STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on December 16, 2010

COMMISSIONERS PRESENT:

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

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

CASE 08-E-1003 - Petition of Orange and Rockland Utilities, Inc. for Approval of an Energy Efficiency Portfolio Standard (EEPS) "Fast Track" Utility-Administered Electric Energy Efficiency Program.

ORDER COMBINING INCENTIVE TARGETS, CLARIFYING INCENTIVE MECHANISM DETAILS AND ESTABLISHING IMPLEMENTATION ADVISORY GROUP

(Issued and Effective December 21, 2010)

BY THE COMMISSION:

INTRODUCTION

In this order, the Commission continues a system of utility shareholder financial incentives applicable to utility-administered energy efficiency programs established as part of the Energy Efficiency Portfolio Standard (EEPS), except that the already combined 2009-2010 energy savings targets are further combined with the 2011 energy savings targets to create a single 2008-2011 target. Calendar year targets will thereafter be in effect for 2012 and beyond. In addition, some technical details are clarified and an Implementation Advisory Group hosted by

Staff consisting of representatives of all EEPS program administrators is established.

BACKGROUND

For utility-administered electric energy efficiency programs established as part of the EEPS program, the Commission mandated a system of financial incentives to promote better program performance, to motivate utilities to pursue efficiency programs as a resource option, and to enable the Commission to hold utilities accountable for meeting energy savings targets.[1] The incentive amount was set at $38.85/incremental megawatt-hour.[2] That figure was derived from a calculation that started with a premise that the maximum amount of any incentive should equate to roughly 20 basis points on the return on equity of New York's major electric utilities. For EEPS gas programs, the Commission established a similar mechanism, but allowed utilities to opt out of the incentives regime.[3] For gas incentives, the incentive amount was set at $3.00/incremental Mcf.[4]

The August 22, 2008 Order establishing the incentives model required that performance be measured and the incentives be applied on an annual, calendar-year basis. But thereafter, in a February 13, 2009 Order[5] adopted in response to petitions for rehearing, the Commission altered the model to allow targets

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[1] Case 07-M-0548, Energy Efficiency Portfolio Standard (EEPS), Order Concerning Utility Financial Incentives (issued August 22, 2008).

[2] Ibid., p. 45.

[3] Case 07-M-0548, supra, Order Establishing Targets and Standards for Natural Gas Efficiency Programs (issued May 19, 2009).

[4] Ibid., p. 30.

[5] Case 07-M-0548, supra, Order on Rehearing Denying In Part and Granting In Part Petition for Reconsideration (issued February 13, 2009).

from 2009 and 2010 to be considered as one target for 2010 in recognition of the difficulties in managing year-to-year targets precisely during the start-up period.

The Commission has received a number of petitions from the utilities complaining that the incentives model is unfair as to the early years, particularly 2009 and 2010, due to forces beyond their control that have had an effect on the pace of rollout of the programs. The petitions include (a) the July 26, 2010 joint petition of Consolidated Edison Company of New York, Inc. (Con Edison), Orange and Rockland Utilities, Inc. (O&R), The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY), KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) and Niagara Mohawk Power Corporation (Niagara Mohawk) seeking clarification of a Commission order issued June 24, 2010; (b) the July 26, 2010 joint petition of New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E) seeking similar clarification of a Commission order issued June 24, 2010; (c) the July 28, 2010 petition of Central Hudson Gas & Electric Corporation (Central Hudson) seeking suspension of the EEPS utility incentive mechanism; (d) the February 19, 2009 petition of O&R seeking clarification that the incentive mechanism does not apply to a terminated program; (e) the February 3, 2010 petition of Con Edison seeking in part for incentives purposes a cumulative program target through 2011 for certain programs; and (f) the February 17, 2009 petition of Con Edison/O&R seeking in part, in the alternative, delay of the application of any incentives in 2009 and 2010 and a revisit of the issue prior to 2011. Petitions designated "(e)" and "(f)" above primarily address matters other than incentives and will be treated in this order as comments on incentives issues to the degree that they address such issues.

