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BY HAND

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

Re: *Retail Access Plan by Orange and Rockland Utilities, Inc.*
I.D. No. PSC-08-05-00008-P

Dear Secretary Brillling:

Enclosed for filing in the above referenced proceeding on behalf of New York State Electric & Gas Corporation ("NYSEG") and Rochester Gas and Electric Corporation ("RG&E"), please find the originally signed Supplemental Comments of NYSEG and RG&E on the Orange and Rockland Utilities Inc. Retail Access Plan which was filed on April 11, 2005 in accordance with Commission rules.

Very truly yours,

Jeffrey A. Rosenbloom
Senior Attorney

Encls.

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Retail Access Plan by)	I.D. No. PSC-08-05-00008-P
Orange and Rockland)	
Utilities, Inc.)	

**SUPPLEMENTAL COMMENTS OF NYSEG AND RG&E
ON THE ORANGE AND ROCKLAND UTILITIES, INC.
RETAIL ACCESS PLAN**

New York State Electric & Gas Corporation ("NYSEG") and Rochester Gas and Electric Corporation ("RG&E") (collectively "the Companies") hereby submit their supplemental comments on the Retail Access Plan (the "Plan") filed by Orange and Rockland Utilities, Inc. ("O&R") on January 27, 2005.¹ These Supplemental Comments address issues and spurious assertions included in the Reply Comments filed on behalf of the Small Customer Marketer Coalition and Mid-Atlantic Power Supply Association ("SCMC"), the National Energy Marketers Association ("NEMA"), O&R and its affiliate, ConEdison Solutions ("CES") (collectively the "Responding Parties"). The Responding Parties mischaracterize the Companies' Initial Comments as untimely and unwarranted, and in addition fail to adequately rebut, or even address, the Companies' central points: 1) that customers may be effectively slammed to prices unilaterally imposed by ESCOs without a customer's affirmative authorization, and 2) that there is no evidence that PowerSwitch has produced sustained savings and just and reasonable prices for customers. The Responding Parties are in a unique position to reply to the Companies' inquiries, as they enroll customers, establish prices and issue bills in the PowerSwitch program.

¹ The New York Public Service Commission (the "Commission") published a Notice (No. PSC-08-05-00008-P) about the Plan on February 23, 2005, seeking public comment on whether to adopt, modify or reject the Plan. The Companies filed initial comments in response to the PSC Notice on March 23, 2005 (hereinafter "Companies' Initial Comments").

But rather than providing facts and evidence of customer savings, or explaining how ESCOs obtain the customer's mutual agreement to prices after the second month (all of which information is in the sole possession of the ESCOs and O&R), the Responding Parties reply with scurrilous rhetoric and conflicting views of how the PowerSwitch program actually operates. Accordingly, the Companies reiterate their request for an immediate investigation of the PowerSwitch program.

A. The Responding Parties' Comments Further Demonstrate the Need for a Full Investigation of the PowerSwitch Program

CES, by its own admission, has participated in Switch and Save (now called PowerSwitch) for 3½ years and "enrolled" nearly 7,000 customers.² O&R has operated the program since 2000 and SCMC represents marketers active in the O&R service territory. What is most disturbing about the Responding Parties' comments is not their spurious procedural argument or their unsubstantiated claims, but rather it is their silence or conflicting views on the fundamental flaws in the PowerSwitch program. CES and SCMC, participating ESCOs, have provided no evidence, or even claims, of sustained savings for its customers in PowerSwitch.³ Nor have the Responding Parties' rebutted the Companies' assertion that customers may be switched after month two to prices unilaterally determined by an ESCO without the customer's affirmative agreement.⁴ In fact, O&R and the marketers state different views about what is required under the PowerSwitch program to sign up customers in month three.⁵ Thus, the Responding Parties' Comments provide further support for an investigation into PowerSwitch to determine whether the program is providing "ESCO choice," rather than customer benefits, and denying consumers just and reasonable rates.

² CES Reply Comments, p. 4.

³ Id.

⁴ Id., pp. 3-4; SCMC Reply Comments, pp. 8-9.

⁵ Compare SCMC Reply Comments, pp. 8-9 with O&R Reply Comments, p.5.

