STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

INITIAL BRIEF
OF
MULTIPLE INTERVENORS

Dated: April 10, 2008

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PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of over 50 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its Initial Brief in Case 07-M-0548, which is examining the design and the implementation of an energy efficiency portfolio standard ("EPS") in New York State.[1] Multiple Intervenors' Initial Brief is submitted in accordance with the Ruling on Staff Motion for Reconsideration and Revising Schedule, issued herein on March 20, 2008 by presiding Administrative Law Judges Eleanor Stein and Rudy Stegemoeller (hereinafter, the "March 20th Ruling").

In the March 20th Ruling, parties were directed to address the following issues in initial and reply briefs due on April 8 and 16, 2008 respectively:

1. issues pertaining to the "March 2008 DPS Staff Report on Recommendations for the [EPS] Proceeding" circulated and then amended by New York State Department of Public Service Staff ("Staff") on March 25 and April 1, 2008, respectively (hereinafter, the "Staff Report"), as well as previously-submitted "Fast Track" proposals sponsored by other parties;[2]

2. the policy rationale for authorizing regulated utilities to administer energy efficiency programs as part of an EPS, and the advisability of the Commission establishing periodic energy efficiency targets for each utility;

3. whether the program cost and bill impact figures presented in the Technical Appendix to the Corrected Ruling Presenting Straw Proposal

[1] Case 07-M-0548, Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard.

[2] In this proceeding, Fast Track programs – also called "bridging" programs – refer generally to energy efficiency programs that could or should be implemented in the near-term (e.g., 2008-2009), while longer-term policy issues related to an EPS are examined and resolved by the New York State Public Service Commission ("Commission").

issued by Judges Stein and Stegemoeller on February 13, 2008 (hereinafter, the "Straw Proposal"), represent a reasonable estimate of the overall cost of those elements of the EPS initiative to be achieved through customer-funded efficiency programs; and

4. the advisability of allocating in advance energy efficiency targets and funding among the New York State Energy Research and Development Authority ("NYSERDA") and regulated utilities.

(March 20th Ruling at 10-11.)[3] In the March 20th Ruling, the Judges emphasized that briefs should be limited to the above issues, and that parties will be accorded an opportunity to brief remaining policy issues related to an EPS later in this proceeding. (Id.)

SUMMARY OF MULTIPLE INTERVENORS' POSITIONS

Multiple Intervenors' Initial Brief is organized into four points, corresponding with the groups of issues identified for briefing in the March 20th Ruling.

In Point I, Multiple Intervenors asserts that while there is much in the Staff Report with which it supports or otherwise does not oppose, the Staff Report is flawed in numerous respects and requires substantial modification before it should be adopted for implementation during the Fast Track period. In particular, Multiple Intervenors opposes the level of customer funding proposed for an EPS, as well as Staff's recommended approach to cost allocation and cost recovery.[4]

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[3] In a Ruling Extending Briefing Schedule and Revising Filing Requirement, issued herein on April 3, 2008, the filing deadlines for initial and reply briefs were extended slightly until April 10 and 18, 2008, respectively.

[4] Importantly, Multiple Intervenors' opposition to material portions of the Staff Report should not be construed as opposition to energy efficiency. Multiple Intervenors members practice energy efficiency where and when it makes good business sense. Indeed, because Multiple Intervenors members generally are very energy-intensive and price-sensitive, they have been implementing cost-effective efficiency projects for many years and

In Point II, Multiple Intervenors advocates that the extent to which regulated utilities are authorized to administer efficiency programs as part of an EPS should not be pre-determined arbitrarily but, rather, evaluated periodically based on the relative merits of each utility's proposed contributions.

In Point III, Multiple Intervenors identifies several concerns regarding the cost and bill impact analyses presented in the Straw Proposal.

Finally, in Point IV, Multiple Intervenors asserts that the Commission should refrain from allocating, in advance, energy efficiency targets and funding among NYSERDA and regulated utilities.

ARGUMENT

POINT I

THE STAFF REPORT IS FLAWED IN NUMEROUS RESPECTS AND REQUIRES SUBSTANTIAL MODIFICATION

Multiple Intervenors supports, or otherwise does not oppose, certain aspects of the Staff Report. Significantly, however, for the reasons set forth below, the Staff Report is flawed in numerous respects and requires substantial modification before it should be

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will continue to do so regardless of whether an EPS is implemented. Notwithstanding Multiple Intervenors' longstanding commitment to energy efficiency, it has numerous, significant concerns regarding how an EPS may be designed and implemented in this proceeding.

adopted for implementation in this proceeding. For ease of review, Multiple Intervenors' comments on the Staff Report – both positive and critical – track the order of that document.[5]

A. Approach

In the Staff Report, Staff contrasts its approach with that embodied in the Judges' Straw Proposal. Specifically, Staff argues that rather than simply allocating resources and load reduction responsibility to NYSERDA and each utility in advance, it would be preferable to expand existing programs, avoid duplication of effort, and make better use of NYSERDA's existing capabilities, which exceed those of the utilities at this time. (Staff Report at 2-3.) Multiple Intervenors generally agrees with that approach, but would not preclude utilities from playing a larger role in the Fast Track where justified.

In contrast to longer-term policy issues, which presumably will be resolved later in this proceeding, the Fast Track is focusing on the implementation of bridging efficiency programs in the very near-term (i.e., 2008-2009). At this time, NYSERDA appears better positioned to expand its most successful efficiency programs than the State's regulated utilities are to implement new programs. NYSERDA has been implementing large-scale efficiency programs for years. In contrast, the utilities either have not been administering efficiency programs, or started implementing such programs only recently and on a much more limited scale. In fact, upon information and belief, a number of utilities currently lack the infrastructure to administer large-scale efficiency programs on short notice and, consequently, would be forced to place undue reliance on outside contractors if directed to implement such programs during the Fast Track.

[5] Many of Multiple Intervenors' comments with respect to the Staff Report also are applicable to proposals advanced by other parties encompassing the Fast Track period.

As detailed in Point II, infra, Multiple Intervenors contends that regulated utilities can participate meaningfully in the implementation of an EPS, but that each utility should have to demonstrate the merits of its proposed role. For the reasons set forth in Points II and IV, infra, Multiple Intervenors advocates that the Commission refrain from allocating customer funds, or assigning efficiency goals, to utilities in advance. Briefly, to the extent utility-proposed efficiency programs do not overlap with NYSERDA efforts, they should be evaluated on their merits, bearing in mind the program-specific and aggregated cost and rate impacts on customers. If a proposed efficiency program is similar to a NYSERDA offering, the entity that can administer the program most effectively and economically should be authorized to do so, regardless of whether that entity is NYSERDA, a utility, or some other entity, i.e., an energy services company ("ESCO"). With this approach, to the extent NYSERDA and utilities (and other entities) are interested in administering efficiency programs, customers should realize the benefits of competitive pressures to design and implement program offerings as effectively and economically as possible.

B. Fast Track Concept

In discussing its Fast Track Concept, Staff states that:

> [I]f the portfolio of programs that Staff has identified were extended through 2015, the projected energy savings levels would be sufficient to meet the necessary contribution to the 15 by 15 target of entities under the Commission's jurisdiction .... However, we fully expect that market players will come up with even better ideas that will obtain more energy savings with higher benefit/cost ratios than the programs we have identified.

(Staff Report at 3.) If Staff is correct, then the above statement would mean that: (a) proposed collections from customers in 2009 should represent the maximum annual cost of an EPS (as possibly adjusted for inflation); and (b) future customer collections should decline from the proposed 2009 level as more cost-effective efficiency programs are implemented.

In implementing an EPS, the Commission should consider capping total annual expenditures of customer funds. Such caps would "limit" the possible rate impacts of an EPS. The Commission also should consider individual customer caps on the annual cost of an EPS. This type of cap (e.g., no customer would pay more than $10,000 annually in EPS costs) would address customer rate impact concerns and provide much-needed cost certainty to large customers subject to EPS-related surcharges.

As detailed, infra, the EPS funding levels proposed by Staff for the Fast Track period are extremely high and need to be reduced. The Staff Report does not devote sufficient attention to customer rate impacts, particularly in light of New York's non-competitive position vis-à-vis other states in terms of electricity prices.

C. Role of Utilities

Staff recommends that regulated utilities gain experience in the planning and implementation of efficiency programs by administering, during the Fast Track period, the following programs: (a) the Small Business Direct Installation program; and (b) the Residential ENERGY STAR® HVAC and Efficient Gas Equipment program. (Staff Report at 4.) Multiple Intervenors has no objections to this particular recommendation, but notes that the utility-administered programs are targeted solely at residential and small commercial and industrial ("C&I") customers. Thus, in order for cost allocation to be handled equitably, the cost of utility-administered efficiency programs should be recovered solely from residential and small C&I customers. No costs associated with those programs should be allocated to large C&I customers because they would not be eligible to participate in – and would receive no direct benefits from – those programs. As detailed, infra, Staff's proposals regarding cost allocation and cost recovery are inadequate, and its repeated failure to distinguish between small C&I and large C&I customers is troubling and undermines the usefulness of its rate impact analyses.

D. Program Administration

Staff recommends that: "The entity administering any given [EPS] program should be determined based on what is most sensible for that energy efficiency application and consumer sector." (Staff Report at 6.) Multiple Intervenors generally agrees with Staff's recommendation – the choice among competing entities to administer efficiency programs should be based on merit, including cost-effectiveness and overall cost to customers. Inasmuch as NYSERDA has been implementing large-scale efficiency programs for years, it makes sense that NYSERDA would play a prominent role during the Fast Track period. On a longer-term basis, the Commission should rely most heavily on those entities capable of producing energy consumption reductions at the least cost to customers.

E. Proposed Expenditures

In the Staff Report, Staff proposes EPS-related expenditures of $157.46 million in 2008 and $308.5 million in 2009. (Staff Report at 8.)[6] The magnitude of those proposed incremental expenditures – totaling nearly half a billion dollars over an approximate 18-month period – are excessive and should be reduced by a substantial

[6] It is Multiple Intervenors' understanding that Staff's recommended expenditures would be incremental to – and not in lieu of – existing System Benefit Charge ("SBC") collections from customers totaling $175 million annually.

amount.[7] Care must be taken to ensure that EPS goals relating to energy consumption are achieved through real efficiency gains, and not through the increased exodus of energy-intensive businesses to states and countries with lower energy costs.

The rate impacts that would result from Staff's proposed EPS expenditures are enormous and must be evaluated in the context of the State's current energy rates. For instance, if adopted, Staff's proposals would result in projected 2009 electric delivery rate increases of 4.6 to 8.6 percent statewide for non-residential customers. (See Staff Report at Attachment 3.)[8] Those are enormous proposed rate increases that warrant careful review. The Commission must recognize that increasing C&I delivery rates statewide by 4.6 to 8.6 percent (see id.) in 2009 (not to mention other years encompassed by an EPS) would have detrimental economic impacts, particularly among large energy-intensive and price-sensitive customers (which tend to be some of New York's largest employers).