In arguing for adjustments, the utilities cite the following factors: (a)the number, nature and magnitude of changes to proposed programs that were adopted; (b) the length of the approval process for energy efficiency programs; (c) the lack of participation by potential implementation contractors in the RFP (request for proposals) process; (d) the effect of the depressed economic situation existing during 2009 and 2010; (e) the effect of moderated energy costs on customer demand for energy efficiency services; and (f) changes in the applicable energy savings calculations for efficiency measures as the Technical Manuals have been refined. The utilities generally seek either elimination of the incentives or adjustments to the annual energy savings targets.

O&R, in its petition seeking clarification that the incentive mechanism does not apply to a terminated program, argues that O&R had previously expressed its concern that its Residential HVAC Program goals were not reasonably attainable and that since the program was effectively limited to 2009 and was then discontinued, O&R did not have the opportunity to combine the results from the 2009 start up period with calendar year 2010, as was allowed for all other programs, and therefore the incentive mechanism should not apply.

Staff advises that the electric utilities forecast that through 2010 they will all be performing well below the intended target scale, and that even by the end of 2011 it will be a significant challenge for most of the utilities to avoid negative incentives under the current performance mechanism. For the gas utilities the forecasts are mixed with more utilities forecasting negative incentives than positive incentives.

NOTICE OF PROPOSED RULE MAKING

A Notice of Proposed Rulemaking concerning the incentives issues under consideration here was published in the State Register on September 8, 2010 [SAPA 07-M-0548SP27]. The minimum time period for the receipt of comments pursuant to the State Administrative Procedure Act (SAPA) regarding this notice expired on October 25, 2010. The comments received are addressed below.

A Notice of Proposed Rulemaking concerning the petition of O&R seeking clarification that the incentive mechanism does not apply to a terminated program under consideration here was published in the State Register on March 17, 2010 [SAPA 08-E-1003SP3]. The minimum time period for the receipt of comments pursuant to the State Administrative Procedure Act (SAPA) regarding this notice expired on May 3, 2010. No comments were received.

ADDITIONAL POSITIONS OF THE PARTIES

Multiple Intervenors (MI)

As it has in the past, MI continues to oppose the provision of financial incentives to utilities for implementing energy efficiency programs because it believes such incentives are not necessary to induce compliance with Commission policy and could unnecessarily inflate the already-substantial cost of the EEPS program paid by customers which combined with the high cost of energy in New York State, makes things that much more difficult for businesses struggling to remain competitive. But if rewards are to be allowed, MI asserts that negative financial incentives must also be retained and enforced and if lower energy prices and/or a weaker economy warrant a relaxation of established penalties, then higher energy prices and/or a stronger economy likewise should warrant making established rewards more difficult to achieve. MI believes that the widespread deployment of Revenue Decoupling Mechanisms (RDMs) makes it unnecessary to pay utilities a financial incentive to implement energy efficiency programs and financial incentives are not necessary to compel the utilities to implement programs ordered by the Commission. According to MI, utilities have long been required to administer programs for which there is no possibility of earning a bonus for compliance, or the programs could employ an asymmetric incentive mechanism that exposes the utility to a financial penalty for poor performance, but not provide an opportunity to earn a bonus for average or above-average performance. According to MI, recent status reports and the utility petitions do not demonstrate that the availability of utility financial incentives has increased the likelihood of achieving any efficiency goal, or that the achieved and projected savings levels would be lower but for the availability of utility financial incentives. Finally, MI asserts that incentives, both positive and negative, if retained, should reflect actual, measured results, not utility “efforts,” which are wholly subjective because for incentives to have any credibility, they need to be tied to objective criteria and customers should not be forced to pay bonuses to utilities where, hypothetically, targeted savings levels were not achieved, but a utility tried hard.

