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March 4, 2005

VIA HAND DELIVERY

Hon. Jaclyn Brilling
Secretary
State of New York Public
Service Commission
Three Empire State Plaza, 14th Floor
Albany, New York 12223-1350

Re: Case 05-M-0090: In the Matter of the System Benefits Charge III

Dear Secretary Brilling:

In accordance with the "Notice Soliciting Comments," issued on January 28, 2005 in the above-captioned proceeding, Multiple Intervenors hereby files an original and 15 copies of its comments. Electronic service on the parties to this proceeding will be effectuated by using the e-mail list server.

Very truly yours,

COUCH WHITE, LLP

Barbara S. Brenner

Barbara S. Brenner

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the System Benefits Charge III | **Case 05-M-0090**

INITIAL COMMENTS OF MULTIPLE INTERVENORS

Dated: March 4, 2005

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PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of approximately 55 large commercial and industrial energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its Comments in accordance with the "Notice Soliciting Comments" ("Notice") issued by the New York State Public Service Commission ("Commission") on January 28, 2005 in Case 05-M-0090, *In the Matter of the System Benefits Charge III*. As set forth in more detail herein, the current system benefits charge ("SBC") program should *not* be extended beyond the June 30, 2006 expiration date because: (1) market-driven initiatives and other utility programs are providing the SBC services; and (2) the SBC increases the price of electricity for all consumers, disproportionately impacting large commercial and industrial consumers upstate. However, if, *arguendo*, the Commission decides to extend the SBC program, the Commission should: (1) limit the program and funding for the program to consumers located geographically within New York Independent System Operator ("NYISO") Zone J; or (2) if the SBC program is not geographically limited, but is imposed on a statewide basis, all industrial customers should be exempt from the SBC.

STATEMENT OF POSITION

The Commission has instituted this proceeding because it is revisiting the SBC program to determine whether the SBC program should be continued and, if so, the appropriate funding levels for the program. (Notice at 1.) Multiple Intervenors urges the Commission not to continue the SBC after the current program expires on June 30, 2006. The SBC is a government-mandated program that subsidizes goods and services that can be and, indeed, are being provided in the competitive marketplace. It is a hidden tax imposed not by the Legislature, but by the Commission. Instead of imposing an SBC surcharge on electric customers, the Commission should encourage customer choice and market-driven initiatives.

Moreover, there is no evidence that the SBC programs need to be continued. For instance, the NYISO's demand response programs, which are voluntary, market-based programs, have been successful. Without the SBC, those programs will continue. Moreover, the private sector has pursued energy-related energy efficiency and research and development. There is no need to fund renewable resources through the SBC because the renewable portfolio standard ("RPS") will provide subsidies for renewable generation. The Long Island Power Authority ("LIPA") and the New York Power Authority ("NYPA") have significant energy efficiency programs that are not funded by the SBC.[1]

The Commission can be proactive without extending the SBC program beyond its current expiration date. The Commission should continue to encourage increased demand responsiveness through other market driven approaches, such as real time or on-peak/off-peak pricing for all consumers. Through exposure to accurate price signals, consumers will be encouraged to reduce demand during peak periods. These market driven approaches encourage load responsiveness, without increasing the price of electricity in New York State.

[1] As to low-income programs, the market may not be providing these services. But, if the market will not provide these services, other sources of funding should be explored. Moreover, all or virtually all of the State's regulated utilities already offer rate discounts to low-income consumers separate and apart from the SBC program through Commission adopted rate plans.

The problem in New York State has been, and continues to be, that retail electricity prices are too high. Electricity prices in New York are well above the national average, and are higher than prices paid in other states that compete with New York in attracting business.[2] Consequently, the State has concluded as a matter of policy that "[e]nergy prices need to be brought more in-line with other states to compete more effectively for economic opportunities."[3] The SBC raises the price of electricity in New York State and, as demonstrated herein, has a disproportionate impact on large commercial and industrial consumers, especially in upstate. This is inconsistent with the State's economic development goals.

Nonetheless, if, *arguendo*, the Commission decides to extend the SBC program beyond June 30, 2006, Multiple Intervenors urges the Commission to adopt a more limited SBC. The SBC program should be funded by and provide services only to customers located in NYISO Zone J.[4] Zone J needs demand response programs. If the Commission so determines, the SBC program could supplement the funding for energy efficiency programs that are included in the pending Con Edison rate case settlement.

Alternatively, if the Commission, *arguendo*, decides to continue the SBC on a statewide basis, Multiple Intervenors urges the Commission to: (1) reduce the level of SBC

[2] New York State Energy Plan and Final Environmental Impact Statement (June 2002) ("State Energy Plan") at 2-26 – 2-27.

[3] *Id.* at 2-37.

[4] Zones J and K are the only two regions in the State that need additional capacity, but LIPA is not subject to the Commission's jurisdiction. The rest of the State does not need additional capacity.

spending; and (2) exempt all industrial consumers from the SBC, including, but not limited to, the currently exempt NYPA customers and flex contract customers. These customers are the backbone of the upstate economy and need lower-priced electricity now.

