

05E1222

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October 28, 2005

Hon. Jaclyn A. Brillling  
Secretary  
New York State Department of Public Service  
Three Empire State Plaza  
Albany, NY 12223-1350

Re: Case No. 05-E-1222, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service

Dear Secretary Brillling:

Enclosed please find twenty-six copies of a Motion for Recusal ("Motion") for filing on behalf of New York State Electric & Gas Corporation ("NYSEG") in the above-captioned matter. We are filing this Motion to preserve NYSEG's right to a fair and impartial hearing on its proposed electric rate plan extension, including the proposed major rate change.

Pursuant to 16 NYCRR § 2.2, the original Motion was submitted to Chairman Flynn today. Should you need anything further, please do not hesitate to contact me at the telephone number listed above.

Respectfully submitted,

  
Thomas G. Rohback

Enclosures

CERTIFICATE OF SERVICE

Pursuant to the New York State Public Service Commission's Rules of Procedure, I hereby certify that I caused an original of New York State Electric & Gas Corporation's Motion for Recusal to be served, by hand delivery, upon the Honorable William Flynn, Chairman of the New York State Public Service Commission and for twenty-five (25) copies of the same to be served, by hand delivery, upon the Honorable Jaclyn A. Brillling, Secretary to the New York State Public Service Commission. In addition, copies of the Motion for Recusal were served upon the active party service list for Case 05-E-1222, a copy of which is attached hereto, via U.S. First Class mail.

Dated this 28<sup>th</sup> day of October, 2005.



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Carrie Szydowski

**Case 05-E-1222  
New York State Electric & Gas Corporation - Electric Rates**

**Active Parties List As Of:**

**October 28, 2005**

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October 28, 2005

William M. Flynn, Esq.  
Chairman  
New York State Department of Public Service  
Three Empire State Plaza  
Albany, NY 12223-1350

Re: Case 05-M-0453, In the Matter of New York State Electric & Gas Corporation's Plan to Foster the Development of Retail Energy Markets; and

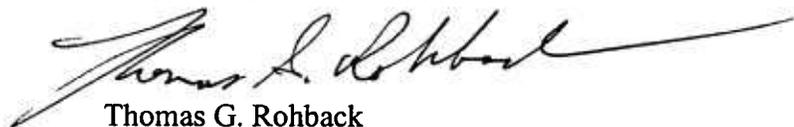
Case No. 05-E-1222, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service.

Dear Chairman Flynn:

Pursuant to 16 NYCRR § 2.2, please find enclosed an original Motion for Recusal ("Motion") for submission in both of the above-captioned matters on behalf of New York State Electric & Gas Corporation ("NYSEG"). We are filing this Motion to preserve NYSEG's right to a fair and impartial hearing on its proposed electric rate plan extension, including the proposed major rate change and the continuation of NYSEG's successful commodity option program for customers.

The requisite number of copies of the Motion are being filed concurrently with Secretary Brilling. Thank you for your consideration of this matter.

Respectfully submitted,



Thomas G. Rohback

Enclosures

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

-----X  
:  
Petitions of New York State Electric & Gas : Case No. 05-M-0453  
Corporation for Approval of its Retail : Case No. 05-E-1222  
Access Plan and its Rate Plan Extension :  
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**MOTION FOR RECUSAL**

New York State Electric & Gas Corporation ("NYSEG") hereby moves, pursuant to Section 2.2 of Title 16 of the New York Codes, Rules and Regulations, that William M. Flynn, as Chairman ("Chairman" or "Chairman Flynn") of the New York Public Service Commission ("Commission" or "PSC"), recuse himself from any consideration of NYSEG's Retail Access Plan in Case No. 05-M-0453 and its proposed Electric Rate Plan Extension Filing, including its request for a major rate change, in Case No. 05-E-1222 (the "NYSEG Plans"). The Chairman's recusal is proper and necessary because his public statements demonstrate that he is biased against NYSEG and the NYSEG Plans, and that such bias will unavoidably taint the applicable proceedings and violate NYSEG's due process rights to a fair and impartial adjudication.

**EXECUTIVE SUMMARY**

Recent statements and actions by Chairman Flynn demonstrate a personal and improper bias regarding NYSEG's proposed continuation of a fixed price option ("FPO") under the NYSEG Plans, which will be subject to review and approval by the Commission. Chairman Flynn has made it clear that he wants to see utilities such as NYSEG withdraw from offering any commodity services. The Commission's forced divestiture of utility generation plants that removed electric production from the Commission's oversight has been followed by record

increases in wholesale supply costs. Chairman Flynn's desire is to move utilities out of the retail supply business and reduce the costs and revenues under the Commission's jurisdiction and further diminish the Commission's control over electric supply in the state. NYSEG is entitled, however, to present its views and proposals to an impartial decision-maker who has not prejudged the matter at issue. In this regard, Chairman Flynn has publicly stated his support for adoption of the Orange and Rockland Utilities, Inc. ("O&R") PowerSwitch program as a "blueprint" for other utilities in the state and has demonstrated both bias and a prejudgment of critical facts now at issue in the proceedings addressing the NYSEG Plans.

Since establishing the Office of Retail Market Development in 2004, Chairman Flynn has cultivated a close relationship with energy service companies ("ESCOs") and ESCO trade associations. In a speech to the National Energy Marketers Association ("NEM") on March 31, 2004, Chairman Flynn stated that he developed the Office of Retail Market Development ("ORM") "to provide ESCOs and marketers a forum within the Department where you can identify the issues that you feel are preventing you from achieving your full potential in New York State."<sup>1</sup> Trying to sound even-handed, he further stated that while he could not guarantee that ORM would "be able to fulfill every wish on your list" the staff would be "responsive to the matters" put before it by NEM members.<sup>2</sup> These ESCOs appear frequently in adjudicatory proceedings before the PSC, often adverse to NYSEG. Chairman Flynn, who has no particular education or training in the field of economics, has championed the ESCOs' position that utilities such as NYSEG should be prohibited from providing commodity service to their customers, particularly at a fixed price. In essence, the ESCOs do not want to have to compete with

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<sup>1</sup> See Remarks of Chairman William M. Flynn, National Energy Marketers' Annual Membership Meeting, p. 3 (March 31, 2004).

<sup>2</sup> Id.

NYSEG, and Chairman Flynn has supported that desire to exclude NYSEG from free and open competition with the ESCOs.

A critical issue in the pending NYSEG Plans is whether the Company will be allowed to continue to offer an FPO which provides substantial customer benefits, or be required to adopt a PowerSwitch-type program, which has not been shown to provide sustained benefits for consumers. Because Chairman Flynn has already decided that utilities such as NYSEG must exit the merchant function -- contrary to the Company's statutory right to sell electricity and without evidentiary hearings on how customers would benefit from such an exit -- and because he has already decided that NYSEG should offer a PowerSwitch-type program, he must be disqualified from participating in the decisions on the NYSEG Plans.

We believe this Motion represents compelling evidence that Chairman Flynn is biased against NYSEG and has prejudged the issues regarding the NYSEG Plans presently before the Commission for review.

