STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

PROCEEDING ON MOTION OF THE COMMISSION REGARDING AN ENERGY EFFICIENCY PORTFOLIO STANDARD	CASE NO. 07-M-0548

CONSUMERPOWERLINE'S REPLY COMMENTS TO THE EPS ADMINISTRATION CONSENSUS RECOMMENDATION FILED ON BEHALF OF THE CONSENSUS PARTIES

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AND NOW COMES ConsumerPowerline ("CPLN"), by and through its counsel, Scott H. DeBroff, Esq. of Smigel, Anderson and Sacks LLP, and submits the following "**Reply Comments To The EPS Administration Consensus Recommendation Filed On Behalf of The Consensus Parties**" in the above captioned proceeding. In support thereof, CPLN avers as follows:

1. ConsumerPowerline (CPLN) is one of the nation's leading demand side management providers, with significant experience providing demand response, energy efficiency, and distributed generation services in New York, New England, California, the Mid-Atlantic, and increasingly in other regions.

2. CPLN is a full service strategic energy asset management firm and the largest provider of demand response solutions in the United States with more than 1200 MWs under management. CPLN currently operates in the nation's largest energy markets including New York, California, New England, and many others. ConsumerPowerline's clients include Fortune 1000 companies and some of the nation's largest commercial, residential, retail and institutional facilities. ConsumerPowerline has found particular success partnering with hotels, hospitals, large co-op residential apartment complexes, financial institutions, unions, and REIT's. CPLN's clients include dozens of substantial users of energy nationwide.

3. CPLN provides its clients with Demand Management, Curtailment Services and Strategic Energy Asset Management. These services include assumption of market risk, representation is all ISO/State programs, interval metering, web-based access to consumption of data, engineering qualification of curtailable load, financing to improve demand response capabilities, frequent optimization of biddable loads, comprehensive energy audits and analysis, identification of tax saving opportunities, design and project management of energy conservation measures, permanent demand reductions, generator uploading, load switching and controls, retro-commissioning to improve energy efficiency, controls development, upgrades and optimization, incentive optimization and reporting, project financing, performance-based contracting and stream management and negotiations. As a result of these services, CPLN is able to provide clients with cost saving mechanisms to reduce energy usage.

4. As a leading demand response solutions provider throughout the United States, CPLN also has significant business interests in New York State and has been involved in this EEPS docket since its inception. CPLN will be significantly affected by the outcome of this proceeding and filed these responsive comments in consideration of that fact.

As has been designated by the ALJ in her "Ruling Establishing a Comment Schedule", CPLN intends to respond and comment on both the procedural and the substantive issues embodied in the Consensus Parties' recommendation.

I. ACCEPTANCE OR REJECTION OF THE CONSENSUS RECOMMENDATION

5. On January. 11, 2008, the "Consensus Parties" ("**CP**") filed a "Request to File & Consider and a Proposal for an "EPS Administration Consensus Recommendation" (Consensus Recommendation) with this Commission.

6. The Consensus Parties contented that this Consensus Recommendation would resolve a very complex, and for purposes of the existing efforts in the EEPS Collaborative process, a yet **unresolved** issue relating to the administrative structure of the process to set forth and organize future consideration of demand response and energy efficiency programs and initiatives for all of New York State.

7. The Commission has indicated that parties may file replies as to both the "procedure" and the "substance" embodied in the Consensus Parties' requests.

8. CPLN will be responding to both. Regarding the procedural nature of the CP's filing, CPLN objects to the Consensus Parties' request for the Commission to accept and consider their Consensus Recommendation for a Governance Proposal.

9. During the weeks leading up to the final Plenary Session of the EEPS rulemaking docket, there was a common understanding amongst all rulemaking parties, and particularly the members of Working Group 1, who conceded that their debating and exchanging of recommendations

regarding a governance structure could not bring them to common agreement on a reasonable governance structure, one that every Working Group member could buy into and agree with.

10. At the final Plenary Session held on December 14, 2007, all four working groups had an opportunity to present the highlights of their work over the course of the entire working group process and where they were currently regarding conclusions and recommendations on their individual assignments and responsibilities. Working Group I, the group identified with working on overall rulemaking issues and the creation of an agreeable Administrative structure, gave their briefing, which said that the working group members had failed to come to consensus regarding a common vision for a governance structure,. The Working Group 1 recommendations included at least five (5) separate proposals for governance, and the group leadership suggested the need for additional time in order to further the discussions on how to bring the different proposals together.

11. It was our impression that the Commission wanted the working group process to continue on the unresolved issues, but there was no "official" determination made as to the timing and structure of additional collaborative meetings on the Working Group I issues which would have certainly included "governance". CPLN assumed that all parties to the EEPS docket would have been noticed on such a process in order to allow them to fully participate in any follow up discussion sessions. Much to the disappointment of CPLN and the rest of the intervening parties, that process did not happen.

12. Instead, the Consensus Parties gathered separately, put together an unsolicited proposal for governance and submitted it for review and determination and approval by this Commission. This request did not emanate as a joint proposal from the entire Working Group, but was a very directed proposal submitted on behalf of the Consensus Parties only.

13. CPLN strenuously objects to the Consensus Parties' request that their "consensus recommendation" be allowed to be procedurally accepted by this Commission during the pendency of this rulemaking.

14. On the procedural side, CPLN contends that the Consensus Parties did not follow the process and procedure established by the Commission to incorporate **all parties** into an extension of the working group structure in order to consider their perspective on governance and any other relevant issues that had been left unresolved as of the Plenary Session on December 14, 2007. The Consensus Parties chose instead to draft a completely separate governance proposal and attempt to gain its consideration "on the record" in this rulemaking docket, without the benefit of an interactive discussion amongst **all of the parties** to this rulemaking.

15. For all these reasons, we believe that the Consensus Parties' proposal should be rejected in this docket and its consideration as a formal pleading, one subject for consideration in the record, be denied.

16. If any parties to this rulemaking desire to present new recommendations or proposals, we request that the Commission extend a schedule for the individual EEPS working groups and allow for the establishment of additional, collaborative meetings to be held in order to work through any unresolved issues and allow for the development of proposals which should be funneled out to the entire working group membership prior to any further consideration by this Commission.

II. CPLN SUBSTANTIVE OPPOSITION TO THE CONSENSUS RECOMMENDATION

INTRODUCTION

In addition to the procedural problems exemplified in the prior section, CPLN also files these comments in opposition to the substantive nature of the Consensus Parties' Recommendation distributed on January 11, 2008.

17. CPLN is, on balance, supporting the opinions of the National Association of Energy Service Companies (NAESCO) and supplementing the NAESCO position with additional points regarding New York market developments and procedures as described in the above captioned case.
18. Our summary of position can be stated as follows:
    a. The Recommendation does not address the majority of the **Criteria for Administrative Structure** as developed over the length of this proceeding, with considerable collaborative effort, by Working Group I. As such, its core positions should be revisited in consideration of these Criteria. Please see the discussion above under Section I for more detail on this aspect of the proceeding. Working Group I has also not been afforded the chance to contribute to the follow-up on EPS program funding, and as such, requests that the funding aspects of this Recommendation be set aside for further review.
    b. CPLN takes strong exception to the statement in the Introduction to the EPS Recommendation that, "*The Utilities, by the nature of their business, possess unique market knowledge and the local presence necessary to overcome these*

barriers" (to customer implementation of efficiency measures.) A competitive market for efficiency services has been achieved in New York State to the point of becoming a mature and technologically advanced environment, thanks in large part to existing NYSERDA programs and their expertise in of building operations. As detailed in the NAESCO document, New York State has seen transparent and concentrated involvement of approximately 200 ESCOs, including Demand Response and curtailment providers, since NYSERDA was established. Any move to replace these firms' experience with utilities' now- nonexistent delivery mechanism would likely interrupt or reverse this significant progress toward permanent efficiency improvements and delay implementation of the State's "15 by 2015" initiative.

c. CPLN also strongly disagrees with the statement that *"The Utilities are also uniquely positioned to integrate energy efficiency into planning for load relief on their delivery systems."* Both NYSERDA and the NYISO have collected point of delivery time-sensitive usage and price data through their advanced metering and load event reporting mechanisms for over a decade. While we agree that the utilities have proved their unique expertise in local distribution and reliability projects, the more useful and transparent measure of real time customer load response and load characteristics over time, lies with the combined statewide public entities. NYSERDA is also, uniquely, funding combined heat and power (CHP) and distributed generation projects toward permanent load relief in New York City. We strongly recommend that NYSERDA be enabled to continue this role with any accelerated EPS funding. The suggestion that these critical load

relief programs could be divided into "upstream" and "downstream" program administration and funding, ignores this vital link between the customer's usage and forecasting of system load.

19. In general, CPLN is disappointed with the cursory treatment the NYSERDA programs have received in this proceeding, and with the general lack of acknowledgement of the role of private sector ESCOs in increasing success of program delivery. NYSERDA is recognized nationally as a leader in efficiency research and development as well as an example of a responsible public/private partnership that is unique in this industry. New York State should be committed to leveraging **all** of its proven assets -- rather than creating new administration of unproven resources -- in future efficiency efforts.

