PACE UNIVERSITY SCHOOL OF LAW
CENTER FOR ENVIRONMENTAL LEGAL STUDIES

DAVID R. WOOLEY
EXECUTIVE DIRECTOR

78 NORTH BROADWAY
WHITE PLAINS, N.Y. 10603
(914) 422-4386
FAX (914) 422-4180

January 18, 1996

John C. Crary, Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case 94-E-0952, In The Matter Of Competitive Opportunities Regarding Electric Service

Dear Secretary Crary:

Enclosed please find the original and twenty-five copies of the Brief on Exceptions of Public Interest Intervenors in the above referenced case.

Very truly yours,

David R. Wooley
Executive Director

cc: Active parties

BEFORE THE
NEW YORK STATE
PUBLIC SERVICE COMMISSION

In the Matter of
Competitive Opportunities **Case 94-E-0952**
Regarding Electric Services

Brief on Exceptions
of
PUBLIC INTEREST INTERVENORS

AMERICAN LUNG ASSOCIATION
AMERICAN WIND ENERGY ASSOCIATION
CITIZEN ACTION
CITIZENS ADVISORY PANEL
CITIZENS UTILITY BOARD
ENVIRONMENTAL ADVOCATES
HUDSON RIVERKEEPER
HUDSON RIVER SLOOP CLEARWATER
NATURAL RESOURCES DEFENSE COUNCIL
NEW YORK PUBLIC INTEREST RESEARCH GROUP
NEW YORK RIVERS UNITED
PACE ENERGY PROJECT
SCENIC HUDSON
SIERRA CLUB-ATLANTIC CHAPTER
THE ASSOCIATION FOR THE PROTECTION OF THE ADIRONDACKS
THE NEW YORK ENERGY EFFICIENCY COUNCIL
THE ADIRONDACK COUNCIL
ASSOCIATION FOR ENERGY AFFORDABILITY, INC.
CITIZENS CAMPAIGN FOR THE ENVIRONMENT

Filed January 19, 1996

PUBLIC INTEREST INTERVENORS

NATURAL RESOURCES DEFENSE COUNCIL

NRDC is a national environmental group with 25,000 members in New York. NRDC is active in electric industry restructuring proceeding in New York, California, Pacific Northwest states and before the Federal Energy Regulatory Commission.

PACE ENERGY PROJECT

The Pace Energy Project is a project of the Pace University School of Law Center for Environmental Legal Studies. It is foundation supported and involves a team of faculty, students and consultants who represent and advise citizen groups on energy efficiency and renewable energy issues in state public utility commission proceedings in New York, New Jersey, Pennsylvania, Florida, and Michigan.

ENVIRONMENTAL ADVOCATES

Environmental Advocates has worked for more than 25 years on a comprehensive agenda of environmental issues to protect New York's community of people, land and wildlife through advocacy, coalition building, citizen education and policy development.

SIERRA CLUB, ATLANTIC CHAPTER

Sierra Club has a membership of 35,000 in New York within the Atlantic chapter. The members are actively involved in lobbying, community outreach, electoral work and education to promote preservation of New York's natural resources.

THE NEW YORK ENERGY EFFICIENCY COUNCIL

The New York Energy Efficiency Council was established in 1992 to represent Energy Conservation Performance Contracting companies active in developing energy efficiency projects in New York State. The council's members have collectively delivered over 100 MW of demand reduction from energy efficient projects in hospitals, schools, factories, office buildings and residences in New York.

CITIZENS UTILITY BOARD

Citizens Utility Board (CUB) is a not-for-profit grassroots organization of more than 20,000 New York utility consumers who have joined together to make residential customer's voices heard in policy-setting proceedings, including the Competitive Opportunities Proceeding. This proceeding is of great importance to CUB's members and all residential consumers, who potentially may benefit, or be seriously harmed by whichever restructuring model the Commission ultimately adopts.

NEW YORK RIVERS UNITED

NYRU, with a membership of 300 individuals and 25 river and conservation organizations has intervened in all 43 of New York State's hydro relicensing cases and several FERC license applications with an interest in protecting the state's riverain environment and ensuring public access to our rivers. NYRU has been a party to DEC proceedings to certify a project's future compliance with water quality standards.

THE ADIRONDACK COUNCIL

The Adirondack Council ia an 18,000-member, privately funded, not-for-profit organization dedicated to protecting the natural character of the Adirondack Park through research, education and advocacy. The Council's member organizations include the National Audubon Society, National Parks and Conservation Association, Natural Resources Defense Council and The Wilderness Society, with combined memberships of more than 1.3 million people.

ASSOCIATION FOR ENERGY AFFORDABILITY, INC.

The Association for Energy Affordability, Inc., is a non-profit membership organization composed of twenty-four non-profit agencies which are part of New York State's Low-Income Weatherization Assistance Program. Our network's primary activities involve the provision of professional building performance services which assist homeowners, building owners and tenants in predominantly low-income properties to achieve comfortable, safe and energy efficient living environments.

CITIZENS CAMPAIGN FOR THE ENVIRONMENT

Citizens Campaign for the Environment (CCE) is a state-wide no-for-profit- environmental organization dedicated to the protection and sound management of New York's natural resources. CCE engages in research, lobbying and public education activities to accomplish our environmental programs. CCE represents 80,000 members throughout New York State.

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STATEMENT OF THE CASE

On August 9, 1994, the New York Public Service Commission ("Commission") instituted Phase II of Case 93-M-0229, the "Competitive Opportunities" case, to evaluate the existing regulatory structure in New York and to determine what improvements can be gained from increased competition in the electric utility industry.[1] The stated objective of the Commission is "to identify regulatory and ratemaking practices that will assist in the transition to a more competitive electric industry designed to increase efficiency in the provision of electricity while maintaining safety, environmental, affordability, and service quality goals."[2] Interested parties engaged in a collaborative effort to formulate comprehensive principles to guide "the transition to a more competitive electric industry." The Commission adopted nine such principles on June 7, 1995.[3]

After the issuance of these principles, interested parties continued to work collaboratively to evaluate the strengths and weakness of various regulatory models as they pertain to certain fundamental issues espoused by Administrative Law Judge Judith A. Lee. These fundamental issues included: industry structure models; corporate structure and ownership; corporate finance; transmission operations, pricing and planning; strandable costs; public policy objectives and the applicablity of SEQRA. To assist in this evaluation, working groups were created to focus on each of these topics. Initial and reply papers were filed with the Commission on October 25, 1995 and November 15, 1995, respectively. The Recommended Decision (RD) of Judge Lee was issued on December 22, 1995.

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[1] In re Competitive Opportunities Available to Customers of Electric and Gas Service and to Develop Criteria for Utility Responses, Order Instituting Phase II of Proceeding, Case 93-M-0229 (N.Y. Pub. Serv. Comm'n Aug. 9, 1994). On November 30, 1994, the case name and number were changed to reflect the fact that the case is now limited to electric service. In re Competitive Opportunities Regarding Electric Service, Order Deciding Petitions for Rehearing and Clarification, Case 94-E-0952 (N.Y. Pub. Serv. Comm'n Nov. 30, 1994) [hereinafter Competitive Opportunities I].

[2] Competitive Opportunities I, supra note 1, at 1-2.

[3] Case 94-E-0952, Opinion No. 95-7 (issued June 7, 1995).

