

Electricity Deregulation in New York State 1996 - 2002

By

GERALD A. NORLANDER, ESQ.
Executive Director
Public Utility Law Project of New York, Inc
90 State Street, Suite 601
Albany, NY 12207
www.pulp.tc

November 8, 2002

Table of Contents

PART I - THE "VISION".	1
The Competitive Opportunities Proceeding	1
The New York Commission's Deregulation "Principles"	2
The Recommended Decision and the 1996 NYPSC Deregulation "Vision Order."	5
The Goals of Deregulation.	7
The Individual Rate/Restructuring Plans	9
The Deregulatory Regime For New Retail Service Providers.	10
Provider of Last Resort/Default Service Pricing.	11
The "Single Retailer ESCO" Regulatory Regime.	13
The "Unbundling" and Provider of Last Resort "End State" Proceeding. ..	14
The "Light Regulation" Orders for the Divested Generation Plants.	14
PART II - THE AFTERMATH OF NEW YORK'S DEREGULATION.	15
Lowering Rates For Customers.	15
Increasing Customer Choice	18
Continuing Reliability of Service	20
Continuing Programs That are in the Public Interest	21
Allaying Concerns About Market Power.	22
Continuing Customer Protections and the Obligation to Serve.	25
PART III - THE FUTURE OF DEREGULATION IN NEW YORK.	26
CONCLUSION.	27

Electricity Deregulation in New York State 1996 - 2002

**By
Gerald A. Norlander¹**

In 1996 the New York State Public Service Commission (NYPSC) began to deregulate the state's electric industry, through a series of voluntary "rate/restructuring" settlement agreements with the incumbent vertically integrated monopoly electric utility companies. This paper summarizes the development and key elements of New York State's electricity deregulation policy as it evolved in recent years. Some aspects of New York's varied experiments with electricity deregulation parallel those of the more publicized debacle in California. In some areas, however, New York's experience is unique. The main elements of the state's deregulation activity are described and assessed, and areas deserving of further inquiry will be identified. The paper concludes that at this point, for residential customers, New York's deregulation of electricity threatens to transform electric service intended to be safe, reliable, and affordable, with stable and predictable prices and consumer protection, into an expensive, volatile priced commodity with risks of future shortage. Steps are suggested to remedy the situation.

PART I THE "VISION"

The Competitive Opportunities Proceeding.

The NYPSC began a multi-year, multi-party "generic" proceeding in 1994 to examine competitive opportunities in the electric industry. Among the approximately 90 stakeholder participants were enthusiastic proponents of deregulation, including New York's largest industrial customers, who hoped to reduce their electric rates if competition were introduced in the area of generation. Electricity generation costs of New York's largest utilities were high both in relation to other states and in relation to marginal costs of production of new gas-fired combined cycle merchant power plants, which at the time also benefitted from low natural gas prices.² At the time there was a large surplus of comparatively cheap energy available in the wholesale markets.

The industrial customers sought to avoid buying expensive energy from the incumbent

¹ Executive Director, Public Utility Law Project, Albany, NY, www.pulp.tc

² In the early 1990's, a combination of high embedded costs for nuclear generating plants and the cost of long term contracts the utilities were required to sign as a result of PURPA and the state's own "six cent law" contributed to rising utility rates in upstate New York.

utilities, particularly those who were recovering in rates their sunk costs for expensive nuclear plants and the above-market cost of legislatively mandated long term non-utility generator (NUG) contracts. The industrial customers demanded direct retail wheeling or “retail access” to buy their energy from non-utility sources, even though the physics of the electricity grid do not support particularized streaming of energy from one generator to any particular user. Joining with the industrial customers as deregulation proponents were energy traders such as Enron, and marketers who hoped to displace the incumbent utilities, initially by selling lower priced energy, and possibly competing for other aspects of electric service such as metering, billing, or customer service if those could be “unbundled” along with energy.

NUGs were concerned that their above-market contracts with the utilities were at risk if the utilities lost their customers and revenue source. Utilities initially opposed full retail access, although one utility, Niagara Mohawk, put forward the details of a voluntary plan of deregulation, which then served as a model for discussion.³

The New York Commission’s Deregulation “Principles”.

An effort was made to identify consensus “principles” among the participants in the generic proceeding to guide a future transition to more competition and less regulation. Inherent in the guiding principles effort was an assumption that market forces would at some point be introduced, and regulation correspondingly relaxed, not merely for the sake of doing so,⁴ but for the sake of achieving social ends, in a manner that would not do violence to established social policy.⁵ Even at that time of high optimism about deregulation there was apprehension that not all customers would be “winners” in a regimen powered by ruthless market forces. A 1994 draft “principle” addressed possible “bill shock” to those who might lose under deregulation, and contained an express affordability provision:

The Commission should strive to minimize “bill shock” for any class of customers. A basic level of reasonably *affordable service* must be

³ Niagara Mohawk, which was in financial distress at the time due to mounting above-market payments to NUGs and nuclear outage cost overruns, voluntarily proposed a “PowerChoice” plan for deregulation in 1995, after the NYPSC staff proposed a rate case disallowance of high energy costs and major rate reductions.

⁴ See Frank, *One Market Under God*, (2000) on the cultural ascendancy of popular market ideology and market choice as a substitute for political choice.

⁵ See Kuttner, *Everything For Sale*, on the appropriate and limited role of markets mechanisms to implement social policy and goals.

maintained, *especially for people living in poverty.*⁶

This was a significant advance for low income consumers, because unlike California and other states, the New York PSC had not fully embraced the concept of affordable rates for low income energy users. This explicit recognition of affordability concerns was eliminated with a change of NYPSC administration in 1995. The NYPSC in *Opinion 95-7* deleted the references in the draft to “affordable service” and “people living in poverty,” with the following explanation:

This wording avoids any potentially troublesome need to decide whether electric service is actually "affordable" for particular customers and accurately reflects our mandate to ensure electric service at just and reasonable rates. It does not, however, diminish in any way our concern to ensure adequate protections for customers who are unable to afford basic electric service. New York has a distinguished history of ensuring such protection for those who may face financial difficulties, and this will continue regardless of industry structure.⁷

In this passage, the PSC left unclear who would be responsible for the “troublesome” issue of affordability of electric service if the Commission did not address it. The utilities had suggested broadened federal and state taxpayer funded programs or “energy stamps,” analogous to the Food Stamp program, to deal with hardship. During an era of reducing taxes and ending such transfer programs, this was hardly a viable solution. General optimism that competition would bring greater efficiency and lower prices prevailed. As will be discussed later, sharp rate increases after deregulation led some utilities and the NYPSC to revisit the issue of affordability and take tentative steps to mitigate some of the hardship for low income consumers.