Joint Utility Comments

In addition to their individual comments, Con Edison, O&R, KEDNY, KEDLI, Niagara Mohawk, NYSEG and RG&E submitted joint comments to express common high-level themes. The utilities desire more flexibility to respond to rapidly changing market conditions and address service-territory specific market conditions and challenges. They believe that the Commission should eliminate the layers of approval and mandates that restrict the Companies’ abilities to modify their EEPS programs in response to customer needs, local market conditions and program evaluations. The utilities want the budgets and savings goals to be reasonably achievable given current economic circumstances and to reflect local demographics and building stock, the cost differentials among the utilities, and current energy prices. To the extent any incentive mechanisms are in place, the utilities want a realistic possibility to earn positive incentives. The utilities express a concern that it is critical that the Commission by mid-year 2011 address the plan and scope for the 2012 EEPS programs (most of the current programs expire at the end of 2011) and avoid a long, drawn-out process that would inject further uncertainty in the market and could force utilities and other stakeholders to ramp down existing EEPS programs needlessly if post-2011 EEPS programs are not timely addressed. Finally, the utilities support a continued collaborative approach to achieving energy efficiency goals and believe such an approach will yield the greatest benefit to all EEPS stakeholders.

NYSEG/RG&E

NYSEG/RG&E would like the incentives to be removed or suspended at least until the current program cycle is complete and agree with the concept of combining annual energy savings targets because certain programs were not given adequate time to achieve annual goals. NYSEG/RG&E assert that increasing the amount of the financial incentives at this juncture will not improve the effectiveness of the energy efficiency programs, but that eventually increased incentives will potentially cost ratepayers more when the utilities catch up and earn positive rewards. NYSEG/RG&E suggest that a collaborative approach to making programs more successful would be more useful than imposing a negative incentive at this time.

NYSEG/RG&E support the concept that financial incentive should be calculated based on the aggregated portfolio rather than by specific programs. They believe that utilities should have flexibility to suspend poor performing programs and reallocate funds to better performing programs. NYSEG/RG&E does not believe that the incentives should apply to programs outside of EEPS that do not have verifiable targets to measure energy savings, which are the current justification for utility financial incentives.

In calculating the incentives, NYSEG/RG&E urge the Commission to consider the due diligence put forth by the utilities and the factors within their control when evaluating "poor" performance in addition to the monthly, quarterly and yearly reports provided to Staff and the evaluation reports that also support verification of savings calculations. NYSEG/RG&E support the immediate and consistent utilization of the Technical Manuals for all reporting purposes, but urge that changes in the Technical Manual be made in a more predictable manner and applied going forward only.

Con Edison/O&R

Con Edison/O&R urge that the EEPS utility incentive mechanism be adjusted for 2009 and 2010, at a minimum, because the energy efficiency savings goals for those years do not provide utilities with a fair and realistic incentive to accomplish the critically important goals of the EEPS proceeding. According to Con Edison/O&R, the 2009-2010 energy savings targets should not be further combined with 2011 energy savings targets. Instead, either the 2009-2010 targets should be eliminated and the 2011 target should be considered alone or the 2009 through 2011 budgets should be extended through 2012 and the incentives should be applied to the 2011-2012 period. According to Con Edison/O&R, programs that are not part of EEPS should not be included in the incentives. In the next program cycle Con Edison/O&R urge the Commission to consider providing incentives for non-resource acquisition programs and activities such as education, behavior change and codes and standards. Con Edison/O&R also urge that the Commission expressly clarify that the negative incentive mechanism is intended to address “poor performance” only, so as to provide utilities with sufficient assurance to enable them to avoid recording negative adjustments.

Con Edison/O&R request that utility program administrators be given more discretion to reallocate funds between programs, adjust program targets to de-emphasize under-performing programs and give greater emphasis to performing or over-performing programs such that they are permitted to expand programs that achieve their targeted total savings much more quickly than anticipated.

