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February 17, 2015

VIA ELECTRONIC FILING

Hon. Kathleen H. Burgess
Secretary
New York State Public Service Commission
Three Empire State Plaza, 14th Floor
Albany, New York 12223-1350

Re: Case 14-M-0224 – Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs

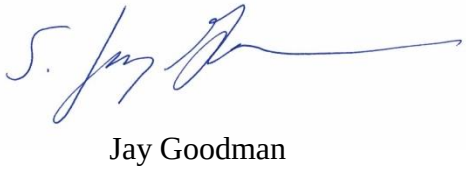
Dear Secretary Burgess:

Enclosed for filing with the Public Service Commission, please find the Comments of the City of New York in the above-referenced proceeding.

Please contact me if you have any questions.

Respectfully submitted,

COUCH WHITE, LLP



Jay Goodman
Counsel to City of New York

SJG/gm
Attachment
cc: All Active Parties (via e-mail)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs **Case 14-M-0224**

COMMENTS OF THE CITY OF NEW YORK

Dated: February 17, 2015

New York City Office of Sustainability
253 Broadway, 10th Floor
New York, New York 10007

PRELIMINARY STATEMENT

There is no question that the electric industry is undergoing a metamorphosis. Customers are increasingly having more choice in how they purchase electricity. Also, more emphasis than ever before is placed on the need to reduce usage and rely on renewable and non-carbon emitting sources of electricity generation. Within New York City, Mayor de Blasio has developed a sweeping plan for reducing greenhouse gas emissions and empowering customer action – "One City, Built to Last: Transforming New York City's Buildings for a Low-Carbon Future" ("Green Buildings Plan").[1] The State of New York, through the New York State Public Service Commission ("Commission") has similar policies and is seeking similar goals through a number of initiatives, foremost of which is its "Reforming the Energy Vision" ("REV") proceeding.[2]

This proceeding, which is an outgrowth of the REV, presents the relatively novel concept of having municipalities assist their residents in increasing their engagement in the electric industry through Community Choice Aggregation ("CCA") programs. Although the City of New York ("City") has not yet made any decisions whether to sponsor a CCA program, the concept appears to be meritorious and worthy of further consideration. Provided the framework for the programs is appropriate and the programs are properly designed and implemented, CCA could provide an additional means to empower consumers. Accordingly, the City submits the following comments to assist the Commission in establishing an appropriate framework for such programs.

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[1] *See* http://www.nyc.gov/html/builttolast/pages/home/home.shtml. *See also PlaNYC 2030: A Greener, Greater New York*, and related documents, which are available at http://www.nyc.gov/html/planyc/html/about/about.shtml.

[2] Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision.

PROCEDURAL SETTING

On December 15, 2014, the Commission commenced this proceeding to examine the potential implementation of CCA programs throughout New York State.[3] The Order included a Department of Public Service Staff ("Staff") White Paper that provides an overview of how CCA programs might be implemented. A Notice of Proposed Rule Making for this proceeding was published in the January 7, 2015 issue of the NYS Register (I.D. No. PSC-01-15-00020-P). Pursuant to the Order and the Notice of Proposed Rule Making, the City submits these comments on the potential implementation of CCA programs in New York State.

Parties were asked to organize their comments into sections with headings that correspond to the enumerated questions presented in the White Paper. These comments adhere to that request after providing some brief, general observations regarding this proceeding and CCA programs.

COMMENTS

GENERAL OBSERVATIONS

The City generally supports the Commission's efforts to harmonize the electric industry with federal, state, and local policy objectives and to take advantage of technological changes that can provide more efficient and lower cost methods of providing electricity to consumers. CCA programs have the potential to be part of the new paradigm and provide increased benefits to consumers as compared to current market designs. The success of such programs depends on numerous factors; cost is perhaps foremost among those factors. Customer

[3] Case 14-M-0224, Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs, Order Instituting Proceeding and Soliciting Comments (issued December 15, 2014) ("Order").

acceptance and involvement, program design, and the rules governing the programs are also important elements.

