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STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL  
120 BROADWAY, NEW YORK, NEW YORK 10271

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ELIOT SPITZER  
Attorney General

*petition*

MARY ELLEN BURNS  
Assistant Attorney General In Charge  
Bureau of Telecommunications and Energy

(212) 416-8340

Hon. Janet Hand Deixler  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

August 3, 2001

*ORIG-FILES  
C01-E-0359  
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PER STATE COUNCIL*

re: PSC Case No. 01-E-0359  
New York State Electric & Gas Corporation  
Electric Price Protection Plan

Dear Secretary Deixler:

Pursuant to the Procedural Rulings of Administrative Law Judge Jeffrey E. Stockholm issued July 17 and July 30, 2001, enclosed herewith please find for filing with the Commission the manually-signed original and five copies of the Initial Statement of Eliot Spitzer, Attorney General of the State of New York, regarding the Electric Price Protection Plan submitted by the New York State Electric & Gas Corporation.

Please be advised that I am today transmitting this letter and the attached statement to ALJ Stockholm and the parties to this proceeding electronically and that I am also today sending these documents to the same addresses via overnight courier service.

Very truly yours,

RICHARD W. GOLDEN  
Assistant Attorney General

cc: ALJ Stockholm  
Active parties

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Petition of New York State Electric &  
Gas Corporation for Approval of its :  
Electric Price Protection Plan.  
----- X

PSC Case No. 01-E-0359

**INITIAL STATEMENT REGARDING  
ELECTRIC PRICE PROTECTION PLAN**

**SUBMITTED BY**

**ELIOT SPITZER  
ATTORNEY GENERAL  
OF THE  
STATE OF NEW YORK**

Mary Ellen Burns  
Assistant Attorney General in Charge  
Telecommunications and Energy Bureau  
Office of the Attorney General of the State of New York

Richard W. Golden  
Charlie Donaldson  
Assistant Attorneys General  
*Of counsel*

120 Broadway  
New York, New York 10271  
Tel. No.: (212) 416-6343  
Fax No.: (212) 416-8877  
E-mail: richard.golden@oag.state.ny.us  
charlie.donaldson@oag.state.ny.us

August 3, 2001

## INTRODUCTION

The New York State Public Service Commission ("Commission" or "PSC") issued Opinion No. 98-6 on March 5, 1998 in PSC Case No. 96-E-0891, in which it established the rates the New York State Electric and Gas Corporation ("NYSEG" or the "company") could charge its retail electric customers during the five years ending March 2003. In doing so, the Commission approved a rate and restructuring settlement proposal submitted to it by NYSEG, the Staff of the New York State Department of Public Service ("DPS") and other parties on October 9, 1997.<sup>1</sup>

The electric rates the company has been charging from 1998 to the present time were thus established by the Commission in Opinion No. 98-6.

On March 14, 2001, NYSEG requested that the Commission approve an "Electric Price Protection Plan" ("EPPP") which would modify important provisions of Opinion No. 98-6. The Commission instituted PSC Case No. 01-E-0359 to review the EPPP proposal and designated Administrative Law Judge ("ALJ") Jeffrey E. Stockholm to preside over the proceeding.

New York State Attorney General Eliot Spitzer has been a party to PSC Case No. 01-E-0359 since its inception. The Office of the Attorney General has attended pre-hearing conferences, participated in confidential settlement negotiations and obtained information through discovery and by other means.

In Procedural Rulings issued on July 17, 2001 and July 30, 2001, the ALJ established August 3, 2001 as the date by which parties may submit initial proposals, statements, testimony or briefs regarding the EPPP and August 10, 2001 as the date by which parties may submit

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<sup>1</sup> The Office of the Attorney General was not a signatory to the October 1997 settlement proposal.

responses to filings made on August 3. This is the Attorney General's initial statement regarding NYSEG's rate proposal.

Commission regulations stipulate that the statements made and documents distributed during settlement negotiations held in this proceeding are confidential and may not be discussed in documents, such as this one, that are to be placed in the Commission's public files and records. Thus far, the only publicly available document in this proceeding in which a party recommends the adoption of a specific proposal is the EPPP petition NYSEG filed in March 2001.

Because of the confidentiality restriction, this office cannot address comments made or alternatives proposed by parties during the course of these negotiations. Since, in our view, it would not advance the Commission's consideration of the EPPP to reference and discuss only the March 2001 NYSEG filing and because we anticipate that various parties will submit substantive filings on August 3, this office will confine its initial comments to one key issue which must be addressed in any rate proposal that emerges out of this proceeding.

We reserve the right to file a reply statement on August 10 responding to the submissions made by other parties on August 3, including any proposals or counterproposals which are made public.

#### **STATEMENT**

**I. The Rates The Commission Establishes In This Proceeding Must Be Just and Reasonable.**

Section 65(1) of the New York State Public Service Law ("PSL") requires that all charges made or demanded by any regulated electric utility "shall be just and reasonable." The

Commission thus has a statutory obligation to ensure that rates are just and reasonable at all times.