BACKGROUND

On May 20, 1996, the Commission issued Opinion No. 96-12, setting forth its vision and goals for the future regulatory regime.[5] The Commission stressed that its vision includes "reduced prices resulting in improved economic development for the State as a whole" as well as "effective competition in the generation and energy service sectors."[6] The Commission also stated that "... necessary public programs will be funded and carried out if they are not otherwise provided by the market."[7]

The guidance provided by the Commission as to the SBC is as follows:

> A System Benefits Charge would provide a funding source during the transition, and possibly over the long term, for public policy initiatives that are not expected to be adequately addressed by competitive markets. It would be designed to ensure that the cost of carrying out these public policy initiatives was fairly allocated across most, if not all, users of the power distribution system ....
>
> In light of the potential benefits, a System Benefits Charge should be put in place during the transition to retail competition.

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[5] Case 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion No. 96-12, "Opinion and Order Regarding Competitive Opportunities for Electric Service" (issued May 20, 1996) at 24 (hereinafter "Opinion No. 96-12").

[6] Opinion No. 96-12 at 24.

[7] *Id*. at 25.

> The use of a System Benefits Charge should be revisited sometime after retail competition has commenced to determine whether the level of these programs is sufficient and whether the continued use of a System Benefits Charge is required.[8]

The Commission identified the public policy initiatives as "energy efficiency, research and development, environmental protections, and low-income [programs] beyond what competitive markets provide."[9]

On January 30, 1998, the Commission issued Opinion No. 98-3, establishing the policies and administrative structure for the SBC as a means of continuing certain public policy programs during the transition to a competitive market.[10] The Commission stated that the goal of the SBC-funded energy efficiency service programs is "[t]o promote competitive markets for energy efficiency services …."[11] As to research and development programs, the Commission specifically stated that "[i]n the long run, generation companies (GENCOs) and ESCOs and their major suppliers are expected to perform generation and end-use research."[12] The Commission determined that the use of these SBC funds should be limited to continuing to preserve specific programs that may not be addressed adequately by competitive markets during the transition to competition – namely, energy efficiency projects, public benefit

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[8] *Id*. at 56-57.

[9] *Id*. at 27.

[10] Case 94-E-0952, *supra*, Opinion No. 98-3 "Opinion and Order Concerning System Benefits Charge issues" (issued January 30, 1998) at 5 (hereinafter, "Opinion No. 98-3").

[11] *Id.* at App. A at 1.

[12] *Id*. at 2.

research, development and demonstration projects, low-income energy efficiency projects and environmental protection projects.[13]

On January 26, 2001, the Commission issued an "Order Continuing and Expanding the System Benefits Charge for Public Benefit Programs." At the time, the Commission issued the 2001 SBC Order, it noted that the NYISO still was developing price-sensitive load programs.[14] The Commission also noted in 2001 that the competitive markets had not yet made energy services more affordable for low-income customers or delivered "appropriate research and development programs." According to the Commission, "[m]any barriers to the provision of these services by the marketplace remain …."[15] Accordingly, the Commission extended the SBC for an additional five years from July 1, 2001 to June 30, 2006. And, beginning with calendar year 2001, the Commission increased substantially the annual level of overall SBC funding from approximately $78.1 million to $150 million.[16]

On January 28, 2005, the Commission issued the Notice instituting this proceeding. In this proceeding, the Commission will determine whether the SBC program should be continued after June 30, 2006 and, if so, the appropriate funding level.

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[13] *Id*. at App. A.

[14] Case 94-E-0952, *supra*, "Order Continuing and Expanding the System Benefits Charge for Public Utility Programs" (issued January 26, 2001) at 6 (hereinafter, "2001 SBC Order").

[15] *Id.*

[16] *Id. at 26.*

ISSUES IDENTIFIED IN THE COMMISSION'S NOTICE SOLICITING COMMENTS

1. To what extent have the goals and objectives established by the Commission been achieved?

Based on the Commission's orders addressing the SBC, it appears that the Commission envisioned that an increasingly-competitively electric industry would provide the services that currently are funded by the SBC. However, the Commission did not establish specific SBC program objectives or targets, in terms of demand (kw) or energy (kwh) savings.

According to the "New York Energy Smart Program Evaluation and Status Report," prepared by the New York State Energy Research and Development Authority ("NYSERDA") and a team of evaluation contractors, more of the SBC-type services are being provided by the marketplace. Thus, as envisioned by the Commission, NYSERDA has used SBC funds to jump start competitive energy efficiency markets. The Evaluation Report also indicates that electricity customers have more choices available today among electricity commodity providers and energy efficiency services than ever before. And, all customers now can choose among multiple energy services providers.[17]

The market also clearly is providing demand response programs, as evidenced by the success, demonstrated *infra*, of the NYISO's demand response programs. The private sector is pursuing energy efficiency. The objective of increasing the amount of renewable

[17] New York Energy Smart Program Evaluation and Status Report, (May 26, 2004) at ES-31 (hereinafter "Evaluation Report").

resources in New York will be achieved through the RPS and no longer requires SBC funding. Thus, the goals and objectives of the Commission appear to have been achieved.