I. INTRODUCTION AND SUMMARY

This Brief on Exceptions is filed in response to the RD. We open with a note of appreciation for Judge Lee's and Ronald Liberty's hard work, wisdom and effective management of this extraordinarily complex matter. In general, Public Interest Intervenors ("PII") support the resolution recommended by Judge Lee. We particularly support: 1) the initial emphasis on establishing the prerequisites for a competitive wholesale electric market (RD at 68-9); 2) the requirement that protective conditions and criteria must be satisfied before retail wheeling would be permitted (RD at 64); 3) the recognition that the retail model risks cause harm to the economic interests and rights of consumers (RD at 55, 107); 4) the acknowledgement that there does not currently exist an active market of energy providers ready, willing and able to serve the needs of residential small commercial, and rural customers (RD at 87); 5) the need for a system benefit charge to continue the development of robust energy conservation services, research and development and other initiatives conferring significant public benefits (RD at 83); and 6) the requirement for a full and timely assessment of environmental impacts and mitigation options (RD at 93-106).

This Brief on Exceptions will address only those aspects of the RD to which we must take exception, and responds to specific questions posed by the judge.[4] Exceptions are taken as to the following: 1) the RD's conditional endorsement of the flexible poolco retail model (Section II.A., herein); 2) the failure to explicitly include portfolio management as part of the distribution utility's obligation to serve (Section V); 3) the RD's lack of attention to renewables (Section VI); 4) the need for greater resolution of policy and methodological issues related to stranded cost recovery (Section VII); and 5) the judge's procedural recommendations for further resolution of this proceeding (Section IX).

Additionally, based on issues raised by the RD, PII argues the following: 1) retail access proposals should be examined for their ability to provide simultaneous and proportionate benefits to all consumers (Section II.B.); 2) the system benefits charge can be administered by the utility, or by a governmental authority, though if the

[4]We will reserve our supporting argument for aspects of the Recommended Decision with which we agree for the Reply Brief, except insofar as these issues directly relate to our specific exceptions or judge's questions.

former course is chosen oversight will be needed to ensure that competitive efficiency markets are developing (Section III); and 3) owing to a lack of comparable environmental standards and government subsidies, a decision by New York to move unilaterally to retail access could have deleterious inter-regional economic and environmental effects (Section IV).

II. THE COMMISSION SHOULD IMPLEMENT ELEMENTS OF THE RECOMMENDED DECISION THAT FOSTER COMPETITIVE WHOLESALE MARKETS, BUT SHOULD NOT SANCTION RETAIL ACCESS UNLESS AND UNTIL THE ASSOCIATED RISKS AND COSTS ARE ADEQUATELY RESOLVED.

PII oppose the RD's conditional endorsement of a flexible retail poolco model for New York's electric system. (See RD at 111) Retail choice is fraught with potential costs and risks that are thoroughly documented by the RD. Until these costs and risks are ameliorated, or proponents of the flexible retail poolco model put on an affirmative factual case that they do not exist, then the Commission should proceed no further than the first stage transition to wholesale competition recommended by the Administrative Law Judge. (See RD at 68)

Further, PII disagree with the RD's suggestion that "the question [should] be transformed from whether retail access will be provided for customers in New York State, into a question of when retail access will be available, and for whom ." (RD at 64 [underlines in original]). This statement is inconsistent with other portions of the RD. By ostensibly committing to retail access, the RD minimizes the concerns that are raised; and negates the tests that are recommended be applied before a retail access regime is effectuated. Additionally, the "for whom" language suggests that only some customer classes may be allowed to retail wheel. This is an unthinkable result. If retail access is shown to be beneficial, then it should be introduced in such a way that all customers attain simultaneous and proportionate benefits.

A. The Commission Should Clarify That It Is Committed To Bringing About A Competitive Wholesale Market, And To Explore Whether Retail Competition Can Be Fostered In Such A Way As To Benefit All Customers.

PII agree with the RD that the risks and potential costs associated with the retail model counsel caution and deliberation. As highlighted by the Judge, there is considerable risk that small customers will suffer significant rate impacts under a retail access regime, especially if, as is contemplated under most retail

proposals, large customers are permitted first crack at the retail market.[5] Moreover, the RD recognizes regional equity as a growing concern; the existence of "load pocket" situations could inhibit development of efficient generation markets (and thus the benefits of competition) from developing in certain parts of the state. These equity concerns are reinforced by the RD's finding that competition does not yet exist in the energy services sector (RD at 87, 108); the dearth of load aggregators, energy service companies (or a comparable small customer "interface" with the competitive generation sector) leaves this segment of the population with no present ability to participate in the retail market. For these customers, retail choice is illusory.[6] Additionally, the RD acknowledges that the retail model puts the reliability of the existing transmission system at risk; the grid will be required to support and coordinate contracts that are vastly different, in both volume and type, from the bulk power contracts that have been accommodated in the past. (RD at 65) Finally, the RD notes the legitimate concerns associated with New York State moving unilaterally to direct retail access. (RD at 60) The lack of environmental comparability among generators will, under a retail access model, result in the import of air pollutants to the New York airshed, while at the same time facilitate the transfer of wealth from in-state to out-of-state generators.

From PII's perspective, these risks overwhelm the unsubstantiated benefits of retail wheeling. We are concerned that the Commission may accept the RD's broad philosophical endorsement of retail wheeling and ignore the sensible proposal to concentrate first on establishing the prerequisites for a robustly competitive wholesale market. The Commission should focus, particularly, on the

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[5] See, e.g., Niagara Mohawk PowerChoice proposal which provides first rights of access to the largest industrial customers, and last rights of access to residential customers. NYPSC Case Nos. 94-E-0098, 94-E-0009, Phase II, Multi-Year Electric Rate, Restructuring and Retail Access Proposal (October 6, 1995). By contrast, the California Public Utility Commission restructuring decision envisions that all customer classes will participate in the phase-in.

[6] Retail "choice" is based on the fictional concept that buyers and sellers can control the physical delivery of electrons through the integrated grid. Because electrons respect only the immutable law of physics and not contracts, it is impossible for a customer to designate a supplier and receive its complement of electricity from precisely that supplier. Individual customers can measure how much they use at a building or plant, but they cannot influence where it comes from. At any given time, all of the power plants owned by all of a grid's interconnected utilities are working together to meet our collective electricity needs.

following significant reforms: 1) separate generation from transmission and distribution; 2) establish and set responsibilities for the independent system operator; 3) construct market mechanisms for wholesale power trading; and 4) consider policies to encourage a vibrant energy service company market. Enhanced competition at the wholesale level promises cost reductions by making generation more competitive and providing entrepreneurs open access to the centralized grid. Importantly, the cost reductions made possible through wholesale competition will flow proportionately and simultaneously to all consumers.

PII further support the RD's insistence that "[r]etail access should be provided only if it is in the best interests of all ratepayers." (RD at 64) To date, no factual evidence has been proffered that retail choice will confer any demonstrable economic and environmental benefits except to a small number of customers. Absent a factual demonstration of the incremental benefits of retail choice above and beyond those derived through wholesale competition, it is both proper and prudent for the Commission to focus initially on changes needed at the wholesale level, and to withhold a blanket endorsement for retail contracts.

Given the RD's reservations with the retail model, the determination that consumer, environmental and other protections precede further evolution of the electric system, and the requirement that retail access be subject to further evaluation against statutorily-derived standards, all suggest that the opinion reflects a conditional preference for, rather than firm commitment to, retail access. Any other interpretation would eviscerate the carefully crafted elements of the RD. Nonetheless, PII are concerned that this broad endorsement will be misconstrued as unconditional support for a flexible retail poolco model.

Therefore, PII recommend that the Commission clarify that it intends to: 1) move expeditiously towards wholesale competition and 2) once the prerequisites for wholesale competition are established, or at some date certain, consider whether retail access is likely to produce *any* incremental benefits which outweigh the attendant risks and costs. If, as a general proposition, retail

access is viewed as capable of yielding additional net benefits, then - and only then - should the Commission take the steps necessary to implement such a model. As requested in the RD at page 114, the standard for allowing customers retail choice is the subject of the next section.

B. Retail Access Should Not Be Adopted Unless It Improves Upon The Fairness and Efficiency of the Wholesale Model.

The RD solicits comments on the following question:

> "(3) Should the standard for allowing customers retail access to the electric system, which is required by statute to be in the 'overall best interest' of all consumers, be the standard used for allowing customers retail access for gas service (i.e. that positive benefits for other customers result), or should a different standard apply, and why?"

(RD at 114)

While the RD is correct in requiring evaluating the economic impacts of retail access, PII submit that the standard used in the evaluation of gas streaming contracts does not adequately support a consideration of how benefits are distributed among different customer classes. Therefore PII believe the standard articulated by the RD should be rejected in favor of a better test of fairness and economic efficiency. Such a standard is set forth in the discussion which follows.

The Commission's "Principles To Guide The Transition To Competition For Electric Service" reflect a keen interest in assuring that the benefits of competition reach all segments of society. Consistent with the Commission's "mandate that all New Yorkers must have access to reliable and reasonably priced electric service." Principle #1 states that "consumers should have a reasonable opportunity to realize savings and other benefits from competition." (See, Opinion 95-7, Principles, Appendix A). Further, as expressed in Principle #2, the Commission regards as fundamental that "A basic level of reasonably priced energy service must be maintained for all New Yorkers." Taken as a whole, the Principles emphasize improving the collective well-being of New York electric consumers.

To be consistent with the Commission's principles, the new electric system must be capable not only of turning potential benefits into real benefits, but of assuring that the benefits are distributed as widely as possible. PII supports a Wholesale model because it lends itself more readily to an equitable sharing of energy cost savings. Under a Wholesale model, the distribution utility, acting as portfolio manager, identifies and procures lowest cost supply and passes along the savings to all customers for which it has an obligation to serve.

In its purest form, retail choice is incapable of delivering price reductions to all New Yorkers. Indeed, retail choice is directed primarily towards changing the existing flow of dollars, not the flow of electrons. Moreover, retail access adds a level of extreme complexity that will advantage only the most powerful and sophisticated players who will inevitably find ways to game the system. Under retail wheeling, some customers would win access to wholesale commodity prices, which are driven by sales of surplus power from previously constructed generators. Since owners of these facilities are motivated to sell their surplus at any price that exceeds short run operating costs, they can almost always undercut the rates posted by utilities today. At the same time, other customers are either explicitly, by the ground rules for the retail model, or implicitly, by the practical limitations of small, dispersed and unsophisticated customers shopping for cheap power, denied these same prices - prices they would almost certainly receive under a wholesale competitive model.

Direct retail access, on its own, is unlikely to serve small customers, especially rural, minority, low-income and senior citizen communities. Individually, these customers have neither the buying power nor present ability to seek out, analyze and acquire energy in the competitive marketplace. Eventually, these customers may be able to compensate for their own individual lack of buying power by aggregating demand, but as recognized by the RD, the formation of an active ESCO market has yet to occur, and there are real barriers to its future development. Consequently, should the Commission move to direct retail access, policies and mechanisms must be established to

realistically allow smaller electric customers to attain a proportionate share of the benefits of that access.

While sensitive to the concerns of small customers, PII take exception to the standard proposed by the ALJ for retail access; namely that "positive benefits for other customers result." (RD at 114). First and foremost, PII believe that the standard adopted by the RD for retail access will still permit massive cost shifting from large to small customers and thus allow the former to reap the lion's share of retail access' purported "benefits" This occurs because the proposed standard focuses exclusively on the existence of cost reductions to other classes, without a consideration of whether the distribution of benefits is in any way equitable. Thus, the standard will be satisfied if, as in one likely scenario, large volume customers receive prices close to marginal cost of energy, and captive customers receive only token savings from what they are now paying. Thus, the Commission's final order should clarify that proposed contracts will be scrutinized for both the existence of, and extent to which, sharing is contemplated

Second, PII object to the application of this standard on a contract- by- contract basis. This standard subjects the energy costs of captive customers to the philanthropy of the transacting parties. PII believe it both unlikely, and incorrect, to expect the transacting parties to pass back a portion of the benefits of their bargain to other customers Additionally, scrutinizing each individual contract for fairness is administratively unworkable.

Instead, PII believe that retail access should be evaluated and, if it passes muster, applied comprehensively and uniformly. Thus, PII propose that the standard for moving to retail access should be **whether it will permit the realization of simultaneous and proportionate benefits for all customers.** Should retail access be introduced, PII believe that it must be introduced for all customers on the same terms and conditions. There is no legal, practical or economic reason that small customers must be last to exercise their choice of supplier. Moreover, the standard we propose places greater emphasis on the relative magnitude of benefits that will enure to the different customer

classes and is in keeping with the Commission's avowed policy of universal access to reasonably priced electricity. Models in which certain customer classes retain a disproportionate share of the benefits do not satisfy this principle.

III. THE RECOMMENDED NON-BYPASSABLE SYSTEM BENEFITS CHARGE FOR CONTINUED INVESTMENT IN ENVIRONMENTAL AND PUBLIC POLICY CONSIDERATIONS CAN BE ADMINISTERED BY THE DISTRIBUTION UTILITY, A GOVERNMENTAL, OR QUASI-GOVERNMENTAL AUTHORITY.

The following discussion is responsive to the RD's request for parties to address in their Briefs on Exceptions questions related to the proper administration of a system benefits fund and delivery of public benefits programs. (RD at 115) Issues addressed include: (1) goals, (2) funding level, (3) fund term, (4) oversight, and (5) programs covered. This discussion conveys PII's recommendations for administering the system benefits fund; however we reserve the right to support proposals that may be proffered by other parties. In addition, we address the RD's concern as to the ability of some customers to bypass the charge.

A. Administration of the Systems Benefit Charge

PII emphatically support the RD's conclusion that a non-bypassable system benefits fund to support delivery of energy efficiency, environmental programs, and research and development on renewable energy resources be made part and parcel of any industry model. The fund would be supported by a non-bypassable charge to all users of the distribution and transmission system. (RD at 83-84) As envisioned by PII, this fund will facilitate and continue the transition to a competitive energy efficiency market, while maintaining economically justified levels of utility-based efficiency investment.

1. Goals.

The energy efficiency component of the fund should be directed to achieve the following goals and objectives:

- foster competition in the delivery of energy efficiency services and practices;
- stimulate economic development for New York businesses and industries;
- reduce the long-term cost of electric energy service and leakage of wealth from the state economy due to imported power plant fuel;
- remove existing market barriers to the adoption of cost-effective energy efficient equipment and practices;
- improve the environmental performance of New York businesses and industries through greater process efficiency; and
- enhance the ability of low income consumers to pay for electric energy service.