In its Initial Comments, the Companies questioned whether Switch and Save provides sustained savings to customers because the de minimis commodity discount of 7% in the first two months could be quickly negated by subsequent price increases unilaterally imposed by the ESCO.⁶ In response, CES makes an obtuse reference to unquantified tax savings and notes that PowerSwitch customers will continue to have the opportunity to choose other supply options.⁷ Similarly, SCMC and O&R offer no quantification of customer benefits and rely solely upon the absence of customer complaints to allegedly demonstrate the success of the PowerSwitch program.⁸ None of the Responding Parties provide specific evidence or quantification of how their customers have obtained sustained savings after month two of PowerSwitch, though they are in the unique position to do so. Rather, CES points to the benefit of customers' continuing opportunity to choose other alternatives, which opportunities exist regardless of whether a customer participates in PowerSwitch.⁹

CES is silent on the question of whether PowerSwitch customers are being effectively slammed to prices unilaterally imposed by an ESCO. While CES points out that customers give affirmative consent to O&R to initially enroll in the discount program, its own description of the process after enrollment demonstrates that, unless customers opt-out, they can be switched to new prices by the ESCO in month three, without the customer's affirmative consent.¹⁰ SCMC also obfuscates the issue of the effective slamming of customers in month three to prices

⁶ Companies' Initial Comments, pp. 3, 7. The Companies estimate that the average total discount for a typical residential customer (600 Kwh per month) enrolling during 2004 would have been approximately \$5.75, or less than a 1% savings on their total annual bill.

⁷ CES Reply Comments, p. 4.

⁸ See O&R Reply Comments, p. 3; SCMC Reply Comments, p. 4.

⁹ See CES Reply Comments, p. 4.

¹⁰ See id., p. 3 (emphasis added)

unilaterally determined by an ESCO by denying that it engages in 'slamming' as defined under Section 5(K)(1) of the UBP, a charge never levied by the Companies.¹¹

What is most alarming about the Responding Parties' comments, however, is the conflicting statements of O&R and the ESCOs on what is required to obtain a customer's mutual agreement to continue service with the ESCO after the two month discount period. O&R's website informs customers that "your price of energy supply after the initial two months will be by mutual agreement between you and the alternate supplier".¹² In its comments, O&R states that for service after the second month, ESCOs are required to comply with the UBP enrollment procedures.

Under the UBP, ESCOs are required to obtain customer authorization within the first two months of PowerSwitch service, in the same manner as if they had initially been contacted by and enrolled the customer. Pursuant to UBP Section 5, Attachment 1-3, the ESCO, and not the utility, is responsible for obtaining and retaining the agreement and/or authorization between the customer and the ESCO.¹³

According to SCMC, however, ESCOs are not subject to the UBP enrollment requirements of Section 5 when seeking the customer's mutual agreement for service beyond the second month.

After the initial enrollment is completed, the remaining step merely involves that the ESCO and the customer reach mutual agreement with respect to the terms and conditions that will be applicable after the two-month introductory period. However, this second step does not constitute a new enrollment by the customer under the terms of UBP as the customer has already been enrolled and transferred to the ESCO's account. ... The UBP does not prescribe a specific format or methodology which must be used to obtain the mutual agreement as to terms and conditions that will continue for the remaining terms of the

¹¹ See SCMC Reply Comments, pp. 6-8.

¹² See Companies' Initial Comments, Exhibit A.

¹³ See O&R Comments, p. 5.

contract, as the UBP is applicable to the enrollment process that has already occurred.¹⁴

Accordingly, the Responding Parties' own pleadings demonstrate that the Commission should investigate the operation of PowerSwitch because participating ESCOs disagree with O&R about what rules apply to obtaining an agreement with customers after month two. The Responding Parties' comments also raise a fundamental question that must be addressed by the Commission – whether a price unilaterally imposed by an ESCO, and not affirmatively agreed to by a customer who has been enticed to participate in a regulated discount program, can be deemed just and reasonable.

B. The Commission Should Investigate PowerSwitch Based Upon New Information About the Program's Flaws

In noticing the O&R Plan, which includes a proposal to continue the flawed PowerSwitch program, the Commission sought "public comment on whether to adopt, modify or reject" the Plan.¹⁵ The Responding Parties' characterization of the Companies' Initial Comments as an untimely petition for rehearing of the August 25, 2004 End-State Policy Statement is erroneous as a matter of fact and law.¹⁶ The End-State Policy Statement did not authorize the PowerSwitch program nor did it require its replication by other utilities. Contrary to the Responding Parties fallacious assertions, the End-State Policy Statement did not include an approval of the PowerSwitch program that would be subject to appeal at that time. The issue of whether to "adopt, modify or reject" PowerSwitch has only become ripe with the filing of O&R's Retail Access Plan.¹⁷ In response to the Commission's Notice seeking comments on the O&R Retail

¹⁴ See SCMC Comments, pp. 8-9.