While Multiple Intervenors recognizes that the EPS initiative is likely to result in some detrimental rate impacts, the desire (and relative ease) of relying on customer-funded programs to meet efficiency goals must be tempered by the compelling need to mitigate energy (particularly electricity) prices in the State. It is essential that the Commission

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[7] Multiple Intervenors notes that Staff's proposed expenditures are materially higher than what it proposed previously in this proceeding. See, e.g., Case 07-M-0548, supra, Revised Proposal for Energy Efficiency Design and Delivery and Reply Comments of the Staff of the Department of Public Service (dated November 26, 2007) at 4. Multiple Intervenors also contends that those previously-proposed expenditures were excessive.

[8] As detailed, infra, Staff's failure to make any distinction between non-residential customers (e.g., small C&I customers and large C&I customers) undermines the usefulness of its rate impact analyses in a manner that masks the true impacts on large C&I customers, which probably would fare far worse than small C&I customers if Staff's proposed volumetric recovery methodology is adopted.

proceed very cautiously with respect to implementation of an EPS – the resulting rate impacts on customers must be minimized as much as possible.

In 2006, the average electricity price for all sectors in the United States was 8.55 cents per kWh.[9] In contrast, the comparable electricity price in New York was 14.43 cents per kWh, approximately 69 percent higher than the national average.[10] Only Connecticut, Hawaii and Massachusetts had a higher average electricity price than New York in 2006.[11] Unfortunately, New York's non-competitiveness in terms of electricity prices did not improve last year. In 2007, the average electricity price for all sectors in the United States was 8.91 cents per kWh.[12] The comparable electricity price for New York in 2007 was 15.04 cents per kWh, still approximately 69 percent higher than the national average.[13] Last year, only Connecticut and Hawaii had a higher average electricity price than New York.[14] In fact, while New York's average electricity price exceeded 15 cents per kWh in 2007, 36 states had comparable average electricity prices under 10 cents per kWh, and 23 states had average electricity prices under 7.5 cents per kWh (i.e., less than half that of New York).[15]

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[9] Energy Information Association, Average Retail Price of Electricity to Ultimate Consumers by End-Use Sector, by State (Report Released March 17, 2008).

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

Energy prices are particularly important for large C&I customers, many of which consume substantial amounts of electricity and gas as part of manufacturing and other processes. The most recent State Energy Plan reports that:

> In a national survey of businesses that primarily included manufacturers, 81% of the respondents considered energy cost and availability to be either an important or very important site-selection factor. Given the relative cost of energy in New York, manufacturers in the State regard energy costs as being even more significant than is indicated by the national survey.[16]

Moreover, the relationship between economic activity and reasonably-priced energy costs is strong and beyond serious dispute. The State Energy Plan concluded that "[p]olicies that promote a secure, competitive, and reasonably priced energy supply will help attract, retain, and expand business in New York," and that such policies "support reducing energy costs to consumers …."[17] The State Energy Plan also found that: "The increase in business profitability and consumer purchasing power that results from lower energy costs will further stimulate business investment, consumer spending, and employment growth within the State."[18]

Some parties may contend that implementation of an EPS ultimately would result in lower energy prices and improve the State's economic competitiveness. Multiple Intervenors is skeptical of such contentions, the accuracy of which would not be ascertainable for quite some time. Importantly, the Commission should recognize that: (a) to the extent it relies on customer-funded efficiency programs, an EPS would increase rates,

[16] New York State Energy Plan and Final Environmental Impact Statement (June 2002) (hereinafter, "State Energy Plan") at 2-16 (footnote omitted).

[17] State Energy Plan at 2-15.

[18] Id.

possibly significantly; (b) most customers probably would not participate in EPS programs, notwithstanding the best efforts of the parties hereto; and (c) non-participants would experience higher energy bills. In fact, in its August 28, 2007 "Preliminary Proposal for Energy Efficiency Program Design and Delivery" ("Preliminary Proposal"), Staff acknowledged that "[h]istorically, participation rates [in efficiency programs] have been low" and "non-participants will experience net bill increases." (Preliminary Proposal at 73.)

In evaluating proposed EPS costs to customers, it also is imperative that the Commission consider this initiative not only individually, but also in the aggregate with other initiatives. For instance, the SBC costs customers $175 million per year. The Renewable Portfolio Standard ("RPS") also has proven to be very expensive, and absent material changes in circumstances or to the underlying goal, is likely to be even more expensive for customers than had been anticipated when approved by the Commission.[19] Additionally, the Regional Greenhouse Gas Initiative is certain to increase retail electricity prices once implemented, and possibly by a substantial amount. In sum, the Commission should not evaluate the potential costs of the EPS in a vacuum – the State is in danger of losing many more energy-intensive businesses if prices do not become more competitive.

It is not possible, at this time, to estimate with certainty the level of contribution toward EPS goals that can be achieved through means other than customer-

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[19] See generally Case 03-E-0188, Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard. A recent report indicated that: "To date, approximately $574.5 million has been committed to [RPS] projects, leaving approximately $207.5 million of the currently specified collections available for future program activity. Based on these estimates and commitments, the current RPS funding of $782 million will not be sufficient to meet New York's targeted 2013 goal." "Clean, Secure Energy and Economic Growth: A commitment to Renewable Energy and Enhanced Energy Independence," The First Report of the Renewable Energy Task Force to Lieutenant Governor David A. Paterson at 3 (February 2008).

funded efficiency programs (e.g., more stringent codes and standards, increased use of financing mechanisms, voluntary efficiency projects). Importantly, however, inasmuch as those means do not increase rates imposed on customers, or exacerbate the State's already-poor competitive position in terms of energy prices, the Commission should rely on them – instead of customer-funded efficiency programs – to the maximum extent practicable. Accordingly, although Multiple Intervenors recognizes the need to expand existing efficiency programs during the Fast Track period if EPS goals are to be achieved, the Commission should proceed cautiously, and minimize the financial commitments that would be borne by customers until other, less-costly means of achieving consumption reductions have been evaluated comprehensively.

F. Benefit/Cost Analyses

The Staff Report presents a summary of benefit/cost analyses of the recommended bridging efficiency programs. (Staff Report at 9.) Multiple Intervenors advances three observations regarding those analyses.

First, the savings achievable through the implementation of residential and C&I efficiency programs pale in comparison to potential savings that would be realized by the adoption of more stringent standards and codes. (Id.) For instance, according to Staff's calculations, the net present value of savings related to more stringent standards and codes (i.e., \$7,789.4 million) is approximately 11 times that of savings projected from C&I efficiency programs (i.e., \$683.2 million) and almost 30 times that of savings projected from residential efficiency programs (i.e., \$264.9 million). (Id.) In contrast, of the \$157.46 million and \$308.5 million in Fast Track spending proposed by Staff for 2008 and 2009, respectively, only \$5.16 million is allocated toward "Standards and Codes Support." (Id. at

8.) Based on the foregoing, Multiple Intervenors questions whether customer-funded EPS expenditures approaching the magnitude proposed by Staff make sense at this time, particularly given the State's poor competitive position. Instead, Multiple Intervenors recommends that the Commission rely far less heavily on customer-funded efficiency programs.

Second, although Staff recommends roughly-comparable levels of funding for residential and C&I efficiency programs, far more savings are expected to come from C&I programs. (Id. at 8-9.) This expectation also is reflected in the higher average benefit/cost ratios for C&I programs compared to residential programs. (Id. at 9.) Given Staff's reliance on the C&I sector, Multiple Intervenors had hoped that Staff would accord more weight to the specific, programmatic recommendations advanced previously herein by Multiple Intervenors, a representative of large industrial, commercial and institutional energy consumers for over 35 years. That, unfortunately, has not occurred.

On October 15, 2007, Multiple Intervenors filed the "Comments of Multiple Intervenors on Fast Track Issues" in this proceeding. Point II of that submission (at pages 24-37), entitled "The Design of Desirable Energy Efficiency Programs for Large C&I Customers," advances numerous, specific recommendations with respect to the design and the implementation of efficiency programs targeted to large C&I customers. Multiple Intervenors' recommendations are not reflected in the Staff Report. Rather than repeat those recommendations here, the relevant pages of Multiple Intervenors' October 15, 2007 submission are annexed hereto as Exhibit A. Multiple Intervenors urges the Commission to consider the annexed recommendations for implementation during the Fast Track period.

Finally, Multiple Intervenors notes that many efficiency programs recommended by Staff have benefit/cost ratios barely over 1.0 (i.e., the point at which benefits equal costs). (Staff Report at 9.) Given the substantial uncertainty associated with benefit/cost analyses, which by necessity rely on numerous assumptions and projections of questionable accuracy, the Commission should be conservative and refrain from approving programs with benefit/cost barely over 1.0. For instance, a "safety cushion" could be adopted that would require benefit/cost ratios of at least 1.5 or 2.0. Multiple Intervenors notes that the programs with barely-favorable benefit/cost ratios are targeted at residential customers. (Id.) If EPS costs are allocated equitably, Multiple Intervenors would advocate no position whatsoever with respect to the costs, benefit/cost ratios or the design of residential (or small C&I) efficiency programs. If, however, no real effort is going to be expended to allocate costs equitably, then large C&I customers should not be forced to support efficiency programs for which there is a realistic probability that costs ultimately would exceed benefits.[20]

G. Compliance Filings

Staff recommends that collaborative meetings be scheduled to discuss bridging efficiency programs to be implemented during the Fast Track period, including expanded NYSERDA offerings. (Staff Report at 13-14.) Staff notes that: "It is not necessary to have a

[20] From Multiple Intervenors' perspective, an equitable cost allocation would assign cost responsibility for each efficiency program to the responsible customer classes. Alternately, cost allocation could be accomplished equitably by: (a) recovering residential program costs from residential customers; (b) recovering small C&I program costs from small C&I customers; and (c) recovering large C&I program costs from large C&I customers. Staff's failure to adopt even this less precise approach – coupled with its repeated failure to recognize the substantial differences between small C&I and large C&I customers – is extremely troubling and should not be adopted by the Commission.

separate meeting for each program expansion. For example, one meeting might cover changes to all residential programs." (Id. at 14, n.4.) Multiple Intervenors agrees with Staff's recommendation, provided that customer representatives – including those that are active parties in this proceeding – are eligible to participate. With respect to the number of collaborative meetings needed, Multiple Intervenors recommends that separate meetings be scheduled to discuss residential programs, small C&I programs, and large C&I programs.

H. Cost Allocation and Cost Recovery

In the Staff Report, Staff advances a number of recommendations regarding cost allocation and cost recovery. (Staff Report at 15-18.) While Multiple Intervenors supports some of Staff's recommendations on these issues, many of them lack merit and warrant substantial modification.