The “Principles” are an artifact of the promises and hopes of the NYPSC at the dawn of its deregulation experiment. They are set forth in full below:

In accordance with the Commission's mandate that all New Yorkers must have access to reliable and reasonably priced electric service provided safely, cleanly and efficiently, the following guiding principles apply in the transition to a more competitive electric industry:

⁶ *Opinion No. 95-7, Case 94-E-0952 - In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Adopting Principles To Guide the Transition to Competition*, (Issued June 7, 1995)(*Emphasis added*). www.dps.state.ny.us/fileroom/doc1114.pdf

⁷ *Id. at 6 (footnote omitted)(Emphasis added)*.

1. Competition in the electric power industry will further the economic and environmental well-being of New York State. **The basic objective of moving to a more competitive structure is to satisfy consumers' interests at minimum resource cost.** Prices should therefore accurately reflect resource costs, and consumers should have a reasonable opportunity to realize **savings and other benefits from competition.**
2. The Commission should strive to **minimize "bill shock"** for any class of customers. A basic level of reasonably priced service must be maintained for all New Yorkers.
3. Increased emphasis should be placed on **market-based means** or competitively neutral approaches **to preserve research, environmental protections, cost effective energy efficiency and fuel diversity.**
4. The **integrity, safety, reliability, and quality of the bulk electric system should not be jeopardized.**
5. Any new electric industry structure should provide: (a) increased **consumer choice of service and pricing options**; (b) a suitable forum for promptly resolving consumer concerns and complaints; and (c) leeway for approaches that reflect the differences that exist among New York electric utilities.
6. With more competition should come **less regulation**, although the transition requires vigorous fair trade safeguards. All market participants should be subject to fair and consistent laws, rules, and regulations. Mechanisms should exist to identify and correct anticompetitive behavior. Where monopoly remains, emphasis on **performance-based regulation** should continue.
7. The current **industry structure**, in which most power plants are vertically integrated with natural monopoly transmission and distribution, must be thoroughly examined to ensure that it does not impede or obstruct development of effective wholesale or retail competition.

8. Utilities should have a reasonable **opportunity to recover prudent and verifiable expenditures and commitments** made pursuant to their legal obligations, consistent with these principles. There should also be respect for the reasonable expectations of independent power producer investors and other market participants. Utilities and independent power producers should share responsibility for taking all practicable measures to mitigate transition costs. The transition should balance order, deliberation, and speed.

9. Pro-competitive policies should further **economic development** in New York State."⁸

To sum up, the “principles” sought to be advanced or protected by the NYPSC were:

- efficiency and cost savings;
- replacement of the ratepayer funded utility research, efficiency, and fuel diversity programs with market based or competitively neutral substitutes;
- maintenance of physical system reliability;
- choice among competitive retail providers of electric service;
- deregulation where possible, and performance based (rather than cost-based) regulation of services still necessary to regulate;
- reexamination of the vertically integrated structure of generation, attention to stranded cost recovery; and
- economic development associated with a more competitive electric industry.

The Recommended Decision and the 1996 NYPSC Deregulation “Vision Order.”

Like the NYPSC, regulators in other states were conducting generic proceedings or workshops in the mid to late 1990's to develop a consensus in favor of market based substitutes for regulation and recommendations for altering the traditional statutory/regulatory paradigm. Typically, in those states that decided to deregulate, the utility regulatory agency developed a plan with input from the “stakeholders” who routinely participate as parties or intervenors in regulatory proceedings, legislative recommendations were made, and then legislative proceedings began, with eventual change in the state laws and statutory scheme for the provision of electric service. Typically, the legislative action took into account broader interests than those

⁸ *Id.*, (Emphasis added).

participating as special interest “stakeholders” in the utility commission proceedings, and addressed the broader policy implications regarding issues such as the environment, taxation, “hard” price caps or other limits on rate increases to protect consumers, timetables, regulation of new retail providers, low income rates, and job protection, to name a few. New York did not follow that path.⁹

After the change in state administration in 1995 also came a turning point in the NYPSC competitive opportunities proceeding. The issue shifted from “whether” to initiate a new deregulatory paradigm to “when,” with deregulation promoters urging more rapid implementation of both wholesale and retail electricity deregulation.¹⁰ The recommended decision of two administrative law judges endorsed the general market-based deregulatory paradigm promoted globally by the Harvard Electricity Policy Group, large industrial customers, Enron, and others in the mid-1990's, and recommended its prompt implementation. Presciently, the judges warned the deregulatory paradigm was not without serious risk of market power, price shocks and other unintended adverse consequences:

“Additionally, the cautions expressed by the Commission about moving too quickly in the telecommunications industry are applicable to the electric industry as well. As the Commission stated when it adopted telecommunications principles, if the transition to competition is “done wisely,” consumers should receive reduced prices, better service quality, and more choices, while industries should become more efficient and productive, and economic development should be stimulated. *However, if competition proceeds too quickly or without appropriate safeguards, the result could be the monopoly provision of an essential service, without any regulation or protection, which could lead to harmful price shocks for customers and serious reductions in service quality....*¹¹

⁹ Some deregulation proponents attribute the California market failure to too much legislative action that blurred a more pure competitive vision originally charted by the California PUC. It cannot be said that the New York legislature interfered with implementation of the NYPSC vision, because the NYPSC deregulated without legislation.

¹⁰ *We recommend that the question be transformed from whether retail access will be provided for customers in New York State, into questions of when retail access will be available, and for whom.* Case 94-E-0952 - In the Matter of Competitive Opportunities Regarding Electric Service, Recommended Decision, at 70 - 71 (Issued Dec. 21, 1995) (*Footnotes omitted*) (*Emphasis added*). <http://www.dps.state.ny.us/fileroom/doc2482.pdf>

¹¹ *Id.* at 60 - 61. (*Footnotes omitted*)(*Emphasis added*).

The Goals of Deregulation.

The NYPSC went forward without legislative support, issuing its "vision" order, *Opinion 96-12* on May 20, 1996.¹² It charted the deregulatory paradigm the agency desired, on a short timetable closely tracking California's. Through *Opinion 96-12*, the following goals were declared:

1. Lowering Rates for Consumers
2. Increasing Customer Choice
3. Continuing Reliability of Service
4. Continuing Programs That are in the Public Interest
5. Allaying Concerns About Market Power
6. Continuing Customer Protections and the Obligation to Serve

In *Opinion 96-12* the NYPSC prescribed a short timeline for the introduction of wholesale and full retail competition for all customer classes: "In order to ensure an orderly transition to retail competition, a short wholesale competitive phase will be implemented. Wholesale competition is expected to begin in early 1997, and retail competition is expected to begin in early 1998." The attributes of the new wholesale deregulation model were described as follows:

A wholesale model allows generating companies to compete to sell their power. In the "poolco" version, the generators bid into a pool which establishes a "spot" or hourly price based on the bids. Transmission and distribution utilities would then buy from the pool at the spot price. A flexible poolco model would allow transmission and distribution utilities to buy their power from a pool at spot market prices, from generators under physical bilateral contracts, or from the pool with contracts for differences with generators or power marketers. In the bilateral version, the generators would each contract with one or more transmission and distribution utilities. A retail model includes an opportunity for each individual retail customer to buy electricity from a generator (either directly or through a power marketer/broker) rather than through a regulated utility. The transmission and distribution utility would simply deliver power to end-users.¹³

Notably, *Opinion 96-12* rejected the test proposed in the RD for limiting retail wheeling.

¹² *Opinion No. 96-12, Cases 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion and Order Regarding Competitive Opportunities for Electric Service* (Issued May 20, 1996). <http://www.dps.state.ny.us/fileroom/doc877.pdf>

¹³ *Id.* at 38.

The ALJs had said in their recommended decision:

Retail access should be provided only if it is in the best interests of all ratepayers. In the gas industry, retail access or "streaming" is allowed only if the utility can demonstrate that other customers would be worse off without the transaction. This standard may well be equally applicable to initiate retail access for electric service, in order to ensure that the benefits flow to all customers, not just to larger ones. This standard should minimize "bill shock" and ensure reasonable prices for all customers, as the Commission required in its principles.¹⁴

Rejecting the standard for retail access or retail wheeling proposed by the ALJs (that all customers benefit), the Commission also extended retail wheeling generally to all customer classes, although existing statutes expressly allowed retail wheeling only for commercial and industrial customers and then only when found to be in the best interest of ratepayers.¹⁵ Further, the Commission indicated that it would relax statutory service standards for new retail providers, eliminating statutory consumer rights and remedies.

The Commission recognized that retail access might lead to inequity and cost shifting, especially if large customers left the utility and no longer shared in defraying some joint and common utility costs:

Concerns about retail access include the possibility of cost shifting. Cost shifting could occur when common costs are not reduced proportionately as customers choose competitive alternatives. This could increase the burden on remaining customers. Any resultant cost shifting should be limited so that no classes of customers receive sudden increases when retail competition is available. Retail competition, therefore, should be established within a structure of a well-designed ISO/market mechanism and carefully designed revenue allocation and rate design of wires charges on the transmission and distribution (T&D) system, at least until such time as stranded costs are no longer an issue. Price caps are one potential mechanism for resolving this matter.¹⁶

Opinion 96-12 called for the electric companies to file plans showing how they might

¹⁴ Case 94-E-0952 - In the Matter of Competitive Opportunities Regarding Electric Service, Recommended Decision, at 70 - 71 (Issued Dec. 21, 1995) (*Footnotes omitted*) (*Emphasis added*). <http://www.dps.state.ny.us/fileroom/doc2482.pdf>

¹⁵ NY Public Service Law 66(12-b)(b).

¹⁶ *Id.* at 40.

restructure to comport with the agency's vision.¹⁷

Utilities brought a lawsuit challenging the agency's assertion of authority, without enabling legislation, to effectuate divestiture, general retail wheeling to all customer classes, and to deregulate competitive retail electric energy suppliers. While indicating in *dicta* that the agency had authority to order the utilities to take the actions envisioned in *Opinion 96-12*, the trial court held that the "Vision Order" was not a "rule" but merely a non-binding "policy statement." As the agency had not yet actually *ordered* divestiture of generating plants, general retail wheeling or deregulation of competitive providers, these issues were found not to be ripe for adjudication.

After the utilities individually filed their plans, the *ex parte* rules prohibiting direct utility to Commission communications were waived. Settlements were eventually reached with each utility in 1997 and 1998, with PSC staff, the utilities and various intervenors entering into voluntary "rate/restructuring" settlement agreements for multi-year rate plans and implementation of the deregulatory regimen. Invoking its ratemaking powers the Commission then approved the voluntary "rate/restructuring" agreements, with further modifications eventually accepted by the utilities.

After the individual utility restructuring settlements were final, the utilities abandoned their court appeal of the "vision order." Ratepayer and taxpayer intervenors in the lawsuit pursued their appeal. They challenged the extension of retail wheeling to all customers and deregulation of competitive providers of retail electric service. The Appellate Division, Third Department held that they had not been directly aggrieved and lacked standing. The Court of Appeals denied leave to appeal.¹⁸ Similar court challenges to the individual rate/restructuring orders were dismissed for lack of standing.

The Individual Rate/Restructuring Plans.

A multi-year "rate/restructuring" plan was established for each of the individual electric utilities. Key features were a commitment by the utility to divestiture of its power plants, a multi-year rate plan typically promising significant rate reductions for large industrial customers, and lesser reductions for residential customers; a timetable for introduction of retail competition for all customer classes; stranded cost recovery; buy-out or restructuring of NUG contracts; cooperation in the formation of an independent system

¹⁷ The order did not require plans from Long Island Lighting Company, (which was in the process of being acquired by the Long Island Power Authority, a public power entity) and Niagara Mohawk, which had already filed its "PowerChoice" plan that resembled the plans desired by the NYPSC from the other utilities.

¹⁸ *Energy Association of New York v. Public Service Commission*, 169 Misc. 2d 924, 653 N.Y.S. 2d 502 (Sup. Ct. Albany Co. 1996), *affirmed* 273 A.D. 2d 708 (3d Dept. 2000), *lv. denied* 95 N.Y.2d 765 (2000).

operator (ISO); and permission to form new utility holding companies. These holding companies were allowed to own generation subsidiaries outside the state, and new retail energy services companies that could compete within the state and within the utility's service territory.¹⁹

The Deregulatory Regime For New Retail Service Providers.

The "vision order" affirmed as one of the six goals "Continuing Customer Protections and the Obligation to Serve." Despite this recognition of the need for customer protection, the NYPSC hinted in the "vision order" that it would subsequently issue the details for a deregulatory regime for new retail providers of electric service.²⁰ In *Opinion 97-5*, the PSC held that new "energy services companies" or "ESCOs" selling electricity are not subject to the statutory consumer protection requirements of the Home Energy Fair Practices Act in Article 2 of the Public Service Law. Instead, the NYPSC announced a relaxed set of requirements for ESCOs similar to those it adopted previously for "gas marketers." The PSC defended its general policy of deregulation of new providers as follows:

In Opinion No. 96-12, we acknowledged our mandate to ensure that "all New Yorkers have access to safe and reliable service at just and reasonable rates." We stated that "[e]ach customer must be able to count on *at least one* supplier who will continue to provide [electric] service at reasonable rates in the event that (a) the customer chooses to make no change from its current situation, (b) a new supplier fails to meet its obligations, or (c) competitive alternatives are not yet available in the area." We concluded that the T&D company should continue to be the POLR during the transition to a competitive environment. With respect to consumer protections, we noted that the Home Energy Fair Practices Act ("HEFPA") currently affords residential customers certain consumer protections including, among other things, receipt of service without undue delay and protection from unwarranted disconnections. We stated that, because of this law, residential customers should continue to receive basic statutory protections. We concluded that these protections shall continue to apply during the transition period, but noted that, as real retail choice develops, it may be sensible to *streamline such requirements for*

¹⁹ See, *Electric Utility Restructuring in New York*, The Record of the Association of the Bar of the City of New York, Vol. 53, No. 3 (May-June 1998) Energy Committee, *From Statehouse to Your House, the Electric Competition Debate in New York*, *Public Utilities Fortnightly*, May 15, 1998, p. 44, 46-47, summarizing the key features of the individual plans;

²⁰ An "ESCO" was not defined by any statute or regulation. The NYPSC indicated it is a provider of retail services in a competitive environment.

new entrants while ensuring that the POLR continues to provide them, a model we adopted for the gas industry.²¹

Thus, a two-tier set of standards was created for retail services. The new standards were not issued as regulations, but as conditions in the tariffs of the distribution companies. ESCOs, to obtain access to the distribution system for their customers and do business with the distribution utilities, were required to certify their compliance with the alternative service standards in applications for ESCO approval determinations issued by NYPSC staff.

Provider of Last Resort/Default Service Pricing.

The passing through of wholesale spot market prices to consumers who have not switched to competitive providers, and who continue to receive their full service from the “provider of last resort” (POLR), was considered and approved in *Opinion 97-5*. The NYPSC “vision” was that all customers eventually would receive service from an ESCO, and the role of the distribution companies, after they sold their generating plants, would no longer encompass the sale of energy. Rather than compete with ESCOs, it was believed that the utility should just acquire energy at ISO prices and pass those prices through to its remaining customers, as the provider of last resort of “default service.” Default service for the vast majority of residential customers who remain with the distribution utility. It is the service most like traditional utility service which customers receive if they do nothing, or “choose not to choose” a new ESCO provider.

An intervenor group (PII), objected to the volatility that would likely be introduced to customer bills by this methodology. The PSC responded:

"Related to this issue, PII may be correct that reliance by a POLR on short-term market purchases for supply could result in greater price volatility than now occurs. However, our interest is to place increasing reliance on the market, rather than the utilities, to make long-term supply determinations in order to reduce costs and to allow the market to develop more efficient pricing for electricity. Our approach is to promote a structure in which reasonable prices will be determined by competitive market forces, rather than regulation. Though some price volatility may result, we expect that ESCOs will offer stable prices if that is what consumers prefer. In the short term, the issue of rate volatility will be considered when we set

²¹ *Id.* at 3 - 4 (Emphasis added).

rates for the individual utilities."²²

The Commission again considered POLR pricing for default service in *Opinion 97-17*, deciding petitions for rehearing of *Opinion 97-5*:

Still, clarification regarding our determination that utilities should "[m]eet customers' electricity supply needs by obtaining electricity consistent with the Commission's decisions in the individual utilities' restructuring cases and the development of the *competitive* electricity market may be helpful. Currently, utilities build and maintain generating plants that provide substantial percentages of the electricity consumed in their service territory. We ultimately envision an electric industry where generation is *competitive* and electricity is marketed through a Power Exchange....

[The Energy Association] accurately notes that *Opinion No. 97-5* does not define *when* reliance on the competitive market will take place. This result is reasonable pending the resolution of certain key matters, namely the development and implementation of an Independent System Operator ("ISO") and Power Exchange. *The degree to which utilities will be permitted to rely on market forces will evolve as utilities divest generation, and as the market matures.* With respect to retail sales of generation by non-T&D companies, we would expect, under normal circumstances, the following: to cease setting rates directly for the generation, as opposed to transmission and distribution, of electricity *when market based pricing establishes "just and reasonable" rates*; to make a *finding* that a market rate is just and reasonable in a given service territory when no owner of a generation facility in that territory has market power or market power concerns are satisfactorily mitigated; and, once that finding is made, to allow market conditions to govern and to refrain from reintroducing rate regulation solely to correct market fluctuations. We also would expect that we would protect customer rights to "just and reasonable" rates by taking action such as preventing mergers, or other action that would allow sellers to exercise market power.

* * *

It should be noted, however, that *Opinion No. 97-5* expressly states that we are committed to allowing utilities to *eventually* meet their supply function by relying on the competitive market and passing through a *competitive market rate*. Thus, it should be clear that, contrary to EA's assertions, the interpretation of the supply obligation was not changed by

²² *Id.* at 11 - 12 (Emphasis added).

Opinion No. 97-5.²³

The PSC also rejected arguments that the agency lacks authority or discretion to relax statutory requirements for new competitors. The PSC stated that statutory requirements for residential service in PSL Article 2, and those of PSL Article 4 requiring filing of rates, etc, ``need not be applied to ESCOs that do not have authority to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places," *id.* at 35, and abstained from applying those provisions to competitive providers.

Ratepayers and taxpayers brought suit to challenge the PSC's relaxation of statutory standards for competitive providers. The trial court denied a motion for dismissal for lack of standing, and directed the NYPSC to answer. The Appellate Division, Third Department reversed, holding that plaintiffs lacked standing to challenge the alternative regulatory regime for ESCOs, and the Court of Appeals denied plaintiffs' motion for leave to appeal.²⁴

The PSC implemented its decision concerning ESCOs by issuing exhaustive "Uniform Business Practices," and added those as conditions to the tariffs of the distribution companies. These agency-promulgated business practices allowed the ESCOs to determine their own consumer deposit, termination, and complaint rules, and allowed the ESCO to terminate its services to the customer for no reason on short notice.

The "Single Retailer ESCO" Regulatory Regime.

The PSC in the Rochester Gas and Electric rate/restructuring case considered a variant of the regulatory regime for competitive providers, in which a competitive provider of energy also provides the distribution service, by purchasing it from the incumbent distribution provider and reselling it to the retail customer. Thus, rather than dealing with two companies, one for distribution and one for energy, the customer deals only with one company, the ESCO. The commission decided not to apply HEFPA to the single retailer ESCOs, stating:

we conclude that HEFPA was designed to apply only to the provision of monopoly services. Since ESCOs are not providing monopoly service, HEFPA does not apply to them. However, the regulatory requirements we have established will adequately protect consumers, while fostering the

²³ *Opinion 97-17, id.* at 7 - 8, 11 (*Emphasis supplied*)(*Footnotes Omitted*).

