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March 22, 2004

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VIA HAND DELIVERY

Hon. Jaclyn Brilling
Secretary
State of New York Public
Service Commission
Three Empire State Plaza, 14th Floor
Albany, New York 12223-1350

Re: Case 00-M-0504 – Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Roles of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities

Dear Secretary Brilling:

Pursuant to the Notice Seeking Comments issued on January 27, 2004, Multiple Intervenors hereby submits the original and 10 copies of its Initial Comments in the above-referenced proceeding.

Please date-stamp the enclosed additional copy of this letter as proof of filing.

Very truly yours,

COUCH WHITE, LLP

Michael B. Mager

Michael B. Mager

MBM/vaf
Enclosures
cc: ALJ Jeffrey E. Stockholm (via Hand Delivery & E-Mail; w/enc.)
Mr. Michael Corso, Acting Hearing Officer (via Hand Delivery & E-Mail; w/enc.)
Active Parties (via E-Mail & U.S. Mail; w/enc.)

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities

Case 00-M-0504

INITIAL COMMENTS OF MULTIPLE INTERVENORS

Dated: March 22, 2003

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PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of approximately 55 large commercial and industrial energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its Initial Comments in response to the Notice Seeking Comments ("Notice") issued by the State of New York Public Service Commission ("Commission") on January 27, 2004 in Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Roles of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities.

On March 21, 2000, the Commission instituted this proceeding "to refine [its] concept of mature competitive retail energy markets (especially the future role of the regulated utilities) and to identify and remove obstacles to its achievement."[1] Pursuant to the Commission's directive, the proceeding progressed initially as a collaborative process. For approximately nine months, the parties, working collaboratively, identified, analyzed and debated the major policy issues relating to the further development of competitive retail energy markets in New York. With the assistance of Administrative Law Judges Jeffrey E. Stockholm and Joel A. Linsider, and Michael Corso, Chief of Residential Advocacy (collectively, the "Judges"), the parties also prepared a report, entitled "Concepts, Issues, and Views of the Future: Report on the Parties' Collaborative Efforts," which summarizes the work performed during the collaborative phase of this proceeding.

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[1] Case 00-M-0504, supra, Order Instituting Proceeding (March 21, 2000) at 2.

In an effort to explore whether a consensus was possible on some or all of the major policy issues, New York State Department of Public Service Staff ("Staff") prepared a proposal ("Straw Proposal #1") and distributed it to the other parties on January 12, 2001. Thereafter, Staff solicited written comments on Straw Proposal #1 and then met with interested parties to discuss that proposal and the parties' comments thereon. Based upon the written and oral comments received, Staff revised its proposal ("Straw Proposal #2") and redistributed it to the parties on February 27, 2001. The parties then met on March 14, 2001 to discuss, inter alia, whether Straw Proposal #2 represented a consensus position of the parties and, if not, whether such a consensus reasonably was achievable through additional collaboration.

Notwithstanding the parties' best efforts, a consensus on the major policy issues being addressed in this proceeding was not achieved. Based upon comments received from the parties at a pre-hearing conference conducted on March 14, 2001, the Judges determined that additional collaboration was not likely to result in a consensus, and that parties should submit briefs on the outstanding policy issues.

Initial and reply briefs were filed in this proceeding by Multiple Intervenors and numerous other parties on or before April 13 and May 4, 2001, respectively.

On July 13, 2001, the Judges issued their Recommended Decision in this proceeding.[2] Multiple Intervenors agreed – and still agrees – with many of the Judges' recommendations, including, but not limited to, that: (a) utilities should be discouraged from remaining permanently in any market which becomes workably competitive (RD at 35-39);

[2] Parenthetical references to the Recommended Decision are preceded by the notation "RD."

(b) a model pursuant to which utilities would exit the retail commodity markets for electricity and gas should be adopted as the end-state vision (id. at 51);[3] (c) New York's retail gas markets are more mature than its retail electricity markets, thereby justifying the transitioning of gas utilities out of retail commodity markets in advance of electricity utilities (id. at 65); (d) an artificial deadline for when utilities should exit retail commodity markets should not be adopted (id. at 65-66); and (e) until fully competitive retail commodity markets emerge, electric utilities have an obligation to pursue least-cost supplies and should make any hedged commodity offerings available to all customer classes, at least until certain conditions pertaining to the competitiveness of the markets and the availability of hedged commodity offerings have been satisfied (id. at 78-79).

Briefs on exceptions and briefs opposing exceptions to the Recommended Decision were filed in this proceeding by Multiple Intervenors and numerous other parties on or before August 10 and 27, 2001, respectively. In its Brief on Exceptions, Multiple Intervenors disagreed with, and took exception to, only two of the Judges' recommendations: (a) that utilities should exit the retail commodity business for electricity and natural gas for large customers in advance of small customers (RD at 65-66, 132); and (b) that a

[3] Even if the end-state is achieved, there may be a need for certain, limited-exceptions. For example, an exception is needed where an individually-negotiated contract for bundled service is necessary to further important economic development goals. See, e.g., Case 01-E-1629, In the Matter of Electric Service at a Potential Manufacturing Facility to be Constructed in New York by Corning Incorporated, Order on Flex-Rate Contract Negotiations (October 31, 2001), Order Directing Entry Into a Flex-Rate Contract (April 12, 2002), Order Denying Rehearing and Stay and Authorizing an Enforcement Proceeding (Mary 23, 2002).

