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September 4, 2001

Honorable Janet Hand Deixler
Secretary
State of New York Public Service Commission
Three Empire Plaza
Albany, NY 12223

RE: Case 01-E-0359 - New York State Electric & Gas Corporation Price Protection Plan

Dear Secretary Deixler:

The National Energy Marketers Association (NEM) hereby files this Response pursuant to Judge Stockholm's August 17, 2001, and July 17, 2001, Procedural Rulings in the above-referenced proceeding regarding the Modified Electric Price Protection Plan filed by NYSEG as well as the Proposed Alternative Plan filed by Staff on August 3, 2001.

I. NYSEG's Modified Price Protection Plan

A. General Terms

Pursuant to the terms of NYSEG's Modified Price Protection Plan, NYSEG will offer customers three rate options as follows: 1) a Bundled Rate Option (BRO) in which customers will pay NYSEG a fixed price for power supply and delivery service; 2) an ESCO Rate Option (ERO) in which customers will pay NYSEG a fixed rate for delivery service and a floating non-bypassable wires charge and will receive commodity service from an ESCO; and 3) a Default Service Offer (DSO) for customers that do not choose either of the aforementioned options.¹ NYSEG's Plan is proposed to commence on January 1, 2002, for a six-year term for which NYSEG can seek a one-year extension.²

The Recommended Decision³ recently issued in the Competitive Opportunities proceeding 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

¹ NYSEG Price Protection Plan, August 2, 2001, at page 8 [hereinafter "Modified Plan"].

² *Id.* at 2.

³ Case No. 00-M-0504, Recommended Decision by Administrative Law Judge Jeffrey E. Stockholm and Michael Corso, Chief of Residential Advocacy and Administrative Law Judge Joel A. Linsider, July 13, 2001.

plan."⁴ NEM agrees that utilities' offerings of competitive products and services on a long-term basis can have significant and adverse impacts on market development. 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. Furthermore, the efficacy of long-term rate deals has been called into question by recent events in California in which the state's negotiated deals resulted in it being saddled with a surplus of power purchased at rates well above the current market price.

NEM maintains that the Plan will negatively effect the ability of consumers in NYSEG's territory to receive reasonably priced energy. As an initial matter, NEM is concerned that NYSEG's Plan will effectively ensure that there will be little or no price competition in its service territory for the six year term of the plan (subject to NYSEG's proposed option to extend the duration of the plan). For instance, NYSEG has proposed a variable wires charge for ERO customers, "to reflect the difference between the cost of NYSEG's existing purchased power obligations and their current market value."⁵ Inasmuch as this charge will increase as market prices decrease, it will serve as a disincentive to customer switching because the savings a marketer may be able to offer for commodity based on lower market prices will be offset by the increased wires charge.

NEM maintains that NYSEG's proposed hedging program and proposed real time pricing program for customer load management represent barriers to competition inasmuch as these products are competitive products that should be rendered by the competitive marketplace. Furthermore, 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. In the instant case NYSEG will not be at risk. It intends to impose a 3 mill/kwh charge⁶ in the delivery rate of its Bundled Rate Option to compensate for hedging-related risk.

B. Unbundled Rates, Market-Based Back-Out Credits and Adders

NYSEG's Plan provides that customers who switch to a retail access supplier will receive a market price credit to include energy, installed capacity, installed capacity reserves, ancillary services, and losses that the supplier will be responsible for supplying.⁷ NYSEG proposes that the adders that were ordered to be implemented in Case 96-E-0891 should expire December 31, 2002.⁸ NEM opposes NYSEG's proposal to eliminate the adders. NEM submits that if this new Plan is adopted, the adders should be increased substantially to reflect the costs and services NYSEG did not include in the negotiated adders and that it will be shedding when customers migrate. The current adders were based on a negotiated estimate of certain costs and retail customer care costs the Commission found NYSEG was in a position to shed and should no longer bill to retail access

⁴ Id. at 82.

⁵ Id. at 10-11.

⁶ Testimony of David Seagal at 12-13.

⁷ Modified Plan at 7.

⁸ Id.

customers.⁹ NEM submits that NYSEG's ability to continue to shed these cost categories for retail access customers will not diminish. Quite to the contrary, pending the outcome of the Unbundling Proceeding, NYSEG should be implementing unbundled rates based on fully embedded costs for each competitively offered product, service, information and technology currently bundled in NYSEG's rates.

