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August 15, 1997

ORIG-Files
96-E-0948
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Hon. John C. Crary
Secretary
New York State Public
Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 96-E-0948 -- Petition of Dairylea Cooperative Inc., to Establish an Open-Access Pilot Program for Farm and Food Processor Electricity Customers

Dear Secretary Crary,

The Consumer Protection Board (CPB) appreciates the opportunity to respond to the Dairylea Pilot Program (the Pilot) proposals (the Filings) of Central Hudson Gas and Electric Corporation (Central Hudson), Niagara Mohawk Power Corporation (Niagara Mohawk), and New York State Electric and Gas Corporation (NYSEG) (collectively the Companies). We will address our comments to issues and proposals where we believe that the Companies' filings do not comply with the Commission's June 23, 1997 order in this case (the Order), could be improved, or should be rejected.

Central Hudson

Central Hudson's entire filing does not comply with the Commission's order in this proceeding. It should be rejected in its entirety. Central Hudson's filing disregards the Commission's authority and Order in many ways:

- Central Hudson has conditioned the effective date of its filing to "one day after approval of the Settlement Agreement" (Filing at 2) in its electric restructuring proceeding, Case 96-E-0909. This conflicts with the Order which states that the Pilot will begin "no later than November 1, 1999." (at 27)

- Central Hudson has included a competitive transition charge (CTC) in its Pilot rate (Filing at 2), contrary to the Order of the Commission. (at 27)

- Central Hudson has required "time differentiated metering [for] all customers who participate...." (Filing at 3) While the Order did not forbid the use of these meters, it did state.

> For the purposes of these pilots, the use of class load shape information should be sufficient for balancing and settlement purposes to allow retail access. (at 9)

and

> Participating customers shall not be required to pay individually for real time (hourly interval) meters or dedicated phone lines as a condition for participation.... (at 27)

Since the Company has not specified how these meters will be paid for in its filing, we assume that it intends to allocate their cost to all customers as outlined in its Settlement in Case 96-E-0909. The CPB does not believe that this was the intent of the Order. This position is supported by Opinion No. 97-13 in Case 94-E-0952, issued August 1, 1997, where the Commission stated:

> We determined above that enhanced metering technologies should be deployed if they reduce the utility's costs, are not anti-competitive, and will not increase stranded costs. (at 21)

and

> ...[W]e find that any new investment in enhanced metering technology and metering infrastructures should not create new, additional stranded costs or be anti-competitive. (at 25)

If Central Hudson is to require the use of time differentiated meters, it must either offset their cost with imputed savings or charge their cost to shareholders.

- Central Hudson has not provided a mechanism and rate for billing services on behalf of the energy services company (ESCO) (Filing at 16, §35.I.) contrary to the language of the Order. (at 27)

- Central Hudson has defined farms as agricultural in nature. (Filing at 24, Tariff for SC 15) The Commission has included horticulture as well. (Order at 3)

- Central Hudson proposes to charge a $25 fee for changes in Retail Supplier. (Filing at 11, §35.B.) While it is unclear whether this charge is proposed to apply to the first change in supplier from Central Hudson, this charge is clearly anti-competitive, not cost justified, and not contemplated in the Order. Also, compare this proposal to that of Niagara Mohawk, where no switching fee will be imposed. (Filing at 5)

Finally, although other infirmities with Central Hudson's proposed Pilot may exist, the ones listed above are sufficient to declare Central Hudson's filing unresponsive to the Commission's Order.

Niagara Mohawk

Niagara Mohawk's Filing generally complies with the Order. However, there are infirmities in its Pilot proposals which must be addressed.

On page 4 of its Filing, Niagara Mohawk states:

> Niagara Mohawk will have the right to suspend or terminate an ESCO's participation ....

The CPB disagrees that Niagara Mohawk should have the authority to suspend or terminate an ESCO's participation in the Pilot. Placing such power in the hands of an entity who is both a competitor and would have a regulated affiliate competing in the Pilot would be extremely anti-competitive. Only the Commission or its designate should have the authority to approve or rescind approval for an ESCO to participate in the Pilot.

Niagara Mohawk also proposes to require ESCOs to maintain records of switch authorizations and yet does not apply that standard to itself in situations where a customer requests to switch back to the utility. (Filing at 4) This should be clarified to indicate that Niagara Mohawk will be held to the same standards as any other provider of service.