Initially, once again, Staff has "punted" on critically-important cost allocation and cost recovery issues. Multiple Intervenors has been advancing its positions and concerns on these issues since the commencement of this proceeding.[21] Unfortunately, it appears that Staff is unwilling to analyze and advance recommendations on cost allocation and cost recovery issues.

Staff states that:

> In its comments, Multiple Intervenors presented a detailed analysis of cost allocation issues. It is asserted that [EPS] surcharges should not be imposed on billing for customers that have reduced energy costs due to NYPA low-cost power allocations and flex-rate contracts. Multiple Intervenors stated that [EPS] costs must be recovered in a manner that promotes

[21] See, e.g., Case 07-M-0548, supra, "Initial Comments of Multiple Intervenors in Response to Staff's Questions" (dated July 11, 2007) at 13-23; "Comments of Multiple Intervenors on Fast Track Issues" (dated October 15, 2007) at 8-24.

> interregional, inter-class and intra-class equity. These and related issues deserve more attention, but in order to get the bridge programs up and running quickly ....

(Staff Report at 15.) Although Staff appropriately would exempt certain customers from EPS-related surcharges, and also recognizes that cost allocation and cost recovery issues warrant attention, its continuing failure to accord adequate attention to those issues is particularly troubling given its detailed proposal to increase spending on customer-funded energy efficiency programs by almost one-half billion dollars through 2009.

For the reasons set forth below, Multiple Intervenors urges that: (a) EPS-related surcharges must not be imposed on New York Power Authority ("NYPA") allocations and flex-rate contracts; (b) EPS-related surcharges must not be imposed on interruptible gas customers; (c) Staff's recommended approach to interclass allocation should be rejected; (d) Staff's recommended approach to interregional equity should be rejected; and (e) Staff's recommended approach to intraclass equity should be rejected.[22]

1. EPS-Related Surcharges Must Not Be Imposed on NYPA Allocations and Flex-Rate Contracts

Staff recommends "continuing existing customer exemptions from SBC payments." (Staff Report at 15.) Multiple Intervenors strongly supports that recommendation with respect to NYPA allocations. The recommended exemptions should be clarified or expanded, however, to encompass all flex-rate contracts.

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[22] Multiple Intervenors' positions on interclass allocation, interregional equity and intraclass equity apply both to electric and gas efficiency programs. Although most of the attention in this proceeding has focused on electric efficiency programs, Multiple Intervenors also is concerned about the proposed costs of gas efficiency programs and how those costs are allocated and recovered.

Initially, it is absolutely essential that NYPA allocations and flex-rate contracts be exempt from any EPS-related surcharges. The purpose of NYPA allocations and flex-rate contracts is to reduce energy costs for the subject customers, primarily for important economic development reasons (e.g., attracting or retaining businesses, and jobs, to the State). The possible imposition of EPS-related surcharges on NYPA allocations and flex-rate contracts would defeat the very purpose of the allocations and contracts, and have significant, detrimental impacts on economic development goals.

The State Energy Plan recognizes the importance of economic development programs that have been developed to attract and retain businesses, and cites specifically to NYPA programs and the Commission's flex-rate contract program.[23] As the State Energy Plan recognizes, the cost of energy remains a significant obstacle to New York's efforts to retain, expand and attract business.[24] In fact, the State Energy Plan concludes that:

> New York's success in working with businesses that could relocate to other states frequently depends on the availability of discounted, low-cost energy and incentives offered through various State and local government and utility-sponsored programs .... [E]ffective energy-related economic development programs for businesses will continue to be necessary to help preserve and expand the State's economic base.[25]

Previously, and as detailed below, the Commission has exempted NYPA allocations and certain flex-rate contract customers from the SBC and the RPS surcharge. The Commission also ruled recently that NYPA customers should be exempt from utility

[23] State Energy Plan at 2-17, 2-22.

[24] Id. at 2-23. If anything, New York's competitive disadvantage in this regard has gotten worse since 2002, when the State Energy Plan was issued.

[25] Id. at 2-24.

stranded costs, and many flex-rate contracts similarly exclude stranded cost recovery. It is critical that the Commission follow the same basic approach with respect to the implementation of an EPS. Imposing EPS-related surcharges on NYPA allocations and load served under flex-rate contracts would be contrary to the State's economic development goals and, in many instances, cast a devastating blow against a company's efforts to retain production, and jobs, in New York. Accordingly, NYPA allocations and flex-rate contracts should be exempt from any EPS-related surcharges.

When the Commission first adopted the SBC in 1998, it exempted NYPA allocations from its imposition.[26] When the SBC was renewed in 2001, the Commission ruled expressly that: "By design, the current SBC is not applied to NYPA ... customers."[27] The Commission also ruled that customers whose flex-rate contracts do not allow the utility to collect an SBC "cannot be forced to pay an SBC without abrogating the contracts."[28] More recently, in extending the SBC for another term, the Commission rejected arguments that either would have expanded or reduced the applicability of the SBC, ruling that: "It was

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[26] Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 98-3, Opinion and Order Concerning System Benefits Charge Issues (issued January 30, 1998) at 6-7 (imposing the SBC only on investor-owned electric utilities, but encouraging NYPA to participate voluntarily in SBC program efforts). Although not explicit in this decision, as detailed, infra, the Commission also exempted from the SBC those flex-rate contracts that did not permit its imposition.

[27] Case 94-E-0952, supra, Order Continuing and Expanding the System Benefits Charge for Public Benefit Programs (issued January 26, 2001) at 22; see also id. at 23 (holding that "[t]he parties that believed that the Staff Proposal [continuing and expanding the SBC] was intended to be applied to NYPA ... customers were mistaken").

[28] Id. at 23. Where the imposition of the SBC would constitute an abrogation of contract, the same conclusion also should be reached with respect to the imposition of EPS-related surcharges.

not our intention to reopen the settled issue of which customers may pay the SBC, and none of the arguments made are new or otherwise convince us that we should change our current policies in this regard."[29]

Significantly, in adopting the RPS, the Commission similarly exempted NYPA allocations and certain flex-rate contracts from the imposition of the RPS surcharge. The Commission ruled that:

> [W]hile all New York customers will benefit from the RPS program, we exempt from contribution those customers currently exempt from the System Benefits Charge (SBC) contributions. Such customers are generally provided electricity at reduced prices to achieve economic development objectives such as sustaining or creating jobs. <u>The Commission recognizes that requiring such customers to pay for the objectives of the RPS would be counterproductive to these economic development goals.</u>[30]

Thus, the Commission concluded, appropriately, that it would be counterproductive to impose the RPS surcharge on NYPA allocations and flex-rate contracts that did not permit its imposition. The exact same conclusion should be reached here with respect to any EPS-related surcharges.

In conjunction with Case 05-E-1222, the last New York State Electric & Gas Corporation ("NYSEG") electric rate proceeding, the Commission was required to rule upon a joint proposal that, if adopted, would exempt new NYPA allocations from NYSEG's stranded costs, which are recovered through a non-bypassable charge ("NBC"). In adopting

[29] Case 05-M-0900, <u>In the Matter of the System Benefits Charge III</u>, Order Continuing the System Benefits Charge (SBC) and the SBC-Funded Public Benefit Programs (issued December 21, 2005) at 29-30.

[30] Case 03-E-0188, <u>supra</u>, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004) at 11 (emphasis added); <u>see also id.</u> at 53-55.

that joint proposal, the Commission recognized, again, the importance of not burdening NYPA allocations with surcharges that would frustrate the economic development goals being pursued: "the JP provides a standard NBC cost exemption for new allocations of NYPA Power that will enhance economic development in NYSEG's service territory."[31] Thus, the Commission repeatedly has recognized the importance of exempting NYPA allocations from surcharges (e.g., the SBC, the RPS surcharge, the NBC) that would increase costs to customers that the State already has determined require competitively-priced electricity supplies to achieve important economic development objectives.

With respect to NYPA customers, there are a number of additional reasons why they should be excluded from any EPS-related surcharges. First, NYPA customers typically have long-term contracts and, therefore, are unlikely to benefit from any declines in market price experienced as a result of EPS-related electricity consumption and/or peak demand reductions. Second, NYPA customers tend to be large energy consumers for whom electricity represents a significant cost of doing business. Therefore, many NYPA customers – including Multiple Intervenors members – routinely implement energy efficient projects on their own, without financial subsidies, because it is cost-effective to do so. Third, NYPA customers – which tend to be extremely price-sensitive – have made numerous, critical business decisions based on the projected cost of their allocations. Under such circumstances, it would be extremely inequitable to impose any EPS-related surcharges on NYPA allocations – particularly surcharges that, on a percentage basis, could have a

[31] Case 05-E-1222, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service, Order Adopting Joint Proposal on New York Power Authority Issues (issued July 20, 2007) at 5. Exempting new NYPA allocations from the NBC also was consistent with the regulatory treatment accorded to longstanding NYPA allocations. See id. at 1-4.

devastating impact on a customer's cost of electricity. Finally, in conjunction with their allocations, most (if not all) NYPA customers already have undergone comprehensive energy audits at their facilities, and NYPA itself implements extensive efficiency programs.

Similarly, there also are additional, compelling reasons to exempt all flex-rate contracts from any EPS surcharges. The State previously has recognized that "flex-rate contracts remain a valuable tool for promoting economic development through the retention and attraction of business customers."[32] The State Energy Plan concluded that the State's "[l]ow-cost power programs have been successful to date in retaining and expanding employment opportunities in the state."[33] It also concluded that: "[o]ffering electricity discounts as a means of retaining or attracting jobs is an important economic development tool."[34] Many flex-rate contract customers made business decisions, and commitments to their New York operations, based upon energy rates (electricity and gas) that were fixed in negotiations prior to the institution of this proceeding. Under such circumstances, it would be inequitable, and counterproductive to economic development goals, to impose the costs of an EPS on flex-rate contract customers.

For the foregoing reasons, it is essential that NYPA allocations and flex-rate contracts be exempt from any EPS-related surcharges that may be imposed in this proceeding.

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[32] State Energy Plan at 2-16.

[33] Id. at 2-36.

[34] Id. at 2-37. The same benefit also can be attributed to flex-rate gas contracts.

2. EPS-Related Surcharges Must Not Be Imposed on Interruptible Gas Customers

In the Staff Report, Staff affirms its prior recommendation that interruptible gas customers (sales and transportation) be exempt from EPS-related surcharges:

> In the Preliminary Proposal, Staff recommended exempting customers of gas utilities that take interruptible sales service and/or interruptible transportation service from mandatory participation in energy efficiency programs, since many of these customers are dual-fueled (natural gas and oil). Staff continues to support that recommendation for the fast track programs.

(Staff Report at 17.) Multiple Intervenors supports Staff's position on this issue.

Interruptible gas customers should not be subject to the costs of an EPS. Those customers have competitive alternatives to gas and, if their gas delivery rates are increased to accommodate an EPS, they would be much more likely to burn alternate fuels (which also may be a less favorable outcome from an environmental perspective). Additionally, imposing an EPS-related surcharge on interruptible transportation customers would achieve no real purpose – utilities then would have to discount their standard transportation rates by a larger amount to ensure that gas is the chosen fuel for such customers, which would affect negatively the interruptible revenues that are used for the benefit of firm customers.

Multiple Intervenors also notes that the gas efficiency programs proposed for the Fast Track period are targeted at residential and possibly small C&I customers (see Staff Report at 9), while most interruptible gas customers, upon information and belief, are large C&I customers. Thus, if the costs of Fast Track gas efficiency programs were to be allocated equitably by service classification or customer type, it is unlikely that interruptible gas customers (or large C&I firm gas customers) would be allocated a material portion (if any) of such costs.

3. Staff's Approach to Interclass Allocation Should Be Rejected

With respect to interclass cost allocation, Staff recommends that "funds collected from a particular class should be used to fund programs for that class." (Staff Report at 15.) By itself, the above recommendation seemingly indicates at least an intent that cost allocation follow cost causation. Unfortunately, however, Staff then proposes adoption of the following approach to cost allocation advanced initially in the Judges' Straw Proposal:

> Interclass equity will be achieved through program distribution and design, not cost allocation; programs will be targeted toward classes so as to match the sources of the program funds. *** [P]rogram administrators will demonstrate that customers of different sizes have an opportunity to participate that is reasonably related to the proportion of the program funds.

(Staff Report at 15-16.)[35] This approach to interclass cost allocation should be rejected.

Staff's approach basically calls for a volumetric EPS surcharge, which would be the same for each applicable customer class served by a utility, coupled with the hope that interclass equity would be achieved if efficiency programs are designed and targeted consistently with how EPS costs are recovered. The approach is flawed in several material respects.

[35] In contrast, at page 8 of its "Clarifications to Interim [EPS] Program Proposals," presented at the March 5, 2008 technical conference conducted in this proceeding, Staff recommended that: "Each class should support programs for its members."

First, Staff's approach fails to reflect cost causation, which should be used to allocate EPS costs to customer classes – or at least customer types – based upon each class's (or type's) contribution to the costs incurred. Instead, EPS costs would be allocated based solely on consumption, and there would be a chance – but certainly no guarantee – that costs would be incurred in a manner roughly approximate to the resulting allocation. Although Staff's approach to cost allocation with respect to gas efficiency programs is not clear, the gas programs proposed for the Fast Track are <u>not</u> targeted at large C&I customers. Accordingly, the costs associated with such programs should not be allocated to large C&I customers.[36]

Second, Staff's approach is an example of the cart leading the horse – instead of designing and budgeting efficiency programs based on the merits and then allocating the resulting costs based on causation, Staff seeks to design and budget programs based, in part, on how a simple volumetric surcharge would recover funds from various types of customers. In addition to creating the very real possibility that EPS surcharges would not be recovered consistently with cost causation principles, the approach unduly limits the Commission's flexibility in the design, budgeting and approval of efficiency programs. For instance, the Commission may conclude that a greater percentage of program budgets should be allocated to residential, small C&I or large C&I customers based on any number of factors (<u>e.g.</u>, cost-effectiveness, social considerations, heretofore untapped potential). If costs are allocated consistently with causation, targeting certain customer types for increased expenditures would not create or exacerbate interclass subsidies. Under the recommended approach,

[36] As detailed, <u>infra</u>, Multiple Intervenors believes its position on this issue is consistent with Staff's proposal with respect to at least some gas efficiency programs to be implemented during the Fast Track period.

however, targeting EPS funds in any manner inconsistent with the allocation produced by a purely volumetric surcharge would be certain to result in interclass subsidies.

Third, the approach advanced by Staff would not conserve resources. Given its lack of merit and Staff's acknowledgment that cost allocation issues "deserve more attention," Multiple Intervenors assumes that Staff's simplistic approach to interclass allocation is based on some belief that it would conserve resources compared to actually allocating costs to customer classes – or even broader customer types – based on cost causation. Inasmuch as Staff has recommended incremental expenditures exceeding $465 million over an approximate 18-month period, Multiple Intervenors disputes any notion that shortcuts are warranted for interclass allocation issues. Moreover, Multiple Intervenors is skeptical resources even would be conserved because "program administrators will [have to] demonstrate that customers of different sizes have an opportunity to participate that is reasonably related to the proportion of the program funds." (Staff Report at 16.) Thus, on behalf of its members, Multiple Intervenors likely would advocate for a demonstration that EPS funds are targeted to, and will be bestowed upon, large C&I customers (as opposed to small C&I customers) in a manner commensurate with how they are recovered from large C&I customers. Other customer representatives likely would desire similar demonstrations.

The above concern is not merely theoretical. Attachment 5 to the Staff Report contains descriptions of proposed Fast Track efficiency programs. Six programs targeted at residential customers are identified therein. (Staff Report, Attachment 5.) Large C&I customers would not be eligible to participate in – and would receive no direct benefits from – those programs. Yet, under Staff's approach, all customers would pay for the residential efficiency programs.

The following four programs proposed by Staff would be targeted at C&I customers: (a) New Commercial Buildings – Whole Building Design; (b) Small Business Direct Installation Program; (c) Existing Commercial Buildings; and (d) FlexTech Including Industrial Process Improvements. (Id.) It is not clear which of those programs truly are targeted at large C&I customers (in contrast to small C&I customers). Clearly, the second program is targeted solely at small C&I customers, and based on the descriptions, it is at least possible – if not probable – that the first and third programs would enjoy greater participation from small C&I customers than large C&I customers. Staff's approach to cost allocation would allocate the cost of those four programs to small C&I and large C&I customers (and residential customers) based solely on volumetric consumption, as opposed to cost causation principles.[37]

Fourth, the approach to cost allocation proposed by Staff would exacerbate, unnecessarily, interclass controversies regarding the design and the cost of efficiency programs. For instance, if EPS expenditures were allocated on the basis of cost causation, Multiple Intervenors would have no interest in the design, or the cost, of efficiency programs targeted at residential and small C&I customers. Significantly, however, pursuant to the recommended approach, large C&I customers would be forced to pay for a material portion

[37] The efficiency needs and operating characteristics of large C&I customers are very different from small C&I customers. Large C&I customers, including Multiple Intervenors members, are sophisticated and practice energy efficiency because it makes economic sense. Most large C&I customers already have addressed the "low-hanging fruit" when it comes to efficiency improvements (e.g., lighting, motors), and focus primarily on process improvements. In many respects relevant to this proceeding, residential and small C&I customers probably are more similar to each other than small C&I and large C&I customers. Staff's failure to distinguish between small C&I and large C&I customers for purposes of program design, cost allocation, and rate and bill impact analyses should be remedied prior to approval of a final set of Fast Track programs.

of residential and small C&I efficiency programs, thereby raising numerous potential concerns regarding how those programs are designed and the budgets assigned to them. Similarly, the recommended approach may cause residential and/or small C&I customer advocates to have concerns regarding the design and the cost of large C&I efficiency programs. If EPS costs were allocated based on cost causation principles, those types of concerns would be eliminated or alleviated significantly.

The cost of an EPS may be substantial, possibly totaling in the billions of dollars. Consequently, the Commission must ensure that EPS costs are allocated in a manner that promotes interclass equity. For instance, large C&I customers should not be forced to pay for efficiency programs targeted at residential and/or small C&I customers. Similarly, residential and small C&I customers should not be forced to pay for efficiency programs targeted at large C&I customers. In utility rate proceedings, the Commission generally strives to allocate costs to customer classes in a fair and equitable manner, consistent with cost of service principles. There is no compelling reason why EPS costs should be treated differently. In fact, because EPS program costs are expected to be relatively discrete, they should be easier than most types of costs to allocate equitably among customer classes. Importantly, the Commission should strive to achieve widespread support for the EPS – that support likely would be weakened, and substantial opposition may be encountered, if implementation of an EPS creates or exacerbates interclass subsidies.

It is noteworthy that the Commission previously has endorsed, in certain circumstances, the allocation of demand-side management ("DSM") costs to specific customer classes to minimize the possibility of interclass subsidies. In response to rate impact concerns, the Commission also has allowed certain customer classes that historically are active in implementing energy efficiency projects on their own (i.e., large C&I customers) to "opt out" of program costs. These approaches should be considered for implementation in this proceeding.

For instance, in Cases 92-E-0621, et al., the Commission noted that:

> Central Hudson, LILCO, NYSEG and Niagara Mohawk assign DSM costs on a program-by-program basis to the sectors of customers eligible to participate in each program. As a further refinement, Central Hudson and Niagara Mohawk conduct a reconciliation to recover DSM costs from specific customer classes based on their actual participation in programs. Supporters of cost recovery based on program eligibility argue that it is fair because it does not require any customer to pay a share of the costs of programs in which the customer does not have an opportunity to participate.[38]

The Commission also noted in the same order that:

> OEEE's preference is that costs specifically related to implementing large-scale DSM resource programs should be allocated only to the customer classes eligible to participate on a program-by-program basis. Equity considerations suggest that it is inappropriate to assign specific program costs such as rebates to classes of customers who do not have an opportunity to participate in the programs and thereby exercise a degree of control over their electricity bills.[39]

In Case 92-E-0108, et al., the Commission adopted a settlement that allowed, inter alia, Niagara Mohawk Power Corporation's largest C&I customers to forego participation in the utility's base DSM program and thereby avoid certain DSM-related charges (such customers also became ineligible for rebates). In so ruling, the Commission

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[38] Cases 92-E-0621, et al., Order Concerning 1993 and 1994 Demand Side Management Plans and HIECA Business Plans (issued March 19, 1993), 142 P.U.R.4th 305, 1993 WL 259592 (N.Y.P.S.C.) (pagination not available).

[39] Id.

noted that it had "specifically encouraged" the development of "approaches that would allocate DSM costs more directly to the customers deriving the greatest benefits from the program."[40]

Similarly, in Case 95-E-0673, the Commission approved a DSM plan incorporated into a settlement agreement for Rochester Gas and Electric Corporation that, recognizing the "high level of knowledge of and interest in energy efficiency by the utility's industrial and commercial businesses," allowed such customers "to forego utility provided DSM services, and thus enable them to pay lower utility rates."[41] In describing this proposal, the Commission stated that:

> The parties acknowledge that many customers targeted by this [opt out] program are committed to energy efficiency and possess considerable expertise with respect to it. The parties also recognize the customers in this class have invested in energy conservation because it makes good business sense, and they reason that these customers should not be required to pay for RG&E's DSM programs if they do not directly participate.[42]

The Commission should consider such approaches here to maintain interclass equity while, at the same time, minimizing the rate impacts of an EPS on the most price-sensitive customers (which already invest a considerable amount of their own resources in energy efficiency because it is cost-effective for them to do so).

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[40] Cases 92-E-0108, et al., Opinion No. 93-3, Opinion and Order Conditionally Approving Settlement (issued February 2, 1993), 33 NY PSC 95 at 142.

[41] Cases 95-E-0673 and 95-G-0674, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric and Gas Service, Opinion No. 95-20, Opinion and Order Approving Settlement of DSM Issues (issued December 27, 1995) at 6; see also id. at 4-9.

[42] Id. at 5.

Finally, Multiple Intervenors notes that Staff's proposed approach to interclass cost allocation seemingly is at odds with its proposal for allocating certain gas efficiency programs: "For Residential ENERGY STAR® HVAC and Efficient Gas Equipment program … Staff has initially allocated the cost to residential gas ratepayers for whom the program is targeted." (Staff Report at 16.) This is the precise approach that should be adopted with respect to all efficiency programs.[43]

For the foregoing reasons, the Commission should adopt as a principle herein that the cost of customer-funded EPS programs shall be allocated to those customer classes or types that participate in, and benefit directly from, the programs.

4. Staff's Approach to Interregional Equity Should Be Rejected

Staff recommends that "costs among utilities be allocated based on energy usage (kwh)." (Staff Report at 16; footnote omitted.) This casual approach to interregional equity should be rejected.

The implementation of an EPS may result, over time, in the expenditure of billions of dollars of customer funds on efficiency programs across New York. Programs may be administered by, inter alia, NYSERDA, regulated utilities, municipalities and ESCOs, resulting in a geographically-uneven distribution of program benefits. Therefore, it is very important that an EPS be implemented in a manner that promotes interregional equity. Specifically, EPS costs should be allocated to, and recovered from, the regions for

[43] Staff then recommends that: "[I]t is possible that some smaller commercial and industrial customers may take advantage of the program. If a gas utility finds this to be the case, then it should allocate that portion of program costs for recovery from commercial customers." (Id.) Multiple Intervenors has no objection to that recommendation, provided that if small C&I customers take advantage of the subject program, a portion of the program costs should be allocated to small C&I customers only, and not to large C&I customers.

whose direct benefit the costs were incurred. Customers in Buffalo, for example, should not have to pay for EPS programs implemented on Long Island, and vice versa. By acting to ensure interregional equity – starting with the implementation of bridging efficiency programs during the Fast Track period – the Commission can avoid concerns and criticisms that certain regions of the State are being subsidized by customers in other regions.

Importantly, perfect interregional equity, i.e., matching program expenditures to regional collections down to the last penny, need not be pursued. The Staff approach, however, simply allocates costs by region and does very little, if anything, to ensure that EPS benefits are distributed in rough approximation to how costs are recovered. At a minimum, collections and benefits should be evaluated, by region, on an annual basis, with inequities addressed in future collections.

Accordingly, the Commission should allocate EPS costs, by region, based on cost causation principles. While interregional equity can be pursued in a variety of ways, the approach proposed in the Staff Report is inadequate and warrants modification.

5. Staff's Approach to Intraclass Equity Should Be Rejected

In the Staff Report, Staff proposes that intraclass equity be pursued by recovering EPS costs on a purely volumetric basis. (Staff Report at 15-16.) Staff also would require "program administrators [to] demonstrate that customers of different sizes have an opportunity to participate that is reasonably related to the proportion of the program funds." (Id. at 16.) For the reasons set forth below, Staff's approach to intraclass equity should be rejected.

Initially, Multiple Intervenors is troubled by, and opposes, proposals that EPS surcharges be recovered solely on a volumetric basis. Arbitrarily recovering EPS costs from all customers on a volumetric basis would penalize large, high load factor customers (ironically, high load factor customers often are the most energy efficient customers). For the reasons detailed, supra, EPS costs should be allocated among customer classes – or, at a minimum, among customer types (e.g., residential, small C&I, large C&I) – in an equitable manner based on program eligibility and receipt of direct program benefits. After such cost responsibility is calculated, EPS costs then should be recovered within each class, or customer type, in a manner reflective of cost of service principles.

For instance, to the extent efficiency programs reduce both energy consumption and peak demand, the cost of such programs ideally should be recovered partly on the basis of consumption and partly on the basis of demand. While this issue may not be relevant to non-demand-metered customers, such as residential customers, it is very important to large C&I customers (particularly given the potential costs of an EPS). Accordingly, the Commission should not adopt a simplistic cost recovery methodology (i.e., a volumetric surcharge) but, instead, should evaluate more sophisticated approaches (following a cost-based interclass allocation) that recover EPS costs, as appropriate, based on number of accounts, demand and/or consumption. Such an approach would best promote intraclass equity.

Additionally, it is not clear from the Staff Report precisely how, or when, program administrators would "demonstrate that customers of different sizes have an opportunity to participate [in EPS programs] that is reasonably related to the proportion of the program funds." (Staff Report at 16.) Such a demonstration appears focused on interclass equity, not intraclass equity. Moreover, the fact that a group of customers (i.e., small C&I and large C&I customers) are accorded an opportunity to participate in a particular bridging program during the Fast Track does not mean that a purely volumetric cost recovery mechanism would: (a) allocate costs equitably (i.e., based on cost causation principles) among customer classes or types;[44] or (b) allocate costs equitably on an intraclass basis.[45] Moreover, the Staff Report is silent as to how demonstrated inequities would be evaluated or remedied.

The approach proposed in the Staff Report for addressing intraclass equity is flawed and should be rejected. Given the level of customer-funded EPS expenditures proposed for the Fast Track period and beyond, it behooves the Commission to allocate sufficient resources towards ensuring that interclass, interregional, and intraclass equity is promoted and achieved.

I. Evaluation and Reporting

Staff advocates that funding for evaluation and reporting on EPS efficiency programs be increased from existing SBC levels. (Staff Report at 18-19.) Specifically, Staff recommends that "for expanded NYSERDA programs, existing mechanisms for program evaluation should be used, with the exception that expenditures of up to 5% of funding for

[44] For instance, what if the program really is targeted at small C&I customers and/or large C&I customers are not able to take full advantage of the program because they previously installed high efficiency versions of the targeted equipment (e.g., lighting, motors)? Under such circumstances, a purely volumetric cost recovery methodology from all C&I customers would not result in an equitable cost allocation.

[45] For instance, many large C&I electric delivery rates are comprised solely of a monthly customer charge and a per kW demand charge. As proposed, a purely volumetric surcharge would recover a disproportionate amount of EPS costs from larger, high load factor customers (which could be doubly penalized if revenue decoupling mechanism reconciliations also are recovered volumetrically).

the program can be used for measurement and analysis (current levels are 2% of funding)." (Id. at 19.) Multiple Intervenors generally supports Staff's call for increased funding for the evaluation of, and reporting on, EPS programs. Importantly, however, it is not clear why such expenditures need to be two and one-half times prior limits. The Staff Report provides no analysis on this point. Evaluation and reporting will be critically-important to an EPS: (a) to provide "accountability to ratepayers and regulators"; (b) for "estimating future electricity generation, transmission, and distribution requirements"; and (c) for ensuring "the results and underlying premises are [presented in a manner that is] transparent to all interested parties." (Id. at 18.) Nevertheless, similar to all other aspects of an EPS, evaluation costs, and resulting rate impacts, should be minimized to the extent practicable.

Staff also concludes that: "As identified by Working Group 3, a key principle of program evaluation is that the group performing the evaluation should not be the group installing the energy efficiency measures to allow for internal control." (Id. at 19.) Multiple Intervenors agrees strongly with this conclusion.

Staff then recommends that for utility-administered efficiency programs, Staff "should have oversight of measurement and analysis contractors, at least in the short term." (Id.) In response, Multiple Intervenors has two concerns. First, rather than Staff, Multiple Intervenors recommends that a reputable outside contractor be retained to provide independent evaluations of EPS efficiency programs. Second, Multiple Intervenors questions why the concept of independent evaluation should be limited to utilities and not also extended to NYSERDA (and any other entity administering EPS efficiency programs). Multiple Intervenors recognizes that to the extent regulated utilities are accorded lost revenue recovery and/or financial incentives (the latter of which Multiple Intervenors opposes) for administering efficiency programs, they may possess different motivations from NYSERDA in terms of the evaluation results. Importantly, however, if future EPS funding is going to be allocated between NYSERDA and utilities (and possibly other entities) based on the relative merits of the proposals presented – as Multiple Intervenors advocates (see Points II and IV, infra) – then Staff's call for truly independent evaluations should be applied uniformly to all entities administering EPS efficiency programs.[46]

In its July 11, 2007 comments submitted in this proceeding, Multiple Intervenors advocated that:

> As part of the implementation and continued administration of energy efficiency programs under an EPS, an independent entity should be selected to rigorously review the effectiveness of all programs on an annual basis. The entity should be selected by, and work for, an entity that is not also responsible for implementing the programs. The evaluating entity should have no motivation or bias – explicit or perceived – to find the programs implemented are any more or less cost-effective than what the actual evaluation results demonstrate. Given the amount of money that may be spent on an EPS, customers are entitled to assurances – from a truly independent entity – that the EPS reflects money well spent. Moreover, by conducting rigorous evaluations on an annual basis, program design changes can be implemented on a periodic basis to improve the cost-effectiveness of selected EPS programs and/or to discontinue programs that are not demonstrably cost-effective.[47]

Multiple Intervenors' position with respect to the need for independent evaluation of EPS programs should be adopted in this proceeding.

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[46] Because Staff is perceived as a strong proponent of an EPS, retaining an "outside" contractor to conduct or oversee independent evaluations of EPS efficiency programs may be preferable to placing Staff in that role. Additionally, it may be awkward to have Staff conduct rigorous evaluations of NYSERDA-administered efficiency programs, which should be subjected to independent evaluation similar to utility-administered programs.

[47] Case 07-M-0548, supra, Initial Comments of Multiple Intervenors in Response to Staff's Questions at 26.

J. Demand Response

Staff recognizes that: "The role of demand response in the overall [EPS] resource portfolio needs to be informed by additional collaborative discussion and analysis." (Staff Report at 24.) Staff, however, then recommends, for the first time, that "at a minimum a requirement should be placed on the [EPS] portfolio that as a result of the implementation of energy efficiency programs there should be no net reduction in system load factor in any utility's service territory." (Id.) Although Multiple Intervenors is a strong proponent of demand response, it opposes the adoption of Staff's recommended requirement at this time.