²⁴ *PULP, et al v. Public Service Commission*, 252 A.D.2d 55 (3d Dept. 1999), *lv. denied* 94 N.Y.2d 755 (1999).

development of competition.²⁵

Thus, the NYPSC established a new paradigm in which customers would cease dealing with the incumbent utility and deal only with a deregulated ESCO. During the transition to competition, the incumbent utility would be a “provider of last resort” for customers not served by ESCOs, but the permanence of that function remained in question.

The “Unbundling” and Provider of Last Resort “End State” Proceeding.

Generic “unbundling” and POLR “end state” proceedings are still underway at the NYPSC. Among the issues under current consideration are whether and how to “unbundle” further the customer service, metering, billing, collection, and customer service functions still performed by the distribution companies. A lengthy process to decide what the “end state” of competition will be with respect to the “provider of last resort function” led to a recommended decision in 2001. The “end state” issues have been pending before the NYPSC for a decision for more than a year. This reflects the still tentative and unpredictable direction of future action.

The “Light Regulation” Orders for the Divested Generation Plants.

As the utilities sold their generating plants to new owners, the NYPSC approved the transfer of ownership and issued new certificates to the companies. A “light regulation” regimen was created administratively for the new owners of the plants, whose owners averred that they intended only to sell their output in the wholesale markets. The NYPSC sifted through the various statutory requirements of the Public Service Law, and issued orders waiving as irrelevant many of the requirements otherwise applicable to utility owners. Among the specific provisions still applicable under the terms of the NYPSC orders is PSL Section 5, which requires electric companies to operate in the public interest.

²⁵ Cases 94-E-0952 - In the Matter of Electric Competitive Opportunities Regarding Electric Service and Case 96-E-0898 - In the Matter of Rochester Gas and Electric Corporation's Plans for Electric Rate/Restructuring Pursuant to Opinion 96-12, *Order Regarding Regulatory Regime For Single Retailer Model* (Issued and Effective December 24, 1997), at 21.

PART II THE AFTERMATH OF NEW YORK'S DEREGULATION

The Assessments of the New York experiment divide into two main camps: was this a 'big mistake'? Or was it a really "bad idea"? The "big mistake" theory is that deregulation and restructuring of the electric industry is a "good idea," implemented imperfectly.²⁶ The "bad idea" theory is that electricity deregulation impedes progress toward important, longstanding economic and social policies aimed to achieve a balance of many goals -- not just short term efficiency, but also goals such as local economic development, and reduction of environmental damage.

Putting aside for the moment whether the deregulation was a bad idea or a good idea poorly implemented, it is fitting now, six years later, to examine how well the deregulation experiment met the expectations as declared by the NYPSC in its "vision order." To reiterate, those goals were:

1. Lowering Rates for Consumers
2. Increasing Customer Choice
3. Continuing Reliability of Service
4. Continuing Programs That are in the Public Interest
5. Allaying Concerns About Market Power
6. Continuing Customer Protections and the Obligation to Serve

On balance, these goals have not been achieved.

Lowering Rates For Customers.

In general, total rates for electricity service have increased. Utilities are quick to point out *delivery rate* reductions, but when the cost of electricity is included, *total* rates have gone up substantially:

The average Con Edison residential customer will save an additional \$50 in 2001 [for delivery]. The average large commercial customer will save about \$1,000 [for delivery] . However, the cost to Con Edison of buying electricity from power generators in the wholesale market has risen

²⁶ For example, the New York State Comptroller identified numerous faulty assumptions with the implementation of deregulation in New York. "*Electric Deregulation in New York State, The Need for a Comprehensive Plan*," H. Carl McCall, New York State Comptroller, (Feb. 2001) at 36. The "wrong" assumptions were: (1) Deregulation would mean reduced prices for all customers right away; (2) There was a sufficient supply of electricity in New York State to allow the wholesale and retail markets to mature with a minimum of problems; (3) Competition in the wholesale market would immediately stimulate new investments in cheaper, cleaner, more efficient power plants; (4) Competition in the retail market could somehow produce lower prices for consumers without a stable wholesale market.

dramatically, *which has in turn driven up customers' total energy costs.*²⁷

The deregulation plan forced the Syracuse-based company [Niagara Mohawk] to sell most of its power plants and instead, purchase its electricity on the volatile open market. The new rate plan actually cuts Niagara Mohawk's charge for delivering the electricity to homes and businesses by an average of 5.4 percent. But overall bills are going up because Niagara Mohawk estimates that *the price of the electricity itself will be about 40 percent higher than what consumers were paying under the rates that were set in 1998* under its Power Choice plan. 'This is all the cost of the electricity itself, which we no longer make,' says Stephen F. Brady, a Niagara Mohawk spokesman.²⁸

The rates increased most substantially where the NYPSC "vision order" was implemented most faithfully, largely because of the impact of volatile wholesale spot market rates being flowed through to retail customers. This occurred most notably in the Con Edison and Orange & Rockland service territories, beginning in the summer of 2000. Customers saw 43% increases in their bills that summer, and while they have receded somewhat, they remain high.²⁹ While the impact is mainly upon residential and small commercial customers, they have also hit industrial customers. These major increases were truly unthinkable in times of cost based regulation. As these rate increase unfolded, the Governor characterized the double-digit increases as "outrageous," and the mayor of New York City termed them "unacceptable."

The downstate utilities, in some of the most severe load pockets of the state and facing the tightest supply and demand situation, sold their generating plants to new owners but did not purchase power from them in long term bilateral contracts to meet customer needs. Fulfilling the NYPSC vision, and similar to the California paradigm, the utilities purchased much of the energy for customers at spot market rates in the new markets under FERC supervision. The "vision" had postulated that these markets, even if volatile, would be efficient and competitive, and that consumers desiring protection of stable prices would find this protection in offers from ESCOs. The ESCO rates, however, were even higher than the rates of the incumbent provider, and some of the

²⁷ "Con Edison Urges Price Protections For Customers This Summer," Con Edison Press Release, Jan. 22, 2001 (*brackets and emphasis added*).

²⁸ "Deregulation of Electricity Isn't Working Out as Hoped," *Buffalo News*, Sept. 2, 2001,

²⁹ "Millions of Consolidated Edison customers got a rude shock last month when they discovered that even though this was one of the coolest summers in memory, their electricity bills had increased by an average of 43 percent over last summer. "Deregulation and Weather Fail to Cool Electric Rates," *The New York Times*, Aug 22, 2000.

ESCOs that had begun to serve residential customers shed them when the spot market prices soared. So, the ESCO customers returned to service from the incumbent at high and volatile rates.