2. Should the SBC program continue beyond its current expiration date of June 30, 2006? If so, for what duration should the SBC be extended and at what funding level?

Multiple Intervenors urges the Commission not to extend the SBC program beyond its current expiration date of June 30, 2006. SBC-type services are being provided by the marketplace and other programs. The NYISO's demand response programs and competitive energy efficiency programs demonstrate that the SBC is no longer needed.

Moreover, New York's economy continues to lag behind the rest of the nation. The upstate economy is in a particularly poor economic condition, with record loss of manufacturing jobs, a sector that traditionally has been the mainstay for the upstate economy. The cost of doing business in the State far exceeds the national average, and the high price of electricity has a negative impact on economic development. New York has one of the highest tax burdens on its residents and the state has one of the lowest population growth rates in the nation. New York needs to lower the price of electricity now. Elimination of the SBC would reduce the cost of electricity in a meaningful way, particularly for energy-intensive industries, such as manufacturers, that the State should be working to attract and retain. The SBC increases the price of electricity, thereby increasing the cost of doing businesses in New York State.

a. Market-driven initiatives should replace the SBC programs

(i) The NYISO's demand response programs are highly successful

The NYISO's demand response programs are market-driven demand response programs that demonstrate that SBC subsides are not needed. The NYISO currently has three demand response programs. One program is the Emergency Demand Response Program ("EDRP"), in which participants are asked to curtail with two or more hours notice when emergency system conditions are anticipated. The participants are guaranteed a minimum price of $500/MWh for verified load reductions during such events. The second program, the Installed Capacity/Special Case Resource ("ICAP/SCR") program, allows participants to sell their load reduction capability as ICAP in exchange of a guarantee to curtail when called upon. The third program, the Day Ahead Demand Response Program ("DADRP"), allows end-use customers to offer demand reduction bids into the NYISO day-ahead electricity market as supply resources and receive market-clearing prices for scheduled curtailments.

Neenan Associates conducted a study of the NYISO's 2003 demand response programs.[18] According to the PRL Study, in 2003, the EDRP provided 854 megawatts; the ICAP/SCR provided 850 megawatts; and the DADRP provided 411 megawatts.[19] The PRL

[18] Neenan Associates, "A Study of NYISO 2003 PRL Program Performance" ("PRL Study").

[19] *Id.*.

Study concluded that the NYISO's demand responses programs were very successful and provided New York State with significant reliability benefits.

Proportionally, the NYISO has the largest amount of demand response out of its three neighboring Northeast ISOs, on both a percentage of ICAP and a percentage of required installed reserves basis.[20] The programs encouraged participation by providing customers with meaningful, market-based compensation. The NYISO demand response programs will continue in the future and are not dependent on the continuation of the SBC.

(ii) Voluntary initiatives producing significant results

Corporations throughout the country have made energy conservation a high priority corporate issue. The Alliance to Save Energy has highlighted the programs of a few of the corporations. One company, Kimberly Clark Corporation, had an energy conservation plan for 1995-2000. It then initiated a second five-year plan, which seeks to expand on the success of the 1995-2000 plan. The first plan led to a corporate-wide reduction in energy use of 11.7% per ton of product.[21] Similar gains are expected for the 2000-2005 period.

Frito-Lay's corporate energy management also has engaged in aggressive energy reduction, with a focus on results. Through 2002, Frito-Lay's initiative has resulted

[20] ISO Power Trends New York's Success and Unfinished Business, May, 2004 at 34 (hereinafter "ISO Power Trends Report")

[21] Alliance to Save Energy, "Benchmarks that Measure Success: Corporate Energy Management."

in a 12% reduction in electricity consumption per pound of product.[22] The story is the same for 3M. 3M seeks to reduce energy consumed (Btus) per pound of product by 20% over the 200-2005 timeframe. According to the Alliance to Save Energy, "the principles of energy management are an integral part of [3M's] corporate culture."[23] Since 2000, [3M has reduced its energy intensity by 27%.

Kodak also aggressively addresses energy savings. Kodak is on the way to cutting its energy usage (indexed to production) by 15 percent. [24] For its accomplishment, Kodak received the 2003 Energy Star Corporate Commitment Award from the U.S. Environmental Protection Agency. Kodak is cutting energy consumption, in large part, as the result of a company-wide program that focuses on its electric motors.

These only are a few examples of market-based initiatives that are taking place in the private sector. Private businesses recognize the importance of energy conservation and are pursuing energy efficiency and management on an unprecedented level. In fact, given the very high cost of electricity in New York – both on an actual and a relative basis – energy intensive businesses must pursue energy efficiency in order to compete in the global marketplace. Large electricity consumers should not be required to pay an SBC surcharge in addition to the funds that they are investing in energy efficiency at their facilities.

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[22] Alliance to Save Energy, "Big Goals Mean Big Success: Corporate Energy Management at Frito-Lay."

