NEW YORK STATE
PUBLIC SERVICE COMMISSION

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IN THE MATTER OF:

Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs. Case 14-M-0224

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COMMENTS OF THE MUNICIPAL ELECTRIC AND GAS ALLIANCE REGARDING THE NATIONAL FUEL GAS DISTRIBUTION CORPORATION PETITION FOR REHEARING

## INTRODUCTION

On April 21, 2016, the New York State Public Service Commission ("Commission" or "PSC") issued its Order Authorizing Framework for Community Choice Aggregation Opt-out Program ("CCA Order" or "the Order"). On May 23, 2016, the National Fuel Gas Distribution Corporation ("NFG") submitted a petition for rehearing/reconsideration/clarification of the CCA Order ("NFG Petition"). The Commission noticed the petition for comments, and set a comment deadline of August 8, 2016. The Municipal Gas and Electric Alliance ("MEGA") submits these comments in opposition to the petition, and in support of upholding the CCA Order and permitting CCA programs to move forward.

## I. NFG FAILS TO MEET ITS BURDEN UNDER 16 NYCRR § 3.7(b)

To sustain a petition for rehearing, a petitioner must show that "the Commission committed an error of law or fact or that new circumstances warrant a different determination." 16 NYCRR 3.7(b). These errors or new circumstances must be clearly identified and explained, with concrete support. *Id.* A petition for rehearing is not the proper mechanism for parties to air their grievances and disagreements with determinations or policy choices made by the Commission. *Entergy Nuclear Power Marketing v. New York State Public Service Commission*, 122 A.D.3d 1024, 1028

(3d Dept. 2013)(confirming that denial of petition for rehearing was proper where petitioner "did not sufficiently establish that there was an error of law or fact or new circumstances" justifying rehearing, where petitioner merely raised disagreements with Commission's risk assessments and determinations).

NFG alleges five errors of law and fact made in the Order: (1) that the use of the Opt-Out CCA was factually unsupported; (2) that the Commission's rationale for authorizing opt-out CCAs for electric service does not apply to gas service; (3) that waiver of Uniform Business Practices Section 5.K would result in Commission-sanctioned "slamming"; (4) that CCA Administrators and ESCOs cannot be trusted to properly operate an opt-out process because they have financial incentives not to allow customers to opt-out; and (5) that the Order treats residents of New York City unfairly because it prevents counties from forming CCAs. But only the first and possibly the third points can fairly be considered allegations of an error of fact or law. The remaining objections are complaints and disagreements about the policy choices made by the Commission in the Order, which are not properly raised in the context of a petition for rehearing or reconsideration.

### *1. The Record Supports the Commission on Opt-out CCAs*

With regard to Petitioner's first claim that the Commission lacked "factual support" for the use of opt-out CCA models, the Petitioner fails to meet its burden because it points to no facts or testimony erroneously relied upon by the Commission which informed its decision, and because it fails to introduce any contrary facts which would controvert the evidence relied upon by the Commission in its record. This proceeding was commenced in December 2014 and the Commission has held multiple on-the-record technical conferences, spent more than 18 months collecting comments and testimony from a wide array of stakeholders, and investigated the use and design of CCA programs in other states. The DPS Staff White Paper on CCA programs was

the first major document submitted to the record in this case, and it includes at least five pages on CCA programs in other states. Other commenters, including MEGA, have submitted testimony and information on the opt-out approach, including information on the approach used in other states where CCA operates on an opt-out basis. The Commission had ample support, in the record at large and in the Order itself, upon which to base its decision to use the opt-out model.

NFG is critical of the way in which the Commission Order relies on "speculation and conjecture" to support the adoption of CCAs generally, and the opt-out model in particular. But NFG's own assertions consist of speculation on consumer behaviors and attitudes toward utility service, and conjecture regarding the potential benefits, or lack thereof, of CCA programs. Further, none of NFG's speculation or conjecture is grounded in facts or evidence offered to controvert the Commission's findings. In fact, nothing raised by NFG in its Petition is particularly new—these are points and arguments that NFG and others had already raised in comments and submissions to the record in opposition to the opt-out model. The Petition seeks to have the Commission abandon its own policy choices—which were grounded in a well-developed record and based upon months of investigation and comment—to adopt NFG's policy choices and preferences, which themselves are pure speculation and conjecture.

