

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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CASE 00-M-0504 - Proceeding on Motion :  
of the Commission Regarding Provider of :  
Last Resort Responsibilities, the Role of :  
Utilities in Competitive Energy Markets, :  
and Fostering the Development of Retail :  
Competitive Opportunities :  
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**BRIEF ON EXCEPTIONS OF  
THE NATIONAL ENERGY MARKETERS ASSOCIATION**

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**BRIEF ON EXCEPTIONS OF  
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This Brief on Exceptions to the Recommended Decision by Judge Jeffrey Stockholm, Judge Joel Linsider, and Chief of Residential Advocacy, Michael Corso,<sup>1</sup> is submitted by The National Energy Marketers Association (NEM) in the above-referenced proceeding, as provided for in the Notice of Schedule for Filing Exceptions of Secretary Deixler, dated July 13, 2001.

As an initial matter, NEM is supportive of many of the conclusions reached in the Recommended Decision and believes that many of these measures could help to foster development of competitive markets. However, there are a number of recommendations for which NEM believes further clarification and discussion are needed prior to implementation.

**1. Utilities Exiting the Merchant Function**

The Recommended Decision states:

[W]e see a fair chance, but far from a certitude, that a Commission decision ousting utilities from the merchant function (or directing customers to purchase commodity from an entity other than the utility) would be sustained in the absence of legislation confirming the Commission's authority. That uncertainty need not deter the Commission from taking those actions if it finds a reasonable basis for them, but it strongly

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<sup>1</sup> Case 00-M-0504, Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, Recommended Decision by Administrative Law Judge Jeffrey E. Stockholm and Michael Corso, Chief of Residential Advocacy, and Administrative Law Judge Joel E. Linsider [hereinafter "Recommended Decision"], dated July 13, 2001.

suggests that their effective date be deferred to allow time for judicial review. The sole exception would be to allow for the immediate effective date of a requirement that utilities cease performing the merchant function in those areas where, as a practical matter they already have done so: the provision of gas to large industrial customers.<sup>2</sup>

NEM does not agree with the suggestion to defer removing utilities from the merchant function. NEM asserts that providing commodity is a competitive function that should be rendered by competitive market participants. The Recommended Decision itself recognizes this point in suggesting that utilities be removed from the merchant function for large industrial gas customers.

The legal interpretations of the term "obligation to serve" have been briefed for the Commission and it has been clear to all parties for many years that the state-protected franchise monopoly clearly applies to natural monopoly functions. It has also been clear to all parties that the Commission has authority to effectuate competition in competitive products, services, information and technology through its extant authority. The Commission has expressed its intention to accomplish this objective repeatedly through numerous Orders over many years. Unbundling competitive functions from monopoly functions must proceed to enable competitive suppliers to make the investments necessary to serve New York customers. Should parties wish to challenge the Commission's authority to accomplish these goals, the Courts will always be available to resolve such disputes. But, stalling competition in advance of such challenges will unnecessarily delay competition and the conditions necessary to make important investment decisions.

## **2. "Workably Competitive" Markets**

The Recommended Decision concludes that the Commission should, "adopt as its end-state vision of competitive markets one in which the utilities no longer provide gas and electric commodity service and are removed from any other market that becomes workably competitive. . . As a general matter, the utilities should not be removed from any market until multiple suppliers offering a variety of products are available for the entire customer class throughout the utility's service territory."<sup>3</sup> NEM agrees that utilities should be removed from the business of providing commodity as well as competitive products, services, information and technologies but believes this should occur expeditiously and by a date certain. The failure to set a date certain for utilities exit of the merchant function and other competitive markets simply does not provide market participants with enough certainty to form business plans to serve New York consumers. Additionally, it is not clear what the definition of "workably competitive" will be construed to mean. If the threshold to determining a "workably competitive market" is whether

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<sup>2</sup> Id. at 126.

<sup>3</sup> Id. at 131-32

multiple suppliers are offering different products for an entire customer class throughout a utility's service territory, NEM submits that this is far too subjective a criteria. It is also unclear how such a determination would be rendered and then implemented in the market.

