

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL TRADE COMMISSION

V010003 -- COMMENTS REGARDING RETAIL ELECTRICITY COMPETITION

COMMENTS OF THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK

Pursuant to the Notice Requesting Comments on Retail Electricity Competition Plans, the Public Service Commission of the State of New York (NYPSC) files these comments regarding the above-captioned inquiry. Copies of all documents and correspondence should be sent to:

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The Federal Trade Commission (FTC) issued a Notice Requesting Comments on Retail Electricity Competition Plans on February 28, 2001, seeking information regarding different regulatory approaches to the introduction of retail electric competition. Pursuant to the Notice and the questions contained therein, the NYPSC submits the following responses.

History and Overview

1. WHY DID THE STATE IMPLEMENT RETAIL ELECTRICITY COMPETITION? WHAT PROBLEMS OF THE PREVIOUS REGULATORY REGIME WAS IT TRYING TO SOLVE?

The NYPSC concluded in 1996, that "after balancing the benefits and risks, we are convinced that we should move towards retail competition. A market with multiple buyers and sellers offers greater incentives and opportunities for lower prices,

greater innovation, and expanded choice of options for customers."¹

2. WHAT WERE THE EXPECTED BENEFITS OF RETAIL COMPETITION? WERE PRICE REDUCTIONS EXPECTED IN ABSOLUTE TERMS OR IN RELATION TO WHAT PRICE LEVELS WOULD BE ABSENT RETAIL COMPETITION? WERE THE BENEFITS OF RETAIL COMPETITION EXPECTED TO BE AVAILABLE TO CONSUMERS IN URBAN, SUBURBAN, AND RURAL AREAS? WERE THE BENEFITS EXPECTED TO BE AVAILABLE FOR RESIDENTIAL, COMMERCIAL, AND INDUSTRIAL CUSTOMERS? WERE THE BENEFITS EXPECTED TO BE COMPARABLE FOR EACH GROUP OF CUSTOMERS?

The NYPSC indicated that "competition in the generation and energy services sectors of the electric industry will be pursued for its potential to reduce rates over the long term, to increase customer choices, and for other economic development advantages."² The benefits of retail competition were expected to pass through to all customer classifications in the question; however, the largest customers were expected to be the earliest beneficiaries.

3. WHAT FACTORS OR MEASURES SHOULD THE COMMISSION EXAMINE IN VIEWING THE SUCCESS OF A STATE'S RETAIL ELECTRICITY COMPETITION PROGRAM? HOW SHOULD THESE MEASURES BE EVALUATED?

It would be premature to review New York's program during the transition to competition. From the beginning of competition, the NYPSC has been dedicated to carefully monitoring the progress of retail competition to help ensure it was being implemented both fairly and effectively. The NYPSC and its staff placed a premium on reliable and timely feedback

¹ Cases 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 96-12 (issued May 20, 1996) (hereinafter "Opinion No. 96-12").

² Opinion No. 96-12.

about electricity markets in general and the State's retail access programs specifically.

The NYPSC secured input from a diverse group of interested parties, including government agencies, consumer advocates, utilities, energy service companies and environmental groups. A collaborative process was frequently employed to help shape policy.

The NYPSC also encouraged the use of evaluations as a source of reliable and unbiased data to monitor progress and guide policy decisions. Either through its own resources or independent contractors, the NYPSC regularly surveys consumers, energy service companies and utilities. For example:

- Comprehensive evaluations of retail access pilot programs and the early stages of retail access were conducted to pinpoint the strengths and weaknesses of these efforts. This research was especially useful in refining billing policies.
- On an annual basis, consumer-tracking surveys are conducted to monitor consumer awareness of retail access and the effectiveness of the NYPSC's retail access outreach program.
- Evaluations are used to provide detailed information about a specific issue or event, such as the survey that was conducted to obtain customer feedback about improving the design of a proposed environmental disclosure label.
- The rates of migration to energy marketers are tracked on a regular basis and posted on the NYPSC's web page.

4. WHAT ARE THE MOST SUCCESSFUL AND LEAST SUCCESSFUL ELEMENTS IN THE STATE'S RETAIL COMPETITION PROGRAM? HAS THE STATE TAKEN STEPS TO MODIFY THE LEAST SUCCESSFUL ELEMENTS?

New York's retail access program has made significant progress. The most successful element in New York's retail competition program is that it has been implemented through the

NYPSC's actions, rather than legislative initiative. These actions have been the result of collaborative efforts among stakeholders to ensure that divergent viewpoints have been considered. When experience with retail competition indicates changes should be made, the NYPSC can take prompt remedial action. For example, some utilities were permitted to establish fixed back-out credits, against which marketers could compete in providing electric supply. When prices in the wholesale market exceeded the fixed backout credit level, the NYPSC instituted market-based backout credits for those utilities. Legislative action would have taken longer and would have been less flexible than the agency administered program.

The NYPSC is working to improve several aspects of retail access. For example, utilities still offer bundled rates to customers with generation credits backed out for retail access customers. However, on March 29, 2001, the NYPSC initiated a proceeding to give expedited consideration to full rate unbundling. The unbundling of functions, costs, and rates on a consistent, statewide basis will allow customers the choice to purchase competitive services from the utility or alternative suppliers. Additionally, the NYPSC has already required that costs for certain functions -- metering and billing -- be backed out of sales rates.

Furthermore, the NYPSC is working to enhance retail access in other critical areas, including consolidated billing, uniform business practices, electronic data interchange (EDI)

and allowing customers to bid demand-side resources into the market.

Consumer Protection Issues

1. **WHAT EFFORTS WERE MADE TO EDUCATE CONSUMERS ABOUT RETAIL COMPETITION? HOW WAS THE SUCCESS OF THESE EFFORTS MEASURED? WERE THE PROGRAMS SUCCESSFUL? WHO FUNDED THESE EFFORTS? WHO IMPLEMENTED THE PROGRAMS?**

The NYPSC's efforts to educate consumers about retail competition are focused on a program targeted directly to consumers as well as encouraging New York's electric and gas utilities to provide effective customer education programs on retail competition. The NYPSC provides a statewide retail competition education program, which utilizes the full range of mass media (i.e., television, radio, newspapers, direct mail and out-of-home advertising). This program is state-funded with an annual budget of approximately \$1 million. In addition, the NYPSC conducts a grassroots outreach effort, which includes events, presentations and train-the-trainer exercises, targeted to smaller audiences. Furthermore, all New York utilities have been directed to provide their customers with information regarding retail choice. This information has been communicated using various vehicles, including direct mail and bill inserts.

Starting in 1998, the NYPSC began conducting annual statewide surveys to track the awareness and understanding of competition, as well as other related issues such as attitudes and informational needs, of residential customers and small business'.

2. DO CONSUMERS HAVE ENOUGH INFORMATION TO READILY MAKE INFORMED CHOICES AMONG COMPETING SUPPLIERS? DID THE STATE COORDINATE ITS LABELING REQUIREMENTS ABOUT THE ATTRIBUTES OF A SUPPLIER'S PRODUCT, IF ANY, WITH NEIGHBORING STATES? IS THERE A NEED FOR FEDERAL ASSISTANCE TO PROVIDE STANDARDIZED SUPPLIER LABELING? IF SO, WHAT WOULD BE THE MOST USEFUL FEDERAL ROLE?

Based on the NYPSC's annual tracking survey of residential consumers, we found that approximately 60 percent of residential consumers are aware of retail access in New York State. However, the research also suggests that not all consumers that are aware of retail access have sufficient knowledge to select and switch to an electric marketer. The NYPSC is continuing its education and outreach efforts to improve awareness and increase understanding.

Regarding the environmental attributes (i.e., fuel mix and emission rate), the NYPSC has instituted a program whereby all retail suppliers will be required to disclose to their existing and prospective retail customers an explanation of the fuel sources used to generate their power. Every six months, customers' bills will indicate the percentage of their power that is coming from coal, natural gas, nuclear, solar, hydro, solid waste and/or biomass. The bills will also include sulfur dioxide, nitrogen oxide and carbon dioxide emission levels benchmarked against New York State's electric generation average. The NYPSC will administer this program and provide the information to the retail suppliers. The labeling format being planned takes into account similar information that is available in other states. The NYPSC Order, which implements the environmental disclosure program, directs staff to review the

disclosure label formats as they evolve in other states or at the federal level and to modify the label as appropriate to maximize uniformity.³

3. HAVE CONSUMERS COMPLAINED ABOUT UNAUTHORIZED SWITCHING OF THEIR ACCOUNTS TO ALTERNATIVE SUPPLIERS ("SLAMMING") OR THE PLACEMENT OF UNAUTHORIZED CHARGES ON THEIR ELECTRIC BILLS ("CRAMMING")? WERE RULES ADOPTED TO PREVENT THESE PRACTICES? HAS THE STATE TAKEN ENFORCEMENT ACTION UNDER ITS NEW AUTHORITY AGAINST SLAMMING AND CRAMMING? HAVE THESE ACTIONS BEEN EFFECTIVE TO CURB THE ALLEGED ABUSES? IS THERE A NEED FOR FEDERAL ASSISTANCE WITH SLAMMING AND CRAMMING ISSUES? IF SO, WHAT WOULD BE THE MOST USEFUL FEDERAL ROLE?

The NYPSC's Order on retail access for both electricity and natural gas established processes for verification of all customer switches.⁴ These rules, which became part of the State's Uniform Retail Access Business Practices,⁵ require that the local distribution company (LDC) verify each consumer switch in writing. The LDC sends a letter asking the customer to notify the LDC if the information submitted by the alternate retail energy service company (ESCO)⁶ is inaccurate. The consumer would then have to object to the switch for it not to occur. Consumers can physically sign a contract with their new ESCO, enroll over the telephone with taped order verifications conducted by a third party, or enroll

³ Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric service, Opinion No. 98-19, (issued December 15, 1998) at p.11.

⁴ Case 98-M-1343, In the Matter of Retail Access Business Rules, Opinion No. 99-3, (issued February 16, 1999) (hereinafter "Opinion 99-3").

⁵ Opinion No. 99-3 at Appendix B.

⁶ An ESCO, as used in this document, refers to an entity that provides electric and/or gas services.

over the internet. The new ESCO must retain all enrollment information for six years.

Slamming charges are individually investigated and verified. The New York State Attorney General (AG) has reached a settlement with one ESCO the AG found engaged in "slamming" practices. We do not think that federal intervention is required.

4. HOW DID THE STATE FACILITATE THE ABILITY OF CUSTOMERS TO SWITCH TO A NEW SUPPLIER? HAVE THESE EFFORTS BEEN SUCCESSFUL? DOES THE STATE ALLOW CONSUMERS TO AGGREGATE THEIR ELECTRICITY DEMAND? IF SO, HAS AGGREGATION ENABLED CONSUMERS TO BENEFIT FROM RETAIL ELECTRICITY COMPETITION? IF NOT, WHY NOT?

LDCs were required to submit a timetable for the phased implementation of retail access to the NYPSC. Each phase included increasing the number of consumers that could be shifted to alternate ESCOs.

Some of the NYPSC's rate and restructuring agreements required LDCs to pay incentives to facilitate the initial movement of consumers. The funding available for these incentives was often quickly exhausted. Although the total number of customers who switched was relatively small compared to the number of eligible consumers,⁷ these efforts have been successful.

New York permits and encourages electricity and natural gas aggregation programs.

⁷ As of December 2000, 229,280 customers (representing 3.7% of eligible customers) have switched to a new supplier.

