STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on April 18, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 07-M-0458 - Proceeding on Motion of the Commission to Review Policies and Practices Intended to Foster the Development of Competitive Retail Energy Markets.

ORDER ON REVIEW OF RETAIL ACCESS POLICIES AND NOTICE SOLICITING COMMENTS

(Issued and Effective April 24, 2007)

BY THE COMMISSION:

BACKGROUND

In Opinion Nos. 96-12 and 94-26,[1] it was envisioned that consumers would have the opportunity to obtain retail electric and natural gas supply through competitive markets. It expected that effective competition over the provision of retail energy services would lead to lower prices and the proliferation of energy product choices.

In 2004, policies that had been developed to promote the growth of competitive retail energy markets were revisited

[1] Case 94-E-0952, Competitive Opportunities Regarding Electric Service, Opinion No. 96-12 (issued May 20, 1996); Case 93-G-0932, Emerging Competitive Natural Gas Markets, Opinion No. 94-26 (issued December 20, 1994).

in the Retail Market Policy Statement.[2] It was concluded that competitive energy markets remained in the public interest, and additional strategies intended to further stimulate market development were proposed. These strategies were implemented or evaluated further both in proceedings dedicated to a particular program and in utility rate plans.[3] Among the strategies were: the auctioning of blocks of load to energy services companies (ESCO);[4] using utility customer service call centers to facilitate the transfer of customers to ESCOs;[5] the purchase of ESCO accounts receivable by utilities in combination with the continuation of utility consolidated billing;[6] the unbundling of utility bill formats;[7] and, procedures for making customers' utility account numbers more readily available to ESCOs.[8]

Efforts were also made, in utility rate plans, to promote the success of retail markets, through spending on advertising and other means of attracting attention to retail access and competitive providers. Included among these practices were outreach and education plans, market match

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[2] Case 00-M-0504, supra, Statement of Policy on Further Steps Toward Competition in Retail Energy Markets (issued August 25, 2004).

[3] Retail Market Policy Statement, pp. 26–31.

[4] Case 04-E-0572, Consolidated Edison Company of New York, Inc., Order Adopting Three-Year Rate Plan (issued March 24, 2005)(Con Edison Rate Order), Joint Proposal (JP), pp. 35-36.

[5] Case 05-M-0858, State-Wide Energy Services Company Referral Programs, Order Adopting ESCO Referral Program Guidelines and Approving an ESCO Referral Program Subject to Modifications (issued December 22, 2005).

[6] See Case 05-M-0333, Niagara Mohawk Power Corporation, Order Clarifying and Adopting Joint Proposal on Competitive Opportunities (issued April 20, 2006).

[7] Case 00-M-0504, supra, Order Directing Submission of Unbundled Bill Formats (issued February 18, 2005).

[8] Case 98-M-1343, Accent Energy LLC, Order Denying Petition and Making Other Findings (issued November 7, 2006).

programs, market expos, energy fairs, and utility designation of an ombudsman to respond to ESCO concerns. Utilities were also required to detail the progress of efforts to promote retail access, by surveying customers' awareness of competitive alternatives and ESCOs' satisfaction with utility performance, and by filing retail access reports.[9] Some utilities were awarded a migration incentive, allowing them to earn monetary rewards based on their success in promoting retail competition, often measured by the number of their customers that selected ESCOs.[10]

Finally, utilities were allowed to recover from ratepayers the lost revenues "that they fail to realize because of retail migration,"[11] because, absent that recovery, utilities would confront financial disincentives discouraging them from actively promoting retail access. Lost revenue recovery issues were addressed in more detail in the Unbundling Policy Statement, where it was decided that lost revenue recovery mechanisms were needed only to the extent that customer migration resulted in total revenues less than those assumed in setting rates.[12] It was also determined that:

> [A] mechanism for measuring lost revenues that is based on rate year assumptions and allows for offsets in a true-up calculation based on

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[9] Case 05-E-0934, Central Hudson Gas & Electric Corporation, Order Establishing Rate Plan (issued July 24, 2006)(Central Hudson Rate Order), JP, pp. 48-52; Case 03-E-0765, Rochester Gas and Electric Corporation, Order Adopting Provisions of Joint Proposals With Conditions (issued May 20, 2004)(RG&E Rate Order), pp. 25-26.