On a more generalized level, the proposal to wait until multiple suppliers are offering multiple products for a customer class in a service territory before requiring utility removal from that market, will impose a "chicken and egg" type scenario on the market. So long as utilities retain responsibility for rendering competitive products, services, information and technology in the market, and can do so at artificially low, or cross-subsidized rates, it will be unlikely that multiple suppliers will be able to offer multiple products that will represent a value proposition for consumers. The failure to set a date certain for utilities to exit competitive markets will similarly constrain further market development. Accordingly, NEM urges that a detailed schedule for utility exit from the provision of commodity and other competitive products, services, information and technology be established with objective milestones that all market participants can rely on to make informed and rational business decisions.

### **3. Fully Unbundled Rates**

The Recommended Decision recognizes the importance of fully unbundling gas and electric rates to foster market development.<sup>4</sup> NEM fully agrees with the proposition. NEM maintains that the reliance on unbundled rates to achieving increased customer migration indicates that the Unbundling Track established in this case assumes even greater significance. The unbundled embedded cost studies to be performed must be sufficiently detailed to transparently quantify and provide sufficient information about each function, product, service, information or technology currently being provided by the utility such that the costs of competitive areas, (such as those set forth in Appendix A attached hereto), are capable of being traced and properly priced by the competitive marketplace. Furthermore, the Recommended Decision concludes that the obligation to serve and consumer protection responsibilities should be borne by ESCOs.<sup>5</sup> Accordingly, the costs associated with utilities rendering these services must be clearly and transparently furnished in the embedded cost studies.

### **4. Customer Migration**

The Recommended Decision concludes that the laissez-faire approach to customer migration should continue until "workably competitive" markets exist, at which time more aggressive measures should be pursued.<sup>6</sup> NEM maintains that if such an approach is to work, the Commission must move aggressively to unbundle the fully embedded costs of all products, services, information and technology set forth in Appendix A. NEM also maintains that this approach again implicates a

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<sup>4</sup> Id. at 133.

<sup>5</sup> Id. at 58.

<sup>6</sup> Id. at 84.

"chicken and egg" situation in which markets are to be deemed "workably competitive" as a function of customer migration, but migration will only be aggressively pursued upon markets being determined "workably competitive."

## **5. Utility Offerings of Competitive Products**

With respect to utility hedging, the Recommended Decision concludes that, "until the wholesale electricity market becomes workably competitive and hedged products are widely available in the retail market, the utilities should continue to offer hedged products for all customers."<sup>7</sup> The Recommended Decision also concludes that, "[o]n the gas side, it appears that the market is offering superior products for industrial customers and perhaps for larger commercial customers, and we therefore conclude that no hedging is required for these customers. As the gas market develops, hedging should be phased out for all commercial customers, and ultimately for residential customers."<sup>8</sup> In order to mitigate utility stranded costs associated with hedging, the Recommended Decision suggests that, "utilities should be required to file for Commission approval their hedging plans by fuel and customer class, including a competitively neutral mechanism to recover the costs."<sup>9</sup>

NEM argues that continued use of utility hedging represents a barrier to competition inasmuch as hedged products are competitive products that should be rendered by the competitive marketplace. If utilities are to be permitted to offer hedged products, the utilities must be fully at risk and should not be entitled to any deferrals.

The Recommended Decision also recognizes the negative impact of long-term utility rate plans for competitive services. It concludes that utility rate plans for competitive services should cover no more than three to four years and that "utility rates for competitive products and services [should] remain based on the utility's costs rather than being fixed regardless of costs under an incentive based regulatory plan."<sup>10</sup> NEM agrees that utilities offerings of competitive products and services on a long-term basis can have negative market development impacts. To the extent that these offerings are set at artificially, low or cross-subsidized rates, they erect large barriers to competition. If utilities are allowed to offer competitive products and services, the rates must be based on the utility's fully embedded costs for said products and services.

## **6. Commission Oversight of ESCO Provision of Consumer Protections**

The Recommended Decision suggests that, "ESCOs be required to provide all of the general consumer protections required of utilities under the Public Service Law and be required to serve without undue discrimination all customers in the customer classes and territories chosen by each ESCO." Furthermore, the

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<sup>7</sup> Id. at 78.

<sup>8</sup> Id. at 79.

<sup>9</sup> Id. at 80.

<sup>10</sup> Id. at 82.