### *2. Slamming*

Petitioner's third claim that the CCA Order will result in Commission-authorized "slamming" is equally unavailing and unsupported. Slamming is an unscrupulous business practice in which unscrupulous marketers employ subterfuge to steal customers from other marketers. It is, by its very nature, something done in secret, without oversight or approval, and in violation of the law.

By contrast, CCA Programs must be municipally-sanctioned. They require the enactment of a local law, and are subject to public hearings and public comment. The CCA Administrator must engage in at least two months of public education and outreach prior to the deployment of the program. The Commission must review and sign off on a CCA program's implementation and data protection plans, and must be provided with proof that municipalities have adopted CCA. Even once the program is approved and ready to go, customers must be provided with opt-out notices—printed on municipal letterhead and reviewed by the DPS staff—and must be afforded opportunities to switch back to their old utility service within a grace period. Nothing about a CCA Program is meant to be secret. CCA programs will require review and approval by multiple levels of government, including local governments ultimately accountable for ensuring regulatory compliance. *See* CCA Order, page 20 (noting that "the requirement that elected officials approve a CCA program before one is implemented represents a reasonable proxy for customer consent, when coupled with consumer education efforts and individual customer opt-out processes.") Regular reporting requirements and consumer protections will be built into each CCA to ensure transparency and fairness in their processes. It stretches the bounds of reason to equate CCA activities with illegal marketing or slamming.

### *3. Policing the Opt Out Process: Municipal Governments*

NFG's fourth point—calling for an independent third party to operate the CCA opt-out process because CCA Program Administrators and ESCOs cannot be entrusted with a process they are financially incented to subvert—blatantly ignores the central and crucial role municipal governments will play in establishing and operating CCAs, and in insulating their constituents from unscrupulous business practices by mandating oversight, transparency, accountability, and

annual reporting from the municipalities themselves.[1] While this point is not a proper basis for a Petition under 16 NYCRR § 3.7, and involves an opinion and not any alleged error of fact or law or changed circumstances, MEGA wishes to raise a few points about this claim.

Before establishing a CCA, Town, Village, and City lawmakers are required to enact a local law to authorize aggregation within each of their respective jurisdictions and, if applicable, hiring a CCA Administrator to help meet its other obligations. The statutorily-proscribed process of enacting a local law requires considerable effort on the part of the municipality to ensure that the proposal provides a benefit to the community, and to ensure the public has had an opportunity to hear the proposal, comment on it, and raise any objections to it, all in accordance with the applicable provisions of State law (NY Town Law, NY Village Law and NY City Law, respectively). Public notice must be provided, and public hearings held, prior to the formation of the CCA in each and every community seeking to participate. Ultimately, the decision to create a CCA would be made by local elected officials who are charged with protecting the interests of their constituents, and who are accountable to those constituents at the voting booth.

The Order also reserves for the Commission and Department of Public Service Staff considerable oversight of the public outreach and education components of CCA, including the development and mailing of opt-out letters to residents, whether those efforts are undertaken by municipalities alone, or in concert with a CCA Administrator. The Order requires that opt-out letters be printed on municipal letterhead, and mandates that DPS Staff have an opportunity to review the letters at least five days prior to their distribution. Further, the Order explicitly holds municipalities accountable for ensuring that their CCA Programs comply with the restrictions and

[1] It is notable that NFG points to the "vested financial interests" of others as reason to distrust that opt-out CCA programs will be operated fairly and transparently, since it is likely those same vested financial interests of utilities like NFG which cause them to favor opt-in, rather than opt-out, aggregation. *See* Petition at page 7.

rules laid out therein, regardless of whether a private CCA Administrator is retained to manage the day-to-day operations of the program. An independent third party is *already* ultimately responsible for ensuring that a fair and meaningful opt-out process is offered to residents: the elected bodies of each and every municipal government seeking to pursue aggregation, and the CCA liaison those municipalities must designate to oversee the aggregation. *See* Order, page 24. There is no reason to believe these Supervisors, Councilpersons, Board Members and Aldermen do not take their duties seriously. The addition of another third party charged solely with implementing the opt-out process would only serve to increase the cost of CCAs to ratepayers and inflate the scope of required data sharing between parties, creating an opportunity for confidential customer information to be compromised.