[23] Alliance to Save Energy, "A Culture of Excellence: Corporate Energy Management at 3M."

[24] Copper Development Association, "Energy Efficiency Case Study: Kodak Focuses on NEMA Premium Motors."

b. The SBC should not be extended because it increases the price of electricity in New York State

The average price of electricity in New York State has been, and remains, well above the national average.[25] The overall average cost of electricity in New York is the second highest in the country. The price of electricity is a matter of particular importance to businesses. The 2002 New York State Energy Plan found that "[b]usinesses need secure and reliable energy supplies that are reasonable priced to expand operations and grow in the State." Moreover, the State Energy Plan found that "energy prices need to be brought more in-line with other states to compete more effectively for economic opportunities." The 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.[26]

According to the Edison Electric Institute, for the period ending June 30, 2004, electricity prices paid by New York's industrial consumers not only exceeded the national average by a significant amount, but also prices paid in neighboring states.[27] The electricity prices paid by high demand/high load factor customers, namely industrial customers, in New

[25] *See, e.g.*, State Energy Plan at 2-25 – 2-26.

[26] State Energy Plan at 2-16 (footnote omitted)

[27] *See*, *Typical Bills and Average Rates Report*, Edison Electric Institute (Summer 2004) ("EEI Report") at 266, 268, 293.

York State were 42 percent above the national average.[28] In contrast, electricity prices paid by comparable customers in neighboring Pennsylvania were 19 percent above the national average.[29] Moreover, the price of electricity in New York State is increasing for industrial consumers. From June 2002 through June 2004, the average bundled rate for industrial consumers served by investor-owned utilities and LIPA increased by 21 percent.[30]

It is also important to recognize that the "average" industrial electricity price is just that – an average. It includes the effect of many economic development programs that reduce the price of electricity for participating businesses and, thereby, reduce New York's average electricity price for industrial customers. But, for businesses not eligible to participate in economic development programs, the electricity prices they pay are higher than the State's non-competitive average price. The high price of electricity in New York continues to have an adverse impact on the State's economy, especially on the manufacturing sector.[31] Quite simply, New York's industrial customers cannot afford a SBC that increases their price of electricity.

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[28] EEI Report at 266, 293.

[29] *Id.* at 268, 293. New York's average residential and large commercial electricity prices also exceeded the national average by substantial amounts. New York's average residential electricity bill of $135.05 was 43 percent higher than the national average of $94.19. *Id.* at 7, 38. New York's average large commercial electricity bill of $21,368.00 was 56 percent higher than the national average of $13,659. *Id.* at 46, 77.

[30] *Id. at* 266; *Typical Bills and Average Rates Report*, Edison Electric Institute (Summer 2002), at 263.

[31] *See, e.g.*, State Energy Plan at 1-22 (concluding that "[e]nergy prices need to be brought more in-line with other states to compete more effectively for economic opportunities"); *id.* at 2-16 (discussing the importance of energy prices to manufacturers).

Natural gas, another important source of energy for businesses, also is expensive in New York. Average industrial prices for natural gas is 37% above the national average.[32] High energy costs routinely are cited as one of the primary reasons for the decline in New York's manufacturing sector.[33] The State Energy Plan recognizes that "energy prices tend to be important factors in business location and expansion decisions, particularly for energy-intensive businesses."[34] The State Energy Plan also recognizes that "[r]educing energy costs … can have a substantial effect on a business' profitability."[35] Policies that increase electricity prices can be very detrimental to the State's economy, and have a disproportionate impact on the upstate economy.

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[32] The Public Policy Institute of New York State, Inc., News Release: *Cost of Employee Benefits, Energy, Taxes add up to higher overall costs of doing business in New York State*, ("Cost of Employee Benefits") (December 28, 2004) at 1.

[33] *See, e.g.*, State Energy Plan at 2-16; *The Key to the Upstate Economy Manufacturing – Still*," Public Policy Institute (September 2002) at 8.

[34] State Energy Plan at 2-16.

[35] *Id.*

c. The SBC should not be extended because it will negatively impact the New York State economy

(i) New York State's economic climate is difficult for manufacturers

New York recently ranked 44th among all states in terms of population growth, with a growth rate of 1.1 percent from April 2000 through July 2003.[36] The State's growth rate is well below the national growth rate for the same period of 3.3 percent.[37] As of January 2005, New York's unemployment rate exceeded the national average.[38] The unemployment rates upstate demonstrate that the upstate economy is lagging behind the rest of the nation.[39]

The national unemployment rate at the end of 2004 was 5.5 percent. But, for several upstate counties it was far greater. For example, the unemployment rate in Chemung County was 6.2 percent; Erie County 6.3 percent; Niagara County 7.2 percent; and Jefferson County 8.2 percent.[40] The economic climate is particularly difficult for New York's manufacturing sector. Between 1990 and 2003, manufacturing jobs in the metropolitan areas

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[36] Business Council of New York State, Inc., *New Census Data Show New York Losing Ground to the Nation in Population Growth* (March 19, 2004) at 1.

