

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

OPINION NO. 97-5

CASE 94-E-0952 - In the Matter of Competitive Opportunities  
Regarding Electric Service.

OPINION AND ORDER ESTABLISHING REGULATORY POLICIES  
FOR THE PROVISION OF RETAIL ENERGY SERVICES

Issued and Effective: May 19, 1997

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COMMISSIONERS:

John F. O'Mara, Chairman  
Eugene W. Zeltmann  
Thomas J. Dunleavy

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BY THE COMMISSION:

INTRODUCTION AND PROCEDURAL HISTORY

Opinion No. 96-12 sets forth our vision and goals for the future electric industry in New York. That vision includes among other features, effective competition and increased customer choice in both the generation and energy services sectors, provider of last resort ("POLR") protections for all consumers, and the availability of information that permits consumers to make informed choices and allows adequate oversight of the market to ensure its fair operation.<sup>1/</sup> In order to realize these aspects of our vision and to implement our goals, we encouraged staff, the seven major utilities and other interested parties to work together to develop recommendations

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<sup>1/</sup>Cases 94-E-0952 et al., In the Matter of Competitive Opportunities regarding Electric Services, Opinion and Order Regarding Competitive Opportunities for Electric Service, Opinion No. 96-12 (issued May 20, 1996), p. 24.

pertaining to the creation of a retail service market (i.e., ESCOs),<sup>1/</sup> including: (1) ESCO oversight and consumer safeguards; (2) transfer of the provider of last resort functions to ESCOs; (3) funding mechanisms to assure fairness among ESCOs; and (4) matters related to billing and metering functions.<sup>2/</sup>

In accordance with Opinion No. 96-12, an ESCO Working Group, after a series of position papers and meetings,<sup>3/</sup> prepared an October 1, 1996 ESCO Working Group Report ("ESCO Report"). In the ESCO Report, the parties reported reaching consensus on the framework for an ESCO oversight process, the necessity of consumer protections and the need to modify existing consumer protection rules in a multi-provider retail environment. The parties also agreed that all customers should have access to some level of basic service subject to applicable consumer protection rules from a POLR, and that there should be a mechanism for a POLR to recover its costs. Finally, most parties were in general accord that issues concerning the role of the Transmission and Distribution (T&D) company and affiliate safeguards should be addressed further in the individual utility restructuring filings.

Staff then prepared more detailed preliminary recommendations on the three most pressing issue areas: POLR,

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<sup>1/</sup>The term "ESCO" has been defined previously in this proceeding as "an entity that can perform energy and customer service functions in any competitive environment, including provision of energy and assistance in the efficiency of its use." Case 94-E-0952, Restructuring New York's Electric Industry: Alternative Models and Approaches - Glossary, September 1995.

<sup>2/</sup>Opinion No. 96-12, p. 74.

<sup>3/</sup>The ESCO Working Group consisted of 30 active parties including staff. This group worked collaboratively to identify, prioritize, and discuss the issues. Staff circulated and sought comment on a series of interim position papers on key issues, and held collaborative technical meetings to discuss the reactions to staff's proposals and the positions of the parties.

consumer protections and ESCO oversight.<sup>1/</sup> As part of that effort, staff met with interested parties on November 14 and 15, 1996 to discuss its proposals. On November 26, 1996, staff issued for public comment<sup>2/</sup> a Draft Report ("Draft Report") containing its preliminary recommendations. Comments on the report were received from the 17 parties listed in Appendix A.

The major issues addressed in the ESCO Report, the Draft Report, the parties' comments on the Draft Report and staff's final recommendations are considered in this opinion and order. We establish policies regarding POLR responsibilities, and approve consumer protection requirements and an oversight process for ESCOs.<sup>3/</sup> While we believe the policies adopted herein are appropriate in light of existing market conditions, we will monitor market development and the effects on all participants, and revise our regulatory policies as needed.

#### POLICY OVERVIEW

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."<sup>4/</sup> We concluded that the T&D company

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<sup>1/</sup>In the ESCO Report, the parties determined to narrow their immediate focus to these three areas.

<sup>2/</sup>Notice of Commission consideration of this Report was published in the State Register on November 27, 1996.

<sup>3/</sup>We expect to consider recommendations on billing and metering issues and reporting requirements later.

<sup>4/</sup>Id. at 28.

should continue to be the POLR during the transition to a competitive environment.<sup>1/</sup>

With respect to consumer protections, we noted that the Home Energy Fair Practices Act<sup>2/</sup> ("HEFPA") currently affords residential customers certain consumer protections including, among other things, receipt of service without undue delay and protection from unwarranted disconnections.<sup>3/</sup> We stated that, because of this law, residential customers should continue to receive basic statutory protections.<sup>4/</sup> 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 new entrants while ensuring that the POLR continues to provide them, a model we adopted for the gas industry.<sup>5/</sup>

An issue related to consumer protections was whether to license or certify ESCOs. As we indicated in Opinion No. 96-12, this seems to be an important step during the transition phase given the public's concern about the credibility of ESCOs. We concluded that a further advantage of licensing would be that data can be gathered about how ESCOs are working, how many and what kind of complaints they are receiving, and what level of service quality they are delivering. Though we recognized that licensing possibly could limit the growth of the ESCO market, we determined that the need to protect customers is paramount, and that ESCOs should be licensed or certified by a state entity. We stated that licensing requirements should provide basic information but should not be onerous.<sup>6/</sup>

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<sup>1/</sup>Id. at 67.

<sup>2/</sup>Public Service Law Article 2.

<sup>3/</sup>Opinion No. 96-12, p. 69.

<sup>4/</sup>Id.

<sup>5/</sup>Id.

<sup>6/</sup>Id. at 68.

PROVIDER OF LAST RESORT RESPONSIBILITIES

To ensure that all consumers have reasonable access to electric service, and to meet their service obligations in a monopoly environment, utilities carry out several basic responsibilities. These responsibilities include connecting customers to the electric system, delivering electricity, and providing electricity supply and ensuring access to sufficient capacity and energy resources to meet customers' needs. In addition, utilities must conform to our consumer protection rules.<sup>1/</sup> These rules ensure that New Yorkers can obtain utility service without undue delay, restriction or interference.<sup>2/</sup>

As competitive forces emerge and new supply and service choices are made available to electric customers, it is appropriate to reexamine how these service obligations should be met. Of particular concern is continued access to electric supply pursuant to consumer protection rules for those consumers for whom competition is not a viable or desirable option, especially for economically vulnerable and less profitable consumers. In Opinion No. 96-12, we decided that for the near term these so-called provider of last resort responsibilities should continue to be performed by the T&D company.

In the ESCO Report, the parties agreed that, during the transition to a fully-competitive market, all consumers should have access to some level of basic electric service from a POLR,

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<sup>1/</sup>Protections for residential customers are established in the Home Energy Fair Practices Act (HEFPA), Public Service Law Article 2, and implemented by regulations in 16 NYCRR, Part 11 (the HEFPA rules). Rules implementing protections for non-residential customers are provided in 16 NYCRR, Part 13. Consumer complaint-handling procedures are set forth in 16 NYCRR, Part 12.

<sup>2/</sup>HEFPA and related rules require: prompt connection to the electric system and delivery of supply to applicants for service; limitations on service deposits that may be required of customers; notice requirements for termination of service and continuation of service during the notice period; and assistance in managing payment of overdue bills for qualifying customers so the customers can avoid losing service.

subject to applicable consumer protections. The parties did not agree, however, on how this should be accomplished.

Parties' Recommendations

Staff recommended that New Yorkers' access to electric service not be diminished due to restructuring, and each consumer should have access to a POLR that offers services in conformance to our consumer protection rules. It recommended that a POLR be available for customers who otherwise would not be able to obtain service in a competitive retail market, and that it appeared they will be, in general, customers who will produce little or no profit due to a lack of ability to pay for service, a low level of usage, or a higher than average cost to serve. Several parties identified other types of customers who may need a POLR including customers who (1) prefer to remain with the utility and not select an ESCO, (2) have an ESCO that goes out of business, or (3) are newly-arrived in New York. Multiple Intervenors ("MI") stated that a POLR will be required to provide electric service to all consumers who do not have a competitive alternative, or who choose not to utilize one. Strategic Energy Management, Incorporated ("SEM") claimed, however, that a POLR is not needed for business customers.

Wheeled Electric Power Company ("WEPCO") stated that the POLR function should not include serving customers who have other choices of providers. It claimed that approach would perpetuate the utilities' dominance over the provision of retail electric service. WEPCO proposed that customers who have alternatives to the transmission and distribution ("T&D") company but do not select another provider be "migrated" to alternative providers during a four-year phase-out period. Similarly, Enron Capital and Trade Resources ("Enron") stated that the utilities should not simply "inherit" customers who do not choose to switch providers, and that competitive providers must have a "full and fair" opportunity to serve these "default" customers.

Staff recommended, as Energy Association of New York State ("EA") had proposed in the ESCO Working Group, that the

utilities' current responsibilities be restructured to recognize monopoly and potentially competitive functions. The responsibility to connect customers to the electric system and to deliver electricity via a transmission and distribution system (i.e., access) would remain monopoly functions of the T&D companies. Potentially competitive functions, including the responsibility to accept customers subject to consumer protection rules and to obtain and provide electricity supply for customers as a "supplier of last resort," would be the role of a POLR<sup>1/</sup> under staff's proposal. Staff recommended that a POLR also be responsible for any programs to assist low-income customers that the Commission determines are appropriate.

Staff claimed that the T&D companies are the only entities currently equipped to provide POLR services and should serve as POLRs during the transition to a competitive market. Staff, however, envisioned the potential for change as the competitive market for energy became more fully developed, and advocated that the utilities' current responsibility to plan for and acquire sufficient long-term capacity and energy resources to meet customers' needs should be supplanted by reliance on the competitive generation market.

Except for EA, the parties, including Niagara Mohawk Power Corporation ("Niagara Mohawk"), New York State Electric and Gas Corporation ("NYSEG"), Rochester Gas and Electric Corporation ("RG&E"), National Fuel Gas and Distribution Corporation ("NFGDC") and Consolidated Edison Company of New York ("Con

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<sup>1/</sup>Consistent with its proposed definition of the POLR responsibilities, staff reiterated its long-run preference that the POLR base its sale of electricity on a pass through of short-term supply purchases (i.e., market prices, at a minimum, though contracts for supply of less than two years would be permitted). See Cases 94-E-0952 et al., In the Matter of Competitive Opportunities regarding Electric Services, New York State Department of Public Service Staff Position Paper, October 25, 1995, pp. 54-55.

Ed"),<sup>1/</sup> agreed that the T&D companies should be POLRs, at least in the short term. EA proposed the utility not be the automatic default POLR, even at the beginning of the transition. EA instead recommended that other means to implement POLR functions, such as its proposal for a tax-supported energy voucher program,<sup>2/</sup> must first be exhausted.

Concerning the services to be provided by a POLR, EA, Con Ed and NYSEG agreed with staff's recommendations for modifying the utilities' current obligation to serve functions, but hold that legislation is required. Specifically, EA claimed that legislation is needed to ensure that the Commission cannot reimpose the obligation for long-term resource planning and acquisition on utilities in the future. Con Ed commented that while the Commission cannot effect a change in laws, it can speed the transition and see its objectives met sooner by lending its support to legislative changes. Con Ed also raised several concerns about the implementation of such a recommendation (e.g., whether or when the ISO and wholesale market will become an adequate substitution for the utilities' historical planning function). MI supported staff's recommendation, however, claiming the Commission has the authority to change the scope of the obligation to serve and manner in which it is fulfilled, and that legislation is not required.

Public Interest Intervenors ("PII") opposed POLR electricity sales based on a pass through of market prices, claiming it would make those with fixed or low income vulnerable to monthly and seasonal price volatility. PII also proposed that a POLR should not be precluded from entering into long-term contracts, pursuing energy efficiency, weatherization and other cost-effective alternatives. Public Utility Law Project ("PULP"), on the other hand, supported staff's long-run

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<sup>1/</sup>Con Ed, however, would limit POLR availability only to residential customers.

<sup>2/</sup>See the discussion below of proposed alternatives to the T&D company as POLR.

preference to have the sale of electricity by a POLR on a pass through of short-term supply purchases. MI proposed that a POLR's contracts for supply be limited to one year, not two years as proposed by staff.

PII stated that the T&D utility acting as POLR should be obligated to offer customers a range of conservation services on a fee-for-service basis. MI opposed this, arguing that the goal should be to limit POLR functions to the minimum necessary to assure all New Yorkers have access to service.

Regarding the recovery of POLR costs, staff stated that they should be collected from all users of the electric system in a competitively-neutral manner in the T&D delivery service charges (wires charge). Currently, these costs are included in the utilities' revenue requirements and recovered in their rates. Staff noted, however, that there is not yet an analysis of the amount of these costs or agreement among the parties on what should be included in a calculation of them. The relevant costs, staff suggests, include some portion of uncollectibles and collections costs.<sup>1/</sup> Staff recommended that more work needs to be done to identify, analyze and measure the associated costs for each service territory in order to determine if it would be cost-effective for ESCOs to assume a POLR role.

The utilities stressed the need for assurance of full POLR cost recovery, and agreed that POLR costs should be recovered in a competitively-neutral manner. They claimed, however, there are additional POLR costs beyond those described by staff. Several parties, including the utilities, agreed that POLR costs should be determined on a utility-specific basis.

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<sup>1/</sup>Staff notes that a portion of uncollectibles and collection costs are part of the normal cost of business and therefore not attributable to the POLR responsibility.

Discussion

The future electric industry in New York will be comprised of a competitive generation market, a monopoly transmission and distribution system, and a competitive retail market that will serve the needs of consumers. In this future market, T&D utilities will continue to carry out the responsibility of connecting customers to and delivering electricity over the transmission and distribution system. We are now in the process of opening the generation and retail services segments to competition. While each of these segments has the potential to develop into competitive markets, we recognize that these markets will not develop overnight. Therefore, to ensure that consumers continue to have reasonable access to electric service during the transition to a more competitive environment, it is necessary to designate the POLR and its responsibilities.

With respect to designation of a POLR during the transition, we find merit in staff's conclusion that the T&D utilities are the only entities currently equipped to serve as POLRs. While the T&D utilities already have systems in place to serve customers statewide, ESCOs have yet to become widely established as retail electric service providers in New York. In addition, as we noted in Opinion No. 96-12,<sup>1/</sup> residential customers would be fully covered under HEFPA if the T&D company remained as the POLR, thus ensuring consistency with existing practice. We reaffirm, therefore, that the T&D utilities will be POLRs until we determine that effective alternatives can be lawfully implemented.

With respect to the definition of POLR responsibilities, we concur that the role of the POLR should consist of the responsibility to accept customers subject to consumer protection rules; to obtain and provide their electricity supply; and to provide programs to assist low-income

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<sup>1/</sup>Opinion No. 96-12, p.66.

customers that we determine are appropriate. Regarding access to sufficient capacity resources, it is our long-term preference to introduce competition wherever feasible to the generation segment of the industry.<sup>1/</sup>

We remain committed to developing market-based generation supply and to allowing utilities to eventually meet their supply function by relying on the competitive market and passing through a competitive market rate. In the near term, however, the utilities's responsibility for generation supply will be examined in their individual restructuring cases and reflected in their rate plans, in which we will establish reasonable rates.<sup>2/</sup> In favoring these policies, we note the well-established principle that we have broad discretion to select the means of achieving the Legislature's goals under the Public Service Law.<sup>3/</sup> Staff's proposal that we allow market forces to control the supply function clearly falls within that broad discretion. Thus, while legislative changes may be warranted at some future date, during the transition from a regulated electricity market to a more competitive one, the evolutionary approach that staff recommends is both reasonable and legally permissible. The EA, NYSEG, and Con Ed assertions to the contrary are hereby rejected.

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

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<sup>1/</sup>Alternatives to T&D utilities as retail providers of last resort are discussed in the following section.

<sup>2/</sup>POLR cost recovery issues for the near term will be addressed in individual company rate plans.

<sup>3/</sup>See Consolidated Edison v. PSC, 47 NY2d 94 (1979), reviewed on other grounds, 447 U.S. 530 (1980).

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 rates for the individual utilities.

PII's recommendation that a POLR be required to offer conservation services on a fee-for-service basis is not consistent with our vision and policy established in Opinion No. 96-12. We expect that restructuring the market to permit competition in retail energy services will result in increased choices of services for consumers, including the availability of demand side management options.<sup>1/</sup> Though a system benefits charge ("SBC") will be established to help support public policy programs not being offered by competitive markets, the market should be allowed to work to address consumers' needs before any conclusion is reached that additional requirements beyond the SBC should be placed on any providers. Further, our interest is to move towards a structure in which competitive services are offered by entities other than the regulated T&D companies, largely to encourage fair competition.

It is premature to consider the proposals by WEPCO and Enron to assign customers among providers. Though it is true that customer inertia may slow the development of the ESCO industry, we are not satisfied that ESCOs could satisfactorily fulfill this responsibility in the near term, or that customers would find involuntary assignment among providers acceptable. We will consider this proposal and others later as the market develops.

In conclusion, we determine that the responsibilities of a POLR are as follows:

- Accept all consumers subject to applicable consumer protection rules;

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<sup>1/</sup>Opinion No. 96-12, p. 25.

- Meet customers' electricity supply needs by obtaining electricity consistent with the Commission's decisions in the individual utilities' restructuring cases and the development of a competitive electricity market; and
- Provide any programs to assist low-income customers that the Commission determines are appropriate.