Aggregation efforts have been modestly successful. Several pilot aggregation programs involving social services clients have reduced the cost of energy supplies to those consumers. Aggregation programs developed by entrepreneurs have resulted in extended term contracts with ESCOs for group membership. It is expected that these efforts will continue to expand.

5. **HAS THE STATE ESTABLISHED LICENSING OR CERTIFICATION REQUIREMENTS FOR NEW SUPPLIERS TO PROVIDE ELECTRICITY TO CUSTOMERS? WHY? WHICH LICENSING PROVISIONS ARE DESIGNED TO PROTECT CONSUMERS? HOW DO THEY OPERATE? HAS THE STATE TAKEN ENFORCEMENT ACTION AGAINST UNLICENSED FIRMS? HAVE THESE ACTIONS BEEN EFFECTIVE TO CURB UNLICENSED ACTIVITY? HAVE THESE REQUIREMENTS ACTED AS AN ENTRY BARRIER FOR NEW SUPPLIERS?**

New York has established certification requirements for new electricity ESCOs. The NYPSC established certain minimum notice requirements for consumers who move away from the LDC to an alternate ESCO, as well as what services will be offered and/or charged by the ESCO. This is accomplished through a disclosure statement presented to the consumer either immediately preceding or subsequent to an enrollment, depending on whether the transaction is in writing or telephonic. Additional notices describe the monitoring role played by the NYPSC in the deregulated market and how to contact the NYPSC should they have any inquiries or wish to file a complaint against the new ESCO. A minimum of 15 days notice is required for termination of the ESCO relationship.

The NYPSC requires electricity ESCOs to file an application to provide service. The LDC will not sign any

operating agreements with an ESCO that has not been found eligible to serve by the NYPSC. Unlicensed firms are not an issue because LDCs will not do business with an ESCO that is not certified by the NYPSC. These rules have been instrumental in keeping unlicensed ESCOs from the marketplace. Our experience indicates that these requirements have not acted as an entry barrier for any legitimate new supplier.

6. DID THE STATE PLACE ANY RESTRICTIONS ON THE ABILITY OF A UTILITY'S UNREGULATED AFFILIATE(S) TO USE A SIMILAR NAME AND/OR LOGO AS ITS PARENT UTILITY, IN ORDER TO AVOID CONSUMER CONFUSION WHEN THE AFFILIATE OFFERED UNREGULATED GENERATION SERVICES? WHY OR WHY NOT? WHAT HAS BEEN THE EXPERIENCE TO DATE WITH THE USE OF THESE RESTRICTIONS? ARE CONSUMERS KNOWLEDGEABLE ABOUT WHO THEIR SUPPLIERS ARE?

New York currently allows a LDC affiliate supplier to use the LDC/parent name, but to identify itself as a subsidiary.

Our experience thus far is that many affiliates have used names similar to their parent; and that, in some territories, affiliates have a large share of the number of customers that have chosen competitive suppliers.

7. DID THE STATE PLACE ANY RESTRICTIONS ON THIRD-PARTY OR AFFILIATE USE OF A UTILITY'S CUSTOMER INFORMATION (E.G., CUSTOMER USAGE STATISTICS, FINANCIAL INFORMATION, ETC.)? WHAT WERE THE REASONS FOR ENACTING THE RESTRICTIONS? WHAT HAS BEEN THE EFFECT OF THESE RESTRICTIONS ON NEW MARKETING ACTIVITY?

Information compiled by a utility regarding a consumer's credit information is not available to a third party without the expressed written consent of the consumer. Affiliates are treated just as any other ESCOs are in this regard.

Marketing activity has not been impeded by the lack of access to LDC customer credit histories. Generally, if an ESCO feels it needs additional information beyond what is available from commercial credit report companies, it can request a customer to authorize the release of these LDC records. ESCOs have thus far been satisfied with the histories already available and some impose security deposits until they are satisfied the customer is not a credit risk. The impact of the restriction has been negligible and can be overcome with consumer cooperation.

8. HAS THE STATE ADOPTED ANY OTHER MEASURES INTENDED TO PROTECT CONSUMERS (E.G., LENGTH OF CONSUMER CONTRACTS, AUTOMATIC RENEWAL PROVISIONS, ETC.) AS IT IMPLEMENTED RETAIL COMPETITION? WHAT HAS BEEN THE EFFECT OF THESE MEASURES?

The terms and conditions of ESCO contracts are left to the ESCOs to devise due to the fact that the relationship with the consumer is theirs. However, the NYPSC continues to address matters that might require a change in policy, such as protecting customers that choose to pre-pay for service.

9. TO WHAT EXTENT HAVE SUPPLIERS ENGAGED IN ADVERTISING TO SELL THEIR PRODUCT(S)? DO SOME SUPPLIERS CLAIM THAT THEIR PRODUCT IS DIFFERENTIATED (E.G., THAT IT HAS ENVIRONMENTAL BENEFITS)? HAS THERE BEEN ANY ENFORCEMENT OR ATTEMPTS TO VERIFY THESE ADVERTISING CLAIMS? DO ANY CERTIFICATION ORGANIZATIONS, SUCH AS GREEN-E, OPERATE IN THE STATE? ARE THEY USED BY (OR AT LEAST AVAILABLE TO) A SUBSTANTIAL PORTION OF CONSUMERS?

Advertising by ESCOs has been limited. Much of the activity surrounded the phased-in participation (migration) of LDC customers to the new market, particularly because of a monetary incentive paid by the LDC to encourage such movement. There has been no per se promotion of environmentally friendly

power. It is anticipated that power "product" offerings will follow the primary development of the retail consumer marketplace.

Please see the above discussion regarding environmental attributes in response to question 2 under "Consumer Protection Issues."

Retail Supply Issues

1. **WHAT DIFFICULTIES HAVE SUPPLIERS ENCOUNTERED IN ENTERING THE MARKET? WHAT CONDITIONS/INCENTIVES ATTRACT SUPPLIERS TO RETAIL MARKETS? HAVE SUPPLIERS EXITED THE MARKET AFTER BEGINNING TO PROVIDE RETAIL SERVICE? IF SO, WHY?**

New York State has a reasonably straightforward process for registering to do business as an ESCO. The process includes: (1) compliance with other State requirements for doing business in the State; (2) providing a copy of the Disclosure Statement, that indicates consumer protections; (3) providing information on Switching Procedures; (4) a description of the ESCO's process for handling and resolving customers' complaints; (5) a sample of the billing form, and; (6) proof of meeting applicable requirements of the New York Independent System Operator, Inc. (NYISO). The registration process has not proven to be a barrier. Because retail access began with six individual utility Rate and Restructuring Orders, certain differences remain among the different utility service territories, even after the NYPSC took steps to minimize these differences. When retail access began, some ESCOs concentrated their business in New York City and surrounding areas, while other ESCOs concentrated their business upstate. More recently,

ESCOs have expanded their service well beyond their initial geographic areas.

The margin between the utility backout credit and the wholesale price ("headroom") the ESCO faces is the most important market condition. The utility that offers bundled customers the lowest prices in New York is the territory with the fewest number of ESCOs and least number of customers participating in retail access. The presence of incentives is another important condition. A NYPSC study showed a significant difference in retail access participation in those utility territories that had incentives available. There was a surge in retail access participation following the opening of the NYISO in November 1999.

One ESCO went bankrupt in 1999. In 2000, wholesale market volatility caused several ESCOs to either exit the market entirely, or to exit the market in certain utility territories when their perception was that there was insufficient headroom for them to make a profit or that their hedging decisions were wrong.

- 2. WHAT ARE THE CUSTOMER ACQUISITION COSTS AND OPERATIONAL COSTS TO SERVICE RETAIL CUSTOMERS? HOW DO ACQUISITION AND OPERATIONAL COSTS COMPARE TO PROFIT MARGINS FOR ELECTRIC POWER GENERATION SERVICES? DO RETAIL MARGINS AFFECT ENTRY? IF SO, HOW? DID THE STATE HARMONIZE THE PROCEDURES SUPPLIERS USE TO ATTRACT AND SWITCH CUSTOMERS WITH OTHER STATES' PROCEDURES, IN ORDER TO REDUCE SUPPLIERS' COSTS?**

Only ESCOs know what their costs are to acquire and service retail customers. We do not keep that information. While New York played a prominent role in the national effort

regarding Uniform Business Practices, which had the objective of standardizing practices nationwide, few ESCOs are serving across the state borders.

3. **HAVE CUSTOMERS SWITCHED TO NEW SUPPLIERS? WHY OR WHY NOT? ARE THERE GREATER INCENTIVES FOR CERTAIN CUSTOMER CLASSES (I.E., INDUSTRIAL, COMMERCIAL, RESIDENTIAL) THAN FOR OTHERS TO SWITCH SUPPLIERS? WHY OR WHY NOT? ARE PENALTIES OR DIFFERENT RATES APPLIED TO CUSTOMERS THAT SWITCH BACK TO THE SUPPLIER OF LAST RESORT? ARE THERE OTHER MEASURES TO DETERMINE WHETHER CUSTOMERS ARE ACTIVELY CONSIDERING SWITCHING SUPPLIERS? IF SO, DO THESE INDICATORS SHOW DIFFERENT PATTERNS THAN THE SWITCHING RATE DATA?**

As of December 2000, the last date for which data is available, 229,280 customers (representing 3.7% of eligible customers) have switched to a new supplier. This total includes 40,270 non-residential customers' (5.3%) and 189,010 residential customers (3.4%).

Because the discounts have been sufficient for the largest customers to switch, the NYPSC has instituted incentive programs limited to residential and small commercial customers.

The NYPSC's Uniform Business Practices⁸ allow utilities to file tariffs that require customers, who voluntarily switch back to the utility, to remain for one year or to impose switching fees. However, not all utilities have adopted these requirements.

The NYPSC does not have any measures to identify whether customers are actively considering switching.

⁸ Opinion No. 99-3 at Appendix B.

4. HAVE SUPPLIERS OFFERED NEW TYPES OF PRODUCTS AND SERVICES (E.G., TIME OF DAY PRICING, INTERRUPTIBLE CONTRACTS, GREEN POWER, ETC.) IN STATES WHERE RETAIL COMPETITION HAS BEEN IMPLEMENTED? IF SO, DESCRIBE THE PRODUCTS AND WHAT CUSTOMER RESPONSE HAS BEEN.

As of the end of 2000, suppliers have not offered new types of products and services in the mass market. Beginning in the spring of 2001, the NYISO instituted programs for Emergency Price Load Reduction and Incentivized Load Reduction, which will be available to customers through ESCOs and regulated utilities. No information is yet available on customer response.

5. WHAT ARE THE BENEFITS OR DRAWBACKS OF THE DIFFERENT APPROACHES TO HANDLING THE SUPPLIER OF LAST RESORT OBLIGATION FOR CUSTOMERS WHO DO NOT CHOOSE A NEW SUPPLIER (E.G., ALLOW INCUMBENT UTILITY TO RETAIN THE OBLIGATION TO PROVIDE GENERATION SERVICES TO NON-CHOOSING CUSTOMERS, AUCTION THE OBLIGATION, OR ASSIGN THE OBLIGATION TO NON-UTILITY PARTIES). WHAT HAS BEEN CONSUMER REACTION TO THESE APPROACHES? IS PROVIDER OF LAST RESORT SERVICE NECESSARY?

In May 2000, the NYPSC instituted Case 00-M-0504 to address the responsibilities of providers of last resort and the role of utilities in competitive energy markets and fostering the development of retail competitive opportunities. A decision by an Administrative Law Judge is expected in the second quarter 2001.