Here, the Commission has just begun to consider the myriad issues associated with CCA programs. The White Paper provides a good starting point, but more analysis and development of the concept is needed before this matter is ready for Commission action.[4] For example, the White Paper presents a reasonable overview of program benefits, costs, and risks, but it does not present the detailed information or analyses that are necessary to support an informed decision on this matter.

That analysis should be developed in an open, transparent process that involves Staff and interested parties. Information regarding CCA programs should be compiled, circulated, and discussed. Legal considerations also should be assessed as there are important distinctions between the statutory authority governing the Commission and the municipalities. The goal of this proceeding should be to develop a consensus regulatory framework for CCA programs that has the support of municipalities, consumers, energy service companies ("ESCOs"), utilities, Staff, and other parties that have an interest in this subject. The Commission should refrain from taking action until after a consensus proposal has been developed and the public has been given an opportunity to provide comments on it.

There are a few critical issues that must be addressed in this process to ensure that CCA programs are attractive alternatives and beneficial to consumers. First, the Order acknowledges that other states that permit CCA programs do not have utility supply charges that fluctuate on a monthly basis, as they do in New York State.[5] This is a critical difference that

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[4] *Cf.* Order at 1, 5 (explaining that the instant comment period is not the final step in the Commission's decisional process).

[5] Order at 5.

may subject CCA customers to higher prices than alternative supply options. Although Staff asserts that the supply agreement could allow customers to opt-out at low or no cost, such provision would increase the ESCO's risk, which likely would be reflected in an increased supply cost. Careful consideration of the program structure and rules is needed to ensure that CCA programs are cost-effective.

Second, an objective evaluation of potential program costs is needed. Although the White Paper claims that CCA programs would have little or no impact on taxpayers, advocates for CCA programs in the REV customer engagement working group last summer acknowledged that CCA programs can impose costs on municipalities and taxpayers. Unfortunately, there was not sufficient time in that process to further explore this issue and understand the potential magnitude of those costs.

The White Paper does not contain any data regarding the potential cost of establishing or administering a CCA program, or any analysis of how the cost of supply under a CCA program might compare to the cost of supply from alternative sources. Without any factual basis, the Commission cannot simply assume that the incremental costs and work burdens placed on municipal officials will be inconsequential, or that the CCA cost would be competitive with the price paid by full-service utility customers.[6] Indeed, the CCA experience in Chicago suggests that CCA customers could pay substantially more than full-service utility customers.

Third, the implementation of CCA programs as described in the Order and White Paper raises concerns regarding the limits and interplay of Commission and municipal authority. Care is needed to ensure that the regulatory framework does not interfere with, or intrude upon,

[6] The addition of a surcharge to finance a public benefit fund could eliminate any cost benefit achieved under the CCA program. The surcharge still may be desirable to support local energy policy initiatives, but municipalities should be accorded substantial flexibility to design the program elements in a manner that is tailored to their specific needs and goals.

matters that the New York State Constitution and New York State Legislature have reserved to municipalities.

RESPONSES TO STAFF QUESTIONS

(2) Should customers already served by an ESCO be included in CCA programs? If so, how can they best be offered that opportunity?

(4) What provisions, if any, should be made to allow customers who move into the region served by a CCA after it has commenced, to participate in the CCA? Similarly, what provisions should be made to allow customers who are served by an ESCO at the time the CCA has commenced, to participate in the CCA at a later time, or to allow customers who initially opted out to later opt in?

A foundational principle, and goal, of this initiative is to "empower customer choice."[7] The Commission recently acted to increase customer attention to the choices that already are available to them. Specifically, the Commission modified the Uniform Business Practices ("UBP") to shorten the period of time between a customer decision to take service from an ESCO, and when the ESCO actually may commence service to the customer.[8] In so ruling, the Commission explained that the acceleration "will encourage customers to be more engaged in the marketplace," thereby "help[ing] to ensure that the retail energy market responds to customer demands."[9]

If implemented in New York State, CCA programs should not restrict customers' existing flexibility to switch supply providers as they deem appropriate and within the time

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7 Case 14-M-0101, *supra*, Order Instituting Proceeding (issued April 25, 2014) at 7.