Competition Council and a Public Benefits Program Council be established (id. at 72-73, 105-06.)[4]

Thus far, the Commission has refrained from issuing a generic decision on the numerous outstanding policy issues following the exceptions phase of the proceeding. The Commission has, however, continued to address and resolve certain issues impacting competitive retail energy markets (e.g., unbundling, uniform business practices, electronic data interchange) on a piecemeal basis.

On January 27, 2004, the Commission issued the Notice in this proceeding. In the Notice, the Commission acknowledged that certain key policy issues "remain unresolved, such as the appropriate role of regulated utilities during and after the transition to competitive retail electricity and natural gas commodity markets." (Notice at 1.) The Commission also commented that: "The competitive retail market today appears to have evolved since this proceeding began, and, before we address the recommendations set forth in the RD, we believe it prudent to seek the parties' comments in light of the passage of time and the continuing evolution of the markets." (Id. at 2.) The Commission then solicited comments from interested parties on "a draft statement of a broad vision for the development of retail energy markets" and "a series of questions dealing with specific initiatives that may be undertaken now." (Id.; see also id. at 3-6.) Importantly, the Commission emphasized that it is "not asking the parties to revisit the arguments previously submitted but to focus here on the current status of the markets and on retail market development since the issuance of the RD." (Id. at 2.)

[4] Multiple Intervenors still opposes those recommendations for the reasons set forth in its Brief on Exceptions.

Multiple Intervenors' Initial Comments in response to the Notice are organized into two sections. In Section I, Multiple Intervenors comments upon the draft "Vision Statement" proposed by the Commission. In Section II, Multiple Intervenors responds to the specific questions posed by the Commission in the Notice.

SECTION I

MULTIPLE INTERVENORS' COMMENTS ON THE COMMISSION'S DRAFT VISION STATEMENT

In the Notice, the Commission solicits comments on the following draft Vision Statement:

> The provision of safe, adequate, and reliable gas and electric service at just and reasonable prices is the primary goal. Competitive markets, where feasible, are the preferred means of promoting efficient energy services, and are well suited to deliver just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation. Regulatory involvement will be tailored to reflect the competitiveness of the market.

(Notice at 3.) Multiple Intervenors supports much of what is proposed in the draft Vision Statement, but recommends that it be modified as detailed below.

The Vision Statement requires modification because it does not reflect adequately two key concepts that are fundamental to the further development of competitive retail energy markets in New York. First, the primary goal should include <u>lower</u> prices, not merely "just and reasonable" prices. As the Commission is well aware, utility customers legally are entitled to "just and reasonable" energy charges, and have been so entitled for decades.[5] The transition to increased competition would hardly be worth the effort, but for the expectation that it eventually will result in, inter alia, lower energy prices for consumers. Indeed, "lowering rates for consumers" was identified as the cornerstone for the transition to competitive markets in the Commission's seminal decision on deregulation.[6]

Lower energy prices also have the advantage of increasing customer satisfaction and facilitating critically-important economic development efforts within the State. As the most recent New York State Energy Plan concludes:

> The pursuit of effective competition, wherever practicable, in the provision of natural gas and electricity services is the policy of the State of New York. Such competition has the potential to reduce energy costs over the long term, increase customer choices and satisfaction, provide economic development advantages, enhance system reliability, promote technological changes and improvements, and improve environmental quality.[7]

In response to the request in the Notice regarding changed circumstances since the issuance of the Recommended Decision, the Commission should take note of the fact that wholesale commodity prices are considerably higher now than they were in 2001, and that manufacturing jobs continue to exit the State at an alarming rate. Clearly, the Vision Statement must reemphasize the Commission's commitment to lower prices, increased choices and overall economic development.

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[5] See, e.g., N.Y. Public Serv. Law § 65(1).

[6] See Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 96-12, Opinion and Order Regarding Competitive Opportunities for Electric Service (May 20, 1996) at 26 (establishing "lowering rates for consumers" as the first general goal of the transition to competition).

[7] New York State Energy Plan and Final Environmental Impact Statement (June 2002) at 2-1.

The second concept not reflected adequately in the draft Vision Statement is that the intent behind the transition to increased competition in New York's retail energy markets was, and should remain, to provide economic relief to end-use consumers. The Commission did not embark on its pursuit of increased competition to benefit the State's electric and gas utilities, or energy service companies ("ESCOs"). While utilities and ESCOs ultimately may benefit from increased competition, the intended beneficiaries clearly are consumers. As the Commission recognized in 1995: "The basic objective of moving to a more competitive structure is to satisfy consumers' interests at minimum resource cost."[8]

The draft Vision Statement contained in the Notice should be modified as follows, consistent with Multiple Intervenors' recommendations:

> New York energy consumers are entitled to safe, adequate and reliable electric and gas service at just and reasonable rates. Where practicable, the Commission will foster increased competition in the provision of energy services, with the primary goal of providing consumers with: (a) lower energy costs; (b) increased choices of services and suppliers; and (c) economic development advantages. The amount of regulatory involvement in different energy markets will depend largely upon the scope of the Commission's powers and duties, and the degree of competitiveness in the markets.