## I. FACTS

### a. NYSEG's Price Protection Plan and Voice Your Choice Program

In 2002, NYSEG offered an FPO through its Price Protection Plan ("PPP"), reflected in a joint proposal that the Commission approved.<sup>3</sup> Under the PPP, NYSEG, in collaboration with State of New York Public Service Commission Staff ("Staff") and certain ESCOs, developed an outreach and education effort to encourage customers to "Voice Your Choice" ("VYC") by selecting an electric commodity supplier. Under the VYC program, NYSEG's customers could choose: 1) the Bundled Rate Option (which was an FPO) under which they obtain a fixed rate

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<sup>3</sup> Cases 01-E-0359 et al., Petition of New York State Electric & Gas Corporation for Approval of its Electric Price Protection Plan, as adopted by the Commission in its Order Adopting Provisions of Joint Proposal with Modifications (issued February 27, 2002) ("PPP Order").

supplied by NYSEG for a two-year period; 2) a Variable Rate Option, which is supplied by NYSEG and reflects an adjusted flow-through of market prices; or 3) an ESCO Rate Option. The PPP Order provided that, "no customer should have their supplier switched without the customer's explicit permission."<sup>4</sup>

The VYC program has been successful in increasing the number of participating ESCOs, the number of customers making an active choice, and the number of customers choosing an alternative supplier.<sup>5</sup> NYSEG's fixed price option has been an effective yardstick for customers to evaluate service offerings by ESCO's. The New York Consumer Protection Board and the Public Utility Law Project have supported NYSEG's offering consumers the stability of an FPO.<sup>6</sup> During the last enrollment period under the PPP, 30% of NYSEG's customers responded to the call to make an affirmative supply choice, an increase of 70% over the previous enrollment period.<sup>7</sup> Moreover, customers have made it known that a fixed price option should be offered by their utility, regardless of their ultimate choice.

b. The Policy Statement

On August 25, 2004, the PSC issued a non-binding "policy statement" articulating its vision for the restructuring of the electric markets in New York.<sup>8</sup> In the Policy Statement, the Commission telegraphed what it wanted to see; namely, the migration of customers from utilities to non-utility ESCOs. The Commission identified the O&R Switch and Save program as a

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<sup>4</sup> PPP Order, p. 12.

<sup>5</sup> See Affidavit of James P. Laurito, NYSEG, attached hereto as Exhibit 1.

<sup>6</sup> See Cases Nos. 00-M-0504 and 05-M-0453, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Markets and Fostering Development of Retail Competitive Opportunities, and 05-M-0453, *supra*, "Comments of Consumer Protection Board on the NYSEG's Retail Access Plan," pp. 4-5 (dated June 27, 2005); Cases No. 01-E-0359 *et al.*, *supra*, "Proposal of the Public Utility Law Project on NYSEG's Electric Price Protection Plan" (dated July 3, 2001).

<sup>7</sup> See Exhibit 1.

<sup>8</sup> Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Markets and Fostering Development of Retail Competitive Opportunities, Statement of Policy and Further Steps Toward Competition in Retail Energy Markets (issued August 25, 2004) (the "Policy Statement").

model for achieving this increased customer migration to ESCOs. While the Commission recognized that its primary goal is to ensure safe and reliable electric service at just and reasonable rates, the Commission stated that its long term goal would be the eventual elimination of all utilities from the commodity services market.<sup>9</sup>

c. The PowerSwitch Model

PSC Staff and the Commission have sought to replicate the O&R PowerSwitch program (the successor to O&R's Switch and Save program) in other utilities' service territories. For example, although neither Consolidated Edison Company of New York, Inc. ("Con Edison") nor National Fuel Gas Distribution Corporation ("NFG") initially proposed a PowerSwitch-type program in their rate filings in 2004, both utilities ultimately entered into joint proposals with Staff and other parties that included a provision for establishing a collaborative to develop a PowerSwitch-type program.<sup>10</sup> In the case of NFG, it agreed to a PowerSwitch-type program after initially voicing strong opposition to this type of initiative.<sup>11</sup>

In the first quarter of 2005, NYSEG filed a number of pleadings opposing the PowerSwitch program on the ground that it allowed ESCOs to engage in bait and switch-type marketing by promising customers a discount for two months and then unilaterally changing the price after that period without the customer's affirmative agreement.<sup>12</sup> NYSEG urged Staff and the Commission to collect and review data to determine whether PowerSwitch was, in fact,

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<sup>9</sup> Id. at 18.

<sup>10</sup> See Case 04-E-0572, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric Service, "Joint Proposal on Three Year Rate Plan (dated December 2, 2004) ("Con Edison Joint Proposal"), as adopted by the Commission in its Order Adopting Three-Year Rate Plan (issued March 24, 2005) ("Con Edison Order"); and Cases 04-G-1047 et al., Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of National Fuel Gas Distribution Corporation for Gas Service, "Joint Proposal" (dated April 15, 2005), as adopted by the Commission in its Order Establishing Rates and Terms of Two-Year Rate Plan (issued July 22, 2005).

<sup>11</sup> See Case 00-M-0504, supra, Initial Comments of National Fuel Gas Distribution Corporation (dated March 22, 2004), p. 7 and Reply Comments (dated April 12, 2004), pp. 4-5.

<sup>12</sup> See e.g., Case 05-M-0334, In the Matter of Orange and Rockland Utilities, Inc.'s Plan to Foster the Development of Retail Energy Markets, Comments of NYSEG and RG&E on the O&R Retail Access Plan (dated February 28, 2005).

providing sustained benefits to customers.<sup>13</sup> Staff's response stated only that the migration results in O&R's service territory demonstrated the success of PowerSwitch and that there had been few complaints by O&R's customers.<sup>14</sup> Staff failed to note that there has been no demonstration of consumer benefits resulting from PowerSwitch and that, notwithstanding the enticement of a two-month discount, two-thirds of O&R's customers have chosen not to participate in the PowerSwitch program. To date, the Commission has taken no affirmative action to investigate the impact of the O&R PowerSwitch program or otherwise collect data on the impact of this program on consumers.

d. Chairman Flynn's Views on NYSEG and the FPO

Prior to NYSEG's challenge to the PowerSwitch programs, in a February 2005 discussion with James P. Laurito, President of NYSEG, Chairman Flynn described a report from his Staff about the VYC Program.<sup>15</sup> According to Chairman Flynn, his Staff reported that VYC had been successful in achieving a high customer participation rate, but that too many customers stayed with Energy East Corporation ("Energy East") companies.<sup>16</sup>

After NYSEG's PowerSwitch challenges, Chairman Flynn became more critical of the NYSEG programs and refused to meet with NYSEG representatives. In an interview reported in the April 8, 2005 *Rochester Business Journal*, while acknowledging that there had been some improvement lately, Chairman Flynn focused his remarks on what he characterized as the "confrontational" attitude of the Energy East companies:

I'm from the area, so I know growing up in Mount Morris that RG&E was very parochial. Everybody at least knew

<sup>13</sup> Id. at 11.

<sup>14</sup> Case 00-M-0504, supra, "Staff Comments on O&R Retail Access Plan" (dated April 11, 2005).

