STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on December 16, 2009

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

CASE 08-E-1132 – Petition of New York State Energy Research and Development Authority (NYSERDA) for Approval of an Energy Efficiency Portfolio Standard (EEPS) NYSERDA-Administered Electric Energy Efficiency Program.

CASE 07-M-0548 – Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard.

ORDER ON REHEARING DENYING IN PART AND GRANTING IN PART PETITION FOR REHEARING

(Issued and Effective December 23, 2009)

BY THE COMMISSION:

INTRODUCTION

In this order, the Commission denies in part and grants in part the relief sought by the New York State Energy Research and Development Authority (NYSERDA) in its August 26, 2009 petition for rehearing of the Commission's July 27, 2009 Order in these proceedings (July Order).[1] In its petition, NYSERDA requests permission to (1) continue using its current method of estimating savings from replacement refrigerators while developing methods to refine such estimates in

[1] Case 08-E-1127, et al., Energy Efficiency Portfolio Standard, Order Approving Multifamily Energy Efficiency Programs with Modifications (issued Jul27, 2009).

collaboration with Department of Public Service Staff (Staff), (2) adopt a “performance-based, technology-neutral standard” for lighting fixtures, (3) collaborate with Staff to develop a pre-qualified list of measures based on a minimum Total Resource Cost (TRC) ratio of 1.0 – with the exception of a minimum TRC of 0.8 for refrigerators, (4) continue using the current “benchmarking tool” to determine project eligibility and incentives, and (5) exclude administrative costs from project-level TRC calculations. Upon reconsideration, the Commission grants the relief requested with respect to the first and second issues, grants with modifications the relief sought in the third and fourth requests, and denies the fifth request while addressing some of NYSERDA’s underlying concerns.

BACKGROUND AND SUMMARY

The July Order authorized NYSERDA’s proposed Multifamily Performance and Low-Income Multifamily Performance programs, as well as a number of utility-administered multifamily programs, with some modifications. The July Order stated a number of energy savings principles applicable to all approved programs. Relevant to NYSERDA’s petition for rehearing, the July Order required that all measures advocated and/or subsidized in any approved program have a TRC ratio of at least 1.0. The July Order also required that all projects have a TRC ratio of 1.0 or greater including each project’s pro rata allocation of administration, marketing, evaluation and shareholder incentive costs.

The July Order required that refrigerator replacement programs target only the replacement of serviceable equipment currently in use within a dwelling unit. The July Order further directed that on average the measure should have a TRC ratio of at least 1.0 and that replacement decisions be based upon building-specific screening criteria that include, at a minimum, use of Technical Manual derived energy savings estimate protocols.

The July Order prohibited the replacement of existing light fixtures with fixtures specifically designed for compact fluorescent light (CFL) bulbs. The Commission reasoned that CFL lighting fixtures could easily become obsolete as light-emitting diode (LED) lighting applications become readily available.

The July Order also directed modifications specific to NYSERDA's multifamily program proposals. NYSERDA was directed to fund measures that target fuels other than natural gas or electricity with funding sources other than EEPS funds. NYSERDA was further directed to replace its multifamily programs' minimum savings threshold with one that requires the installation of measures that will produce 80% of the indentified cost-effective savings.

NOTICE OF PROPOSED RULE MAKING

A Notice of Proposed Rulemaking concerning NYSERDA's petition for rehearing was published in the State Register on September 16, 2009 [SAPA 08-E-1132SP1]. The minimum time period for the receipt of public comments pursuant to SAPA regarding that notice expired on November 2, 2009. The comments received are summarized below.

SUMMARY OF PUBLIC COMMENTS

A number of contractors and other entities directly involved or partnered with NYSDERA's multifamily programs submitted comments: The Association for Energy Affordability Inc.; GreenHomes America; Conservation Services Group; Energy Investment Systems; SNS Energy Distribution Corporation; Community Environmental Center; L&S Energy Services; Rand

Engineering and Architecture, PC; People’s Equal Action and Communities Effort, Inc.; Community Energy Services; Ronald Jablonski; Integral Building & Design; R3 Energy Management, Audit and Review, LLC; HughESCO Companies; Rich Rustici; Jon Davignon; Performance Systems Development; and Steven Winter Associates, Inc.. In addition, comments were submitted by the New York City Economic Development Corporation; the New York State Housing Finance Agency; the Northeast Energy Efficiency Council; the Building Performance Contractors Association and the Joint Supporters. Trump Village Cooperative Housing Sec 4, Inc., a program participant, also submitted comments.

NYSERDA’s partners generally supported its petition for rehearing. Almost all of the partners expressed concern that NYSERDA’s abrupt suspension of the programs could damage the programs’ reputations and diminish customer enthusiasm. Many of the commenting parties suggested implementing an interim program while NYSERDA made the program changes required by the July Order. The partners frequently cited the general economic and job creation/retention benefits of energy efficiency programs as justification for continuing the programs until NYSERDA can comply with the July Order.

