replaced by ESCOs when markets become workably competitive. In determining when markets are becoming workably competitive, and are therefore prepared for more aggressive migration strategies, we intend to consider a number of factors, including those proposed by Staff in SP2 (Appendix B).[28]

We decline to adopt any of the particular models considered in the collaborative. In the face of the uncertainty already noted, it is important to maintain flexibility to respond to evolving circumstances. We will continue to take an incremental and flexible approach, favoring competition as an overall policy and creating a fair and balanced market structure.

Vision Statement

The January Notice included a draft vision statement as follows:

> The provision of safe, adequate, and reliable gas and electric service at just and reasonable prices is the primary goal. Competitive markets, where feasible, are the preferred means of promoting efficient energy services, and are well suited to deliver just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation. Regulatory involvement will be tailored to reflect the competitiveness of the market.

Most parties providing comments on this vision statement agreed entirely or in large part with the vision as presented. Several parties recommended wording changes to emphasize certain concepts.

MI recommended modifying the vision statement to say that the primary goal should include lower prices, not merely just and reasonable prices. The second concept MI emphasized is that the intent behind the transition to increased competition in

[28] While we are adopting the general approach recommended in SP2 regarding its measurement of the existence of a workably competitive market, we are not endorsing the document's timelines or other details except as discussed here.

New York's retail energy markets was, and should remain, economic relief for end-use customers.

NFGDC believes that to remain focused on the primary objective of safe, adequate, and reliable service at just and reasonable prices, competitive markets cannot be "preferred" over regulation. It recommends that instead of characterizing competitive markets as the "preferred" means of promoting efficient energy services, competitive markets should be seen as "among the means" available. NFGDC rejects the notion that choice has intrinsic value to customers.

NEM supports the vision statement if the first sentence is modified to read as follows: "The utilities [sic] prompt, safe, efficient and reliable delivery of competitively provided gas and electric service at just and reasonable prices is in the public interest and is the primary goal."[29] According to NEM: "These modifications recognize and reinforce that it is critical to the public interest for utilities to deploy available financial resources on infrastructure maintenance, operations and upgrades to ensure the safety and reliability of the energy delivery network."[30] NEM goes on to say that it believes it is no longer in the public interest to establish utilities as the default provider of all energy supply-related services.

Pace Law School Energy Project and the Natural Resources Defense Counsel (PACE) note the absence of any reference in the proposed vision statement, to the Commission's role in ensuring environmentally sound energy service. PACE also contends that achievement of the Vision Statement does not necessarily require that the dominant position of the utilities providing competitive retail services be reduced, or in some cases, eliminated. PACE states that the distribution utility may be the most effective and economically efficient deliverer of commodity and delivery service and may be able to provide economies of scope.

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[29] NEM's comments, p. 5.

[30] Id.

SCMC notes that the draft vision statement builds on the work of the RD, but has failed to incorporate the overarching vision that the utilities exit the merchant function for natural gas and electricity. SCMC says that a clear view of the competitive end state must be adopted in order for ESCOs to develop and secure funding for their business plans and to formulate rational, workable and logical plans for transitioning customers and the utilities from a regulated to a competitive model.

UGI Energy Services, Inc. (UGI) generally supports the proposed Vision Statement but suggests changing the last sentence to read: "The Commission will administer its oversight responsibilities and work with utilities and other industry stakeholders to develop policies, rates and service offerings that promote the competitiveness of the market."[31] UGI intends this change to emphasize a proactive role for the Commission.

After reviewing the wording changes proposed by the parties, and considering the nearly unanimous support expressed, we conclude that the draft vision statement best reflects our view of the future. We of course remain committed to providing economic relief to end-use customers, as well as the benefits of a variety of service and supplier choices, in a manner that preserves environmental values, as we stated above. Further, we are committed to ensuring the reliability of the networks. In our view, those commitments can best be met if utility services and products are opened to competition, a view set forth in the draft vision statement. We do not find that any of the proposed changes better reflect our views at this time, and we therefore adopt the draft.

Gas Policy Statement

On November 3, 1998, the Commission issued its Policy Statement Concerning the Future of the Natural Gas Industry in New York State and Order Terminating Capacity Assignment[32] (Gas

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[31] UGI comments, p. 2.

[32] Cases 93-G-0932 and 97-G-1380.

Policy Statement). The Policy Statement noted that the gas industry had undergone dramatic change in the previous decade and set forth the Commission's vision for competition in the gas industry. The goals associated with this vision were presented (p. 4) as follows:

(1) Effective competition in the gas supply market for retail customers;

(2) Downward pressure on customer gas prices;

(3) Increased customer choice of gas suppliers and service options;

(4) A provider of last resort;

(5) Continuation of reliable service and maintenance of operations procedures that treat all participants fairly;

(6) Sufficient and accurate information for customers to use in making informed decisions;

(7) The availability of information that permits adequate oversight of the market to ensure its fair operation; and,

(8) Coordination of Federal and State policies affecting gas supply and distribution in New York State.

The Gas Policy Statement further stated that "[t]he most effective way to establish a competitive market in gas supply is for local distribution companies to cease selling gas."[33] The Policy Statement also called for termination of the mandatory assignment of capacity allowed by the Commission's March 28, 1996 Order in Case 93-G-0932, except for system reliability or system operation reasons.

The Judges recommended integrating our existing Gas Policy Statement with their broader vision recommendations (RD,

[33] Gas Policy Statement, p. 4.

pp. 62-66), but concluded that pipeline capacity and potentially other utility services might not become workably competitive.[34]

We see no need to amend the overall vision presented in the Gas Policy Statement, although we recognize that the retail market has not developed at the pace anticipated. We will further discuss pipeline capacity issues below. Nevertheless, competitive markets remain a worthy goal wherever feasible, and the increased use of market mechanisms should be included in any overall vision of the future.

TRANSITION STEPS

Unbundling

The RD contemplated an inquiry into the unbundling of utility rates, a process supported by many parties for the purpose of ensuring a reasonable calculation of the rates customers will avoid when they no longer subscribe to various utility services. That inquiry is under way in a separate track of this proceeding and the results of that inquiry will be issued with this Policy Statement.[35] Below, we consider other transitional steps that have been examined in the case.

Timelines

The Judges declined to recommend any specific schedules for utility displacement by workably competitive markets, noting the drawbacks to attempts by government to dictate the details of how quickly and in what manner a market must develop.

It seems clear from our experience since the issuance of the RD that development of markets will depend on a number of factors, ranging from regulatory and tax policy to the business model chosen by the utilities and the ESCOs. Given these

[34] As discussed under "hedging" below, the Judges also recommended adoption of the gas commodity purchasing approach that we adopted in our April 28, 1998, Statement of Policy Regarding Gas Purchasing Practices (Gas Purchasing Policy Statement) (Case 97-G-0600 – Proceeding to Reduce Gas Cost Volatility and Provide for Alternate Gas Purchasing Mechanisms).

[35] Case 00-M-0504, Unbundling Track, Order Directing Expedited Consideration of Rate Unbundling (issued March 29, 2001).

variables, it is not possible to establish a date certain by which all markets for each service and each customer class will become workably competitive. We therefore affirm the RD's refusal to establish such deadlines and overrule the exceptions to those recommendations.

We will monitor market conditions, following the utilities' and ESCOs' progress in developing the market by implementing the transitional steps described in the next section. When market development conditions for a given class of customers seem appropriate,[36] more aggressive migration efforts will be undertaken.

Additionally, all utilities will be required to prepare plans in consultation with Staff and other interested parties, to implement the goals and policies set forth herein, including methods for accelerating migration of customers to non-utility suppliers. When new rate cases or rate plan extensions are filed, the utilities will be expected to include specific proposals to encourage migration of customers and to otherwise further the development of retail competitive markets. For utilities willing to implement migration strategies before the expiration of their current rate plans, we encourage them to work with Staff and other interested parties toward fulfillment of those strategies. Staff is further directed to work with the utilities and the interested parties to create retail market development plans and to periodically report to us on the status of those efforts. Should these informal efforts prove inadequate, we would consider directing the filing of formal plans by each utility for our approval.

Customer Migration Strategies

After reviewing the various mechanisms that have been or might be used to encourage or require customers to migrate from utilities to ESCOs, the Judges concluded that many such mechanisms could be appropriate depending on the particular circumstances. The one exception was large-scale forced

[36] See Appendix B.

migration, i.e., requiring customers to leave the utilities against their will or without their affirmative consent. The RD noted that such an approach might be used to enable utilities to leave a market that had largely migrated to ESCOs and had become workably competitive, but forced migration was not generally endorsed.

We agree with the RD that any of the large array of migration strategies examined on the record may be appropriate depending on the state of market development. We are also encouraged by some of the relatively recent migration strategies that have been implemented or are being considered by some New York utilities (e.g., Niagara Mohawk's exploration of an auction process for SC3 customers and its facilitation of a fixed or capped gas price offering by ESCOs; Orange and Rockland's Switch and Save program; utilities' willingness to purchase ESCO accounts receivable). We additionally note that other states have implemented competitive market initiatives that we believe can be successful in New York (e.g., Ohio's use of municipal aggregation and the dissemination of information that facilitates comparison of ESCO offerings).

We encourage utility efforts to continue the development of new migration strategies and to fine tune strategies that prove successful. Our long-term goal is for competitive suppliers to displace utilities from the commodity function (as well as any other functions that become workably competitive), but because of the differences in market maturation among service areas and customer classes, a one-size-fits-all approach to fostering migration is ill-advised. Some migration strategies are more appropriate during the early phase of market maturation and others should be considered in the longer-term and to achieve our end-state vision. Similarly, some approaches are best designed for residential customers and others for non-residential. Accordingly, we discuss below recommended approaches for fostering migration depending on customer class and time frame.

To achieve a fully competitive end state, we envision a transition that can be characterized as having near-term and longer-term goals and strategies. Although we decline to set a specific statewide timeframe to achieve the end state, we expect to implement these strategies in a step-by-step manner that will largely be determined by the timing of utility rate case filings[37] and by utilities willing to submit proposals to foster the competitive marketplace outside of rate cases. "Near-term" encompasses actions that are underway; or are now being considered, planned, or negotiated in or outside of current rate cases. "Longer-term" encompasses rate plans that will be filed in the next several years and other strategies that may take some years to fully develop.

Given the durations and parameters of existing rate plans, there may be some limitations on possible migration initiatives in the near-term for some utilities. But even for utilities that have a number of years remaining in their rate plans, we believe that significant migration, especially for larger-usage customers, can occur in the near term. For example, even though its rate plan ends in 2011, Niagara Mohawk has said it is moving forward with a number of migration strategies in the near term and is willing to consider other new approaches.

In the short term, we encourage the development of programs that will foster the large scale migration of customers to ESCOs, especially in classes where workably competitive markets now exist. We anticipate at the outset that these programs will be most relevant to large customer classes. Where most customers in a class have migrated, it may well be in all parties' interests to develop a method to migrate the remaining customers and to allow the utility to exit the function. We acknowledge that this may well require statutory amendments, but we remain open to other suggestions regarding an appropriate approach to this end-state issue.

Finally, in its reply comments to the January Notice, Central Hudson said that it would now be appropriate to eliminate its provision of commodity supply to its largest electric

[37] We do not preclude, in fact we encourage, implementation of some near-term strategies by the utilities during existing rate plans.

customers, except for provider of last resort (POLR) service. Hourly pricing would be most appropriate for its SC-3 and SC-13 customers that now have interval metering. Central Hudson proposed that if these customers do not want hourly pricing, they would be free to choose from among competing suppliers with alternative pricing plans. We encourage Central Hudson to meet with Staff and other parties for the purpose of developing a more comprehensive proposal for our consideration.

1. Auctions

Auctions have been used in a number of states to increase the number of customers purchasing energy supply from ESCOs and to increase the number of ESCOs offering services in the market. We are convinced by the arguments of the parties and the experience reflected in this record that auctions of customers may be the most effective way of facilitating market development.[38] Auctions could take a number of forms, including auctions of load or of customers. In this section we discuss some possible approaches, but others may be acceptable as well. We encourage interested parties to explore the idea of auctions to further develop the approaches that would best serve the New York energy marketplace.

A number of those submitting comments in response to the January Notice recommended use of the New Jersey auction process. This approach uses a descending clock bidding process done over the Internet. Participants (suppliers) bid on a fixed percentage of utility load for a fixed time period with bidding continuing until demand matches supply. We are not endorsing the New Jersey model because it unnecessarily prolongs the utilities' commitment to multi-year wholesale contracts and their role as a commodity supplier. Although the commodity auction proposal would create a visible price to beat, it does not directly facilitate the movement of customers to competitive retail

[38] Customer migration to ESCOs also seems to be stimulated when a customer class becomes subject to spot market utility pricing.

suppliers and it does not encourage an ESCO/customer relationship.

Direct Energy/Centrica North America (Centrica), in its initial comments (p. 2), recommends an auction process for assigning large blocks of customers, as opposed to blocks of load, to ESCOs. This is potentially a more effective retail migration strategy.[39] Under Centrica's proposal, each ESCO with a winning bid[40] would provide its assigned block of customers with a fixed price for commodity for one year. At any time during that year, a customer could return to the utility or select another ESCO. At the end of the year, the ESCO would offer commodity to these customers under arrangements that it chooses to offer, including short and long-term contracts, fixed or variable pricing, etc.

Niagara Mohawk has also been considering a program to aggregate the SC-3 (medium to large commercial/industrial) electric customers[41] who still purchase commodity from the utility, and to hold an auction in which ESCOs would bid to provide supply to blocks of these customers. The customers in the auction pool could choose to take service from another ESCO or return to the utility's commodity supply, if they had otherwise been assigned to a supplier. Niagara Mohawk and Staff have already conducted extensive consumer education to encourage all SC-3 customers to select an ESCO. Depending on the ultimate success of those efforts, an auction may or may not be necessary. We would support an appropriately designed auction pilot for this customer class, if needed, especially considering that hedges for this class will completely expire on January 1, 2005.

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[39] Centrica proposed that this auction process be used only for mass market customers, but we consider it a useful strategy for commercial and industrial customer migration as well.

[40] In practice, winning bids could be determined solely based on the lowest price or on price and a number of other factors, such as the stability of the company, ability to perform the task, experience, etc.

[41] These customers will no longer be hedged and will be exposed to spot market prices after January, 2005.

Aspects of the Centrica proposal are also attractive, especially for classes that are or will soon be subject to spot market pricing. We are concerned, however, with an aspect of both proposals that would assign customers to ESCOs unless the customer affirmatively chooses not be included in the auction (so called "opt-out" provision).[42]

Our concern is with the consistency of such an approach with our UBPs (Section 5(k)), which generally consider transfers of customers without their affirmative consent to be slamming, and with our statutes[43] which guarantee customers (subject to limited exceptions) that the utilities will always be available as a supplier. Regardless of the approach taken, however, the design for an auction process is by no means simple, and care must be taken to ensure a sufficient number of ESCO bidders and an effective bidding process. Accordingly, we will require auctions to be filed with us for approval, and we expect any such filing to include a detailed and complete description of the process and a fully supported justification for the approach taken.

We encourage the utilities and interested parties to continue to work with Staff to develop auction approaches, including voluntary (i.e., opt-in) pilot auction program for mass market customers, wherever market conditions could benefit from such programs. Based on the results of these pilot auctions, utilities, Staff, and interested parties should meet to develop approaches that may be applied statewide in the long term. We expect the results of the pilots and lessons learned to be reported periodically.