[37] *Id.*

[38] U.S. Department of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey; New York State Department of Labor, New York State Unemployment Rate.

[39] "State's Private Sector Job Count Declines at Same Rate as Nation," Press Release, New York State Department of Labor (January 23, 2003).

[40] U.S. Department of Labor, *supra*; New York State Department of Labor, *supra.*

of upstate New York declined by 31.8 percent, dropping from 18 percent of total jobs in the region in 1990, to 12 percent in 2003.[41] During the same period, the United Sates overall loss of manufacturing jobs was 17.9 percent compared with upstate New York's 31.8 percent.[42] The SBC should not be extended because it increases the cost of electricity and therefore hampers economic development efforts, particularly upstate.

(ii) The cost of doing business in New York is too high

The cost of doing business in New York significantly exceeds the national average. The higher costs bear directly on the State's ability to keep and create good jobs. New York State has the highest state-local tax burden in the nation, 48 percent above the national average per capita.[43] Moreover, New York has the third highest property taxes per capita in the country, approximately 55 percent above the national average.[44] The net result of those high taxes is that upstate New York businesses and residents pay state and local taxes that are as much as $6 billion a year higher than they would be if the State's taxes matched the national average per capita.[45]

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[41] Public Policy Institute of New York State, Inc., *Could New York Let Upstate be Upstate?*, at 4 (May 2004).

[42] *Id*. at 4.

[43] Public Policy Institute of New York State, Inc., *How High Is the Upstate Tax Burden – and Why?* at 2.

[44] *Id.* at 3.

[45] *Id*. at 1.

Average employer costs for work-based health insurance in New York are the second highest in the country.[46] The total average premium, including employees' costs, is third-highest in the nation.[47] The average costs of a workers' compensation case in New York was third-highest in the nation, 80 percent higher than the median figure for all states.[48] Most neighboring and competing states, such as New Jersey and Michigan, have much lower workers' compensation costs. It is important to reduce the cost of doing business in New York and extending the SBC is not consistent with this important public policy goal.

d. If, *arguendo*, the SBC program is continued, it should be continued only for the NYISO Zone J which needs additional capacity

In May 2004, the NYISO issued its report "ISO Power Trends New York's Success & Unfinished Business". The NYISO recommended that additional capacity should be completed in the 2008 and beyond time frame predominantly in New York City and on Long Island to ensure that these areas do not fall below the minimum reliability requirements.[49] According to the ISO Power Trends Report, New York City could fall below its locational requirement in 2009.[50] The NYISO programs dampen peak demand in New

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[46] *Costs of Employee Benefits, supra,* at 1.

[47] *Id.*

[48] *Id.*

[49] *ISO Power Trends Report, supra,* at 8.

[50] *Id.*

York City. If the Commission finds that these programs and/or any energy efficiency programs emanating from the pending Con Edison rate case do not sufficiently reduce peak demand, then it may be appropriate to continue the SBC program in the Con Edison service territory.[51]

However, the rest of the state does not need additional SBC programs. Demand in New York City and Long Island is growing, but it has flattened upstate.[52] Indeed, in NYISO Zones A, C, E, F, and G, the summer peak demand was less in 2003 than in 1994,[53] as was the winter peak demand for all of these zones except Zone C.[54] And, the annual energy requirements for these same zones has decreased. Moreover, the RPS will result in increased wind generation in Zones A-G, even though demand in several of the zones has decreased.[55]

In addition, the upstate zones currently account for more curtailable load under the NYISO programs than do Zones J and K.[56] In the EDRP program, Zones J and K

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[51] LIPA also needs demand response programs. However, LIPA is not regulated by the Commission and its demand response programs are not part of the current SBC program.

[52] *Id.* at 39.

[53] New York Independent System Operator "2004 Load & Capacity Data" at 7.

[54] *Id.*

[55] NYSERDA, *The Effects of Integrating Wind Power on Transmission System Planning, Reliability, and Operations, Report on Phase 2: System Performance Evaluation*, (February 3, 2005 Draft) at 2.1.

[56] PRL Study at E-6.

account for only 33 percent of curtailable load; in the ICAP/SCR program, only 16 percent of the total load enrolled is located in Zones J and K.[57] Clearly, in the upstate region, consumers are participating in the NYISO's market-driven programs and reducing demand.

Because the capacity is needed in Zone J, if the Commission decides that SBC funded programs are necessary there, the SBC programs should be targeted to Zone J (in which case, the SBC should be funded by downstate consumers). However, given the success of the market-driven NYISO demand response programs in upstate and the excess capacity in upstate, it is not necessary to continue the SBC programs outside of Zone J.

e. If, *arguendo*, the SBC is extended beyond its current expiration date, the funding level should be significantly decreased

If the SBC program is continued, Multiple Intervenors believes that the Commission should adopt, as a policy, the goal of decreasing the level of SBC spending over time. Energy efficiency measures already are included among the panoply of services that is offered by power marketers, technology companies, and energy service companies. There should be a presumption that the market will address fully all energy efficiency and research and development needs.