8 Cases 12-M-0476 *et al.*, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in New York State, Order Authorizing Accelerated Switching of Commodity Suppliers (issued December 15, 2014) at 1.

9 *Id.* at 1-2.

frames recently modified by the Commission. Inflexible programs risk discouraging customers from engaging in the retail energy market and could impede the development of a market that is responsive to customer demands. These outcomes are inconsistent with the REV goals and should be avoided.

Customers receiving service from an ESCO at the time a CCA program is established should be given the same opportunity as all other residents of the municipality to join the program. This opportunity should be on an opt-in basis, only, for two reasons. First, upon information and belief, ESCOs require contracts with their customers. The Commission has no legal authority to abrogate such contracts, so it does not have the ability to force ESCO customers to take service under a CCA program.[10] Similarly, the Commission does not have the legal ability to require ESCO customers to terminate their contracts. Second, instituting procedures that would contemplate the abrogation of private contracts between ESCOs and utility customers would erode confidence in the State's retail access programs, which the Commission has separately stated continue to be an important policy initiative.

(3) Should customers who participate in a low-income energy assistance program administered by a utility or receive Home Energy Assistance Program (HEAP) benefits be included in CCA on an opt-out basis? If not, should they be included on an opt-in basis?

Improving energy affordability for low-income customers is a pillar of City energy policy, as described in the Green Buildings Plan. CCA programs may constitute an additional option for municipalities to reduce the energy cost burden on their low-income residents.

[10] *See, e.g.*, U.S. Constitution, Article I, Section 10.

There is no guarantee, however, that CCA programs will yield savings. Because there has not been a proper analysis of the potential costs and benefits of such programs in New York, it is premature to conclude that the customers' cost of participating in a CCA program will be less than the cost of alternative supply options.

Low-income customers cannot afford to assume the risk of higher energy costs. It is imperative, therefore, that CCA programs, if implemented, be designed in a manner that specifically accounts for and protects those customers. Nevertheless, low-income customers should be accorded the same opportunities as all other customers, including the ability to join CCA programs.

An additional comment is warranted based on the nature of the CCA programs. As the City understands the concept, a CCA program is not the equivalent of municipalization. That is, a municipality would not take over the utility's distribution system. CCA programs serve to provide customers in a municipality the opportunity to lower their supply costs through aggregation and increased buying power. The electricity would still be delivered by the electric distribution company.

Because the Commission does not have jurisdiction over the commodity, the low-income programs administered by the utilities have been based solely on delivery charges. Under CCA, the utilities would still administer the low-income programs, and eligibility should not be affected based on whether a customer participates in a CCA program for his or her commodity purchases. Concomitantly, the fact that a customer participates in a utility's low-income program should have no bearing on whether that customer can participate in a CCA program.

(9) Should municipalities be required to allocate a portion of the CCA customer payments to a clean energy or public benefit fund?

No. The ability of a municipality to establish a CCA program is established by Article 14-A of the New York General Municipal Law ("GML"), not the Public Service Law. Section 360(7) of the GML provides that the rates and charges assessed for public utility services rendered by municipalities shall be determined by the legislative body of the municipal corporation.

The Commission has no legal authority to require a municipality to allocate payments in a particular manner. To the extent the funds are collected by the ESCO and provided to the municipality, the Commission does not have the legal authority to direct the disposition of any municipal revenues.

Moreover, while the Commission has invoked jurisdiction over the ESCOs, that jurisdiction has been limited to certain operating practices and compliance with the Home Energy Fair Practices Act. The Commission has never examined ESCOs' capital structures, rates of return, or revenues. It is not clear that the Commission could order an ESCO to allocate a portion of its revenues for a municipal public benefit fund.

Finally, the Order and White Paper do not provide any information regarding the purpose, scope, size, administration, or governance of the public benefit fund, nor do they establish that such a fund is needed. If the intent is for the fund to be under the control of the municipalities, the matter is beyond the scope of this proceeding and the Public Service Law. If the intent instead is for the fund to be under the control of the Commission, the City respectfully submits that the surcharges (*e.g.*, System Benefits Charge, Renewable Portfolio Standard) in place now are adequate, and an additional surcharge is not necessary.