Retail Pricing Issues

1. HOW IS ENTRY AFFECTED BY THE PRICE FOR THE PROVIDER OF LAST RESORT SERVICE (FOR CUSTOMERS WHO DO NOT CHOOSE) OR FOR DEFAULT SERVICE (FOR CUSTOMER WHOSE SUPPLIER EXITS THE MARKET)? HOW DOES THE PRICE FOR THE PROVIDER OF LAST RESORT OR DEFAULT SERVICE COMPARE TO PRICES OFFERED BY ALTERNATIVE SUPPLIERS? IS THE PRICE FOR PROVIDER OF LAST RESORT SERVICE OR DEFAULT SERVICE CAPPED? IF SO, FOR HOW LONG?

In New York State, there is no designated price for either provider of last resort (POLR) service or default

service. Instead, the utility offers a regulated price in some cases based on market price, while ESCOs offer unregulated prices. It is presumed that the unregulated price is lower because customers are switching to ESCOs. However, we have observed instances where the ESCO price is greater than the upstate utility price and customers stayed with the ESCO, at least for a couple of months.

Regulated rate requests must be acted upon within 11 months under the New York Public Service Law.⁹ However, more recently we have authorized long-term rate agreements that last for approximately 3 years. Recently, several utilities have filed petitions for new rates.

2. HAS THE STATE REQUIRED RETAIL RATE REDUCTIONS PRIOR TO THE START OF RETAIL COMPETITION? WHAT IS THE RATIONALE FOR THESE REDUCTIONS? HOW HAVE STATE-MANDATED RATE REDUCTIONS PRIOR TO THE START OF RETAIL COMPETITION AFFECTED RETAIL COMPETITION?

Beginning in 1997, the NYPSC reduced the rates paid by customers of nearly every electric utility in New York. The specific rate reductions were negotiated as part of each utilities rate and restructuring plan. For example, cumulative rate reductions and cost savings for Con Edison customers will total about \$2.9 billion over eight years.

These rate reductions are in response to the NYPSC's goal of getting New York's electric prices more in line with the national average.

⁹ N.Y. PUB. SERV. Law § 66(12) (McKinney 2000).

While the exact details of the rate reductions vary from utility to utility, the overall goal was to lower rates for all electric customers regardless of their choice of electric supplier.

3. DO ANY SEASONAL FLUCTUATIONS IN THE PRICE OF WHOLESALE GENERATION CAUSE SOME SUPPLIERS TO ENTER THE MARKET ONLY AT CERTAIN TIMES OF THE YEAR? HOW HAVE THESE SUPPLIERS FARED?

The NYPSC's policy discourages suppliers from serving customers only during lower cost times of the year. During the summer of 2000, however, one ESCO ceased doing business for the summer and picked up most of its former customers in the fall.

4. HOW HAS THE STATE ADDRESSED PUBLIC BENEFIT PROGRAMS (E.G., UNIVERSAL SERVICE REQUIREMENTS, LOW INCOME ASSISTANCE, CONSERVATION EDUCATION, ETC.) AS IT HAS IMPLEMENTED RETAIL COMPETITION? WHICH OF THESE PROGRAMS ARE NECESSARY AS COMPETITION IS INTRODUCED AND WHY? ARE PUBLIC BENEFITS AVAILABLE TO ALL CUSTOMERS OR ARE THEY RESTRICTED TO CUSTOMERS OF THE SUPPLIER OF LAST RESORT? HOW DOES THIS AFFECT RETAIL COMPETITION?

In January 2001, the NYPSC renewed and enlarged its System Benefits Charge (SBC) program. This program is funded by a competitively neutral surcharge on distribution rates. It offers energy efficiency programs, research and development programs, low-income programs and environmental programs through a statewide program administrator called the New York State Energy Research and Development Authority (NYSERDA). The question of whether these types of programs should be continued when we have a fully competitive market is being addressed in an on-going NYPSC proceeding.¹⁰

¹⁰ Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Order Continuing and Expanding the

Market Structure Issues

1. HOW HAS THE DEVELOPMENT OF REGIONAL TRANSMISSION ORGANIZATIONS (RTOs) AFFECTED RETAIL COMPETITION IN THE STATE?

The NYISO enables Load Serving Entities (LSE's) and ESCOs to purchase wholesale power for resale at the retail level.

2. DID THE STATE REQUIRE THE DIVESTITURE OF GENERATION ASSETS (OR IMPOSE OTHER REGULATORY CONDITIONS ON THE USE OF THESE ASSETS) WHEN RETAIL COMPETITION WAS INTRODUCED? TO WHAT EXTENT WAS DIVESTITURE OF GENERATION ASSETS A COMPONENT OF THE STATE'S HANDLING OF A UTILITY'S STRANDED COSTS? WAS DIVESTITURE USED TO REMEDY A HIGH CONCENTRATION OF GENERATION ASSETS SERVING THE STATE? WAS THERE APPRECIABLE VOLUNTARY DIVESTITURE OF GENERATION ASSETS? HAS THE STATE EXAMINED WHETHER THERE HAS BEEN APPRECIABLE CONSOLIDATION OF OWNERSHIP OF GENERATION SERVING THE STATE SINCE THE START OF RETAIL COMPETITION?

Five of the six NYPSC Orders that instituted competition contained provisions related to the divestiture of generating assets. The timetables for completing generation divestiture have differed. At this time, all fossil fuel and hydroelectric plants have been divested by the utilities in those five Orders. The NYPSC is currently reviewing the transfer of several nuclear plants.¹¹

New York does not have a statewide policy regarding the treatment of stranded costs. The NYPSC has handled this

System Benefits Charge for Public Benefit Programs, (issued January 26, 2001).

¹¹ The nuclear plant divestitures pending before the NYPSC are for Indian Point Unit 2, which is owned by Consolidated Edison Company of New York, Inc., and Nine Mile Unit 1, which is owned by Niagara Mohawk Power Corp. (Niagara), and Unit 2, which is owned by Niagara, Rochester Gas & Electric Corp., Central Hudson Gas & Electric Corp., New York State Electric & Gas Corp. and the Long Island Power Authority (LIPA).

issue on a utility specific basis. Many of the plant sales were for more than book value.

Divestiture was not viewed as a remedy for high concentrations of generation assets. Instead, it was seen as an opportunity to open a formerly regulated market to competition. Today, there is greater diversity of ownership of generation than in 1995, when the NYPSC announced its intention to open wholesale and retail markets to competition.

3. IF A UTILITY NO LONGER OWNS GENERATION ASSETS TO MEET ITS OBLIGATIONS AS THE SUPPLIER OF LAST RESORT OR DEFAULT SERVICE PROVIDER, WHAT MARKET MECHANISM (E.G., SPOT MARKET PURCHASES, BUY BACK OR OUTPUT CONTRACTS, ETC.) DOES IT USE TO OBTAIN GENERATION SERVICES TO FULFILL THESE OBLIGATIONS? WHAT SHARE OF A UTILITY'S LOAD IS OBTAINED VIA THE DIFFERENT MECHANISMS? HOW ARE THESE SHARES TRENDING? IS THE MARKET MECHANISM TRANSPARENT? IS IT NECESSARY TO MONITOR THESE MARKET MECHANISMS? WHY OR WHY NOT? IF SO, WHAT SHOULD THE MONITOR EXAMINE?

Some utilities in New York State are operating under rate cap mechanisms. Others pass through their supply costs to customers. Generally, bilateral contracts, transition service contracts with the new owners, Independent Power Producer contracts, self owned generation and spot market purchases are all used to some extent to fulfill supply obligations. The balance of the energy needs are purchased in the NYISO's day-ahead and real-time markets. The transition contracts with the new owners were filed with the NYPSC. Typically, the amount of output of the plant that is covered by the contract diminishes over time. The duration of these contracts vary and some are already completed.

4. EXPLAIN THE STATE'S ROLE IN OVERSEEING OPERATION OF THE TRANSMISSION GRID IN THE STATE AND THE EXTENT TO WHICH PUBLIC POWER OR MUNICIPAL POWER TRANSMISSION SYSTEMS ARE INTEGRATED INTO THIS EFFORT. WHAT IS THE RELATIONSHIP BETWEEN THE STATE'S ROLE AND THE FEDERAL ENERGY REGULATORY COMMISSION'S ROLE IN TRANSMISSION SYSTEM OPERATION IN THE STATE?

The New York Public Service Law requires the NYPSC to ensure a safe and reliable electric system.¹² This includes assessing the need for and approving transmission expansions, power plant construction and ensuring reliability. The NYPSC actively oversees the operation of the transmission grid, meets with the NYSIO operators, receives and analyzes operating reports, and investigates major incidents on the grid.

The New York State Reliability Council (NYSRC) is a not-for-profit entity whose mission is to promote and preserve the reliability of electric service in New York State by developing, maintaining and updating Reliability Rules. The NYISO and all entities engaging in electric transmission, ancillary services, and energy and power transactions on the New York State Power System must comply with these rules. The NYPSC participates in the NYSRC meetings, without vote, and serves to arbitrate disputes, if they should occur, between the NYISO and NYSRC.

Two public power authorities (i.e., Long Island Power Authority and the Power Authority of the State of New York (NYPA)) and a representative of the Municipal Electric Systems

¹² N.Y. PUB. SERV. Law § 65 (McKinney 2000).

and Cooperatives sector are three of the 13 members of the NYSRC.

While the NYPSC has responsibility for overseeing the reliable operation of the transmission grid, the FERC's role is primarily to set wholesale rates and ensure wholesale competitors are on a level playing field, and that barriers are not erected that would hinder the bulk power markets. FERC is not involved in the physical operation of the system. States have regulatory authority over retail transactions.

5. DO FIRMS THAT HAVE PROVIDER OF LAST RESORT OR DEFAULT SERVICE OBLIGATIONS (FORMERLY ANATIVE LOAD@ OBLIGATIONS IN THE REGULATED ENVIRONMENT) RECEIVE PREFERENTIAL TRANSMISSION TREATMENT? IF SO, HOW DOES THIS AFFECT WHOLESALE ELECTRIC POWER COMPETITION? HOW AND BY WHOM SHOULD RETAIL SALES OF BUNDLED TRANSMISSION SERVICES (I.E., RETAIL SALES OF BOTH ENERGY AND TRANSMISSION SERVICES) AND RETAIL SALES OF UNBUNDLED TRANSMISSION BE REGULATED? IF BY MORE THAN ONE ENTITY, HOW SHOULD REGULATION BE COORDINATED? WHAT SHOULD THE STATE'S ROLE BE IN OVERSEEING WHOLESALE TRANSMISSION RELIABILITY?

Providers of last resort are not given preferential treatment for transmission service.

New York is responsible for overseeing transmission reliability. States are in the best position to ensure that the transmission systems in their states are properly maintained. Please see our response to the previous question. The NYPSC is the petitioner in New York v. Federal Energy Regulatory Commission.¹³ We do not believe that the Federal Power Act authorizes FERC to regulate unbundled retail transmission.