If the Commission decides to extend the SBC beyond its current expiration date, it should reduce the level SBC funding by a significant amount. As the Evaluation Report indicates, an extensive network of energy services companies, contractors and service

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[57] *Id.*

providers are implementing energy efficiency projects throughout New York State.[58] More than 150 energy service companies are now doing business in New York, up from 13 in 1998 before the SBC program began.[59] The market now is capable of providing many of the services that previously have been provided with SBC funding. Thus, SBC funding level should be reduced to reflect the increasing impact of market-driven measures.

3. Have conditions changed since the establishment of the SBC that would necessitate a change in the overall goals and objectives of the SBC? If so, what changes are recommended?

As demonstrated, *supra*, the NYISO demand response programs have been implemented and the RPS has been instituted since the establishment of the SBC. In addition, the energy service industry in New York has developed. And, the private sector has been pursuing energy efficiency aggressively. Moreover, because electricity prices in New York are higher than ever and State's competitiveness vis-à-vis other states continues to deteriorate, a major change in condition is the lack of ability on the part of consumers to withstand discretionary surcharges and rate increases. Thus, the conditions have changed significantly since the SBC program was established and the SBC programs and funding levels, if they are continued at all, must be adjusted to reflect these changes.

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[58] Evaluation Report, *supra,* at ES-8.

[59] *Id.* at ES-30.

5. How might SBC programs be adjusted given the Commission's order, issued September 24, 2004, regarding Renewable Portfolio Standard (Case No. 03-E-0188)?

The Commission's "Order Regarding Retail Renewable Portfolio Standard," issued on September 24, 2004, requires consumers to subsidize renewable resources. The RPS surcharge from 2006 through 2013 is projected to range from $582 million and $762 million in 2003.[60] Many participants in the RPS proceeding believe that projected cost to be understated. To reflect the fact that consumers will be funding renewable resources through the RPS surcharges, the level of SBC funding should be reduced. The SBC funds that were allocated to renewable resources should be viewed as "extra" money that can be reallocated and used to fund other SBC programs. The goal should be to reduce (and, hopefully, eliminate) the SBC, not to utilize the current actual expenditure level as a revolving fund that remains available for programs in perpetuity.

6. In what ways might the current SBC fund collection and allocation process be improved?

Although, as demonstrated above, the SBC program should not be extended, if it is, the current SBC fund collection and allocation process can be improved by exempting all industrial consumers from the SBC, including, but not limited to, the customers who

[60] Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard,* "Order Regarding Retail Renewable Portfolio Standard" (issued September 24, 2004) at App. D, Tables 13 and 14 (hereinafter "RPS Order").

currently are exempt -- NYPA's industrial customers and some customers with flex-rate contracts.[61]

a. If, *arguendo*, the SBC program is extended beyond June 30, 2006 on a statewide basis, all industrial customers should be exempt from the SBC

Industrial customers pursue energy efficiency because a proactive energy efficiency policy helps their companies stay competitive. They invest in energy efficiency in their facilities. And, they participate in the NYISO demand response programs.[62] They have pursued market-based initiatives. The competitive markets are addressing energy efficiency for industrial consumers. They do not need SBC programs and should not be required to pay for them.

The Commission has exempted industrial consumers from this type of surcharge in the past. Prior to the adoption of the SBC program, Niagara Mohawk and RG&E had programs in place that permitted their largest industrial customers to choose not to participate in the utilities' demand side management ("DSM") programs and not to pay for them.[63] Central Hudson utilized an interclass allocation methodology for DSM expenses that

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[61] Although some members of Multiple Intervenors who pay the SBC surcharge have participated in the SBC programs, in general they would prefer not to pay the surcharge and not participate in the SBC programs. For large industrial customers, the SBC surcharge exceeds the SBC funding that is paid to them for energy efficiency projects.

[62] See PRL Study at E-6.

[63] *See e.g.*, Case 92-E-0108, *et al*, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric*

also resulted in industrial customers paying the DSM program costs based only on participation of the large industrial class.

New York State's industrial electricity rates far exceed not only the nationwide average, but also the rates in neighboring states that openly court New York businesses. In order to ensure that New York State does not lose more jobs to states where the cost of doing business is lower, or to other countries, it is imperative that the price of electricity be reduced in New York.[64] Exempting all industrial customers from the SBC would be a step in the right direction.

b. If, *arguendo*, the SBC program is continued, NYPA's industrial customers should be exempt from the SBC

In Opinion No. 98-3, the Commission exempted NYPA's customers from the SBC surcharge.[65] In the 2001 SBC Order, the Commission reaffirmed that the SBC would not be applied to NYPA customers.[66] If the Commission extends the SBC beyond June 30, 2006, it should continue the explicit exemption for NYPA's industrial customers. Imposition of the SBC on NYPA's industrial customers would be antithetical to the goals of the NYPA

Service. "Opinion No. 93-3, "Opinion and Order Conditionally Approving Settlement" issued February 2, 1993.