## II. MUNICIPAL AUTHORITY

Petitioner misconstrues the NY Constitution's gifts clause, NY Constitution Article VIII Section 1, which is inapplicable in this situation. It's true that the state Constitution's prevents municipalities from giving money or making loans to private parties for private benefit. But it does not prevent municipalities from taking actions for the benefit of the public, which result in ancillary benefits to private parties. *See, e.g., Lavin v. Klein*, 12 A.D.3d 244, 245 (1st Dept. 2004); *Tribeca Community Assn. v. New York State Urban Dev. Corp*., 200 A.D.2d 536, 537, (1st Dept. 1994); *Landmark West! v. City of New York*, 9 Misc.3d 563 (NY Sup. 2005).

Municipalities seeking to create CCA would not be doing so purely for the benefit of some private interest. The Commission would not have authorized the creation of CCAs if they were purely for that purpose, and not for some broader public good. A CCA is meant to benefit the community in a number of ways—from giving ratepayers a mechanism to control costs and choose where their energy comes from, to providing additional market opportunities for consumers to

actively engage in the state's Energy markets, become more energy independent, reduce carbon emissions, encourage renewable energy growth, and fight climate change. A municipality's involvement in CCA is required in order to authorize, via a local law, the establishment of the program, and to facilitate public outreach and negotiation of contracts. But consumers will still purchase their energy from authorized energy suppliers—not from the municipality. CCA operating and administrative costs will be recovered from customers via charges on their bills, not paid for with municipal funds, and, unlike with other statewide utility charges used to fund incentive programs, only those customers being served by the CCA would carry these costs. Utility supply service will be put out to competitive bid and no money would be given by the municipalities to the ESCO supplier to pay for commodities used by others—only, perhaps, the energy commodities consumed by the municipality as a customer. The CCA model does not call for the use of public monies to procure power for private parties, to give power as a gift to individual consumers, or to pay ESCOs directly for service.

A successful CCA program *would* create positive benefits for customers and private companies—and some of those benefits may be financial ones—but those benefits are not the sole purpose behind aggregation. Further, those benefits would accrue from participation in the program over time; they would not result from the municipality directing public dollars, property or commodities to participants or ESCOs, which is the type of activity the Gifts Clause precludes.

## III. CCA IS MAKING PROGRESS ALREADY

Prior to the adoption of the CCA Order, MEGA had filed a petition, 16-M-0015, dated January 12, 2016 seeking authorization to establish a CCA Program in Upstate New York. The MEGA petition was supported by more than 30 municipalities, across New York State, interested in pursuing CCA in their communities. Following the adoption of the CCA Order in April 2016,

MEGA has invested significant time and effort to develop some of the many documents necessary to implement a CCA program, as required by the CCA Order, and to provide information to assist dozens of local governments in understanding the potential created by the Order. MEGA has filed a Generic CCA Implementation Plan with the Commission (dated July 7, 2016)—that document is currently available for public comment—and will soon submit the required Customer Data Protection Plan for comment and review. In recent months, MEGA has worked closely with numerous municipalities to develop some of the many measures that will be required to set up CCAs in interested communities, crafting a Model Local Law establishing CCA, providing draft resolutions and informational presentations to municipal boards, and generally working to implement the programs envisioned in the CCA Order.

Response has been overwhelmingly positive.

**CONCLUSION**

The Petition provides no clear identification of factual or legal errors in the Commission's decision, and provides no specific facts or legal authority to support its own claims or controvert the Commission's. This is largely because NFG's arguments are merely opinions on what the company feels is the ideal approach to CCA implementation—it clearly prefers an opt-in model, at least for natural gas service, if not for all utility service, which would be deployed only after other Pilot programs have been thoroughly studied, as NFG had previously argued in its comments in the Generic CCA Proceeding. NFG has identified no legal or factual error made by the Commission in adopting its Generic CCA Order, nor has it provided any new circumstances which warrant a different determination. Therefore, the Petition should be denied.

Respectfully submitted

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Young/Sommer LLC
On Behalf of the Municipal Electric
And Gas Alliance ("MEGA")