The signatories of the October 1997 settlement proposal, which the Commission approved in Opinion No. 98-6, acknowledged this statutory obligation by asking the Commission to find that the rates produced thereunder would be just and reasonable. (Settlement Proposal at 36.) In approving the settlement, the Commission complied with this request by stating that the agreement would "produce just and reasonable rates that we expect will be lower than they would be otherwise." (Opinion No. 98-6 at 41.)

The Commission did not say in Opinion No. 98-6 that NYSEG's rates would remain unchanged throughout the order's five year term even if the rates as established by Opinion No. 98-6 become unjust and unreasonable. To the contrary, should this occur, the Commission would be obligated under PSL § 65(1) to institute new rates. The Public Service Law does not allow the Commission to suspend its responsibility to assure just and reasonable rates during the effective term of a rate order. As previously stated, Opinion No. 98-6 establishes NYSEG's electric rates into March 2003. The Commission, however, may introduce changes in the rate regime instituted in Opinion No. 98-6 in order to assure just and reasonable rates.

Moreover, PSL § 72 stipulates that the burden of proof that a change would result in just and reasonable rates shall be on the utility proposing the rate. When reviewing the EPPP or any subsequent proposal, the Commission should require that NYSEG sustain this burden.

## **II. The Commission Must Ascertain NYSEG's Return On Equity In Determining Whether NYSEG's Rates Are Just And Reasonable.**

The Commission must consider many factors when determining the level at which a utility's rates are just and reasonable. The parties to this proceeding discussed many of these factors during the settlement negotiations. Because these discussions were confidential under the Commission's regulations, this office cannot allude here to the statements made and information distributed by other parties in the negotiations. We anticipate that other parties will be making their positions and proposals public in the initial statements they file on August 3, 2001, and we reserve the right to comment on these statements and proposals in our subsequent filing in this proceeding.

A central issue in any Commission proceeding concerned with the rates of a regulated utility is the return on equity ("ROE") the utility will receive while the rates are in effect.<sup>2</sup> Recently, the Commission has raised the question of whether NYSEG's ROE is currently excessive.<sup>3</sup> The Commission is thus obligated to determine how to ensure that current rates are just and reasonable. The Commission must also ask, in considering NYSEG's proposal, whether the rates that would prevail under any rate restructuring would also be excessive.

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<sup>2</sup> Return on equity may be defined as a measure of a company's yearly earnings compared with its shareholder equity. For instance, if, after paying all expenses and taxes, a company had earnings of \$10 million in a given year and its shareholder equity was \$100 million, then the company's ROE that year would be 10%.

<sup>3</sup> See, "Order Clarifying Data Required," issued by the Commission in PSC Case No. 01-E-0359 on April 25, 2001.

In its April 25, 2001 Order, the Commission found that "NYSEG's current rates are generating earnings of approximately 35%...."<sup>4</sup> According to the April 25, 2001 Order, such a return is "well in excess of returns authorized for electric, gas or telephone corporations." The conclusion the Commission drew in the April 25, 2001 Order was that extending the rates that produced this return without examining the earnings that would flow from them through an analysis of NYSEG's current and projected costs "would not be in the public interest."<sup>5</sup>

This office urges the parties to this proceeding, especially NYSEG and the Staff of the Department of Public Service ("DPS") to place on the record the facts upon which the parties can judge and the Commission can determine what NYSEG's ROE is now and what it would be in the future, assuming adoption of either the EPPP or any alternative plan a party may propose. Without this information, the Commission cannot carry out its statutory mandate to ensure that proposed rates would be just and reasonable.

This office intends to comment fully, in our August 10, 2001 filing, on all of the facts, figures and proposals which are currently subject to a veil of confidentiality, but which should be made public by other parties in their August 3, 2001 filings.

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<sup>4</sup> For comparison purposes, the ROEs of other New York investor-owned utilities currently range from 0% to 15%.

<sup>5</sup> April 25, 2001 Order at 4.

## CONCLUSION

For the reasons set forth herein, the Commission should, in its review of the New York State Electric and Gas Corporation's rates and of any proposal put forth in this proceeding, ensure that the rates charged by NYSEG be just and reasonable at all times. Moreover, in making this evaluation, the Commission should consider, *inter alia*, the return on equity the company would receive.

Dated: New York, New York  
August 3, 2001

Respectfully submitted,

ELIOT SPITZER  
Attorney General of the  
State of New York

By:

  
Assistant Attorney General

Mary Ellen Burns  
Assistant Attorney General in Charge  
Telecommunications and Energy Bureau  
Office of the Attorney General of the State of New York

Richard W. Golden  
Charlie Donaldson  
Assistant Attorneys General  
*Of counsel*

120 Broadway  
New York, New York 10271  
Tel. No.: (212) 416-6343  
Fax No.: (212) 416-8877  
E-mail: richard.golden@oag.state.ny.us  
charlie.donaldson@oag.state.ny.us