[10] Con Edison Rate Order, JP, pp. 29-30.

[11] Case 00-M-0504, supra, Order Establishing Parameters For Lost Revenue Recovery and Incremental Cost Studies (issued March 21, 2002), p. 23.

[12] Case 00-M-0504, supra, Statement of Policy on Unbundling and Order Directing Tariff Filings (issued August 25, 2004).

> revenue growth would be an acceptable approach to designing a recovery mechanism."[13]

Lost revenue recovery mechanisms meeting that standard have been devised in rate plans.[14]

DISCUSSION AND CONCLUSION

We have long supported the development of viable and sustainable competitive markets, which promote economic efficiency and thereby yield consumer benefits. In pursuit of that goal, the Retail Access Policy Statement prescribed programs and initiatives intended to identify and eliminate barriers to entry into retail energy markets and obstacles to the development of those markets.

In response to the Retail Market Policy Statement programs, and the practices for promoting market development adopted in rate proceedings, retail energy markets have developed and grown. Currently, more than 100 ESCOs, including companies that are large and well-capitalized, are eligible to do business in New York. In each of the service territories of the six major combined utilities, at least six electric and six gas ESCOs are actively serving customers. These ESCOs serve more than 1.3 million customer accounts, with about 40% of New York's electric usage and 46% of gas usage met by ESCOs or from other alternatives to utility supply.[15] Competitive markets have continued to grow over the past year, with an overall statewide increase of about 44% in the number of electric customer accounts moved to ESCOs (a 15% increase in load) and an 18%

[13] Unbundling Policy Statement, p. 34.

[14] See, e.g., Central Hudson Rate Order, JP, pp. 19-22.

[15] Electric statistics have been updated through February 2007; gas statistics are those from December 2006.

increase for gas customer account movement (a 4% increase in load).

Large electric customers, equipped with sophisticated metering that enables them to track their demand and usage on an hourly basis and respond to hourly price signals, and large gas customers, have generally embraced retail competition. Among large time-of-use metered electric customers, 74% of statewide electric usage is served through the retail marketplace, and, for large gas customers, 83% of statewide gas usage is supplied from non-utility sources. These figures represent, over the past year, a 6% increase in large electric customer movement (a 12% increase in load), and a 13% increase in large gas customer movement (a 12% increase in load).

Mass market customers are trying retail access in increasing numbers. The highest retail access penetration rate for residential customers in a single service territory has reached 37%. Statewide, ESCOs now serve about 11% of the residential electric customer accounts in New York, with only one utility service territory falling substantially below the 10% figure. For gas customers, the statewide residential penetration rate is approaching 10%, with migration below 1% at just two of the eleven gas companies offering retail access. Over the past year, the statewide increase in residential electric customer movement is 55% (a 41% increase in load) and the increase in residential gas customer movement is 19% (albeit load decreased). These figures indicate that the retail energy marketplace is established in New York and is continuing to expand.

The 2004 Retail Access Policy Statement directed utilities to file plans that incorporated programs and practices that would encourage retail market development by reducing or removing barriers to entry for ESCOs to provide competitive retail services. It may be appropriate, at this time, to review these programs and practices to determine their effectiveness in removing barriers, examine the costs of these initiatives and the extent to which those costs are borne by ratepayers, and determine the need to continue programs and practices that are subsidized by ratepayers or, alternatively, the potential harm of discontinuing those programs.