2. Funding level.

PII believe that the actual annual funding level should be the subject of further analysis and negotiation among the parties. Nonetheless, the Commission should articulate, as a general principle, that existing levels of investment in energy efficiency, renewable alternatives, research and development, low income and environmental programs will be maintained. This is consistent with recent developments in California and New England, which have progressed the furthest in their consideration of continued delivery of public benefits programs. In California, the Public Utility Commission has recommended as part of its electric restructuring decision that the legislature adopt a surcharge to fund information programs about managing electricity use, and for financial incentives for transforming the market for energy efficiency products and services. In addition, the Commission supports a surcharge to fund "public goods" research and development, and low income assistance programs. Similarly, consensus is emerging in New England around an access charge to support energy conservation and renewables commercialization at existing investment levels.[7]

As a starting point for discussion in New York, PII recommend that the charge should be set so as to generate annual revenues equivalent to the 1994 combined DSM spending levels of the seven investor owned utilities, or the equivalent of roughly 2 mils/kWh. The 1994 base year is chosen

[7]New England Electric System's "Choice New England" sets a 4 mil/kWh distribution access charge. Green Mountain Power has similarly proposed that the distribution charge generate funds sufficient to cover existing investment levels.

because this marks the year utilities were achieving their highest net resource savings[8] through DSM programs. 1994 also represents the high water mark of DSM achievement as full-scale programs reached maturity and demonstrable cost-effectiveness. The vast untapped economic and technical potential for energy efficiency suggest that this level of expenditure can continue to be invested cost-effectively.[9]

Alternatively, a range could be established around this funding level, with the administering authority setting annual funding requirements based on program priorities and accomplishment. For example, as energy efficiency markets are transformed or are addressed by the private markets, public funding may be withdrawn from these areas and/or shifted elsewhere.

3. Fund term.

PII supports the Commission's Third Principle which states that "Increased emphasis should be placed on market-based means or competitively neutral approaches to preserve research, environmental protections, cost effective energy efficiency and fuel diversity." Consistent with this principle, PII believes that the system benefits fund should be continued for a minimum of five years, or until a self-sustaining market for energy efficiency services emerges. As specific market barriers for energy efficient technologies are addressed, the charge can be redirected or reduced.

4. Oversight.

The revenues generated to support the system benefits fund can be administered by the distribution utility, or by a government or quasi-governmental entity.

In the short-term, the distribution utility could collect and administer the fund as it currently does for DSM program costs. If this option is chosen, then protections will be needed to ensure that

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[8]The long-term benefits of conservation programs are expressed as "net resource savings". This is a dollar measure of the savings in tangible resources - fuel, labor, construction costs, etc. - that are avoided through conservation programs. Net resource savings do not include additional benefits of conservation programs such as avoided environmental costs, fuel diversity benefits, and national security benefits.

[9]Utility planned potential (i.e. the amount of cost-effective efficiency the utilities planned to procure) has fallen consistently short of achievable potential. See 1994 State Energy Plan, Vol. III, p. 37, Table 9.

the utility is not using the fund in a way that dampens competition for energy efficiency services and to ensure that any generation affiliates of the distribution utility cannot influence the use of the fund. Competitive bidding for energy conservation services may be one way to maximize the cost-effective use of the fund, and at the same time create opportunities for alternative providers.

In the longer-term, consideration should be given to structures that are compatible with the evolution to competitive efficiency markets. As one possible approach, the fund could be collected and administered by an independent governmental authority ("Authority") comprised of representatives from the Commission, NYSERDA, DED and DEC. The Authority would be responsible for setting an annual budget, establishing program priorities, selecting winning projects, evaluating program success, and auditing loans, grants and other financial awards.

PII further envision that the Authority would establish and support an Advisory Board made up of the full range of consumer and provider interests.[10] The Advisory Board would provide the Authority with general guidance and counsel on the administration of the fund. Individual Advisory Board members would act as liaison between their constituency group and the Authority, canvassing members needs and interests, and providing ideas, input and technical support to the Authority.

5. Programs.

The fund administrator should have wide discretion to allocate and direct funds to program eligible activities. As described above, these decisions should be made based on input received from the Advisory Board. Generally, PII believe the fund should be used to support the following general program types:

- Financing - In some markets availability of capital is a limiting factor. A portion of the fund could be devoted to providing low interest loans or a loan guarantee pool for energy efficiency

[10]Membership might include designated representatives from the following organizations and constituencies: energy efficiency service companies, commercial building owners, retail merchants, industrial electric users, efficiency equipment manufacturers, public interest groups, agricultural associations, architectural and construction trade associations, building code enforcement officials, distribution utilities, and small consumer representatives.

investments that would not otherwise receive financing from the private sector at market competitive rates. Requests for financing could be initiated by ESCOs or customers.

- Technical Assistance - In institutional, small industrial, new construction and other markets access to technical audit and design assistance will cost-effectively stimulate private investment in conservation measures.

- Market Transformation -The focus would be on reducing the costs and risks of bringing new energy efficient products to market through cooperative action by a wide range of interests (utilities, government, manufacturers). In some cases, market transformation would include the use of customer incentives to jump-start markets for efficient technologies.

- Information - Training and information programs can lower barriers that exist because knowledge about efficiency opportunity often lags behind product availability.

- Standard Offer Purchases - The fund administrator would "buy" verified energy savings achieved by ESCOs and others at or about the wholesale rate for energy.

B. Bypass Issues

The RD concludes that a non-bypassable system benefits charge, imposed on all customers using the distribution system is the fairest way of ensuring the continuation of these important investments in the future. The decision reflects a desire that the charge be "truly non-bypassable". (RD at 84, fn. 1) To meet this goal PII believe that a charge should be assessed on all customers connected to the distribution or transmission system. Self-generators could be assessed an appropriate amount through their standby tariffs.

The system benefits fund proposed by PII is extremely modest, especially in comparison to other costs of service. Thus, it is unlikely that electric consumers would be incented to leave the system simply in order to avoid contributions to the system benefits fund. We believe that use of the fund can be designed so that benefits are widely shared across all customer sectors.

IV. THE COMMISSION NEEDS TO BE SENSITIVE TO HOW ITS GOALS FOR ECONOMIC AND ENVIRONMENTAL IMPROVEMENT COULD BE UNDERCUT BY ACTIONS TAKEN BY OTHER STATES AND PROVINCES.

The RD invites comments from the parties on the following specific question: "What would be the impact on other states and Canada of New York moving toward a competitive market, and is

there a need for a regional approach?" (RD at 114) Although comity requires New York to consider the effect of its decisions on other states and regions, PII are particularly interested in the consequences to New York of a decision to open its grid to power wheeled in from outside the state. These concerns are enumerated by the RD: "the reduction of low cost power for other customers in New York, concerns about structuring a reliable system involving two different power pools, the potential for adverse environmental impacts, an exacerbation of the stranded cost issue, and, perhaps, the need to build additional transmission lines." (RD at 61) Because of the serious economic and environmental ramifications of New York moving unilaterally to open its retail market to out-of-state producers, PII concur with the RD that these impacts "are better considered sooner than later." (RD at 60)[11]

A. Environmental Issues

Environmental issues put in stark relief the need for a regional perspective as the Commission moves to restructure the New York electric system. States on the eastern seaboard, including New York, are struggling to comply with the national ambient air quality standard for ozone. Fossil-fired power plants, through the emission of nitrous oxides (NOx), represent a major contributor to the ozone problem and to acid deposition. The Ozone Transport Commission (OTC), made up of representatives of 12 eastern states and the District of Columbia are working together to solve this problem. A region-wide Memorandum of Understanding mandates a series of reductions in NOx emissions from electric utility boilers. This will have direct cost consequences for all utilities in the region.[12]

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[11] Thus, for example, PII fully support the decision to proceed immediately with a SEQRA analysis of the environmental impacts of industry restructuring. This will place the Commission in a better position to consider, and if necessary take mitigative actions, in its threshold decision on industry structure.

[12] The addition of selective catalytic reduction technology (SCR) to a 500-MW base load plant are estimated to cost between 2.56 and 3.23 mills/kWh. State and Territorial Pollution Control Program Administrators/ Association of Local Air Pollution Control Officials,

However, mid-Western states and their utilities are subject to much less stringent NO_x regulation. Thus, mid-Western utilities do not face the stringent control requirements placed on New York utilities, even though their emissions contribute to New York's air quality problems due to prevailing winds and storm patterns.

Policies initiated at the federal level and at the Commission to promote open access could exacerbate the problem, unless some mitigative action is taken. The cost advantages which stem from different environmental regulatory requirements would lead to more mid-Western generation and more transported emissions. This is harmful to New York utilities, customers, and the general population. It also runs counter to the goals of a competitive generation market:

- If less-stringently regulated non-New York utilities have an economic advantage over more environmentally regulated New York ones, they will, under competition, gain a larger market share. This could make New York utilities less competitive, and make any stranded investment problem worse. This would adversely affect shareholders of New York utilities and, to the extent that they are expected to compensate companies for uneconomic investments, New York ratepayers.

- To the extent that neighboring non-New York utilities increase generation to compete in regional power markets they will increase emissions. To the extent that NOx emissions increase to the west, this is likely to make attainment of health-based air quality standards in New York more difficult, and increase acid deposition problems. This will have a direct economic effect on New York businesses and its citizens, as both utility and non-utility sources of ozone and acid rain precursors are required to reduce emissions even more within New York State because of this transported pollution. It will also likely exacerbate respiratory problems for those who are most at risk--the elderly, those with respiratory diseases and the very young.

- Newer generating plants must adhere to more stringent New Source Performance Standards. To the extent incumbent, dirtier generators derive an economic advantage from disparate environmental standards, the Commission's goals of introducing greater competition in the generation market could be frustrated.

B. Impact on New York Utilities and Power Producers

By moving out ahead of other states and provinces on retail access, the Commission would put in-state utilities and independent power producers in peril. Out- of-state generators would be free to "cherry-pick" New York's large volume customers, without any correlative responsibility to

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"Controlling Nitrogen Oxides Under the Clean Air Act: A Menu of Options", p. 27, July 1994.

provide New York utilities access to their own industrial customer base. Retail access would enhance the market share of Hydro-Quebec and other producers of highly subsidized hydropower at the expense of New York utilities and independent power producers. The flight of large volume customers to out of state generators will place greater pressure on remaining customers to support the existing electric infrastructure. The export of dollars for electricity will also have a deleterious financial effect on the New York communities in which power plants are located.

A unilateral move to retail access also undercuts the states' ability to control its own energy and environmental destiny. By improving the position of out-of-state generators relative to New York-based utilities and independent power producers, New York erodes its jurisdictional reach and influence over important public policy considerations such as economic development, resource diversity, security, and environmental quality.

C. A Regional Approach to Competition

In facilitating a more competitive industry structure, the Commission should strive to create a level playing field between in-state and out-of-state generators. Both in its own deliberations, and in its interactions with other state public utility commissions and the Federal Energy Regulatory Commission, the New York Public Service Commission should encourage the following:

- Equivalent environmental standards for all generators selling into New York. This would eliminate any market advantage that derives from the current differences in environmental requirements;
- A program of regional emission trading (in a region expanded to include the midwest) to permit attainment of ambient air quality standards at the lowest possible compliance cost;
- A conference of the Ozone Transport Region states who closely interact with New York in electric utility matters. The meeting(s) could function in some ways like the FERC technical conferences; i.e., an opportunity for all interested parties to attend, and participate, in a structured format. The conveners would control the agenda, and the nature of the parties' participation. The product could be anything from a report to a proposed model restructuring statute and regulations package.It should be underscored that this effort is not intended to supplant this proceeding, nor should the work products that may ultimately come out of that effort substitute for a final order in the instant proceeding.

V. THE COMMISSION SHOULD EXPLICITLY RECOGNIZE PORTFOLIO MANAGEMENT AS AN ESSENTIAL ATTRIBUTE OF THE DISTRIBUTION UTILITY'S OBLIGATION TO SERVE, AND CONTINUE POLICIES WHICH WILL ENCOURAGE THE UTILITY TO ASSEMBLE A LEAST COST RESOURCE MIX.

The RD places the obligation to serve squarely on the distribution company. The RD correctly concludes that the energy services market is too uncertain, and the mandate for safe and adequate electric service at just and reasonable rates too important, to permit any departure from long-standing customer protections. The customer protections embodied in the Public Service Law are matters that "cannot be taken lightly." (RD at 86) "It is not sufficient to claim that the market will provide reasonably priced electricity to all New Yorkers, especially given the lack of experience with energy services companies being available to deliver services in all areas of the state." (RD at 86)

While PII have no quarrel with the RD's recommendation to vest the distribution company with the obligation to serve, the RD does not adequately describe the attendant requirements and responsibilities. Noting the many services the distribution company will inherit from the vertically integrated utility[13], the RD fails to mention perhaps the most fundamental: the portfolio management function. Part and parcel to the obligation to serve, the distribution company must assemble a least-cost mix of supply and demand-side resources on behalf of its customers. These customers either can not (or choose not to) buy power on their own, and thus require the local distribution company to make sound and prudent purchasing decisions on their behalf.

PII also believe it essential that the Commission maintain the financial incentives for the distribution company to do proper portfolio management. Customer and shareholder interests should be harmonized. To accomplish this, the portfolio which minimizes long-term customer bills should be the utility's most profitable one. The National Association of Regulatory Utility Commissioners (NARUC), after determining that traditional regulation affords utilities little incentive to be good portfolio managers, pressed state commissions to "ensure that the successful implementation of a

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[13]"...insuring appropriate voltage levels, resolving complaints,performing energy audits, and other electrical service functions." (RD at 86-7).

utility's least-cost [investment and procurement] plan is its most profitable course of action." (NARUC Resolution, adopted July 27, 1989) Congress endorsed NARUC's objective in the National Energy Policy Act of 1992 for both electric and gas utilities.[14]

The Commission should explicitly state that, in regulating the distribution utility, it will continue and expand it's policies and practices of effectively "decoupling" utility sales from profits. PII has endorsed specific "performance-based" ratemaking techniques, such as revenue caps, as an effective means of instituting effective utility-based, least-cost planning.[15] New ratemaking techniques will also be necessary in a restructured utility industry as part of the Commission's program to distance generation company and distribution company decision-making, whether or not the utility has decided to divest itself of generation assets.

VI. THE RD FAILS TO INSTITUTE POLICIES NEEDED TO SUPPORT CONTINUED PUBLIC AND PRIVATE INVESTMENT IN RENEWABLE ALTERNATIVES.

PII devoted considerable attention in their briefs to issues associated with renewable energy sources. Other parties also discussed renewable energy sources in great detail. Unfortunately the RD did not address the issues raised by PII and other parties, except through cursory reference to "environmental and other public policy considerations." The serious ramifications of electric utility

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[14]The EPAct amended § 111(d)(8) of PURPA to require state commissions to consider adopting the following standard:

> [t]he rates allowed to be charged by a state-regulated electric utility shall be such that the utility's investment in and expenditures for energy conservation, energy efficiency resources and other demand-side management measures are at least as profitable, giving appropriate consideration to income lost from reduced sales due to investments in and expenditures for conservation and efficiency, as its investments in and expenditures for the construction of new generation, transmission and distribution equipment. 16 U.S.C.A. § 2621(d)(8) (West Supp. 1994).

[15]Revenue caps are gaining a foothold among utility managements, as one utility has entered a settlement containing a revenue cap (See, Opinion No. 95-3, Opinion and Order Approving Settlement, Case 94-E-0334, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulation of Consolidated Edison Company of New York, Inc. for Electric Service (April 6, 1995)), and another utility has proposed a revenue cap in a case currently under consideration at the Commission (See, "Initial Brief of Orange and Rockland Utilities, Inc. on Rate Case Issues," (December 1, 1995), Case 95-E-0491; 93-E-0849).

restructuring on renewable energy sources warrant more consideration than has been given to date Renewable resources are an essential component of New York State's effort to promote fuel diversity, economic growth, health, and environmental protection. Renewables are uniquely benign environmentally and rely on local fuels -- wind, sun, biomass -- that can be used with local labor. Indeed, New York's Energy Law explicitly commands that "Every state agency shall conduct its affairs so as to conform to the state energy Policy"

> to accelerate development and use within the state of renewable energy sources...in order to promote the state's economic growth, to create employment within the state, to protect its environmental values, to husband its resources for future generations, and to promote the health and welfare of its people.

Renewable sources are identified as small hydro, wood, solar, wind, and biomass.[16] Accordingly, it is critical that the Commission account for renewables in its consideration of competitive opportunities in the utilities industry.

PII specifically ask the Commission, in support of a universal system benefits charge (USBC), that a portion of the fund be devoted to research and development of renewable resources that would not otherwise occur in the market. In addition, a portion of the USBC should be devoted to support low interest financing of customer purchases of customer-sited renewables. The support provided by this investment will hasten the commercialization of renewables by expanding their markets and thus enabling their production to capture scale economies not otherwise achievable as quickly. To assure that a diversity of resources is supported, a limit (e.g., 60%) should be placed on the amount devoted to any one technology.

A second critical issue to renewable energy sources is the responsibility of an ISO. Bid rules must allow renewable resources a fair opportunity to compete against other supply. Thus no minimum bid should be specified and resources below a certain size should be eligible for net

[16] N.Y. Energy Law §§30101(1), (5).

metering[17] in order to simplify administration and encourage customer activity. Further, the capacity value (installed capacity and reserve capacity contributions) from intermittent renewable resources (wind, biomass, solar) must be recognized and compensated in any spot market bidding structure. Other evaluation factors should include contributions to economic development (especially by biomass in economically stagnant regions Upstate) and benefits of combining technologies (such as wind with a winter peak resource and solar with a summer peak).

Furthermore, the ISO should be required to manage dispatch to insure that the renewable energy contribution to the state's generation mix does not fall below current levels. The ISO will be well-placed to account for long-term economic factors that competitive market participants will ignore. This can be accomplished through a "renewable portfolio standard". The portfolio standard integrates the ISO function with a market-based renewable procurement strategy that minimizes the need for and costs of governmental oversight and implementation. The portfolio standard is a mechanism developed to address, with one market-based policy, many of the criteria needed to support an effective renewables policy. Instead of supporting renewables as a sidebar to the market as some other mechanisms would do, the portfolio standard would integrate renewables into the market. The standard would rely on the market to ensure that renewables are developed in the most economical way.

As a condition of doing business in a state, every power supplier would be required to purchase a percentage of its energy needs from renewable resources. The percentage would be determined by the state based on its resource diversity, environmental protection and economic development goals, and other factors. The percentage could start low and increase over time, which would allow the market to "gear up." Individual requirements would be tradeable so that every power supplier need not become a renewable energy developer, and would permit distribution companies to meet the

[17] Net metering credits customer-sited renewable production at the retail rate by allowing metered production to be deducted from metered consumption.

standard in the most cost-effective way. Government involvement would be limited to setting the standard, monitoring compliance and facilitating trading.

This approach meets many of the criteria outlined in the Commission's principles: it is competitively neutral; it obviates the need for government- or utility-issued contracts or financing guarantees because the market can be expected to develop workable contracts; it would hedge overall fuel price and supply risks; it accounts for public goods; and it provides a predictable and growing market for renewables, which can be expected to drive technology costs down rapidly. In addition, because the standard is a floor, not a ceiling, it allows marketers to sell renewable energy to consumers wishing to exceed the standard.

The standard should start out at a level that slightly increases the renewables generation that existed as of 1992, or approximately 9.2% of total in-state electric consumption.[18] The standard must be at least slightly above the existing renewables capacity in order to establish a competitive market price for renewables. The standard should be set to increase over time to comply with New York law requiring an increase in renewable energy resources.[19] It is important that the standard

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[18] SEP, supra note 2, at Vol.I, p.71.

[19] The New York State Energy Plan of 1994, which is presumptively binding on the PSC, states:

> New York should continue to accelerate the development and use of renewable resource technologies in end-use and electricity production applications.
>
> New York should encourage actions to increase the use of renewable resources as a proportion of primary total energy consumption.

SEP, supra note 2, at Vol.I, p.14. In its findings the SEP states:

> Renewable energy resources can contribute toward State compliance with the federal Clean Air Act and assist utilities in better serving customer needs. Id. at Vol.I, p.73, Vol.III, p.99.
>
> Continued RD&D activities are necessary to demonstrate the use, applications and benefits of renewable and indigenous energy technologies if the State is to have a functioning market for renewables by the end of the planning period. Id. at Vol.I p.74, Vol.III, p.97.

In its recommendations sections the SEP states:

increase predictably over time so that the market is able to respond in an orderly fashion. The PSC has the authority, under existing state law, to set a specific portfolio standard for the pool. This renewable portfolio standard will enable the ISO to evaluate bids with reference to their relative contributions to mitigation of such risks as fuel price volatility, uncertainty of demand and availability forecasts, and future environmental regulation. Renewables make significant contributions to mitigation of each of these risks. Given the exclusive nature of the ISO's bid evaluation activities, it is important the Commission maintain oversight over them.

The State should continue to encourage development, demonstration and use of renewable and indigenous energy resources in niche and end-use applications consistent with economic development, environmental and diversity objectives of the SEP." Id. at 74.

Utilities should integrate renewable generation and end-use technologies into their planning processes and target specific niche and customer service choice applications in renewable procurement. Such efforts should be coordinated with information and results from utility and State renewable research, development and demonstration programs and be consistent with the PSC's order in the renewables proceeding." Id.

The Public Service Commission (PSC) should require utilities to include in their resource planning efforts a detailed examination of renewables energy electricity supply and end-use alternatives and transmission and distribution applications, consistent with the requirement of EPAct." Id.

New York State energy policy reflects a recognition that renewable energy resources must play an important role in meeting the State's energy needs in the 21st century. Renewable resources as part of an integrated energy system can be used to generate electricity for distribution in a utility grid system or to meet customer electricity and thermal energy needs on-site. Id. at Vol.III, p.70.

The increased use of sustainable, renewable, and indigenous energy resources will reduce the State's vulnerability to supply, deliverability and price risks associated with the current energy supply system. The increased use of some non-combustible renewable resources also will benefit the environment, reducing air pollutants (sulfur dioxide, volatile organic compounds, nitrogen oxide, air toxics, and greenhouse gases including carbon dioxide) associated with the use of fossil fuels. In addition, reclaiming methane from landfills as an energy source benefits the environment by reducing greenhouse gases which may otherwise escape and contribute to global climate change. Moreover, greater reliance on cost-effective indigenous and renewable resources in the State's fuel mix can have economic development benefits by enabling energy consumers to retain more disposable income for spending in New York, rather than having that income flow out of the state to pay for energy imports. Id.

Renewable resources offer economic development benefits that go beyond the export market, with favorable local and regional jobs and earnings impacts. ...[E]nergy efficiency and renewable energy technologies generally provide larger employment and earnings impacts than conventional energy technologies per 10 GWh of deployment. Id. at 83.

A third issue that should be addressed with consideration of renewables is that of the development of market mechanisms to make wholesale and perhaps later retail, competition work. Mechanisms that will put renewables on a level playing field competitively include:

- financing for customer acquisition,
- net metering,
- interconnection standards,
- access by renewable developers to customer billing information and billing systems (in a manner that protects customer privacy),
- required disclosure of alternatives to utility line extension, and
- required offering to customers of an environmentally sensitive alternative (e.g., small rooftop PV units at a premium price), at least until the marketplace develops such options.

A fourth set of issues revolve around the obligation to serve of the remaining transmission-and-distribution (T&D) monopolies. Since these entities will be making the wholesale market purchases, it is critical that their decision processes reflect Commission and other New York State policy goals and statutory mandates. Among other things, this implies the continuation of a public planning process, overseen by the Commission, to review generation purchase decisions as well as T&D investment decisions. Care must be taken that full valuation is considered with respect to all alternatives, especially with respect to avoidable T&D investments and the relatively long-term risk mitigation values listed above. In some cases, renewable resources will rise above others as a result of such analysis because their avoidable T&D and risk-mitigation values will outweigh other values.

In establishing regulatory principles for the remaining T&D monopolies, the Commission should include incentives for excellence in the discharge of these portfolio management and T&D investment obligations, including incentives based on the achievement of specified levels of investment in environmentally benign renewable resources.

Finally, the proposed Environmental Impact Assessment should review the environmental contribution of renewable resources, particularly as compared to the environmental (and thus economic) risks related to existing nuclear units and "old source" fossil units. The Assessment should also consider the desirability of a plant dispatch sequence that takes environmental costs into account as well as direct, short-term economic costs.

PII recommend that the Commission include the following elements in its plan for industry restructuring:

- Adopt a renewables "target" for the pool.[20] The proposed policy, a "renewables portfolio standard," is a market-based strategy that will achieve the state-mandated goal of a diverse resource base while minimizing need for governmental oversight.
- Design pool and ISO rules to accommodate intermittent renewable resources. Intermittent resources should be exempt from any requirements to bid into the pool 24 hours in advance, in one-hour or half-hour increments. The energy, capacity, and reserve value of renewables must be compensated.
- Because the pool price may be too low to ensure that New York maintains and improves its existing level of diversity, the Commission must require all retail suppliers to meet the renewables standard.
- The standard should be set at a level slightly above the current overall level of renewables for pool participants and increase over time.
- It is essential that a separate market-clearing price for renewables be created within the pool in order to achieve the standard.

VII. TREATMENT OF STRANDABLE COSTS.

PII generally support the RD in its treatment of strandable costs, and especially the RD's implied creation of a two-part process to determine the actual levels of stranded cost recovery. PII, however, would like to see this process explicitly adopted by the Commission as a means to generically resolve the stranded cost issue. As stated in the RD, the first part of the test would create an objective

[20] In the event that the Commission adopts a retail model, then the target would apply to all suppliers of electricity.

methodology which could be applied by all utilities in their calculation of stranded costs. This methodology, as suggested in the RD, can be adopted by a generic decision. PII note that the RD does not directly recommend that such a generic approach to stranded costs should be adopted by the Commission, but states that a generic decision regarding some issues of stranded cost recovery are "potentially" addressable on a generic basis, including recovery mechanisms and recovery standards. PII assert that a generic decision is necessary to avoid conflicting stranded cost methods arising case by case and to assure, in part, that stranded cost recovery policies do not create new disincentives which restrict development and expansion of energy efficiency services. The Commission should adopt generic policy can then be applied in the course of company-specific rate/restructuring cases.

Further, the mechanism by which access charge monies are collected must also be determined in a generic case, to assure the equal application of stranded cost policies among all utility companies. Therefore, PII reiterate their position as expressed in their Initial Paper that the Commission create a stranded cost recovery fund, and determine when and on what terms utilities may recover stranded costs from this fund. This fund, established as an escrow-type account, would be the recipient of all monies collected and represented as the "access charge" on customer bills. Utilities must then make a showing, on a pre-determined periodic basis, of the level of dollar recovery that they are entitled to recover and which represents that level of prudent, verifiable, non-mitigable stranded cost. The level of recovery would be determined in each company's specific rate/restructuring case.

As to the second, or "subjective," part of the test, PII agree with the RD that recovery levels are determined according to a balance between economic development issues and maintaining the appropriate "investment-friendly" perception. The RD is correct to assume that a balancing of all consumer interests and investment expectations must determine the actual level of stranded cost recovery, and that such levels of recovery are best handled on an individual case basis. Yet PII are concerned that, without a specific directive from the Commission as to the generic standards and mechanisms which govern the process of stranded cost recovery, the ability to differentiate between

costs that are clearly recoverable stranded costs and cost representing above-market costs for which the utility is not entitled to recover may become infeasible. A stated Commission policy, indicating the temporary nature of stranded cost allowances as well as recovery levels, will be necessary for all parties to be able to engage in the called-for negotiating process.

VIII. ASSESSING COMPETITION IN THE VARIOUS MARKETS COMPRISING THE ELECTRIC INDUSTRY IS AN EXTREMELY IMPORTANT FUNCTION THAT WILL BE ASSISTED THROUGH REPORTING OF DISAGGREGATED INFORMATION IN A NUMBER OF AREAS.

The RD directs parties attention to the following issue: "What reporting requirements are necessary to allow the Commission to monitor competition to ensure that customers are adequately protected." (RD at 114)

In general the reporting requirements must be adequate to ascertain the degree of competition in selected markets. The degree of competition can not be measured unambiguously by any single index. Furthermore, the degree of competition can not be reliably measured with highly aggregated information.

PII believe that this issue is a critical one that ought to be the subject of a working group and a statewide policy determination. Leaving this to a case-by-case determination will create a patchwork of information that may be useless for statewide perspective and decisionmaking. In the discussion that follows PII suggest several indicators that might be used to monitor competition. This list is neither all inclusive, nor does it suggest priorities for analysis, auditing, and routine data collection. PII recognize that there is a tradeoff between the costs information gathering and the costs (efficiency losses) that are incurred by the customers when adequate monitoring, auditing and analysis of the right sort are not undertaken.

The reporting requirements should include information regarding the proportion of customers being served by the distribution companies as a share of the total base of that customer class.

Reporting requirements should be sufficient to answer questions regarding evidence of coordinated price change among service providers in a particular market. For example, if there is an increase in costs for a regulated provider, are they able to pass that cost along? Do competitors follow with matching price increases?