[64] The SBC surcharge for large, high load factor customers is substantial. For a 10 megawatt customer, with a 75 percent load factor, it is almost $100,000 annually.

[65] Opinion No. 98-3 at 6-7

[66] 2001 SBC Order at 23.

economic development programs. These programs are designed to provide lower-cost electricity to businesses.

(i) The purpose of the NYPA industrial power programs is to enhance economic development

The State has several programs to provide lower-cost electricity to industry to enhance economic development in the State of New York. NYPA sells Niagara Project hydropower to industrial consumers within 30 miles of the Niagara Project switchyard. One category of industrial hydropower is Replacement Power. In 1957, the United Stated Congress enacted the Niagara Redevelopment Act ("NRA"), 16 USC § 836(a). The NRA provides that NYPA shall contract to sell 445 megawatts of Niagara Project power, known as Replacement Power, to industries that are located in the Buffalo/Niagara area. This power has been sold to industrial customers for more than 40 years.

In addition, 250 megawatts of power generated at NYPA's Niagara Project, known as Expansion Power, is sold to industries on the Niagara Frontier for economic development. This power has been sold to industrial customers since the early 1960s. In 1987, the New York State Legislature amended Section 1005 of the New York Public Authorities Law to codify the preexisting contractual Expansion Power program. *See* N.Y. Econ. Dev. Law §§ 182 *et seq*. (McKinney 1988 & Supp. 2003); N.Y. Pub. Auth. Law §1005 (McKinney 1988 & Supp. 2003). In enacting the Expansion Power Program, the New York Legislature found that:

> Expansion power contracts have been a proper and essential part of The Power Authority's plan for marketing Niagara project

> power and energy. The legislature further found that the economy of the Niagara region ... has become critically dependent on these allocations and the businesses which require them to be competitive.

1987 N.Y. Laws, Ch. 32, at § 1.

When the Legislature amended Section 1005 of the New York Public Authorities Law to codify the Expansion Power Program, it also created another lower-cost category of power, Economic Development Power. The New York State Legislature created this program to encourage job development and industrial investment in New York State. *See* 1987 N.Y. Laws, Ch. 32, at § 1.

In 1997, the Legislature also created the Power For Jobs ("PFJ") program. The Legislature enacted the PFJ program because New York State businesses "pay well above the national average for electricity and are compelled to compete in a national and global economy with other enterprises that pay less for electricity." 1997 N.Y. Laws, Ch. 316, at § 1. The PFJ program makes a lower cost form of power available to New York businesses for job retention and economic development purposes. *See* N.Y. Econ. Dev. Law § 189 (McKinney Supp. 2003).

In enacting the PFJ Program, the Legislature expressly determined that "the cost of electricity has a significant effect on economic development, employment levels and decisions to retain, attract or expand businesses in New York." 1997 N.Y. Laws, Ch. 316, at § 1. The Legislature determined that in the absence of the opportunity to avail themselves of a lower cost form of power in the future, "New York enterprises may not make the investments and commitments to maintain and expand facilities in New York State." *Id.*

Thus, the PFJ program was enacted to "provide electricity at the least cost" to New York State businesses and thereby "strongly advance the economic interests of New York State by improving economic opportunities, enhancing its competitive position, and making possible the retention of existing jobs and the expansion of job opportunities." Bill Jacket, 1997 N.Y. Laws, Ch. 316, Governor George E. Pataki's Program Bill No. 96 at 2. Lauded by Governor George Pataki as "yet another example of [New York State's] aggressive and innovative strategy to encourage business growth and expansion," this program also has been heralded by members of the New York State Senate and the Assembly as "important and historic legislation" that will "help New York compete with other states which have lower energy costs."[67]

The legislative intent of these programs is to provide low-cost power to businesses. Imposing a SBC surcharge on these customers would increase the price paid by these consumers and would be contrary to the legislative intent. These customers should not be required to pay a SBC surcharge.

(ii) NYPA has extensive energy efficiency programs

Since 1991, NYPA has completed close to 1,400 energy efficiency projects at about 2,200 locations statewide. During the first six months of 2004, NYPA completed energy-efficiency improvements at 65 schools and other facilities. The projects included the

[67] Press Release, State of New York Executive Chamber, *Governor Pataki Signs Historic "Power For Jobs" Legislation -- Law Will Provide Low-Cost Electricity to Save, Create Jobs* (August 6, 1997).

installation of high-efficiency lighting at public schools in New York City and Buffalo and at Nassau University Medical Center; insulated windows at the Metropolitan Transportation Authority's New York City headquarters; and a new boiler at a New York Police Department precinct house.[68]

In July 2004, NYPA increased its funding for energy efficiency projects for its governmental customers in southeastern New York by $230 million. Previously, NYPA's energy efficiency funding had been more $750 million. The additional funding brings total NYPA funding statewide to $1.33 billion for projects that conserve energy.[69]

NYPA also has a peak load management program to reduce summer electrical demand among its New York City area government and business customers.[70] The peak load management program has been instituted at more than 80 customer facilities. Customers earn incentives of more than $40 for each kilowatt saved. These programs, which are paid for by NYPA's customers, are separate from the SBC programs. NYPA customers should not be required to pay for both NYPA's programs and SBC programs.

c. If, *arguendo,* the SBC program is continued, all flex-rate contract customers should be exempt from the SBC

Some flex-rate contract customers currently are exempt from the SBC. The Commission should extend this exemption to all customers who have a flex-rate contract or

[68] NYPA Notes (Week of August 1, 2004) at 1.