If barriers to entry and other obstacles to the growth of competitive markets have been successfully removed, it may be preferable to allow competitive retail markets to develop on their merits without ratepayer subsidization. If the market is open to competition, competitive providers should succeed or fail based on whether they can offer energy products on terms that consumers find preferable to regulated utility rates. Subsidizing competitors could impede this proper functioning of a competitive market.

Moreover, continuing to burden ratepayers with the costs of programs or practices promoting market development may be of questionable value, if the removal of obstacles to entry and market development has been achieved, or achieved to the extent feasible. Some programs or practices may have outlived their usefulness and could be allowed to expire. In other cases, the costs of programs or practices might be shifted from ratepayers to market competitors.

On the other hand, continuation of some of the existing or the introduction of new programs and practices for promoting retail access might still be needed to realize the full potential of retail markets, especially if the cost of implementing a program or practice is not charged to ratepayers.[16] Moreover, to ensure that retail markets continue to function efficiently and fairly, the Electronic Data Interchange and Uniform Business Practices we have adopted will remain in place and will be enforced.[17]

Parties are encouraged to examine and submit comments on the existing programs and practices of the utilities to promote retail market development. The evaluation of such programs and practices should examine whether they are still necessary; if competitors are improperly subsidized; if risks and expenses are properly allocated among ratepayers, utilities and competitors; or, if a program or practice should otherwise be reconfigured. On the other hand, parties may also point out that the continuation of a program or practice remains necessary, to ensure that all market participants are treated fairly or to prevent the re-building of barriers to entry.

Unbundled backout rates, competitive service charges, or market supply charges, as well as associated lost revenue recovery, are included among the issues parties are encouraged to analyze in greater depth. The Unbundling Policy Statement already notes that other approaches might be more reasonable than the alternatives suggested in the Policy Statement itself, and parties were encouraged to explore alternatives as future utility filings were received. That process should continue.

Comments on the issues raised in this Order and Notice will be considered on a generic basis. In the interim, while we are considering those comments, however, parties are encouraged

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[16] If continued ratepayer funding of a program is warranted, but costs have grown to levels that are excessive, cost reductions may be necessary before cost recovery is allowed to proceed.

[17] See Cases 98-M-0667 and 98-M-1343, Electronic Data Interchange and Uniform Business Practices, Order Modifying Electronic Data Interchange and Uniform Business Practices (issued May 19, 2006); Case 07-G-0331, Appeal of Olympic Power, Inc., Order Denying Appeal (issued March 30, 2007).

to submit in rate proceedings, analysis of a particular utility's existing retail access programs and practices and, where appropriate, propose modifications, with the understanding that we might defer to the generic process in reaching a decision on any particular policy or program. Consideration in rate cases, however, will allow us to respond rapidly where a proposed modification to a retail access program or practice would clearly prevent subsidization of competitors or benefit ratepayers.

Accordingly, interested parties are invited to submit an original and ten copies of their comments on the issues discussed above to the Secretary by June 7, 2007. Reply comments may be filed by June 27, 2007. Persons intending to file comments or wishing to receive copies of the comments that might be filed should notify the Secretary in writing no later than May 18, 2007, so that a list of active parties may be timely posted to the Web site.

<u>The Commission orders</u>:

1. Interested parties shall submit an original and ten copies of their comments on the issues described in the body of this Order by June 7, 2007, to Jaclyn A. Brilling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, New York 12223-1350. An original and ten copies of reply comments may be filed by June 27, 2007.

2. Retail access programs, practices and policies will be reviewed in on-going and future electric and gas utility rate proceedings in conformance with the discussion in the body of this Order.

3. Persons intending to file comments or wishing to receive copies of the comments of others are invited to notify the Secretary in writing no later than May 18, 2007. A list of

active parties to this proceeding will be posted to the Web site prior to June 7, 2007. Any person filing comments shall serve copies to that list of active parties.

4. The deadlines provided for in this Order and Notice may be extended as the Secretary may require.

5. This proceeding is continued.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary