

LAW OFFICE

USHER FOGEL
ATTORNEY AT LAW

557 CENTRAL AVENUE, SUITE 4A CEDARHURST, NY 11516

TEL: 516.374.8400 X 108

FAX: 516.374.2600

CELL: 516.967.3242

E-MAIL: ufogel@aol.com

January 25, 2008

Hon. Eleanor Stein
Hon. Rudy Stegemoeller
Administrative Law Judges
New York State Public Service Commission
3 Empire State Plaza
Albany, New York 12223

Re: Case: 07-M-0548 – Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard

Dear Judges Stein and Stegemoeller:

These comments are submitted on behalf of the Retail Energy Supply Association ("RESA")¹ in accordance with the *Ruling Establishing Comment Schedule* issued on January 15, 2008 ("Ruling").

In the Ruling, parties were provided with the opportunity to submit comments regarding both the procedure and substance embodied in the "EPS Administration Consensus Recommendation" ("Consensus Recommendation") filed jointly by certain parties on January 11, 2008. The filing was submitted on behalf of a number of utilities, National Resources Defense Council (NRDC), Pace Energy Project (Pace), City of New York (NYC), the Association for Energy Affordability, Inc. (AEA), and the New York Power Authority (NYPA) ("Consensus Parties").

RESA respectfully submits that the Consensus Recommendation should not be accepted at this time as it is procedurally infirm, ill-conceived and imbued with significant deficiencies and omissions.

¹ RESA's members include Commerce Energy, Inc.; Consolidated Edison Solutions, Inc.; Direct Energy Services, LLC.; Gexa Energy; Hess Corporation; Integrys Energy Services, Inc.; Liberty Power Corp.; Reliant Energy Retail Services, LLC.; Sempra Energy Solutions, LLC.; Strategic Energy, LLC.; SUEZ Energy Resources NA, Inc.; and U.S. Energy Savings Corp. The comments expressed in this filing represent the position of RESA as an organization but may not necessarily represent the views of any particular member of RESA.

A. Procedural Comments

Under the aegis of the Administrative Law Judges, a comprehensive procedure was established for consideration and resolution of the critical issues raised in this proceeding. The Administrative Law Judges established a collaborative process which embodied the use of working groups that focused on particular issues associated with the development of an energy efficiency portfolio standard. Working Group I was specifically tasked with the subject of developing governance proposals.

The activities of Working Group I in which RESA actively participated were open to all interested parties and were conducted in a fully transparent and equitable manner. After many months of analysis and discussion Working Group I (as well as the other Working Groups) prepared a report that summarized their activities and potential approaches to addressing the matter of governance, which was then presented for review to the Administrative Law Judges.² The development and implementation of this collaborative process was supported by all interested parties and engendered a cooperative atmosphere in which all parties felt that they had the ability to make their voice heard and to have a say in the ultimate outcome of the resolution of the critical issues identified for resolution by the Commission in this proceeding.

The purported Consensus Recommendation now submitted by a limited group of parties threatens to undermine the transparency, validity and fairness that until now have been the hallmarks of this proceeding. The Consensus Recommendation seeks to bypass the activities of Working Group I, by presenting a new proposal that was not publicly vetted by all parties through the Working Group process. More pointedly, the Consensus Recommendation was not developed in an open and transparent manner. Instead, the self-selected Consensus Parties obviously serving their own individual interests, met without notice to the other parties, and developed a new governance proposal that not unexpectedly places the reins of power in their hands.

RESA was not invited to nor did it participate in the process that lead to the Consensus Recommendation and it appears on the face of the Consensus Recommendation that it was purposefully designed not to incorporate the views of ESCOs and other competitive market participants, as well as, PSC Staff and the New York Energy Research and Development Authority (NYSERDA). Accordingly, due to the lack of transparency, openness and equitableness of the process by which this Consensus Recommendation was devised, it should not be accepted at this time and, the Administrative Law Judges should follow the policies and procedures which were previously agreed to by all parties.

B. Substantive Comments

The Consensus Recommendation suffers from a number of inherent deficiencies that render it unsuitable as a reasonable governance mechanism for the energy efficiency program.