Initially, Multiple Intervenors agrees with parties that advocate the importance of demand response. Targeting reductions in statewide demand – as opposed to consumption – may provide equal or greater benefits to customers. As Multiple Intervenors asserted in its July 11, 2007 comments herein, "although the specific goal of the EPS – to reduce New York's electricity usage by 15% from expected levels by 2015 – is laudable, there has been no analysis that this particular goal is more beneficial to possible alternate goals of an EPS."[48] For instance, reducing electricity consumption by 7.5% and demand by 7.5% may produce far greater benefits than focusing solely on consumption reductions. Disappointingly, this proceeding was instituted with a single, predetermined goal in mind – a 15% reduction in electricity consumption by 2015 – and, consequently, possible alternative goals (and their costs to customers) have been ignored. Staff's last-minute proposal to introduce a new, demand-based requirement in this proceeding – without any modification of the consumption reduction goal – should be rejected because it could increase the burden on

[48] Case 07-M-0548, supra, Initial Comments of Multiple Intervenors in Response to Staff's Questions at 5.

customers to achieve a goal that many parties – including Staff – already consider to be extremely (if not overly) aggressive.

If the Commission wishes to adopt some demand-based goal for this proceeding, it should relax the aggressive consumption-based goal adopted previously. By implementing a more flexible approach to this proceeding, the Commission may be able to achieve the main thrust of its goals while, at the same time, achieving greater benefits and/or reducing costs for customers. If, however, the aggressive 15% consumption reduction goal is set in stone, regardless of the cost to customers, then the Commission should refrain from adopting any additional requirements that only would exacerbate the cost of this proceeding to customers.

K. Enhanced Energy Codes and Standards

Staff recommends that a limited amount of funding be allocated toward efforts to facilitate the statewide adoption of more stringent energy codes and standards. (Staff Report at 24-25.) According to Staff: "Potential impacts from building codes and appliance standards are so significant, and the lead times needed to effect and implement revised requirements are so long, that we recommend that work in this area should begin immediately and should not wait for completion of a long-term planning process and review." (Id. at 25.) Multiple Intervenors supports Staff's recommendation on this issue.

The Staff Report indicates that the potential savings attributable to enhanced standards and codes dwarf the savings achievable through residential and C&I efficiency programs. (See id. at 9.) Additionally, the benefit/cost ratio of achieving these potential savings (i.e., 3.6) exceeds that of most efficiency programs. (See id.) Given the limited funding proposed by Staff to pursue enhanced standards and codes during the Fast Track (i.e., $5.16 million over 2008-2009) (id. at 8), this investment strikes Multiple Intervenors as money well spent.

Importantly, Multiple Intervenors supports the pursuit of more stringent standards and codes as a means of achieving EPS goals at a lower cost to customers. In order to minimize the rate impacts associated with implementation of an EPS, the Commission should rely, to the maximum extent practicable, on national programs, modifications to standards and codes, and voluntary efforts.

Modifications to standards and codes (e.g., new construction building codes, more stringent appliance standards) are preferable to customer-funded efficiency programs for several reasons. First, modifications to standards and codes do not impact electricity rates and, therefore, would not exacerbate the State's non-competitive position in this area. Second, enhanced standards and codes likely would have a larger reach, and impact, than any single efficiency program, and possibly all planned programs combined. Third, to the extent modified standards and codes have financial costs, such costs would be borne by the beneficiaries (i.e., the entities realizing the efficiency improvements caused by the higher standards and codes), as opposed to efficiency programs, pursuant to which non-participants typically pay a large percentage of the costs.

For all the foregoing reasons, the Commission should modify the proposals and recommendations contained in the Staff Report in accordance with Multiple Intervenors' positions.

POINT II

THE FUTURE ROLE OF REGULATED UTILITIES IN ADMINISTERING EPS PROGRAMS SHOULD BE MERIT-BASED, NOT PREDETERMINED ARBITRARILY

In the Ruling, parties were directed to brief:

> the policy rationale for authorizing utility administration of energy efficiency programs in the broader context of the [EPS] proceeding, including the reasons identified in the February 11, 2008 Straw Proposal: "Utilities can bring access to end-use customers, especially mass market customers, an ability to leverage outside funding through on-bill financing, and the potential to integrate energy efficiency with overall energy resource planning."

(Ruling at 10-11; footnote omitted.) Additionally, the Ruling advised that: "Parties may also brief the advisability of the Commission establishing periodic energy efficiency targets for each utility." (Id. at 11.) For the reasons set forth below, Multiple Intervenors advocates that the role of regulated utilities in administering customer-funded efficiency programs under an EPS should be based on merit, and not predetermined arbitrarily.

Multiple Intervenors has no "favorites" when it comes to deciding which entities should administer efficiency programs under an EPS. From Multiple Intervenors' perspective, the party or parties that can administer programs most effectively and economically, thereby facilitating achievement of EPS goals at the least cost to customers, are the entities that should be authorized to administer the programs. Given the highly-aggressive EPS goal of reducing electricity consumption 15 percent by 2015, it is likely that NYSERDA and the State's regulated utilities will need to play meaningful roles in the administration of efficiency programs (along with contributions from other entities).

As a practical matter, NYSERDA probably is the entity best positioned to administer efficiency programs during the Fast Track period. NYSERDA has been implementing large-scale efficiency programs funded by the SBC for years, while many utilities have not yet started – or are just beginning – to offer similar programs. Thus, while regulated utilities should not be precluded automatically from administering programs during the Fast Track, their role in the near-future probably should be limited given NYSERDA's advantage in experience and infrastructure, as well as the compelling need to limit the cost of an EPS to customers.

Another factor hurting the utilities' opportunities to administer efficiency programs is their repeated requests for lucrative financial incentives for complying with Commission policy. Although issues pertaining to financial incentives for utilities apparently will not be addressed at this time, to the extent such incentives are authorized in the future, they would add costs to the administration of efficiency programs by utilities and possibly render those programs less cost-effective than comparable offerings from NYSERDA.

Both NYSERDA and regulated utilities seemingly possess unique characteristics that may be beneficial during the long-term administration of efficiency programs under an EPS. In addition to NYSERDA's considerable experience and in-house expertise, there should be economic and other advantages to offering certain programs on a statewide basis. Utilities, on the other hand, assumedly possess superior knowledge regarding their service territories and customers, and, consequently, may be better equipped to administer certain programs, particularly those targeted at "mass market" customers. Additionally, there may be other entities – such as municipalities and ESCOs – that are well positioned to administer certain efficiency programs and should not be precluded from fulfilling that role.

Significantly, however, regulated utilities should not be accorded, arbitrarily, a specific role in the administration of efficiency programs under an EPS. Rather, to the extent utilities desire to displace NYSERDA as administrators of certain programs, they should be required, at a minimum, to demonstrate that they are the best entities to administer such programs. For instance, why would the Commission possibly authorize a utility to administer an efficiency program if it is less cost-effective (with or without incentives) than a comparable offering from NYSERDA? Utilities should be forced to compete with NYSERDA, and other entities, for the right to administer efficiency programs. Forcing the utilities to compete, rather than assigning administrative responsibilities to them arbitrarily, should result in better utility-sponsored program offerings. Similarly, this approach also should be beneficial to the efficacy of all program offerings, because competitive pressures may cause each entity to maximize its performance if it wishes to administer customer-funded efficiency programs.

After the Commission authorizes an entity to administer an efficiency program, it is important that the program – and the administrator's performance – be evaluated rigorously. It seemingly is unavoidable that customer-funds will be allocated to NYSERDA and/or regulated utilities based on representations of the future efficacy of efficiency programs. There needs to be transparency and accountability with respect to EPS expenditures. Thus, Multiple Intervenors has no objections to the Commission "establishing periodic energy efficiency targets for each utility" (see Ruling at 11), but, significantly, such targets should not be predetermined far into the future. Rather, the Commission should select program administrators under an EPS based on the merits of their offerings, and only then establish efficiency targets for each administrator (not just utilities) based on the specific programs they have been authorized to administer.

POINT III

MULTIPLE INTERVENORS' CONCERNS REGARDING THE COST AND BILL IMPACT ANALYSES PRESENTED IN THE STRAW PROPOSAL

The Ruling directs the parties to brief "whether the program cost and bill impact figures presented in the Technical Appendix to the Straw Proposal represent a reasonable estimate of the overall cost of those elements of the 15 x 15 initiative to be achieved through utility ratepayer-funded programs and on-bill financing." (Ruling at 11.) For the reasons set forth below, Multiple Intervenors has several concerns regarding the cost and bill impact analyses set forth in the Straw Proposal.

Initially, Multiple Intervenors notes that the Judges' Straw Proposal, if adopted, would be even more expensive for customers than the proposals advanced in the Staff Report. In the Straw Proposal, the Judges proposed, inter alia, that: (a) $181,294,839 be allocated annually to NYSERDA; and (b) $146,450,047 be allocated annually to utilities. (Straw Proposal at 7-8.) Such spending – totaling almost $328 million annually – would be incremental to the existing $175 million in annual SBC funding. For the reasons detailed in Point I(E), supra, the Commission needs to control its reliance on customer-funded efficiency programs to achieve EPS goals. Existing energy rates in New York already are extremely high, and discretionary rate increases of the magnitude proposed in the Straw Proposal and the Staff Report would exacerbate the State's competitive disadvantage to the detriment of its economy, including employment levels.

Second, the Straw Proposal does not include adequate rate impact analyses. Although the Straw Proposal can be commended for advancing separate analyses for small C&I and large C&I customers,[49] the analyses presented are bill analyses – not rate analyses. The costs of an EPS, whether recovered through the SBC or a separate surcharge, would increase delivery rates. Prior to the adoption of any Fast Track expenditures, the Commission should evaluate – and customers should be entitled to review – an accurate analysis of the impact of such expenditures, in percentage terms, on existing delivery rates. Although Multiple Intervenors raised this concern regarding the Straw Proposal during the March 5, 2008 technical conference conducted in this proceeding, no additional analyses have been forthcoming.

The need for accurate delivery rate impact analyses should be obvious. Indeed, such analyses typically are performed in every utility rate proceeding, which often involve proposed rate increases that would constitute a small fraction of what is being considered here. The need for rate impact analyses is particularly strong for large C&I customers, which typically are the most energy-intensive and price-sensitive of all utility customers. Rate impacts also are needed for large C&I customers to ascertain the true impact of EPS proposals, particularly proposals that all costs be recovered on a volumetric basis. For instance, for the largest category of C&I customer analyzed, the Straw Proposal

[49] As detailed, supra, the Staff Report's failure to recognize and account for the material differences between small C&I and large C&I customers is a fatal flaw that should be remedied prior to implementation of an EPS.

calculates that of a Central Hudson Gas & Electric Corporation ("Central Hudson") monthly electric delivery bill of $34,514.89, over 15 percent (i.e., $5,241.60) is related to an increased SBC. For small and medium-sized C&I customers, the impact is under 10 percent.[50]

The Commission should refrain from approving any level of customer funding for an EPS, even during the Fast Track period, without fair and accurate bill and rate impact analyses. Such analyses should focus on delivery bills and rates, rather than attempting to minimize the appearance of such impacts through the inclusion of purely speculative commodity charge estimates. Additionally, it is imperative that the analyses recognize critical differences among customers – under no circumstances should all C&I customers be lumped together.