[69] News Release: "NYPA Energy Efficiency Tops $1.3 Billion" (July 27, 2004).

[70] NYPA Notes (week of June 20, 2004) at 1

become eligible for one. The goal of the flex-rate contract legislation is to reduce the price of electricity for industrial consumers in order to enhance economic activity in the state.

In 1983, the New York Legislature added Section 66(12-b)(a) to the Public Service Law. That law authorizes the Commission to designate as economic incentive areas, specific areas in which reduced economic activity and unemployment "… justifies the approval of reduced incentive for utility services …." N.Y. Pub. Serv. Law § 66(12-b)(a)(1). The statute also authorizes the Commission to designate classes of customers as appropriate for special rates or tariffs, "… in order to prevent loss of such customers, or to attract new customers …." *Id.* In his Memorandum of Support for Section 66(12-b)(a), Senator Dale M. Volker, the New York State Senate sponsor of the bill, stated that the purpose of the legislation was "[t]o retain and attract businesses." 1983 N.Y. Laws Ch. 626 (Memorandum in Support of Senator Dale M. Volker at 1.)

The Commission has used its authority wisely to authorize the utilities to offer flex-rate contracts to customers with competitive alternatives, including the potential relocation of production out of state. To qualify, customers must satisfy a series of stringent requirements and demonstrate that the flex-rate contracts are critical to their ability to retain production, and jobs, in New York. In furtherance of the state's economic development policies, flex-rate customers should be exempt from the SBC. Accordingly, the flex-rate exemption should not only be continued, but it also should be broadened to include any existing or future flex-rate customers.

The Governor, the Legislature and the Commission have recognized that electricity prices are too high in New York. Indeed, it is State policy that "[e]nergy prices need to be brought more in-line with other states to compete more effectively for economic opportunities."[71] The SBC increases the price of electricity, thereby increasing the disparity between New York's electricity prices and the prices available to businesses located in other states. Flex-rate contract customers who by definition, have demonstrated that discounted electricity prices are critical to their survival in New York, should be exempt from the SBC surcharge.

12. Should SBC funds be extended to programs that encompass research and development into retail and/or wholesale electric market competitiveness issues, or transmission and/or distribution of the State's energy resources?

SBC funds should not be utilized for research and development into retail and/or wholesale electric market competitiveness issues or transmission and/or distribution of the State's energy resources. In Opinion No. 96-12, the Commission expressly delineated the scope of programs to be funded by the SBC, stating that "certain programs such as energy efficiency, research and development, environmental protections and low-income beyond what competitive markets provide" may need SBC funding during the transition period to ensure that electric service is provided safely, cleanly and efficiently. (Op. No. 96-12 at 27.)

It is Multiple Intervenors' position that, if the SBC is extended beyond June 30, 2006, its scope should not be expanded. The composition of the SBC should be limited to no more (and preferably less) than the four public policy programs that were identified by the Commission in Opinion No. 96-12. Studies of retail and/or wholesale electric market

[71] State Energy Plan at 2-37.

competitiveness and the State's transmission and/or distribution system capabilities and planning are issues that the Commission and the NYISO have been, and continue, to examine. The SBC was established "to address public benefit programs unlikely to be assumed by the energy marketplace during the transition to full electric retail competition."[72] It should not be used to fund other programs or studies.

13. Should the scope of the SBC program be expanded to include programs for natural gas customers? If so:

As set forth above, the SBC program should not be expanded to include any additional initiatives. And, since the SBC program is funded by a volumetric surcharge on electric customers, it would be inappropriate to provide any of the funding to natural gas customers. There is no evidence supporting the development of gas SBC programs, even if they were to be funded by a separate surcharge applied to gas customers. Finally, any incremental gas SBC program would only exacerbate New York's non-competitive position with respect to energy rates and further undermine the state's economic development efforts.

[72] 2001 SBC Order, *supra*, at 1.

CONCLUSION

The current system benefits charge program should *not* be extended beyond the June 30, 2006 expiration date because: (1) market-driven initiatives and other utility programs are providing the SBC services; and (2) the SBC increases the price of electricity for all consumers, disproportionately impacting large commercial and industrial consumers upstate. However, if, *arguendo*, the Commission decides to extend the SBC program, the Commission should: (1) limit the program and funding for the program to consumers located geographically within NYISO Zone J; or (2) if the SBC program is not geographically limited, but is imposed on a statewide basis, all industrial customers, including but not limited to the currently exempt NYPA customers and flex-rate contract customers, should be exempt from the SBC.

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Respectfully submitted,

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