However, NYSEG's Plan also seeks to insulate NYSEG from the determination of the Competitive Opportunities proceeding. The Plan provides that:

Unless NYSEG specifically petitions the Commission to exit a retail delivery function (including, by way of example, metering and billing) and the Commission approves such petition on terms acceptable to NYSEG, NYSEG will continue through the term of the Plan to provide all currently provided retail supply and delivery services. The terms of this Plan shall take precedence over the provisions of any future order of the PSC imposing costs or obligations on NYSEG associated with the unbundling of electric service or rates, the end-state of the electricity market and other matters associated with Case 00-M-0504, whether entered in that proceeding or another proceeding.¹⁰

NEM submits that NYSEG should not be able to exempt itself from the responsibility of implementing the Commission-ordered directives associated with the Competitive Opportunities proceeding. NEM urges the Commission to insist that NYSEG comply fully with its Order in the unbundling proceeding. NEM and the industry are still awaiting NYSEG's fully unbundled cost of service studies.

NYSEG also proposes that the market price back-out should not be permitted to produce a bill that is less than zero.¹¹ The Commission also addressed this issue in Case 96-E-0891 and declined to impose a cap on the retail access credit or a zero bill floor¹² finding that a minimum bill provision is anti-competitive.¹³ The Commission found that in situations that produced a negative bill NYSEG might realize savings because it would not have to purchase generation for retail access customers or could potentially resell generation it had purchased for departed

⁹ Case 96-E-0891 - In the Matter of New York State Electric & Gas Corporation's Plans for Electric Rate/Restructuring Pursuant to Opinion No. 96-12-Retail Access Credit Phase, Order Adopting a Market-Based Retail Access Credit, issued and effective January 26, 2001, pages 10-11.

¹⁰ Modified Plan at 17.

¹¹ Id. at 7.

¹² Cases 96-E-0891, 01-E-001 and 01-E-0217 - In the Matter of NYSEG's Plans for Electric Rate/Restructuring Pursuant to Opinion No. 96-12. RETAIL CREDIT ACCESS PHASE et al., Order Denying Rehearing on Market-Based Retail Access Credit Issues, issued and effective August 30, 2001, page 21 (hereinafter "August Order"); Cases 96-E-0891 and 01-E-0217 - In the Matter of NYSEG's Plans for Electric/Rate Restructuring Pursuant to Opinion 96-12, Order on Tariff Compliance Filings, Cancelling Ordinary Filing and Rejecting Other Requests for Relief, issues and effective April 26, 2001, pages 17-18 (hereinafter "April Order").

¹³ August Order at 21.

customers at a profit.¹⁴ Furthermore, NYSEG had not made a showing of harm to justify imposition of a capped RAC or zero bill requirement.¹⁵

D. Avoided Costs

NYSEG's Plan also provides that,

to the extent the Commission determines in the unbundling track of Case 00-M-0504 that additional services should be offered competitively and therefore unbundled, NYSEG will comply (subject to its reservation of all legal rights to seek rehearing, reconsideration and judicial review of such orders) by offering credits on the bills of customers who choose to take such services from another supplier, subject to system capability constraints and recovery pursuant to the Uncontrollable Cost provisions of this Plan.¹⁶

NYSEG's characterization of uncontrollable costs includes: metering and billing credits for customers choosing alternative suppliers; lost revenues from distributed generation; mandated regulatory, legislative, accounting or tax changes; incremental information technology development and operating costs for system changes beyond the scope of the Plan; costs of complying with competitive market development and transition requirements; and a catchall for "other uncontrollable costs."¹⁷

NEM submits that the Commission has provided guidance on the cost recovery aspects of charges for competitive products, services, information and technologies in Case 96-E-0891. In that proceeding, the Commission denied NYSEG's request for an energy rate surcharge and deferral treatment with respect to its' market-based retail access credit.¹⁸ The Commission reasoned that since NYSEG avoids costs when customers move to retail access, NYSEG would receive a double recovery if it were allowed to implement a surcharge.¹⁹ Further, the Commission found that the changes to the retail access credit were not entitled to deferral treatment as an uncontrollable cost because such changes were reasonably foreseeable by NYSEG.²⁰ Also, the Commission reasoned that NYSEG should be revenue neutral with respect to a market-based retail access credit. NEM submits that similar reasoning should be applied in the instant matter.

NYSEG's attempt to characterize the litany of items as uncontrollable costs is merely an attempt to circumvent multiple Commission Orders, precedent and pending determinations of issues including implementation of unbundled rates, properly structured back-out credits, the provider of last resort function, utilities

¹⁴ August Order at 21; April Order at 18.