Many of these entities also supported the use of incentives for measures that are not cost-effective if NYSERDA can demonstrate that an overall project is cost-effective. Generally, the parties cited the benefits of “deep” or “comprehensive” savings as justification for the inclusion of non-economical measures in the programs. A number of NYSERDA partners also supported the use of SBC funded incentives for measures that do not result in electricity or natural gas savings but rather offer the potential to conserve other fuels including heating oil and propane. A few of the partners opposed the inclusion of administrative costs in calculating a project level TRC ratio because they feared that inclusion of such costs would render many projects not cost-effective.

Many of NYSERDA’s partners opposed exclusion of CFL’s from the multifamily programs. Many commenting parties also opposed compliance with the New York Standard Approach for Estimating Energy Savings from Energy Efficiency Measures in Multifamily Programs (Technical Manual) for determining the energy savings for refrigerator replacements. They cited the high cost and other practical difficulties for monitoring refrigerator power usage.

The New York City Economic Development Corporation, recognized the need for program refinements and improvements but supported a continuation of the multifamily programs while NYSERDA made the modifications necessary to comply with the Commission’s requirements. The organization also supported a “technology-neutral” approach to lighting measures. The New York State Housing Finance Agency expressed concern about available funding for affordable housing projects.

Trump Village Cooperative Housing, Sec. 4, Inc., supported NYSERDA’s petition for rehearing. The organization cited its own on-going renovations to demonstrate the need for subsidize the installation of energy efficiency measures. Trump Village also supported incentive payments for upgrades to oil burning equipment stating that the exclusion of such equipment from the electric and natural gas programs is unfair and unreasonable.

Both the Northeast Energy Efficiency Council (NEEC) and the Building Performance Contractors (BPC) opposed a per-measure cost-effectiveness requirement. NEEC stated that it is important to take advantage of as many energy savings opportunities as possible. Both organizations supported per-project cost-effective standards. However, NEEC indicated that each project’s share of administrative and other program costs should be excluded from TRC ratio calculations because such costs are too burdensome for the programs to be successful. NEEC supported the inclusion of CFL fixtures and opposed testing of existing refrigerators as too expensive. Both organizations stated that the positive impact the multifamily programs have on jobs and economic development would be diminished if NYSERDA’s abrupt termination of the programs continued for an extended period.

The Joint Supporters supported NYSERDA’s petition for rehearing. They indicated concern that the July Order could have unintended consequences. Specifically, they noted their concern with program delays that may result from the July Order.

DISCUSSION

Our rules provide that rehearing may be sought only on the ground that the Commission committed an error of law or fact or that new circumstances warrant a different determination (16 NYCRR 3.7[b]). Here, NYSERDA alleges a factual misunderstanding as well as new circumstances and evidence.

Program Suspension

Upon reconsideration of the issues raised in NYSERDA’s petition for rehearing, we modify the July Order in the manner detailed below. The Commission fully recognizes the important economic and environmental impacts that energy efficiency programs can have on New York State. We also recognize the potential public interest consequences of NYSERDA’s decision to suspend its multifamily programs. In that regard, we authorize NYSERDA to continue to administer its multifamily programs (as part of EEPS) in the manner approved prior to the July Order, until June 30, 2010.[2] After such time, NYSERDA will be required to administer the programs in compliance with our directives. For the period ending June 30, 2010, we will also authorize NYSERDA to use up to a maximum of 25% of the EEPS funds approved in the July Order to administer its multifamily programs as approved prior to the July Order. The remaining 75% of those funds must be used for projects that comply with the directives contained in our July Order as modified herein. We also establish some additional reporting requirements as explained below.

Refrigerator Testing

The July Order required that refrigerator replacement decisions be based on a building specific pre-screening of the existing units to ensure that replacement of those units results in cost-effective savings. The July Order further required that pre-screening include an estimate of savings calculated using the protocol identified in the Technical Manual. The Technical Manual protocol includes actual monitoring of a sample of a project's existing refrigerators for a minimum of two hours during which time the refrigerators must stay closed. NYSERDA has indicated that the monitoring requirement is overly stringent because of the cost and the practical difficulty of obtaining access to a sufficient number of customer refrigerators.

Upon reconsideration, the Commission will allow NYSERDA to continue, for the time being, its current method of using manufacturers' published energy usage data for pre-screening refrigerators for replacement. However, in order to test the reasonableness of using the published information in

[2] NYSERDA indicted in its rehearing petition that it would require seven to nine months to comply with the modifications contained in the July Order. June 30, 2010 is approximately 10 months from the issuance of the July Order.

light of the age and condition of existing refrigerators, NYSERDA shall, within 60 days of the issuance of this order, submit to the Commission a plan for measuring the performance of a sample of replaced refrigerators.[3] Within 12 months of the issue date of this order, NYSERDA shall report the results of this measurement and verification analysis including recommended modifications to its current estimation method.

Compact Fluorescent Lighting Fixtures

The July Order did not permit the installation of replacement fixtures designed for CFL bulbs because the development of LED lighting applications could render the CFL fixtures obsolete. NYSERDA questions this requirement for a variety of reasons including the idea that using a “technology neutral” standard will avoid lost energy savings opportunities while LED technology more fully develops. NYSERDA’s point is well taken. We further recognize that there is widespread acceptance of a pin-based socket design that accommodates both CFL and LED bulbs. Because these sockets are pin-based and accommodate multiple types of bulbs, their use in multifamily efficiency programs minimizes concerns about obsolescence or the possibility that burned out lamps could be replaced with incandescent or other inefficient screw-base bulbs. Upon consideration of this new information, we will modify the July Order to allow the incorporation of cost-effective light fixture replacements that are designed to accommodate both CFL and LED bulbs in NYSERDA’s multifamily programs.

[3] The plan shall comport with the Commission’s guidelines and protocols for evaluation, measurement and verification plans.

Pre-Qualified List of Measures

NYSERDA requested permission to collaborate with Staff to define a list of eligible measures that would always be allowed in a project based on a predetermined TRC ratio. Such a request is reasonable and has the potential to reduce administrative costs. Upon consideration of this request, the Commission will modify the July Order to allow NYSERDA to collaborate with Staff to develop a prescriptive list of cost-effective measures for inclusion in NYSERDA's multifamily programs.

Minimum TRC for Refrigerator Replacement

NYSERDA requested permission to use a minimum TRC of 0.8 to qualify refrigerator replacements because it believes that refrigerators typically do not perform up to their nameplate ratings. NYSERDA requests use of a lower TRC ratio because it believes that an economic analysis for refrigerator replacement based on nameplate ratings, rather than actual energy usage, typically understates the costs of operating an older and potentially poorly maintained appliance.

NYSERDA's concerns may be valid. However, we are reluctant to adopt any measure with a TRC of 0.8. Rather, after consultation with the Director of the Office of Energy Efficiency and the Environment, NYSERDA shall submit a method for refining the TRC calculation that includes consideration of the name plate issue.

Benchmarking

NYSERDA requested that it be allowed to continue its "benchmarking" approach. Prior to NYSERDA's decision to suspend its multifamily programs, it required a project to demonstrate 20% overall energy savings in order to be eligible for its entire allotment of incentives. The July Order modified this approach to require that 80% of the identified cost-effective savings be achieved. The modification was made in consideration of the fact that the 20% overall energy savings may not be obtainable under the terms of the July Order which limited eligible measures to those that save electricity and/or gas.

In its rehearing petition, NYSERDA indicated that it is willing to modify the threshold level but that it would like to continue the benchmarking approach in order to minimize the administrative burden of modifying the programs. Information provided by NYSERDA indicates that the cost to the public of adopting a 15% energy threshold is significantly lower than the costs associated with a 20% target. Therefore, we will allow NYSERDA to continue to use its benchmarking approach but will modify the threshold to 15% beginning July 1, 2010. Similarly, we shall reduce the final payment cap for the EEPS funded programs to 20% from the 30% allowed in the July Order. Further, we will continue to require that all measures be cost-effective and that natural gas measures are paid for with natural gas funds and electric measures are paid for with electric funds. Measures that do not save electricity or natural gas are not eligible for EEPS incentives.

Administrative Costs

NYSERDA requested exemption from the requirement that each project’s pro rata share of administrative costs be included in the calculation of project-level TRC ratios. NYSERDA reasoned that such a general approach could not realistically reflect differences that exist in administrative costs between various types of projects. We cannot adopt NYSERDA’s proposal because administrative costs represent real costs for each project and should be properly accounted for in determining cost-effectiveness. However, we do acknowledge NYSERDA’s point that different projects involve varying levels of administrative support. Given NYSERDA’s extensive experience administering multifamily programs, we believe that it can develop an appropriate pro rata allocation of administrative cost for each project. We will allow NYSERDA the flexibility to determine whether that allocation should consist of a per-unit of energy basis across all programs, a basis that varies with the type and/or size of the project or any other appropriate allocation.

Other Matters

Our decision today recognizes the importance of continuing NYSERDA's Multifamily Performance programs. We also recognize the complex nature of the various elements of these programs including funding sources and the processes that NYSERDA uses to approve projects and to commit and disperse funds. To gain a better understanding of these considerations, we will establish additional reporting requirements.