¹⁵ See Notice PSC-08-05-00008-P.

¹⁶ See CES Comments, pp. 2; O&R Comments, p. 6; see also Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, pp. 3, 15, 16 (hereinafter the "End-State Policy Statement").

¹⁷ See Notice I.D. No. PSC-08-05-00008P.

Access Plan NYSEG and RG&E have appropriately suggested that the Commission immediately investigate, and determine whether to halt, the flawed PowerSwitch program under which customers may be subject to a 'bait and switch' type offer and then effectively slammed to prices imposed by an ESCO without the customers' affirmative acceptance.

As a result of the Commission's commentary on PowerSwitch in the End-State Policy Statement, three utilities have proposed to replicate that program in the past several months.¹⁸ Based upon those filings, parties have been inquiring into the details of the O&R program, in an attempt to determine what has, or has not, been successful. As a result of this scrutiny, it has been revealed that the PowerSwitch program is, in fact, flawed, because it allows for the effective slamming of customers in the 3rd month to ESCO prices not affirmatively agreed to by the customer.¹⁹ Moreover, it has also become apparent that there is no evidence demonstrating that the PowerSwitch program provides sustained savings for customers.

In referring to the PowerSwitch program in the End-State Policy Statement, the Commission did not order utilities to adopt the program or approve continuation of the O&R plan indefinitely. In fact, the Commission noted that emerging markets are unpredictable and that it needs to remain flexible to adapt its policies to changing circumstances.²⁰ There was no consideration of the customer impacts resulting from PowerSwitch or the effective slamming of O&R customers in the End-State Policy Statement. Indeed, O&R's own website states that after month two, customer's prices will be subject to "mutual agreement" of the customer and the ESCO.²¹ As evidenced by the conflicting comments of O&R and ESCOs in this proceeding, ESCOs do not believe they need to comply with Section 5 of the UBP, while O&R maintains

¹⁸ See National Grid Retail Access Plan, Case 00-M-0504 (12-21-04); Central Hudson Retail Access Plan, Case 00-M-0504 (12-15-04); and Con Edison Joint Proposal, Case 04-E-0572 (12-2-04).

¹⁹ Companies' Initial Comments, pp. 3-5.

²⁰ See End-State Policy Statement, pp. 2, 4, 24.

²¹ See Companies' Initial Comments, Exh. A.

that they require such compliance for signing up customers for service beyond the second month of PowerSwitch.

The SCMC Reply Comments also fail to squarely address what participating ESCOs are doing to obtain the 'mutual agreement' of customers for prices and terms after month two in the PowerSwitch program.²² SCMC admits that there is no direct agreement between participating customers and the ESCO when the customer initially enrolls.²³ SCMC then illogically asserts that the "agreement" with the customer for prices and terms after month two is not governed by the UPB, because the customer is already enrolled with the ESCO, even though there was no direct agreement between the ESCO and the customer for such enrollment, as required by Section 5(B) of the UPB.²⁴ As noted above, SCMC's position conflicts with that of O&R, which asserts that the new enrollment requirements under UPB Section 5(B) apply to ESCO service after month two. SCMC carefully avoids stating its view of what is required to obtain a customers' 'mutual agreement' for service beyond month two in the PowerSwitch program, and, tellingly, never denies that in month three participating customers who do not 'opt out' of the ESCO's program are automatically switched to new prices unilaterally determined by the ESCO without the customers affirmative agreement.²⁵

The Companies have only begun to become aware of how the PowerSwitch program actually operates in discussions in the National Grid Retail Access Collaborative. In that collaborative, the Companies and other parties have repeatedly inquired about evidence of sustained savings for customers, customer impacts and data documenting operation of the PowerSwitch program. O&R has failed to respond to the questions of the parties, including the

²² See SCMC Reply Comments, pp. 6-10

²³ See *id.*, p. 8. SCMC's claim that an ESCO's agreement with O&R to participate in PowerSwitch "in effect" acts as the sales agreement with the customer is spurious and not provided for under Section 5(B) of the UPB.

²⁴ *Id.*

²⁵ See SCMC Reply Comments, pp. 8-9.