¹³ See Transmission Access Policy Study Group v. Federal Energy Regulatory Commission, 225 F.3d 667 (D.C. Cir. 2000) (upholding FERC's jurisdiction over unbundled retail transmission of electricity), cert. granted, New York v. Federal Energy Regulatory Commission, 121 S.Ct. 1185 (2001)

6. TO WHAT EXTENT DID THE STATE IDENTIFY TRANSMISSION CONSTRAINTS AFFECTING ACCESS TO OUT-OF-STATE OR IN-STATE GENERATION PRIOR TO THE START OF RETAIL COMPETITION? IS THE STATE CAPABLE OF REMEDYING THESE TRANSMISSION CONSTRAINTS, OR IS FEDERAL JURISDICTION NECESSARY? HOW DO THE RATIONALES FOR FEDERAL JURISDICTION OVER ELECTRIC POWER TRANSMISSION SITING COMPARE TO THE REASONS UNDERLYING FEDERAL JURISDICTION OVER THE SITING OF NATURAL GAS PIPELINES?

Prior to the start of retail competition, transmission constraints were well known. The NYISO was designed with a location-based marginal pricing system that ensures equal access to in-state and out-of-state generation and transmission resources.

The adequacy of the transmission system for reliability purposes is ensured by NYISO studies that are submitted to the NPCC. However, the possible advantages of increased transmission needs to be evaluated by considering the amount of energy price benefits, transmission costs and the cost of building new generation in high cost areas. There have been no experiences to date that demonstrates a need for federal jurisdiction.

7. HOW HAVE STATE SITING REGULATIONS FOR NEW GENERATION AND TRANSMISSION FACILITIES BEEN AFFECTED BY THE ONSET OF RETAIL COMPETITION? HAS NEW GENERATION SITING KEPT PACE WITH DEMAND GROWTH IN THE STATE? IF NOT, WHY NOT? IS FEDERAL JURISDICTION NECESSARY FOR SITING OF ELECTRIC POWER GENERATION FACILITIES? HAS THE STATE ACTIVELY MONITORED AND REPORTED THE RELATIONSHIP BETWEEN IN-STATE CAPACITY AND PEAK DEMAND IN THE STATE? WHAT INCENTIVES DO SUPPLIERS HAVE TO MAINTAIN ADEQUATE RESERVE CAPACITY? WHAT ARE THE WAYS TO VALUE CAPACITY IN COMPETITIVE MARKETS? IS RESERVE SHARING STILL IMPORTANT IN COMPETITIVE MARKETS? DO OTHER INSTITUTIONS/MARKET PROCESSES PROVIDE A REASONABLE SUBSTITUTE FOR RESERVE SHARING?

Enacted in 1992, Article X of the NYPSL replaced the former regulations for the siting of major electric generating facilities (i.e., 80 MW or more). The new siting law included

the elimination of detailed "need" studies. In lieu of a detailed needs study, a showing of either consistency with long range energy planning objectives and strategies or selection pursuant to an approved procurement process establishes the need for a project. As applications to construct generating facilities have been considered, proposed merchant plants have generally been found to be consistent with the state's energy plan.

During the transition to retail competition, utilities divested their generation facilities, while the market response to build new projects developed slower than demand growth. However, the market response to a competitive wholesale market has resulted in 21 projects filed under Article X of the NYPSL. At least 25 developers are conducting interconnection studies as a preliminary step to filing applications under Article X. The lag between the restructuring decisions and the market response, in the form of new applications, could be attributed, in part, to market uncertainty while the Environmental Protection Agency (EPA) evaluated whether to delegate federal permits to the New York State Board on Electric Generation Siting and the Environment. However, Article X of the NYPSL requires applications to be processed in one year from their compliance and should compensate for the lag. Siting smaller units (i.e., less than 80 MW) and reducing demand will also factor into the balance of demand growth with new generation. We see no need for FERC to make state siting decisions. These are local

matters better resolved by those governmental officials close to the consumers.

The NYPSC monitors the relationship between capacity and peak demand in the state. Adequate reserve requirements are the responsibility of the utilities (i.e., LSEs) that must contract for adequate reserves as specified by the NYSRC and NYISO.

Operating reserve sharing is being pursued where it can increase reliability and/or reduce costs. Operating reserve costs are spread across and shared by all New York consumers.

8. SINCE THE START OF RETAIL COMPETITION, WHAT HAS BEEN THE RATE OF GENERATION PLANT OUTAGES (SCHEDULED AND UNSCHEDULED)? TO WHAT EXTENT HAS THE STATE MONITORED THESE OUTAGES AND EXAMINED THEIR CAUSES?

The NYPSC does not continuously monitor generation plant outages, but can do periodic studies.

Other Issues

1. WHAT MEASURES HAS THE STATE TAKEN TO MAKE CUSTOMER DEMAND RESPONSIVE TO CHANGES IN AVAILABLE SUPPLY? HAS THE STATE PROVIDED UTILITIES INCENTIVES TO MAKE CUSTOMERS MORE PRICE RESPONSIVE? HAS THE STATE MOVED AWAY FROM AVERAGE COST PRICING? WHAT EFFECT HAVE THESE MEASURES HAD ON DEMAND AND ON DEMAND ELASTICITY?

In the past, the NYPSC has approved tariff-based programs that provide incentives to curtail load due to potential supply shortages. Recently, the NYPSC has worked with the NYISO and endorsed programs that provide incentives for end use customers to curtail load either during emergency supply situations or in response to high prices. These programs include accelerating the use of sophisticated pricing options

and advanced metering technologies, known as real-time metering. These programs will enable customers to respond effectively during peak demand periods and implement voluntary, pre-arranged load shedding programs that make it economically attractive for large electricity users to curtail their electricity demand at critical times and participate in real-time pricing of electricity.

New York has not moved away from average cost pricing at this time, but customers will be able to avail themselves of real-time pricing soon.

- 2. HAS THE STATE PROVIDED MECHANISMS AND INCENTIVES FOR OWNERS OF CO-GENERATION CAPACITY TO OFFER POWER DURING PEAK DEMAND PERIODS? HAS THE STATE IDENTIFIED, REPORTED, AND FACILITATED DEVELOPMENT OF PUMPED STORAGE FACILITIES OR OTHER APPROACHES TO ARBITRAGING BETWEEN PEAK AND OFF-PEAK WHOLESALE ELECTRICITY PRICES?**

Cogenerators can bid to participate in the demand reduction program discussed in the last question. The NYPSC has not participated in the development of pumped storage facilities; however, the NYPA owns and operates two such facilities in New York.

- 3. WHAT ISSUES HAVE ARISEN UNDER RETAIL COMPETITION THAT HAVE REQUIRED COOPERATION OR COORDINATION WITH OTHER STATES? WHAT APPROACH WAS TAKEN TO SECURING THIS COOPERATION OR COORDINATION? ARE THERE OTHER ISSUES REQUIRING COOPERATION THAT HAVE NOT YET BEEN ADDRESSED? WHICH OF THESE ISSUES ARE THE MOST SIGNIFICANT?**

The two initiatives that have required the greatest degree of cooperation and coordination are the development of Uniform Retail Access Business Practices and the corresponding EDI standards to support those practices. To achieve these

initiatives, NYPSC was actively involved in the development of a National Report on Uniform Business Practices recently released by the Edison Electric Institute. In addition, we are actively participating in the creation of a national EDI standard, as members of a Utility Industry Group, and have been closely following the proposed organizational restructuring of the Gas Industries Standards Board. Efforts are also underway in the Mid-Atlantic States to develop a regional approach for version control of EDI data standards. Uniform Business Practices are most significant because they have the greatest potential to minimize barriers to entry in the competitive marketplace.

4. HOW PREVALENT IS THE USE OF DISTRIBUTED RESOURCES (E.G., DISTRIBUTED GENERATION) WITHIN THE STATE? WHAT BARRIERS DO CUSTOMERS FACE TO IMPLEMENTING DISTRIBUTED RESOURCES?

There is a growing amount of Distributed Generation in New York. The NYPSC has taken initiatives to address the barriers to using distributed generation. Specifically, the NYPSC approved a proposal to standardize and streamline technical requirements for interconnection to utility facilities.¹⁴ That proposal included a standardized application process and a simplified contract for interconnecting distributed generation units with a nameplate rating of 300kV or less. Currently, there are two NYPSC proceedings underway to examine costs and benefits of distributed generation with regard

to distribution service and the reasonableness of rates, terms and conditions for the provision of electric standby service.¹⁵

5. WHICH SPECIFIC JURISDICTIONAL ISSUES PREVENT STATE RETAIL COMPETITION PROGRAMS FROM BEING AS SUCCESSFUL AS THEY MIGHT BE?

Due to FERC's claim of exclusive jurisdiction over unbundled retail transmission,¹⁶ states may be reluctant to adopt programs which take away their authority.¹⁷ Furthermore, FERC's hesitancy to intervene in wholesale markets affected by market power could influence state decision-making.

6. WHICH SPECIFIC TECHNOLOGICAL DEVELOPMENTS ARE LIKELY TO SUBSTANTIALLY AFFECT RETAIL OR WHOLESALE COMPETITION IN THE ELECTRIC POWER INDUSTRY THAT MAY ALTER THE MANNER IN WHICH STATES STRUCTURE RETAIL COMPETITION PLANS? WHY? WHAT TIME FRAME IS ASSOCIATED WITH THESE DEVELOPMENTS?

In the short to intermediate term, technological developments in metering are likely to be the only ones that affect competition in the electric industry. New York has structured retail competition to include competitive metering. However, customers need interval meters to take advantage of the

¹⁴ Cases 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Instituting Further Inquiry (issued March 20, 1998).

¹⁵ Cases 00-E-0005 et al., Proceeding on Motion of the Commission to Examine Costs, Benefits and Rates Regarding Distributed Generation, Order Instituting Proceedings (issued January 10, 2000).

¹⁶ Docket Nos. RM95-8-000, RM94-7-001, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888 (issued April 24, 1996), p. 7.

¹⁷ See Transmission Access Policy Study Group v. Federal Energy Regulatory Commission, 225 F.3d 667 (D.C. Cir. 2000) (upholding FERC's jurisdiction over unbundled retail transmission of electricity), cert. granted, New York v. Federal Energy Regulatory Commission, 121 S.Ct. 1185 (2001).

opportunities from real-time pricing and to participate in emergency demand response programs. Programs have recently been enacted to provide discounts to customers who install interval meters. These efforts are designed to reduce customer costs through energy efficiency, reduced usage and also help moderate wholesale electricity prices.

In the longer term, technological developments in fuel cells and distributed generation have the potential to substantially affect the electric power industry. Furthermore, advances in transmission and distribution technology will increase the amount of power capable of being transmitted and distributed over existing facility rights-of-way.

7. **WHAT ARE THE LESSONS TO BE LEARNED FROM THE RETAIL ELECTRICITY COMPETITION EFFORTS OF OTHER COUNTRIES? ARE THERE OTHER FORMERLY-REGULATED INDUSTRIES IN THE U.S. (E.G., NATURAL GAS) THAT ALLOW CUSTOMER CHOICE AND PROVIDE USEFUL COMPARISONS TO RETAIL ELECTRICITY COMPETITION? IF SO, WHAT ARE THE RELEVANT INSIGHTS OR LESSONS TO BE LEARNED?**

The lessons to be learned from other countries' introduction of retail electricity competition are that it takes a long time to introduce competition and that it is difficult to get it right at the outset. At the NYPSC, we are looking at the telecommunications industry as well as the natural gas industry for useful comparisons. One current issue is whether the telecommunications model, where all competitive providers have the obligation to serve, is a model that might be adopted for retail competition in both electricity and natural gas. One difficulty in looking to the telecommunications industry is that we do not see a parallel with the widespread technologies (e.g.,

wireless and cable), that can bring telecommunications service to customers in competition with the existing network infrastructure.