2. Near Term Strategies – Residential Customers

In the near term, we believe that utilities should continue to maintain a balanced contract portfolio for

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[42] See Cases 01-E-0359, et al., supra, Order Adopting Provisions of Joint Proposal with Modifications, p. 12.

[43] Public Service Law, §65; Transportation Corporation Law, §12.

residential customer commodity.[44] As the residential energy market matures, we will consider proposals by utilities for alternative commodity pricing approaches.

We strongly encourage utilities to consider implementing purchase of ESCOs' accounts receivable without recourse under utility consolidated billing programs, discounted as appropriate, and supported by a utility customer service call center program that will facilitate the transfer of customers to ESCOs. We believe that a properly designed and implemented program patterned on Orange and Rockland's Switch and Save program[45] will stimulate significant ESCO and customer interest, and result in meaningful migration results. We view the Switch and Save program as an interim, near-term strategy, and would expect that it would be made obsolete and be superseded by ESCOs undertaking customer care functions for residential customers over the longer term.

Billing options and easily understood formats are important to customers and critical to the development of the market as we have previously noted.[46] On December 5, 2003, we solicited comments in this proceeding from the parties on these issues[47] and we will soon provide general guidance regarding bill formats based on those comments. However, each company's bill format and the limitations and abilities for creating the bills are different. Accordingly, Staff should also review bill format issues on a utility-by-utility basis as new rate plans are being developed.

It is our expectation that many ESCOs will want to use utility billing services, but others will want to provide their own billing capability. Utilities should provide for these options and offer ESCO consolidated billing options for ESCOs that want to provide their own billing services.

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[44] See the "Ratemaking" section below for more details.

[45] See Appendix D for a full explanation of Switch and Save.

[46] March Order, pp. 29-30.

[47] Case 00-M-0504, Unbundling Track, Notice Soliciting Comments (issued December 5, 2003).

It is also important to make the process of switching to an ESCO as easy as possible for consumers. To that end, we endorse Staff's recommendation that, in situations where the customer is physically present with appropriate identification, a process that accepts an actual signature from the customer requesting the utility to provide the utility account number (needed to make the switch to the ESCO) and, at the same time, enroll the customer with the ESCO will be acceptable. We will separately propose changes to the UBPs to eliminate any requirements that might obstruct the contemporaneous feature of this process.

We recognize that the mass market (residential and small commercial) is not likely to be ready for advanced metering (including interval metering) in the near term. However, we encourage parties to consider pilots and other programs that would evaluate the feasibility of advanced metering and time-of-use pricing arrangements.[48] We have approved such a program in the recently completed Central Hudson proceeding.[49] Up to $500,000 from the Central Hudson Benefit Fund is reserved for potential use in encouraging appropriate installations of advanced metering technologies and implementation of related pricing strategies intended to facilitate development of competitive markets. Staff should present a proposal for implementing this competitive metering initiative after consultation with Central Hudson and other interested parties.

3. Longer Term Strategies – Residential Customers

In the longer term and depending on the state of market development, it may be reasonable for utilities to expose residential customers to seasonal pricing (for example winter,

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[48] While current competitive metering tariffs generally apply to large customers, there is a metering pilot for residential customers underway in Con Edison's service territory.

[49] Cases 00-E-1273, 00-G-1274, Rates, Charges, Rules and Regulations for Central Hudson Gas & Electric Corporation for Electric Service, Order Modifying Rate Plan (issued June 14, 2004).

summer, and shoulder rates). The sooner customers experience pricing variations, the sooner competitive markets will provide alternatives, including fixed-price options and peak and off-peak pricing, possibly accompanied by interval metering.[50] ESCOs, not the utilities, are expected to provide those options in the longer-term.

[50] For example, a pilot program has been developed by NYSERDA and Econnergy that provides advanced meters and for a group of residential customers in Con Edison's Westchester County territory.

4. Near Term Strategies – Commercial and Industrial Customers

In the near term, non-residential electric and gas customer migration can be facilitated by exposing the largest-usage customers to spot market[51] pricing as contract and hedging arrangements expire. There should be no new hedging for medium to large C&I customers unless we determine that hedged products, similar to those now offered by the utilities, are not available to the class in the particular retail market. Utilities should consider and implement migration strategies during their existing and yet-to-be filed rate plans that will focus on encouraging migration in these larger C&I classes, including the use of auctions (infra).

5. Longer Term Strategies – Commercial & Industrial Customers

Over the longer term, we expect all remaining utility-served commercial and industrial customers will be exposed to a pass through of spot market prices in utility rates. Our expectation is that ESCOs will provide fixed and other stable pricing options to those customers who desire it. As utility contracts expire and utilities reduce their hedging exposure,[52] it should be easier for ESCOs to attract customers seeking to avoid market volatility.

Ratemaking

The Judges considered a variety of ratemaking issues posed by the transition to a competitive market. We provide our guidance on some of the issues.

1. Portfolio Management

To protect ratepayers against wide swings in spot market prices until supply and demand are brought into better balance, the Judges recommended portfolio-theory-based hedging for all electric and for small-use gas customers. Portfolio

[51] We intend by "spot market" to refer to either the day-ahead and/or the real time market.

[52] This is happening now for Niagara Mohawk's SC3 and 3A customers.

theory suggests that neither 100% hedging (i.e., fixed rates regardless of the market) nor 100% exposure to the spot market, with no hedging at all, would be prudent. The hedging recommended parallels that established in our Statement of Gas Purchasing Policy Statement,[53] which the Judges recommended adopting for electricity customers.

While hedging can provide useful protection against market price variation, requiring utilities to enter into ongoing, long-term, full-service contracts for its existing commodity customers may be inconsistent with the movement toward a fully competitive marketplace. Our existing gas purchasing policies, which require a portfolio purchasing approach and generally consist of contracts of a few months to a year or so, should remain in place for small-use gas customers. As we previously stated:

> We expect companies to manage their gas portfolios to meet the needs of their systems. We note that since we issued our previous order, several of the [local distribution companies] LDCs have diversified pricing, while others have remained largely with predominantly non-diversified pricing strategies. While we are not directing any particular mix of portfolio options, volatility of customer bills is one of the criteria, along with other factors such as cost and reliability, that LDCs should consider in their gas supply purchasing strategies. Excessive reliance on any one gas pricing mechanism or strategy does not appear to reflect the best management of the gas portfolio. Any utility without a diversified gas pricing strategy will have to meet a heavy burden to demonstrate that its approach is reasonable.[54]

We are also concerned with volatility in electric spot markets and believe smaller-use customers should be afforded some protection from that volatility, at least until advanced meters and related demand response controls are installed that allow these customers a real-time demand response to spot market price spikes or until equivalent hedged services are generally offered

[53] Case 97-G-0600, supra, Statement of Policy on Gas Purchasing Practices (issued April 28, 1998).

[54] Id., at pp. 4-5 (footnote omitted).

by ESCOs. At this time, however, the utilities continue to have multi-year hedges from independent power producer contracts and generating plant sales. We see no need now to call for additional electricity hedges; as the utilities' existing contracts expire, we expect utilities to review the need for additional hedges and to use mitigation of customer bill volatility as one of their commodity purchasing criteria.

There could be instances where a long term commodity contract might be judiciously used in support of public policy goals (system reliability, environmental considerations, fuel diversity, or market power mitigation). Those instances will be examined on a case-by-case basis as required. However, if it is determined that a utility has entered into a long term contract to retain market share or to otherwise impede the development of a competitive market, the costs of those contracts may not be recoverable from ratepayers.

Consistent with our gas purchasing policy, new supply contracts should focus on mitigating price volatility. Over time and commensurate with wholesale and retail market development, we expect utility hedging to be eliminated, but it should not be abandoned for a customer class until equivalent rate services and plans are generally available to all customers in the class. In addition, we decline to establish any firm timetables for this effort, preferring the flexibility to design rate programs on an individual utility basis, taking account of the unique state of market development in each territory and the terms of the hedging contracts held by each utility.

Based on the current state of the competitiveness of the electric market, it is our view that, for the largest commercial and industrial customers,[55] their commodity rates should reflect spot markets and existing hedges should be allowed to expire without being renewed. We will continue to monitor the

[55] For purposes of determining which customers no longer need hedge protections, it is our intent that this apply initially to all customers served under a mandatory TOU rate. In the future, we will consider lowering this threshold in utility specific proceedings.

state of the market for other customer classes and as the markets continue to mature, we expect that the hedges providing price volatility protection for these customers will be allowed to expire as well.

2. Long-Term Supply Contracts

In addition to supply contracts for portfolio purposes, electric utility long-term commodity and/or capacity contracts may be needed for reliability purposes or might be used in support of other public policy goals (e.g., environmental considerations, fuel diversity, or market power mitigation). The above market costs of these contracts, assuming utility prudence, should be reflected in delivery rather than commodity rates.

The January Notice (p. 5) also asked whether all utilities' commodity purchases should be considered public information as to price, terms, and conditions. The vast majority of non-utility commenters advocated public disclosure of contract terms to add transparency to marketplace transactions and to level the playing field, while most utilities generally opposed release of this information, arguing that it constitutes trade secret data. Of course, for those utilities that do not object to disclosing the contract information, we strongly encourage them to do so.

However, for utilities that do object, trade secret status will be determined on a document by document basis under 16 NYCRR, Part 6. Without an individual review, we cannot determine whether or what portions of these contracts may qualify for legal protection as trade secrets. We agree with the comments that this information would be useful to the developing market, and we direct Staff to work with the utilities and interested parties to evaluate whether or not a system can be established that would make appropriate information public on a routine basis, weighing the benefit of disclosure of the information against the resources that would be required to do so.

3. Gas Pipeline Capacity

In its comments on the January Notice, Staff recommended a reexamination of the Gas Policy Statement because, with limited exceptions, ESCOs have not acquired capacity, long-term commitments are required to persuade pipelines to build incremental capacity, and there is a limited amount of short-term capacity available. According to Staff:

> Because there is uncertainty that the market will provide the infrastructure improvements needed for reliability purposes, at least in the near term, some level of long-term contracts may be an appropriate component of a utility's portfolio to ensure construction of incremental infrastructure needed to meet expected core customer requirements. This suggests that new natural gas pipeline capacity contracts should be limited to those needed for reliability and core customer growth until the ESCOs step forward and assume this role.[56]

Many parties (including Calpine Corporation, Central Hudson, Community Energy Inc., Constellation NewEnergy, Inc./Constellation Power Source, Inc., Independent Power Producers of New York, Inc., KeySpan, Mirant New York, Inc., MI, NFGDC, Select Energy New York, Inc., and UGI) agreed with Staff that some level of long-term gas contracts will be needed in the near term to ensure that incremental infrastructure is built to meet expected demand.

However, not all parties agreed with this conclusion. For example, Hess believes that much of the backup capacity held by utilities is unnecessary. According to Hess, this inefficient use of these resources creates the appearance of a capacity shortage, but Hess argues that this is more perception than reality.[57] It further claims that allowing or requiring long-term contracts creates an incentive for utilities to stay in the commodity business, and such an incentive should not be created.

[56] Staff's Initial Comments, pp. 24-25.

[57] Hess's Initial Comments, p. 12.

Con Edison and Orange and Rockland noted that, as a general rule, they are "opposed to use of utility long-term contracts to ensure the construction of incremental merchant infrastructure."[58] Con Edison and Orange and Rockland also noted that long-term contracts expose customers to the risk of overpayment followed by second-guessing if the contract price ends up being above market. Niagara Mohawk, likewise, does not believe that utilities should execute new electric long term contracts.

NEM suggested that this concern is best addressed through other forums. SCMC argues that this question puts the cart before the horse and that the end state vision needs to be clarified so that companies will be able to make strategic decisions about investments in infrastructure.

Based on the record compiled in this case, we conclude that, for now, utilities should ensure that adequate pipeline capacity exists to serve the needs of their firm delivery customers. Some level of long term contracts may be an appropriate component of a utility's pipeline capacity portfolio when it is required to ensure adequate infrastructure for the core customer loads on its system. However, long term gas and electric supply contracts held by utilities should be kept to the minimum level necessary to provide reliable service, and non-utility entities should increasingly be taking over this responsibility from utilities.

The January Notice (p. 6) also asked if there is a need for greater commitment regarding gas pipeline capacity from ESCOs serving gas customers, asking specifically: (1) when a utility is acquiring capacity for ESCO-served loads, should there be a minimum commitment that marketers must take; and (2) if ESCOs are providing their own capacity, should they be required to commit to provide the utility with access to that capacity if they exit the utility's retail access program?

Staff, in its responses to the January Notice, said that obtaining access to pipeline capacity may be a barrier to

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[58] Con Edison's and Orange and Rockland's Initial Comments, p. 25.

further development of retail markets. Staff argued that if a utility releases excess capacity that becomes available due to increased migration, the ESCO should not have to make a specific commitment when obtaining this capacity because it was not acquired specifically for it, but there would likewise be no assurance that the utility would have capacity available to be released to the ESCO. In those instances where excess capacity is not available but the utility acquires capacity to serve marketer loads, marketers should provide a commitment to take the capacity acquired for their loads. Staff further noted that it is important that existing capacity remains available to serve New York customers, and it recommended use of tariff provisions requiring that agreements among utilities and ESCOs provide for capacity to follow customer loads.

Most utilities agreed that a greater commitment is required regarding gas pipeline capacity from ESCOs serving gas customers. For example, Central Hudson opined that if the Commission is going to require utilities to purchase capacity for ESCO-served loads, the ESCOs should be subject to a minimum commitment requirement. It further recommended that the ESCOs be subject to a requirement that, for reliability purposes, they would provide a utility with access to capacity in circumstances not limited to the ESCO's exit from the utility's retail access program.

KeySpan noted that if a utility acquires capacity for ESCO-served loads, those ESCOs should be required to use that capacity to serve their customers as long as they are doing business in the utility's service territory. KeySpan went on to say that "[i]f ESCOs providing their own capacity decide to exit the utility's service territory or turn back substantial load, the ESCOS should be obligated to offer the capacity to the utility, but the utility should not be obligated to accept it."[59]

Select favored a centralized approach to pipeline control where the utilities or an ISO-like entity have responsibility for capacity acquisition and management. SCMC

[59] KeySpan's Initial Comments, p. 16.

called for establishment of an end-state vision before resolving these questions.

For now, an ESCO should be free to contract with the local distribution company (LDC) or directly with the pipeline for capacity. In order to ensure reliability of service when an ESCO provides capacity that it has acquired from the pipeline, the utility should have the first right to purchase the ESCO's capacity if the ESCO exits the utility's market.

With regard to minimum commitment for pipeline capacity, the ESCO should either take assignment of LDC-contracted capacity or contract directly for such capacity. If the ESCO chooses to take capacity from the utility, and the utility is holding or acquiring incremental capacity on the ESCO's behalf, then there should be a commitment from the ESCO to take capacity for a period consistent with the utility's capacity purchase commitment. An ESCO providing its own capacity should provide the LDC with access to the pipeline capacity using the approach discussed above.

Staff, utilities, and interested parties should continue to work through these issues as part of the on-going Gas Reliability Collaborative, refining policies as market conditions change.

4. Economic Development and Flexible Rate Contracts

The Judges recommended that individually negotiated utility retail contracts for commodity be phased out over five years based on their concern that utility offerings of discounted commodity rates to large customers could impede the development of a competitive commodity market. After the phase-out period, utility economic development rates would be offered only for transmission and distribution service.