As to the calculation of the incentives, Con Edison/O&R believe they already provide reasonable supporting documentation to support any incentive requests. They believe the utilities should not be required to retroactively reduce savings using new algorithms without revising program goals, because that may lead to negative incentives. Therefore, modifications to the Technical Manuals should be applied prospectively only to the next program cycle. While they state that utilities should consider the impact of changes in the Commission-approved Technical Manuals when measuring energy savings, Con Edison/O&R believe that utilities should be authorized to use savings models that vary from the Technical Manuals when necessary to obtain a fair representation of savings.

KEDNY/KEDLI/Niagara Mohawk

KEDNY, KEDLI and Niagara Mohawk submitted joint comments under their common business name "National Grid". National Grid supports a performance-based utility incentive mechanism and generally supports the current incentive level, the structure of the current mechanism and the way it appropriately balances risk and reward. National Grid requests that the Commission clarify that the negative adjustment under the incentive mechanism is intended to address “poor performance” only where poor performance excludes those circumstances that the utilities were not able to control or overcome despite reasonable efforts. National Grid urges the Commission to apply the incentives structure to cumulative targets for calendar years 2008-2011. In the alternative, if the Commission is unwilling to move to a single target that coincides with the end of 2011, National Grid requests that the Commission suspend the application of incentives based on changed circumstances that render them unreasonable.

National Grid argues that, consistent with the order on incentives, incentives should be calculated over aggregated portfolio performance rather than by individual program. National Grid recommends that utilities be allowed increased flexibility to shift funding among intra-class programs, in conjunction with the ability to modify customer incentive or rebate levels for specific program measures, as important elements in advancing the success of both electric and gas EEPS programs. This would allow each utility to shift funds from under-performing programs to more successful programs while making greater progress toward the achievement of the 15 x15 goal. Several of National Grid’s EEPS programs have been more successful than originally forecast, and it comments that successful programs should not lead to negative financial effects.

National Grid supports using the correct gross savings methodology for calculation of achieved savings in its 2009 and 2010 EEPS programs. National Grid plans to utilize the gross savings calculations as described in the applicable Technical Manual in effect at the time of the particular EEPS program approval. National Grid requests that the commission clarify what is meant by the “supporting documentation” that the utilities would be expected to present.

NYSERDA

NYSERDA supports the combining of energy savings targets to create a single 2011 target. NYSERDA believes it is reasonable to combine the interim targets into a single overall target because it will allow program administrators the flexibility to tailor program roll-out and ramp-up in a manner more closely matched to market conditions. NYSERDA suggests that the performance of a program administrator’s entire EEPS portfolio, reported at both the program and aggregated portfolio levels, is the appropriate measure of the benefits and costs of that program administrator’s portfolio. NYSERDA also recommends that all program administrators should be given more discretion to reallocate funds between programs and adjust program targets to balance under-performing programs with those that are over-performing because the added discretion will enhance the likelihood of success of achieving the ultimate goals of EEPS.

NYSERDA seeks a more methodical and predictable process for the application of the Technical Manual requirements and implementation of the requirements. According to NYSERDA, any future proposed changes to the Technical Manual should first be vetted with the Evaluation Advisory Group. Final changes should be promulgated through the administrative process a minimum of six months prior to the end of a program approval cycle. The changes should become effective no earlier than the beginning of the next program cycle, when program implementation plans are being prepared by the program administrators. NYSERDA recommends that savings models that vary from the Technical Manual may be used by program administrators, but only after receiving approval of those models from Staff of the Department of Public Service.