With respect to last sentence, Multiple Intervenors agrees with the intent of the draft Vision Statement that the amount of regulatory involvement in different energy markets should depend, at least in part, on the competitiveness of a particular market. However, the Vision

[8] Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Adopting Principles to Guide the Transition to Competition (June 7, 1995), Appendix C at 1.

Statement also should recognize that the Legislature has bestowed upon the Commission certain powers and duties that may not be abrogated upon the introduction of competition.[9]

Finally, in explaining its draft Vision Statement, the Commission states in the Notice that: "Achieving this vision will require the development of robust energy markets providing a variety of choices for customers, which in turn requires that the dominant position of the utilities providing competitive retail services should be reduced, or, in some cases, eliminated." (Notice at 3.) Multiple Intervenors generally agrees with the Commission's statement. Specifically, for the reasons detailed in Section II, infra, Multiple Intervenors believes that the end-state vision adopted by the Commission should include the State's electric and gas utilities exiting retail commodity markets over time, subject to the certain important considerations that must not be overlooked.

SECTION II

MULTIPLE INTERVENORS' COMMENTS ON THE SPECIFIC QUESTIONS POSED IN THE NOTICE

In the Notice, the Commission poses 14 specific questions regarding the current status of retail energy markets and potential strategies for promoting competition in those markets. (Notice at 4-6.) For ease of review, Multiple Intervenors reproduces each of the questions below and then provides its comments in response thereto.

By these Initial Comments, Multiple Intervenors is not advocating that any utility-specific multi-year rate plan – either existing or pending currently at the Commission – be modified in any respect. Multi-year rate plans that are the product of settlement

[9] See, e.g. N.Y. Public Serv. Law § 5(1).

negotiations routinely involve a myriad of compromises by the settling parties that should not be disturbed in this proceeding. Thus, Multiple Intervenors recommends that the positions advanced herein be implemented as soon as practicable within the context, or following the expiration, of existing and pending multi-year utility rate plans.[10]

QUESTION NO. 1

> **Based on experience to date and, particularly, developments in the retail markets over the past 3 years, what specific actions should now be taken to increase customer choice? Which actions would be most appropriate for the residential and small commercial customer classes? What are the expected benefits and costs of such actions?**

In order to increase customer choice, the number of ESCOs competing actively to serve electric and gas customers needs to grow. Because the Commission does not regulate the potential service offerings of ESCOs, the Commission's efforts to increase customer choice should focus on increasing the rate of customer migration to ESCOs. As migration grows, the number of ESCOs willing and able to compete actively for customers should increase, thereby promoting greater customer choice. With more ESCOs competing

[10] For instance, Multiple Intervenors recently executed an Electric Rate Joint Proposal in Case 03-E-0765, the pending Rochester Gas and Electric Corporation ("RG&E") electric rate proceeding. As part of that proposed settlement, a number of parties, including Multiple Intervenors, compromised their positions on issues pertaining to the electric commodity options that should be available to customers through 2008. Importantly, those compromises are inextricably related to numerous other compromises involving different aspects of the proposed settlement. Disturbing the negotiated resolution pertaining to electric commodity options would frustrate the intent of the settling parties and could jeopardize the substantial customer benefits for which Multiple Intervenors and other parties bargained.

for customers, the types of service offerings that are available should expand as individual ESCOs attempt to distinguish themselves from the competition.[11]

On November 3, 1998, the Commission issued its Policy Statement Concerning the Future of the Natural Gas Industry in New York State and Order Terminating Capacity Assignment ("Gas Policy Statement") in Cases 93-G-0932 and 97-G-1380.[12] In its Gas Policy Statement, the Commission ruled, inter alia, that "[t]he most effective way to establish a competitive market in gas supply is for local distribution companies to cease selling gas." (Gas Policy Statement at 4.) In so ruling, the Commission held that "[w]ithout separation of the monopoly gas distribution function and the competitive merchant function the LDCs would likely remain dominant providers." (Id.) The Commission ruled that the States' gas utilities should cease selling commodity within three to seven years. (Id. at 7.)

In response to arguments that permitting utilities to remain in the commodity business increases the number of competitors and, therefore, competition in general, the Commission concluded that:

> Although the exit of an LDC from the merchant business would reduce the choice of available gas suppliers by one, that action is preferable to the potential competitive harm in having a regulated LDC continuing to dominate the supplier function. If an LDC transition out of the merchant business is properly made, the result will be more choice for customers, not less.

[11] The Commission should not force customers to migrate to ESCOs, however, unless and until there are savings to be realized. Again, the goal of promoting migration is to benefit customers, not ESCOs.

[12] Case 93-G-0932, Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market; and Case 97-G-1380, In the Matter of Issues Associated with the Future of the Natural Gas Industry and the Role of Local Gas Distribution Companies.

(Id. at 5.)[13] For competition in retail energy markets to grow and prosper in New York, over time the State's utilities should exit from those markets, subject to limited exceptions.[14]

Importantly, the transition of the State's electric and gas utilities out of the commodity business must be carefully calibrated and should be carried out so that the primary goals of deregulation – lower prices and increased customer choice – are achieved. Actions that would result in stranded costs or interclass cost subsidies should be avoided. In addition, the following considerations should be addressed. First, utilities should not exit retail commodity markets unless such markets truly are competitive. For instance, there are legitimate questions as to whether all of the State's wholesale and retail electricity markets are sufficiently competitive so as to warrant utilities exiting from those markets at this time. Second, New York's retail gas markets are more mature than its retail electricity markets and, therefore, utilities may be able to cease selling gas supplies before electricity supplies.[15]

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[13] In their Recommended Decision, the Judges concluded that: "In our opinion, there is sufficient evidence to believe that workably competitive energy commodity markets can be achieved and that they will provide net benefits to consumers. We recommend that the end-state vision include competitive energy commodity markets with the regulated utilities no longer providing these services." (RD at 64-65.)