Niagara Mohawk proposes that it be given the right to audit the ESCO's customer records for eligibility. (Filing at 5) The utility should not be given the right to audit the ESCO's records. We propose that Staff should be responsible for assuring that eligibility requirements are being met.

While Niagara Mohawk explicitly states that it will issue one bill for all services as required by the Order, it does not state how much it will charge for this service and leaves it up to negotiations between the utility and the ESCO. (Filing at 7) Since one of the ESCOs participating will be an affiliate, leaving such provisions to negotiation rather than tariff is unwise. Niagara Mohawk should be ordered to indicate how much it intends to charge for precisely what service(s).

Further, on this same issue, Niagara Mohawk has stated that it will not bill past-due amounts or penalties or interest for ESCOs. (Filing at 7) The CPB finds this provision contrary to the spirit of the Order, if not to its letter. There would be very little use in the Company's offer to bill, if the ESCO would have to provide its own billing for these items.

Niagara Mohawk also would only provide 14 months of free customer usage data to customers and their designated ESCOs. (Filing at 8) This is in direct conflict with Opinion No. 97-13, Case 94-E-0952, issued August 1, 1997, where the Commission stated that "24 months of data should be provided at no charge." (at 17)

There are considerable anti-competitive concerns associated with Niagara Mohawk's affiliate transaction proposals. Niagara Mohawk would allow its unregulated affiliate to use "utility personnel, property, or services" as long as "appropriate cost allocation procedures" were followed. The transfer of information and resources that this proposal would allow, at a cost allocation that is not detailed, is improper for a test of retail access. Moreover, when this proposal is combined with Niagara Mohawk's proposal to allow the affiliate to use its "name and logo," with "no fee or royalty imposed," the effect on competitors would be devastating. Finally, the Company also proposes that it be allowed to recommend its affiliate solely, upon permission by the customer, when the service requested "is other than the direct marketing or brokering of the electric commodity...." Niagara Mohawk's affiliate transaction proposals must be altered if its affiliate is to be permitted to compete in the utility's service territory.

Niagara Mohawk's proposal also assumes that "existing complaint resolution procedures are adequate to handle complaints by ... the company against an ESCO." (Filing at 25) Since Staff will not handle complaints of customers against ESCOs, it is unlikely that it will handle utility complaints against ESCOs. Therefore, Niagara Mohawk should propose an alternative complaint resolution forum for these types of complaints.

NYSEG

NYSEG's Filing suffers from a number of infirmities. The Company claims that it may not be able to comply with the inception date contained in the Commission's Order. (Filing Appendix A at 1) NYSEG states that it will likely need to constrain "the number of Eligible Customers able to receive electric power supply from a Retail Supplier ... until February 1998." (Id.)

NYSEG also states that customers "receiving comparison bills under NYSEG's Residential Time of Use [TOU] provision of S.C. 12 would not be eligible unless they elect to forego comparison billing." (Filing Appendix A at 2) The CPB has two concerns regarding NYSEG's TOU qualification. Our first concern is that NYSEG does not state whether other SC 12 TOU customers would be eligible for the Pilot. Our understanding from Staff is that these customers would be eligible, but would remain on TOU rates with

the average backout amount subtracted from each time-differentiated rate. While the CPB believes this methodology is flawed (see CPB's informal comments to Staff, dated July 18, at 7-8), we do not oppose its use for the limited purpose of the Pilot. However, these customers should not be excluded from participating in the pilot program.

Second, we are concerned with whether customers can "elect" to forego comparison billing, since SC 12 is a mandatory tariff. Further, comparison billing is only used for certain phases of the introduction of this rate to customers. Is NYSEG suggesting that those TOU customers that elect to forego comparison billing also forego the natural progression through the phases of the TOU tariff? Its tariff filing indicates that customers in the second and third phases of SC 12 TOU rates would be eligible, but does not specify whether the other phases would be? (Filing Tariff Leaf 67) These issues must be addressed.

NYSEG's Filing also defaults to a two bill model with no tariffed billing service in its filing. (at 3,5) As discussed above, the CPB believes that negotiations should not be used to set billing rates. This process would provide an opportunity for anti-competitive behavior.