DISCUSSION AND CONCLUSION

Continuation of the Incentives Mechanism

We continue to believe that a system of financial incentives is necessary to promote better program performance, to motivate utilities to pursue efficiency programs as a resource option, and to enable the Commission to hold utilities accountable for meeting energy efficiency targets. Based on feedback and the number of petitions received, the current $38.85/incremental megawatt-hour and $3.00/incremental Mcf amounts have proven to be sufficient to garner the attention of utility management, as was intended. We see no reason to change the amount of the incentives at this time and are mindful of the cautions expressed by MI and NYSE/RG&E that raising the incentive levels now might not improve the effectiveness of the energy efficiency programs but may eventually result in unnecessary added ratepayer costs. No party has advocated for an extension of the incentives regime to non-EEPS energy efficiency programs on a global basis. We will leave consideration of incentives for such programs to individual case-by-case determinations, as has been done in the past.

Combined Targets

Some of the reasons cited by the utilities for why the 2009-2010 targets should be either waived or suspended are not as meritorious as the simple fact that it takes considerable time and effort to start up new programs and the short timeframes allowed by us were purposefully ambitious. The already combined 2009-2010 energy savings targets shall be further combined with the 2011 energy savings targets to create a single 2009-2011 target.[6] The combined approved annual program budgets for 2009-2011 will support each utility's efforts to reach the 2009-2011 targets. Calendar year targets shall thereafter be in effect for 2012 and beyond. In any event, as we now near the end of 2010, the beneficial effects of the pressure to meet the 2009-2010 targets by the end of 2010 has nearly run its course. The solution of further combining the targets will keep the utilities accountable for performance during 2009 and 2010 while reflecting the realities of how long it takes to implement new programs. To not extend the performance period may be viewed by the utilities as harsh and might undermine our desire to motivate utilities to pursue efficiency programs as a resource option. The utilities will have all of 2011 to catch up with the targets and we expect them to redouble their efforts and meet that challenge without further requests for adjustment to the allowed timeframe. This decision to further combine the targets gives full credit to over-performance within 2008-2010 as credit towards 2011 targets. As the programs mature, they should be modulated so that annual performance matches the annual targets more closely.

Implementation Advisory Group

Many parties expressed a desire for more collaboration regarding the implementation of EEPS programs. In order to further the discussion of issues which ultimately affect the success of our EEPS programs, it is appropriate that we create

[6] O&R's target will not include any MWh's for the discontinued programs.

an advisory group, much like the Evaluation Advisory Group (EAG) which we created in our June 23, 2008 Order in this proceeding. The EAG has proven valuable in coordinating the discussion of evaluation issues, and we would expect the advisory group we are now creating to serve a similar role with regard to program implementation issues. Therefore, the Director of the Office of Energy Efficiency and Environment is directed to establish an Implementation Advisory Group, hosted by Staff and consisting of representatives of all EEPS program administrators to advise Staff on implementation issues and to assist in program coordination among program administrators.

Factors to be Considered

The decision above to further combine the targets eliminates the need to give any future consideration to the following factors that the utilities allege affected their performance: (a) the number, nature and magnitude of changes to proposed programs that were adopted; (b) the length of the approval process for energy efficiency programs; (c) the alleged lack of participation by potential implementation contractors in the RFP (request for proposals) processes; and (d) the effect of currently moderated fuel and energy costs on energy efficient demand. The utilities now have all of 2011 to overcome such factors. We are persuaded that it may be necessary in applying incentives and assessing portfolio performance to consider the effect of the depressed economic situation existing during 2009 and 2010, but the burden of proof of an effect shall be on the utilities to demonstrate concretely on a program by program basis such an effect. If a utility wants to preserve a claim in that regard, it should first explore the issue of how to quantify and present such a claim, preferably in the first quarter of 2010, with the Implementation Advisory Group.

The August 22, 2008 Order establishing the incentives model provides at page 43 that the "[i]ncentive awards will be calculated over aggregated portfolio performance, provided that the contribution of any particular program toward the overall calculation may be capped or weighted, in order to prevent undue emphasis being placed on one or more programs at the expense of a balanced portfolio." Based on the comments received, some clarification is necessary. First, electric portfolios will be considered completely independent of gas portfolios. Second, the overall portfolio target of a utility is the sum of the program targets for that utility; the overall portfolio target of a utility to be used in the calculation of incentives is not the MWhs set forth in the table on page 45 of the August 22, 2008 Order. Finally, we will consider the need to cap or weight individual programs when the utilities submit their incentive earnings calculations because at that time we will have before us the performance by program so it will be apparent whether the performance is out of balance with the intended program balance by service class or other factors. We shall consider the due diligence put forth by the utilities, and the factors within their control, when evaluating "poor" performance and the need to cap or weight individual programs.