[14] For example, if the Commission determines, in response to a utility petition, that critical generation infrastructure requires the utility to commit to long-term supply contracts, some customers may have to be designated full service customers to match those contracts (see Response to Question No. 8, infra). In addition, there may be circumstances where important economic development goals can be achieved only through a discounted, bundled contract. See, e.g., Case 01-E-1629, supra.

[15] There are at least two critical differences between electricity and gas which argue for a more expedited transition out of retail commodity markets for gas utilities. First, the existing gas markets – wholesale and retail – are considerably more mature than the comparable electricity markets. For instance, some large customers have been purchasing gas supplies from ESCOs since the mid-1980's. In contrast, the State's wholesale and retail

Third, the Commission should refrain from adopting an artificial deadline for utilities to exit retail markets at this time. Finally, while the utilities remain in the commodity business, larger commercial and industrial customers should have the option, but not an obligation, to select that service. It would be inequitable to prohibit utilities from selling commodity to some customer classes, but not to others.

In furtherance of a plan whereby utilities would exit the merchant function, Multiple Intervenors also recommends that customers be exposed to market price volatility to a greater extent. For instance, on the electric side, some customers that still purchase commodity from the utility pay rates based on a complete or substantial pass-through of market prices.[16] However, many customers still are shielded entirely, or almost entirely, from any market price volatility. Consequently, those customers rarely (if ever) receive accurate price signals regarding the cost of electricity. Exposing more utility customers to market price signals should assist the development of increasingly competitive retail energy markets.

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electricity markets still are in their infancy. Second, unlike New York's gas utilities, the State's electric utilities recently auctioned off most of their generating plants and, as part of that process, entered into various power purchase agreements ("PPAs"). The contractual obligations assumed in those PPAs must be addressed in an equitable manner – to utilities and customers – before an electric utility is ordered out of the commodity business.

[16] For example, Niagara Mohawk Power Corporation ("Niagara Mohawk") S.C. 3-A electric customers that purchase commodity from the utility pay a straight pass-through of market prices administered by the New York Independent System Operator, Inc. ("NYISO"). For other customer classes, Niagara Mohawk has gradually phased-in a pass-through of NYISO prices. Ultimately, such a phase-in of exposure to market prices should be implemented for all customer classes.

Finally, the Commission should continue to promote real-time pricing ("RTP") information and options to customers.[17] Multiple Intervenors supports the Commission's initiative to increase the availability of RTP information to customers. Importantly, to the extent RTP measures are implemented, the Commission must avoid the creation or exacerbation of interclass subsidies. For instance, RTP should not be mandated for some customer classes in order to benefit other customer classes, and each customer class should be responsible for the RTP-related costs (e.g., installation of interval meters) necessary to serve that particular class.

QUESTION NO. 2

Are there features at individual utility retail access programs, such as Orange and Rockland Utilities (O&R's) "Switch and Save" Program, that could have applicability to other service territories? If so, please explain.

The most important incentive for retail access is the retail access credit that most utilities have adopted. In many service territories, the credit is the primary reason that retail access survives at all. The retail access credits are necessary and should be continued until the State's retail energy markets develop and are fully competitive. As customer migration continues to grow, utilities should be obligated to avoid costs when customers

[17] Multiple Intervenors' position on RTP-related issues are set forth in its Initial Comments filed on June 2, 2003 in Case 03-E-0641, Proceeding on Motion of the Commission Regarding Expedited Implementation of Mandatory Hourly Pricing for Commodity Service. Additional copies of Multiple Intervenors' Initial Comments in Case 03-E-0641 are available upon request.

migrate, and, where justified, utilities should be placed at risk for higher retail access credits.[18]

In addition, based on Multiple Intervenors' experience in Commission proceedings, two other market design features that are considered highly desirable by many ESCOs are a single bill option and the utility's purchase of ESCO accounts receivable, preferably without recourse. With respect to the former, many ESCOs entering New York's retail energy markets apparently lack the capability, or find it difficult to maintain the infrastructure necessary, to issue their own bills to customers. The availability of a single bill option, at a fair cost to ESCOs, should be universal throughout the State. With respect to the latter feature, many ESCOs have indicated that the utility's purchase of ESCO receivables, preferably without recourse, makes it much easier for them to commence and expand operations in New York. As to the potential availability of this option, the Commission should ensure that utility delivery customers are not placed at increased financial risk for ESCO uncollectibles. Rather, to the extent a utility purchases an ESCO's accounts receivable, it should be at a negotiated discount, and the utility should not seek compensation from delivery customers if the discount turns out to be inadequate.[19]

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[18] As discussed, supra, the primary goal of competitive retail energy markets is to benefit customers – e.g., lower costs – not to hold utilities harmless from all possible impacts of competition, particularly when they have been on notice of the Commission's general policy favoring competition since 1995.