POINT IV

THE COMMISSION SHOULD REFRAIN FROM ALLOCATING IN ADVANCE ENERGY EFFICIENCY TARGETS AND FUNDING AMONG NYSERDA AND REGULATED UTILITIES

The Ruling directs parties to brief "the advisability of allocating in advance energy efficiency targets and funding among NYSERDA and each utility, as per the Straw Proposal." (Ruling at 11.) For the reasons set forth in Point II, supra, and below, the

[50] According to the revised appendices to the Staff Report, Staff's proposed bridging efficiency programs would result in an 8.6 percent delivery rate increase to Central Hudson's non-residential customers in 2009. (Staff Report at Attachment 3.) Multiple Intervenors suspects strongly that the percentage delivery rate increase to large C&I customers proposed by Staff – if calculated separately from small C&I customers – would be substantially greater. Indeed, a possible reluctance to publicize potential double-digit percentage delivery rate increases for certain customer classes or types resulting from an EPS may explain Staff's repeated refusals to examine small C&I and large C&I customers separately.

Commission should refrain from allocating in advance energy efficiency targets and funding among NYSERDA and the State's regulated utilities.

The Straw Proposal is flawed because it proposes allocating almost $330 million in customer funds annually between NYSERDA and utilities without regard to the relative merits of their ability to achieve EPS goals at least cost to customers. (See, e.g., Straw Proposal at 7-8.) In fact, the Straw Proposal does not even identify or describe the specific efficiency programs that would be funded by those enormous expenditures. As detailed in Point II, supra, NYSERDA, regulated utilities and other entities interested in administering EPS programs should compete on the merits to fulfill that role. Under this approach, Multiple Intervenors would expect that the manner in which EPS funds are allocated to NYSERDA, utilities and other entities for the purpose of administering efficiency programs to change over time.

Because Multiple Intervenors advocates that the Commission refrain from allocating EPS funding in advance among NYSERDA and the State's regulated utilities, it follows that the Commission also should refrain from establishing energy efficiency targets in advance. Multiple Intervenors supports strongly the need for rigorous evaluation, and accountability, with respect to the use of customer funds to support an EPS. Accordingly, each time that customer funds are allocated under an EPS to NYSERDA, utilities and/or other parties to administer programs, specific efficiency targets should be established. Those targets, however, should be reflective of the proposed programs and the specific funding levels that are authorized by the Commission.

CONCLUSION

For all the foregoing reasons, the Commission should resolve EPS issues pertaining to the Fast Track period in accordance with Multiple Intervenors' positions.

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EXHIBIT A

adopt a simplistic cost recovery methodology (i.e., a volumetric surcharge) but, instead, should evaluate more sophisticated approaches that (following a cost-based interclass allocation) recover EPS costs, as appropriate, based on number of accounts, demand and/or consumption. Such an approach would best promote intraclass equity.

For all the foregoing reasons, the EPS should be implemented in a manner that: (a) minimizes rate impacts to customers; (b) exempts NYPA allocations, flex-rate contracts and interruptible gas service from EPS surcharges; (c) promotes interregional equity; (d) promotes interclass equity; and (e) promotes intraclass equity.

POINT II

THE DESIGN OF DESIRABLE ENERGY EFFICIENCY PROGRAMS FOR LARGE C&I CUSTOMERS

Multiple Intervenors recognizes that, in order for the EPS goal to be achieved, it is likely that customer-funded efficiency programs targeted at large C&I customers will need to be implemented. This section of Multiple Intervenors' Comments details, and provides examples of, desirable design characteristics for large C&I customer efficiency programs. As an association comprising approximately 50 of the largest energy consumers in New York, Multiple Intervenors is positioned uniquely to identify such characteristics for future implementation within this proceeding, as part of Fast-Track programs and longer-term programs.

Initially, in order to evaluate the optimal design characteristics for efficiency programs targeted at large C&I customers, it is essential that the Commission first recognize some of the characteristics that differentiate large C&I customers from other customers (e.g., residential customers, small C&I customers). Those characteristics include, but are not limited to, the following: (a) large C&I customers typically are very energy-intensive, and energy often comprises a significant cost of doing business; (b) large C&I customers typically are very price-sensitive; (c) most large C&I customers are very knowledgeable about energy efficiency; (d) most large C&I customers have been implementing energy efficiency projects for years – if not decades – because it has made good business sense to do so; (e) most large C&I customers already have captured the "low hanging fruit" in terms of efficiency programs, such as lighting and motor retrofits; (f) the energy efficiency projects being undertaken now by large C&I customers generally are industry-specific, facility-specific and/or process-specific, and are the exact opposite of the "cookie cutter" type programs prevalent for residential and small C&I customers; (g) large C&I customers are extremely concerned about energy prices and, at least with respect to Multiple Intervenors members, the potential costs of the EPS; and (h) having implemented energy efficiency projects at their facilities for years, many large C&I customers also are very concerned about subsidizing projects for less-efficient customers, some of which may be business competitors.

Thus, Multiple Intervenors asserts that, for large C&I customers, the Commission should adopt energy efficiency programs that: (a) are very flexible, and facilitate customer implementation of projects specific to their business needs and facilities; (b) subject to certain exemptions that are warranted (e.g., NYPA allocations, flex-rate contracts, interruptible gas service), include a cap, or ceiling, on the amount of EPS surcharges than can be imposed on an individual customer within a 12-month period; and (c) "bank" individual customers' EPS surcharges and accords them the first opportunity to recoup them, on a dollar-for-dollar basis, to fund their own efficiency projects. If, arguendo, this type of "banking" program is not implemented, the Commission should adopt a competitive solicitation approach, similar to that in effect in Texas. Moreover, to the extent the Commission directs the implementation of "cookie cutter" type efficiency programs for large C&I customers, those customers unable to participate actively therein should be permitted to "opt out" of both the programs and the program expenses. Each of these design characteristics is discussed in more detail below.

A. Large C&I Customer Efficiency Programs Should Be Extremely Flexible

Most large C&I customers already have implemented the most basic of energy efficiency improvements (e.g., lighting, motors). For instance, Staff acknowledges in its Preliminary Proposal that certain efficiency programs targeted at C&I customers use 34.6% of the SBC funding, but are responsible for 76% of the energy savings. (Preliminary Proposal at 51.) "Cookie cutter" type programs designed to serve the masses no longer satisfy the needs of large, energy-intensive C&I customers. In order to maximize incremental energy efficiency from large C&I customers, programs must provide sufficient flexibility to allow customers to implement unique efficiency projects specific to their industries, facilities and/or processes. One of the most frustrating aspects of existing efficiency programs for many Multiple Intervenors members is that the targeted efficiency improvements already have been undertaken and/or incremental opportunities pale in comparison to the costs being imposed to fund such programs.

In order to maximize future energy efficiency from the large C&I sector, efficiency programs implemented hereinafter should be extremely flexible, and facilitate the undertaking by customers of efficiency projects specific to their particular needs and circumstances. Rigid program requirements that, inter alia, limit eligibility to certain types of equipment or products and/or make customers "jump through hoops" that are administratively burdensome should be avoided.

B. Subject to Certain Customer Exemptions, EPS Surcharges Should Be Capped Annually for Large C&I Customers

For the reasons set forth in Point I(B), supra, it is essential that NYPA allocations, flex-rate contracts and interruptible gas service be exempt from any EPS surcharges. Subject to those exceptions, and a proposed "opt out" election if "cookie cutter" type efficiency programs are implemented, it is imperative that EPS surcharges be capped annually for large C&I customers. Even before the implementation of an EPS that ultimately may cost customers billions of dollars, New York's energy prices are among the highest in the nation and have a significantly-detrimental impact on the State's economic development efforts. In addition to raising rates, the EPS may create tremendous uncertainty for large C&I customers making decisions about whether to come to or leave New York, or to shift production to or from the State. Adoption of an annual cap on EPS surcharges for non-exempt large C&I customers would be extremely beneficial because it would: (a) limit the potential rate impacts from the EPS to a pre-determined level; and (b) eliminate the tremendous uncertainty that exists today regarding the maximum rate impacts likely to stem from this proceeding. Importantly, the adoption of an annual cap on surcharges is not unprecedented and, in fact, several states already have such caps in place.

1. New Mexico

In 2007, the New Mexico Legislature enacted statutes designed to promote renewable energy and energy efficiency.[40] Although the legislation requires electric suppliers to participate in energy efficiency, the suppliers are permitted to recover their costs by imposing special fees on their customers. Importantly, however, those fees are limited. A public utility may recover the costs associated with energy efficiency and load management programs as set forth in a tariff rider, but that rider is limited to "the lower of the commission's approved tariff for that customer's bill or seventy-five thousand dollars ($75,000) pear year."[41]

2. Nevada

Nevada employs a "Universal Energy Charge," which is used to fund numerous activities and other funds, including the Fund for Energy Assistance and Conservation.[42] Significantly, Nevada limits the Universal Energy Charge for a retail customer to $25,000 per quarter.[43] If a customer pays more than $25,000 per quarter, that customer is entitled to a refund of the excess amount.[44]

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[40] See S. 418, at 1 (N.M. 2007).

[41] N.M. Stat. Ann. § 62-17-6(A). For large customers, the commission cannot approve an increase from this cap without the customer's consent. Id. The $75,000 cap existed prior to the most recent legislation.

[42] Nev. Rev. Stat. Ann. § 702.250(1).

[43] Nev. Rev. Stat. Ann. § 702.160(5).

[44] Id.

3. Illinois

Illinois enacted legislation in 2007 that in part sets forth requirements for energy efficiency and demand response programs.[45] The legislation calls for incremental energy savings starting in 2008. Utilities must implement those energy efficiency and demand response programs. The cost of those programs are capped, however, at a 0.5% rate impact in any one year, with an overall maximum rate increase of 2%.[46]

Thus, Multiple Intervenors urges the Commission to adopt an annual cap on EPS surcharges for non-exempt large C&I customers. In light of New York's already-poor competitive position vis-à-vis other states in terms of energy prices, the per customer cap on EPS surcharges should be less than those implemented in New Mexico, Nevada and Illinois. From Multiple Intervenors' perspective, it is difficult to justify imposing more than $25,000 per year in additional EPS-related surcharges on any customer, let alone a large C&I customer struggling to conduct business in a high-priced state.[47]

C. Customers Subject to EPS Surcharges Should Be Accorded the Opportunity to Use That Money to Fund Energy Efficiency Projects

Multiple Intervenors' strongest recommendation concerning customer-funded large C&I energy efficiency programs is that customers be permitted to "bank" any EPS surcharges and be accorded the first opportunity to recoup that money, on a dollar-for-dollar

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[45] American Council for an Energy-Efficient Economy, *Energy Efficiency Resource Standards Around the U.S. and the World*, Sept. 2007.