Customers of two upstate utilities, New York State Electric & Gas (NYSEG) and Rochester Gas & Electric (RG&E) fared relatively better, because their rates had been frozen in the multi-year restructuring deals. RG&E did not divest, kept its generating plants, and thus did not rely so heavily on purchases in the wholesale markets as did the other utilities:

RG&E energy prices will not increase here this summer. "We have been reducing rates yearly since 1996, and the current rates are in place until the end of the year," Power said. On most days, RG&E can meet customer electricity needs with energy from its own power plants and through contracts with other suppliers. "Our own power plants are operating at full capacity," Power said. "We have firm contracts in place for days when extra energy is needed." RG&E also has negotiated "energy hedging instruments" to maintain stable prices. "It's like an insurance policy," Power said. "We negotiate a price for energy a provider is willing to pay on peak days in July and August. If we need that energy and the market price then is higher, they have to sell it at the negotiated price and we make out. If it is lower, we have to pay and they make out."³⁰

As the NYSEG rate/restructuring agreement with a five year residential price freeze expired, however, a new agreement has been made which begins to expose residential customers to the wholesale markets. A fixed rate will soon be provided to customers at a price 35% above the price currently established by futures markets for 2003-2005, and there will be an option to take service under a variable rate that is determined by fluctuations in the NYISO spot markets. With consumer choices between the "rock" of a high fixed rate for energy and the "hard place" of unpredictably volatile floating market based rates, a major campaign is being launched to urge customers to switch to ESCOs. In addition, revenue reallocation and rate design changes may bring an 11% increase to all NYSEG residential delivery rates in 2003.

Central Hudson Gas & Electric customers have been largely sheltered from the impact of the new markets and the associated price volatility:

The short-term future for Central Hudson consumers is price stability -- an

³⁰ *RG&E Cool About Energy Supply, Rochester Democrat and Chronicle (May 29, 2002).*

achievement of which the company is proud, and that it pioneered by being the first to persuade the PSC to allow power supply deals with Dynegy Inc. and Constellation Nuclear, the buyers of its plant interests. "Importantly, this agreement also means that we can promise price stability during the next few years while the deregulated energy markets mature here in New York -- and that is priceless," Senior Vice President Arthur Upright said last August.³¹

On balance, the promise of lower rates has not been met. At best, customer rates have been frozen at what were relatively high levels even during a period of relatively low fuel costs. At worst, rates increased dramatically.

Increasing Customer Choice .

The second goal has not been realized for residential customers. Very few ESCOs serve residential customers. While a dozen or more ESCOs may be listed on websites of the utilities and the NYPSC as eligible to serve residential customers, in reality the number may be from two to five, and the largest ESCOs tend to be the subsidiaries of the familiar utilities, such as Con Edison Solutions and NYSEG Solutions. The "migration" data on the NYPSC website indicate that as of May 31, 2002, approximately 320,000 residential customers had migrated to ESCOs, representing 5% of the customers with retail access.³²

This figure must be considered in light of significant financial inducements, such as switching credits of \$65 to \$100 for the ESCO (usually split with the customer) and non-cost based rate-breaks, and a sales tax break on the commodity portion of the bill for customers who switch. From a market theory standpoint, these subsidies and delivery rate discounts are inefficient and can result in a situation where a less efficient provider can make the sale that would otherwise be unjustified. The National Association of State Utility Consumer Advocates has opposed manipulation of the default service rates, provided to customers who do not switch, in order to skew customer choices or stimulate a false competition.³³

³¹ "New Rules Fail To Create Cheaper Power: Competition Not Attracting Customers," Poughkeepsie Journal, (May 29, 2002).

³² http://www.dps.state.ny.us/Electric_RA_Migration.htm

³³ *Resolution Urging Jurisdictions Introducing the Competitive Provision of Electricity or Natural Gas Service to Assure the Continued Availability of Reliable Service to Customers from a Default Service Provider at Just and Reasonable Rates*, www.nasuca.org, click "resolutions," click "02-02."

In addition, New York utilities and the NYPSC have been spending large sums of ratepayer money on promotion of competitive service offerings, and are increasing these expenditures:

"The consumer education effort in New York generally has been conducted by the PSC itself (with a modest \$1 million budget for the entire state....) and by the individual utilities. The utilities have spent \$5-6 million/year on this effort."³⁴

From a total resource perspective, the advertising and promotion expenses of perhaps \$20 - 24 million over the past four years, which arguably should be borne by competitors, offset savings for the 320,000 consumers who have switched. Renewed utility campaigns, with major increases in funding, are underway in 2002 to interest consumers in switching to ESCOs.³⁵

By comparison, although 26 % of the non-residential load had switched to non-utility providers of electricity, only 6.9% of the non-residential customers had switched. The implication is that very large customers, with large loads, have switched, but smaller non-residential customers are not likely to have done so.

In a remarkable development, some very large customers have sought and obtained long term, seven to ten year fixed rates in NYPSC-supervised "negotiations" with the utilities. The NY PSC issued several orders in 2001 - 2002 requiring NYSEG and NIMO (utilities that sold off their generating plants with PSC encouragement), to provide long term, fixed rate, low price contracts for large industrial customers.³⁶

³⁴ *An Analysis of Residential Energy Markets in Georgia, Massachusetts, Ohio, New York and Texas, National Center for Appropriate Technology, www.ncat.org*

³⁵ "The Public Service Commission approved the scheduled Oct. 1 start for the utility's "Voice Your Choice" initiative, a \$2.6 million ratepayer financed campaign designed to educate customers about their ability to choose between fixed- and variable-rate electric service."
NYSEG Launches Promotion, Binghamton Press Sun, Sept. 19, 2002.

³⁶ Case 01-E-1628, *In the Matter of Electric Service at a Potential Manufacturing Facility to be Constructed in New York by Corning Incorporated, Order on Flex Rate Contract Negotiations* (Issued and Effective October 31, 2001); Case 01-E-0680, *Nucor Steel Auburn, Inc., Complaint Seeking Resolution of a Dispute With NYSEG Regarding Application of Tariff Rates*; Case 00-E-1463, *Petition of Multiple Intervenors and Deferiet Paper Company for a Declaratory Ruling that the Minimum Price for Individually Negotiated Electricity Contracts Entered into by Niagara Mohawk Power Corporation Should be Calculated on an Annual Basis*, Feb. 16 2001. ("Their request derives in part from the changed circumstances in the electricity market prices which are now not only higher but, as the marginal cost is now calculated based on the NYISO wholesale prices rather than avoided cost estimates, also

(continued...)

Originally it was the large industrial customers who demanded a break-up of the utilities and the opportunity for "retail access" to buy energy from other generation plant owners or marketers, in the belief that competition and market forces would be more efficient and drive prices down.