FAILURE OF THE RECOMMENDATION TO CONSIDER WORKING GROUP I CONSENSUS CRITERIA FOR ADMINISTRATIVE STRUCTURE

The following excerpts introduce the proceeding to date from the vantage point of Working Group I. CPLN has responded to each of the twelve Criteria with the intent of demonstrating the pitfalls of the current Consensus Recommendation.

CRITERIA FOR ADMINISTRATIVE STRUCTURE

20. In September 2007, Administrative Law Judge Eleanor Stein established four working groups in preparation for collaborative efforts. One early work product of Working Group I was the establishment of "Criteria for an Administrative Structure".

21. These criteria are intended to guide the group in its analysis and assessment of the different proposed governing models sponsored by Working Group I representatives. After much

discussion, the Working Group agreed on the criteria listed in Table 1. The criteria are numbered for easy reference only and are not intended to be prioritized.

TABLE 1. CRITERIA FOR ADMINISTRATIVE STRUCTURE

1. Does the model facilitate the least-cost administration and achievement of the EPS goal?

CPLN Response: The Working Group I has not had an opportunity to submit its follow-up recommendations regarding funding of EPS initiatives (requested to have submitted around January 14, 2008.) Historical and recent experiences in New Jersey and California (please see NAESCO comments for a full description) have indicated that changes in administrative structure such as the one proposed, can be extremely disruptive and expensive even in an environment without explicit goals such as "15 by 2015". The proposed Partnerships do not incorporate expertise already established at NYSERDA on a least-cost basis and fully implemented through energy service and demand response firms.

2. Does the model provide an opportunity for the interests of the broad range of stakeholders to be served?

CPLN comment: Yes. The range is quite broad, especially in the sense that the Partnerships create many new stakeholders around NY State. It does not, however, include customer representation at any meaningful level.

3. Do the entities responsible for meeting the EPS goals have the authority and the opportunity to meet these responsibilities?

CPLN Comment: The authority is not yet established for any of these Partnerships. The opportunity will depend on whether the skilled staff necessary: 1) to create and market the new utility programs; 2) to fairly administer their funding across and between already defined customer classes, and for new construction; 3) to benchmark and establish reporting standards; 4) to create new Measurement and Verification protocols (where technologies to meet these standards have advanced enormously since the 1990s DSM programs); 5) to incorporate over a decade of NYSERDA experience in the creation of new incentives over time; and 6) to incorporate already mandated local distribution upgrades into program and systemwide planning, will be quickly and fully incorporated into each utility by 2009. CPLN believes there will not be sufficient opportunity to meet these EPS responsibilities at any Partnership or utility level unless at least these (6) program areas are addressed within the early months of 2008.

4. Does the model take advantage of the inherent strengths of the various participants and present a coherent structure for coordination and cooperation?

CPLN Comment: No, because the responsibilities outline above under #3 are not already established at all of the Partnership utilities. Whether a utility's taking on new EPS program responsibilities would add to the fulfillment/coordination of local distribution upgrades, and long term reliability overall, we believe is the most critical issue that is not addressed in the Consensus Parties' document. NYSERDA's contribution to the development of new

technologies should also not be discounted, i.e., any interruption to the information chain (from a facility's successful project back to the next generation of Programs) would severely disrupt cooperation and economies of scale. The inherent strengths of the large and diverse ESCO population in New York State, most of whom have extensive experience with NYSERDA, are also not incorporated into the coordination plan.

5. Does the model minimize unnecessary functional overlap and duplication of effort?

CPLN Comment: No. Functional overlap would be both an immediate and long term issue. The staff necessary to implement the new Partnership programs would need to be identified, trained, and not "poached" from neighbor utilities, ESCOs, or public administration. Please see the NAESCO filings for a more complete description of this staffing issue.

6. How well does the model take advantage of the salient features of the existing and emerging program development and delivery infrastructure?

CPLN Comment: Not at all. The last time Con Edison developed a large roster of customers for its own electric DSM programs – which were comparably expensive per KW saved versus new generation – was around 1992. (Con Edison has, however, seen success more recently with natural gas and steam efficiency projects.) The personnel responsible for those programs have since been absorbed into other roles or offered positions at ESCOs.

7. Is the model flexible enough to accommodate differing conditions (e.g., geographic, climatic, load, institutional) across the State? Is the model robust enough to adapt to changing circumstances?