[19] Multiple Intervenors' members do not have significant experience with the "Switch and Save" program implemented by Orange and Rockland Utilities, Inc. ("O&R"). By most accounts, the program has been successful in increasing customer migration to ESCOs.

QUESTION NO. 3

What, if any, barriers exist for customer aggregation programs (e.g., those using affinity groups) and what should the Commission do to remove those barriers? Should additional pilots be established?

Initially, as discussed in greater length in response to Question No. 6, infra, neither the Commission, nor the State's regulated utilities, should undertake the responsibility of designing and implementing retail aggregation groups for customers.[20] Rather, ESCOs, aggregators and customers themselves should be the entities responsible for aggregating customers. Thus, while Multiple Intervenors supports the Commission's initiative to eliminate potential barriers to customer aggregation, it opposes efforts by the Commission and/or individual utilities to establish customer aggregation groups.

Additionally, there already are numerous entities that actively seek to aggregate customers. For instance, ESCOs and aggregators routinely seek to combine customers, who also aggregate themselves in order to realize cost savings and/or achieve other business purposes. For instance, there is a Multiple Intervenors Buying Group comprised of Multiple Intervenors members that routinely solicits bids for aggregated electricity supplies. The Commission and the utilities it regulates should avoid competing with these market-initiated aggregation efforts.

That being said, the Commission can and should act to remove certain barriers to market-initiated aggregation efforts. For instance, customers should have access to their

[20] By way of contrast, Multiple Intervenors is not opposed to the utilities utilizing physical and financial hedges to secure least-cost electricity and gas supplies for its remaining full requirements customers. The utilities should not, however, be acting as the customers' agent in forming aggregation groups.

own load data in order to better pursue aggregation opportunities. To the extent customer groups are subject to imbalance penalties, there may be ways to implement, or improve upon, automated imbalance trading. Moreover, individual members of an aggregation group should not be subject to balancing penalties or adjustments if the group can balance itself internally.

QUESTION NO. 4

Should the Commission facilitate coordination of the Department's and the utilities' education campaigns with ESCOs' marketing campaigns? How best can this be accomplished?

Yes, the Commission should make reasonable efforts to facilitate coordination of education campaigns by Staff and the utilities with ESCOs' marketing campaigns. Multiple Intervenors details below two ways in which such coordination can best be accomplished.

First, the scope and the content of education campaigns by Staff and the utilities should be reviewed in a public forum, and ESCOs and customer groups should be permitted to help develop the proposed campaigns. The primary goal of education campaigns conducted by Staff and the utilities should be to inform customers of their rights and opportunities with respect to retail competition. By enabling ESCOs and customer groups to participate in the development of the scope and the content of the education campaigns, additional, important perspectives are added.[21]

Second, the Commission should continue to encourage the use of Market Expos as a means of facilitating the efforts of utility education campaigns and ESCOs'

[21] It should be remembered that inasmuch utility education campaigns are funded by customers through rates, the intent of such campaigns is to educate and benefit customers; they should not be used to advance utility shareholders' interests.

marketing campaigns. Thus far, several utilities have conducted Market Expos, and by most accounts they were successful. Upon information and belief, Market Expos also help lower customer acquisition costs for ESCOs, thereby facilitating retail access efforts (and, hopefully, lowering prices for consumers).

QUESTION NO. 5

> **Assuming the Commission establishes guidelines for electric utility retail commodity pricing and wholesale supply portfolio management, similar to its guidelines in the gas industry, what should be addressed in those guidelines? To what extent should the guidelines vary for small versus large customers? For example, should hedges be assigned to smaller customers so they face more predictable prices, letting larger customers be more exposed to price volatility?**

The Commission should start by distinguishing between existing customers and any future hedges that may be permitted. Many of the State's electric utilities entered into long-term PPAs when they divested generation assets. Because the construction, operation and maintenance of the divested generation assets were funded by all customer classes, it generally has been recognized that the costs or benefits of the divestiture-related PPAs should be recovered from, or distributed to, all customer classes. As the Judges recommend:

> We also agree with Multiple Intervenors that the benefits of the transition power contracts should be made available to all customer classes. Those classes supported the construction and operation of the utility plants, and, if there are benefits flowing from their sale, all customer classes should be entitled to them.

(RD at 79.) Thus, there is no justification for "directing" the economic value of existing hedges to selected customer classes.

To the extent the State's electric utilities are authorized to enter into contracts for additional supplies, all customers (not merely small customers) should have the opportunity – but not the obligation – to elect commodity service from the utility. For those that do, they should bear the burden of the utility's procurement strategy, which may include new pricing hedges. Now that the utilities' retail access programs have been underway for a number of years and customers have the option to migrate to ESCOs, there is no justification for imposing the costs (or distributing the savings) associated with a utility's purchasing strategy indiscriminately to all customers. The costs or benefits of such strategies should be recovered from, or distributed to, only those customers electing to remain a commodity customer of the utility.

Many large businesses operating in highly competitive industries have less tolerance for price volatility than typical small commercial or residential customers. And, as noted earlier, there may be times when economic development considerations compel the offer of a bundled product to a large consumer. Thus, while the State's electric utilities are permitted to remain in retail commodity markets, all customers should have the option of remaining a commodity customer of the utility, and those customers that elect that option should pay all prudently-incurred costs associated therewith.[22]

[22] It should not be the burden or responsibility of large customers to "test" the market for the benefit of small customers. Many large customers are struggling to conduct business in New York notwithstanding energy prices that are well in excess of the national average.