The degree of competition is related to the number of competitors offering service within a market. Monitoring competition therefore requires information on the number of and characteristics of alternative providers in specific markets and an estimate of the market share outside of the distribution companies. In an effort to monitor competition it is important to examine the net entry rate of firms into markets.

As noted above, the entry rate of alternative providers is an indicator of the level of healthy competition within a market. There are also issues involved with barriers to entry that may be employed by a dominant service provider. The Commission must review the present rules for entry into the market to assess which serve a legitimate purpose and which might simply be unnecessary obstacles to the free entry of alternative providers into markets.

The markup of price over marginal costs is a ***critical*** index of competition, or a lack thereof. The Commission needs to monitor the extent to which a service providers prices in particular markets are in step with its input cost changes. The ability to earn above-normal profits over a sustained period of time is a market power indicator. The Commission needs information and analysis that will permit the assessment of rates of return in particular markets.

The degree of demand responsiveness is an important concern. If a service provider is able to increase prices with an insignificant loss of market share, there is evidence of market power.

The degree of supply responsiveness needs to be analyzed. There must be information available that will allow the Commission to understand the supply capability of competitors in specific markets. For example, if there were a shift of customers from the "dominant" service provider, to smaller providers in a particular market, what share of the dominant providers customers could the alternative

providers service instantaneously? What share could alternative providers service within a six month period, or a period of one year?

How often customers switch service providers is another index of the level of competition. The Commission should monitor information on "churn rates" within specific markets.

The level of advertising expenditures might be analyzed as another in a set of informal indicators of the degree of competition. Significant changes in advertising expenditures as a share of sales revenues in particular markets may provide some evidence of increasing competition within those markets.

In summary, there is a growing technical record on the matter of assessing the level of competition in formerly regulated markets. PII suggest that the parties look for guidance on this monitoring/auditing and analysis function to the proceedings that have been held or are under way within telecommunications and gas consumer markets

IX. PROCEDURAL MATTERS.

The RD recommends that parties move expeditiously towards consideration of comprehensive, long-term and utility-specific restructuring proposals (RD at 112) Towards this end, the RD identifies several areas for further exploration in utility-specific negotiations, and if necessary evidentiary hearings.

As a general matter, PII support the bifurcation of issues into those that, on the one hand, are fact- or utility-specific and therefore lend themselves to separate consideration; and those policy matters that require consistency.[21] Thus, for example, the precise level of stranded cost recovery will turn on the unique circumstances facing each utility, whereas the methodology by which strandable costs are computed and recovered should be uniform.

[21]This is consistent with the Commission's blend of quasi-judicial and quasi-legislative functions.

As active participants in all earlier phases of this proceeding, PII are deeply concerned that, without clearer direction from the Commission, the utility-specific proceedings will be unduly contentious, chaotic and unproductive. The forward progress on restructuring that the Commission expects, and that the parties desire, will be hampered without better guidance from the Commission. In this regard, PII suggest the following specific clarifications to the RD:

1. The RD endorses a non-bypassable system benefits charge for environmental and other public policy questions, and asks for comment on how the fund should be administered. In the event the Commission decides that the charge should be administered by individual utilities, utilities should be directed to set forth their specific proposals for doing so.

2. A more precise statement of the test(s) to be used in arriving at the amount of strandable costs which are recoverable. As discussed in Section VII, PII support a two-part test comprised of: 1) a quantitative analysis based on methodologies previously endorsed by the Commission and 2) a qualitative balancing of interests. PII further believe that the preferences expressed by the RD for, among other things: (1) recovery through a non-bypassable, non-volumetric access charge (RD at 77); and (2) recalculation of strandable costs at regular intervals (RD at 73-4) should be explicitly adopted by the Commission. The Commission should set forth a clear and consistent set of guidelines on other methodological questions, such as whether a "bottom-up" or "top-down" approach should be used.

3. As to "proposals for phasing in retail access for all customers" (RD at 113), the utilities should be obligated to: 1) justify its timing preference, and if applicable, explain why it is not in the consumers best interests for all customers to obtain retail access simultaneously, and 2) "[i]f a utility proposes to limit retail access to only certain classes of customers, the utility should be prepared to justify the need for this with factual documentation, and provide an assessment of how this meets the standard that the arrangements are in the best interests of all ratepayers." (RD at 69-70).

4. Issues related to the independent system operator and its relationship with utility and non-utilitygeneration should be decided generically. Therefore, PII recommend that Issue #5[22] be explored as part of the ISO work efforts described at page 93 of the RD.

X. CONCLUSION.

WHEREFORE, PII respectfully request that the Commission adopt as its final order in this proceeding the Administrative Law Judge's Recommended Decision, with the foregoing exceptions.

Respectfully submitted,

January 18, 1996
White Plains, New York

Pace Energy Project
By: David Wooley
Public Interest Intervenors

[22] "(5) descriptions of the utility's proposed relationship with an independent system operator including evaluation of the potential ownership options..." (RD at 113).

Pace Energy Project
David Wooley
Executive Director
Fred Zalcman, Senior Attorney
Jerrold Oppenheim, Director
Renewable Energy Technology Analysis
78 N. Broadway
White Plains, New York 10603
(914) 422-4386

Natural Resources Defense Council
Ashok Gupta, Senior Energy Associate
Kit Kennedy, Senior Attorney
40 West 20th St.
New York, NY 100011
(212)727-4462

Environmental Advocates
Peter Iwanowitz
Lee Wasserman, Executive Director
353 Hamilton St.
Albany, NY 12210
(518)462-5526

Sierra Club
John Stouffer
83 Wellington Ave.
Albany, NY 12203
(518)426-9144

NYPIRG
Judith Enck
46 Washington St.
Albany, NY 12210
(518)436-0876

New York Rivers United
Bruce Carpenter
199 Liberty Plaza
Marine Midland Bank Bldg.
Rome, NY 13440
(315)339-2097

American Wind Energy Association
Tom Gray
PO Box 1008
Norwich, VT 05055
(802)649-2113

American Lung Association
Michael Perrin
8 Mountain View Ave
Albany, NY 12205
(518)459-4197

Citizens Advisory Panel
Gordian Raacke/Joe Bryan
1767 Veterans Highway, Suite 46
Central Islip, NY 11722
(516)234-0232

New York Energy Efficiency
Council/Enersave
Dennis Wilson
355 Lexington Ave.
New York, NY 10017
(212)661-9494

Citizens Utility Board
Keith Gordon
146 Washington Ave.
Albany, NY 12210
(518)426-4282

Hudson Sloop Clearwater
Madeline Arana
112 Market St.
Poughkeepsie, NY 12601
(914)454-7673

Citizens Action of New York
Mary Clark
30 State St.
Binghamton, NY 13903
(607)723-0110

Association for the Protection of the Adirondacks
David Gibson
(518)377-1452

Association For Energy Affordability, Inc
David Hepinstall
505 Eighth Avenue, Suite 1801
New York, NY 10018
(212) 279-3902

Hudson Riverkeeper
John Cronin
PO Box 130, Rt. 9D
Garrison, NY 10524
(914)424-4149

Citizens Campaign For The Environment
Paul Hill
518 Broadway
Massapequa, NY 11758
(516) 321-0869

Scenic Hudson
Cara Lee
9 Vasser St.
Poughkeepsie, NY 12601
(914)473-4440

The Adirondack Council
Bernard Melewski
P.O. Box D-2
Elizabethtown, NY 12932
(518) 432-1770