NYSERDA shall provide a quarterly project progress report which includes the number of completed projects, the status of uncompleted projects that are expected to go forward, and the status of uncompleted projects that are not expected to move forward. This report should include incentive payments made to each project, payments that are committed to each project, and provide a calculation of the total moneys which NYSERDA has available to fund these programs. NYSERDA should consult with the Director of the Office of Energy Efficiency and the Environment regarding the details of this reporting requirement.

SEQRA FINDINGS

Pursuant to our responsibilities under the State Environmental Quality Review Act (SEQRA), in conjunction with this order we find that programs modified here are within the overall action previously examined by us in Case 07-M-0548 and will not result in any different environmental impact than that previously examined. In addition, the SEQRA findings of the June 23, 2008 Order in Case 07-M-0548 are incorporated herein by reference and we certify that: (1) the requirements of SEQRA, as implemented by 6 NYCRR part 617, have been met; and (2) consistent with social, economic, and other essential considerations from among the reasonable alternatives available, the action being undertaken is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable.

CONCLUSION

For the reasons discussed above, the Commission grants, with modifications, the relief NYSERDA has requested in its rehearing petition dated August 26, 2009.

The Commission orders:

1. The New York State Energy Research and Development Authority (NYSERDA) is authorized to continue administering its multifamily programs in the manner approved prior to July 26, 2009, until June 30, 2010 and may allocate up to a maximum of 25% of the funds approved in the July 26, 2009 Order Approving Multifamily Energy Efficiency Programs with Modifications to administer the program during this grace period. As of July 1, 2010, NYSERDA must comply with the directives of the Commission's July 26, 2009 Order Approving Multifamily Energy Efficiency Programs with Modifications, as modified herein.

2. NYSERDA shall report to the Director of the Office of Energy Efficiency and the Environment within 30 days of the issuance of this order the results of its efforts to disencumber SBC funds related to its Multifamily Performance and Low-income Multifamily Performance programs. The report shall also include details concerning all of NYSERDA’s efforts to

manage the programs within approved budget levels. The report shall list all projects terminated since August 1, 2009. For each project NYSERDA shall include:

- Project name, project identification number and contract identification number;
- Identification of all funds paid to each project including amounts from each funding source and funding codes for each incentive;
- The last milestone reached by the project and the date on which that milestone was reached;
- Reason(s) for termination of the project; and
- Amount of funds disencumbered for each terminated project, broken out by funding source and source code.

The report should also include NYSERDA's recommendations for improving program throughput including actual measure installation.

3. After consultation with the Director of the Office of Energy Efficiency and the Environment, NYSERDA shall, within 60 days of the date of issuance of this order, file with the Secretary a refrigerator measurement and verification plan, including sampling size and methods. If the Director of the Office of Energy Efficiency and the Environment is dissatisfied with such plan as filed, he shall refer it to the Commission with his recommendations for further action.

4. NYSERDA shall, within 12 months of the date of issuance of this order, file with the Secretary a report indicating the results of the measurement and verification activities pursuant to the plan directed above, including a comparison of those results to the results of its current method of estimating replaced refrigerator energy usage.

5. Within 30 days of the end of each quarter, NYSERDA shall submit quarterly progress reports to the Director of the Office of Energy Efficiency and the Environment detailing the progress, including metrics at each of the milestone payment steps, of any projects with approved applications or otherwise representing encumbered and/or pre-encumbered dollars (including terminated, cancelled or re-assigned projects). The reports shall contain the following information:

- Project name, ID number and contract number;
- Itemization of all dollars encumbered and/or pre-encumbered per project including breakdown by funding sources and funding codes that reconciles to the monthly, SBC and EEPS status reports previously required by Commission order;
- Incentive payments made to each project for each milestone payment step; and
- All other costs, encumbrances and pre-encumbrances that are or will be charged to the multifamily programs.

Projects that have missed milestone due dates should be flagged and the number of days past due should be provided. Possible next steps for overdue projects should also be indicated.

The data provided shall be sorted by milestone payment step and by the type of project (i.e., existing building, new construction, Consolidated Edison gas programs). Projects that were part of the ResTech or the Assisted Multifamily Program should be identified).

6. NYSERDA shall, within 60 days of the issuance of this order, submit to the Secretary a supplemental revision to the SBC Operating Plan incorporating the directives contained in this order. As part of its supplemental revision of the SBC

Operating Plan, NYSERDA shall submit, after consultation with the Director of the Office of Energy Efficiency and the Environment, a method for refining the TRC calculation for refrigerator replacements to include consideration of the underperformance issue.

7. The Secretary at her sole discretion may extend the deadlines set forth in this order.

8. These proceedings are continued.

By the Commission

(SIGNED) JACLYN A. BRILLING
Secretary