<sup>15</sup> See Exhibit 1.

<sup>16</sup> Id. at 8.

<sup>18</sup> Tom Adams, "PSC Chairman Touts Strength of NY Power," *Rochester Business Journal*, April 8, 2005.

somebody who knows somebody that worked there, or you knew somebody that worked there.

Then here comes Energy East. They have had a history at the Commission of, whether it was RG&E or NYSEG, being difficult to deal with. They were much more confrontational than other utilities.<sup>18</sup>

Another instance involves The Center for the Advancement of Energy Markets ("CAEM") which is a special interest lobbying group headquartered in Washington, D.C., which was founded in 1999 by Ken Malloy, a former U.S. Department of Energy staffer.<sup>21</sup> In July, 2004, CAEM presented Chairman Flynn with the Thomas Jefferson Award for "innovation in the public sector by creating the Office of Retail Market Development."<sup>22</sup> On June 6, 2005, Chairman Flynn was a featured speaker at CAEM's Convention for Supporters of Competition, which was organized to counter negative ESCO coverage associated with the recently released film about Enron.<sup>23</sup>

In his speech at the CAEM Convention for Supporters of Competition, Chairman Flynn told marketers that they were not doing a good job of promoting the advantages of their model of competition. Chairman Flynn warned that utilities which opposed those efforts were convincing the public that markets don't work.<sup>24</sup> Echoing his comments in the speech to NEM on March 3, 2004, Chairman Flynn again committed to doing all in his power to sell the public on markets where utilities were non-participants and told the ESCOs that they needed to fight back.<sup>25</sup>

Remarkably, at the same time that Chairman Flynn was delivering speeches at ESCO rallies, he

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<sup>21</sup> The CAEM Story, [www.caem.org](http://www.caem.org).

<sup>22</sup> The mission of the Office of Retail Market Development, which has no statutory mandate, is to coordinate the design and implementation of retail access programs and encourage the development and participation of ESCOs. See Remarks of Chairman William M. Flynn, National Energy Marketers' Annual Membership Meeting, p. 3 (March 31, 2004).

<sup>23</sup> CAEM declared that opponents of competition "now have Hollywood on their side" based on the release of *Enron: The Smartest Guys in the Room*.

<sup>24</sup> *Restructuring Today*, "Flynn Warns Marketers of Punishment for Not Communicating" (June 8, 2005).

<sup>25</sup> *Id.*

told NYSEG that he could not even discuss any policy issues with NYSEG regarding NYSEG's Retail Access Plan.

On July 6, 2005, *The Rochester Democrat and Chronicle* published a guest essay by Robert Bergin, NYSEG's Director of Public Affairs, under the headline "Keep a Wide Selection of Electricity Providers in N.Y."<sup>27</sup> In the article, Bergin noted that the PSC's goal of excluding utilities from selling electricity was contrary to a truly competitive model where any party can compete.<sup>28</sup> The article also characterized programs in which customers are teased away from utilities with temporary discounts (i.e., PowerSwitch) as unfair to consumers and ultimately anti-competitive.<sup>29</sup>

In a July 22, 2005 letter, Mr. Cerniglia responded to the Bergin essay at the request of Chairman Flynn ("Flynn/Cerniglia Letter", attached hereto as Exhibit 2), by explicitly stating that "ESCOs - not the utility - should provide value-added services like fixed price options to customers."<sup>30</sup> The letter also took issue with the characterization of the PowerSwitch-type programs as unnecessary, unfair to customers and ultimately anti-competitive.<sup>31</sup>

The Flynn/Cerniglia Letter, dated Friday, July 22, 2005, and addressed privately to Mr. Bergin, was inappropriately disclosed and reported in *Restructuring Today* the next business day under the headline "Is Energy East For or Against Competition[?]" The article repeated, almost verbatim, the Flynn/Cerniglia letter, including the assertion that ESCOs – not utilities – should provide an FPO to customers. Mr. Bergin responded to this letter on August 1, 2005.<sup>32</sup>

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<sup>27</sup> Robert Bergin, "Keep a Wide Selection of Electricity Providers in N.Y.", *The Rochester Democrat and Chronicle*, July 2005.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Letter of R. Cerniglia to R. Bergin, NYSEG (dated July 22, 2005).

<sup>31</sup> *Id.* at 2-3.

<sup>32</sup> Letter of R. Bergin to R. Cerniglia, PSC (dated August 1, 2005) (attached hereto as Exhibit 3).

In subsequent correspondence between Cerniglia and Bergin dated September 7, 2005 and Bergin's response dated September 15, 2005 (attached hereto as Exhibit 5), Cerniglia stated that it was appropriate for him to defend the Commission's "previous policy decisions regarding the development of competition and retail markets."<sup>33</sup> Mr. Cerniglia did not address, however, the more fundamental question of whether it was appropriate for him and Chairman Flynn to advocate prohibiting NYSEG from selling electricity even though under New York Law NYSEG has a clear right to do so.

The very same day that *Restructuring Today* featured the Flynn/Cerniglia rebuttal letter to Bergin, the *Buffalo News* published an interview with Chairman Flynn under the headline "PSC Boss Wants More Competition for Utilities."<sup>34</sup> Chairman Flynn unequivocally characterized O&R's PowerSwitch program as the "blueprint" for utilities to introduce competition. He also publicly expressed his disagreement with NYSEG's proposal to keep selling electricity to its customers and compete with other ESCOs for that business, saying "[W]e hope they come around."<sup>35</sup>

In recent weeks Chairman Flynn has continued his public statements suggesting that NYSEG should be forced out of the commodity market. An October 1, 2005, article on the filing of NYSEG's Rate Plan Extension and 10% rate reduction reported: "In fact, the Commission has 'talked from time to time' about forcing residential customers to stop buying power from utilities such as NYSEG..., Chairman Flynn said earlier this week."<sup>36</sup> The spokesperson for Chairman Flynn and the PSC, David Flanagan, also echoed Flynn's inappropriate comments on the NYSEG Plans now pending before the Commission. Faced with rising energy prices, Mr. Flanagan

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<sup>33</sup> Letter of R. Cerniglia to R. Bergin, NYSEG (dated Sept. 7, 2005) (attached hereto as Exhibit 4).  
<sup>34</sup> David Robinson, "PSC Boss Wants More Competition for Utilities", *Buffalo News*, July 25, 2005.  
<sup>35</sup> Id.  
<sup>36</sup> Yancy Roy, "NYSEG Offers Rate Cut for Power Distribution Role" *The Ithaca Journal*, October 1, 2005.

admitted the value of a fixed price alternative, but suggested that this could not be offered directly by utilities.<sup>37</sup>

e. Pending Proceedings

On April 1, 2005, NYSEG filed a Petition for Rehearing of the Commission's Order approving the Con Edison joint proposal. Specifically, NYSEG asked the Commission to reject the provision of the joint proposal authorizing a PowerSwitch-type program in which customers would be baited to switch to an ESCO with a temporary discount and then effectively slammed with a price unilaterally determined by the ESCO without the customer's affirmative consent.<sup>38</sup> Because there was no evidence that the O&R PowerSwitch program had produced sustained benefits for customers, NYSEG requested that the Commission refrain from replicating that program pending further review and investigation.<sup>39</sup>

On April 14, 2005, NYSEG filed a Retail Access Plan proposing to continue the electric commodity program and requesting Commission approval of that Plan by September 30, 2005.<sup>40</sup> The PSC subsequently noticed the proceeding and took written comments on the Plan in June and July, 2005. Parties opposing NYSEG's Retail Access Plan, including certain ESCOs and a special interest lobbying group that calls itself National Energy Marketers' ("NEM"), argued that NYSEG should be prohibited from providing an FPO to its customers and should be required to offer an ESCO migration program such as the PowerSwitch program adopted by O&R.<sup>41</sup>

<sup>37</sup> John Milgrim, "NYSEG Proposes Cutting Electricity Rates", Ottaway News Service, October 1, 2005.