QUESTION NO. 6

Should the Commission require or encourage programs whereby utilities purchase supply for their retail customers through an auction process? Should the auction process be used to select alternative commodity suppliers for blocks of utility sales customers' load?

It is important to distinguish between auctions that may be used to attract customers to the utility's commodity service and those that may be used to provide least-cost supplies for customers that the utility serves as the provider of last resort. The utilities should not be acting as an aggregator and conducting auctions in order to retain customers as full service customers. Multiple Intervenors recently participated in an informal process examining whether Niagara Mohawk should implement an auction process to serve S.C. 3 customers, who already are exposed to market prices for 80 percent of their supply. Multiple Intervenors supported Niagara Mohawk's decision not to implement an auction process at this time. For the reasons set forth below, Multiple Intervenors opposes attempts to implement utility-administered auction processes to compete with alternate suppliers.

First, permitting utilities to act as aggregators for a large group of contestable customers pursuant to an auction could detract from the effectiveness of market-initiated aggregation efforts. As discussed in response to Question No. 3, supra, ESCOs, aggregators and customers routinely explore aggregation opportunities. The effectiveness of market-initiated aggregation efforts – and their attractiveness to potential suppliers – could be impaired, possibly significantly, by utilities entering into the aggregation business.

Second, there has been little to no justification for implementing utility-administered auctions, which would represent a fundamental shift in Commission policy.

Previously, the Commission has exerted great efforts towards having electric utilities divest generation and promote retail access. The long-term goal, Multiple Intervenors understood, was to transition the State's electric utilities out of the commodity business, at least eventually. Therefore, the proposal that utilities enter into new commitments to purchase commodity on behalf of aggregated groups of contestable customers through auction processes would represent, if implemented, a fundamental shift in Commission policy.[23]

Third, to the extent auction processes are implemented on behalf of some customer classes and not others, the utility could be subject to claims of discrimination and/or undue preference.[24] Moreover, if auction participants would be entitled to retail access credits and the utility's existing rate plan allows it to recover the "costs" associated with such credits from all customer classes, the auction proposal could be quite costly and unfair to non-participants.

On the other hand, subject to the overriding concern of the effect of large volume purchases by the utilities on the market, Multiple Intervenors is not opposed to the utilities' use of an auction, or any other prudent purchasing mechanism, as a means of securing least-cost supplies for remaining full service customers. For the reasons set forth earlier, such utility hedging strategies should be coordinated with a phase-in of market prices so that the end-state can be achieved. In addition, the utilities' purchasing decisions would

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[23] If the Commission changes its policy in a way that puts the utilities firmly back into the commodity business, it must ensure that delivery services customers still have access to vibrant, competitive commodity markets where they can save money. Allowing the utilities to seek bids for large blocks of power may limit the savings opportunities for delivery customers and further impede the transition to retail access.

[24] See, e.g., N.Y. Public Serv. Law § 65.

be subject to possible Commission prudence reviews, and all costs associated with those decisions would have to be absorbed by the remaining full service customers or, in the event of an imprudence finding, the utility. Under no circumstances should any costs associated with a proposed auction process – including any potential new stranded costs – be recovered from non-participating customers.

In conclusion, any auction activity undertaken by a utility should be in furtherance of its responsibilities to full service customers, while they exist. Such auctions should be short-term in nature, and terminate when utilities exit the merchant function. Importantly, auctions should not be used by utilities as a means to attract or retain customers to their commodity service, and participants should be responsible for all costs associated with the auction.

QUESTION NO. 7

Should all utilities' commodity purchases be considered public information as to price, terms and conditions?

With one caveat explained below, all commodity purchases by utilities should be considered public information as to price, terms and conditions. Utilities that purchase commodity to serve retail customers presumably intend to recover the costs of such purchases from customers in rates. Once the issue of cost recovery comes into play, there is no reasonable alternative but to treat information regarding utility commodity purchases – such as price, terms and conditions – as public information.

The one caveat to Multiple Intervenors' position on this issue pertains to whether a utility can demonstrate that the imposition of a short delay before information on its commodity purchases reaches the public domain would benefit customers. For instance, it is possible that a utility in the process of making commodity purchases from multiple suppliers would wish to have its recent purchases remain confidential so as to not impact negatively its current purchasing efforts. Where a utility can so demonstrate that a delay in making public commodity purchase information would be beneficial to customers, such a delay should be granted. However, given the public nature of this information and the volatility in New York's wholesale electricity markets, any delay granted should be relatively short in duration.

QUESTION NO. 8

What is the potential impact on retail competition of increased long-term (i.e., > 1 year) wholesale contracts purchased to fulfill the requirements of full-service utility customers?

Longer term wholesale contracts by utilities will have a dampening impact on retail competition. Initially, the existence of long-term wholesale commodity contracts likely would make it more difficult to transition utilities out of the merchant function, which may hurt retail access development. Moreover, before such long-term commitments can be authorized, a decision must be made to effectively preclude a subset of customers from migrating to retail access. Thus, encouraging longer-term supply contracts by the utilities would be a monumental policy decision for the Commission, as it would firmly place the utilities back in the commodity business and reverse a fundamental tenet of the Commission's unbundling/retail access initiative – that customer choice should be enhanced.