CPLN Comment: Yes. It is flexible by region, to a degree that may isolate the regions from each other if the NYSERDA experiences are ignored in the Partnership model. But no, it is not robust. NYSERDA is the only entity, along with its contractors, with enough technical expertise to quickly adapt to changing circumstances in the wholesale energy markets (e.g, cogeneration incentives, which simultaneously address: Note letters added : a) core BTU efficiency; b) some of the volatility in natural gas and fuel oil prices through hedging; c) provide long term system benefits along the mandated distribution upgrade criteria at least in Con Ed, and d) must be implemented over at least a 3-5 year cycle.) Where does permanent system benefit fall into a Partnership agreement where long-term compliance incentives and penalties are not already established?

8. Where appropriate, does the model enable the seamless, integrated delivery of electric and gas efficiency programs?

CPLN Comment: No, for all of the reasons stated above. There are simply too many seams in this plan given the program delivery role expected at each utility, each headquartered within separate regions/counties.

9. Is the model structured to allow meaningful and timely input, oversight, feedback and reallocation of effort and resources?

CPLN Comment: No. We are especially concerned with the word "timely". Is the time considered to establish the Partnerships? ESCOs and Demand Response firms would be the only entities with a proven track record of "allocation of resources," in that they are able to respond quickly to changes in the energy services marketplace. Please see #4 above for more explanation of this problem.

10. Does the model contain structures for independent monitoring, verification, auditing, and reporting of results? Does the model ensure that the entity or entities responsible for program administration are effectively moving towards achieving energy efficiency goals and are held accountable for achieving program goals?

CPLN Comment: Where can truly "independent" verification, monitoring, auditing and reporting be assured, except with a public agency such as NYSERDA? For instance, and for at least the last eight (8) years, NYSERDA and the NY PSC EDI/MDSP/MSP proceedings have clearly refined the advanced time-of-use protocols necessary for customers to participate in competitive supply purchasing and demand response. There is no reason to expect that a change in accountability would benefit the deployment of more/better metering. Under several different governance proposals, NYSERDA's new role could be to take program reporting to an enhanced time stamp or even real-time level, made available selectively over the internet, and used to create a longitudinal tracking system to meet both the interim and "15 x 15" goals. The NYISO

is also obviously qualified to collect and disseminate load curve data over time, which new customers of efficiency programs may compare with their own results.

11. Are the entity/entities responsible for program administration appropriately incentivized or otherwise committed to secure cost effective energy efficiency and ultimate success of the program? Is there demonstrable interest by the named entity in serving in this capacity?

CPLN Comment: The proposed separation of "downstream" programs and "upstream" research and development has not been described as fully as is necessary to devote an answer to the question of commitments. Wherever program responsibilities are ultimately housed, the separation of program costs and incentives from each utility's rate recovery mechanism must be assured through any new proposed Partnership. Without the opportunity to make a program cost proposal through the Working Group I process, we cannot fully address this issue at this time.

12. Does the model promote the elimination of disincentives and align interests relative to participants' roles?

CPLN Comment: As with our comment in #11, none of the new program participants' proposed roles are as yet fully defined. We respectfully request that the issue of revenue decoupling in future rate cases be considered an unknown factor. Any utility's inherent disincentive to encourage efficiency, or to recover lost sales through future ratemaking, is not addressed in this Consensus Recommendation.

22. Therefore, ConsumerPowerline recommends a complete review of all of the Working Group documents in order to identify the most appropriate role for all participants in future EPS incentive programs. We hope that due consideration is given to progress already made to enhance or replicate the strongest programs in New York State and nationwide.

23. CPLN appreciates the opportunity to propose these alternatives to the Consensus Recommendation and to follow through on the tasks so carefully considered in the Working Groups over the last few months.

WHEREFORE, ConsumerPowerline respectfully requests that the Commission find that the Consensus Parties' Recommendation filed on January 11, 2008, should be denied consideration in this proceeding for the procedural issues we addressed. In addition, we contend that the substantive issues brought out in the Consensus Recommendation be held for consideration as part of any further discussions amongst all members of the working groups in this EEPS docket and that all parties have an opportunity to weigh in on the appropriateness of the governance structure as part of such working group collaborative effort.

Respectfully submitted,

Dated: **January 25, 2008**

By: _____

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CERTIFICATE OF SERVICE

I certify that I have by electronic mail and by first class mail, as necessary, provided under the above listed docket number, this day served a true and correct copy of the original attached, "**CONSUMERPOWERLINE'S REPLY COMMENTS TO THE EPS ADMINISTRATION CONSENSUS RECOMMENDATION FILED ON BEHALF OF THE CONSENSUS PARTIES**", in this proceeding upon the Active Party List.

Dated: **January 25, 2008** By:

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