

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

STATEMENT OF REGULATORY POLICIES REGARDING
OPERATING AGREEMENTS

Issued and Effective: March 10, 1998

STATE OF NEW YORK
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COMMISSIONERS PRESENT:

John F. O'Mara, Chairman
Maureen O. Helmer
Thomas J. Dunleavy

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BY THE COMMISSION:

INTRODUCTION

Consolidated Edison Company of New York, Inc. (Con Edison), Niagara Mohawk Power Corporation (NMPC), New York State Electric and Gas Corporation (NYSEG), Central Hudson Gas & Electric Corporation (Central Hudson), Rochester Gas & Electric Corporation (RG&E), and Orange & Rockland Utilities, Inc., (O&R) (Transmission and Distribution companies or T&Ds) are currently developing the terms and conditions governing their transactions with energy service companies (ESCOs). Operating agreements between ESCOs and T&Ds are one of several documents in which such terms and conditions will be set forth. The T&Ds have proposed to use both operating agreements and supplier manuals, in addition to their retail access tariffs, to establish, communicate and enforce the terms and conditions under which an ESCO may provide service in a particular service territory. The specific terms and conditions of the operating agreements, therefore, may impact the ease of entry by ESCOs into New York's electric market, the level of retail customer participation in the competitive marketplace, and the expected benefits of competition.

The policies set forth in this statement are intended to help ensure that operating agreements, and the terms and conditions therein, do not unduly hamper or restrict the

development of effective and robust competition. We also expect the submission of operating agreements as described herein.

T&Ds' Rationale for Operating Agreement

The T&Ds cited several reasons for using operating agreements, including the need to make necessary modifications quickly, and claims that inclusion of all the terms and conditions in tariffs would unnecessarily "burden" the tariffs with details not normally found therein. According to the T&Ds, signed operating agreements will ensure their ability to enforce the terms and conditions they believe are necessary, to delineate T&D and ESCO responsibilities, and to make modifications, if necessary, much more expeditiously than the 90 or more days typically required to effectuate tariff revisions.

In addition to the operating agreements, some T&Ds also intend to use supplier manuals to communicate, in plain language, the terms and conditions contained in the tariff and operating agreement, as well as other procedures associated with retail access. For the purposes of this statement, the term "operating agreement" is used to refer to both the operating agreement and the supplier manual.

Farm and Food Processor Pilot Experience

As part of our Farm and Food Processor Pilot Program,^{1/} NMPC, NYSEG, and RG&E filed separate operating agreements, while Central Hudson included an operating agreement within its tariff. There, we expressed the view that "...as a general policy matter, we expect the T&Ds to consult with our staff and seek the input of the ESCOs and other interested parties in developing such operating agreements."^{2/} We noted

^{1/} Case 96-E-0948, Petition of Dairylea Cooperative, Inc. to Establish an Open Access Pilot Program for Farm and Food Processor Electricity Customers, Order Establishing Retail Access Pilot Programs (issued June 23, 1997).

^{2/} Case 96-E-0948, supra, Order Concerning Compliance Filings (issued September 18, 1997), mimeo at 35-36.

that "such input should be valuable in producing operating agreements that are fair, workable and effective."^{1/} We further noted that, to the extent ESCOs believed any of the provision to be unfair, they could file a complaint in accordance with the complaint resolution process identified in that statement.^{2/}

The Farm and Food Processor Pilot Program T&Ds required ESCOs to sign operating agreements and undergo creditworthiness evaluations before switching customers. Several ESCOs reported difficulty reaching agreement on the terms and conditions in the operating agreements. In fact, some ESCOs reported to staff that they signed operating agreements under protest in order to begin to enroll customers for the pilot. In one case, a final operating agreement was not developed until after the start of the pilot program. As a result of the foregoing, staff facilitated several meetings among ESCOs and the T&Ds to negotiate changes to the operating agreements.

Staff's Efforts

Concurrent with the Farm and Food Processor initiative, staff examined on a more generic basis how the T&Ds and ESCOs will conduct business in a competitive environment. Staff met with and sought comment from the T&Ds and interested parties on relevant issues such as: whether the Commission should approve the operating agreements; how much public involvement a T&D should undertake to gather input on its proposed operating agreement; and what recourse an ESCO should have when it has a disagreement with a T&D.