Instead, industrial customers are returning to the old utilities for special negotiated long term contract rates. Apparently, they are unable to make satisfactory long term arrangements directly with the new generation owners or new marketers. When the industrial concerns cannot get the price and terms they want from the utilities, the PSC has directed the utilities to "agree" to the terms of long term rates, at undisclosed prices. Before restructuring, there was authority for utilities to negotiate reduced rate contracts with industrial customers to prevent them from leaving the state or from co-generating less efficiently than the utility. These are firm (non-interruptible) contracts for 7 - 10 years that do not fluctuate from month to month. The undisclosed prices raise obvious transparency problems.

These developments are not the evolution of "choice" intended in the "vision order" and are symptoms of the dysfunctional market system for setting wholesale prices.

Continuing Reliability of Service.

From a system viewpoint, there must be adequate generation capacity to assure reliable service. Typically a "reserve margin" of 18% more than peak system demand was maintained through regulation of the utilities. A precept of the "vision order" and the subsequent State Energy Plans, however, was that the utilities no longer needed to build power plants - indeed, they could sell their plants - and the invisible hand of the market would bring any needed new resources, all without conscious government planning or intervention. The 1998 State Energy Plan signaled that there could be a tight supply-demand situation beginning in 2000, but explicitly relied on market forces.

In the years before the restructuring agreements, utilities reduced their expenditures, by about half, on demand reduction and conservation measures. In all the restructuring agreements, supposedly "revenue neutral" rate adjustments were allowed, which reduced usage charges and raised the non-usage sensitive monthly customer charges. These factors, coupled with economic expansion in the late 1990's led to an looming shortage of supply.

Independent generators had filed many applications to build many new power plants, but few have actually been built, some have been canceled, and some are on hold until

³⁶(...continued)
considerably more volatile)." *Id.*, at 7.

more favorable market conditions - higher rates - materialize.

The Public Service Commission, whose members are appointed by the governor, and other state agencies have approved six new power plant projects, including three in New York City that would provide 1,450 additional megawatts of electrical power by the end of 2005. But at least one of those projects - the 1,000-megawatt SCS Energy plant in Astoria, Queens - has been stalled because of difficulties in finding financing, according to the Independent Power Producers of New York, which represents power generators.

Few of the other private generation projects presently under review have secured adequate investments to move forward. Power producers say that investors have been wary in the wake of the Enron scandal and are also concerned about existing price caps, environmental laws and other regulations in New York.³⁷

The New York ISO has issued a report sounding the alarm that a severe problem is in the offing in the next few years if new plants are not built.

In the New York City area, the situation became so extreme the New York State Power Authority built on a crash basis ten small peaker power plants, and is building a new baseload plant. This appear to be a pragmatic but temporary solution to the problem. Without a “builder of last resort” like the Power Authority or the old utilities, a severe shortage could occur with reliability implications.³⁸

Continuing Programs That are in the Public Interest .

The “vision order” called for creation of a “system benefits” fund to support, in a competitively neutral manner, various functions that had been supported by the utilities. The “vision order” considered this to be a possibly “transitional” matter, until the market met the need for energy services that had been funded by the utilities. The “system benefit charge” is added to customer bills for delivery service, and is collected and administered by the New York State Energy Research and Development Authority.

³⁷ *Bloomberg Sees Need for More Power Plants in the City, The New York Times, July 23, 2002.*

³⁸ On a more local level, there have been numerous explosions of transformers and ensuing outages. *Officials: Con Ed Needs Upgrades, Newsday, July 22, 2002.* The incidence of unscheduled plant outages may have increased and there have been two explosions at a divested coal-fired generating plant. These matters deserve further investigation and assessment.

Initially the funding for efficiency measures was set at about half the level the utilities had supported in 1995. Funding for efforts such as demand reduction and conservation was continued and increased in 2001. This represents a realistic appraisal that the “transition” may be much longer and that there is a need for these functions that are not met by the market.

Allaying Concerns About Market Power.

The “vision” was that competitive, efficient spot markets for energy and capacity would be run by the New York ISO. The former New York Power Pool transformed itself into the NYISO and it began operations in November 1999. All generators whose bids are accepted to meet the load at any given hour are paid the same market clearing price.³⁹ Competition among owners of generation would, in theory, induce them to bid their energy supply at their marginal operating cost. Those more efficient than the last and most expensive unit to run would reap the margin between their costs and the clearing price. Those whose marginal costs were higher than the clearing price would not run. The last unit called would nonetheless earn enough to recover investment costs (as opposed to running costs) through the separate installed capacity market.

The NYPSC had approved the sale of generating plants owned by the utilities to new merchant owners, and made specific findings in the divestiture cases that market power concerns were satisfied. As a result, Con Edison began to buy much of the power needed for its customers either at the NYISO or in contracts whose prices were closely pegged to the NYISO rates. Like California, the NYPSC staff had discouraged Con Edison from buying back energy from the new owners of the plants in long term fixed price contracts, favoring instead very heavy reliance upon spot market purchases once the ISO became operational.⁴⁰

Early warnings that the wholesale markets envisioned by regulators would not work had been disregarded in the enthusiasm for deregulation. These warnings came from academic researchers who found that the repetitive hourly auctions could be easily

³⁹ The NYISO performs the function of a private cartel in which production is limited and uniform prices are set in a confidential sellers’ “auction” to determine which units will run and the price to be paid to all, legitimized by the NYPSC as a nonprofit New York electric company, and by FERC as a regulated utility. A “cartel” is “[a] combination of independent business organizations formed to regulate production, pricing, and marketing of goods by the members.” American Heritage Dictionary, 2d College Edition, (1985). The market shares of electricity sellers in the New York City are more concentrated than in the OPEC oil cartel.

⁴⁰ In a Pennsylvania case involving Orange and Rockland Utilities (O&R), a Con Edison subsidiary, the company argued that NYPSC staff had “discouraged” O&R from entering into a long-term purchased power agreement with the purchase of its generation assets because it would have decreased the amount of generation bid into the marketplace and lowered the purchase price of O&R’s generating assets....” Petition of Pike County Light & Power Company, Pa. PUC Dkt. No.

“gamed” to the mutual benefit of participants, even if participants did not possess large market shares and did not overtly collude in price fixing. Also, the New York City market created after divestiture was highly concentrated even under the relatively lenient standards normally applicable to products other than electricity.⁴¹

By July 2000, the wholesale market prices had skyrocketed on several occasions. At the time, Con Edison said it was buying about half the energy for its customers at spot market prices. As a result, small retail and commercial customers’ bills suddenly shot up by 43%. The situation was quite analogous to San Diego California, where the local utility began to flow through to retail customers the wholesale ISO prices. This caused a furor locally that was overshadowed by the more extreme situation in California at the time.