We agree with the RD that discounts on commodity below a utility's costs are not favored, and the role of ESCOs in supporting economic development efforts should be expanded. In the future and based on the record in this proceeding, utility-offered economic development programs should focus on delivery rates. While the record here supports the above conclusions, we are also in the process of re-examining these policies in a separate proceeding,[60] and will revisit these issues as required by the record developed in that proceeding.

5. Utility Rates

The Judges recommended that utility rates be based solely on utility costs and that no profit margin on commodity sales be allowed.[61] Only in that way, they believed, could the market operate efficiently and avoid the anomalies that would be caused by the utility as a competitor charging prices set by regulation rather than by market forces. Eliminating this utility profit incentive would, according to the Judges, also better align the utilities' interests with our goal of fostering competitive markets. We agree.

Several of the parties commenting on the January Notice expressed concerns with utilities providing fixed rates, including a profit margin, as part of their offerings to retail customers. ESCOs see a fixed rate offering as a value-added service that they can provide to customers. These parties argue that allowing utilities to provide this service, and to boost their earnings by treating commodity service as a profit center, creates a strong incentive for the utility to remain the monopoly provider in the commodity business and undercuts ESCO efforts to provide these services. We concur with these parties' concerns. We do not propose any changes to existing rate plans regarding commodity profit centers; however, in future rate proceedings, utilities should not propose fixed rate commodity tariffs or tariffs creating a profit center for commodity sales.

Generally, rates should increasingly reflect market prices over time. As markets develop and utility multi-year contracts expire, utility commodity rates should move toward a short-term market price flow-through. We therefore agree with the RD that in the final stage of a utility's offering of a competitive service, the rates for that service should closely

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[60] Case 03-E-1761 – Proceeding to Reexamine Policies and Tariffs for Flexible Rate Contract Service to Economic Development Customers.

[61] At this time, none of the gas utilities profit from the sale of gas commodity.

track the unadjusted spot market price. As noted above, however, customers should not be exposed solely to the spot market until other hedged services are generally available.

Finally, the January Notice asked whether an incentive mechanism is needed for utilities to minimize their commodity costs. In general, the respondents saw no need for such an incentive mechanism. Based on our experience and the responses to the January Notice, we conclude that there is no need for an incentive mechanism of this type. We do not propose any changes to existing rate plans regarding such mechanisms, but, in future proceedings, utilities and other parties should not propose such mechanisms.

Electric Transmission Infrastructure

The Judges, agreeing with MI, recommended that additional attention be focused on the need to reinforce electric transmission capability. Adequate transmission capacity is essential for reliability and market efficiency alike, and it is an important aspect of the State Energy Plan. This issue is best addressed elsewhere by the regular engineering and planning studies performed by the transmission owners and the NYISO and reviewed by this Department and other interested parties.

Other Issues

1. Rochester Single Retailer Experiment

The Judges concluded that, despite its apparent lack of success, RG&E's experiment with a single-retailer program should be allowed to continue. This issue became moot after the Commission's decision in Cases 02-E-0198, *et al*. (*Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric Service*) to replace the single-retailer approach with a multi-retailer model. It should be noted that in the long term, as ESCOs become better established on a statewide basis, use of a single retailer model, where the ESCO does the billing and performs other customer care functions and provides both delivery and commodity, may become more prevalent.

2. Aggregation

The Judges saw no need to require registration of aggregators or to subject them to consumer protection obligations (assuming that they do not take title to the commodity, do not bill consumers, and simply act as agents). They nevertheless recommended a voluntary, for-profit aggregator certification process, including an agreement to abide by a code of conduct.

Aggregation has proven to be an attractive method for putting the competitive market within the grasp of small-volume and low-income users by reducing the cost to ESCOs of acquiring new customers. Both in New York and elsewhere, government and other affinity organizations have successfully used this approach to negotiate energy contracts with ESCOs. We agree with Staff's recommendation that efforts be made to foster governmental and other affinity group aggregation by assisting interested groups.

We are not prepared at this time, however, to address the Judges' recommendation of a voluntary aggregator registration process. Staff should continue to monitor the development of the market regarding the ESCO and direct customer categories we initially defined as well as any new categories of competitors such as aggregators and brokers. Staff should advise us if it becomes apparent that a certification process or other actions would benefit market development or further the public interest. Other interested parties should work with our Staff on these efforts.

CUSTOMER PROTECTIONS AND CONSUMER OUTREACH

Market Monitoring

One potential problem in moving from a regulated monopoly to a competitive market is the ongoing dominance of the former monopoly. The Judges recommended that we actively monitor the dominant firms, including overseeing both the rules of conduct designed to preclude improper, market-skewing transactions between the utilities and their unregulated affiliates, and the firms' compliance with those rules.

Utilities that act in the competitive arena and in a manner that would otherwise run afoul of the antitrust laws should not escape accountability for their actions on the basis of the state action exemption from those laws.[62] We hold, therefore, that any utility activities that impede the development of the competitive market, or the development of competition in potentially competitive markets (and are not otherwise actively supervised), would not be consistent with our policies and, therefore, are not eligible for the exemption.[63] Our orders since 1996 set forth our policies on competitive markets, especially with regard to energy commodity, and those policies require a level playing field for ESCOs, free of antitrust abuses.

Given the inapplicability of the state action exemption to anticompetitive conduct by utilities in markets for competitive products and services, remedies for improper anticompetitive conduct by dominant market players could be obtained from enforcement of the antitrust laws. However, antitrust enforcement can be a cumbersome process; and because the dominant firms, for now, are those we traditionally have regulated, it is reasonable for us to continue monitoring the

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[62] Cases 01-E-0359, et al., Petition of New York State Electric & Gas Corporation for Approval of its Electric Price Protection Plan, Order Adopting Provisions of Joint Proposal with Modifications, (issued February 27, 2002), pp. 11-12.

[63] See, United States v. Rochester Gas and Electric Corporation, 4 F. Supp. 2d 172 (W.D.N.Y., 1998); see also California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

market and the actions of the market participants to the extent needed to promote fair competition, as recommended by the Judges. We have gained considerable experience in doing so for the telecommunications industry, and that experience is readily transferable to energy markets. Among other things, Staff can mediate or resolve conflicts between utility and ESCO competitors, and Staff dispute resolution teams can intervene promptly in the event matters arise requiring immediate attention.

Consumer Protections

Due to their historic role as monopolies providing an essential service, utilities are subject to the wide-ranging residential consumer protection requirements set forth in HEFPA (PSL Article 2) and our regulations thereunder (16 NYCRR Part 11). HEFPA declares it:

> . . . to be the policy of this state that the continued provision of gas, electric and steam service to residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest.[64]

The statute also requires that gas and electric utilities "shall provide residential service upon . . . request" subject to limited conditions,[65] a requirement also known as the "obligation to serve." These consumer protection requirements together define the utilities' role as provider of last resort.

The Judges recommended that ESCOs also be required to provide many of the HEFPA protections and to provide service without undue discrimination. They recommended that the ESCOs be regulated directly as providers of utility services, rather than indirectly through the utilities' tariffs. The RD reasoned that the obligation to serve was the equivalent of a legal requirement

[64] PSL §30. Other consumer protection regulations (16 NYCRR Part 13) apply to non-residential customers. Consumer complaint provisions are set forth in 16 NYCRR Part 12.

[65] PSL §31.

to sell to all consumers without undue discrimination, and that with such a requirement applicable to all ESCOs, all providers would then effectively be providers of last resort and the so-called POLR issues would be moot.

Two significant changes have occurred since the issuance of the RD regarding the provision of consumer protections. First, we have begun resolving consumer complaints regarding ESCOs.[66] Most of the ESCOs in this proceeding recommended this approach based on the Commission Staff's expertise in this area and the relative convenience and efficiency of the Commission's process as compared to court-based litigation. We also believe that consumer confidence in the developing markets will be enhanced as a result of providing this additional consumer protection benefit.

Second, the Legislature passed the Energy Consumer Protection Act of 2002.[67] Under this Act, any entity selling or facilitating the sale or furnishing of gas or electricity to residential customers will be considered to be a utility for the purposes of Article 2 of the Public Service Law. Except for the obligation to serve, which the Legislature decided would remain binding only on the traditional utilities, the new statute requires ESCOs to provide HEFPA protections to all residential customers. We currently have implemented the statute[68] and are now finalizing related changes in EDI and the UBPs. Accordingly, the Judges' recommendations in this area are moot.

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[66] A table showing the number of customer contacts to the Commission, by ESCO, is available on the Department's website.

[67] Ch 686, Laws of 2002.

[68] Case 99-M-0631 –Consumer Billing Arrangements and Case 03-M-0017 – Implementation of Chapter 686 of the Laws of 2003, Order Relating to Implementation of Chapter 686 of the Laws of 2003 and Proration of Consolidated Bills, (issued June 20, 2003).

Consumer Education and Outreach

We believe it is important to acknowledge, as we have done on many previous occasions, the value of consumer education in furthering the development of retail competitive markets. Staff conducts a statewide "Your Energy, Your Choice" program that provides customers with information about how to choose an energy supplier. We have heard repeatedly, through surveys on customer opinions and at events where we participate, that customers consider Staff an unbiased source for information about the services, products, prices, and terms available in the competitive marketplace.

Consequently, we direct Staff to continue and expand its educational efforts to provide this unbiased and neutral market information to consumers. In addition, we encourage utilities to include as part of their next rate plans enhanced consumer education programs, and we encourage other stakeholders to do their share. Staff is directed to take the lead role in coordinating the efforts of the various stakeholders involved in consumer education and outreach to maximize the effectiveness of these efforts.

Staff is developing a simple and user-friendly method to provide consumers critical market information, such as the prices at which competitive services are being offered and the terms and conditions of the offerings. This information is expected to be available on the Department's websites (www.dps.state.ny.us and www.askpsc.com) later this year. Staff should work with willing utilities and interested parties to develop additional creative ways for consumers to compare ESCO and utility prices. We also conclude that utility outreach programs on competition issues should involve coordination with interested ESCOs, including collaborative meetings of interested parties to design outreach campaigns. Those campaigns should recognize the need for repeated consumer exposure to allow the advertising message to be internalized.[69] An important part of the message should be to inform customers of their opportunity to choose non-utility options and that their rights and service reliability will not be affected by making this choice.

Ultimately, the success of outreach and education campaigns is a function of the quality of the utility's effort. A consistently positive approach and attitude toward retail choice will significantly contribute to success. To align utility interests with these goals, incentives that reward utilities for facilitating customer choice (including the increased migration of customers to non-utility suppliers) will be considered in our review of rate plans.

Provider of Last Resort (POLR)

After discussing the definitional and other complexities of the POLR issue, the Judges expressed the view that the obligation to serve comprises an obligation that service be provided without discrimination on the basis of such categories as age, sex, and race, or on the basis of economic status. They recommended that all ESCOs be bound by that requirement within the geographic area and with respect to the customer classes (residential, commercial, industrial, etc.) they elect to serve.[70] Were every supplier subject to that obligation, they suggested, designating a single POLR would be obviated.

Whether mandating the obligation to serve for all ESCOs would be reasonable in the long term could be considered by some to be an open question. Assuming we had the legal authority to do so, we would be concerned that imposing such an obligation could unduly constrain ESCOs and thereby impede development of

[69] NYSEG's and RG&E's Voice Your Choice and Niagara Mohawk's geographically concentrated gas retail access outreach and education campaign (GEO-Campaign) are examples of a targeted outreach campaign, aimed at getting a coordinated message from the utilities and ESCOs regarding customers' ability to choose during a focused time period.

[70] New York adopted this approach for telephone competitors, thereby avoiding POLR issues.

the market. In the recent HEFPA amendments, the Legislature directly addressed this issue by exempting the ESCOs from the requirement that they serve all customers who request service.[71] Thus, the RD's recommendations on this issue are moot.

For the present, utilities will retain the obligation to serve. However, in the longer-term, when markets have developed to the point that a large percentage of customers in a class have migrated and numerous ESCOs are offering multiple products to all customers, a provider of last resort may no longer be needed.[72]

PUBLIC BENEFIT PROGRAMS

Universal Service

Concluding that New York statutes and our regulatory decisions over the years have established universal gas and electric service as the State's de facto policy (subject to line and main extension rules), the Judges recommended that we explicitly adopt that policy. We see no need to do so, though existing low-income programs, as well as the other practices taken by the Judges as evidence of the policy, should continue. Those policies have been successful in addressing the provision of utility services to the public in a just and reasonable manner, and we see no need to adopt the explicit statement of policy. The RD's recommendation in this regard is denied.

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[71] The ESCOs have not been subject to the requirement that service be provided without undue or unreasonable preference, prejudice, or disadvantage (PSL § 65(3)).

[72] As the RD noted (p. 51), there does not appear to be a need for a provider of last resort for gas commodity for the larger industrial classes, due to the fact that nearly 100% of customers have migrated.

Low-Income Programs

1. Consensus Statement

The Judges reported the parties' success in adopting a broad consensus statement on low-income programs during the transition to the end-state and in the end-state itself.[73] They recommended adoption of the substance of the statement (if not its precise wording) as our low-income assistance policy.

The transition to competition requires the development of innovative, market-driven mechanisms for meeting the needs of low-income customers, and we commend the parties' efforts to do so. The consensus statement includes much that is worthy of endorsement; in particular, we note its recognition that low-income needs must be addressed through a variety of initiatives, that programs required in existing agreements should be continued, that we must continually reconcile the conflicting goals of funding low-income programs through utility rates while still reducing prices overall, and that coordination among program providers should be increased. Aggregation of low-income customers who are then provided service by an ESCO has also proven to be an effective strategy, and we encourage its expanded use. We direct Staff to work with utilities and interested parties to explore additional opportunities for low-income aggregation programs.

In view of the need to maintain flexibility in the face of a necessarily unpredictable future, we will stop short of endorsing the consensus statement in all its particulars, and we will continue to monitor market developments as they may impact the access to reliable energy services by customers facing financial difficulties.[74]

2. Funding of Low-Income Programs

How low-income programs should be funded presents a subset of the issues considered in the parties' consensus statement. Among other things, the Judges recommended placing

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[73] The consensus statement appears at RD 98-99 and is reproduced as Appendix E to this policy statement.

[74] Cases 94-E-0952, et al., supra, Opinion No. 96-12 (issued May 20, 1996), p. 28, n. 1.

primary emphasis on competition-based mechanisms such as aggregation programs, with no immediate increase in the extent to which low-income programs are funded through utility rates. They also proposed creation of a gas systems benefit charge (SBC) to parallel the existing electric SBC and remove that asymmetry between the two energy sources; the electric SBC would be adjusted to avoid any increase in the overall revenues collected through the charge. They recommended as well the continued use of multifaceted program offerings, including rate discounts where appropriate, as part of a package of assistance designed to keep low-income customers on the system.

Here, too, we see no need for sweeping policy pronouncements. It is enough to reaffirm that low-income programs require adequate funding and that we must continually reassess the sources of that funding. With respect to the creation of a gas systems benefit charge, we recognize that there are important public benefit issues that warrant our attention. We will not, however, decide our policy regarding such issues here. Instead, that issue will be deferred for later consideration, and we may choose to address the possible merits and structure of a gas system benefit charge concurrent with our future consideration of the electric system benefit charge.

Public Benefits and Competition Councils

The Judges recommended establishing a Public Benefits Program Council and a Competition Council, each with specified responsibilities. We see no need, however, for structures of this sort. The issues that arise during the transition to competitive markets, and there will be many, can be addressed through on-going discussions among Staff and interested parties and can be brought to our attention as needed. Adding an additional level of review would likely be counterproductive. These recommendations of the RD are denied.