<sup>38</sup> Case 04-E-0572, NYSEG and RG&E Petition for Rehearing (April 2005).

<sup>39</sup> Id.

<sup>40</sup> NYSEG's VYC Program was developed through a collaborative effort consistent with the PPP Order. A further description of the VYC Program is included in Section I, *infra*.

<sup>41</sup> See Cases 00-M-0504, *supra*, 05-M-0453, *supra*, and 05-M-0454, In the Matter of Rochester Gas and Electric Corporation's Plan to Foster the Development of Retail Energy Markets, "Response of NYSEG and RG&E to Comments Opposing Their Retail Access Plans," Case No. 00-M-504, 05-M-0453 and 05-M-0454 (dated July 29, 2005).

On September 30, 2005, NYSEG submitted a filing to extend its current Rate Plan, which expires December 31, 2006, for at least another six years. The Rate Plan Extension proposal includes the continuation of the FPO. Based upon the oppositions filed against NYSEG's Retail Access Plan, the Company expects that ESCOs and NEM will continue to oppose NYSEG's FPO in the Rate Plan Extension proceeding.

## II. ARGUMENT

NYSEG brings this Motion with full recognition that, unlike any citizen, it is regulated in its business by the very Chairman whom it asks to recuse himself. This Motion is brought with the belief that the Chairman will have the honesty and the integrity to recognize his own emotional and intellectual leanings or prejudices. This Motion is also brought with the hope that the Chairman will choose to avoid even the appearance of impropriety and will not permit this Motion to galvanize any sense of retaliation or indignation against NYSEG for having brought this Motion.

### a. The Standard for Recusal for Bias Based on Public Comments Requires Chairman Flynn's Removal

Recent statements and actions by Chairman Flynn demonstrate a personal and improper bias regarding NYSEG's proposed continuation of an FPO under the Company's Retail Access Plan and the proposed Rate Plan Extension, both of which are subject to review and approval by the Commission. Participants in administrative adjudications are entitled to the "appearance of complete fairness" and decision makers must disqualify themselves when they have "in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."<sup>42</sup>

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<sup>42</sup> See Cinderella Career & Finishing Schools v. Federal Trade Comm., 425 F. 2d 583, 591 (D.C. Cir. 1970) citing Amos Treat and Co. v. SEC, 306 F. 2d 260, 267 (1962) and Gillian, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert denied, 361 U.S. 896 (1959). In Cinderella, the Federal Trade Commission ("FTC") charged the Cinderella Career College and Finishing School with making representations and advertising in a manner that was false, misleading, and deceptive. 425 F.2d at 584. After the hearing on the matter, the hearing examiner determined

Chairman Flynn, through his public statements, close associations with parties adverse to NYSEG, and actions towards the Company, has demonstrated both bias and a prejudgment of critical facts now at issue in the proceedings addressing the NYSEG Plans. Accordingly, Chairman Flynn must be recused from ruling on the pending NYSEG Plans.

New York has recognized that a statutory right to a fair adjudicatory hearing includes the right to be heard before an impartial tribunal. In furtherance of this goal, the New York State Administrative Procedure Act provides that "[h]earings shall be conducted in an impartial manner. . . ."<sup>43</sup> In addition, the Commission has enacted its own Rules of Procedure. Section 2.2 of those Rules governs the recusal of its members and provides that:

[n]o presiding officer shall preside over, and no member of the Commission shall participate in making a decision in, a proceeding in which such officer or Commissioner has a personal bias or interest with respect to the matter involved.<sup>44</sup>

While "no single standard determines whether an administrative decision maker should disqualify himself [sic] from a proceeding for lack of impartiality," in 1616 Second Ave. Restaurant, Inc. v. N.Y. State Liquor Auth., the New York Court of Appeals expressly cautioned that "public statements that indicate prejudgment are especially problematic."<sup>45</sup> Thus, the forum for Chairman Flynn's statements makes the need for recusal even stronger. In such instances, the general standard for disqualification for bias - - support for bias in the record and proof that the

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that the charges against the school should be dismissed. While a subsequent appeal by the FTC was pending, the chairman of the FTC made public statements relating to advertising standards and, without mentioning the school's name, made reference to the representations made in the school's ads. *Id.* at 589-590. On appeal, the D.C. Circuit vacated the FTC's order and remanded the case to the FTC to reconsider without the participation of the chairman. *Id.* at 592. In doing so, the Court found that a "disinterested observer" could perceive the chairman's public statements as an indication of the chairman's prejudgment of the facts and issues presented to the FTC for determination. *Id.* at 591.

<sup>43</sup> NY Admin. P. Act § 303 (2005).

<sup>44</sup> 16 NYCRR § 2.2 (2005).

<sup>45</sup> 75 N.Y. 2d 158, 162 (1990).

outcome of the hearing flowed from bias<sup>46</sup> - - is abandoned for a lesser standard as articulated by the D.C. Circuit in Cinderella Career & Finishing Schools v. Fed. Trade Comm'n<sup>47</sup> and adopted by the New York Court of Appeals in Second Ave.<sup>48</sup>

In Second Ave., the chairman of the State Liquor Authority ("SLA") made public statements before a legislative oversight committee regarding charges then pending in an SLA proceeding against a licensee. The chairman's public discussion of those charges prompted the licensee to request that the chairman recuse himself from consideration of the allegations against it on the ground that he had prejudged the matter. The chairman declined to do so, and participated with the other Commissioners in adopting the findings of an Administrative Law Judge and imposing penalties against the licensee. Thereafter, the licensee filed an Article 78 proceeding seeking to overturn the decision. The Appellate Division confirmed the decision of the SLA.

On appeal, the New York Court of Appeals reversed the Appellate Division's decision, holding that the chairman's statements indicated prejudgment of the facts at issue in the SLA proceeding, thus depriving the licensee of due process of law under the United States Constitution. In holding that the SLA chairman was obligated to recuse himself from the proceeding, the Second Ave. Court applied the test set forth by the D.C. Circuit in Cinderella Career & Finishing Schools v. F.T.C.<sup>49</sup> that an administrative official "will be disqualified on the ground of prejudgment if 'a disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."<sup>50</sup> Thus, the

<sup>46</sup> See e.g., Warder v. Board of Regents of Univ. of State of N.Y., 53 N.Y.2d 186 (N.Y. 1981).