Staff subsequently developed and issued a paper in October 1997 which described the differences between tariffs and operating agreements. Staff reported that as a general rule, tariffs reflect dealings between a T&D and its customers and have focused on matters of policy and principle. In contrast, staff

^{1/} Id. at 36.

^{2/} Id.

noted that operating agreements address the mechanisms by which a policy or principle is effected. Staff further noted that typical elements of a T&D's tariff include general and special provisions, customer eligibility standards and rates and conditions of service while an operating agreement typically deals with subjects such as billing procedures.

In its paper, staff concluded that during the early phases of retail access, it was imperative that the T&Ds and ESCOs have the ability to modify the terms and conditions of their business relationship expeditiously, an objective best accomplished if the terms and conditions subject to change resided in an operating agreement and not in a tariff. Staff also concluded, however, that there could be occasions, particularly during the early stages of retail access, when it might be appropriate to include specified terms and conditions in tariffs rather than operating agreements in order to more effectively address ESCO concerns.

Staff asked the T&Ds to describe their plans for gaining input into the development of operating agreements, the dispute resolution process to be used if parties could not reach agreement on particular terms and conditions, and the role the Commission should play in exercising its authority over the operating agreements. Written comments were received in November 1997 from NMPC, NYSEG, RG&E, O&R, and Con Edison, with responsive comments from Multiple Intervenors (MI) and Joint ESCO Commentators (E-cubed, Consolidated Natural Gas, Enron, Wheeling Electric Power Company, Joint Supporters and New Energy Ventures (NEV)).

T&D Plans

With the exception of NYSEG, all of the T&Ds that submitted plans expressed varying degrees of interest in seeking input from ESCOs and other interested parties when developing their operating agreements. While NYSEG did not object to obtaining input, it indicated that such endeavors should await full development of its retail access infrastructure.

Regarding plans for dispute resolution, only Niagara Mohawk submitted a detailed process. O&R and Con Edison stated their expectation that disputes will be resolved by the Commission, while NYSEG stated that it was premature to develop a dispute resolution process. RG&E supported informal steps and voluntary mediation and arbitration before coming to the Commission for resolution.

Finally, regarding the role that the Commission should play in exercising its authority over the operating agreements, Con Edison stated that its settlement requires the Commission to approve its retail access plan which includes an operating agreement. Niagara Mohawk also commented that it intends on filing its operating agreement with the Commission for approval. O&R stated that the Commission would likely be involved in resolving disputes among the parties over operating agreement details. NYSEG did not comment specifically on the Commission's role, but had expressed on previous occasions its belief that the Commission lacks jurisdiction over ESCOs, and hence over operating agreements between T&Ds and ESCOs. RG&E commented that the Commission's role should be as a last resort, and that, consistent with its settlement, it did not intend to submit its operating agreement to the Commission for approval.

Responsive Comments

MI recommended that the T&Ds file operating agreements for review and comment before they are filed formally with the Commission. MI further recommended that the T&Ds provide a complete package for the parties' review (e.g., tariffs, operating agreement, supplier manual), allow an adequate amount of time for review, and fully justify any rejections of commenting parties' suggestions. Joint ESCO Commentators recommended an input process with an adequate amount of time for review and comment on operating agreement proposals.

With respect to the dispute resolution processes, Joint ESCO Commentators recommended a dispute resolution process that

begins informally and, if necessary, involves the Commission or another acceptable dispute resolution mechanism.

Regarding Commission jurisdiction, MI stated its expectation that the Commission would exercise its jurisdiction over operating agreements by formally acting on them. Joint ESCO commentators supported using staff to facilitate negotiations regarding the specific terms and conditions in the operating agreements. Joint ESCO Commentators furthermore supported Commission involvement in the development of a standard operating agreement.