Respectfully submitted,

Paul B. Powers
Director, Office
of Electricity and
Environment

Dated: April 13, 2001
Albany, New York

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL TRADE COMMISSION

V010003 -- COMMENTS REGARDING RETAIL ELECTRICITY COMPETITION

COMMENTS OF THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK

Pursuant to the Notice Requesting Comments on Retail Electricity Competition Plans, the Public Service Commission of the State of New York (NYPSC) files these comments regarding the above-captioned inquiry. Copies of all documents and correspondence should be sent to:

Paul B. Powers, Director
Office of Electricity and Environment
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223

The Federal Trade Commission (FTC) issued a Notice Requesting Comments on Retail Electricity Competition Plans on February 28, 2001, seeking information regarding different regulatory approaches to the introduction of retail electric competition. Pursuant to the Notice and the questions contained therein, the NYPSC submits the following responses.

History and Overview

1. WHY DID THE STATE IMPLEMENT RETAIL ELECTRICITY COMPETITION? WHAT PROBLEMS OF THE PREVIOUS REGULATORY REGIME WAS IT TRYING TO SOLVE?

The NYPSC concluded in 1996, that "after balancing the benefits and risks, we are convinced that we should move towards retail competition. A market with multiple buyers and sellers offers greater incentives and opportunities for lower prices,

greater innovation, and expanded choice of options for customers."¹

2. **WHAT WERE THE EXPECTED BENEFITS OF RETAIL COMPETITION? WERE PRICE REDUCTIONS EXPECTED IN ABSOLUTE TERMS OR IN RELATION TO WHAT PRICE LEVELS WOULD BE ABSENT RETAIL COMPETITION? WERE THE BENEFITS OF RETAIL COMPETITION EXPECTED TO BE AVAILABLE TO CONSUMERS IN URBAN, SUBURBAN, AND RURAL AREAS? WERE THE BENEFITS EXPECTED TO BE AVAILABLE FOR RESIDENTIAL, COMMERCIAL, AND INDUSTRIAL CUSTOMERS? WERE THE BENEFITS EXPECTED TO BE COMPARABLE FOR EACH GROUP OF CUSTOMERS?**

The NYPSC indicated that "competition in the generation and energy services sectors of the electric industry will be pursued for its potential to reduce rates over the long term, to increase customer choices, and for other economic development advantages."² The benefits of retail competition were expected to pass through to all customer classifications in the question; however, the largest customers were expected to be the earliest beneficiaries.

3. **WHAT FACTORS OR MEASURES SHOULD THE COMMISSION EXAMINE IN VIEWING THE SUCCESS OF A STATE'S RETAIL ELECTRICITY COMPETITION PROGRAM? HOW SHOULD THESE MEASURES BE EVALUATED?**

It would be premature to review New York's program during the transition to competition. From the beginning of competition, the NYPSC has been dedicated to carefully monitoring the progress of retail competition to help ensure it was being implemented both fairly and effectively. The NYPSC and its staff placed a premium on reliable and timely feedback

¹ Cases 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 96-12 (issued May 20, 1996) (hereinafter "Opinion No. 96-12").

² Opinion No. 96-12.

about electricity markets in general and the State's retail access programs specifically.

The NYPSC secured input from a diverse group of interested parties, including government agencies, consumer advocates, utilities, energy service companies and environmental groups. A collaborative process was frequently employed to help shape policy.

The NYPSC also encouraged the use of evaluations as a source of reliable and unbiased data to monitor progress and guide policy decisions. Either through its own resources or independent contractors, the NYPSC regularly surveys consumers, energy service companies and utilities. For example:

- Comprehensive evaluations of retail access pilot programs and the early stages of retail access were conducted to pinpoint the strengths and weaknesses of these efforts. This research was especially useful in refining billing policies.
- On an annual basis, consumer-tracking surveys are conducted to monitor consumer awareness of retail access and the effectiveness of the NYPSC's retail access outreach program.
- Evaluations are used to provide detailed information about a specific issue or event, such as the survey that was conducted to obtain customer feedback about improving the design of a proposed environmental disclosure label.
- The rates of migration to energy marketers are tracked on a regular basis and posted on the NYPSC's web page.

4. WHAT ARE THE MOST SUCCESSFUL AND LEAST SUCCESSFUL ELEMENTS IN THE STATE'S RETAIL COMPETITION PROGRAM? HAS THE STATE TAKEN STEPS TO MODIFY THE LEAST SUCCESSFUL ELEMENTS?

New York's retail access program has made significant progress. The most successful element in New York's retail competition program is that it has been implemented through the

NYPSC's actions, rather than legislative initiative. These actions have been the result of collaborative efforts among stakeholders to ensure that divergent viewpoints have been considered. When experience with retail competition indicates changes should be made, the NYPSC can take prompt remedial action. For example, some utilities were permitted to establish fixed back-out credits, against which marketers could compete in providing electric supply. When prices in the wholesale market exceeded the fixed backout credit level, the NYPSC instituted market-based backout credits for those utilities. Legislative action would have taken longer and would have been less flexible than the agency administered program.

The NYPSC is working to improve several aspects of retail access. For example, utilities still offer bundled rates to customers with generation credits backed out for retail access customers. However, on March 29, 2001, the NYPSC initiated a proceeding to give expedited consideration to full rate unbundling. The unbundling of functions, costs, and rates on a consistent, statewide basis will allow customers the choice to purchase competitive services from the utility or alternative suppliers. Additionally, the NYPSC has already required that costs for certain functions -- metering and billing -- be backed out of sales rates.

Furthermore, the NYPSC is working to enhance retail access in other critical areas, including consolidated billing, uniform business practices, electronic data interchange (EDI)

and allowing customers to bid demand-side resources into the market.

Consumer Protection Issues

1. WHAT EFFORTS WERE MADE TO EDUCATE CONSUMERS ABOUT RETAIL COMPETITION? HOW WAS THE SUCCESS OF THESE EFFORTS MEASURED? WERE THE PROGRAMS SUCCESSFUL? WHO FUNDED THESE EFFORTS? WHO IMPLEMENTED THE PROGRAMS?

The NYPSC's efforts to educate consumers about retail competition are focused on a program targeted directly to consumers as well as encouraging New York's electric and gas utilities to provide effective customer education programs on retail competition. The NYPSC provides a statewide retail competition education program, which utilizes the full range of mass media (i.e., television, radio, newspapers, direct mail and out-of-home advertising). This program is state-funded with an annual budget of approximately \$1 million. In addition, the NYPSC conducts a grassroots outreach effort, which includes events, presentations and train-the-trainer exercises, targeted to smaller audiences. Furthermore, all New York utilities have been directed to provide their customers with information regarding retail choice. This information has been communicated using various vehicles, including direct mail and bill inserts.

Starting in 1998, the NYPSC began conducting annual statewide surveys to track the awareness and understanding of competition, as well as other related issues such as attitudes and informational needs, of residential customers and small business'.

2. DO CONSUMERS HAVE ENOUGH INFORMATION TO READILY MAKE INFORMED CHOICES AMONG COMPETING SUPPLIERS? DID THE STATE COORDINATE ITS LABELING REQUIREMENTS ABOUT THE ATTRIBUTES OF A SUPPLIER'S PRODUCT, IF ANY, WITH NEIGHBORING STATES? IS THERE A NEED FOR FEDERAL ASSISTANCE TO PROVIDE STANDARDIZED SUPPLIER LABELING? IF SO, WHAT WOULD BE THE MOST USEFUL FEDERAL ROLE?

Based on the NYPSC's annual tracking survey of residential consumers, we found that approximately 60 percent of residential consumers are aware of retail access in New York State. However, the research also suggests that not all consumers that are aware of retail access have sufficient knowledge to select and switch to an electric marketer. The NYPSC is continuing its education and outreach efforts to improve awareness and increase understanding.

Regarding the environmental attributes (i.e., fuel mix and emission rate), the NYPSC has instituted a program whereby all retail suppliers will be required to disclose to their existing and prospective retail customers an explanation of the fuel sources used to generate their power. Every six months, customers' bills will indicate the percentage of their power that is coming from coal, natural gas, nuclear, solar, hydro, solid waste and/or biomass. The bills will also include sulfur dioxide, nitrogen oxide and carbon dioxide emission levels benchmarked against New York State's electric generation average. The NYPSC will administer this program and provide the information to the retail suppliers. The labeling format being planned takes into account similar information that is available in other states. The NYPSC Order, which implements the environmental disclosure program, directs staff to review the

disclosure label formats as they evolve in other states or at the federal level and to modify the label as appropriate to maximize uniformity.³

3. HAVE CONSUMERS COMPLAINED ABOUT UNAUTHORIZED SWITCHING OF THEIR ACCOUNTS TO ALTERNATIVE SUPPLIERS ("SLAMMING") OR THE PLACEMENT OF UNAUTHORIZED CHARGES ON THEIR ELECTRIC BILLS ("CRAMMING")? WERE RULES ADOPTED TO PREVENT THESE PRACTICES? HAS THE STATE TAKEN ENFORCEMENT ACTION UNDER ITS NEW AUTHORITY AGAINST SLAMMING AND CRAMMING? HAVE THESE ACTIONS BEEN EFFECTIVE TO CURB THE ALLEGED ABUSES? IS THERE A NEED FOR FEDERAL ASSISTANCE WITH SLAMMING AND CRAMMING ISSUES? IF SO, WHAT WOULD BE THE MOST USEFUL FEDERAL ROLE?

The NYPSC's Order on retail access for both electricity and natural gas established processes for verification of all customer switches.⁴ These rules, which became part of the State's Uniform Retail Access Business Practices,⁵ require that the local distribution company (LDC) verify each consumer switch in writing. The LDC sends a letter asking the customer to notify the LDC if the information submitted by the alternate retail energy service company (ESCO)⁶ is inaccurate. The consumer would then have to object to the switch for it not to occur. Consumers can physically sign a contract with their new ESCO, enroll over the telephone with taped order verifications conducted by a third party, or enroll

³ Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric service, Opinion No. 98-19, (issued December 15, 1998) at p.11.

⁴ Case 98-M-1343, In the Matter of Retail Access Business Rules, Opinion No. 99-3, (issued February 16, 1999) (hereinafter "Opinion 99-3").

⁵ Opinion No. 99-3 at Appendix B.

⁶ An ESCO, as used in this document, refers to an entity that provides electric and/or gas services.

over the internet. The new ESCO must retain all enrollment information for six years.

Slamming charges are individually investigated and verified. The New York State Attorney General (AG) has reached a settlement with one ESCO the AG found engaged in "slamming" practices. We do not think that federal intervention is required.

4. **HOW DID THE STATE FACILITATE THE ABILITY OF CUSTOMERS TO SWITCH TO A NEW SUPPLIER? HAVE THESE EFFORTS BEEN SUCCESSFUL? DOES THE STATE ALLOW CONSUMERS TO AGGREGATE THEIR ELECTRICITY DEMAND? IF SO, HAS AGGREGATION ENABLED CONSUMERS TO BENEFIT FROM RETAIL ELECTRICITY COMPETITION? IF NOT, WHY NOT?**

LDCs were required to submit a timetable for the phased implementation of retail access to the NYPSC. Each phase included increasing the number of consumers that could be shifted to alternate ESCOs.

Some of the NYPSC's rate and restructuring agreements required LDCs to pay incentives to facilitate the initial movement of consumers. The funding available for these incentives was often quickly exhausted. Although the total number of customers who switched was relatively small compared to the number of eligible consumers,⁷ these efforts have been successful.

New York permits and encourages electricity and natural gas aggregation programs.

⁷ As of December 2000, 229,280 customers (representing 3.7% of eligible customers) have switched to a new supplier.