Only after the Summer of 2000 did Con Edison begin to hedge against price surges in the energy futures markets.⁴² Con Edison rates, discussed above, are still much higher than anticipated when deregulation began. Con Edison portrayed itself publicly as helpless to remedy the situation. In FERC filings, Con Edison complained of market power and market manipulation by the new owners of the plants it had sold:

“Consolidated Edison, Inc. ...today urged the Federal Energy Regulatory Commission (FERC) to take immediate action to protect the company’s more than three million electric customers this summer by instituting mechanisms to reduce price spikes in the wholesale electric marketplace. Con Edison also called on the FERC to correct market flaws that allow power generators to exercise market power, and penalize those generators that are shown to be gaming the market to their own advantage.... ‘Relative to estimated costs to produce energy, the energy markets frequently do not produce prices that are competitive,’ Con Edison said in remarks prepared for the FERC hearing.”⁴³

⁴¹ “[O]nly five firms (including NYPA) provide electricity in the City and the Herfindahl-Hirshmann Index (HHI) is above 1,800, indicating that this market is highly concentrated.” Case 99-F-1627, *Application by New York Power Authority for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 500 Megawatt Electric Generation Facility in the Astoria Section of Queens County, Recommended Decision* (Dec. 17, 2001).

⁴² “To reduce the volatility of electric energy costs, Con Edison of New York has firm contracts to purchase electric energy and has entered into derivative transactions to hedge expected purchases for a substantial portion of the electric energy expected to be sold to its customers in summer 2001 (see Note M to the financial statements).” From Con Ed’s SEC Form 10-K for the year ending 12/31/2000, at pages 50-51.

⁴³ Con Edison Press Release, Jan. 22, 2001; “Con Edison Seeks Review of Flaws in Wholesale Electric Market Action Requested to Protect Customers This Summer,” Press Release, June 18, 2001.

(continued...)

The NY PSC also filed a pleading supporting Con Ed, and criticizing the NYISO for ineffective mitigation of market power abuse. The NYISO shot back, criticizing the Con Ed divestiture plan that had left peakers in the NYC load pockets "in too few hands;" faulting Con Ed for relying so heavily on spot purchases instead of long term contracts with generators.

New York's most serious problems are the tightness of supply in "downstate" New York, the dearth of retail demand response mechanisms and the existence of serious transmission constraints that create vulnerable load pockets. Indeed, New York City itself is a huge load pocket that encompasses many smaller pockets. These difficulties have been exacerbated by problems in the design of ConEd's generation divestiture plan, which happens to have been supervised by the PSC. Key errors include leaving peaking units that are essential to reliability in too few hands and failing to require ConEd to enter into long-term bilateral contracts with their owners, *which created a California-like situation with respect to peaking capacity*.⁴⁴

NYISO argued that the NYPSC should be encouraging Con Ed and the generators to do bilateral deals, off the spot market.⁴⁵ To simultaneously counter the threat of market power exercise by the new generation owners and to address the potential insufficiency of supply, the New York State Power Authority on an expedited basis built ten 79 MW temporary peaker plants for New York City. While explained primarily as being a necessary expedience to keep the lights on while the market brings new baseload power plants on line, these publicly owned plants, whose output is presumably bid responsibly, may be keeping the lid on downstate NYISO prices at hours when their bids capture the market clearing price. This would explain why some of the "temporary" plants are running far more often than if they were needed only for emergency reliability purposes. NYPA also stepped up to the plate to build a baseload plant in Astoria, which will replace a less efficient and more polluting plant that will be shut down.⁴⁶

The question arises, what will be done if market forces do not bring needed resources. Old laws requiring the utilities to provide adequate service to all customers on demand

⁴³(...continued)

http://www.pulp.tc/html/con_edison_seeks_review_of fla.html

⁴⁴ "Request for Leave to Submit Limited Answer and Limited Answer of NYISO," *Re Consolidated Edison Company of New York, Inc.*, FERC Dkt. Nos. EL01-45-001; ER01-1385-001, at p. 2 (Filed June 22, 2001).

⁴⁵ NYISO filing: <http://www.pulp.tc/isoreply6-28-01.pdf> at pages 1 -3 of its 6/22 filing

⁴⁶ Case 99-F-1627, *supra*.

were never repealed, and so the utilities have a continuing duty to provide safe and adequate commodity service.⁴⁷ With the dramatic decline of investor interest in merchant plants, it may be necessary for either the old utilities or NYPA to use their better access to credit to build the facilities needed to assure reliable service.

Continuing Customer Protections and the Obligation to Serve.

The proponents of electric restructuring offered New York consumers a new vision. It was a time of energy surpluses and cheap energy was readily available in 1997. Expenditures on conservation measures could be reduced because the market would provide that, and we could rely upon the wholesale markets to supply cheap energy to customers who hadn't switched. If there was some volatility, the market would step forward and cure the problem by offering stable prices. That was the vision, but the reality today, five years later, is that there is no realistic choice for most customers except the very largest. We have in the Con Edison area particularly unstable spiking rates and some blackout possibilities.

⁴⁷ *Legal Analysis of a Public Utility's Obligation to Provide Sales Service*, Cullen & Dykman, <http://www.cullenanddykman.com/advisory/advisorypage.asp?pubid=0532810272000>

PART III

THE FUTURE OF DEREGULATION IN NEW YORK

As described above, the specific goals of electricity deregulation in New York have not been met. In this section, options are suggested with respect to each of the goals.

[To be announced.⁴⁸]

⁴⁸ While the “future of deregulation” is uncertain now, the following is a “Top 10 List” of elements which appear today to be necessary parts of any future market design:

1. Rate stability as the norm based upon long-term supply contracts (or utility construction of supply) implemented through RFP procurement process.
2. Default rates set to protect consumers rather than designed to “promote” competition.
3. Strong and consistently applied statutory consumer protections.
4. Increased regulatory jurisdiction over fraudulent and deceptive practices.
5. Establishment of NYPA as a credible builder of last resort.
6. Focused Public Interest funding to emphasize affordability measures.
7. Severely limited migration of jurisdiction from State to FERC.
8. Regulation of generators in the public interest to limit economic or physical withholding.
9. Maintained utility obligation to serve and extension of obligation to all market participants.
10. Improved funding for public interest and low-income intervenors.

CONCLUSION

The deregulation experiment to date has harmed many consumers, particularly where the deregulation model was most fully deployed. In areas that retained power plants or a commitment to maintain customer price stability, consumers are comparatively better off. Except where the old utility has kept its generating plants, customers of those utilities still offering stable rates will face exposure to the wholesale markets in the coming years. The possibility that the federal government will control the wholesale natural gas and electricity markets sufficiently to protect New York consumers is speculative.