COMMISSION AUTHORITY AND RELATED LEGAL ISSUES

The Judges reported in detail on the parties' debate over our legal authority to take various steps discussed among the parties during this proceeding. Because we are now simply adopting a policy and vision statement that provides guidance for future developments, but imposes none of the requirements whose legality was debated among the parties, we need not resolve now the legal issues beyond those views expressed here. We will further consider issues of our jurisdiction if and when they become pertinent as a practical matter.

SUMMARY

The Commission appreciates the efforts and input of the many parties that have participated in this proceeding. We are encouraged by the progress that the parties and our Staff have made since the issuance of the RD in preparing the infrastructure to make energy competition successful. Our policy of allowing experimentation has resulted in a number of highly successful approaches. The best of these practices can now be applied statewide, and they have the potential to transform the New York marketplace into the vibrant entity that we have envisioned since we began the process of restructuring in the mid-1990's.

The infrastructure changes necessary to support competition are now in place (e.g., divestiture of generation, a reasonably competitive wholesale market, consumer protection rules, EDI, and UBPs), and therefore we have the opportunity to introduce new programs, some as proposed by the parties. In addition, completing this competitive framework positions New York to remain in the forefront of retail energy market competition. We encourage all interested parties to work with Staff[75] to develop innovative initiatives that will continue to foster competition.

[75] Given the numerous tasks we have assigned to Staff, we recognize that prioritizing its efforts will be required.

<u>The Commission orders</u>:

1. The utilities (Consolidated Edison Company of New York Inc., Orange and Rockland Utilities, Inc., Central Hudson Gas & Electric Corporation, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Niagara Mohawk Power Corporation, National Fuel Gas Distribution Corporation, KeySpan Energy New York, and KeySpan Energy Long Island) shall prepare plans to foster the development of retail energy markets in collaboration with Staff and other interested parties, as discussed herein.

2. This proceeding is continued.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

CASE 00-M-0504

APPENDIX A

APPEARANCES

APPEARANCES

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CASE 00-M-0504

APPENDIX B

STRAW PROPOSAL 2

APPENDIX B

COMPETITIVE MARKETS CASE 00M0504
STRAW PROPOSAL 2
February 26, 2001

This proposal does not necessarily represent Staff's or the Department's position nor are we bound by it in any way.

I. Vision:

- Ensuring the provision of safe, adequate, and reliable electric and gas service at lower overall costs to consumers is the primary goal of developing competitive markets.

- Competitive markets should be relied upon for providing all products and services that result in more choices and value for customers.

- The utility delivery function will continue to be a monopoly service. The remaining utility functions, including retailing and customer care services, will be or have potential for becoming competitively provided by non-utility companies. In the long run, and depending on how the market develops, the utility's function is expected to be delivery service.

- Regulation should continue for the remaining monopoly functions, and should facilitate the development of workably competitive markets, monitor the functioning of those markets, establish consumer protections for all consumers, and address the needs of consumers who are not served by the competitive markets. Regulatory oversight should be relaxed as markets become more competitive.

Implementation:

There are several steps in getting to this long-term vision.

UNBUNDLING

- Fully unbundling retailing services will enhance the development of competitive retail markets. The Commission immediately should institute a proceeding to address generic policy issues related to unbundling with a goal of establishing an appropriate level of uniformity in calculating back-out credits.

MARKET PRICE PASS-THROUGH

- Large Customers

  - Gas

- Most large volume natural gas customers have already switched from the utility to marketers for commodity service. The large customers that still purchase bundled gas service from utilities generally pay a market-based price.

- Electric

- Utilities should be required to offer their largest electric customers (i.e., those with interval metering) rate options reflecting the straight pass-through of hourly market electricity prices.[1] In the long run, such pricing options will need to be coupled with appropriate customer outreach and education programs and further supported by market offerings to customers of load management and other price-responsive program packages that will enable customers to better manage their operations in a market-based pricing environment.

❑ Small Customers

- Gas

- The Commission has already required gas utilities to take action to mitigate price volatility.[2]

- Electric

- A purchasing practices policy statement for electric utilities should be established, similar to that already in place for gas.

- At this time, electric utilities should manage their supply portfolios to, among other things, reduce customer exposure to price volatility. This can be phased-out as the competitive market develops.

- Once criteria (a) and (b) listed below under Preconditions, Timing/Process, have been met, utility rates that are more reflective of a straight pass-through of market-based prices for commodity, capacity and other ancillary services should be extended to the incumbent's smaller commercial and residential customers. Such utility pricing options will need to be coupled with appropriate customer outreach and education programs.

UTILITIES EXIT COMMODITY FUNCTION (MODEL 2) ONCE PRECONDITIONS ARE MET

- The most direct way to establish a robust competitive market is for utilities to cease buying and selling commodity (see the Commission's November 1998 Natural Gas Policy Statement wherein the Commission envisioned gas utilities exiting the merchant

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[1] See Case 00-E-2054, In the Matter of a Status Report on the Demand/Supply Component of the Department's Electric price and Reliability Task Force Including Recommendations for Specific Utility Actions on the Demand-Side, Order Requiring Filings and Reports on Utility Demand Response programs (issued December 20, 2000).

[2] See Case 97-G-0600, In the Matter of the Commission's Request for Gas Distribution Companies to Reduce Gas Cost Volatility and Provide Alternative Pricing Mechanisms, Statement of Policy Regarding Gas Purchasing Practices (issued April 28, 1998).

function in three to seven years). Electric and Gas utilities are expected to be out of the commodity function, i.e., buying and selling electricity and gas, for all customers.

Before the complete exit, however, the Commission needs to be assured that the preconditions identified below have been met. These criteria may be satisfied at different times for gas and electricity and for large and small customers.

PRECONDITIONS, TIMING, AND PROCESS

- **Preconditions** - Before utilities exit the merchant function the Commission needs to be assured that the following criteria have been met:

(a) "Workably competitive wholesale markets" exist;

(b) New York State registered ESCOs/marketers are collectively able and willing to provide reliable service to the appropriate market;

(c) Mechanisms are in place to provide access to electric and gas service to all consumers who need service but are unable to secure it in the competitive markets (see POLR and Low-Income sections below);

(d) There is general public acceptance of energy market restructuring and a reasonable expectation that greater levels of customer migration to competitive providers will create additional opportunities for all customers to save and to benefits; and

(e) Potential legal impediments are addressed.

- **Timing/Process** - The timing for utilities to exit the commodity function will depend on how well the above conditions are satisfied. A multi-stakeholder "Competition Council" should be established to monitor the status of wholesale and retail competition, and to report to the Commission when the above criteria have been met. The specific measures to determine that these criteria have been met will be established with input from all parties. The following framework is suggested:

  - within three months after an order in this proceeding - parties decide on metrics for determining when the above preconditions (a) - (e) have been achieved;

  - twelve months after an order in this proceeding - review the status of the wholesale market to ensure that specific criteria are met;

  - twenty-four months after an order in this proceeding - review the status of retail issues [pre-conditions (b), (c) and (d), above] to ensure that specific criteria are met;

  - twenty-five to forty-eight months after an order in this proceeding (assuming that the 12 and 24 month reviews were successful) conduct a coordinated statewide outreach campaign educating customers that the utility is exiting the commodity business, coordinated outreach could be conducted sooner to educate consumers on other emerging competitive issues, depending on the need;

- Forty-eight months after an order in this proceeding - utilities are expected to exit the commodity business.

UTILITIES EXITING RETAIL FUNCTIONS (MODEL3)

- The opening of some retail functions (billing and electric metering) to competitive markets is currently in progress. Before the utilities cease providing retailing functions (Model 3), however, the Commission must be assured that competing ESCOs/marketers have the infrastructure to provide the retail services. This issue should be revisited within the next few years to assess the ability of the marketplace to provide these services. However, individual utilities should not be precluded from voluntarily seeking to exit the retail function sooner, as long as there is a showing that the marketplace is ready and capable of providing these services (some of the yard sticks to gauge whether the marketplace is ready might.-4-include percentage of customer/load migration experienced to date, number of ESCO/marketer choices available to serve customers, customer satisfaction with ESCOs/marketers, collective ESCO/marketer infrastructure in place to handle retail functions for millions of consumers).

II. Consumer Protections:

- Development and implementation, including enforcement, of modified consumer protection rules appropriate to meeting the needs of consumers in a competitive marketplace is essential for the well-being of all New Yorkers. Changes may be needed to HEFPA and Non-Residential rules, and the modified rules should be aligned with other existing statutory requirements.

- All service providers in New York are expected to abide by a standard basic level of consumer protection rules. The parties should develop these standard rules. Specific areas to be considered include disclosure requirements, service quality standards, fair trade practices (e.g., anti-slamming, anti-redlining), and complaint resolution. More consumer protections may be needed during the transition phase (e.g., limitations on prepayments, marketing codes of conduct). Experience would allow for the refinement and modification of those protections, to achieve an appropriate balance between the strengthening of consumer trust that they create, and the costs they impose on marketplace participants. Once there is a vibrant competitive retail market, some of the protections may be relaxed.

- The Commission should investigate and resolve customer complaints against ESCOs. This could be accomplished through alternative dispute resolution and other mediation techniques.

III. Customer Migration Strategy:

- Ideally, full customer migration to competitors should happen voluntarily. This has occurred for large gas customers and may in fact occur for large electric customers. Voluntary migration should and will be strongly promoted through customer education and customer choice.

- ESCO/marketer price mechanisms and value-added services should give consumers new options over current utility offerings. In addition, utility price signals (e.g., utility recovery of some stranded costs via commodity charges) could also help facilitate customer migration.

IV. Provider of Last Resort:

- The POLR entity or entities will have the responsibility of satisfying "obligation to serve" and attendant consumer protections. As long as the utilities provide commodity service to some classes of customers, they will continue to be the POLR for commodity service to customers in those classes. During the transition, however, utilities should be encouraged to outsource POLR functions (i.e., implement POLR pilots). Once the utilities fully exit the commodity function, other entities will discharge this responsibility. The POLR entity could be different for electric and gas industries and different by customer group, and should be approved by the Commission. The utilities may also bid for providing POLR service. The preferred approach is the one where one or more entities provide POLR service on a regional or statewide basis, with the "obligation to serve" not imposed on all ESCOs. It is expected that in the end-state, the POLR will serve "transient or gap" customers only, and not necessarily have a large customer base.

- A pre-requisite for establishing the new POLR entity or entities is the continuity of the obligation to serve. Reliability must be ensured. The solution must address the term of obligation and what will happen if one or more entities are unable to fulfill POLR obligations during, or at the end of, the term.

- With regard to POLR pricing to consumers, price offerings could include both fixed and variable prices as options. The variable price could be formula-based, approved by the Commission.

- Assuming all ESCOs do not have the obligation to serve, a competitive process involving issuance of an RFP should be used to select the POLR entities. The term should be at least a one-year period with possible provision for extensions to two or three years. Bidders should be able to bid across utility territories, by fuel type and/or service class, to allow serving multiple areas or the entire state. Evaluation of RFPs must consider the technical and financial competence of the bidders and terms of the proposed service offerings. Renewable energy sources could also be considered in the selection process. A process is needed to provide guidance on how, if at all, the terms could be changed during the term. If suitable bidders are not found, the PSC can designate an entity (a governmental body, NYPA, incumbent utility, etc.) as the POLR or solicit a qualified bidder under negotiated terms. An interim POLR could be designated by the PSC in case of default.

- POLR oversight is expected to involve pricing, service quality, consumer protections, economic viability and a process for back up in the event of POLR failure. This will require the collection of data regarding complaints and other compliance measures. It will also involve a process for monitoring and problem resolution, as well as provision for enforcement and disqualification as conditions and qualifications may change over time. Some limited number of service standards (addressing reliability, safety etc.) should be developed that qualifying bidders would be subject to. A publicly available report card on POLR performance is recommended and should be periodically issued by the Commission. POLR oversight role should be expanded to include other stakeholders besides the PSC (e.g., consumer groups and other representatives of the community) on a voluntary basis in an advisory role, working with Department staff, subject to the Commission's decision making authority.

V. Low Income Programs:

- The energy burden on low-income customers should not be worsened as a result of the development of competitive markets. The continuing needs of low-income customers both in the end-state and during the transition to the end-state must be addressed through low-income programs and other initiatives. Appropriate funding resources should be assured to address the needs of low-income consumers.

- Market-based solutions, where possible, should be developed to address the needs of low-income customers.

- In the long run, the financial support needed to assist low-income customers should be derived from broad-based public funding. For the transitional period, however, surcharges on bottleneck functions (e.g., pipes and wires) would be a reasonable alternative mechanism for achieving these benefits, the loss of which would not be in the public interest. Such cost recovery mechanisms are reasonable because low income programs help to at least partially avoid collection related and working capital costs on unpaid bills that are borne by all customers, as well as collateral costs to government social service agencies.

- A basic level of reasonably affordable service must be maintained for low-income customers. Coordinated program initiatives that include programs implemented by utilities as well as alternative providers should be developed. The sources of program funding should be considered in program design and implementation. Some of the components to be considered part of a coordinated statewide low-income program could include the following:

    - Targeted energy efficiency and weatherization measures - to reduce usage and overall energy costs for payment-troubled low-income consumers and address the concern that low-income households tend to live in poorly maintained housing stock.
    - Energy education and budget counseling programs - to help customers manage energy affordability problems.

- Forgiveness of arrears linked to improved prospective payment behavior - to improve revenues from low-income customers.

- A "lifeline" discounted rate (without distorting economic price signals) - to reduce energy burden. Such a discount should be applied to delivery rates, in order to maintain customer entitlement whether the customer stays with the utility for sales service or migrates to a competitive supplier.

- Market-based solutions, such as aggregation programs - that allow low-income customers an opportunity to enjoy the benefits of a competitive market, as well as providing a savings to counties, municipalities, or other entities that seek to aggregate low income customer load.

- Reducing overall energy rates to achieve lower consumer prices and funding low-income programs through energy delivery rates are competing goals that need to be continually reconciled. The future sources of funding for low-income programs need to be examined on an on-going basis.

VI. Public Benefit Programs:

- A competitive market may not necessarily provide all energy efficiency, renewables and R&D programs that are in the public interest because demand for these activities in a competitive market is driven by the benefits derived by the purchaser rather than the benefits to society as a whole. These programs provide important environmental benefits that are difficult to obtain through markets. Ideally, the financial support needed for these programs should be derived from broad-based public funding.

- Energy Efficiency/Renewables/R&D programs (fuel-neutral) could be funded from a competitively neutral Public Benefits Charge assessed on all electric delivery rate customers until the market meets the societal needs that the programs are designed to address or broad based funding approaches can be implemented.

- Such energy efficiency/renewables/ R&D programs could be implemented by a single entity to be designated by the Commission (e.g., New York State Energy Research and Development Authority) as program administrator.

- A multi-stakeholder forum could be established to assist with defining needs and objectives, setting fund requirements, reviewing compliance and other standards for participation, as well as periodically assessing whether the market is meeting the societal needs that the program is designed to address.

- The Public Service Commission will administer a process that will aid in its determination of the amount and oversight of the collection of the funds as part of its regulation of the T&D companies.

- Gas customers should continue to fund utility-based R&D as per existing Commission orders.[3]

VII. Aggregation:

- We expect that clarity and commonality in language will facilitate the transition to competition. As a first step, we offer the following definitions. Once consensus is reached on definitions, the parties should develop necessary business practices and list requirements for new entities.