Aggregation efforts have been modestly successful. Several pilot aggregation programs involving social services clients have reduced the cost of energy supplies to those consumers. Aggregation programs developed by entrepreneurs have resulted in extended term contracts with ESCOs for group membership. It is expected that these efforts will continue to expand.

5. **HAS THE STATE ESTABLISHED LICENSING OR CERTIFICATION REQUIREMENTS FOR NEW SUPPLIERS TO PROVIDE ELECTRICITY TO CUSTOMERS? WHY? WHICH LICENSING PROVISIONS ARE DESIGNED TO PROTECT CONSUMERS? HOW DO THEY OPERATE? HAS THE STATE TAKEN ENFORCEMENT ACTION AGAINST UNLICENSED FIRMS? HAVE THESE ACTIONS BEEN EFFECTIVE TO CURB UNLICENSED ACTIVITY? HAVE THESE REQUIREMENTS ACTED AS AN ENTRY BARRIER FOR NEW SUPPLIERS?**

New York has established certification requirements for new electricity ESCOs. The NYPSC established certain minimum notice requirements for consumers who move away from the LDC to an alternate ESCO, as well as what services will be offered and/or charged by the ESCO. This is accomplished through a disclosure statement presented to the consumer either immediately preceding or subsequent to an enrollment, depending on whether the transaction is in writing or telephonic. Additional notices describe the monitoring role played by the NYPSC in the deregulated market and how to contact the NYPSC should they have any inquiries or wish to file a complaint against the new ESCO. A minimum of 15 days notice is required for termination of the ESCO relationship.

The NYPSC requires electricity ESCOs to file an application to provide service. The LDC will not sign any

operating agreements with an ESCO that has not been found eligible to serve by the NYPSC. Unlicensed firms are not an issue because LDCs will not do business with an ESCO that is not certified by the NYPSC. These rules have been instrumental in keeping unlicensed ESCOs from the marketplace. Our experience indicates that these requirements have not acted as an entry barrier for any legitimate new supplier.

6. DID THE STATE PLACE ANY RESTRICTIONS ON THE ABILITY OF A UTILITY'S UNREGULATED AFFILIATE (S) TO USE A SIMILAR NAME AND/OR LOGO AS ITS PARENT UTILITY, IN ORDER TO AVOID CONSUMER CONFUSION WHEN THE AFFILIATE OFFERED UNREGULATED GENERATION SERVICES? WHY OR WHY NOT? WHAT HAS BEEN THE EXPERIENCE TO DATE WITH THE USE OF THESE RESTRICTIONS? ARE CONSUMERS KNOWLEDGEABLE ABOUT WHO THEIR SUPPLIERS ARE?

New York currently allows a LDC affiliate supplier to use the LDC/parent name, but to identify itself as a subsidiary.

Our experience thus far is that many affiliates have used names similar to their parent; and that, in some territories, affiliates have a large share of the number of customers that have chosen competitive suppliers.

7. DID THE STATE PLACE ANY RESTRICTIONS ON THIRD-PARTY OR AFFILIATE USE OF A UTILITY'S CUSTOMER INFORMATION (E.G., CUSTOMER USAGE STATISTICS, FINANCIAL INFORMATION, ETC.)? WHAT WERE THE REASONS FOR ENACTING THE RESTRICTIONS? WHAT HAS BEEN THE EFFECT OF THESE RESTRICTIONS ON NEW MARKETING ACTIVITY?

Information compiled by a utility regarding a consumer's credit information is not available to a third party without the expressed written consent of the consumer.

Affiliates are treated just as any other ESCOs are in this regard.

Marketing activity has not been impeded by the lack of access to LDC customer credit histories. Generally, if an ESCO feels it needs additional information beyond what is available from commercial credit report companies, it can request a customer to authorize the release of these LDC records. ESCOs have thus far been satisfied with the histories already available and some impose security deposits until they are satisfied the customer is not a credit risk. The impact of the restriction has been negligible and can be overcome with consumer cooperation.

8. HAS THE STATE ADOPTED ANY OTHER MEASURES INTENDED TO PROTECT CONSUMERS (E.G., LENGTH OF CONSUMER CONTRACTS, AUTOMATIC RENEWAL PROVISIONS, ETC.) AS IT IMPLEMENTED RETAIL COMPETITION? WHAT HAS BEEN THE EFFECT OF THESE MEASURES?

The terms and conditions of ESCO contracts are left to the ESCOs to devise due to the fact that the relationship with the consumer is theirs. However, the NYPSC continues to address matters that might require a change in policy, such as protecting customers that choose to pre-pay for service.

9. TO WHAT EXTENT HAVE SUPPLIERS ENGAGED IN ADVERTISING TO SELL THEIR PRODUCT(S)? DO SOME SUPPLIERS CLAIM THAT THEIR PRODUCT IS DIFFERENTIATED (E.G., THAT IT HAS ENVIRONMENTAL BENEFITS)? HAS THERE BEEN ANY ENFORCEMENT OR ATTEMPTS TO VERIFY THESE ADVERTISING CLAIMS? DO ANY CERTIFICATION ORGANIZATIONS, SUCH AS GREEN-E, OPERATE IN THE STATE? ARE THEY USED BY (OR AT LEAST AVAILABLE TO) A SUBSTANTIAL PORTION OF CONSUMERS?

Advertising by ESCOs has been limited. Much of the activity surrounded the phased-in participation (migration) of LDC customers to the new market, particularly because of a monetary incentive paid by the LDC to encourage such movement. There has been no per se promotion of environmentally friendly

power. It is anticipated that power "product" offerings will follow the primary development of the retail consumer marketplace.

Please see the above discussion regarding environmental attributes in response to question 2 under "Consumer Protection Issues."

Retail Supply Issues

1. WHAT DIFFICULTIES HAVE SUPPLIERS ENCOUNTERED IN ENTERING THE MARKET? WHAT CONDITIONS/INCENTIVES ATTRACT SUPPLIERS TO RETAIL MARKETS? HAVE SUPPLIERS EXITED THE MARKET AFTER BEGINNING TO PROVIDE RETAIL SERVICE? IF SO, WHY?

New York State has a reasonably straightforward process for registering to do business as an ESCO. The process includes: (1) compliance with other State requirements for doing business in the State; (2) providing a copy of the Disclosure Statement, that indicates consumer protections; (3) providing information on Switching Procedures; (4) a description of the ESCO's process for handling and resolving customers' complaints; (5) a sample of the billing form, and; (6) proof of meeting applicable requirements of the New York Independent System Operator, Inc. (NYISO). The registration process has not proven to be a barrier. Because retail access began with six individual utility Rate and Restructuring Orders, certain differences remain among the different utility service territories, even after the NYPSC took steps to minimize these differences. When retail access began, some ESCOs concentrated their business in New York City and surrounding areas, while other ESCOs concentrated their business upstate. More recently,

ESCOs have expanded their service well beyond their initial geographic areas.

The margin between the utility backout credit and the wholesale price ("headroom") the ESCO faces is the most important market condition. The utility that offers bundled customers the lowest prices in New York is the territory with the fewest number of ESCOs and least number of customers participating in retail access. The presence of incentives is another important condition. A NYPSC study showed a significant difference in retail access participation in those utility territories that had incentives available. There was a surge in retail access participation following the opening of the NYISO in November 1999.

One ESCO went bankrupt in 1999. In 2000, wholesale market volatility caused several ESCOs to either exit the market entirely, or to exit the market in certain utility territories when their perception was that there was insufficient headroom for them to make a profit or that their hedging decisions were wrong.

2. **WHAT ARE THE CUSTOMER ACQUISITION COSTS AND OPERATIONAL COSTS TO SERVICE RETAIL CUSTOMERS? HOW DO ACQUISITION AND OPERATIONAL COSTS COMPARE TO PROFIT MARGINS FOR ELECTRIC POWER GENERATION SERVICES? DO RETAIL MARGINS AFFECT ENTRY? IF SO, HOW? DID THE STATE HARMONIZE THE PROCEDURES SUPPLIERS USE TO ATTRACT AND SWITCH CUSTOMERS WITH OTHER STATES' PROCEDURES, IN ORDER TO REDUCE SUPPLIERS' COSTS?**

Only ESCOs know what their costs are to acquire and service retail customers. We do not keep that information. While New York played a prominent role in the national effort

regarding Uniform Business Practices, which had the objective of standardizing practices nationwide, few ESCOs are serving across the state borders.

3. **HAVE CUSTOMERS SWITCHED TO NEW SUPPLIERS? WHY OR WHY NOT? ARE THERE GREATER INCENTIVES FOR CERTAIN CUSTOMER CLASSES (I.E., INDUSTRIAL, COMMERCIAL, RESIDENTIAL) THAN FOR OTHERS TO SWITCH SUPPLIERS? WHY OR WHY NOT? ARE PENALTIES OR DIFFERENT RATES APPLIED TO CUSTOMERS THAT SWITCH BACK TO THE SUPPLIER OF LAST RESORT? ARE THERE OTHER MEASURES TO DETERMINE WHETHER CUSTOMERS ARE ACTIVELY CONSIDERING SWITCHING SUPPLIERS? IF SO, DO THESE INDICATORS SHOW DIFFERENT PATTERNS THAN THE SWITCHING RATE DATA?**

As of December 2000, the last date for which data is available, 229,280 customers (representing 3.7% of eligible customers) have switched to a new supplier. This total includes 40,270 non-residential customers' (5.3%) and 189,010 residential customers (3.4%).

Because the discounts have been sufficient for the largest customers to switch, the NYPSC has instituted incentive programs limited to residential and small commercial customers.

The NYPSC's Uniform Business Practices⁸ allow utilities to file tariffs that require customers, who voluntarily switch back to the utility, to remain for one year or to impose switching fees. However, not all utilities have adopted these requirements.

The NYPSC does not have any measures to identify whether customers are actively considering switching.

⁸ Opinion No. 99-3 at Appendix B.

4. HAVE SUPPLIERS OFFERED NEW TYPES OF PRODUCTS AND SERVICES (E.G., TIME OF DAY PRICING, INTERRUPTIBLE CONTRACTS, GREEN POWER, ETC.) IN STATES WHERE RETAIL COMPETITION HAS BEEN IMPLEMENTED? IF SO, DESCRIBE THE PRODUCTS AND WHAT CUSTOMER RESPONSE HAS BEEN.

As of the end of 2000, suppliers have not offered new types of products and services in the mass market. Beginning in the spring of 2001, the NYISO instituted programs for Emergency Price Load Reduction and Incentivized Load Reduction, which will be available to customers through ESCOs and regulated utilities. No information is yet available on customer response.

5. WHAT ARE THE BENEFITS OR DRAWBACKS OF THE DIFFERENT APPROACHES TO HANDLING THE SUPPLIER OF LAST RESORT OBLIGATION FOR CUSTOMERS WHO DO NOT CHOOSE A NEW SUPPLIER (E.G., ALLOW INCUMBENT UTILITY TO RETAIN THE OBLIGATION TO PROVIDE GENERATION SERVICES TO NON-CHOOSING CUSTOMERS, AUCTION THE OBLIGATION, OR ASSIGN THE OBLIGATION TO NON-UTILITY PARTIES). WHAT HAS BEEN CONSUMER REACTION TO THESE APPROACHES? IS PROVIDER OF LAST RESORT SERVICE NECESSARY?

In May 2000, the NYPSC instituted Case 00-M-0504 to address the responsibilities of providers of last resort and the role of utilities in competitive energy markets and fostering the development of retail competitive opportunities. A decision by an Administrative Law Judge is expected in the second quarter 2001.