<sup>47</sup> 425 F.2d 583 (D.C. Cir. 1970).

<sup>48</sup> 75 N.Y. 2d 158, 162 (1990).

<sup>49</sup> 425 F.2d 583 (D.C. Cir. 1970).

<sup>50</sup> Second Ave., 75 N.Y.2d at 162, quoting Cinderella, 425 F.2d at 591

standard to apply to this matter is whether or not a disinterested observer would conclude that Chairman Flynn has prejudged this matter in advance of the hearing on its merits.<sup>51</sup>

Indeed, even Chairman Flynn himself has recognized the right of an applicant to a hearing free of the appearance of impartiality.<sup>52</sup> By not following his own advice, Chairman Flynn has made public statements that would lead a disinterested observer to believe that he has prejudged the NYSEG Plans.

b. Chairman Flynn Has Made Public Statements that Indicate a Prejudgment of the Issues at Hand; to Allow Him to Preside Over These Matters Would be a Violation of NYSEG's Due Process Rights

Unlike the sixteen other states in the nation that have pursued competitive retail electric markets, the restructuring of the electric industry in New York has been accomplished through an administrative, rather than legislative process.<sup>53</sup> There are no legislative mandates or statutory standards that guide the PSC's restructuring efforts. Rather, the Chairman has used the Commission to articulate his own vision in the form of "policy guidance" and then attempted to introduce ratepayer-supported subsidies for ESCOs in individual utility proceedings. By his clear actions and statements, the Chairman has prejudged the merits of NYSEG's positions when he says, before the hearing even begin, that he hopes that NYSEG will "come around".<sup>54</sup>

The United States Supreme Court has made clear that "[a]n applicant is constitutionally entitled to unprejudiced decision-making by an administrative agency."<sup>55</sup> Further, "[i]t is beyond dispute that an impartial decision maker is a core guarantee of due process, fully applicable to

<sup>51</sup> See also Beer Garden, Inc. v. N.Y. State Liquor Authority, 79 N.Y.2d 266, 278 (N.Y. 1992) (finding that the "mere appearance of impropriety" was sufficient to warrant disqualification of an administrative officer that had prior involvement in the matter to be decided).

<sup>52</sup> See Remarks by William M. Flynn, Chairman, New York PSC Center for Business Intelligence; 2<sup>nd</sup> Annual Forum, June 11, 2004, p. 3 ("Because the Commission has yet to make a final decision in this proceeding [February 2003; Renewable Portfolio Standards], I cannot comment on the specifics of the [Recommended Decision] or prejudice its outcome by indicating what decisions or directions the Commission may take at this time").

<sup>53</sup> See Remarks of Chairman William M. Flynn, Harvard Electricity Policy Group, p. 3 (October 7, 2004).

<sup>54</sup> David Robinson, "PSC Boss Wants More Competition for Utilities", *Buffalo News*, July 25, 2005.

<sup>55</sup> See Withrow v Larkin, 421 U.S. 35 (1975).

adjudicatory proceedings before administrative agencies."<sup>56</sup> NYSEG has a due process right to have each and every member of the Commission judge the NYSEG Plans impartially. When the Chairman of the Commission publicly announces a position contrary to the FPO proposed in those Plans prior to the receipt of evidence, that right to due process is violated if the Chairman continues his involvement in the proceedings.

Here, Chairman Flynn's public statements show that he is biased against utility proposals such as the NYSEG Plans, which seek to provide an FPO to consumers. In Second Ave., the hearing officer made public statements concerning specific charges pending before the SLA. New York courts, however, also require recusal where public statements are made regarding issues that are central to the determination of pending proceedings.<sup>57</sup>

In Woodlawn Heights, the Court relied on Second Ave. when it considered the disqualification of the SLA commissioner after he made comments at a public meeting regarding the need for more liquor establishments in the area.<sup>58</sup> At the time when the statements were made, a highly controversial application for a liquor permit was pending before the Liquor Commission.<sup>59</sup> While not specifically referring to the pending application, the Court found that the commissioner's comments, "which are at the core of the issue concerning the alteration, were offered in a public forum, before any vote was taken, and clearly indicate a preconceived bias on

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<sup>56</sup> Second Ave., 75 N.Y.2d at 161, citing Withrow v Larkin, 421 U.S. at 46-47; Matter of Warder v. Board of Regents, 53 N.Y.2d 186, 197, cert den., 454 U.S. 1125 (1981); and State Administrative Procedure Act § 303.

<sup>57</sup> See Woodlawn Heights Taxpayers & Cmty. Ass'n v. N.Y. State Liquor Auth., 307 A.D.2d 826 (N.Y. App. Div. 2003); see also Beer Garden, Inc. v. New York State Liquor Authority, 79 N.Y.2d 266 (N.Y. 1992) (rejecting the SLA's contention that the "mere appearance of impropriety" will not suffice to mandate recusal where no actual bias is shown and holding that the SLA Commissioner should have been recused).

<sup>58</sup> Id.

<sup>59</sup> Id.

the part of that commissioner."<sup>60</sup> The Woodlawn Heights Court, therefore, remanded the decision to be reconsidered by the Board without the commissioner.<sup>61</sup>

Chairman Flynn's public comments asserting that the O&R PowerSwitch program is the "blueprint" for the State, and indicating his desire that NYSEG change its mind about providing commodity service, are "at the core of the issue" in the proceedings concerning the NYSEG Plans. As noted above, under those Plans, NYSEG proposes to continue to provide an FPO commodity service and not to offer a PowerSwitch-type program. NYSEG has raised legitimate issues regarding the benefits of PowerSwitch, and should not be subject to retaliatory bias because it has revealed flaws in a so-called "model" program. Before reviewing any evidence on the NYSEG Plans, Chairman Flynn has publicly expressed his conclusions that NYSEG should "come around" and change its position on the FPO and that PowerSwitch should be the blueprint for all of the utilities in the State. In light of his predetermination of material facts, Chairman Flynn's involvement in the decisions regarding the NYSEG Plans will unavoidably taint the proceeding and thus violate NYSEG's due process rights to a fair and impartial adjudication.

### III. CONCLUSION

In light of his public statements, it is apparent that Chairman Flynn has prejudged the issues of whether NYSEG should be prohibited from providing an FPO and be required to provide a PowerSwitch-type program. The vast power of the PSC over this regulated utility should cause Chairman Flynn to rise above the natural, human inclination to deny any prejudice. Rather, precisely because of the power of the PSC, NYSEG would hope that Chairman Flynn would eliminate even the suspicion of bias by taking the principled action of self-recusal.

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<sup>60</sup> Id. at 827.

<sup>61</sup> Id.

NYSEG therefore respectfully moves that Chairman Flynn recuse himself from any consideration of NYSEG's Retail Access Plan and its Rate Plan Extension.