Aggregator means any person or firm joining two or more customers into a single purchasing unit to negotiate the purchase of electricity and/or natural gas from ESCO/marketers. Aggregators may not sell or take title to electricity or natural gas. ESCO/marketers are not aggregators.

Broker means a firm that acts as an agent or "middle man" in the sale and purchase of electricity or natural gas in the wholesale market, but never owns the electricity or gas.

ESCO means an entity that can perform energy and customer service functions in any competitive environment, including buying and reselling of electricity and natural gas and assistance in the efficiency of its use. [modifications from the PSC definition]

Marketer means an entity that can perform energy and customer service functions in any competitive environment, including buying and reselling of electricity and natural gas and assistance in the efficiency of its use.

Registered Aggregator means any non-profit, public interest organization, governmental entity or private firm that provides one or more of the following: conducts outreach and education to small use customers; acts as procurement agent for targeted end-users, negotiating pricing, terms and conditions with ESCO/marketers and offers the package to the customers; renders bills on behalf of the ESCO/marketer; and maintains on-going customer service relationships with the aggregated customers. Registration with the PSC is voluntary. The PSC Web site will list registered aggregators.

Restricted ESCO/marketer means a firm or governmental entity that takes title to electricity or natural gas on behalf of two or more service end points (defined customers or for its own use), which are defined when registering with the Department of Public Service such that others are precluded from joining or participating. Restricted ESCO/marketers are not listed on the PSC Web site.

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[3] Case 99-G-1369, Petition of New York Gas Group for Permission to Establish a Voluntary State Funding Mechanism to Support Medium and Long Term Gas Research and Development (R&D) Programs, Untitled Order (issued February 14, 2000).

Sales Agents means a separate person or firm that matches buyers and retail sellers of electricity or gas, playing no role beyond customer acquisition.

- We expect the marketplace will provide consumer information about ESCO offerings and performance of ESCOs and aggregators in an unbiased manner. Access to information on ESCO/marketer offerings also will continue to be provided on the PSC Web Site.

VIII. Additional Transition Measures:

- Uniformity in ESCO, customer, utility business interaction practices should continue to be pursued, i.e., continue to improve the UBP.

- Any economic development or flex rates offered by incumbent utilities to large customers in the future should be competitively neutral, should cover the incumbent’s marginal cost plus a contribution to fixed costs and preferably should be administered as discounts to standard delivery service rates.

CASE 00-M-0504

APPENDIX C

COMMENTS SUMMARY

APPENDIX C

CASE 00-M-0504 Comments Summary

Amerada Hess Corporation (Hess)

Auctions: Hess would support wholesale auctions if they are used only for residential customers that stay with the utility or with the provider of last resort. Hess does not support retail auctions since this does not allow the ESCO to build a long-term relationship with the customer.

Capacity: Hess urges a reduction of the proportion of backup capacity held by utilities. It urges the Commission to set a reliability standard and allow the ESCOs to determine how best to meet that standard. Hess does not object to a mechanism by which capacity could follow the customer in the event that the ESCO exits the retail program. However, Hess does not agree that the capacity should necessarily go to the utility.

Consumer Outreach and Education: Hess believes that there is some value in a coordinated marketing and education approach. However, ESCOs marketing to the larger customers should not be hampered by a statewide program.

Contract Disclosure: Hess advocates making commodity information regularly available since it helps ESCOs plan their pricing strategies and is an intermediate step toward the utility exiting from the merchant function.

End-State Vision: Hess believes the Commission's ultimate goal should be the exit of the utilities from the merchant function. This will require establishment of a clearly defined end state that eliminates the utilities from provision of commodity service for both gas and electricity.

Hedges: Hess notes that utilities should not be allowed to hedge. However, in the short term if hedges are necessary, they should be assigned to smaller customers rather than larger ones. Costs should be recovered in a manner that ensures that retail access customers do not cover costs associated with service to sales customers.

Incentives: Hess does not believe utilities should get an incentive to reduce commodity costs.

Price: Hess is in favor of guidelines that provide uniform price computations and the requirement that utilities install interval meters for all large commercial and industrial customers. In addition, Hess does not believe utilities should be permitted to offer fixed price products. As an interim step, Hess recommends that monthly forward prices be utilized by the utilities for their electric commodity offerings, with the eventual goal being a switch to hourly pricing.

Calpine Corporation (Calpine)

Auctions: Overall, Calpine believes that the cost savings possible through preserving contract flexibility outweigh the efficiency gains of an auction.

Hedges: Calpine recommends hedging smaller customers rather than larger customers, for longer periods. Retail customer flexibility would be increased if the resource adequacy component of service (generating capacity purchases) were unbundled from the price hedging services (energy and ancillary services).

Price: Calpine notes that the only way to ensure that prices are competitively determined is to time purchases of capacity consistent with the lead time for new entry. There is no substitute for determination of competitive prices through the market; in the case of generating unit capacity services, this will require longer lead time procurement by load serving entities.

Central Hudson Gas and Electric Corporation (CHG&E)

Aggregation: CHG&E supports the encouragement of customer aggregation, particularly for low-income customers.

Auctions: CHG&E recommends that an RFP process be encouraged, but not required by the Commission.

Capacity: CHG&E states that if utilities are required to purchase capacity for ESCOs, there should be minimum purchase requirements and utilities should get full recovery of all capacity-related costs.

Customer Outreach and Education: CHG&E recommends voluntary coordination and would offer its services to all ESCOs toward this goal.

Hedges: CHG&E believes that utilities should be allowed to hedge at their own discretion. It supports the selective use of long term contracts to blend into a portfolio.

Incentives: CHG&E does not believe incentives to reduce commodity costs are necessary and, in fact, may be counterproductive.

Price: CHG&E recommends guaranteed savings off the utility's full service price to encourage migration, with ESCOs guaranteeing the discount at their expense. Any gain or loss resulting from migration should be included in commodity rates. CHG&E supports hourly day-ahead prices for large customers and maintaining hedged services for smaller customers.

Switch and Save Program: The company currently offers purchase of receivables 'without recourse' to ESCOS and is reluctant to reverse course and convert to 'with recourse'.

Utility Role: CHG&E has proposed that it is now appropriate to eliminate itself as a supply option for its largest electric customers, except as a POLR supplier, and has outlined a plan to do so.

Centrica/Direct Energy (CDE)

Auctions: CDE recommends auctioning blocks of mass market customers with a single retail price for all customers who do not select an ESCO. Auctioned customers would get a one-year fixed price with an assigned ESCO unless they choose another ESCO. At the end of the one year term, customers that have not affirmatively switched to an ESCO remain with the ESCO that was assigned to them and get market prices. CDE believes this method creates an ESCO incentive to keep prices and service options competitive. Commercial and Industrial customers should get a market price pass through, with no hedged portfolios. CDE opposes wholesale auctions because it believes they only benefit generators and could slow utility exit from the marketing function.

Hedges: CDE does not recommend the use of long-term contracts, particularly by utilities. Further, if there are any cost/revenue mismatches because of hedges, no commodity costs should be contained in distribution rates.

Price: As a first step, commodity and retail services should be structurally separated (like Texas and the United Kingdom) so that utility commodity charge is not subsidized.

Community Energy (CE)

Customer Outreach and Education: CE recommends creation of a "Green Power Marketing Committee" consisting of Staff, utilities, and green power suppliers to work on collaborative public education efforts and develop common statewide green power themes to increase green power choice awareness. CE believes it is necessary to track and reconcile generation supply against customer purchases through environmental disclosure.

Hedges: CE states that it is important to develop new wind generation facilities and other renewable facilities and to make green power supply available to consumers, thereby meeting market and policy goals. CE contends that it is important to explore innovative ways for utilities to support purchase power agreements.

Price: CE believes retail customers should be allowed to actively choose green products.

Con Edison Solutions (CES)

Auctions: CES supports wholesale procurement for mass market customers as the best way for utilities to firm up supply costs for customers who remain with the utility. CES recommends that auction rules and results (CES prefers New Jersey's BGS style auctions) be public information, with the information released at an appropriate time.

Customer Outreach and Education: CES believes the Commission should focus on increasing customer awareness. It does not believe it is practical to coordinate utility and/or ESCO marketing campaigns due to differences in campaigns and business strategies.

Hedges: CES believes there is no need for prospective hedges. Utilities should hedge as little as possible (limited to mass market customers) and pass though market prices. Short term (1 and 2 year) contracts are workable but, due to a lack of liquidity, 3 year terms are not appropriate.

Price: Utilities should pass through real time market prices to the largest customers, specifically hourly rates wherever possible. Pre-existing supply contracts or owned generation should be reflected in delivery rates.

Switch and Save Program: CES notes that purchase of receivables resolves uncollectible concerns. These programs are highly effective at increasing awareness, facilitating migration, and reducing acquisition costs. Utilities should consider incorporating some form of purchase of receivables model into their single bill offering.

Consolidated Edison Company, Inc. /Orange &Rockland Utilities, Inc. (Con Ed/O&R)

Aggregation: Con Ed/O&R are not aware of any specific barriers to aggregation although it believes that there are some legal obstacles that have been encountered in considering implementation of a low-income aggregation program.

Auctions: Con Ed/O&R would support a trial auction for electric customers, similar to the New Jersey BGS model or recently authorized D.C. auctions, as a transition measure. However, Con Ed/O&R cautions that auction outcomes in highly constrained load pocket areas like New York City are usually uncertain, and the Commission may have to guarantee recoveries. Accordingly, the Commission should not decide to proceed in a generic way. It does not believe there is a need for auctions for gas customers because the gas market is already transparent.

Capacity: Con Ed/O&R contend that if ESCOs are willing to enter into capacity contracts, it reduces the need for utilities to do so. It is willing to continue its requirement to obtain capacity, but believes that ESCOs must have a corresponding capacity obligation.

Contract Disclosure: Con Ed/O&R state that revealing prices would increase bid prices; accepted bids would automatically become floor prices under which no new bidder would offer, knowing the utility had accepted that price already.

Customer Outreach and Education: Con Ed/O&R believe that no facilitated coordination is necessary.

Hedges: Con Ed/O&R believe utilities should continue to hedge for residential and small commercial customers, but would not object to guidelines outlined in the Commission's Gas Policy Statement on the basis that the Commission extends presumption of prudence if it follows guidelines. In general Con Ed/O&R are opposed to long term contracts since financial markets are the best arbiter of merchant project need. Con Ed/O&R believe other efforts may make more sense, including streamlining and expediting the Article X process. It recommends that the Commission review this issue on a utility-by-utility basis to determine impacts. Further, Con Ed/O&R believe that any future utility long term contracts should have Commission pre-approval and utilities should be rewarded for the higher risk of entering into contracts.

Incentives: Con Ed/O&R recommend that the Commission provide meaningful and achievable utility incentives, where migration goals and recovery of costs and lost revenues are aligned. The utility must fully recover unavoidable costs and lost revenues associated with migration. If the Commission develops alternative incentive mechanisms that do not have arbitrary effects, those should be resolved within individual utility rate cases.

Price: Con Ed/O&R recommend that any gains and losses from hedging full service customers should be reflected in the commodity charge as a non-bypassable delivery charge or credit, applicable to both full service and retail access customers, instead of the delivery charge, because utilities should not have to absorb the financial risk of migration. For Con Edison electric, these costs are currently reflected in delivery charges, but the company believes this should be changed.

Switch and Save Program: Con Ed/O&R are interested in this program if it proves feasible but does not believe it should be assumed that results will be the same in another service territory. It does not believe that any aspect of the program should be imposed on any other utility, in particular purchase of receivables. The issues should be resolved on a utility-by-utility basis in proceedings, where utilities can be granted appropriate protections.

Constellation NewEnergy, Inc. (Constellation)

Auctions: Constellation believes that mass market customers should be supplied by utility via a competitive solicitation process, either through an RFP process or in an auction, with a minimum of 6 month terms and a maximum of three year terms, with monthly adjustments. Constellation prefers an RFP process to procure wholesale full requirements to obtain a fixed price offering.

Aggregation: Constellation believes that the benefits of aggregation are best assessed by the marketplace. Since larger customers are already effectively aggregating, it sees provider of last resort (POLR) service functions as an aggregation service for small customers. However, Constellation believes that mandatory aggregation is unnecessary and creates additional risk and uncertainty for wholesale suppliers, raising the cost of POLR service.

Contract Disclosure: Constellation states that prices bid by potential wholesale suppliers are competitively sensitive and should be kept confidential.

Customer Outreach and Education: Constellation believes that there is a need for accessible customer data from the utility and that the Commission should participate in and facilitate the education campaigns of utilities. However, there should be no increase in requirements upon ESCOs and the Commission should not be in charge of ESCO programs and marketing.

Hedges: Constellation believes contract lengths should be limited to specific rate classes, with mass market customers receiving limited fixed price service and others getting real time pricing service.

Incentives: Constellation states that there should be no incentive mechanism for utilities to participate in the commodity business.

Price: Constellation notes that residential and small commercial customers need stable fixed prices. It believes that the tariff price to beat should be the real time price or an index of spot market prices, there should be no utility multiple pricing options and existing back-out credits should be kept until unbundling is completed

Consumer Protection Board (CPB)

Capacity: CPB notes that if the utility is the provider of last resort and is required to maintain a certain level of capacity, it should be able to recover any losses incurred due to customer attrition. If marketers, however, can effectively compete with the utility, the utility should bear that risk as a market participant, and ratepayers should not compensate the utility for commodity not supplied.

Customer Outreach and Education: CPB recommends effective coordination of utility and Commission programs, funded through regulated rates and limited to the effective, productive, and efficient delivery of information. It notes that there should be no coordination with marketing campaigns of individual ESCOs, but there should be a coordination of overall industry efforts to increase consumer awareness.

End-State Vision: The Commission should resolve the unbundling case and standardize programs and policies affecting ESCOs and competition throughout the state.

Hedges: CPB states that some price hedging is necessary for the mass market and long term contracts (as part of a balanced portfolio) are vital to the interest of consumers and should be part of utilities' overall supply portfolio. ESCOs should also enter into long-term bilateral contracts for supply.

Incentives: CPB contends that incentives to reduce commodity costs are not needed because of current Commission oversight obligations.

Switch and Save Program: CPB recommends that this program be replicated in other service territories, including guaranteed savings over utility commodity service for an initial period, unlimited switching, and utility consolidated billing.

Department of Public Service Staff (Staff)

Aggregation: Staff recommends that the Commission undertake a pilot program with an interested utility that would allow customers the opportunity to opt into aggregation pools (either residential or small business) for electric and/or natural gas commodity service. ESCOs would be selected though competitive bidding to supply the pools. Staff further recommends that the Commission foster affinity group aggregation by matching interested groups with ESCOs that serve the entire state.

Auctions: Staff recommends that the Commission require utilities to use an auction process to switch blocks of large as well as mass market customers to ESCO commodity service. Under a retail opt-in program conducted by the utility, customers may choose to participate in a program switching them to the winning ESCOs to supply their power. Once willing participants are identified, a bidding process would be established, with the intent of switching those customers to the winning ESCO(s). Under this scenario, the utility could maintain the billing services and purchase ESCOs' accounts receivable if the utility and ESCO agree to that arrangement. Details of the auction process should be worked out by each utility with input from parties.

Back-Out Credits: Staff recommends eliminating, wherever feasible, the use of electric spot market price-based commodity back-out credits in cases where a utility's actual electricity sales service rate is not a pass-through of market prices, but is, instead, a hedged or otherwise different price.