The so-called "Consensus Recommendation" would diverge from the approach incorporated in the governance models incorporated in the Report by eliminating the economies of scale and administrative efficiencies associated with a statewide governance structure and acts

² Case 07-M-0548 – EPS Working Group Report I, December 5, 2007 ("Report")

to disenfranchise state agencies with extensive experience in this field as well as stakeholders who already provide energy services directly to New York customers. As proposed the members of the governing body, denoted as Energy Efficiency Partnerships ("EEP"), would include only local utilities, NYPA, NYC and LIPA. In other words governance would solely reside within the province of utilities and a number of governmental bodies. Notably excluded from any substantive role in this critical governance process would be other wholesale providers of commodity supply and related energy services such as ESCOs, retailers, large customers, energy service providers, community based organizations and other important entities that have an important role to play in the provision of energy efficiency services and also actively participated in this proceeding.

In the case of ESCOs, no seat will be provided to them on the EEP. Instead they will be deemed "Implementation Partners" and it will be left entirely to the discretion of the EEP to determine what, if any, "possible role they will have in meeting the state's energy efficiency goals."³ Although the EEP may seek input from ESCOs and at the sufferance of the EEP allow them to attend certain EEP meetings,⁴ it is evident that ESCOs will have no meaningful role in the proposed governance process.

In this regard it is worthwhile to emphasize that ESCO participation should be deemed a critical part of any energy efficiency governance structure that the PSC adopts because retail suppliers are in the business of bringing customers the products and services they want--that is the foundation of our businesses success. Unlike utilities, ESCOs do not have a captive customer base and thus ESCOs are most accustomed to listening to customer needs and responding to customer demand for energy efficiency and demand response products on a timely basis. Furthermore, retail suppliers recognize that these programs and tools present further opportunities to build and strengthen customer relationships that comprise a large part of our core competencies. A marketer recognizes that if it does not meet a customer's need, some other retailer will.

In addition to its failure to include competitive entities such as ESCOs in the EEP, the Consensus Recommendation also fails to include PSC Staff as a member of the EEP. Staff's role will be limited to "review" of the utility compliance filings.⁵ This omission is quite glaring given the essential role of Staff in the development and implementation of energy efficiency programs. It is also most troublesome that the limited role provided to Staff appears to conflict with at least two of the governance models presented for consideration in the Report. Specifically, the Consensus Recommendation conflicts directly in a variety of aspects, including the role of Staff, with the Department of Public Service Governance Model and the NYSERDA Governance Model.⁶

Although NYSERDA is nominally placed on the EEP, its actual role will be severely limited as currently proposed because it is envisioned that NYSERDA would focus only on "statewide upstream market transformation initiatives focusing on long-term structural functional changes for markets, rather than direct offerings to end-users".⁷ NYSERDA's narrow role will now be to focus on some ill-defined and undisclosed long-term analysis rather than being involved in the

³ Consensus Recommendation, p. 2

⁴ *Id.*, p. 3.

⁵ *Id.*, p. 4.

⁶ Report, p. 11, 18.

⁷ Consensus Recommendation, p. 2

direct offering of energy efficiency services to end users. This makes little sense given NYSEERDA's vast experience in developing and implementing energy efficiency programs for end users.⁸

The structure of the proposed EEP is also highly inefficient and has the potential to balkanize the efforts by the Commission to assure the orderly implementation of energy efficiency programs on a statewide basis. Under the Consensus Recommendation the administration and implementation of energy efficiency programs will devolve to a series of EEPs established on a regional level with at least two in the down state area and additional EEPs located in other parts of the State. As proposed, there will be no central statewide governance body to coordinate the implementation of energy efficiency activities. Instead, approximately five separate bodies would be established to develop and administer energy efficiency programs within their area of control without the mandate or even the ability to ensure consistency and continuity in the provision of energy efficiency products and services throughout the State. In reality, numerous individual energy efficiency fiefdoms will be established throughout New York, creating the serious potential for conflict, administrative bickering and other defects arising from such a diffuse governance model. Moreover, the potential for administrative inefficiencies and redundancy associated with the proposed governance model may severely limit the ability of fully achieving Governor Spitzer's "15 by 15" public policy initiative.

In view of the foregoing, it is apparent that the Consensus Recommendation is defective from both a procedural and substantive prospective. It is therefore respectfully requested that the Consensus Recommendation be rejected and that the Administrative Law Judges continue with their deliberations based upon the presentations submitted through working group process.

Respectfully submitted,

Retail Energy Supply Association

By: *Usher Fogel, Counsel*
Usher Fogel, Counsel

cc: Active Service List

⁸ It is also most telling that neither NYSEERDA nor Staff is a signatory to the consensus proposal.