In addition, the T&D companies' obligation to serve will continue to consist of connecting all customers to the electric system, maintaining the transmission and distribution system in their service territories, and delivering electricity to consumers in their service territories via the T&D system.

#### ALTERNATIVES TO T&D UTILITIES AS POLR

Several alternatives in which ESCOs would assume POLR responsibilities were proposed for trial evaluation during ESCO Working Group discussions, including: requiring all providers to assume POLR obligations; bidding out the POLR responsibility; assigning less desirable or all customers among providers; a "serve or pay" option that would permit providers to choose whether to assume a POLR role or pay into a fund to support POLR services by other providers; and a tax-supported government program to provide eligible customers with vouchers to pay for electricity. The parties did not reach agreement on details of how these mechanisms would operate or which should be implemented.

#### Parties' Recommendations

Due to a lack of experience with non-utility providers serving as POLRs for electric service, staff's Draft Report recommended experimenting with alternative mechanisms in retail competition pilot programs before any approach is adopted on a large-scale basis. The details would be determined in the context of individual utility restructuring plans, since different approaches may make sense.

Staff recommended that any alternative POLR mechanism provide, at a minimum, that all New Yorkers have access to a supply of electricity at a reasonable price, and that all residential customers have access to a provider that complies with HEFPA. Staff also stated its preference for a mechanism that promotes competition in the POLR function; provides customers a choice of provider (i.e., customers are not assigned to a provider, unless they indicate a willingness to be assigned); and does not compel ESCOs to serve in markets in which they prefer not to operate.

Con Ed commented that staff's recommendations would create a POLR role for the utility or another supplier that would extend beyond a reasonable transition period. EA proposed that a utility be relieved of its POLR responsibilities if an ESCO(s) assumes those responsibilities.

EA, Con Ed, NYSEG, SEM and MI supported instituting a tax-supported program to provide "energy stamps" or some type of voucher to consumers who need assistance to pay for electricity, instead of relying on consumer protections and a POLR mechanism. MI claimed that approach not only apportions the costs appropriately, but it best meets the goals identified by staff.

NYSEG, Niagara Mohawk and RG&E stated a willingness to work with parties during the transition to develop long-term alternatives to the T&D companies as POLRs. Association for Energy Affordability ("AEA"), Joint Supporters/E Cubed ("JS/E3"), WEPCO and NFGDC agreed that alternatives should be tested in retail competition pilot projects. JS/E3 agreed that there should be competition to provide POLR services, and that ESCOs should have a choice of whether to assume POLR responsibilities. MI opposed experimentation with POLR alternatives in retail pilot programs, claiming such experimentation may delay implementation of statewide competition and will be confusing to customers.

A number of parties expressed objections or opposition to various proposed alternatives. Their comments indicated the following concerns regarding the mechanisms: potential barrier to entry by ESCOs; the failure to provide adequate incentive for

ESCOs to assume a POLR role or to reduce POLR costs; expected difficulty in administering funding mechanism and oversight/enforcement of ESCOs providing POLR functions; and the potential to tilt the playing field of competition in favor of ESCOs that assume a POLR role but have a large number of non-POLR customers.

### Discussion

Successful development of a competitive alternative(s) to the T&D companies as POLRs is desirable in the long run, particularly given the potential for market forces to lower costs and improve the quality of POLR functions. Many parties, including several utilities, expressed an interest in working to develop evaluations of POLR alternatives in individual service territories during the transition. The parties disagree, however, on which of the alternatives should be tested.

Some parties support institution of a tax-supported voucher program to pay for the electric service of New Yorkers who cannot afford service on their own. While there may be advantages to a tax-supported program in the long run, such a program would require legislative action, which, even if it could be successfully initiated, might not ultimately be approved. We prefer to assess first whether a competitive market can cost-effectively provide POLR services before turning to a tax-funded mechanism.

Thus, while as a matter of policy, it remains our long-term preference to introduce competition to the POLR function,<sup>1/</sup> it is not appropriate to decide this issue now. Due to lack of agreement among parties on the approaches that should be tried, the current limited experience with ESCOs providing electric service, and the lack of reliable estimates of POLR costs, it does not appear useful to further develop alternative

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<sup>1/</sup>As noted supra, this function would consist of accepting customers subject to applicable consumer protection rules; supplying their electricity needs; and providing low-income assistance programs that the Commission determines are necessary.

approaches at this time. We will reconsider this issue after we have more experience with the competitive retail market. For now, the T&D companies will continue to serve in a POLR role while the market develops and the capabilities of ESCOs are ascertained.<sup>1/</sup>

#### CONSUMER PROTECTIONS

As we noted above, HEFPA currently affords residential customers certain consumer protections including, among other things, receipt of service without undue delay and protection from disconnections.<sup>2/</sup> We stated that, because of this law, any provider serving residential customers is obligated to ensure that residential customers continue to get basic statutory protections.<sup>3/</sup> We concluded that these protections shall continue to apply during the transition, but noted that, as real choice develops, it may be sensible to streamline such requirements for new entrants while ensuring that the POLR continues to provide them, a model we adopted for the gas industry.<sup>4/</sup>

In the ESCO Report, the parties agreed that consumer protections were necessary and further agreed that the existing consumer protections should be modified in a multi-provider environment. Parties did not agree whether the same rules should apply equally to all energy service providers.

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<sup>1/</sup>In response to Con Ed's comment that staff's proposed approach would create a POLR role that would extend beyond a reasonable transition period, as well as EA's proposal that a utility be relieved of its POLR responsibilities if they are assumed by an ESCO, we reiterate our statement that a POLR may continue to be needed as real choice develops. See Opinion No. 96-12 p. 69.

<sup>2/</sup>Opinion No. 96-12, p. 69.

<sup>3/</sup>Id.

<sup>4/</sup>Id.

Parties Recommendations

In its Draft Report, staff proposed a two-tier approach to protections. The stated objective of staff's proposal was to ensure that all consumers continue to have the full range of required protections from a POLR while not imposing requirements on market entrants that could be a barrier to entry. The ability to obtain service subject to our rules from a POLR is the first level of protections under staff's proposal. Staff's proposed second tier would consist of the following set of protections which would be required of any non-POLR ESCO and implemented as part of the ESCO oversight process:

- A requirement to give a prospective customer a disclosure statement<sup>1/</sup> that provides a complete description of a customer's rights and responsibilities prior to the customer making a commitment to the provider. This should include, at a minimum, a description of the complaint-handling procedures available to the customer; the rights and obligations of customers regarding payment of bills; procedures for terminating the contract to provide electricity supply; and security deposit requirements and procedures;
- A minimum of 15 business days' notice to the customer prior to terminating the contractual relationship for electricity supply;
- Practices to ensure a smooth transition, by a customer, from one provider to another. This should include, at a minimum: procedures for how and when a switch of provider becomes effective and notification of the T&D company of such switches; and guidelines for the collection and reporting of metered energy usage data;

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<sup>1/</sup>In its Draft Report, staff proposed that ESCOs provide a complete description of a customer's "rights and responsibilities." In its final recommendations, staff used the term "disclosure statement" to avoid confusion between the content of the "rights and responsibilities" brochure that utilities are currently required to disseminate pursuant to Public Service Law Section 44(2) and the content of this proposed disclosure statement by ESCOs.

- Protection from unauthorized switch of provider (also known as "slamming"). This should include, at a minimum: criteria for customer authorization of a change of provider, verification procedures for change orders, and a mechanism for customers to "freeze" their selected provider; and
- A process for resolving customers' complaints regarding the provision of electric service by ESCOs.<sup>1/</sup> This should involve an affordable means to resolve disputes, including convenient local access to the supplier. Customers should have opportunity to reach the ESCO via a local or toll-free phone call, and have the right to appeal the ESCO's offered resolution to an independent third party.

Staff recommended that ESCOs be allowed flexibility to develop approaches to meet these requirements, and that an ESCO's proposed procedures be reviewed when the ESCO submits its application for eligibility. Finally, staff's approach would not allow ESCOs to shut off the electric service to any customer whose contract with the ESCO for electric service is terminated. Unless the customer makes arrangements with another ESCO for electric service, the customer would continue to receive service without interruption from the T&D company serving as a POLR.<sup>2/</sup>

Staff also advocated modifications to our current consumer protection rules that will apply to the T&D companies in their role as POLRS. Staff claimed that changes are appropriate because consumers will begin to have a choice of providers. The proposed changes are:

- Allow a POLR to require positive identification from residential applicants;

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<sup>1/</sup>In its Draft Report, staff anticipated that customers' disputes regarding access to, or service from the regulated T&D company would continue to be resolved by the Department of Public Service through the existing complaint-handling process (as prescribed in Part 12 of 16 NYCRR). This process would also apply to situations in which an ESCO is a customer of the utility.

<sup>2/</sup>The termination of electric service requires a shut-off of the customer meter which is under the utilities' control.

- Allow a POLR to require a deposit or other remedy if a residential customer has outstanding past due bills for electric service from another provider;
- Allow electricity providers to share sufficient customer payment information to make the above determination;
- Eliminate or streamline existing requirements for utility bill contents and for Commission approval of utility bill formats; and
- Apply a partial payment by a customer on a combined bill for T&D and ESCO services to the balance outstanding for T&D services before any portion of the payment is applied to the balance due for ESCO services.

Staff recommended further in its report that a Commission proceeding be initiated to consider staff's and other parties' proposals for changes to the rules.

Finally, to address the need to provide customers accurate and consistent information in service offerings and in bills rendered, staff recommended that the energy services industry and interested parties develop fair marketing principles to ensure that customers have the information they need to make appropriate choices of providers and services.

Several parties opposed a two-tier system of consumer protections. PULP argued that all electricity providers are "electric corporations" under Public Service Law and subject to HEFPA, in which the State legislature has already defined basic consumer protections. New York State Consumer Protection Board ("CPB") claimed that, due to both the critical nature of electricity and to assure consumer acceptance of restructuring, it is necessary that the same protections be required of all providers serving residential and small commercial customers. Further, it claimed it has no evidence that consumers are currently overprotected or that high electricity rates in New York are due to burdensome consumer protections. CPB claimed the two-tier approach would allow non-POLR ESCOs to discriminate within the customer classes they have targeted for service, which

could result in redlining. PII stated that the need for protections is most pronounced for those who lack the ability to negotiate protection terms on their own or to pay for protections.

PII and PULP stated there has been no factual support for staff's fear that imposition of current consumer protection requirements on would-be providers would discourage them from entering New York. PULP claimed that our requirement that all new entrants to the telecommunications market in New York are subject to existing consumer protection rules has produced no noticeable impact on the willingness of competitors to enter the State.

EA claimed that staff's two-tier approach could result in an expansion of protections that will allow some customers to game the system by switching among providers and unfairly delay termination of their service. EA and NYSEG proposed that all providers of similar activities should be subject to the same rules.

Niagara Mohawk, NFGDC and WEPCO supported staff's proposed two-tier approach to consumer protections. NFGDC commented that the model acknowledges that customers served by non-POLRs are protected by market forces, and that staff's proposed description of POLR responsibilities is reasonable and nearly identical to the methodology currently in practice in New York's gas industry. WEPCO claimed that imposing current consumer protection rules on all ESCOs would pose a barrier to entry, and supports an approach in which ESCOs are responsible for a reduced set of fundamental protections. Niagara Mohawk, NYSEG and WEPCO agreed with the protections that would be required of ESCOs under staff's proposal.

Several parties commented on staff's proposed processes for resolving customers' complaints regarding service from an ESCO, and for resolving disputes between an ESCO and a T&D company. CPB commented that it is incongruous for staff to propose to monitor customer complaints but not to resolve them. It claimed that staff's proposal would provide a very important

consumer safeguard (DPS resolution of complaints regarding the T&D company) to the ESCO but would deny an ESCO's customers the same protection. CPB claimed this is not sound policy. Further, CPB seeks clarification regarding the definition of an "affordable" complaint resolution process and requests confirmation that staff's intent is that the face-to-face resolution of a dispute, available upon appeal, will take place in New York State.

WEPCO claimed that the existing DPS complaint-resolution process may be too slow for addressing complaints between the T&D company and ESCOs. Several utilities also opposed applying the existing process. MI commented that an expedited dispute-resolution process is needed to ensure the development of a robust competitive market.

New York State Department of Law ("DOL") claimed the public will not be able to make informed choices unless there is uniformity as to basic contract terms, and recommended that ESCOs not be permitted to solicit residential or small business customers until the Commission has established a schedule of minimum offer terms. On a related point, Utility Workers Union of America ("UWUA") proposed that consumer protections should include "consumer performance standards" applicable to all energy services that ESCOs or T&D companies are expected to provide.

Regarding consumer protection requirements for a POLR, EA, NYSEG and WEPCO supported staff's proposed modifications, but EA claimed that legislation is required to make changes to consumer protections. EA and NYSEG also claimed that staff's proposed changes do not go far enough and proposed additional modifications to the consumer protection rules, including:

- Broadening the circumstances in which a security deposit may be required of a customer, increasing the amount of an allowed deposit, and allowing a provider to keep a deposit for the life of an account;
- Reducing the requirements for utilities to offer deferred payment agreements to customers in arrears;

- Relaxing the restrictions on when a service disconnection for nonpayment may be made;
- A requirement of tenants to pay arrears as a condition of maintaining service to halls and public lights in multi-family housing; and
- Repeal of the shared meter law.

## Discussion

### Consumer Protections Required of ESCOs

Staff's recommended approach is similar to the approach we adopted for the gas industry. It would ensure that all customers have continued access to service in conformance with HEFPA and related rules from the T&D company, and would allow non-POLR providers to offer different types and levels of protections. It therefore would permit consumers to select the specific type of service offering that is appropriate for their circumstances.

We find unpersuasive the claim that consumers would be denied choice unless all providers are required to comply with HEFPA. HEFPA and non-residential rules require providers to accept all customers requesting service, except in very limited circumstances. HEFPA was not designed for monopoly providers and we expect that if those rules were imposed, they would act as a barrier to entry for many ESCOs, particularly small providers. Requiring that ESCOs comply with only a set of fundamental protections will promote their entry to the State and, on balance, will provide more customers with choice of provider than would imposing HEFPA on all ESCOs. In addition, customers will have access to service from a POLR in addition to offerings of combinations of services and protections from ESCOs that they may find more attractive.

We also note that an ESCO would not be allowed to terminate electric service under staff's proposal. Thus, the application of HEFPA to ESCOs would provide no additional protection of service because any residential customer who ceases

to obtain electric service from an ESCO will be able to obtain service from the utility, with full HEFPA protections, or seek electric service from another ESCO. Even for those customers who select a competitive ESCO, staff's proposal ensures that access to retail service from the T&D company remains available if they wish to return. Therefore, staff's proposal satisfies our requirement established in Opinion No. 96-12 that residential customers continue to get basic statutory protections.

Aside from the opposition of some parties to a two-tier approach to providing protections, we note there is general support for the types of fundamental protections staff proposes. Notably, NYSEG stated that the proposed requirements are consistent with what its customers have said are needed. In light of all of the foregoing, we find staff's proposed framework for consumer protections to be a reasonable balance of the need for customer protections and the desire to ensure that the benefits of competition are available to as many customers as possible, and it is therefore adopted. Our HEFPA and non-residential consumer protections rules will not apply to ESCOs. Instead, we will require that ESCOs agree to provide specific and limited customer protection as a condition of using the facilities of the T&D companies. We also direct that only a T&D utility subject to the Commission's jurisdiction will be permitted to terminate a customer's electric service.

We will not act at this time on DOL's recommendation that a schedule of minimum offer terms be required of ESCOs. We note, however, that our requirement that ESCOs provide prospective customers a disclosure statement may address DOL's underlying concern. We encourage the parties to develop fair marketing principles for ESCOs. DOL may choose to raise its proposal for consideration should parties develop those principles or, as discussed below, when parties discuss the content of the disclosure statement for customers that will be required of ESCOs.

UWUA's proposal to establish "consumer performance standards" for all the energy services provided by ESCOs and T&D

companies would place unnecessary limits on providers' abilities to develop creative strategies to meet the needs and expectations of consumers, and is not adopted. We have established basic consumer protection requirements and will monitor the development of the energy services market. We expect the competitive market to determine energy services performance standards for ESCOs. As is the current practice, service quality incentive plans for the T&D companies will be considered in the individual utilities' rate plans.

### Complaint Resolution

#### 1. ESCO and its customers

We anticipate that in the restructured market, a customer who believes he or she has been harmed will have recourse available that is not available to utility customers today: the customer can switch to another provider. In light of this option, it is not necessary for competitive firms to use the dispute resolution process that is designed for monopoly services. Imposing specific requirements would also have an undesired effect of restricting ESCOs' creativity in finding solutions to satisfy and retain customers.

As we begin the transition to competition, it is reasonable to establish minimum requirements for an ESCO to make available to customers an affordable and convenient means of resolving disputes. While some parties have requested specificity as to what will constitute affordable and convenient dispute resolution, a prescriptive process is neither necessary nor desirable. While we will not adopt specific complaint handling requirements, we encourage ESCOs to build on the experiences of the gas market, where acceptable complaint resolution processes have been developed and unacceptable ones have been rejected by staff. For example, acceptable complaint resolution processes provide customers access at reasonable times to a company representative via a local or toll-free phone call; they do not require customers to travel out of their local area

or to pay a fee for a third-party appeal process; and they contain methods appropriate to deal with complaints from small customers (which may vary from those appropriate for larger customers). ESCOs will be required to fully describe their complaint-resolution process in their disclosure statements so customers can make their own informed decisions.

In the interest of monitoring customers' experiences during the transition to a competitive market, staff will track customer complaints with ESCOs. To that end, ESCOs will be required to include the DPS telephone number on their disclosure statements for use by customers to register complaints. Staff should track the volume of complaints and use that information when considering an ESCO's continued eligibility to provide retail electric service in New York.

## 2. T&D and its customers

Our continuing interest in ensuring quality service by T&D companies includes monitoring and, if necessary, ultimately resolving complaints by ESCOs regarding tariffed electric services.<sup>1/</sup> We encourage ESCOs and the T&D companies to resolve disputes informally, or, if necessary, to rely on available legal remedies. We will remain involved in monitoring and resolving customers' complaints regarding service from the T&D companies, including those who receive bundled electric services and those taking delivery service from the T&D and purchasing electricity supply separately from an ESCO.

### Proposed Modification to Consumer Protection Rules

Most parties support staff's proposed modifications to current consumer protection rules. However, some parties, particularly the utilities, argue that additional changes are

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<sup>1/</sup>There may be allegations of undue or unreasonable preference regarding competitive services. We expect such complaints will be resolved in accordance with the applicable affiliate safeguards or standard of conduct rules.

needed. There are also some objections, such as MI's, to specific rule changes. Staff's proposed modifications to existing consumer protection rules are an appropriate response to the developing multi-provider retail environment.

We will initiate a formal rulemaking proceeding to consider modifications to the rules effecting the provider of last resort responsibilities. We will indicate in our notice that we are primarily interested in changes to rules that are needed to recognize the change from a monopoly to a multi-provider market structure. Parties will have additional opportunity to comment on staff's proposed rule changes and to make other proposals.<sup>1/</sup>

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To summarize, we adopt staff's proposed consumer protection requirements for ESCOs. These requirements, which are listed among the compliance requirements in Appendix B, will apply to ESCOs that market or aggregate electricity for retail sale. Additional requirements may be added later, after we consider metering and billing issues and the reporting requirements that will apply to ESCOs. If, in staff's view, an ESCO does not demonstrate that it has sufficient mechanisms in place to meet the consumer protection requirements in its eligibility application, staff should work with the ESCO to resolve any deficiencies. In addition, we will initiate a formal rulemaking proceeding to consider changes to the consumer protection rules applicable to a POLR.

#### THE ESCO OVERSIGHT PROCESS

In the ESCO Report, the parties agreed that the oversight process should have the following objectives:

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<sup>1/</sup> The concerns raised here that the proposed changes could lead to gaming should be raised in the comments on the specific proposed rule changes.

- Provide assurances that ESCOs are technically and financially competent;
- Gather basic information about ESCOs and their performance and monitor the development of the competitive ESCO market;
- Not impede the growth of the competitive ESCO market with onerous requirements; and
- Ensure that performance by an ESCO does not harm electric system reliability, and that default by an ESCO does not harm the regulated T&D company's ratepayers.

The parties also reached consensus on the need for a centralized oversight process, to be administered by the Department of Public Service (DPS), for all ESCOs that intend to market or aggregate electricity for retail sale to New York State consumers.<sup>1/</sup> The parties agreed that the ESCO oversight process should not apply to customers who procure electricity for their own use.

#### Oversight Process

##### Parties' Recommendations

Staff proposed an oversight process designed to meet the parties' agreed-upon objectives. The proposed process includes:

- Filing requirements for DPS determination of ESCO eligibility;
- Compliance requirements to ensure ESCO performance; and
- Reporting requirements to monitor the performance of individual ESCOs and the development of local and statewide competition.

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<sup>1/</sup>The parties agreed that ESCOs that wish to provide metering services would be subject to an oversight process. We will consider metering issues, including a suitable oversight process, at the appropriate time in the future.

Staff's proposed oversight process would require ESCOs to:

- Identify the location of their corporate headquarters, the offices of any affiliates or branch offices located or operating in New York State, and the name, address and contact person for any entity that has an ownership interest in the ESCO's corporation or any of its affiliates;
- Provide proof of registration with the NYS Department of State and proof that all financial security provisions required by the oversight process have been met;
- Provide certification of compliance with all technical and financial requirements of the ISO;<sup>1/</sup>
- Comply with applicable consumer protections; and
- Provide periodic reports<sup>2/</sup> to permit the Commission to monitor the development of retail competition in New York.

ESCOs would also have to file descriptions of:

- The types of customers and regions of the state they intend to serve to allow the DPS to monitor the development of competitive markets;
- Their proposed plans to protect customers from an unauthorized switch of provider;
- Their proposed complaint-handling and resolution processes;
- Their proposals to meet required consumer protections; and
- All relationships with NYS affiliates generally, and specifically any relationships with entities that own transmission or distribution facilities.

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<sup>1/</sup>This may include, for example, a provision that ESCOs that install devices and/or equipment connected to the T&D system must meet certain safety standards, similar to the requirements for regulated entities. Pending the completion of ISO requirements ESCOs should comply with the reliability rules of the New York Power Pool.

<sup>2/</sup>The scope and frequency of this reporting have yet to be determined.

Staff proposed that once the DPS determined and notified T&D companies that an ESCO applicant complied with all Commission oversight requirements, the ESCO would be eligible to provide electric service to end-use customers via the T&D system. The T&D companies would be required to include provisions in their delivery service tariffs that require ESCOs that market or aggregate electricity for retail sale to New York consumers to meet the oversight requirements.

Under staff's proposal, an ESCO's eligibility could be temporarily or permanently suspended if an ESCO subsequently failed to comply with the oversight criteria, ISO or DPS reporting requirements, or if it has an unacceptably high volume of customer complaints. Suspension would be subject to a hearing. If eligibility is suspended, the DPS would notify the T&D companies that an ESCO is no longer an eligible provider.

EA and MI claimed that the level of oversight proposed by staff is too onerous for a competitive market and, ask that, at a minimum, we acknowledge that it is our intent to reduce the oversight requirements eventually. EA asserted that staff's oversight proposal borders on regulation of the ESCO industry and competitive industries should be subject to much less, or no, oversight. EA also proposed establishment of a reasonable time frame in which the initial ESCO eligibility determination process should be completed, and suggested 30 days. JS/E3 recommended that the DPS "take cognizance" of ESCOs rather than regulate them. SEM commented that ESCOs who intend to serve only larger commercial and industrial customers should require less oversight than ESCOs proposing to serve residential customers.

Representing an opposite view, as noted above, PULP commented that ESCOs selling electricity to end users will be "electric corporations," and therefore, should be subject to the same statutory requirements currently imposed on utilities. From PULP's perspective, a new oversight regime is unnecessary because current Public Service Law provides the Commission with ample tools to regulate these companies. PULP also stated that, at a minimum, "enforcement of consumer protection provisions" should

be added to the list of the objectives for the oversight process especially in light of the Commission's statement that the "need to protect customers is paramount."<sup>1/</sup> The AEA concurred, suggesting that the objectives of the oversight process be augmented to reflect the need "to ensure that the ESCO provides all required customer protections."

### Discussion

Based on parties' comments regarding the objectives of the oversight process, staff agrees, and we concur, that the need to ensure that ESCOs provide the required level of consumer protections should be expressly stated as an objective. To that end, ESCO applicants will be required to file a detailed description of the consumer protections they will provide and a copy of the disclosure statement. Further, staff's experience in reviewing the bill formats submitted by gas marketers pursuant to our gas restructuring order prompted it to recommend that ESCOs intending to render bills to retail customers also be required to file their proposed bill formats<sup>2/</sup> as part of their eligibility application. We agree.

We concur with the parties that the ESCO oversight process should not apply to customers who procure electricity for their own use. Given that the oversight process is designed, in part, to ensure the provision of customer protections, it would be incongruous to apply such requirements to customers who are merely procuring electricity for their own use and not for retail sale to others.

Next, we reiterate our intent to eventually reduce oversight requirements.<sup>3/</sup> However, eligibility and filing requirements for ESCOs intending to market electricity are

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<sup>1/</sup>Opinion No. 96-12, p. 68.

<sup>2/</sup>Staff will make recommendations on guidelines for bill content and format in a subsequent report.

<sup>3/</sup>See, e.g., id. at 70.

needed, particularly at the outset of retail competition, in order to ensure the competency of providers, protect system reliability and oversee the development of the market. As we stated in Opinion No. 96-12, licensing energy service companies is one means of addressing the public's concerns about the credibility of ESCOs. Further, sufficient basic information from ESCOs will be needed to determine when the market has evolved so that the number and diversity of ESCOs could be an effective replacement for any portion of the eligibility determination process as a means to ensure basic protections.

We share EA's interest in ensuring that staff's procedures for determining ESCO compliance not be unnecessarily lengthy nor pose a barrier to competition. We will direct staff to develop its procedures for determining ESCO compliance and to report its procedures to the Commission. In addition, we direct staff to use a flexible approach to evaluate applications and cooperate with ESCOs to resolve any deficiencies. We expect staff to determine an ESCO's compliance as quickly as is practical after receipt of an application.

Finally, we find staff's proposed requirement that ESCOs disclose any and all affiliate relationships unnecessarily broad. We do not intend to impose requirements beyond those needed for oversight which could be an unnecessary burden to potential market entrants. Such disclosure should be limited to energy industry affiliates.

We conclude that staff's proposed ESCO oversight process objectives and requirements, as modified herein, strike a proper balance by ensuring continued protection of essential service to consumers and avoiding onerous requirements that could impede the growth of competition. These requirements, as modified herein, are adopted and listed in Appendix B, and will apply to ESCOs that seek to market or aggregate electricity for

retail sale to customers in New York State.<sup>1/</sup> The oversight process should be periodically reviewed to ensure that it continues to meet its objectives.

Below we consider parties' comments on how specific features of the oversight process should be implemented.

### T&D Companies' Role

#### Parties' Recommendations

Staff proposed that the DPS be responsible for keeping the T&D companies apprised of eligible ESCOs. Such ESCOs would be eligible to receive distribution services under the utility tariffs and to supply electricity to their customers via the T&D system. When an ESCO is no longer eligible to receive distribution services or to supply electricity via the T&D system under the utility tariffs, the DPS would notify the utilities. The utilities would then be required to cease providing service to the ESCO.

Utility parties were concerned that, by including ESCO eligibility requirements in their tariffs, they would become responsible (and potentially liable) for the ESCO oversight process. EA stated there must be affirmative statements from the Commission that no liability attaches to the utility for its limited role in the oversight process. NYSEG and RG&E claimed that the utilities must have some oversight responsibilities if, as proposed by staff, they are to serve ESCOs through their tariffs. EA claimed that staff's proposal presumes that an ESCO is a customer of the T&D company, which would not be the case under the two-bill option,<sup>2/</sup> and questions why utility tariffs

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<sup>1/</sup>As we noted above, these requirements will not apply to customers who procure electricity for their own use and not for retail sale to others.

<sup>2/</sup>In this situation, the T&D company and the ESCO each submit a separate bill for the services they provide to a customer. Alternatively, either the T&D company or an ESCO could provide a customer with a single bill that includes charges for services received from both the ESCO and the utility.

would be used as the ESCO oversight enforcement vehicle if T&D utilities do not provide services directly to ESCOs.

Further, EA and RG&E raised numerous questions about what would happen under staff's proposal when an ESCO is no longer eligible to receive distribution services, such as: how customers would be notified and choose another supplier; how service would be terminated; who would provide interim services; and how final bills would be handled.

WEPCO agreed with staff that T&D companies should not be responsible for ESCO oversight, while SEM, PULP, AEA, MI, and JS/E3 proposed that T&D companies should have only limited responsibility for ESCO oversight.

### Discussion

Staff reconsidered its proposal in light of the parties' comments. In particular, staff recognizes that under the two-bill system ESCOs will not be customers of the T&D companies and, therefore, will not be subject to utility tariff provisions.<sup>1/</sup> Staff now recommends that T&D company tariffs require, that if a customer purchases retail electricity from an ESCO under the two-bill system, that ESCO must meet our eligibility requirements. We agree with staff's recommendation and therefore direct T&D utilities to include tariff provisions that require a customer who purchases retail electricity from an ESCO under the two-bill system to make such purchases from an ESCO that complies with our eligibility criteria and oversight requirements.

The utilities' role under staff's proposal, as revised, will consist of its current role of enforcing their own tariff provisions and providing customer notification discussed below. First, the T&D company will continue its current obligation to ensure that its customers (including ESCOs that purchase services

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<sup>1/</sup>Under the two-bill system, a customer contracts separately for delivery service (from the utility) and for supply (from an ESCO). Under this arrangement the ESCO does not resell delivery service and is not a utility customer.

and then resell them) are taking service under the proper service classification. Second, if the DPS determines an ESCO is no longer eligible to receive T&D service or to use the T&D system to facilitate retail electricity sales, a T&D company will be required to notify the ESCO's customers and inform them of their option to either select another ESCO for supply service or be transferred to a tariff for both supply and delivery service from the T&D company. The utilities therefore will need to develop procedures to maintain information that is sufficient to fulfill this notification requirement. The specific elements of this notice should be developed by the individual utilities in consultation with staff. Finally, since the T&D company will be required to track ESCOs' eligibility in order to enforce its tariffs, it should also provide an updated list of eligible ESCOs<sup>1/</sup> to consumers upon request.

In addition to the DPS eligibility and oversight requirements discussed above, the tariffs under which an ESCO purchases service should include the T&D company's specific creditworthiness standards, if applicable, and any other T&D company operating procedures that an ESCO must meet.

#### ESCO Creditworthiness

The parties agreed that ESCOs need to demonstrate creditworthiness or meet some financial standard before being permitted to provide services to the retail market in New York. This should enhance the financial integrity of the new market in which new relationships and contractual obligations among ESCOs, the ISO, the T&D companies, power exchanges, and consumers will be established.

In the technical discussions subsequent to the release of the ESCO Report, the parties generally agreed that applying a standard creditworthiness test during the ESCO application process was unnecessary. The parties concluded that if an ESCO

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<sup>1/</sup>Such lists will be provided by the DPS upon request by the T&D company.

meets the creditworthiness standard for its obligations to the ISO and/or Power Exchange, and T&D company, if applicable, retail customers could be reasonably assured that the ESCO was a financially viable entity. Most also agreed that some risk to customers is inherent in a competitive market. Further, staff and others expect that it would be impossible, as a practical matter, to apply the level of scrutiny necessary to guarantee the financial integrity of competitive ESCOs to retail electric customers.

The parties focused on creditworthiness standards to address the risks to the T&D company, and its customers, when an ESCO bills and collects for all energy services, including T&D charges, under a single-bill system. The parties weighed the merits of a standard creditworthiness test to be applied by all T&D companies versus permitting each T&D company to negotiate a satisfactory security arrangement with each ESCO individually.

#### Parties' Recommendations

Staff proposed that an ESCO's creditworthiness should be scrutinized only if it renders customers a single bill for both its services and T&D company charges, and collects from customers on behalf of the T&D company. A two-tier framework would apply in that situation. The Dun & Bradstreet ("D&B") composite credit appraisal was proposed as the initial test of creditworthiness. A "first line" D&B appraisal would be considered sufficient indication of creditworthiness if the ESCOs aggregate billings pertaining to a particular utility territory were less than 1% of the utility's revenues. If the ESCO's billings exceeded this threshold level, financial security would be required. Staff proposed that the ESCO be required to provide a deposit of at least the amount of total T&D service bills over two months as an additional security measure. If an ESCO had a "second line" (or lower) composite rating, additional financial security would be necessary.

Under Staff's proposal, utilities would be permitted to waive the proposed deposit requirements provided that no losses,

if any occurred, were passed through to customers. Thus, if the utility agreed to enter into a financial arrangement with an ESCO, the utility shareholders, rather than ratepayers, would be at risk if a utility failed to adequately monitor ESCO payment behavior.

NFGDC stated that staff's proposed creditworthiness guidelines are reasonable and similar to standards adopted for gas marketers. However, NFGDC argued that utilities, rather than the DPS, should be responsible for determining ESCO creditworthiness if utility shareholders are at risk when ESCO payment behavior is not properly monitored. EA claimed this aspect of staff's proposal is both unclear and troubling, since staff would be dictating what security requirements are adequate and then penalizing utilities if the requirements prove inadequate. EA recommended that neither the utilities' shareholders nor its ratepayers should be at financial risk for the failure of an ESCO.

MI opposed permitting T&D companies to require additional security measures for ESCOs billing for more than 1% of T&D company revenues, and favors the two-bill system as a means of protecting the T&D company in this instance.<sup>1/</sup> It stated that creditworthiness requirements should be intended only to protect customers, not the T&D company.

The ESCO parties (SEM, WEPCO and JS/E3) stated that case-by-case review of creditworthiness by T&D companies is inappropriate for competitive reasons, and that a standardized approach is essential. Consumer advocates (CPB, AEA and PULP) generally agreed with developing and applying standardized criteria.

Several parties voiced concerns regarding the specific standardized criteria proposed by staff. JS/E3 urged rejection of higher levels of security for ESCOs billing greater than 1% of

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<sup>1/</sup>Multiple Intervenors claims the one-bill/two-bill issue is not related to creditworthiness, and favors the two-bill system for direct supplier relationship and confidentiality reasons.

utility revenues, and says the application of this 1% rule to groups of ESCOs with common ownership needs to be developed further. WEPCO agreed that billing arrangements that reduce financial risk to utilities would serve the interests of all parties, and supports either the two-bill system or the one-bill system with the bill provided by the T&D company. EA contended that creditworthiness can be a significant issue even with the two-bill system if the utility is providing ancillary services directly to the ESCO.