Billing: Staff recommends adoption of a more standardized unbundled bill format with content that provides consumers plain language information to assist them in making competitive choices. As part of that process, Staff recommends the unbundling of the utility retail sales service bill to separately reflect prices paid for each service provided by the utility. Utility consolidated bills for combined ESCO and utility services should be similarly unbundled and structured.

Capacity: Staff recommends that a tariff provision requiring that agreements among utilities and ESCOs provide for capacity to follow customer loads. If the utility is acquiring capacity specifically for ESCO-served loads on its system, the ESCOs must commit to take that capacity. If a utility releases excess capacity that becomes available due to increased migration, an ESCO should not have to make a specific commitment in obtaining this capacity because the capacity was not acquired specifically for it. The Commission has allowed the utility, in areas where capacity is tight, to purchase incremental pipeline capacity and make capacity available to ESCOs at its average cost of capacity. That program is ending and Staff recommends that it be reexamined. If ESCOs provide their own capacity, it is critical that the utility have access to that capacity in the event the ESCO either defaults or decides to exit the market.

Consumer Outreach and Education: Staff recommends that the Commission facilitate the alignment of utility, Department, and ESCO marketing and outreach efforts on a regular basis. Utility-sponsored marketing and customer education campaigns beyond the coordinated efforts should also be encouraged. Implementation of Market Match and Market Expo programs to encourage exchange of customer information between customers and ESCOs is recommended. Staff also supports a focused effort to create an "apples to apples" price and service comparison information guide to assist customers in deciding whether to select an ESCO or remain with their utility. In addition, Staff recommends defined enrollment periods preceded by strong, tightly coordinated marketing campaigns to stimulate mass market customer awareness and interest in retail access subscription.

Contract Disclosure: Staff notes that, on a going forward basis, information on the status of utility portfolios, provided periodically, would be of enormous benefit to ESCOs and the marketplace in general. However, some of the utility supply contracts may contain terms and conditions that contain sensitive information. Such contract terms should be afforded trade secret status if it is demonstrated that its public disclosure could unduly harm customer or supplier interests.

Customer Enrollment: New York has required that the utility customer account number be used to identify a customer being switched to an ESCO. Staff recommends that, in situations where the consumer is physically present, a process that accepts a wet signature from the customer requesting the utility to provide the account number and enroll the customer should be acceptable.

End-State Vision: Staff urges the development and Commission adoption of a single vision and model for the future competitive marketplace in New York, referencing target dates for moving the individual utility franchises toward a more unified statewide market.

ESCO Purchase of Utility Services: Staff believes that the ability of ESCOs to buy some of the utility's services on a wholesale basis for resale would be valuable. It would allow ESCOs to gradually build the “back office” functions necessary to provide all these services and continue to collect revenues to write down the capital investments it has made, thereby reducing its stranded costs.

Hedges: For the medium to largest standard tariff service C&I electricity customers, Staff recommends that utilities not offer any new hedged commodity service but, instead, move toward passing through spot market prices. For residential and small C&I (mass market) customers, Staff recommends that electric utilities offer a more stable pricing scheme for the next several years through the construction of a balanced utility portfolio, consisting of supply purchases in the spot market, short term and long term markets, and financial hedges. Staff does not recommend that electric utilities be precluded from fulfilling a portion of their portfolios with longer term contracts; some level of long-term electric contracts of varying expiration dates would be an appropriate component of a diversified portfolio. Non-uniform contract expiration dates present a better opportunity for the utility to manage its portfolio to accommodate changes, such as migration, in the future.

Incentives: Staff believes that the Commission's normal review and oversight of utility portfolios should be sufficient to ensure that utility commodity costs are minimized and portfolios are appropriately structured. Staff advocates the continued use of regulatory incentives linked directly to migration level targets as an integral part of all electric and natural gas rate plans of all utilities. The incentives should be based on the demonstrated achievement of reasonable targets and provide sufficient utility motivation to achieve those targets.

Price: Staff contends that delivery rates should be independent of utility commodity purchases and purchasing practices. Wherever possible, utilities' commodity rates should reflect the entire "price to beat," including any adders or unbundled procurement rates, structured so as to affect delivery rates only minimally. The cost of any newly entered supply hedges should be reflected in the commodity price to more accurately reveal the utility's real price. All losses and gains due to migration forecast errors that cannot be easily reflected in an annually set “price to beat” could be deferred and recovered in future commodity prices to the extent the utilities cannot mitigate their impacts.

Switch and Save Program: Staff believes that O&R's program is a model for the near-term expansion of competitive offerings for residential and small commercial customers (mass markets) in New York. Staff notes that the relative success of this program compels consideration of its broader application statewide.

Unbundling: Staff recommends the prompt unbundling of all utility services to more clearly reveal the "price to beat" for those services. In addition, having utility consolidated bills, which contain both utility and ESCO charges, reflect the same design and format as the unbundled bills would provide consumers with an increased ability to shop for the services they want and need.

Green Mountain Energy (Green Mountain)

Auctions: Green Mountain recommends a competitive bid process to auction blocks of customers to qualified ESCOs, where customers opt-out of the program if they do not wish to participate. Green Mountain strongly urges avoidance of wholesale commodity auctions like the New Jersey BGS program because it eliminates relationships between ESCOs and end-use customers.

Customer Outreach and Education: Green Mountain contends that coordination among the stakeholders is essential, but should occur when there are services and offerings readily available to consumers. Green Mountain recommends creation of a committee comprised of representatives of the Department, utilities, ESCOs, and consumer groups to facilitate this goal.

End-State Vision: Green Mountain sees the creation of market structure rules that include utility consolidated billing, purchase of receivables, limitations on utility affiliates, no utility initial service requirement for new-connecting customers, semi-annual adjustment of the price to beat to reflect market prices, and structuring of default service so it is not an alternative to competitive service offerings. The Commission's vision statement should emphasize competitive pricing, regulatory flexibility, and cleaner electricity. In addition, there should be a single green power provider for each utility, similar to Oregon's "Portfolio Options" program.

Hedges: Green Mountain believes that utility portfolio development strengthens market power of incumbents at the expense of retail competition, and ultimately customers.

Incentives: Green Mountain recommends that the Commission examine incentives to encourage municipalities to join in energy aggregation programs.

Price: Green Mountain would like to see a price to beat set on a semi-annual basis.

Switch and Save Program: Green Mountain notes that this program is a step in the right direction, but the mandatory rate discount for the first two months of service, combined with supplier switching, could result in gaming.

Independent Power Producers of NY (IPPNY)

Auctions: IPPNY recommends initiation of a collaborative wholesale competitive solicitation process and favors the New Jersey BGS auction model. IPPNY believes marketers should compete to serve utility's load on a multi-month, annual, and/or multi-year basis.

Contract Disclosure: IPPNY contends that utilities should publish information regarding the percentage of their load that is hedged and how much is available to be served by a competitive solicitation process. It believes the Commission should work with utilities to publish load hedging.

Hedges: IPPNY notes that hedges should be discussed when designing the competitive solicitation. The design should accommodate longer term contracts to support development of new generation and continued investment in needed existing generation and apply a mix of short and long-term wholesale supply contracts. It does not recommend prohibiting long term contracts. IPPNY recommends that the Commission should examine wholesale competitive procurement issues in a process that is transparent, built on stakeholder participation, and is uniformly applicable to all current load servers.

KeySpan Energy Delivery NY/LI (KeySpan)

Auctions: KeySpan contends that auctions are worth exploring but initially recommends a wholesale approach followed by retail auctions after it is decided that utilities should completely exit the merchant function. KeySpan supports the New Jersey BGS auction model.

Capacity: If the utility acquires capacity for ESCOs, KeySpan believes that the ESCOs should agree to serve customers as long as they are in the service area. In addition, ESCOs should offer the utility the right of first refusal on capacity, consistent with FERC capacity release rules.

Customer Outreach and Education: KeySpan recommends that the Commission facilitate coordination of education campaigns to the extent necessary to ensure consistent and constructive messages.

Hedges: KeySpan discourages the elimination of hedges from utility portfolios.

Incentives: KeySpan believes the Commission should retain existing incentive mechanisms and create other incentives to reward utilities for participating in an auction program where the utility purchases commodity at market prices. In addition, it believes the Commission should ensure that utilities are disinterested in whether customers migrate to competitive suppliers and that utilities must be permitted to recover revenue lost to customer migration regardless of their financial positions.

Price: KeySpan believes that utilities should charge market prices through their GACs to permit ESCOs that can buy commodity at better than market prices to offer savings to customers and returns for their investors. At a minimum, the Commission could take steps to make the price customers pay distribution utilities for commodity more reflective of the costs of providing that service. A move toward aligning utility costs with market prices would indicate that the differential be reflected in delivery rates.

Switch and Save Program: KeySpan believes this program is merely a stopgap measure to prop up the existing inadequate business model and impose costs and risks on customers without any corresponding benefit.

Mirant New York, Inc. (Mirant)

Auctions: Mirant sees a need for a collaborative to develop the framework for a standardized wholesale competitive auction process. Mirant recommends that auctions be utilized throughout the State, along the lines of New Jersey's BGS auction, to transition customers away from incumbents to competitive suppliers. However, the process must have clearly defined terms and conditions and be as uniform as possible

Hedges: Mirant believes longer term contracts are needed to secure capital investment.

Multiple Intervenors (MI)

Aggregation: MI contends that neither the Commission nor utilities should undertake aggregation and that it is more appropriately conducted by ESCOs and customers. However, MI believes the Commission can and should remove certain barriers to market-initiated aggregation efforts by providing access to customer's own load data and implementing, or improving upon, automated imbalance trading. Further, aggregated customers should not be subject to balancing penalties or adjustments if the group can balance itself internally.

Auctions: MI views auctions as a fundamental shift from prior policies to transition utilities out of the merchant function. Rather, auctions must be subject to Commission prudence reviews and costs recovered only from customers that remain with the utility.

Billing: MI recommends a single bill option, at a fair cost to ESCOs, as the universal standard across the State.

Capacity: MI states that the obligation to provide capacity should lie with ESCOs. If the utility acquires capacity for marketer-served loads, the cost should be the responsibility of the specific marketers and customers utilizing such capacity. In addition, pipeline capacity should be tied to the load it serves. Dedicated capacity should not be added generically but on an individual contract basis.

Customer Outreach and Education: MI recommends Commission and utility customer outreach and education programs, the scope and content of which should be reviewed in a public forum. ESCOs and customer groups should help develop the proposed campaigns. The Commission should continue to encourage the use of Market Expos as a means of facilitating the efforts of utility education campaigns and ESCOs' marketing campaigns.

End-State Vision: MI wants a vision statement that reemphasizes a commitment to lower prices, increased choices, and education. The end-state vision should include utilities exiting the merchant function (subject to important considerations). However, utilities should not exit retail commodity markets unless such markets truly are competitive. It believes larger commercial and industrial customers should have the option, but not the obligation, to select utility commodity service.

Hedges: MI believes that the utility should be able to enter into long term contracts when it can: 1) demonstrate that the supply purchased under contract is no more than needed to meet requirements of the utility's customers; 2) where the need for new generation meets rising demand; and 3) it is necessary to ensure generation is constructed. Where utilities enter into new (or more recent) wholesale electricity contracts for the purpose of providing commodity service to remaining full requirements customers, only those customers should be responsible for the costs of such contracts. Utilities have an obligation to minimize their commodity costs to the extent practicable.

Price: MI notes that customers should be exposed to market price volatility to a greater extent and recommends the continued promotion of real time prices. It does not want to create or exacerbate interclass subsidies -- each customer class should be responsible for own real time pricing costs (e.g., installation of interval meters). MI believes retail access credits should continue until markets develop further.

Switch and Save Program: MI contents that purchase of receivables (POR) without recourse should be implemented but utility delivery customers should not be placed at increased financial risk for ESCO uncollectibles. POR should be at a negotiated discount and the utility should not seek compensation from delivery customers if the discount is inadequate.

National Energy Marketers Association (NEM)

Aggregation: NEM states that there is a cost associated with customer aggregation, particularly when it is an opt-in program. A model with an accurate full cost commodity price to beat is one of the most efficient means to eliminate significant costs associated with customer aggregation.

Auctions: NEM rejects auctions, considering it a method for utilities to provide stable prices without having to internalize the risks and costs of trading and hedging activities.

Capacity: NEM recommends a market-based framework to ensure the availability of capacity. ESCOs should have the option to purchase capacity up to the level needed to serve migrated customers, with the ability to obtain more capacity.

Contract Disclosure: NEM does not believe utilities should be allowed to hedge, but any contract they have should be public.

Customer Outreach and Education: NEM recommends that the Commission facilitate coordination of Commission and utility education campaigns with ESCO campaigns, with ESCO participation on a voluntary basis.

Hedges: NEM believes the Commission should establish a date certain for each class of customer upon which utilities will no longer provide commodity and related functions.
Utilities should not offer hedged prices and should not be permitted to trade, swap, hedge, speculate, or gamble with ratepayer funds. It does not want to see use of long term wholesale contracts to serve default customers.

Incentives: NEM states that utilities should not get incentives to retain default service customers and any revenues received in excess of commodity costs should benefit all customers via lower stranded costs or distribution rates. Utilities may require regulatory or tax incentives to properly and timely establish a commodity price to beat during the transition period, fully exit the merchant function and focus deployment of their resources on maintaining and operating a reliable delivery network. The Commission should provide incentives for reliability, infrastructure upgrades, resolution of customer complaints, accuracy and speed of info sharing, and/or reductions in the cost of credit achieved both during and after the transition.

Price: NEM states that proper pricing of the commodity price to beat is critical. The utility should not provide risk-free hedged or cross-subsidized commodity prices to beat. Further, utility pricing of commodity to large commercial and industrial customers should be based on an hourly time-of-day rate. Small commercial and residential customers should start with a monthly adjusted, market-based rate to which should be added utility's stranded costs associated with providing commodity products service and technologies currently in the bundled rate. All costs related to commodity-related functions should be removed from delivery service charges and placed in the commodity charge.

Switch and Save Program: NEM wants to see this program implemented as a statewide model and require purchase of receivables.

National Fuel Gas Corporation (NFG)

Auctions: NFG is not optimistic about the potential benefits from retail auction processes and is unable to discern the benefits of wholesale auctions over current RFP processes.

Capacity: NFG does not believe that retail competition and reliability can be achieved when the utility holds upstream capacity and releases it to the ESCOs, with capacity following the customer. NFG believes that mandatory capacity release programs should be implemented to ensure reliability and long term planning by the utility.

Contract Disclosure: NFG objects to contract disclosure because to do so would reduce negotiating strength, diminish competition by setting an artificial target for ESCOs retail prices, and would be anti-competitive.

End-State Vision: NFG believes the state's competition movement has advanced as far as it should and that utilities should not exit the merchant function. It states that choice itself has no intrinsic value and reliability, and just and reasonable rates may be jeopardized. It believes competition in natural gas service is artificial, unlike the telecommunications market in which there are technological advances.

Hedges: NFG states that ESCOs lack the financial wherewithal to compete in the long term capacity market. The Commission's bias against long term contracting is placing utilities at a disadvantage compared to gas fired power generators and utilities from other states and short term contracts increase volatility and do not enhance reliability or reduce energy prices. ESCOs should be obligated to provide utilities with the right to capacity.

Incentives: NFG does not believe incentives are necessary. Further, it states that there is no evidence that the utility's commodity costs are higher than usual.