Additionally, the Commission observed that "CCA programs … allow municipalities to set their own energy goals based on local input."[11] Requiring CCA programs to include a public benefit fund adder would be inconsistent with the Commission's goal of empowering municipalities to set their own energy objectives. It also would be inconsistent with the cornerstone REV objective of fostering a retail energy market that maximizes customer choice. Municipalities should have the flexibility to tailor their CCA programs to fit their needs,[12] within legal constraints, and they should be solely responsible for determining whether program costs should include an adder for a public benefit fund.

(11) Should municipalities receiving personally identifiable information be required to abide by the same policies for protecting and use of that information that are currently applicable to utilities and ESCOs? If not, why not?

It is imperative that the transmission and use of personally-identifiable customer information be subject to strict safeguards. The Commission has broad authority under the Public Service Law to establish rules for its treatment of personal privacy information, and to require the entities subject to its jurisdiction, or participating in its proceedings, to adhere to such rules. Municipalities are subject to separate statutory provisions and requirements regarding the protection of personal privacy information, such as the Freedom of Information Law ("FOIL"). The Commission should ensure that appropriate procedures are in place under CCA programs to protect personal privacy information, but it should not attempt to specify how municipalities protect such information.

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[11] Order at 4.

[12] This flexibility necessarily includes the determination of whether to implement CCA on an opt-out or an opt-in basis.

(12) Should municipalities considering CCA be required to conduct public forums or other public engagement at certain points during the process of establishing a CCA program?

Inasmuch as the policy goal underlying CCA programs is to empower and engage consumers, public forums and other meetings should be employed. However, there is a difference between encouraging and mandating such processes. Article 14-A of the General Municipal Law specifies the procedures that municipalities must complete before providing public utility services, and only those requirements should be imposed on the municipalities when they establish CCA programs.

There would be merit and value in the Commission developing guidelines and best practices to provide support for municipalities that need assistance with program development and implementation. This may be particularly useful during the initial implementation period, when CCA programs are developed without the benefit of reference to programs that have operated successfully in New York State. The City therefore encourages the Commission to develop such advisory materials and provide assistance to municipalities on an as requested basis.

(18) Are there matters, including concerns regarding policy and legal issues, not fully addressed in the above questions? If so, please provide comments on those matters.

The questions posed to parties suggest that the Commission may specify certain terms of CCA contracts, or mandate key program elements that relate to areas in which municipalities have specific statutory rights and obligations. For example, the Commission seeks input on whether it should (i) specify the public outreach that municipalities conduct before implementing a CCA program, (ii) establish conditions on the supply price that may be

reflected in CCA contracts, or (iii) require municipalities to increase the supply cost of a CCA program by including an "adder" to finance a public benefit fund.[13]

The City respectfully submits that the Commission should not intrude on municipalities' rights, and it should not attempt to develop a one-size-fits-all model for CCA programs. Rather, the Commission should develop a set of parameters and guidelines that municipalities could use to establish their own programs. The municipalities can then tailor their CCA programs as they deem appropriate.

Also, the Commission should not create a set of rules that act as barriers to the development of CCA programs. Since the goal of the REV is to foster market principles over a strict regulatory regime, the Commission should allow municipalities and their constituents, and market conditions, to decide the parameters of CCA programs, including whether to implement those programs on an opt-in or an opt-out basis. The Commission's role should be to facilitate the development of CCA programs and ensure that consumers are adequately protected within the confines of the Public Service Law (and the Home Energy Fair Practices Act, in particular).

[13] *See* White Paper, Questions 5, 6, 9, 12.

CONCLUSION

The Commission should take action to promote CCA programs and assist municipalities in establishing them. The regulatory framework it establishes for such programs should be governed by its authority under the Public Service Law and be respectful of the authority granted to municipalities by the New York State Constitution and other state statutes. Accordingly, the City respectfully recommends that the Commission proceed in a manner that is consistent with the City's comments set forth herein.

Respectfully submitted,

/s/ S. Jay Goodman

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Dated: February 17, 2015
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/s/ Anthony J. Fiore

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Dated: February 17, 2015
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