RESPECTFULLY SUBMITTED,

NEW YORK STATE ELECTRIC & GAS  
CORPORATION

*LeBoeuf Lamb, Greene & MacRae, LLP*  
By its attorneys:

LeBoeuf, Lamb, Greene & MacRae, LLP  
125 West 55<sup>th</sup> Street  
New York, NY 10019  
212.424.8000 (ph.)  
212.424.8500 (fax)

**EXHIBIT 1**

**AFFIDAVIT OF JAMES P. LAURITO**

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

-----X  
: Petition of New York State Electric & Gas : Case No. 05-M-0453  
: Corporation for Approval of its Retail : Case No. 05-E-1222  
: Access Plan and its Rate Plan Extension :  
: :  
: :  
-----X

**AFFIDAVIT OF JAMES LAURITO IN SUPPORT OF  
PETITIONER'S MOTION FOR RECUSAL**

State of New York )  
 ) ss:  
County of Monroe )

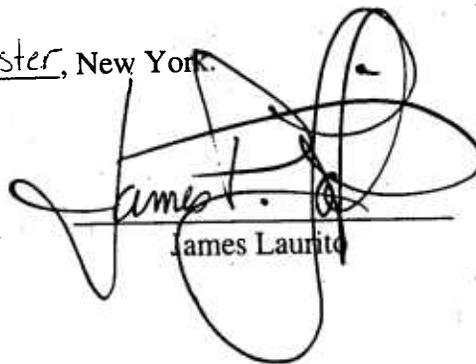
James Laurito, being duly sworn, deposes and says:

1. I am the President of New York State Electric & Gas Corporation ("NYSEG") and of Rochester Gas and Electric Corporation.
2. I submit this affidavit in support of NYSEG's Motion for Recusal in the above-captioned matter.
3. I make this affidavit of my own free will under penalties of perjury. I have personal knowledge that all the facts stated herein are accurate and true.
4. In 2002, NYSEG offered a fixed price option ("FPO") through its Price Protection Plan ("PPP") approved pursuant to the New York State Public Service Commission's Order Adopting Provisions of Joint Proposal with Modifications (issued February 27, 2002) in Case 01-E-0359. Under the PPP, NYSEG, in collaboration with PSC Staff and certain energy services companies ("ESCOs"), developed an outreach and education effort to encourage customers to "Voice Your Choice" ("VYC") by selecting an electric commodity supplier.

5. Under the VYC Program, NYSEG's customers could choose: 1) the Bundled Rate Option (or FPO) under which they may obtain a fixed rate supplied by NYSEG for a two-year period; 2) a Variable Rate Option, which is supplied by NYSEG and reflects an adjusted flow-through of market prices; or 3) an ESCO Rate Option.
6. The VYC Program has been successful in increasing the number of participating ESCOs, the number of customers making an active choice, and the number of customers choosing an alternative supplier. During the last enrollment period, 30% of NYSEG's customers responded to the call to make an affirmative supply choice, an increase of 70% over the previous enrollment period.
7. Sometime in February of 2005, I had a discussion with William M. Flynn, Chairman ("Chairman Flynn") of the New York Public Service Commission.
8. During the course of that discussion, Chairman Flynn described a report from his Staff about the VYC Program. According to Chairman Flynn, his Staff reported that VYC had been successful in achieving a high customer participation rate, but that too many customers stayed with Energy East.

I do solemnly declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 26<sup>th</sup> day of October at Rochester, New York.



James Laurito

Subscribed and sworn to before me  
this 26<sup>th</sup> day of October, 2005

Roberta B. Holahan  
Notary Public

**ROBERTA B. HOLAHAN**  
Notary Public, State of New York  
No. 01H08040322  
Qualified in Monroe County  
Commission Expires April 17, 2006

**EXHIBIT 2**

**Letter of R. Cerniglia to R. Bergin, NYSEG (dated July 22, 2005)**

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE  
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>

PUBLIC SERVICE COMMISSION

WILLIAM M. FLYNN  
Chairman  
THOMAS J. DUNLEAVY  
LEONARD A. WEISS  
NEAL N. GALVIN  
PATRICIA L. ACAMPORA



DAWN JABLONSKI RYMAN  
General Counsel

JACLYN A. BRILLING  
Secretary

July 22, 2005

Mr. Robert Bergin  
Director, Public Affairs  
Rochester Gas & Electric Corporation  
89 East Avenue  
Rochester, NY 14649

Dear Robert:

Chairman Flynn asked me to respond to your July 6 opinion piece (Keep a wide selection of electricity providers in N.Y.) that appeared in the *Rochester Democrat and Chronicle*. While your comments supporting the Commission's efforts to establish competition and customer choice are appreciated, most of the piece seemed to be dedicated to criticizing the competition "experiment" in general, and New York's pro-competitive policies in particular. In attempting to play both sides of the issue, some key facts were omitted.

First, your letter seems to indicate that higher wholesale electricity prices are the result of some policy failure. One need only look at the price of the fuels used to run generators, namely natural gas and oil, to understand the rise in wholesale electricity prices. Fuel costs are always reflected in the price of electricity whether that price is established in a competitive wholesale market or through the old monopoly ratemaking regime. Your opinion piece also ignored the fact that, since New York's competitive wholesale market was established, the availability of our state's generators has improved dramatically, with fewer forced outages than ever before.

As for the benefits of a competitive wholesale market, The Coalition for Competitive Power Markets released a July 2005 study which concluded that competitive wholesale power markets in the eastern half of the United States produced at least \$15.1 billion in savings during 1999-2003 and dramatically improved power plant efficiencies nationwide. COMPETE, a coalition of large commercial customers, expressed similar sentiments, touting the benefits of competition to consumers, system reliability, and the environment. The New York Independent System Operator's (NYISO) April 2005 study entitled "ISO Power Trends: 2005" concurs that competition in the energy markets has improved the industry, with power plant operation being conducted as well or better than under monopoly regimes and more current power plant generation availability than before deregulation. An Independent Power Producers of New York (IPPNY) member survey determined that \$4.75 billion has been invested in New York power

plants since 1999, with private investors picking up costs that New York customers were responsible for before competitive energy markets. Through divestiture, the risks and costs associated with operating generation plants has shifted away from customers and ratepayers to plant owners. In short, competition reduces costs, drives innovation and efficiencies, rewards creative ideas and spurs growth, all of which results in tangible benefits to customers.

Second, your piece attacks the success of retail access in other states. KEMA, Inc., a leading consultant to the energy and utility industry, recently noted that retail markets are growing steadily both in customer participation and number of retail suppliers serving customers. To put this in perspective, the national retail choice market is now larger than the wholesale markets in Texas, California, New York, and New England. At least 65,000 MW peak load has migrated in U.S. retail markets as of June 2005. KEMA, Inc. projects that the U.S. retail power market will grow by more than 50% by the end of the decade, from approximately 300,000 GWh at the end of 2003 to 475,000 GWh by the end of 2009. The most active markets are expected to be in the Northeast, Mid-Atlantic and in Texas. Further, KEMA, Inc. ranked New York as the second most successful state (after Texas) because of its administrative approach to implementing competition and its steadily rising level of customer migration activity. Customers increasingly are exercising the choice afforded to them through competitive markets and our research, and the steadily increasing pace of customer migration, indicate that they are happy with those choices.