Price: NFG believes that increased choice undermines reliable service and ESCOs have produced few if any new and innovative offerings. The utility should recover its gas costs and gains on sales that should be netted against losses to enable full recovery for the utility if the Commission wants to avoid discouraging longer-term commitments.

New York State Electric and Gas Corporation/Rochester Gas and Electric Corporation (NYSEG/RG&E)

Consumer Outreach and Education: In light of the level of coordination already occurring in its territory, NYSEG/RG&E believes no further Commission facilitation is necessary.

Contract Disclosure: NYSEG/RG&E believe public disclosure of prices terms and conditions of utility wholesale contracts should not be permitted.

Price: NYSEG/RG&E states that utilities will, necessarily, remain a dominant supplier to mass market customers and should keep their "appropriately priced" fixed offerings. Retail electric price should reflect all costs; failure to reflect the full price of retail commodity service in rates would harm competition by providing below market-price signals or by arbitrarily defining a different product for suppliers to provide competitively.

Switch and Save Program: NYSEG believes its Voice Your Choice program is the best approach and aspects of it should be applied to other utility territories.

Niagara Mohawk Power Corporation (NMPC)

Aggregation: NMPC has not had success with low-income aggregation, but would be willing to discuss feasibility of a renewed initiative

Capacity: NMPC believes that the Commission should consider an approach where the utility, as part of its monopoly function, ensures pipeline capacity availability for the distribution network. ESCOs could take assignment of utility capacity, contract directly, or provide utilities with access to their capacity.

Contract Disclosure: NMPC believes the back-out rate or price to beat should be public, but wholesale contracts should be subject to reasonable confidentiality requirements since suppliers will not bid as aggressively or may not participate at all if bids are public.

Customer Outreach and Education: Consistent press releases and events, customer messages, and bill inserts can reach customers at a much lower cost than an advertising campaign. However, NMPC does not want to disrupt its current program.

End-State Vision: The Commission should continue to carefully monitor developing retail markets and proceed incrementally. It should continue to work to ensure that there is an appropriate dividing line between state and federal jurisdictions and to see that consistent policies are in place.

Hedges: NMPC believes that the Commission should not require utilities to enter long term contracts for power supplies. It recommends using policy and regulatory changes and tax incentives to foster capital investment.

Incentives: NMPC believes that an incentive would give a utility an economic interest in the sale of commodity and hurt ESCOs in its territory.

Price: NMPC is interested in seeing marketers provide fixed price gas service offers to customers. NMPC believes that full reconciliation of commodity costs is necessary to ensure that the distribution company has no economic interest in making commodity sales to its delivery customers and does not become a market participant.

Switch and Save Program: NMPC states it already undertakes Market Match and Market Expo programs with success and should continue to employ these programs. NMPC would implement a limited time purchase of receivables program if there is a discount involved and the utility is able to recover bad debt.

Utility Role: NMPC made several proposals, including an auction process its remaining SC-3 electric customers and a program that would assist gas ESCOs in offering a fixed or capped price to gas customers.

North American Energy (NAE)

Capacity: NAE notes that the only way to guarantee capacity is to tie it to the customer.

Customer Outreach and Education: NAE believes marketing is proprietary and marketers should not be lumped into one group.

Contract Disclosure: NAE notes that transparency of purchases or methodology employed in purchases would be very beneficial to competitive markets.

Hedges: NAE states that it does not seem prudent or fair to marketers to allow utility recovery from losses when providing a hedge. Any loss or gain from the sale of these assets should add to or reduce delivery rates for all customers. Recovery should be broad based and applied to delivery charges.

Incentives: NAE believes that giving an incentive to utilities will only prolong migration and that utilities will protect the profit center created by providing incentives.

Switch and Save Program: NAE recommends purchase of receivables (POR) without recourse.

Pace Energy Project/National Resource Defense Council (Pace/NRDC)

Auctions: Pace/NRDC supports competitive bidding for utility supply and the "harvesting" of energy efficiency resources.

Contract Disclosure: Pace/NRDC recommends full disclosure with evidentiary hearings of utility portfolios.

Hedges: Pace/NRDC advocates active aggressive portfolio management by the utility for default service, with Commission oversight. Portfolios should include spot, long and short-term contracts, financial hedges, DG, renewables, supply-side measures, and efficiency resources, both owned by the portfolio manager and secured through contracts. It does not see a need to reduce the utilities' dominant share of the mass markets. Pace/NRDC believes the

Commission should remain vigilant to utility supply portfolios that over-commit to long-term contracts at the expense of more flexible alternatives.

Price: Pace/NRDC believes that the gains or losses from changes in supply associated with customer migration away from or back to the incumbent utility should be evaluated through a prudence analysis with rate treatment, if any, afforded only after an evaluation of the foreeseeability of the migration and the steps the utility could have taken to plan for these changes in customer load. The utility's cost recovery should be independent of total electricity delivered

<u>Public Utility Law Project (PULP)</u>

Aggregation: PULP notes that the most effective aggregation is when the utility provides supply through a modern, cost of service regulatory regime. The small business market sector could make it work, but overall system benefits to such segmentation are unclear.

Contract Disclosure: PULP believes that after all the transactions are completed, all terms of the utility (and ESCO) wholesale purchases should be made public.

Customer Outreach and Education: PULP contends that there is a need to better understand how campaigns contribute to "safe, adequate and reliable service" and "just and reasonable rates". It believes that the focus should instead be on development of a level playing field between the utility and ESCOs and the goal of universal and affordable service.

End-State Vision: The Commission should expand utility pricing options (fixed rates, variable rates, green power, TOU, etc.) and customer choice should be focused on large commercial and industrial customers.

Hedges: PULP believes portfolios should be differentiated between residential and large commercial and industrial customers and should be used to stabilize residential prices. PULP predicts that incumbents will be serving residential loads for some time. It is less concerned with the process for obtaining a portfolio of varied elements and more concerned about prudence of the utility's actions in planning and developing portfolios. PULP recommends that utilities select different sources for different blocks of customer load. It notes that long term contracting tools are necessary and in their absence acceptable retail competition may be impossible to achieve.

Incentives: PULP states that prudence analysis and standards provide the clearest incentive to the utility to minimize its commodity costs.

Price: PULP states that low income and residential customers are not being offered significant choices and that utility offerings should include standard terms and conditions for fixed rates and voluntary options (i.e. green power, variable rates, and fixed and variable time of use offerings). It recommends focusing choice efforts on large commercial and industrial customers because they are more sophisticated, with all switching costs paid for by these classes.

Select Energy Corporation (Select)

Auctions: Select recommends developing a pilot auction that ensures that there will be several winners and that can be used while the market matures. It recommends direct assignment of individual large customers to ESCOs, with a firm sunset date after which there is no more utility role for large customers. The identity of winning bidders should be kept confidential for a minimum time period to allow them to contract for necessary supplies and hedges. Larger customers should be auctioned to marketers in such a way that they are free to negotiate new contracts, following the initial auction term, with a new supplier or enter into amended arrangements with their assigned supplier.

Billing: Select wants utilities to be required to offer purchase of receivables without recourse and consolidated billing under a "Bill Ready" model. It believes that the utility should be accountable for load forecasting, gas balancing, enrollments, drops, and load history requirements.

Capacity: Select favors a centralized approach to pipeline capacity control where either utilities or an ISO-like entity acquires and manages capacity. Select also recommends that capacity follow the customer.

Customer Outreach and Education: Select would like to see an increase in outreach and education efforts regarding customer awareness and greater customer list availability. It is in favor of potential incentives for ESCOs to conduct marketing campaigns that coincide with the Department's and the utilities' education campaigns.

Hedges: Select recommends that hedges be assigned only to smaller customers to temper price volatility. Retained hedge costs should be allocated to delivery functions to avoid skewing the competitive market's ability to compete for provider of last resort (POLR) service. It envisions auctioning off retained hedges to ESCOs who in turn win the right to serve mass market POLR customers. It does not support utilities having "managed portfolios". As the market matures, groups of smaller customers, rather than their load, can be auctioned to the marketplace. In any case, utilities should not be directed to enter into long term contracts where other methods may be more effective. In regions where supply reserve is low, utilities should contract long-term for a portion of generation output. Once the generation is built, it can be moved to ESCOs via an auction process.

Incentives: Select recommends establishing utility incentives to encourage accountability, requiring utilities to exit the merchant function, creating a "best practices" collaborative, and expanding consolidating billing programs and purchase of receivables without recourse to other service territories. Further, it recommends providing incentives for utilities to achieve the lowest reasonable price for provider of last resort service to meet or exceed certain targets, which should not be counted against the utility's allowable rate of return), and incorporating incentives into the "backout rate".

Price: Select has resigned itself that mass market customers are not ready to accept widely varying market prices. It believes the "market-based" part of a utility's retail commodity tariff service should reflect all elements of market cost, and adjustments should be kept to a minimum to make for easy comparison between the market and ESCO offers. Further, Select believes that retail commodity rates must also include all costs required to offer a retail product such as billing, collections, labor, and a fair allocation of overhead cost.

Switch and Save Program: Select considers the consolidated billing program, with purchase of accounts receivable at a discount, to be the most significant element of O&R's program. Select recommends that this billing option be expanded to other utility service territories.

<u>Small Customer Marketer Coalition (SCMC)</u>

Auctions: SCMC is generally not in favor of auctions and would rather see market-based supply procurement for utilities.

Capacity: SCMC notes that if utilities exit the commodity function, ESCOs will obtain financing but it is unfair and unreasonable in the current ambiguous environment to ask ESCOs to acquire capacity without knowledge of the final market state.

Contract Disclosure: SCMC is concerned about potential problems for ESCOs that have built their own marketing networks that would be asked to engage in a more open competitive bidding exercise. It believes that there should be transparency to the maximum extent possible.

Customer Outreach and Education: SCMC recommends implementation of additional programs on an optional basis, targeted to smaller customers; each entity should tailor its message to minimize duplication and increase the message's effectiveness.

Hedges: SCMC contends that utilities should be prevented from engaging in hedging and long term price programs. There should be no utility portfolio management, especially for the largest customers. If such activity is permitted, any cost differences should be reflected and/or recovered in a manner that will not distort real time price signals or place retail access customers at a competitive disadvantage.

Incentives: SCMC does not believe there is a need for utility incentives since the utility is already obligated to be prudent

Price: SCMC believes that commodity should be provided by the competitive markets and the utilities that remain in the commodity market should face the same risks as the private sector.

Switch and Save Program: SCMC believes this program is beneficial when a utility directs the customers to the ESCO. Further, consolidated billing is very important to the effectiveness of this program but a dual-bill option should also be offered. It believes that purchase of receivables without recourse does no harm to the utility and should be practiced across the state.

<u>Strategic Energy L.L.C. (Strategic)</u>

Aggregation: Strategic advocates use of opt-out aggregation programs for customers that have not already switched to an ESCO.

Auctions: Strategic supports the Texas Price to Beat approach as the end state model for New York default service.

Billing: Strategic would like to see Con Edison's bills designed in such a way that they help customers understand what they can save with an alternate supplier.

Capacity: Strategic opines that the current New York capacity market is counterproductive because it sends the wrong price signals to potential investors. Strategic advocates an easing of price mitigation and collateral costs in the state's wholesale markets. It argues that duplicative collateral obligations are a significant financial burden for ESCOs. Strategic recommends that there be a net settlement of firm bilateral contracts to bring its costs to do business in New York more in line with costs in other states.

Customer Outreach and Education: Strategic recommends use of collaborative customer education between staff, utilities, and ESCOs. Further, customer lists should be made available to the ESCOs.

End-State Vision: Strategic contends that the end state for electric deregulation in New York should require the utility to exit the merchant function. The distribution utility should compete for customers with over 100kW demand only through an affiliate.

Incentives: Strategic believes utilities should receive incentives that diminish the attractiveness of remaining in the merchant function.

Price: Strategic states that New York needs increased price transparency in the wholesale market and that the benefits of competition can best be achieved in New York if default service is awarded to any qualified supplier, not just the distribution utility. Strategic suggests that all customers should be allowed to manage the volatility of the market by using price protection products offered by ESCOs or participating in demand response programs. Time-of-use metering advances should be applied to small end users, beginning with a pilot program. During the transition to a fully competitive market, Strategic believes that utilities should not offer any fixed or hedge product to customers over 100kW.

UGI Energy (UGI)

Aggregation: UGI believes that when there is price transparency, aggregation occurs naturally. Therefore, the Commission should not allow utilities to aggregate commercial or industrial customers for ESCOs since aggregating is the responsibility of the ESCO that wants to serve those customers.

Auctions: UGI favors the New Jersey auction model and opposes utility auctions because it believes it is simply another form of customer aggregation and fixed utility pricing.

Capacity: UGI notes that utilities should be permitted to contract for and recover cost of upstream storage and transportation capacity on a long term basis. Utilities should get recovery for the capacity they hold but only after using best efforts to mitigate capacity costs by selling unused capacity. If a utility suffers from stranded commodity costs as the result of the movement of marketers to competitive transportation, the recovery of such costs should be spread equally among all of the utility's customers and should not be recovered through exit fees or migration riders. Capacity release should be an option but not a mandate for ESCOs.

Contract Disclosure: UGI favors disclosure, stating that there is no reason why information related to utility commodity purchases should not be public information.

Customer Outreach and Education: UGI believes that marketing to and education of customers is the responsibility of the ESCOs. Further, ESCOs should not be required to coordinate their campaigns with utilities.

End-State Vision: The Commission should develop and adopt changes to uniformly establish fair programs across state. Programs should eliminate cross subsidization and charge the same delivery charges for both utility and ESCO sales, with the only difference in the rates charged being the commodity charge, including interstate delivery, which would be charged by either the utility or ESCO.

Incentives: UGI contends that utilities already have an incentive to reduce operation and maintenance expenses between rate cases to over-recover costs. Providing an incentive to the utility regarding commodity sales would be counter to the Commission's objectives.

Hedges: UGI notes that long term contracts encourage investment and utilities with regulated cost recovery mechanisms are in the best position to make long-term capacity commitments. Capacity release permits pipelines to reallocate long term capacity entitlements to third party suppliers as the market evolves.

Price: UGI recommends no utility fixed price options because it hurts competition and creates uncertainty and instability in the competitive market.

Case 00-M-0504 - Reply Comments Summary

Central Hudson Gas and Electric Corporation (CHG&E)

Billing: CHG&E believes that the proposed sample energy bill format needs more work to incorporate all of the unbundled components and should be addressed in a separate proceeding. CHG&E contends that it is in the best position to perform back office functions and can better integrate such functions with its OMS, productivity, and emergency response systems.

Hedging: CHG&E contends that the utility should have a blended portfolio but not totally exit the merchant function at this time. It would like to see CHG&E service eliminated as a supply option, except for Provider of Last Resort (POLR) functions.

Price: CHG&E wants the POLR energy rate to be hourly prices charged by the NYISO, grossed up for line losses plus separate charges for capacity and allowances for working capital costs and bad debts. Any development of “wholesale” pricing should follow cost-based ratemaking principals.

Centrica/Direct Energy (CDE)

Aggregation: CDE believes that the opt-out method results in higher migration.

Auctions: It supports retail auctions but only for mass market customers. Auctions should produce diversity of retail supply and be available only to customers who have not already chosen an ESCO.

Hedging: CDE contends that Staff is too focused on portfolio and utility commodity procurement practices and should focus on utility exit of the merchant function.