Retail Pricing Issues

1. HOW IS ENTRY AFFECTED BY THE PRICE FOR THE PROVIDER OF LAST RESORT SERVICE (FOR CUSTOMERS WHO DO NOT CHOOSE) OR FOR DEFAULT SERVICE (FOR CUSTOMER WHOSE SUPPLIER EXITS THE MARKET)? HOW DOES THE PRICE FOR THE PROVIDER OF LAST RESORT OR DEFAULT SERVICE COMPARE TO PRICES OFFERED BY ALTERNATIVE SUPPLIERS? IS THE PRICE FOR PROVIDER OF LAST RESORT SERVICE OR DEFAULT SERVICE CAPPED? IF SO, FOR HOW LONG?

In New York State, there is no designated price for either provider of last resort (POLR) service or default

service. Instead, the utility offers a regulated price in some cases based on market price, while ESCOs offer unregulated prices. It is presumed that the unregulated price is lower because customers are switching to ESCOs. However, we have observed instances where the ESCO price is greater than the upstate utility price and customers stayed with the ESCO, at least for a couple of months.

Regulated rate requests must be acted upon within 11 months under the New York Public Service Law.⁹ However, more recently we have authorized long-term rate agreements that last for approximately 3 years. Recently, several utilities have filed petitions for new rates.

2. HAS THE STATE REQUIRED RETAIL RATE REDUCTIONS PRIOR TO THE START OF RETAIL COMPETITION? WHAT IS THE RATIONALE FOR THESE REDUCTIONS? HOW HAVE STATE-MANDATED RATE REDUCTIONS PRIOR TO THE START OF RETAIL COMPETITION AFFECTED RETAIL COMPETITION?

Beginning in 1997, the NYPSC reduced the rates paid by customers of nearly every electric utility in New York. The specific rate reductions were negotiated as part of each utilities rate and restructuring plan. For example, cumulative rate reductions and cost savings for Con Edison customers will total about \$2.9 billion over eight years.

These rate reductions are in response to the NYPSC's goal of getting New York's electric prices more in line with the national average.

⁹ N.Y. PUB. SERV. LAW § 66(12) (McKinney 2000).

While the exact details of the rate reductions vary from utility to utility, the overall goal was to lower rates for all electric customers regardless of their choice of electric supplier.

3. DO ANY SEASONAL FLUCTUATIONS IN THE PRICE OF WHOLESAL E GENERATION CAUSE SOME SUPPLIERS TO ENTER THE MARKET ONLY AT CERTAIN TIMES OF THE YEAR? HOW HAVE THESE SUPPLIERS FARED?

The NYPSC's policy discourages suppliers from serving customers only during lower cost times of the year. During the summer of 2000, however, one ESCO ceased doing business for the summer and picked up most of its former customers in the fall.

4. HOW HAS THE STATE ADDRESSED PUBLIC BENEFIT PROGRAMS (E.G., UNIVERSAL SERVICE REQUIREMENTS, LOW INCOME ASSISTANCE, CONSERVATION EDUCATION, ETC.) AS IT HAS IMPLEMENTED RETAIL COMPETITION? WHICH OF THESE PROGRAMS ARE NECESSARY AS COMPETITION IS INTRODUCED AND WHY? ARE PUBLIC BENEFITS AVAILABLE TO ALL CUSTOMERS OR ARE THEY RESTRICTED TO CUSTOMERS OF THE SUPPLIER OF LAST RESORT? HOW DOES THIS AFFECT RETAIL COMPETITION?

In January 2001, the NYPSC renewed and enlarged its System Benefits Charge (SBC) program. This program is funded by a competitively neutral surcharge on distribution rates. It offers energy efficiency programs, research and development programs, low-income programs and environmental programs through a statewide program administrator called the New York State Energy Research and Development Authority (NYSERDA). The question of whether these types of programs should be continued when we have a fully competitive market is being addressed in an on-going NYPSC proceeding.¹⁰

¹⁰ Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Order Continuing and Expanding the

Market Structure Issues

1. HOW HAS THE DEVELOPMENT OF REGIONAL TRANSMISSION ORGANIZATIONS (RTOs) AFFECTED RETAIL COMPETITION IN THE STATE?

The NYISO enables Load Serving Entities (LSE's) and ESCOs to purchase wholesale power for resale at the retail level.

2. DID THE STATE REQUIRE THE DIVESTITURE OF GENERATION ASSETS (OR IMPOSE OTHER REGULATORY CONDITIONS ON THE USE OF THESE ASSETS) WHEN RETAIL COMPETITION WAS INTRODUCED? TO WHAT EXTENT WAS DIVESTITURE OF GENERATION ASSETS A COMPONENT OF THE STATE'S HANDLING OF A UTILITY'S STRANDED COSTS? WAS DIVESTITURE USED TO REMEDY A HIGH CONCENTRATION OF GENERATION ASSETS SERVING THE STATE? WAS THERE APPRECIABLE VOLUNTARY DIVESTITURE OF GENERATION ASSETS? HAS THE STATE EXAMINED WHETHER THERE HAS BEEN APPRECIABLE CONSOLIDATION OF OWNERSHIP OF GENERATION SERVING THE STATE SINCE THE START OF RETAIL COMPETITION?

Five of the six NYPSC Orders that instituted competition contained provisions related to the divestiture of generating assets. The timetables for completing generation divestiture have differed. At this time, all fossil fuel and hydroelectric plants have been divested by the utilities in those five Orders. The NYPSC is currently reviewing the transfer of several nuclear plants.¹¹

New York does not have a statewide policy regarding the treatment of stranded costs. The NYPSC has handled this

System Benefits Charge for Public Benefit Programs, (issued January 26, 2001).

¹¹ The nuclear plant divestitures pending before the NYPSC are for Indian Point Unit 2, which is owned by Consolidated Edison Company of New York, Inc., and Nine Mile Unit 1, which is owned by Niagara Mohawk Power Corp. (Niagara), and Unit 2, which is owned by Niagara, Rochester Gas & Electric Corp., Central Hudson Gas & Electric Corp., New York State Electric & Gas Corp. and the Long Island Power Authority (LIPA).

issue on a utility specific basis. Many of the plant sales were for more than book value.

Divestiture was not viewed as a remedy for high concentrations of generation assets. Instead, it was seen as an opportunity to open a formerly regulated market to competition. Today, there is greater diversity of ownership of generation than in 1995, when the NYPSC announced its intention to open wholesale and retail markets to competition.

3. IF A UTILITY NO LONGER OWNS GENERATION ASSETS TO MEET ITS OBLIGATIONS AS THE SUPPLIER OF LAST RESORT OR DEFAULT SERVICE PROVIDER, WHAT MARKET MECHANISM (E.G., SPOT MARKET PURCHASES, BUY BACK OR OUTPUT CONTRACTS, ETC.) DOES IT USE TO OBTAIN GENERATION SERVICES TO FULFILL THESE OBLIGATIONS? WHAT SHARE OF A UTILITY'S LOAD IS OBTAINED VIA THE DIFFERENT MECHANISMS? HOW ARE THESE SHARES TRENDING? IS THE MARKET MECHANISM TRANSPARENT? IS IT NECESSARY TO MONITOR THESE MARKET MECHANISMS? WHY OR WHY NOT? IF SO, WHAT SHOULD THE MONITOR EXAMINE?

Some utilities in New York State are operating under rate cap mechanisms. Others pass through their supply costs to customers. Generally, bilateral contracts, transition service contracts with the new owners, Independent Power Producer contracts, self owned generation and spot market purchases are all used to some extent to fulfill supply obligations. The balance of the energy needs are purchased in the NYISO's day-ahead and real-time markets. The transition contracts with the new owners were filed with the NYPSC. Typically, the amount of output of the plant that is covered by the contract diminishes over time. The duration of these contracts vary and some are already completed.

4. EXPLAIN THE STATE'S ROLE IN OVERSEEING OPERATION OF THE TRANSMISSION GRID IN THE STATE AND THE EXTENT TO WHICH PUBLIC POWER OR MUNICIPAL POWER TRANSMISSION SYSTEMS ARE INTEGRATED INTO THIS EFFORT. WHAT IS THE RELATIONSHIP BETWEEN THE STATE'S ROLE AND THE FEDERAL ENERGY REGULATORY COMMISSION'S ROLE IN TRANSMISSION SYSTEM OPERATION IN THE STATE?

The New York Public Service Law requires the NYPSC to ensure a safe and reliable electric system.¹² This includes assessing the need for and approving transmission expansions, power plant construction and ensuring reliability. The NYPSC actively oversees the operation of the transmission grid, meets with the NYSIO operators, receives and analyzes operating reports, and investigates major incidents on the grid.

The New York State Reliability Council (NYSRC) is a not-for-profit entity whose mission is to promote and preserve the reliability of electric service in New York State by developing, maintaining and updating Reliability Rules. The NYISO and all entities engaging in electric transmission, ancillary services, and energy and power transactions on the New York State Power System must comply with these rules. The NYPSC participates in the NYSRC meetings, without vote, and serves to arbitrate disputes, if they should occur, between the NYISO and NYSRC.

Two public power authorities (i.e., Long Island Power Authority and the Power Authority of the State of New York (NYPA)) and a representative of the Municipal Electric Systems

¹² N.Y. PUB. SERV. Law § 65 (McKinney 2000).

and Cooperatives sector are three of the 13 members of the NYSRC.

While the NYPSC has responsibility for overseeing the reliable operation of the transmission grid, the FERC's role is primarily to set wholesale rates and ensure wholesale competitors are on a level playing field, and that barriers are not erected that would hinder the bulk power markets. FERC is not involved in the physical operation of the system. States have regulatory authority over retail transactions.

5. DO FIRMS THAT HAVE PROVIDER OF LAST RESORT OR DEFAULT SERVICE OBLIGATIONS (FORMERLY ANATIVE LOAD@ OBLIGATIONS IN THE REGULATED ENVIRONMENT) RECEIVE PREFERENTIAL TRANSMISSION TREATMENT? IF SO, HOW DOES THIS AFFECT WHOLESALE ELECTRIC POWER COMPETITION? HOW AND BY WHOM SHOULD RETAIL SALES OF BUNDLED TRANSMISSION SERVICES (I.E., RETAIL SALES OF BOTH ENERGY AND TRANSMISSION SERVICES) AND RETAIL SALES OF UNBUNDLED TRANSMISSION BE REGULATED? IF BY MORE THAN ONE ENTITY, HOW SHOULD REGULATION BE COORDINATED? WHAT SHOULD THE STATE'S ROLE BE IN OVERSEEING WHOLESALE TRANSMISSION RELIABILITY?

Providers of last resort are not given preferential treatment for transmission service.

New York is responsible for overseeing transmission reliability. States are in the best position to ensure that the transmission systems in their states are properly maintained. Please see our response to the previous question. The NYPSC is the petitioner in New York v. Federal Energy Regulatory Commission.¹³ We do not believe that the Federal Power Act authorizes FERC to regulate unbundled retail transmission.