Staff's Proposal

Based on the above comments and the experience to date with the development of operating agreements, staff issued a proposal that would allow interested parties an opportunity to provide input into the development of the operating agreements, a process for making modifications to existing operating agreements, and a dispute resolution process, and would address miscellaneous matters such as filing requirements. Staff specifically proposed that T&Ds provide interested parties with adequate notice of proposed changes to existing operating agreements, including time to resolve potential disputes, and a dispute resolution process that would be available to dissatisfied parties. In both cases, staff proposed that the interested parties should informally resolve their differences and that the Commission would become involved only if the parties could not resolve their differences, or if a change was proposed that adversely affected the development of a competitive market. Staff also proposed that the T&Ds file, with the Commission, their standard operating agreements, all revisions thereto, and, as appropriate, their operating agreements with affiliated ESCOs.

Comments in Response to Staff's Proposal

Comments in response to staff's proposal were received from MI, Consolidated Edison, Niagara Mohawk, NYSEG, NEV, and Plum Street Enterprises in December 1997.

MI, Con Edison, Niagara Mohawk, and NEV supported staff's goal of gaining input into the development of operating agreements. MI noted that the concept of gaining input from all parties is consistent with the Commission's vision expressed in Opinion 96-12. MI further stated that ESCOs will make decisions on whether to participate in New York State based on the degree of input allowed. Con Edison noted that its current tariff filing, made pursuant to its Commission-approved settlement, was largely consistent with staff's proposal. According to Con Edison, it has sought comments on its filing and has met with the parties to discuss areas of concern.

NYSEG reiterated its position that it is premature to comment on operating agreements, but stated that it sought comments on its operating agreement as part of the Dairylea pilot and felt that process worked well.

None of the responding parties excepted to the need for an operating agreement dispute resolution process. Plum Street Enterprises, in fact, proposed specific billing dispute and arbitration procedures.

With respect to the Commission's role in operating agreements, Con Edison, Niagara Mohawk, and MI support, and expect, Commission approval of operating agreements and revisions. NEV supports filing all operating agreements, including non-standard operating agreements, with the Commission but did not indicate if it expected specific Commission approval. On a related issue, Con Edison opposed staff's proposal for additional filing requirements associated with operating agreements.

Discussion

The success of electric competition in New York State will be hindered if unreasonable terms and conditions are imposed on ESCOs. The terms and conditions that T&Ds incorporate into their operating agreements should allow the system to work effectively, efficiently, and safely for all parties. Therefore, it is appropriate that the views of all affected parties be

considered in the development of these terms and conditions. As a matter of policy, we support the use of operating agreements, in addition to tariffs, to prevent the placement of numerous details in tariffs and to enable the parties to make modifications to operating procedures to meet changing business conditions and technological improvements in a timely fashion. This support, however, envisions that the T&Ds will obtain input from interested parties when developing, and revising, the operating agreements, and will include a dispute resolution process in the operating agreement.

We will not require, at this time, specific timetables for gaining input into the development of operating agreements. However, consistent with our policy in the Farm and Food Processor pilot, we fully expect that the T&Ds will establish a reasonable and fair process for obtaining input into the operating agreements, and will develop or revise their plans accordingly.

As the competitive market develops, we expect the parties will propose modifications to operating agreements to reflect, among other things, changes in business conditions, lessons from the pilot programs and initial stages of retail access, and the development of new technologies, as well as relevant orders issued by this Commission and the Federal Energy Regulatory Commission. Such changes should be effectuated by notifying the interested parties and by allowing a reasonable amount of time to review and comment on proposed changes.

As a general policy, we expect the parties to work out any differences concerning proposed operating agreement terms and conditions. However, we recognize that differences may still exist between the parties on particular terms and conditions. Therefore, T&Ds should include dispute resolution processes in their operating agreements. Further, we shall reserve authority over the agreements, and, if appropriate, resolve disputes that the parties can not reconcile themselves.

In response to requests that we approve operating agreements, we believe that the process outlined in this

statement should help ensure that fair and workable operating agreements are produced. However, during the transition period, we expect standard operating agreements, and any revisions thereto, will be supplied to staff. Consistent with the schedule set forth in the individual rate and restructuring agreements, the operating agreements should be supplied with the retail access tariffs, in order to assist staff in its review of the tariffs. Additionally, to help ensure that preferential treatment is not afforded to T&D affiliates, we also expect any operating agreements reached between a T&D and its affiliated ESCO also will be supplied to staff. Finally, we expect staff to continue monitoring the operating agreement development process and report back us as needed.

By the Commission,

(SIGNED)

JOHN C. CRARY
Secretary