City of New York (City)

Contract Disclosure: The City believes that public access should be facilitated with appropriate protection for legitimate confidentiality concerns. There should be some protections for contract confidentiality.

End-State Vision: The City contends that no policies should be undertaken that risk substituting means for the ends sought.

Hedges: The City states that long term contracts should be part of a utility's blended portfolio but the Commission should initiate a separate proceeding to determine the circumstances and conditions in which long term contracts are permitted and. It should also initiate a proceeding for an RFP process regarding long term capacity procurement. Long term contracts should be staples of ESCO portfolios.

Consolidated Edison Corporation/Orange &Rockland Utilities, Inc. (Con Ed/O&R, the companies)

Auctions: Wholesale auctions should not be mandated but the companies are willing to explore the issue. However, it is premature to call for retail auctions and the Commission should not force mass market customers to ESCOs.

Billing: The companies believe that ESCOs should develop their own services.

Capacity: Con Ed/O&R believe that the makeup of a gas supply portfolio is a utility- specific matter and reliability would be jeopardized if the utility lost direct control of storage assets. It contends that ESCOs can subscribe to new storage in the marketplace and an ISO-like entity should be established for the gas capacity market to ensure equal access.

Contract Disclosure: There should be no general rule for price disclosure and the Commission should rule on this matter in specific rate cases.

Customer Confidentiality: Con Ed/O&R believe that utilities should not be required to provide customer lists to ESCOs without explicit customer consent.

End-State Vision: Con Ed/O&R believe the Commission should continue its current flexible approach to the development of competition and allow for individual utility plans tailored to each service territory. Uniformity should be limited to basic rules governing competition (UBP and EDI).

Hedges: Con Ed/O&R recommend that hedging continue, even long term hedges (which they define as 3-4 years duration). The companies stress that there is a need to ensure that a utility is not at financial risk when migrating customers. Further, the companies believe that utilities should not be required to enter into contracts for reliability unless the Commission has specifically authorized the price and terms. Con Ed/O&R reject the idea of a generic proceeding on utility procurement practices since the NYISO should determine what market changes are needed to encourage new infrastructure.

Outreach and Education Campaigns: Con Ed/O&R contend that formal facilitation would create administrative hurdles and impede timely rollout of campaigns.

Switch and Save Program: Con Ed/O&R recommend tailoring a non-mandated purchase of receivables program to fit the utility's circumstances affecting stakeholders in each territory.

<u>Con Ed Solutions (Solutions)</u>

Auctions: Solutions notes that a retail auction of large customers is unnecessary and could undermine current ESCO investment for enrolling large customers, creating incentives for suppliers to drop more costly customers. Instead, Solutions believes the PSC should look at mandatory real time pricing programs like those used in New Jersey.

Billing: Solutions does not want the current rate-ready bill replaced with a bill ready consolidated bill because it believes it increases error risk and is not suited for handling mass market customers. If marketers want to offer more complex billing, they can do so under a two bill model.

End-State Vision: Solutions notes that utilities should focus their efforts on developing and enhancing non-commodity/regulated products and services.

Hedges: Solutions recommends no long term contracts for utilities. In addition, Solutions does not recommend flowing the impact of utility hedges through a commodity charge because deferring gains and losses is likely to create additional stranded costs for the utility. It believes ESCOs should not be required, provided with incentives, or otherwise encouraged to enter into long term contracts because they are not cost effective relative to the short term market. The decision should be left up to each individual ESCO and its business model.

Price: While Solutions believes it is preferable to have all customers see market prices, the utility fixed price offer to smaller customers could be workable only if the price is truly fixed and includes all cost and risk elements (which Solutions believes would be the case if the price were determined through a wholesale auction process). In addition, Solutions recommends that customers migrate to hourly pricing based on real time pricing instead of day-ahead market prices.

Independent Power Producers of NY (IPPNY)

Auctions: IPPNY recommends utilizing a spot market pass-through and a New Jersey BGS type auction to encourage large commercial and industrial customer choice. It recommends implementation of a standardized, statewide wholesale competitive procurement process where wholesale suppliers will compete to serve a utility's retail load on a multi-month, annual and multi-year basis. IPPNY contends that the PSC should institute a collaborative proceeding with pre-defined time frame to design and implement a standardized wholesale procurement process.

End-State Vision: IPPNY states that the status quo is untenable and that the Commission must act to develop markets.

Hedges: IPPNY states that more customers must be exposed to market signals and residential and small commercial and industrial customers should have some level of price volatility protection. Further, it believes there should be some level of long term contracts with varying expiration dates.

KeySpan Energy Corporation (KeySpan)

Auctions: KeySpan contends that the New Jersey BGS auction model is worth exploring in New York.

Billing: KeySpan states that there is no hue and cry to open non-commodity services to competition and programming requirements to reformat customer bills for this purpose are extensive, time consuming, and expensive.

Capacity: KeySpan believes that the utility must retain responsibility for capacity infrastructure. To protect reliability, the Commission must permit utilities to procure capacity long term on an as-needed basis. As long as there is sufficient capacity in place to meet customer demand, KeySpan is indifferent about whether it or an ESCO is using it to serve customers.

Incentives: KeySpan recommends that there be no utility disincentives to customer migration. It expressed interest in migration incentives, but believes it is better to minimize risk to the utility from migration, which could cause it to incur stranded costs.

Price: KeySpan contends that the utility's commodity prices must reflect market prices to diminish the role of the utility as the least-cost commodity provider. ESCOs cannot compete with utility GACs. Unless utilities price commodity at market prices, their presence in the market will be a barrier to small customer migration.

Multiple Intervenors (MI)

Auctions: MI states that the Commission should neither require nor encourage the utility to procure commodity supplies for contestable customers through an auction process.

Customer Confidentiality: MI does not want to see a scaling back of the confidential treatment accorded to customer data as part of this proceeding.

End-State Vision: MI believes the Commission's goal should be to adopt a framework for New York's competitive energy markets that will result in customers realizing lower prices and increased choices. Further, it should be mindful of existing or proposed multi-year rate plans and reject electric revenue decoupling mechanisms.

Hedges: MI contends that new utility hedges should be optional for all customer classes and costs associated with any long term utility commodity contracts should be recovered solely from the utility's hedged commodity customers.

Incentives: MI states that no positive incentives should be provided to the utility to promote migration.

National Fuel Gas Corporation (NFG)

Capacity: NFG recommends mandatory utility capacity assignment to ESCOs where, when the ESCO exits the market, the utility may exercise its capacity recall rights. The utility may re-release the same capacity to the new ESCO serving the former ESCO's customers.

End-State Vision: NFG recommends incremental modifications to the utility's current choice programs, together with a clearly defined end-state with the utility as a merchant, especially if the utility is the provider of last resort (POLR). NFG does not want to see a framework adopted that discourages utilities from acquiring and maintaining assets to serve the POLR merchant role over the long term.

New York State Electric and Gas Corporation/Rochester Gas and Electric Corporation (NYSEG/RG&E, the companies)

End-State Vision: The companies do not object to general policy guidelines, but do not want to see a "one size fits all" model. They recommend that the Commission proceed with caution when making changes and implement flexible policies. Further, NYSEG and RG&E assert that there are limitations on the Commission's authority absent explicit legislative changes to the Public Service Law. They believe that the terms and conditions of existing multi-year rate plans should not be undermined and/or disturbed.

Hedges: In addition to raising potential anti-trust issues, NYSEG/RG&E believe it is costly and unnecessary for the Commission to oversee utility hedging decisions.

Price: The companies do not want to see utility fixed price options eliminated.

Niagara Mohawk Power Corporation (NMPC)

Aggregation: NMPC believes that the Commission should allow opt-out aggregation programs when the terms and conditions of the service are Commission-approved and the customers can exit the program at any time.

Auctions: NMPC does not need auctions in the near term because it is well hedged. Long term, NMPC supports its customer aggregation proposal. NMPC recommends that larger customers be transferred to market prices in advance of smaller customers.

Billing: There should be no further unbundling of bills beyond what NMPC has done because doing more would only confuse customers.

Capacity: NMPC notes that utilities should have the obligation to ensure that adequate pipeline capacity exists for all of its delivery customers. ESCOs can contact the utility or the pipeline directly for capacity, but the utility should have first right to purchase ESCO's capacity should it exit the New York marketplace.

Contract Disclosure: NMPC believes that confidentiality is appropriate in the short term to allow wholesalers to arrange hedges and in the long term to assure active wholesaler participation in the bidding process.

End-State Vision: NMPC wants to exit the merchant function. It believes that current rate plans should be honored and any new approaches to commodity, either wholesale or retail, should be implemented consistently with existing rate plans. The Commission should continue to exercise jurisdiction over retail delivery, create consistent market rules, and work to develop policies and actions that facilitate retail markets.

Hedges: NMPC contends that utilities should not execute long term wholesale contracts for supply and there should be no mandate that they do so. NMPC notes that ESCOs are the most appropriate party to structure long term portfolios for their customers.

Pricing: NMPC believes that all commodity costs should be recovered through commodity charges. Fixed costs associated with long term commitments by utilities should be recovered from customers whether or not the capacity associated with those contracts is needed by customers.

Switch and Save Program: NMPC is willing to work collaboratively on this issue.

Small Customer Marketer Coalition (SCMC)

Auctions: SCMC notes that proponents of the auction process have the obligation to show that introduction of a wholesale procurement approach will not undermine having many ESCOs in the service territory. It rejects the idea of creating a new marketplace with just a few ESCOs.

End-State Vision: SCMC believes the Commission needs to adopt an end state vision in which the utility exits merchant function.

Price: SCMC notes that utility fixed rate offerings further solidify the utility's dominant market position, and the Commission should direct utilities to exit the merchant function.

Strategic Power Management (SPM)

Aggregation: SPM contends that there should be a balance between expanding the competitive market and customer privacy concerns, but recommends more relaxed standards for commercial and industrial customers, including opt-out programs.

End-State Vision: SPM believes that the Commission should issue a final order as quickly as possible so that all market participants can share the Commission's vision and make business plans accordingly.

Hedges: SPM does not believe it is feasible over the next few years to move the utility out of the commodity business. It recommends that the Commission avoid long term utility supply procurement and scrutinize all long term utility contracts to ensure that, at the very minimum, it is the only way to provide just and reasonable rates to full service utility customers.

Incentives: SPM contends that a utility's negative attitude toward retail access can make ESCO entry burdensome, and recommends that the Commission provide enhanced shareholder returns for increased migration.

Price: SPM believes there should be no additional fixed price utility commodity service and that customers that stay with the utility must be exposed to market prices. A market-based supply charge is essential to stimulate customers who default to full utility service to at least consider other offers. SPM states that interval metered customers should be exposed to NYISO hourly day-ahead market prices as a default.

Switch and Save Program: SPM notes that the key to purchase of receivables (POR) is a single bill option rendered by the utility and POR without recourse.

Texas Eastern Transmission, L.P. (TE)

Capacity: TE believes commitments by ESCOs for capacity should be long term and assignment between parties must be accomplished within FERC gas tariff provisions. TE recommends that the Commission provide incentives for suppliers to obtain capacity that is contractually dedicated to markets on a firm primary basis.

Hedges: TE recommends continued reliance on long term contracts, as part of a balanced supply portfolio, to ensure commitments by interstate pipeline and financial community to invest in infrastructure.

UGI Energy (UGI)

End-State Vision: UGI recommends that the PSC refine unmanageable programs in slow markets rather than completely revise existing regulations.

Price: UGI contends that utility fixed price offers only hurt competition; the utility's pricing should be market-based.

APPENDIX D

SWITCH AND SAVE

Orange and Rockland's Switch and Save Program has proven to be the most successful model yet tried in New York State for moving mass market customers to non-utility entities. Orange and Rockland launched the program in August 2000. As of March 1, 2004, 31,363 electric service and 18,648 gas service customers had enrolled in retail choice through the Switch and Save program.

The program's objectives are to minimize the complexity of switching for customers, minimize acquisition costs for ESCOs, and increase customer participation in Orange and Rockland's retail choice programs. Participating ESCOs agree to offer customers enrolling in Switch and Save a 7% discount on commodity service for a two-month period and to take all customers that are assigned to them. The discount is provided by the ESCO, and serves as a low-cost marketing tool. Customers can sign up by contacting Orange and Rockland specifically about the program or they can be referred to the program after being informed about the program by a customer representative whenever a customer calls Orange and Rockland for any type of transaction (e.g. new service call, billing inquiry, etc.). In addition, Orange and Rockland promotes the program through media advertising, bill inserts, its speakers' bureau, the internet, and special events.

Enrolling customers are assigned by Orange and Rockland to ESCOs on a random, daily basis, with each ESCO receiving an equal number of accounts by service type (electric only, gas only, or electric and gas combination service) and rate classification. Customers in the program are not permitted to select a specific ESCO.[1] Once a customer is enrolled, a notification letter is sent to the customers within 24 hours of enrollment that provides the name of the assigned ESCO, the start date, and contact information. During the introductory period the ESCO is required to contact the customer to discuss terms for extending the relationship beyond the two-month introductory period. After the two-month introductory period, the price of energy is set by mutual agreement between the ESCO and the customer. The customer is also given notification about a rescission period during which the customer may cancel participation in the program.

For ESCOs participating in the program, Orange and Rockland purchases their accounts receivable without recourse, which simplifies ESCOs operations and can reduce up-front costs of doing business in the service territory. Accounts enrolled in the program are billed by Orange and Rockland.

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[1] Customers wishing to select a specific ESCO can do so outside of the Switch and Save program by contacting the ESCO directly.

This program has succeeded because it provides advantages for all of the participants. For customers, it offers an up-front savings and switching is easy to do. For ESCOs, Orange and Rockland takes care of administrative details and makes it easy to acquire customers at very low cost. For the utility, the model encourages migration during the normal course of business and makes it easy for customers to migrate, thus making it possible to move large numbers of customers with relatively little effort.

CASE 00-M-0504

APPENDIX E

CONSENSUS STATEMENT
ON LOW INCOME PROGRAMS

Consensus Statement on Low Income Programs

Movement to End-State

1. The needs of low-income customers during the movement to the end-state will continue to need to be addressed through low-income programs and other initiatives.

2. Since the needs of low-income customers are diverse, they need to be addressed through a variety of initiatives.

3. The needs of both gas and electric customers should be considered in the design of low-income programs.

4. Utility low-income programs should continue as required in existing settlement agreements.

5. Lowering utility rates so that consumers can receive lower prices and funding low-income programs through rates are competing goals that need to be continually reconciled.

6. Utility rates may fund low-income programs for the near term. In the future, the sources of funding for low-income programs need to be examined on an on-going basis.

7. Low-income programs, while appropriately recognizing the diversity of needs, could benefit from increased cost-effective coordination among community, government, private, utility and non-profit low-income program providers.

End-State

1. Even in the end-state, some low-income consumers in New York State may spend a greater portion of their income on energy costs (i.e., have a greater energy burden) than other residential consumers.

2. The needs of low-income consumers need to be addressed in the end-state.

3. The needs of both gas and electric consumers should be considered in the design of low-income programs.

4. If a Model 3 scenario is adopted in which utilities have no retail relationship with the consumer, other retail service providers and/or other non-utility entities will have to assume responsibility for the operation of low-income programs previously provided by the utilities.

5. Appropriate resources should be provided to address the needs of low-income consumers in the end-state.

6. Low-income programs, while appropriately recognizing the diversity of needs, could benefit from increased cost-effective coordination among community, government, private, utility, and non-profit low-income program providers.