[46] Id.

[47] In evaluating the appropriate level for an annual cap on EPS surcharges, the Commission should be cognizant that most large C&I customers already are subject to non-competitive energy prices, the SBC, the RPS surcharge, and energy-related taxes.

basis, to fund their own efficiency projects.[48] Such projects would be subject to mandatory verification procedures.

This "banking" approach accomplishes many beneficial purposes. First, because large C&I customers are accorded an opportunity to recoup their money, the ultimate cost to customers should be reasonable. Second, by allowing customers to "bank" the EPS surcharges for their future use (for some reasonable amount of time), the issue of intraclass subsidies – and customers potentially subsidizing their competitors – is addressed satisfactorily. Third, because customers' ability to recoup money paid in response to EPS surcharges is contingent upon them completing efficiency projects at their own facilities, customers should be strongly motivated to undertake projects in furtherance of the EPS goal. Fourth, inasmuch as this approach provides customers with broad discretion to implement efficiency projects specific to their industries, facilities and/or processes, maximum flexibility is achieved, and customers that have pursued efficiency projects on their own would not continue to be "shut out" of limited program offerings that do not address their organization's specific needs. Set forth below are some examples of this type of approach being implemented by other states.

1. New Mexico

As discussed, supra, the New Mexico Legislature established a program to promote renewable resources and energy efficiency. Pursuant to this program, electric

[48] This approach is not intended to supersede customer exemptions that, as demonstrated, supra, are warranted for economic development purposes and should be adopted in this proceeding.

utilities are authorized to recover their costs from customers.[49] Significantly, however, New Mexico also provides an exemption for customers who have "self-directed programs."[50] A large energy customer "shall receive approval for a credit for and equal to the expenditures that customer has made at its facilities on and after January 1, 2005 toward cost-effective energy efficiency and load management."[51] The utility, or a "self-direct program administrator" that is approved by the commission, first must approve the expenditures.[52] Once approved, the customer receives a credit that "may be used to offset up to seventy percent of the tariff rider" used to set forth the utility's fees to recover its costs.[53]

2. Minnesota

Minnesota permits a large energy customer to exempt itself out of contributing toward a utility's energy efficiency expenditures under the New Generation Energy Act of 2007. The customer must petition the commission and prove that: (a) there are "competitive or economic pressures on the customer"; and (b) the customer must demonstrate "reasonable efforts to identify, evaluate, and implement cost-effective conservation improvements at the facility."[54] Although the utility must spend 1.5% of its "gross operating revenues" on energy

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[49] S. 418, at 1 (N.M. 2007).

[50] N.M. Stat. Ann. § 62-17-9 (2007).

[51] Id. at § 62-17-9.A.

[52] Id. at § 62-17-9.C.

[53] Id. at § 62-17-9.A.

[54] Minn. Stat. § 216B.241(b).

conservation efforts, those "gross operating revenues" do not include revenue generated from the exempted large electric customers.[55]

3. North Carolina

In 2007, North Carolina enacted a law establishing a renewable energy and energy efficiency portfolio standard.[56] Pursuant to that law, electric utility companies are allowed to recover from customers the costs associated with new DSM and energy efficiency projects.[57] Importantly, a large electric customer may elect an exemption from contributing to the utility's cost recovery if the customer has "implemented at any time in the past or, in accordance with stated, quantified goals for demand-side management and energy efficiency, will implement alternative demand-side management and energy efficiency measures."[58]

4. Wisconsin

Wisconsin similarly requires its energy utilities to invest in energy efficiency programs.[59] Accordingly, the utilities impose surcharges on their customers to recover the programs' costs. Large energy customers, defined as customers "that [have] an energy demand of at least 1,000 kilowatts of electricity per month ... [and are] billed at least

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[55] Id. at § 216B.241(a).

[56] N.C. Session Law 2007-397, S. 3.

[57] N.C. Session Law 2007-397, S. 3, at 8-9 (codified as N.C. Gen. Stat. § 62-133.8(d) (2007)).

[58] Id. (codified as N.C. Gen. Stat. § 62-133.8(f)).

[59] Wis. Stat. § 196.374(3)(b)2 (2007).

$60,000 for electric service [in a month],"[60] are permitted to pay for their own energy efficiency programs instead of paying for the utilities' programs. Wisconsin law provides that:

> A customer of an energy utility may, with commission approval, administer and fund its own energy efficiency programs if the customer satisfies the definition of a large energy customer for any month in the 12 months preceding the date of the customer's request for approval. A customer may request commission approval at any time. *A customer that funds a program under this paragraph may deduct the amount of the funding from the amount the energy utility may collect from the customer* under sub. (5)(b). If the customer deducts the amount of the funding from the amount the energy utility may collect from the customer under sub. (5)(b), the energy utility shall credit the amount of the funding against the amount the energy utility is required to [invest in energy efficiency programs].[61]

Thus, several states, in recognition of concerns similar to those advanced herein by Multiple Intervenors, permit large C&I customers to "bank" or obtain exemptions from energy efficiency related surcharges, provided that such customers implement efficiency projects at their facilities. For those large C&I customers not exempt from EPS surcharges for compelling economic development reasons (e.g., NYPA allocations, flex-rate contracts, interruptible gas service), this approach would be highly beneficial and should be adopted by the Commission on a Fast Track and longer-term basis.

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[60] Id. at § 196.374(1) (em).

[61] Id. at § 196.374(2)(c) (emphasis added).

D. If, Arguendo, the "Banking" Approach Described Above Is Not Adopted, a "Standard Offer" Program Similar to That Implemented in Texas Should Be Adopted for Large C&I Customers

For the reasons detailed above, Multiple Intervenors urges the Commission to adopt a "banking" approach for non-exempt large C&I customers. If, arguendo, such an approach is not adopted herein, the Commission alternately should approve a "Standard Offer" program for non-exempt large C&I customers, similar to that implemented currently in Texas.

Texas requires that "each electric utility will provide, through market-based *standard offer* programs or limited, targeted, market-transformation programs, incentives sufficient for retail electric providers and competitive energy service providers to acquire additional cost-effective energy efficiency equivalent to at least 10 percent of the electric utility's annual growth in demand."[62] Further, those standard offer programs "must be neutral with respect to technologies, equipment, and fuels, including thermal, chemical, mechanical, and electrical energy storage technologies."[63] Customers with a maximum demand of more than 100 kW are eligible to participate in the program. Pursuant to the Standard Offer Program, eligible customers propose to the utility the energy efficiency measures that they intend to implement. The utility then provides financial incentives based

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[62] Texas Utilities Code § 39.905(a)(3) (2007) (emphasis in original).

[63] Id. at § 39.905(c).

on the customers' proposals, which are tailored to their specific needs. Customers must propose and implement verification measures to assess actual energy savings accurately.[64]

Some of the general rules and eligibility requirements of the Texas Standard Offer Program include the following: (a) projects can include new construction or retrofits; (b) incentives only are paid for verified energy and demand savings; (c) a single customer may not receive more than 20% of the annual incentive budget; (d) similar sites with similar measures may be combined as a single project; (e) savings must be achieved through increases in energy efficiency; (f) measures must have a useful life of at least ten years; and (g) installed measures must exceed minimum equipment efficiency standards.[65] Recent financial incentives paid to winning customers included $175 per kW reduction and $0.06 per kWh saved.[66]

While the "standard offer" approach does not address fully the issue of intraclass subsidies, because invariably some large C&I customers would receive financial incentives while others would not, the approach would achieve the following benefits: (a) customers would be accorded an opportunity to recoup their EPS surcharges – and possibly more – by implementing energy efficiency projects; (b) customers would have the flexibility to propose projects that meet their particular needs; and (c) customers would have a strong financial motivation to propose and, for those customers whose proposals are accepted, undertake efficiency projects in furtherance of the EPS goal. Thus, while the "banking"

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[64] See American Electric Power ("AEP"), Overview of AEP's Commercial & Industrial Standard Offer Program, http://www.aepefficiency.com/cisop/intro/index.htm. Other electric utilities in Texas offer similar programs.

[65] See, e.g., http://www.centerpointcisop.com.

[66] Id.

proposal detailed, supra, would be optimal for large C&I customers, the "standard offer" approach is worthy of serious consideration in the alternative.

E. Large C&I Customers Should be Permitted to "Opt Out" of Certain Efficiency Programs

The "banking" and "standard offer" approaches advanced above would be far preferable for large C&I customers than the "cookie cutter" type DSM programs prevalent in the past. Adoption of Multiple Intervenors' recommendations in this regard would facilitate incremental efficiency projects and accord customers substantial flexibility while, at the same time, addressing many of the cost-related concerns detailed herein. If, however, the Commission approves the implementation of efficiency programs for large C&I customers that are more narrow in scope (i.e., dependent upon specific types of improvements or equipment), then customers should be accorded the ability to "opt out" of those programs, including the recovery of program costs.

An "opt out" election has been incorporated into DSM programs previously in New York – as detailed in Point I(D), supra – primarily in recognition of the fact that large C&I customers typically are very knowledgeable about energy efficiency and, in many cases, already have undertaken the "basic" efficiency projects. Large C&I customers that have a record of undertaking energy efficiency projects should not be forced to fund programs from which they can derive little or no benefit.

Multiple Intervenors' recommendations with respect to large C&I efficiency programs should be accorded substantial weight by the Commission. As the only active party representing the interests of numerous large customers, Multiple Intervenors has advanced recommendations that address its members' cost-related concerns and desire for maximum flexibility while, at the same time, also should result in substantial energy efficiency projects being undertaken.

CONCLUSION

For all the foregoing reasons, Multiple Intervenors' positions should be adopted with respect to: (a) cost-related issues; and (b) the design of EPS programs targeted to large C&I customers. With respect to cost-related issues, the Commission should: (a) minimize the rate impacts of the EPS on customers; (b) exempt NYPA allocations and flex-rate contracts from any EPS surcharges; (c) allocate EPS costs in a manner that promotes interregional equity; (d) allocate EPS costs in a manner that promotes interclass equity; and (e) recover EPS costs in a manner that promotes intraclass equity. With respect to EPS programs targeted to large C&I customers, the Commission should: (a) maximize the flexibility of the programs; (b) institute a per customer cap on EPS surcharges; and (c) implement programs that allow customers implementing energy efficiency programs to recoup, dollar for dollar, their contributions to the EPS or, in the alternative, implement a standard offer program that pays customers for implementing energy efficiency projects that achieve verified energy consumption reductions.

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