Consumer Protection Board, the Public Utility Law Project and the Companies. Staff invited O&R to participate in the collaborative and respond to the parties' questions, but O&R declined. Now in this proceeding, O&R and the participating ESCOs have also interceded in an apparent attempt to avoid further scrutiny of this flawed program. Meanwhile, O&R's affiliate (ConEd) has not provided evidence supporting the justness and reasonableness of its similar retail access proposal.²⁶ The Responding Parties' Comments serve only to confirm the program flaws, the lack of evidence of consumer savings and the need for an immediate investigation of all of these ConEd affiliate programs. Because the Commission has promoted PowerSwitch as a "model" program, it should not now allow participating marketers, O&R and its affiliates to stonewall and block a public examination of the program's operations and results.

C. The Commission Must Ensure That Prices Charged Under PowerSwitch Are Just and Reasonable

The Responding Parties' assertion that the just and reasonable standard should not apply to PowerSwitch because it is inapplicable to 'competitive ESCO charges' is erroneous. PowerSwitch is a program that is clearly subject to the jurisdiction of, and approval by, the Commission. Under the program, ESCO's customer acquisition costs are subsidized by the utility's marketing assistance, which subsidies are ultimately borne by O&R's customers. ESCOs offer a standard discounted rate, approved by the Commission, in order to entice the customers into continuing service with the ESCO.

SCMC asserts that there is no new enrollment of the customer required after month two.²⁷ Accordingly, the customer is continuing to participate in a regulated program, where the prices

²⁶ See Case 04-E-0572, Petition for Rehearing of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation of the Commission's March 24, 2005 Order Adopting Three-Year Rate Plan (dated April 1, 2005), in Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York for Electrical Service, pp. 8-9.

²⁷ See id.

charged should be subject to the just and reasonable standard. Indeed, if PowerSwitch were not a regulated program, ESCOs could not agree to provide one standard discounted price under anti-trust statutes.

D. The Responding Parties' Retaliatory Request For An Inquiry of NYSEG and RG&E Is Baseless

SCMC's and NEMA's scurrilous allegations that the Companies' Initial Comments are an abuse of process are unfounded and a disingenuous attempt to shift focus away from legitimate questions regarding PowerSwitch. In their Initial Comments, NYSEG and RG&E raised valid concerns regarding a so-called "model" program that is now being proposed for replication in three other service territories. Responding to the Commission's request for comments on the O&R Retail Access Plan by asking the Commission to consider whether this "model program" has, in fact, produced sustained benefits for customers is an appropriate invocation of the Commission's jurisdiction. The Responding Parties refusal to address this question, their conflicting views on what UBP rules apply to the program and their extensive efforts to shield from public review the impacts of the PowerSwitch program on customers further supports the Companies' request for an investigation.

All of the Companies' programs are reviewed and approved by the Commission, which has determined those programs, including the fixed rate commodity option are just and reasonable. All material information about the Companies' finances are publicly disclosed to the PSC, to the Securities and Exchange Commission and in other forums, where they are subject to full public scrutiny. Unlike the ESCO's activities in PowerSwitch, all details about the Companies' retail access activities are transparent and subject to public review.

The Companies have instituted the most comprehensive retail access programs in the state, Voice Your Choice, to facilitate customer choice and migration. As noted recently by

Chairman Flynn, 20% of RG&E's electric customers are now purchasing from ESCOs, which is the second highest penetration rate of any utility service territory in New York.²⁸ In the most recent Voice Your Choice program, 30% of NYSEG's customers made a choice, resulting in an increase of 38% of customers served by ESCOs. All of this has been accomplished by offering customers fully informed choices, without the need to bait customers with artificial discounts. Measured by the criteria propounded by the Responding Parties that absence of customer complaints defines a successful retail access program, the NYSEG Voice Your Choice program is an unqualified success as there have been no complaints about the program from the over 850,000 customers to whom the program was offered since October, 2002.

SCMC's and NEMA's ridiculous suggestion that the Companies are engaging in anti-competitive conduct and abuse of process by raising legitimate questions about a flawed program is baseless and clearly retaliatory. The only question that should be considered by the Commission is why ESCOs participating in PowerSwitch want to shield from public disclosure the facts about how customers have been impacted under that program. Unlike the ESCOs, NYSEG and RG&E welcome the continuing public review of their programs and actions in a fully transparent marketplace.


²⁸ See Speech by Chairman William Flynn, NYPSC, before the Rochester Electrical Assoc. (3-30-05).

I. Conclusion

For the above-stated reasons, NYSEG and RG&E respectfully reiterate their request that the Commission immediately investigate, and determine whether to halt, the O&R PowerSwitch Program. In the interim, the Commission should defer consideration of any retail access programs modeled after PowerSwitch.

Respectfully submitted on behalf of

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