SEM stated that the use of the D&B rating system will create a high barrier to ESCO entry and recommends bill collection by a third party as an alternative.<sup>1/</sup> EA questioned the value of the D&B rating since the information used by D&B is provided by the ESCOs themselves and, therefore, the D&B rating does not provide adequate assurance of creditworthiness.

WEPCO proposed a flexible approach, for example, letters of credit in lieu of a deposit as a security measure. NFGDC claimed that a security deposit of two months of total T&D service bills may not be sufficient, depending on the frequency of ESCO payments to the T&D company and the length of the hearing process before an ESCO is declared ineligible to receive distribution services.

### Discussion

While a standardized ESCO creditworthiness approach is appealing in terms of anti-competitive protection, problems identified with its proposed approach (e.g., data is self-reported and lack of flexibility or allowance for innovative approaches) indicate that it is not appropriate. Staff now recommends that a case-by-case determination by the T&D utilities should be used in situations where an ESCO will render a single bill. Also, staff concurs with the EA and NFGDC that the entity

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<sup>1/</sup>Customers payments would be sent to a third party payment agent who would be responsible for apportioning payments between the ESCO and T&D company accounts.

that bears the risk of default should set reasonable terms and conditions for any financial arrangement. Accordingly, staff proposes that if an ESCO wishes to render a single bill for both distribution services and electricity, in addition to any other energy services it provides, the ESCO should negotiate the terms and conditions with the specific utility. Given the numerous variables that may affect the terms and conditions of this arrangement, this appears to be the most practical solution.

Each utility should set forth its creditworthiness criteria in the tariff it develops for ESCOs who will collect payment from end-use customers for T&D delivery services. We took a similar approach when restructuring New York's gas industry. Staff should monitor this process closely to ensure that the creditworthiness criteria specified in individual utility tariffs are reasonable and that an ESCO's application for service is processed promptly.

From the perspective of end users, we expect that ESCOs will need to enter into contractual arrangements with a Power Exchange, the ISO, the T&D company or another power supplier and meet their creditworthiness standards. The financial assessments of those entities provide reasonable assurance of an ESCOs financial viability. However, steps must be taken to ensure that customers do not erroneously presume that the DPS oversight process involves a staff evaluation of the financial integrity of an ESCO. Staff and the utilities should explain this during education programs and other contacts with the public about electric utility restructuring.

#### Criteria for ESCO Suspension

##### Parties' Recommendations

Under staff's proposal, an ESCO could lose its eligibility, either temporarily or permanently, for: failure to comply with DPS oversight requirements, ISO (or Power Exchange) requirements, DPS reporting requirements, or utility tariff provisions; or if it had an unacceptably high volume of customer

complaints. The proposed process would provide the ESCO with an opportunity for a hearing.

SEM, WEPCO, and Enron proposed that there should be no need for DPS action to suspend ESCOs for complaints, since the market will not sustain ESCOs which do not satisfy their customers. Although the EA claimed monitoring of ESCO complaints is unnecessary, it proposes that if these complaints are to be monitored by DPS, it should be made clear what constitutes a complaint and what level would be considered unacceptable.

### Discussion

During the transition to a competitive market, it is important that the oversight process provide for sanctions when suppliers cannot or will not perform adequately. Though market forces may eventually drive a poor-performing company out of business, individual customers could be harmed in the meantime. This has been our experience with competition in telecommunications.

We believe that the threat of sanctions is particularly important in a transitional market. In a newly-competitive market, an individual ESCO that performs inadequately raises public concerns about the credibility of all ESCOs and the restructured market. Even with the promise of price reductions, customers may be unwilling to switch to a non-utility provider if they believe the risk of poor performance or unethical behavior is high. Therefore, consistent with the consensus position of the parties, the ESCO oversight process should include ongoing compliance with prescribed requirements in order to retain eligibility as a provider.

Accordingly, an ESCO must, on an ongoing basis: meet any applicable ISO (or Power Exchange) requirements; comply with the required consumer protections; comply with ongoing reporting requirements; keep DPS apprised of any material change in the data contained in its initial eligibility application filing; and

continually adhere to the description of its own policies and procedures as set forth in its disclosure statement<sup>1/</sup> to customers.

In response to comments seeking clarification regarding an unacceptable level of customer complaints, we note that, complaint levels are a relative, rather than an absolute measure of customer dissatisfaction. There is no specific threshold number above which a provider's performance would be considered inadequate. Thus, relying exclusively on the volume of customer complaints as an indication of service quality may be inappropriate. Consequently, suspension criteria will be considered on a case-by-case basis.

We agree with EA that what constitutes a complaint should be clarified. A substantial portion of the current customer contacts to DPS are classified as complaints because DPS has determined that the utility failed to comply with statute, regulation or tariff. Other contacts pertain to service reliability problems associated with maintenance of the transmission and distribution system. These matters would not be considered a complaint with a competitive ESCO if the relevant statutory or regulatory requirements do not apply to it and it does not have responsibility for the T&D system. Nonetheless, staff should monitor all customer reports of unsatisfactory experiences with an ESCO. We expect that such contacts will alert DPS if an ESCO is not adhering to the procedures it agreed to provide in order to meet oversight requirements. Monitoring an ESCO's adherence to its own policies and procedures (as set forth in the disclosure statement) will also be effective as a means of measuring service quality.

We are not prescribing at the outset all of the possible circumstances that may warrant ineligibility. A determination that an ESCO is no longer eligible to provide service should be based on the particular circumstances

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<sup>1/</sup>Requiring adherence to disclosure statements is intended to address the potential for marketing abuses.

presented. Accordingly, failure to adhere to a single criterion or isolated instances of failure to comply with required consumer protections will not result in automatic suspension. The specific facts and circumstances will be examined on a case-by-case basis, with an opportunity for a hearing.

### Additional Proposed Oversight Requirements

#### Parties' Recommendations

The majority of the remaining comments on the oversight process focused on whether there should be a requirement that ESCOs report data on the prices charged, and on proposals to establish safeguards for affiliate relationships. JS/E3 provided for the record: affiliate guidelines developed by the Board of Directors of the National Association of Energy Service Companies, Inc.; and the proposed guidelines of the Massachusetts Department of Public Utilities. Enron proposed adoption of a generic set of affiliate relationship standards for the T&D utilities, like those proposed by staff during the ESCO Working Group collaborative process.

AEA recommended the development of a code of conduct and bonding requirements for ESCOs. According to AEA, such a code should be designed to help prevent abuses by new entrants and to provide restitution to customers who are victimized by fraudulent practices.

#### Discussion

The oversight process requires ESCOs to agree to provide periodic reports to enable us to monitor the development of competition. However, since staff has not yet specified the form, content and frequency of required reporting in its proposal, comments on ESCO reporting requirements are premature and resolution of such comments is deferred pending our consideration of forthcoming recommendations on metering and billing issues.

The ESCO Report contained principles for affiliate safeguards that parties agreed upon, and the substance of this agreement was made available to interested parties. Further, the staff Generic Team on Reporting Requirements is in the process of examining alternative approaches regarding reports on the nature, scope and frequency of utility transactions with their affiliates, and will propose a reporting scheme in a subsequent report.

Development of an ESCO code of conduct may provide certain benefits, and we encourage the industry and other interested parties to consider developing such a code if fair marketing practices for ESCOs are developed.

#### SUMMARY AND CONCLUSION

Establishing a robust ESCO industry is essential to bring effective competition to the retail electric markets. In adopting the policies herein, we have endeavored to strike a balance between encouraging ESCOs to enter the New York State energy market and ensuring that the risks to customers are minimized. We expect that these policies will result in a diversity of prices and service options that only a competitive market can deliver, while allowing customers to retain the level of protections they enjoy today if that is their choice. We intend to monitor the market's development and to take corrective action should problems arise, and, when necessary, to adapt our policies as the market evolves.

We expect qualified ESCOs to be able to compete for retail electric customers. And as the market evolves, consumers should have access to uninterrupted electric service at reasonable rates and to adequate information to enable them to make choices among providers, service or pricing options and their desired level of consumer protections.

To implement the policies we have adopted herein, we expect specific steps to be taken by various parties. First, we have concluded that during the transition to a competitive retail

market, a POLR must be available to any customer and that the utilities are the only entities currently equipped to serve as POLRs. Although in the long run we would like to see, consistent with the Public Service Law, competitive alternative(s) to the utility as POLR, this issue should be reconsidered after we have more experience with the competitive retail market. For now, the utilities will function as POLRs.