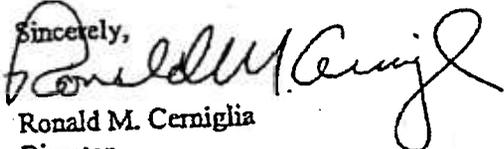
Third, you indicate that "ESCOs are not enthusiastic about competing for smaller profit margins and more extensive service responsibilities that customers in this sector require." In fact, we have found the exact opposite to be true, with 77 ESCOs eligible to provide New York's customers with pricing options and value-added services, including green power, bundling of services (electric/gas, phone, internet), security system installation, and appliance repair. New York has experienced a boom in competition activity with 31 new ESCOs entering the market since the creation of the Commission's August 2004 Policy Statement in Case 00-M-0504. The Policy Statement outlined the Commission's vision for a competitive retail electricity market by determining that competition is the best means to provide just and reasonable rates to customers and ESCOs -- not the utility -- should provide value-added services like fixed price options to customers. In fact, the National Energy Marketers Association (NEMA) in a July 20, 2005 article in *Restructuring Today* stated that New York is ranked ahead of all others in terms of attracting energy marketer interest in the country.

Fourth, you state that "Voice Your Choice provides customers with real choices among suppliers -- utilities and ESCOs -- and products -- fixed and variable electricity supply prices," intimating that customers prefer a fixed supply price provided by the utility. However, statistics from an Edison Electric Institute (EEI) Survey (of which Energy East Corporation is a member) conducted in March 2005 of NYSEG and RG&E customers show that, while respondents believe their utility should be allowed to supply commodity, it does not indicate that customers prefer the utility-provided fixed price supply option. In addition, respondents were not asked whether they would prefer a utility fixed price option that includes a premium (with a profit component) for the utility. Again, the Commission believes that ESCOs competing on a level playing field are well-equipped to offer these services and Energy East Corporation has the ability to offer the same service through Energetix, its unregulated energy services subsidiary.

Fifth, you state that "PSC initiatives to tease customers away from utility companies with promises of modest savings.....are unnecessary, unfair to customers, and ultimately anti-

competitive." Obviously, we disagree with this characterization. ESCOs, and most importantly, customers have been very satisfied with our pro-competitive, retail choice policies. It should be noted, too, that while Voice Your Choice did spur modest customer migration, many customers expressed confusion and frustration about the program. In fact, the Commission received 114 contacts from customers during the campaign period, the vast majority of which were negative. As a result, Staff launched and sponsored an intensive multi-media educational effort and developed its Power to Choose ESCO comparison chart to help customers review information on the various ESCO offerings in RG&E's service territory. ESCOs also expressed frustration on a variety of issues regarding doing business in NYSEG and RG&E's service territories. In response, Staff initiated a series of meetings with Energy East, ESCOs, and other interested parties to discuss problems with the program and make changes to address ESCOs' concerns and alleviate customer confusion in the next campaign period.

Sixth, you note that "ESCOs should be expected to fully educate customers on prices and other relevant market information, as utilities do." It is heartening that NYSEG and RG&E plan to continue to educate customers about the competitive market. Going forward, it is important for all parties, including utilities, to work together to facilitate the continued development New York's competitive market. A collaborative effort will maximize customer awareness and minimize customer confusion about the choices that are now available. Staff looks forward to working with NYSEG and RG&E toward that common goal.

Sincerely,  
  
Ronald M. Cerniglia  
Director  
Office of Retail Market Development  
New York State Public Service Commission

**EXHIBIT 3**

**Letter of R. Bergin to R. Cerniglia, PSC (dated August 1, 2005)**



Robert J. Bergin  
Director, Public Affairs

August 1, 2005

Mr. Ronald M. Cerniglia  
Director  
Office of Retail Market Development  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, NY 12223-1350

Dear Ronald:

I received your letter of July 22, 2005 and must respond. Your claim to the contrary, NYSEG and RG&E support competition and our approach is to provide our customers with what they want and deserve, i.e. the broadest possible range of competitive choices, including those we may offer. To be clear, our objection is with the O&R Power Switch program in that it is not in concert with the restructuring goal of providing more choices for customers. I respectfully submit that forcing the O&R program on other utilities without knowing the benefits or costs to consumers is misguided.

It is important that I address the various incomplete and misleading statements made in your letter.

- Natural gas prices are not the only explanation for increases in electricity supply prices, as you claim. The PSC-supported artificial demand curve, which was opposed by NYSEG, RG&E and others, and higher return of capital requirements by non-utility generators have also contributed to higher prices. Proponents of the artificial demand curve, such as the New York ISO, admitted that their proposal would cost more than \$150 million in the first year. There has been no associated increase in capacity as the proponents argued there would be. Furthermore, in the new NYISO model the price of electricity is not the average costs of power generated by the plants in service but the price set by the most expensive plant on the margin (often, gas-fired generation). The cost to the upstate consumer has now been averaged up at a time when its economy can least afford it. There is no evidence that generation cost savings you claim in your letter have been passed through to customers. They have accrued to the benefit of the non-utility generation owners. I suggest that you take a look at how the non-utility generators have benefited from the recent heat wave at the expense of consumers. The impact is more significant for variable-price pass-through customers, as opposed to the fixed priced customers for whom we assume the risk.

An equal opportunity employer

RG&E | 89 East Avenue | Rochester, NY 14649  
tel (585) 771-2294 | fax (585) 724-8668 | robert\_bergin@rge.com

- Let me remind you that non-utility generation in New York State, since its inception in 1982, has cost ratepayers billions of dollars in above market costs. Relying only on non-utility solutions to meet the public policy goals of retail access would be a mistake and bad public policy because it limits customers' choices and is contrary to what customers want.
- Relying on pro-ESCO advocates such as KEMA, lends no credibility to the discussion. As the former owners of their consulting group, Xenergy, we are all too familiar with their rhetoric. Your heavy reliance on special interest/lobbying associations such as NEMA, KEMA and Restructuring Today to make policy decisions is troubling. Our industry has already experienced how the unfounded rhetoric of Enron has hurt customers.
- Regarding the state of competition around the country, the 65,000 MW migration figure must be put in context. First, this represents less than 9% of the peak load in the country as a whole. Second, more than 70% of that migration has occurred in only five states. In fact, in 33 states there has been no migration at all and their consumers are well satisfied. Third, approximately 15 – 20% of the total represents large customers in Texas who have no alternative but to find a competitive supplier. Finally, you state that New York is ranked "the second most successful state" (by KEMA, no less) because of its "administrative approach". We read that only to mean that New York has implemented retail access using substantial subsidies to ESCOs at great cost to customers. I should also point out that New York is the only state in which the legislature was not involved in enabling the restructuring process.
- Specific to the state of competition in New York State, NYSEG and RG&E are the leaders by encouraging customer migration with over 206,000 customers having migrated – more than any other utility in New York. This represents more than 25% of the migrated customers in the state. How can you call this "modest"?
- The fact that 77 ESCOs are eligible to participate in NY is immaterial; few are engaged in competition for residential customers. For example, in NYSEG and RG&E's territory, 34 ESCOs are qualified but only 11 participate in the residential electric and natural gas markets.
- Regarding your statement about Green Power, let me remind you that NYSEG was the first to offer a wind energy program in New York State through our "Catch the Wind" program in August 2002. We are not aware of any other value-added service being offered by ESCOs. The goal of restructuring was not value-added services but the lowering of consumer energy costs and increased customer choice of suppliers.
- Our supply offerings provide price transparency and a yardstick against which customers can measure ESCO offerings for fairness, reasonableness and sustained benefits. There is no guarantee that ESCOs will provide customers with "just and reasonable rates" as you claim.