¹³ See Transmission Access Policy Study Group v. Federal Energy Regulatory Commission, 225 F.3d 667 (D.C. Cir. 2000) (upholding FERC's jurisdiction over unbundled retail transmission of electricity), cert. granted, New York v. Federal Energy Regulatory Commission, 121 S.Ct. 1185 (2001)

6. TO WHAT EXTENT DID THE STATE IDENTIFY TRANSMISSION CONSTRAINTS AFFECTING ACCESS TO OUT-OF-STATE OR IN-STATE GENERATION PRIOR TO THE START OF RETAIL COMPETITION? IS THE STATE CAPABLE OF REMEDYING THESE TRANSMISSION CONSTRAINTS, OR IS FEDERAL JURISDICTION NECESSARY? HOW DO THE RATIONALES FOR FEDERAL JURISDICTION OVER ELECTRIC POWER TRANSMISSION SITING COMPARE TO THE REASONS UNDERLYING FEDERAL JURISDICTION OVER THE SITING OF NATURAL GAS PIPELINES?

Prior to the start of retail competition, transmission constraints were well known. The NYISO was designed with a location-based marginal pricing system that ensures equal access to in-state and out-of-state generation and transmission resources.

The adequacy of the transmission system for reliability purposes is ensured by NYISO studies that are submitted to the NPCC. However, the possible advantages of increased transmission needs to be evaluated by considering the amount of energy price benefits, transmission costs and the cost of building new generation in high cost areas. There have been no experiences to date that demonstrates a need for federal jurisdiction.

7. HOW HAVE STATE SITING REGULATIONS FOR NEW GENERATION AND TRANSMISSION FACILITIES BEEN AFFECTED BY THE ONSET OF RETAIL COMPETITION? HAS NEW GENERATION SITING KEPT PACE WITH DEMAND GROWTH IN THE STATE? IF NOT, WHY NOT? IS FEDERAL JURISDICTION NECESSARY FOR SITING OF ELECTRIC POWER GENERATION FACILITIES? HAS THE STATE ACTIVELY MONITORED AND REPORTED THE RELATIONSHIP BETWEEN IN-STATE CAPACITY AND PEAK DEMAND IN THE STATE? WHAT INCENTIVES DO SUPPLIERS HAVE TO MAINTAIN ADEQUATE RESERVE CAPACITY? WHAT ARE THE WAYS TO VALUE CAPACITY IN COMPETITIVE MARKETS? IS RESERVE SHARING STILL IMPORTANT IN COMPETITIVE MARKETS? DO OTHER INSTITUTIONS/MARKET PROCESSES PROVIDE A REASONABLE SUBSTITUTE FOR RESERVE SHARING?

Enacted in 1992, Article X of the NYPSL replaced the former regulations for the siting of major electric generating facilities (i.e., 80 MW or more). The new siting law included

the elimination of detailed "need" studies. In lieu of a detailed needs study, a showing of either consistency with long range energy planning objectives and strategies or selection pursuant to an approved procurement process establishes the need for a project. As applications to construct generating facilities have been considered, proposed merchant plants have generally been found to be consistent with the state's energy plan.

During the transition to retail competition, utilities divested their generation facilities, while the market response to build new projects developed slower than demand growth. However, the market response to a competitive wholesale market has resulted in 21 projects filed under Article X of the NYPSL. At least 25 developers are conducting interconnection studies as a preliminary step to filing applications under Article X. The lag between the restructuring decisions and the market response, in the form of new applications, could be attributed, in part, to market uncertainty while the Environmental Protection Agency (EPA) evaluated whether to delegate federal permits to the New York State Board on Electric Generation Siting and the Environment. However, Article X of the NYPSL requires applications to be processed in one year from their compliance and should compensate for the lag. Siting smaller units (i.e., less than 80 MW) and reducing demand will also factor into the balance of demand growth with new generation. We see no need for FERC to make state siting decisions. These are local

matters better resolved by those governmental officials close to the consumers.

The NYPSC monitors the relationship between capacity and peak demand in the state. Adequate reserve requirements are the responsibility of the utilities (i.e., LSEs) that must contract for adequate reserves as specified by the NYSRC and NYISO.

Operating reserve sharing is being pursued where it can increase reliability and/or reduce costs. Operating reserve costs are spread across and shared by all New York consumers.

8. SINCE THE START OF RETAIL COMPETITION, WHAT HAS BEEN THE RATE OF GENERATION PLANT OUTAGES (SCHEDULED AND UNSCHEDULED)? TO WHAT EXTENT HAS THE STATE MONITORED THESE OUTAGES AND EXAMINED THEIR CAUSES?

The NYPSC does not continuously monitor generation plant outages, but can do periodic studies.

Other Issues

1. WHAT MEASURES HAS THE STATE TAKEN TO MAKE CUSTOMER DEMAND RESPONSIVE TO CHANGES IN AVAILABLE SUPPLY? HAS THE STATE PROVIDED UTILITIES INCENTIVES TO MAKE CUSTOMERS MORE PRICE RESPONSIVE? HAS THE STATE MOVED AWAY FROM AVERAGE COST PRICING? WHAT EFFECT HAVE THESE MEASURES HAD ON DEMAND AND ON DEMAND ELASTICITY?

In the past, the NYPSC has approved tariff-based programs that provide incentives to curtail load due to potential supply shortages. Recently, the NYPSC has worked with the NYISO and endorsed programs that provide incentives for end use customers to curtail load either during emergency supply situations or in response to high prices. These programs include accelerating the use of sophisticated pricing options

and advanced metering technologies, known as real-time metering. These programs will enable customers to respond effectively during peak demand periods and implement voluntary, pre-arranged load shedding programs that make it economically attractive for large electricity users to curtail their electricity demand at critical times and participate in real-time pricing of electricity.

New York has not moved away from average cost pricing at this time, but customers will be able to avail themselves of real-time pricing soon.

- 2. HAS THE STATE PROVIDED MECHANISMS AND INCENTIVES FOR OWNERS OF CO-GENERATION CAPACITY TO OFFER POWER DURING PEAK DEMAND PERIODS? HAS THE STATE IDENTIFIED, REPORTED, AND FACILITATED DEVELOPMENT OF PUMPED STORAGE FACILITIES OR OTHER APPROACHES TO ARBITRAGING BETWEEN PEAK AND OFF-PEAK WHOLESALE ELECTRICITY PRICES?**

Cogenerators can bid to participate in the demand reduction program discussed in the last question. The NYPSC has not participated in the development of pumped storage facilities; however, the NYPA owns and operates two such facilities in New York.

- 3. WHAT ISSUES HAVE ARISEN UNDER RETAIL COMPETITION THAT HAVE REQUIRED COOPERATION OR COORDINATION WITH OTHER STATES? WHAT APPROACH WAS TAKEN TO SECURING THIS COOPERATION OR COORDINATION? ARE THERE OTHER ISSUES REQUIRING COOPERATION THAT HAVE NOT YET BEEN ADDRESSED? WHICH OF THESE ISSUES ARE THE MOST SIGNIFICANT?**

The two initiatives that have required the greatest degree of cooperation and coordination are the development of Uniform Retail Access Business Practices and the corresponding EDI standards to support those practices. To achieve these

initiatives, NYPSC was actively involved in the development of a National Report on Uniform Business Practices recently released by the Edison Electric Institute. In addition, we are actively participating in the creation of a national EDI standard, as members of a Utility Industry Group, and have been closely following the proposed organizational restructuring of the Gas Industries Standards Board. Efforts are also underway in the Mid-Atlantic States to develop a regional approach for version control of EDI data standards. Uniform Business Practices are most significant because they have the greatest potential to minimize barriers to entry in the competitive marketplace.

4. HOW PREVALENT IS THE USE OF DISTRIBUTED RESOURCES (E.G., DISTRIBUTED GENERATION) WITHIN THE STATE? WHAT BARRIERS DO CUSTOMERS FACE TO IMPLEMENTING DISTRIBUTED RESOURCES?

There is a growing amount of Distributed Generation in New York. The NYPSC has taken initiatives to address the barriers to using distributed generation. Specifically, the NYPSC approved a proposal to standardize and streamline technical requirements for interconnection to utility facilities.¹⁴ That proposal included a standardized application process and a simplified contract for interconnecting distributed generation units with a nameplate rating of 300kV or less. Currently, there are two NYPSC proceedings underway to examine costs and benefits of distributed generation with regard

to distribution service and the reasonableness of rates, terms and conditions for the provision of electric standby service.¹⁵

5. WHICH SPECIFIC JURISDICTIONAL ISSUES PREVENT STATE RETAIL COMPETITION PROGRAMS FROM BEING AS SUCCESSFUL AS THEY MIGHT BE?

Due to FERC's claim of exclusive jurisdiction over unbundled retail transmission,¹⁶ states may be reluctant to adopt programs which take away their authority.¹⁷ Furthermore, FERC's hesitancy to intervene in wholesale markets affected by market power could influence state decision-making.

6. WHICH SPECIFIC TECHNOLOGICAL DEVELOPMENTS ARE LIKELY TO SUBSTANTIALLY AFFECT RETAIL OR WHOLESALE COMPETITION IN THE ELECTRIC POWER INDUSTRY THAT MAY ALTER THE MANNER IN WHICH STATES STRUCTURE RETAIL COMPETITION PLANS? WHY? WHAT TIME FRAME IS ASSOCIATED WITH THESE DEVELOPMENTS?

In the short to intermediate term, technological developments in metering are likely to be the only ones that affect competition in the electric industry. New York has structured retail competition to include competitive metering. However, customers need interval meters to take advantage of the

¹⁴ Cases 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Instituting Further Inquiry (issued March 20, 1998).

¹⁵ Cases 00-E-0005 et al., Proceeding on Motion of the Commission to Examine Costs, Benefits and Rates Regarding Distributed Generation, Order Instituting Proceedings (issued January 10, 2000).

¹⁶ Docket Nos. RM95-8-000, RM94-7-001, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888 (issued April 24, 1996), p. 7.

¹⁷ See Transmission Access Policy Study Group v. Federal Energy Regulatory Commission, 225 F.3d 667 (D.C. Cir. 2000) (upholding FERC's jurisdiction over unbundled retail transmission of electricity), cert. granted, New York v. Federal Energy Regulatory Commission, 121 S.Ct. 1185 (2001).

opportunities from real-time pricing and to participate in emergency demand response programs. Programs have recently been enacted to provide discounts to customers who install interval meters. These efforts are designed to reduce customer costs through energy efficiency, reduced usage and also help moderate wholesale electricity prices.

In the longer term, technological developments in fuel cells and distributed generation have the potential to substantially affect the electric power industry. Furthermore, advances in transmission and distribution technology will increase the amount of power capable of being transmitted and distributed over existing facility rights-of-way.

- 7. WHAT ARE THE LESSONS TO BE LEARNED FROM THE RETAIL ELECTRICITY COMPETITION EFFORTS OF OTHER COUNTRIES? ARE THERE OTHER FORMERLY-REGULATED INDUSTRIES IN THE U.S. (E.G., NATURAL GAS) THAT ALLOW CUSTOMER CHOICE AND PROVIDE USEFUL COMPARISONS TO RETAIL ELECTRICITY COMPETITION? IF SO, WHAT ARE THE RELEVANT INSIGHTS OR LESSONS TO BE LEARNED?**

The lessons to be learned from other countries' introduction of retail electricity competition are that it takes a long time to introduce competition and that it is difficult to get it right at the outset. At the NYPSC, we are looking at the telecommunications industry as well as the natural gas industry for useful comparisons. One current issue is whether the telecommunications model, where all competitive providers have the obligation to serve, is a model that might be adopted for retail competition in both electricity and natural gas. One difficulty in looking to the telecommunications industry is that we do not see a parallel with the widespread technologies (e.g.,

wireless and cable), that can bring telecommunications service to customers in competition with the existing network infrastructure.

Respectfully submitted,

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of Electricity and
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Albany, New York