Multiple Intervenors recognizes that the Commission is concerned that new, long-term wholesale commodity contracts may be required to help ensure that new electric generation is constructed. The need for additional generation is particularly acute in New

York City and Long Island. Moreover, in the current market environment, developers of generation are finding it increasingly difficult to obtain financing absent long-term power purchase commitments. Thus, it may be desirable where new generation is needed in a utility's service territory, and the utility can help ensure that such generation is constructed by entering into a long-term wholesale commodity contract with the developer, to authorize such contracts.[25] However, such actions must be justified on a case-by-case basis and, in general, should be the exception, and not the rule. In addition, the long-term commitments need to be calibrated carefully with the needs of the remaining full service customers because, depending on the term, they may preclude some of those customers from migrating to retail access.

QUESTION NO. 9

How should differences between the wholesale market price of the commodity and the retail price of electricity under a utility's managed portfolio be reflected in end-user rates (i.e., should the difference be an adjustment to the utilities' delivery or commodity rates)?

Multiple Intervenors assumes that this question pertains primarily, if not exclusively, to the appropriate ratemaking treatment that should be accorded to differences between the utility's cost of purchasing electricity at wholesale and actual market prices for such electricity. Inasmuch as the question implies that such differences are recoverable from

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[25] For instance, Consolidated Edison Company of New York, Inc. recently issued a request for proposals for 500 MWs of new electric capacity for delivery in New York City. See Case 02-E-1656, Consolidated Edison Company of New York, Inc. – Petition for a Declaratory Ruling with Respect to Cost Recovery of Payments For Capacity and Associated Energy To Be Made As a Result of a Recently-Issued Request for Proposal Soliciting 500 MW of New Electric Capacity.

customers in rates, Multiple Intervenors also assumes that the utility's purchases are prudent; otherwise, they should not be recoverable from customers. For the reasons detailed below, all wholesale purchases of electricity by utilities should not be treated in the same manner for ratemaking purposes. A distinction should be made between existing and new hedges.

Initially, wholesale commodity purchases by a utility, presumably pursuant to a contract, should be examined to ascertain whether the contract is related to, or was intended to benefit, all customer classes. For instance, as part of the decision to divest generation, many utilities entered into PPAs with the purchasers of the generation assets. Some of those PPAs are at prices below market value; other PPAs are at prices around or slightly higher than market value. Importantly, all customer classes were responsible for funding, through rates, the construction, operation and maintenance of the power plants that were sold in the transactions to which the PPAs were integral components. Accordingly, all customer classes should share in the benefits, or losses, of the PPAs as compared to market prices. The differences between such PPAs and market prices should be passed back to all customers through a non-bypassable rate credit or surcharge, separate and apart from delivery rates. As the Commission transitions to unbundled rates for electric utilities, care should be exercised to limit delivery rates solely to costs associated with the provision of delivery service. Supply-related credits and costs should not be reflected in delivery rates.

In contrast, where utilities enter into new (or more recent) wholesale electricity contracts for the purpose of providing commodity service to remaining full requirements customers, only those customers should be responsible for the costs of such contracts. For instance, except as discussed above with respect to existing hedges, customers that have migrated to ESCOs should not be responsible for any costs, or receive any savings, resulting from wholesale commodity contracts intended to serve the utility's remaining full requirements customers. For those customers electing or obligated to remain a commodity customer of the utility, commodity rates should reflect the actual cost of the purchasing the commodity, including any hedge impacts and regardless of prevailing market prices.[26]

QUESTION NO. 10

If migration creates either a gap or a surplus between the utility load and the load covered by the portfolio contracts, and in selling the excess or purchasing the difference the utility experiences either a gain or loss, how should that gain or loss be treated in rates?

Initially, this question appears to presume that any gains or losses caused by a utility reselling electricity that is not needed due to an increase in migration would be reflected in rates. Such an outcome may not be appropriate in every instance. Utilities should be cognizant of migration levels and trends, and are under a duty to mitigate stranded costs. Thus, to the extent a utility enters the wholesale market, contracts for significantly more electricity than is needed to serve its full requirements customers, and then realizes losses when the excess is sold, the utility should bear all of the losses realized.[27]

[26] The Commission should make clear that to the extent a utility's decision to enter into a new, long-term contract results in strandable or stranded costs, and if the utility is authorized to recover such costs from customers, such recovery shall be limited to those full requirement customers that are taking hedged commodity service from the utility. Customers that purchase commodity from alternate suppliers, or the utility itself pursuant to an unhedged market-price pass-through, should not be responsible for the financial impact of new hedges entered into by the utility.

[27] In this respect, utilities would be treated comparably to ESCOs, who bear the financial risk associated with excessive commodity purchases.

To the extent customers are responsible for any gains or losses realized on excess electricity in the utility's commodity portfolio, the ratemaking treatment that should be accorded to such gains or losses should mirror the ratemaking philosophy outlined in response to Question No. 9 above. In other words, if excess electricity resold into the market stems from a PPA for which all customers are responsible (e.g., a PPA linked to the divestiture of generation assets), then all customers should share in the resulting gain or loss through a non-bypassable credit or charge that is separate and apart from delivery rates. Alternatively, if the excessive PPA was entered into for the sole benefit of full requirements customers, then those customers alone should share in the resulting gain or loss. As noted earlier, any gain or loss should be flowed only to full requirements customers through a non-bypassable credit or charge. Under no circumstances should the excess costs be reflected in delivery rates.