Recommended Decision maintains that, "the Commission should assume direct oversight of the ESCOs' provision of consumer protections, the resolution of consumer/ESCO complaints, and the provision of non-discriminatory service by ESCOs."<sup>11</sup> NEM submits that Commission oversight of ESCO provision of consumer protections should be consistent with all existing consumer protection rules. NEM submits that promulgation of new rules targeting the energy industry will impose added costs on energy consumers without any appreciable increase in consumer protections.

Respectfully submitted,

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<sup>11</sup> Id. at 90.

## **Appendix A**

### **List of Services that can be Offered Competitively or Outsourced to Competitive Suppliers**

Competitive retail energy services include, but are not limited to the marketing, sale, design, construction, installation, or retrofit, financing, operation and maintenance, warranty and repair of, or consulting with respect to:

1. Retail marketing, selling, demonstration, and all energy commodity related functions including the supply and installation of distributed generation, fuel cells, and microturbines;
2. Energy commodity provider of last resort;
3. Hedging and risk management services;
4. Fuel storage facilities;
5. Energy imbalance services;
6. Billing services - services related to the production and remittance of a bill to an end use customer and/or a utility for competitive service charges applicable to a competitive provider's customers. Competitive billing system services include, but are not limited to, the following:
  - a. Generation of billing charges by application of rates to customer's meter readings, as applicable;
  - b. Presentation of charges to utilities for the actual services provided and the rendering of bills;
  - c. Extension of credit to and collection of payments from end-use customers and utilities, as well as uncollectible accounts;
  - d. Disbursement of funds collected;
  - e. Customer account data management;
  - f. Customer care and call center activities related to billing inquiries from end-use customers and utilities;
  - g. Administrative activities necessary to maintain utility billing accounts;
  - h. An operating billing system; and
  - i. Error investigation and resolution.
7. Customer care services - customer care services are services rendered to customers associated with education and support of a competitive provider's products, services, information and technologies;
8. Installation and maintenance of metering equipment;

9. Metering system services - metering system services relate to the installation, maintenance, reading and polling of an end-use customer's standard meter. (Above 50kW as well as below 50kW);
10. Metering system services include, but are not limited to, the following:
  - a. Ownership of standard meter equipment and meter parts;
  - b. Storage of standard meters and meter parts not in service;
  - c. Measurement or estimation of the energy consumed or demanded by a retail consumer during a specified period limited to the customer usage necessary for the rendering of a monthly bill;
  - d. Meter calibration and testing;
  - e. Meter reading, including non-interval, interval, and remote meter reading;
  - f. Individual customer outage detection and usage monitoring;
  - g. Theft detection and prevention;
  - h. Customer account maintenance;
  - i. Installation or removal of metering equipment;
  - j. An operating metering system; and
  - k. Error investigation and re-reads.
11. Energy-consuming, customer-premise equipment;
12. The provision of energy efficiency and control of dispatchable load management services;
13. The provision of technical assistance relating to any customer-premises process or device that consumes electricity or natural gas, including energy audits;
14. Customer or facility specific energy efficiency, energy conservation, power quality and reliability equipment and related diagnostic services, and load management and resale services;
15. The provision of anything of value other than tariffed services to trade groups, builders, developers, financial institutions, architects and engineers, landlords, and other persons involved in making decisions relating to investments in energy-consuming equipment or buildings on behalf of the ultimate retail customer;
16. Customer-premises transformation equipment, power-generation equipment and related services;
17. Privately-owned and operated power generation equipment and related services;

18. The provision of information relating to customer usage, including electrical pulse service;
19. Communications services related to any energy service;
20. Provision of financial services, fixed or levelized payment plans, insurance products, and home or property security services;
21. Non-roadway, outdoor security lighting,;
22. Building or facility design and related engineering services, including building shell construction, renovation or improvement, or analysis and design of energy-related industrial processes;
23. Propane and other energy-based services;
24. Facilities operations and management;
25. Controls and other premises energy management systems, environmental control systems, and related services;
26. Performance contracting (commercial, institutional and industrial);
27. Indoor air quality products (including, but not limited to air filtration, electronic and electrostatic filters, and humidifiers);
28. Duct sealing and duct cleaning;
29. Air balancing; and
30. Other activities identified by the commission.