

VIA HAND DELIVERY

April 8, 2005

Jaclyn A. Brillling
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: CASE 05-M-0090 – In the Matter of the System Benefits Charge III.

CASE 03-E-0188 – Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard.

Dear Secretary Brillling:

Pursuant to the two Notices Seeking Additional Comments, both dated April 1, 2005, please accept this letter as comments to be submitted in each of the above-captioned proceedings.

These additional comments have been requested in order to address a budget item, passed by both houses of the State Legislature, which would authorize and require the Governor of New York to propose a Fiscal Year 2006-2007 budget appropriation of dollars associated with assessments collected for the purpose of public policy energy programs. Parties in each of the above-captioned proceedings have been requested to submit comments “on the impact of the proposed budget amendment language on the continuation and scope of the SBC [System Benefits Charge] program” and/or “the potential impact of the proposed budget amendment language on the implementation and administration of the RPS [Renewable Portfolio Standard] program”.

In addition, the Notices stated that all comments are to be received by the Public Service Commission Secretary by April 8, 2005, and parties are forewarned that no extensions of such deadline will be granted. This thereby presumes that parties who wish to be heard on such issues must respond no later than that date.

Procedural Issues

The origin of the budget language at issue rests in a recommendation by a Budget Conference Subcommittee Report, dated March 21, 2005, which stated the joint Senate-Assembly Article VII budget bill language “[i]nclude language requiring the Executive to appropriate monies for

the Systems Benefit [sic] Charge in the State budget beginning in SFY 2006-07.” This recommendation was issued as a result of several publicly-held meetings of the subcommittee in March of this year. The language ultimately agreed to by the Senate and Assembly was printed in Senate Bill Number 3669/Assembly Bill Number 6843 at Part H, subsection 2. The seemingly broader language agreed to by both houses of the legislature, which references “public policy energy programs,” is reprinted – with emphasis – in each of the April 1 Notices.

The Senate and Assembly passed their respective bills, which were presented to the Governor on March 31, 2005. Notwithstanding other issues or arguments, the Governor has the authority to veto such provision within 10 days upon presentation by the State Legislature. That veto must be exercised by April 12, 2005.

This last statement is essential. The budget provision at hand may still be affirmatively rejected by the Governor by veto. Upon such rejection, that provision does not become effective law, unless that veto is subsequently overridden by the State Legislature.

In the midst of this veto period, the April 1 Notices were issued, containing an extraordinarily rapid response time. In fact, that response time – with no consideration for extensions – will permit the receipt of comments by the agency prior to the expiration date of the Governor’s veto power. Considering that the Governor is still able to veto the provision, the need for the Commission to collect comments from parties in this administrative proceeding, presumably to advance this issue in these proceedings, is premature. The political decision-making process may well prove that collection of these comments – not to mention the speed with which such comments are to be collected – to be unnecessary.

Purpose of the Comments

Neither Notice contained an explanation of why such comments are immediately necessary for the continuation of the two listed proceedings. It is unclear what, if any, action the Commission might take that would have a direct impact on the Legislature’s action, or any potential action the Governor may take with respect to this budget item. In addition, the effective time period of the budget item is not until next fiscal year (beginning April 1, 2006). Thus, while a budget appropriation of these funds is therefore appropriately discussed in the ongoing proceedings of both these cases, most especially in the discussions of the structure and duration of SBC III, the immediacy of the collection of these comments is unclear.

In short, why have these comments been requested and why are they being collected so quickly?

One concern is that these collected comments will somehow be used to support a possible veto decision by the Governor. This would be a very unfortunate outcome. Certainly there has been ample opportunity for individuals, interest groups and organizations to voice their support or opposition through traditional political (i.e. lobbying) channels. This would be an appropriate activity, considering the nature of the political process.

What would be unfortunate would be to hear that the objective administrative process, wherein agency decision-making is designed to occur outside the political process, has been compromised. That compromise would be noted in the transfer or summary of the collected comments, of whatever substantive position, to political decision-makers in the Governor's office prior to the April 12 veto deadline.

Further, if the Commission felt the need to render a statement on any particular bill or legislative activity, it is fully within the capability of the Commission or the Department (of Public Service) to voice its opinion on any such activity. The Department has a legislative affairs office and regularly, and appropriately, discusses issues with the Legislature on a wide array of utility issues.

However, it would be wholly inappropriate for an administrative proceeding to be used as a vehicle to amass public comment – whether in support or opposition – on any particular legislative proposal or activity, or to support or oppose a political activity. Any and all comments or evidence collected in the course of an administrative proceeding should be reserved solely for the purpose of creating a record of decision-making with respect to the specific issues of concern raised in that administrative proceeding.