NYSEG indicates that its Pilot delivery rates would be individualized for each customer based on "customer's location, applicable load shape, and individual usage." (Filing Appendix A, also see tariffs generally) The CPB is concerned that such rates for delivery could be abused and produce anti-competitive results. In tariff leaf 19, for instance, this language is applied to residential SC 1 customers. The ability of ESCOs to market a total price to customers would be severely constrained if the delivery rate to be charged would vary with each customer's individual consumption, or if residential customers were to be charged different rates for delivery service based on their location within a service franchise. NYSEG should not be allowed to charge different delivery rates to customers who currently pay the same bundled sales service rate.

NYSEG states that until February 1998 it will be unable to provide ongoing customer information to ESCOs in electronic format and will, therefore, provide this information by fax. (Filing Appendix A at 7) As well, the Company states that the information will be provided "on the same day such information is used to issue NYSEG's bill to the customer." (Id.) The CPB is concerned that this data is not being provided to the ESCO the day NYSEG collects it. Providing this information on the same day as billing, especially by fax, could produce delays in billing for the ESCO, resulting in extra unnecessary costs for customers. Further, providing data by fax could produce billing errors due to the low resolution of the reproduction.

NYSEG's primary objective in its proposed Pilot customer education plan is to:

> Maintain NYSEG's reputation and credibility as the best utility of choice.... (Filing Appendix B at 1)

The CPB does not believe that this goal is appropriate for an education program designed to introduce retail access for the first time in NYSEG's service territory. It is this sort of concern that reinforces CPB's belief that educational materials should be drafted by Staff in collaboration with the other parties. We suggest that Staff draft such materials and circulate them for comment. If this process is not feasible, Staff should very carefully review all educational materials and reserve editing rights on documents to be used to educate consumers about the Pilot.

NYSEG also filed a model Supplier Operating Agreement. (Filing Appendix C) This document incorporates by reference the "terms and conditions" of other documents and regulatory agencies. (Filing Appendix C at 2, §1.A.) These include NYSEG's tariffs, the Order, Appendix B of Opinion No. 97-5, and the regulations/procedures of "the Commission, FERC, New York Power Pool, Northeast Power Coordinating Council, and the North American Electric Reliability Council...." (Id.) It also says that, in the event of conflict, these documents and regulations/procedures will be subordinate to the Supplier Operating Agreement. (Filing Appendix C at 3, §2.) It is improper for the Company to assign a higher priority to its document than the orders of the state and federal regulatory agencies. It is this sort of concern about the nature of contract documents that prompted the CPB's comments on July 18, that tariffs should be used instead of operating agreements. (at 8) As we described in more detail there, contracts between ESCOs and utilities increase the risk of anti-competitive behavior and reduce the Commission's ability to correct potential unanticipated problems. (Id.)

NYSEG, like Niagara Mohawk, seeks the ability to audit the records of the ESCO pertaining to ESCO and customer eligibility. Our concerns regarding this ability were addressed above and we shall not repeat them here. Like Central Hudson, NYSEG has defined farms as agricultural in nature. (Filing Tariff Leaf 16-J) We have previously addressed the Commission's intention to include horticultural farms in the Pilot.

Conclusion

Generally, the Filings of NYSEG and Niagara Mohawk comply with the Order. Central Hudson's filing, however, does not. While the former filings can be modified to achieve the Commission's objectives, Central Hudson's must be rejected.

The CPB has filed several sets of informal comments to Staff on slamming issues (such as the freezing of accounts), local low-cost consumer complaint resolution, the inclusion of borderline customers, customer educational materials, "green" power labeling, affiliate codes of conduct, and the use of tariffs in place of operating agreements. (see

CPB informal comments dated July 18, 1997 and July 25, 1997, respectively) These comments should be used by Staff in its evaluation of the Filings, in conjunction with our formal comments here. We believe that if the concerns we raised in these documents are addressed in the evaluating the Filings, the Pilot will provide a valuable tool in evaluating the introduction of retail access statewide for all consumers as well as providing significant savings for participants, while holding non-participants harmless.

Sincerely,

Timothy S. Carey
Chairman and Executive Director

Ann Kutter
Deputy Executive Director

Kevin M. Bronner
Director, Utility Intervention

Stephen A. Berger
Associate Utility Rates Analyst

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