QUESTION NO. 11

Is an incentive mechanism needed for the utility to minimize its commodity costs? How would such a mechanism function?

Utilities should be obligated to minimize their commodity costs to the extent practicable. Therefore, an incentive mechanism to induce utilities to do what they already should be doing is not necessary.

In addition, such an incentive could hamper retail access development. The potential availability of positive financial incentives, pursuant to which additional profits could be realized through the sale of commodity to customers, likely would impede retail competition. In Multiple Intervenors' opinion, a utility would be less likely to promote retail access if it possesses a profit motive to continue selling commodity supplies to customers.

QUESTION NO. 12

Would some level of long term contracts as a component of electric or gas utility portfolios help to ensure incremental infrastructure gets built when needed to meet expected demand?

As discussed in response to Question No. 8, supra, it may be desirable, from a public policy standpoint, to allow a utility to enter into new long-term commodity contracts where it can demonstrate to the Commission that: (a) the commodity purchased under the contract is no more than what reasonably is needed to meet the projected requirements of the utility's commodity customers; (b) there is a compelling need that incremental infrastructure (e.g., new electric generating facilities) is constructed to meet rising demand; and (c) the utility's entering into a long-term commodity contract is necessary to ensure that the incremental infrastructure is constructed. Importantly, such a demonstration should be made before the utility enters into the long-term commodity contract, and the cost of that contract should be assigned to the intended beneficiaries (e.g., the utility's remaining full requirements customers). Moreover, as noted earlier, such a policy decision represents a reversal of prior policy of promoting retail access, and requires careful matching of the needs of the full requirements customers with the term of the long-term contract. Such contracts should be the exception, not the norm; and a utility contemplating entering into such a contract should be required to demonstrate that it will produce net benefits for consumers.

QUESTION NO. 13

Is there a need for a greater commitment regarding gas pipeline capacity from ESCOs serving gas customers?

- **If the utility is acquiring capacity for ESCO-served loads on its system, should there be a minimum commitment that the marketers must make to take that capacity?**
- **If ESCOs are providing their own capacity, should they be required to commit to providing the utility with access to that capacity if they exit the utility's retail program, or turn substantial load back to the utility? If yes, please explain how.**

It is Multiple Intervenors' position that gas marketers should continue to have the responsibility to obtain and maintain gas pipeline capacity for their customers. Currently, the Commission requires that marketers serving firm loads have primary firm capacity for the five months, November through March.[28] To the extent that a marketer cannot meet the primary firm capacity requirement, marketers have an obligation to notify their customers that they are deemed secondary firm customers subject to interruption under certain circumstances.[29] There has been no demonstration that the obligation to procure capacity should be shifted to the utility.

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[28] Case 97-G-1380, In the Matter of Issues Associated with the Future of the Natural Gas Industry and the Role of Local Gas Distribution Companies, Order Revising Pipeline Capacity Requirements for Marketers (August 28, 2000), Order Denying Petition for Rehearing and Granting Petition for Clarification (November 20, 2000).

[29] See e.g., Case 01-G-1668, Proceeding on the Motion of the Commission as to the Rates, Charges, Rules, and Regulation of New York State Electric and Gas Corporation for Gas Service, Order Establishing Terms and Conditions of Service (September 23, 2003). However, large commercial and industrial customers retain the option of contracting for secondary firm delivery from the upstream pipelines.

However, if, arguendo, a utility does acquire capacity for marketer-served loads on its system, the cost of such capacity should be the responsibility of the specific marketers and customers utilizing such capacity. As the Commission has held previously, it would be inappropriate to recover such upstream capacity costs from customers that previously have migrated from the system and who, often in conjunction with marketers, obtain, and pay for, their own upstream capacity rights.[30]

Lastly, in general, Multiple Intervenors agrees that pipeline capacity should be tied to the load it serves. However, as the Commission held in Case 97-G-1380 in addressing this issue, "[t]he particular circumstances faced by each LDC [and customer] give rise to issues that do not lend themselves to generic resolution."[31] Accordingly, the issue of dedicated pipeline capacity should be addressed on an individual contract basis.

QUESTION NO. 14

Are there any other issues related to the further development of retail markets that have arisen since the RD was issued that may be relevant to this proceeding and are not being addressed in another forum? If so, please identify them.

Multiple Intervenors has no response to this question at this time.

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[30] See Cases 98-G-1785, et al., In the Matter of the Allocation by Local Distribution Companies of Strandable Costs Caused by Customers Migrating from Sales to Transportation Services, Order Concerning Recovery of Stranded Capacity Costs (February 22, 1999).

[31] Case 97-G-1380, In the Matter of Issues Associated with the Future of the Natural Gas Industry and the Role of Local Gas Distribution Companies, Order Concerning Reliability (December 21, 1999).

CONCLUSION

For all the foregoing reasons, Multiple Intervenors urges the Commission to resolve the specific questions identified in the Notice in a manner consistent with these Initial Comments.

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Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail/by hand/overnight delivery.

Date: 3/22/04 Valerie K. Scarelli