Thus, to alleviate any such concerns or misperceptions, and to protect the neutrality of the proceedings, I ask that the Commission issue a statement detailing: 1. why the comments have been solicited on such an immediate basis, taking into account that the budget item at hand is not fully effective by the comment due date; and 2. whether the received comments will be transferred to, shared with, summarized for, or in any other way provided to any person or persons in the Governor's office prior to April 12, 2005. In addition, the most recent Active Parties List, dated March 10, did not contain any representatives from the Governor's office. I also ask the Commission to state whether such Active Party List has been updated since March 10 to include a representative for the Governor's office, or whether the electronic "listserve" for this proceeding includes a representative for the Governor's office.

Future Discussions

In my earlier comments submitted in the SBC III case, which were timely submitted to the Secretary on March 4, the issue of the need for legislated authority for the SBC was raised. No determination has yet been issued by the Commission whether this issue, or any other issue raised by any party, would be specifically discussed or dismissed during the course of the proceedings. The April 1 Notices have made a determination that issues regarding a legislated SBC are now a subject for discussion and consideration within the course of that proceeding, if not in both proceedings. I welcome the opportunity to begin this discussion in the context of these proceedings, to hear all the arguments, and to hear if there exist any one or more issues which give rise to the need to bypass the legislative process in the collection of revenues from the public. Further, and considering that my previous comments had recommended discussion of this issue in the course of this proceeding and the limited time to discuss the merits of the issue, I reserve the right to comment on any further issues not addressed in this letter.

That said, I must argue one point from comments that I have already heard: that budget appropriated funds for similar programs in other states have been “raided” for use in other government-funded programs. Such argument cannot be used as evidence in these proceedings. Merely because other states have found the need to access SBC or RPS dollars for non-program purposes, such argument is not determinative that New York will act in the same fashion. Such argument and/or evidence should only be permitted in this proceeding if it is accompanied by the history of every other of the over 20 states that have implemented such programs and the frequency with which such funds have been “raided” for other governmental programs. Only by such comparison can the appropriate weight be given to arguments that budget appropriation of public policy energy programs jeopardizes the flow of dollars to support those programs.

It would not be appropriate for me to provide an explanation or justification for the budget appropriation language in the context of comments submitted in these administrative proceedings. However, as noted in the Assembly Budget Resolution (C322, appended report pg. 62-1) supporting an appropriated SBC, I will state that the underlying purpose for the inclusion of the public policy energy programs monies as a budget appropriation is to bring to light, and to the full discourse of state policy-making, the revenues and allocations associated with these public policy energy programs. It is certainly not this legislator’s intent that the budget process be used as a means to kill these programs and the valuable purpose that they serve. To presume that the creation of an SBC budget appropriation demonstrates any intent that the Legislature does not value these programs would be untrue.

Conclusion

I remain concerned that there may exist unspecified motives why these comments have been solicited. This concern stems from the unspecified need for a very fast response, with no consideration for extensions. The time period in which these comments are due, prior to the Governor’s veto deadline, is highly suspect, especially considering the status of the two proceedings at hand. The RPS proceeding has moved onto the implementation phase, and the SBC III proceeding has not even yet had its first all-parties meeting. Certainly if the budget appropriation provision is not vetoed, the issue will merit discussion in both proceedings. However, it is unclear how the two proceedings are immediately affected by this pending budget item.

Incredibly, there has been a considerable degree of lobbying on the issue to date – and which is the right and privilege of any citizen or organization with an interest in any issue before the Legislature or Executive. Why these cases needed to be specifically opened to compile a record of the concerns of the parties participating in these cases is not satisfactorily addressed in the Notices, or in any other communications. I further note, that the comments collected here are only the comments of the parties in these cases. They do not, therefore, necessarily represent the entire range of opinions and concerns of the public at large.

In addition, aside from the purpose of collection comments for this proceeding, I am hopeful that the April 1 Notices were also not designed to galvanize Active Parties to provide opinions outside the administrative process. It will not be beneficial to the process if it is found that

parties addressing comments for submittal here, are then re-addressed to the Governor for use as a separate lobbying device. Whether this would be the intended result of these Notices or not, it will certainly create a perception that the administrative process was used to galvanize political lobbying activity. This unfortunate outcome may, in fact, provide further evidence supporting the argument that additional legislative oversight of the public policy energy programs has become a necessity.

I look forward to continued participation in these administrative proceedings.

Respectfully submitted,

A handwritten signature in black ink that reads "Paul D. Tonko". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Paul D. Tonko
Chairman
Assembly Standing Committee on Energy

cc: SBC listserv via e-mail