Mr. Ronald M. Cerniglia  
August 1, 2005  
Page 3

- With respect to the EEI survey, you are drawing unwarranted conclusions. The survey does make clear that customers would prefer that their utility remain in the competitive supply market and that a fixed price option be among its offerings. A customer survey of the PSC-endorsed Power Switch program has yet to be performed.
- This is the second time you wrongfully refer to 114 "contacts" by customers during the Voice Your Choice program campaign as if they were complaints against NYSEG and RG&E. You know that the overwhelming majority of these contacts were not directed at our program but at the inability of customers to obtain useful ESCO price information from either the ESCOs or the PSC staff. To put it in perspective, we reached out to approximately 1.2 million electricity customers during our Voice Your Choice campaigns and the PSC received virtually no complaints.

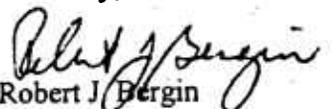
Finally, although you informed us that you would be responding to my July 6 opinion article, we are disappointed that you felt compelled to do so in so public a fashion. It is particularly troubling that you would release a private correspondence to a special interest advocacy newsletter. Your agency is legally required to perform an unbiased evaluation of any filing made by a public utility to determine that the public interest is served. It is inappropriate, therefore, that a senior DPS Director, working directly with Chairman Flynn, would advocate so publicly and so injudiciously. This type of public advocacy statement, responding on behalf of Chairman Flynn, is clearly prejudicial to NYSEG.

You have personalized this issue in an unprecedented manner by releasing your letter at the time when public comments are being solicited on our retail access plans. Rather than being an independent enabler in developing competition and customer choice, you have taken on a biased advocacy role. This is wrong.

In summary, we welcome competition from all participants including NYSEG and RG&E. You, however, want to inhibit participation by NYSEG and RG&E contrary to the interests of our customers. By definition, open competition allows any service provider to offer any product or service. Open competition requires that customers take the responsibility to make their choices. This is competition.

You may contact me if you have any further questions or comments.

Sincerely,

  
Robert J. Bergin

c: Chairman William M. Flynn

**EXHIBIT 4**

**Letter of R. Cerniglia to R. Bergin, NYSEG (dated September 7, 2005)**

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE  
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350  
Internet Address: <http://www.dps.state.ny.us>

PUBLIC SERVICE COMMISSION

WILLIAM M. FLYNN  
Chairman  
THOMAS J. DUNLEAVY  
LEONARD A. WEISS  
NEAL N. GALVIN  
PATRICIA L. ACAMPORA



DAWN JABLONSKI RYMAN  
General Counsel

JACLYN A. BRILLING  
Secretary

September 7, 2005

Mr. Robert Bergin  
Director, Public Affairs  
Rochester Gas & Electric Corporation  
89 East Avenue  
Rochester, NY 14649

Dear Robert:

Thank you for your August 1 letter regarding my response to your July 6 opinion piece that appeared in the *Rochester Democrat and Chronicle*. I would like to follow-up on some of the points raised in your letter.

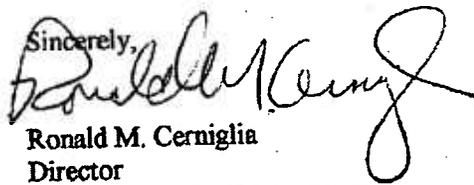
First, and most importantly, I understand that it is your job to advocate for Energy East's positions on the issues, just as it is my job to help formulate, implement, promote, and advocate the policies adopted by the Commission. As the Director of the Office of Retail Market Development, it is appropriate for me to respond to the issues that were raised publicly in the newspaper, and to defend the Commission's previous policy decisions regarding the development of competition and retail markets. Therefore, given my role, I do not view my response as "biased advocacy".

Second, my letter was released to Jay Gallagher of Gannett News Service only in response to his inquiry to the Department for a story on which he was working about the very same issues raised in your opinion piece. According to our Director of Public Affairs, David Flanagan, Mr. Gallagher began working on the story after a visit from, and conversations with, representatives of Energy East. Again, Energy East has every right to make its case in the press, just as the Department of Public Service and the Commission have every right to respond. Similarly, the letter was released to *Restructuring Today* after the editor requested a copy upon learning about the developing story and our response.

Finally, while you and I may disagree on some of the underlying issues, it is heartening to know that we both plan to continue to express support toward the goal of competitive energy markets in New York State. With respect to the details of how retail markets develop in RG&E and NYSEG's territories, those decisions ultimately rest with the Commission. As always, all interested parties will have an opportunity to make their

case, fully and fairly, and the Commission's decision will be based on a fully-developed record. I look forward to working with you as part of that process.

As always, feel free to contact me if you wish to discuss ways in which we can work collaboratively toward our common goal of fostering competitive electric and gas markets in New York.

Sincerely,  
  
Ronald M. Cerniglia  
Director  
Office of Retail Market Development

cc: David Flanagan

**EXHIBIT 5**

**Letter of R. Bergin to R. Cerniglia, PSC (dated September 15, 2005)**



Robert J. Bergin  
Director, Public Affairs

September 15, 2005

Mr. Ronald M. Cerniglia  
Director  
Office of Retail Market Development  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, NY 12223-1350

Dear Ronald:

I have considered your September 7, 2005 letter and feel obliged to respond.

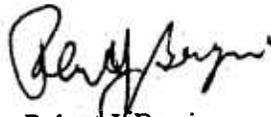
Your explanation for the release of your letter addressed to me, to a reporter and to the editor of *Restructuring Today* is obviously intended by you to disguise what was an inappropriate action. The subject of your letter was my opinion article that first appeared in the *Rochester Democrat and Chronicle* on July 6, 2005.

Your letter to me is dated Friday, July 22, 2005. The detailed analysis of the opinion article and the letter personally addressed to me appeared in the *Restructuring Today* issued on Monday, July 25, 2005. I question how the editor of a lobbying journal would have known of your Friday letter and had the notion and weekend time to construct a detailed analysis unless it was part of an organized effort to publish this correspondence.

Public release of this information by you is wrong in your role as a Senior Policy Advisor to the PSC, whose job is to provide unbiased oversight and decision making within the framework of regulatory proceedings.

We remain committed to the development of effective competitive markets. We are about to kick off another Voice Your Choice Program at RG&E and look forward to a collaborative effort with you and others at the Public Service Commission.

Sincerely,



Robert J. Bergin

xc: Chairman William Flynn  
Mr. David Flanagan

An equal opportunity employer

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