As POLRs, the utilities will continue to accept customers subject to applicable consumer protection rules and only utilities will be permitted to physically terminate a customer's electric service. Further, in this role, we expect each utility to meet their customers' electricity supply needs consistent with the determinations we will make in their individual rate/restructuring plans.

Regarding the consumer protection requirements of a POLR, we conclude that certain modifications to our current rules are necessary to recognize the change from a monopoly to a multi-provider retail market. We will therefore institute a proceeding to consider these necessary changes.

At this time, ESCOs will not be required to conform to our current consumer protection rules. However, they will need to provide specific and limited protections as required by the ESCO oversight process we have adopted herein. These include an adequate disclosure statement, sufficient notice of supply contract termination, procedures sufficient to ensure a smooth transition from one provider to another, including slamming protections, and a process for resolving disputes that is convenient and affordable for customers.

Further, under the ESCO oversight process we have approved, a prospective ESCO must provide data to staff that will permit it to determine whether the ESCO is in compliance with the eligibility criteria. The criteria will apply to ESCOs that market or aggregate electricity for retail sale in New York State. To maintain eligibility, such ESCOs must meet specific compliance and reporting requirements on an ongoing basis. If warranted, following a review of the specific circumstances, an

ESCO's eligibility will be suspended for either evidence of persistent customer dissatisfaction and/or failure to adhere to specific performance criteria.

To implement this process, we will require the utilities to reflect certain aspects of our approved ESCO oversight process in their tariffs. The utilities (Central Hudson Gas & Electric, Consolidated Edison Company of New York, New York State Electric & Gas, Niagara Mohawk Power Corporation, Orange & Rockland Utilities, Incorporated, and Rochester Gas & Electric Corporation.<sup>1/</sup>) should file such tariffs no later than the time they file their rate/restructuring plan tariffs.

The oversight tariff provisions should set forth the criteria an ESCO, as a customer of the utility, would have to meet in order to purchase delivery services from the utility. These criteria would have to include, at a minimum, the utility's specific creditworthiness standards and compliance with our oversight requirements for ESCOs. Additional tariff provisions will be necessary to address customers who choose to purchase their electricity supply from an ESCO but wish to purchase delivery services separately as a customer of the utility. The tariffs should indicate that a utility customer's eligibility for delivery services is contingent upon purchasing supply from an eligible ESCO.

Consistent with the discussion contained herein, utilities will also be required to maintain, and provide to customers upon request, a list of DPS-eligible ESCOs and to notify customers if their ESCO is no longer eligible. We expect both utilities and staff to develop plans for educating electric customers regarding the ESCO oversight process we have adopted.

Further, staff will formulate a plan for implementing our approved oversight process including application forms and instructions to be provided to ESCO applicants. This plan should describe (a) the process for determining an ESCO's initial

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<sup>1/</sup>Long Island Lighting Company will not be required to file at this time.

eligibility, (b) the process for determining an ESCO's ongoing compliance with oversight requirements, and (c) any modifications necessary to enable the existing DPS Complaint Tracking System to collect and retain information on contacts received from customers of ESCOs. This plan will be reported to the Commission once it is developed.

The Commission orders:

1. The consumer protection requirements and oversight process for ESCOs, as discussed herein, and listed in Appendix B are approved.

2. Consistent with the schedule established in its individual rate/restructuring plan, or as otherwise established by the Commission, each electric utility shall file tariffs to implement retail access. These tariffs shall include the following provisions:

- The ESCO eligibility requirements and T&D tariff requirements that are approved in this Opinion and Order and listed in Appendix B;
- A requirement that any ESCO that uses the utility's distribution system to deliver electricity supply to customers has met the ESCO eligibility requirements;
- A requirement that any customer who purchases retail electricity supply from an ESCO must make such purchases from an ESCO that has met the ESCO eligibility requirements; and
- A requirement that an ESCO inform the utility when an electricity supply customer of the ESCO changes supplier.

3. Each electric utility shall provide a current list of eligible ESCOs to customers upon request.

4. Each electric utility, when notified by staff of the suspension of an ESCO, shall notify the suspended ESCO's

customers of such suspension and their option to either select another eligible ESCO or receive electricity supply from the utility. Each utility shall maintain information sufficient to accomplish the foregoing notification requirement.

5. Consistent with the discussion contained herein, all comments on the November 26, 1996 Draft Report not approved are hereby denied.

6. This proceeding is continued.

By the Commission,

(SIGNED)

JOHN C. CRARY  
Secretary

PARTIES SUBMITTING COMMENTS ON STAFF'S 11/26/96 DRAFT REPORT

1. Association for Energy Affordability (AEA)
2. Consolidated Edison Company of New York, Inc. (Con Ed)
3. Energy Association of NYS (EA)
4. Enron Capital & Trade Resources (Enron)
5. Joint Supporters/E Cubed (JS/E3)
6. Multiple Intervenors (MI)
7. National Fuel Gas Distribution Corporation (NFGDC)
8. NYS Department of Law (DOL)
9. NYS Consumer Protection Board (CPB)
10. New York State Electric and Gas Corp. (NYSEG)
11. Niagara Mohawk Power Corporation (Niagara Mohawk)
12. Public Interest Intervenors (PII)
13. Public Utility Law Project of New York, Inc. (PULP)
14. Rochester Gas and Electric Corp. (RG&E)
15. Strategic Energy Management, Inc. (SEM)
16. Utility Workers Union of America (UWUA)
17. Wheeled Electric Power Company (WEPCO)

ESCO OVERSIGHT PROCESS

To be eligible to act as a commodity supplier and/or purchase distribution services from a T&D company for resale to its customers, the ESCO must comply with the following oversight requirements:

FILING REQUIREMENTS:

File an application with Consumer Services Division of the New York State Department of Public Service that contains the following information:

- 1) name and address of corporate headquarters, as well as any energy affiliates located or operating in New York State;
- 2) name, address, and contact person of any entity that holds an ownership interest of 10% or more in those affiliates listed in (1) above;
- 3) proof of registration with New York Department of State;
- 4) proof that the applicant has met all applicable requirements of the Independent System Operator and/or the Power Exchange;
- 5) a description of the customers the applicant intends to serve by type (i.e., residential, small commercial, large commercial, industrial), and geographic region of the State;
- 6) a description of how the applicant intends to comply with the required consumer protections;
- 7) if the applicant intends to render bills to customers, a sample copy of the applicant billing form sufficient to display the proposed format and content;
- 8) a description of the procedures the applicant intends to follow to protect customers from any unauthorized switch of provider;
- 9) a description of the applicant's procedures for handling and resolving customers complaints; and
- 10) a copy of the applicant's disclosure statement to be provided to customers prior to a contract offer.

REPORTING REQUIREMENTS: To be determined at future Commission sessions.

COMPLIANCE REQUIREMENTS:

- 1) Eligible ESCOs must comply with the following set of consumer protections which are described in more detail in this opinion and order:
  - Provide prospective customers with a copy of their disclosure statement prior to the customer making a commitment to the provider;
  - Provide customers with a minimum of 15 business days notice prior to terminating the contractual relationship for electricity supply;
  - Adhere to practices sufficient to ensure a smooth transition, by a customer, from one provider to another;
  - Adhere to practices sufficient to protect customers from an unauthorized switch of provider (also known as "slamming"); and
  - Offer customers, and adhere to, a process for resolving their complaints that is both affordable and convenient for the customer.
- 2) Eligible ESCOs must comply with reporting requirements to be determined in subsequent Commission order(s).
- 3) Eligible ESCOs must notify DPS of any material change in the information submitted to DPS for eligibility determination.
- 4) Eligible ESCOs must adhere to the policies and procedures contained in their filed disclosure statements.

SUSPENSION CRITERIA

The circumstances that may warrant suspension of an ESCO's eligibility will be considered on a case-by-case basis. An ESCO found to be ineligible will be afforded an opportunity for a hearing. The criteria to be considered in determining whether an individual ESCO should be declared ineligible include:

- Failure to adhere to the policies and procedures described in the ESCO's disclosure statement;
- Failure to comply with prescribed consumer protections;
- An unacceptably high volume of customer complaints;
- Failure to comply with the requirements of the ISO or Power Exchange;
- Failure to comply with prescribed reporting requirements; and
- Failure to apprise DPS of all material changes in the information contained in an applicant's initial filing.

T&D TARIFF REQUIREMENTS

The T&D company will continue its current obligation to ensure that its customers are taking service under the proper service classification. The T&D company tariffs under which an ESCO purchases distribution services should reflect the need for the ESCO to comply with the eligibility criteria and oversight requirements, the specific T&D company's creditworthiness standards, if the ESCO will be rendering a bill that will include T&D charges, and any other operating procedures of the T&D company that an ESCO must meet in order to be able to resell T&D delivery service. Similarly, the T&D company tariffs applicable to an end-use customer taking delivery-only service from the T&D company (while purchasing electricity from an ESCO) should require such customers to purchase electricity from an ESCO that meets the DPS eligibility requirements.