¹⁵ August Order at 21; April Order at 18.

¹⁶ Id. at 17.

¹⁷ Modified Plan, Appendix B, at page 2.

¹⁸ August Order at 15-19; April Order at 14-16.

¹⁹ August Order at 18; April Order at 14.

²⁰ August Order at 16; April Order at 16.

exit of the merchant function, competitive provision of billing, metering, and distributed generation, and uniform business practices.²¹

E. Provider of Last Resort

NYSEG proposes to retain POLR responsibilities for the term of the Plan for all customers.²² NEM submits that NYSEG should not be permitted to predetermine the outcome of the Competitive Opportunities proceeding in this fashion. If NYSEG is permitted to act as POLR for a six or seven year term it will inhibit the development of the competitive market.

Furthermore, the Recommended Decision in the Competitive Opportunities case maintains that, "[a]s 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."²³ **If NYSEG is able to implement an anti-competitive "floating wires charge" with new hedging fees hidden in delivery rates and unlimited deferral accounts labeled as "uncontrollable costs," thereby eliminating any market risks, and is then designated as POLR for the proposed term, it will become virtually impossible for the NYSEG service territory to become "workably competitive" in the foreseeable future.**

II. Staff's Alternative Proposal

Staff has filed an alternative proposal that would allow customers to choose to receive service from an ESCO, from NYSEG under a variable price option or from NYSEG under a fixed price option.²⁴ The NYSEG fixed-price offering is to be in effect from 2003-05.²⁵ Residential and small customers will be placed on the fixed price option unless they choose otherwise during an enrollment period. Customers in other classes that do not make an affirmative selection will be placed on the NYSEG variable rate option.²⁶

Staff proposes to unbundle NYSEG's rates such that the delivery rate is separated from the commodity rate, including charges for production plant, purchased power, fuel, congestion and transmission revenues.²⁷ All transmission and distribution costs are to be fixed for all customers at a reduced rate. All customers

²¹ Restructuring issues have been and are being considered in additional proceedings such as Case 96-E-0891 - In the Matter of New York State Electric & Gas Corporation's Plans for Electric Rate/Restructuring Pursuant to Opinion No. 96-12; 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; Case 99-M-0631 - In the Matter of Customer Billing Arrangements; Cases 00-E-0165 and 94-E-0952 - In the Matter of Competitive Metering; In the Matter of Competitive Opportunities Regarding Electric Service; Cases 99-E-1470 and 00-E-0005 Standby Rates and Distributed Generation; and Case 98-M-1343 - In the Matter of Uniform Business Rules.

²² Modified Plan at 7.

²³ Id. at 131-32.

²⁴ Staff Statement Concerning NYSEG's Electric Price Protection Plan and Staff's Proposed Alternative, dated August 3, 2001, at 16.

²⁵ Id. at 17.

²⁶ Id. at 16.

²⁷ Id. at 27.

will also pay a Commodity Adjustment Charge to account for fixed price contracts that NYSEG has already entered into for 2003-05.²⁸ Staff proposes that retail customers receive 2 and 4 mill adders as a credit from the delivery charge.²⁹ Finally, Staff recommends incorporation of the results of the Competitive Opportunities proceeding.³⁰

NEM is supportive of Staff's initiative to unbundle commodity rates as an interim step prior to the implementation of fully unbundled rates. NEM also supports the continuation of the Commission-ordered 2 and 4 mill adders. Although, NEM is somewhat concerned that the adders, that are based on certain limited negotiated costs, not be characterized or construed as delivery-related and that the adders be increased to reflect the results of the embedded cost of service studies required by the Commission in its Order instituting the unbundling proceeding.³¹

NEM is also concerned that implementation of the three-year NYSEG fixed rate option will undermine the establishment of a "workably competitive" market in the NYSEG service territory at the very time the Commission is predicating all future "competitive opportunities" on the existence of such a workably competitive market. Granting NYSEG default provider status with a floating wires charge, hedging fees hidden in delivery rates and unlimited deferrals in the form of "uncontrollable costs" would give NYSEG multiple unfair competitive advantages while retaining its incumbent monopoly status.

Respectfully submitted,

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²⁸ Id. at 29.

²⁹ Id. at 30.

³⁰ Id. at 23.

³¹ 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, Order Directing Expedited Consideration of Rate Unbundling, issued March 29, 2001.