Calculations and Use of Technical Manuals

We have already directed the program administrators to use the savings calculations applicable in the Technical Manual at the time the EEPS program was approved until January 1, 2011 when the new consolidated manual should be used.[7] The Technical Manual calculations should not be supplemented unless the Technical Manual is silent as to the particular measure or calculation methodology. Any program administrator that

[7] Case 07-M-0548, supra, Order Approving Consolidation and Revision of Technical Manuals (issued October 18, 2010).

believes the changes made to date in the Technical Manual caused particular program targets to now be overstated should make their case for lower targets to Staff in a cooperative manner in the Implementation Advisory Group. Staff will compile the requests and document the effects of the changes in the Technical Manual and present to us a recommendation on the need for restated targets, if any, by April 1, 2011. Staff's recommendation will be noticed in the State Register for comment before we take action upon it.

Also by April 1, 2011, the Implementation Advisory Group should work with Staff to clarify the scope and format of information necessary to be provided to Staff to support utility calculations of incentives.

Budget Reallocations

Utility program administrators were already given some discretion to reallocate funds between programs and adjust program targets to de-emphasize under-performing programs and give greater emphasis to performing or over-performing programs, and all program administrators including NYSERDA were already given some discretion to make adjustments in energy efficiency program or measure incentive levels[8] and some have. We encourage prudent, but aggressive, use of this option in the future, if appropriate. The utilities do not currently have so many multiple programs serving individual service classes that there would be many opportunities for budget transfers within the service class. No further discretion will be necessary until such time as the discretion already afforded proves to be insufficient.

Other Matters

[8] Case 07-M-0548, et al., supra, Order Approving Three New Energy Efficiency Portfolio Standard (EEPS) Programs and Enhancing Funding and Making Other Modifications for Other EEPS Programs (issued June 24, 2010).

In our January 4, 2010 Order we approved a utility incentive to encourage the referral of eligible customers to NYSERDA's EmPower NY Program and we expect that the utilities will be actively working with NYSERDA to effectively refer such customers. NYSERDA, the utilities and Staff should review the current state of progress in this regard through the Implementation Advisory Group and work together to maximize this program. This incentive allows the referring utility to claim 15% of the energy saved from measures installed under the EmPower NY program at the referred customer’s location. We now clarify that the utility 15% share of energy savings will be added to the energy savings achieved by the utility from its own approved EEPS programs for calculating the utility’s portfolio performance against its energy savings target for the applicable incentive performance period. This calculation will be conducted for the purpose of implementing the utility incentive mechanism only. It will not affect the amount of energy savings credited to NYSERDA due to serving the referred customers towards the Empower NY program energy savings targets, nor will it be included for determining the actual energy savings achieved by the utility from its EEPS programs.

The Commission orders:

1. For incentives purposes, the already combined 2009-2010 energy savings targets shall be further combined with the 2011 energy savings targets to create a single 2009-2011 target. Calendar year targets shall thereafter be in effect for 2012 and beyond.

2. All Energy Efficiency Portfolio Standard (EEPS) program administrators shall designate representatives to participate in the Implementation Advisory Group in the manner described in the body of this order.

3. The Secretary, in her sole discretion, may extend the procedural deadlines set forth herein; such discretion does not apply to the deadlines to meet the energy savings targets which may only be altered by the Commission.

4. This proceeding is continued.

By the Commission,

Jaclyn A. Brilling

Digitally Signed by Secretary
New York Public Service Commission

JACLYN A. BRILLING
Secretary