

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on October 13, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair  
Patricia L. Acampora  
Gregg C. Sayre  
Diane X. Burman, abstaining

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

ORDER ON REQUEST FOR RECONSIDERATION  
AND PETITION FOR REHEARING

(Issued and Effective October 13, 2016)

BY THE COMMISSION:

INTRODUCTION

On April 21, 2016, the Commission issued an Order Authorizing Framework for Community Choice Aggregation Opt-Out Program (CCA Framework Order) that established a process and guidelines for municipalities in New York State to develop and implement Community Choice Aggregation (CCA) programs. Pursuant to the CCA Framework Order, municipalities, individually and in concert, may develop opt-out CCA programs in order to aggregate the electric and gas purchases of their residents. CCA programs have the potential to increase the ability of individuals and communities to manage their energy usage and bills, facilitate wider deployment of clean energy including energy efficiency, large-scale renewables and distributed energy resources (DERs), and increase the benefits of retail competition for residential and small non-residential customers.

On May 23, 2016, the National Fuel Gas Distribution Corporation (NFG) submitted a petition for rehearing, reconsideration, and clarification of the CCA Framework Order. Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Central Hudson Gas & Electric Corporation, National Fuel Gas Distribution Corporation, The Brooklyn Union Gas Company d/b/a National Grid NY, KeySpan Gas East Corporation d/b/a National Grid, Niagara Mohawk Corporation d/b/a National Grid, New York State Electric & Gas Corporation, and Rochester Gas and Electric Corporation (together, the Joint Utilities) also filed a petition on May 23, 2016, requesting rehearing, reconsideration, and clarification of certain aspects of the CCA Framework Order.

This Order addresses the petitions for rehearing, reconsideration, and clarification filed by NFG and the Joint Utilities, as well as the comments filed in response to those petitions. NFG's petition, which requests modification of CCA to an opt-in program and that formal opinions regarding legal requirements on municipalities be sought from the Attorney General and Comptroller, is denied. Pursuant to the Joint Utilities' petition, reconsideration is granted regarding certain elements of the required data transfers and clarification is granted regarding opportunities to comment. In addition, clarification sought by the City of New York regarding the treatment of customers whose bills are paid by social services organizations and the ability of a municipality to conduct a phased or partial implementation of CCA is granted.

#### BACKGROUND

The Commission initiated consideration of CCA as part of the Commission's Reforming the Energy Vision (REV) initiative and its continued review and revision of retail energy markets.

CCA programs in other states have offered ratepayers cost savings and rate stability while promoting community engagement and clean energy. The Commission developed CCA through an extensive public process, including the issuance of a Department of Public Service Staff White Paper, which included a list of questions for public comment, an extended comment period, and several technical conferences to discuss matters related to CCA programs. In addition, the Commission authorized a pilot CCA program in Westchester County in February 2015 and incorporated lessons learned in that pilot into the CCA program design.

As more fully described in the CCA Framework Order, CCA programs have the potential to create a number of benefits for municipalities, citizens, and businesses. Furthermore, consistent with the goals of REV, the CCA construct provides substantial opportunities for meaningful and effective local and community engagement on critical energy issues and the development of innovative programs, products, and services that promote and advance the achievement of the State's energy goals. Existing programs, such as the New York Prize microgrid competition, Solarize New York, and community distributed generation have demonstrated that local governments are an effective and powerful resource for educating and engaging citizens to take actions with regard to energy usage that is beneficial for the environment, the resiliency of our power grid, and their own pocketbooks. CCA programs can educate, encourage, and empower communities and individuals to take control of their energy future through engagement with existing REV and Clean Energy Fund opportunities and development of new DER and clean energy initiatives.

SUMMARY OF PETITIONS

NFG

In its petition, NFG seeks rehearing, reconsideration, and clarification on two issues. First, NFG seeks reconsideration and rehearing on the Commission's determination to authorize CCA program enrollment statewide on an opt-out basis. NFG argues that because the Commission has not yet resolved certain retail market issues, it is premature to authorize an opt-out enrollment as the default mode within the CCA Framework Order. NFG further argues that the decision is factually unsupported because an opt-in model could provide similar benefits, and states that even if an opt-out model is used, the opt-out process should not be run by the CCA Administrator or the selected Energy Service Company (ESCO). NFG also questions whether an opt-out model is equally applicable to gas service as to electric service. NFG expresses concern that the CCA Framework Order's waiver of certain provisions of the Uniform Business Practices (UBP) could result in improper enrollment of customers. Finally, NFG notes that for certain municipalities, particularly New York City, jurisdictional and geographic issues could make the implementation of a CCA program difficult or impossible.

Second, NFG seeks clarification and assurance that municipalities have the requisite constitutional and statutory authority to undertake all actions contemplated by the CCA Framework Order. NFG requests that the Commission seek a formal opinion from the New York State Attorney General and the New York State Comptroller on whether municipal implementation of CCA programs would comply with all applicable laws.

Joint Utilities

The Joint Utilities' petition requests reconsideration or clarification on three specific matters. First, the Joint

Utilities ask that the Commission clarify that the Commission will analyze and individually approve the details of each CCA Administrator's Implementation Plan following a process that permits interested parties, such as the Joint Utilities, to comment on those Plans.

The Joint Utilities' second and third requests relate to the data that the CCA Framework Order requires the Joint Utilities to provide to either the CCA Administrator, the municipality, or the selected ESCO. The Joint Utilities propose that the requirement that a telephone number be included in customer specific information be eliminated. They argue that telephone numbers are unnecessary for the opt-out process and raise privacy concerns.

The Joint Utilities also state that they should not be required to provide information regarding customer participation in low-income programs or low-income status (also described as Assistance Program Participant (APP) status). The Joint Utilities argue that it is unnecessary at this time, better resolved in another venue, and potentially inconsistent with federal and state law.

#### NOTICES OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), Notices of Proposed Rulemaking (Notices) were published in the State Register on June 22, 2016 [SAPA Nos. 14-M-0224SP2; 14-M-0224SP3]. The time for submission of comments pursuant to the Notices expired on August 8, 2016. Moreover, in a Notice with Respect to Request for Reconsideration and Petition for Rehearing, comments were solicited by, and the time to respond to the NFG rehearing extended to, August 8, 2016. The comments and responses received are addressed below.

SUMMARY OF COMMENTS AND RESPONSES

Comments were filed by Good Energy and the City of New York (City), while the Municipal Electric and Gas Alliance (MEGA) responded to the NFG petition.

Good Energy expresses concern that the Joint Utilities' request could require each individual municipality to submit its own independent CCA application for Commission approval. Good Energy explains that a requirement of individual Commission approval for each added municipality would delay the development and implementation of the CCA programs.

The City comments on three specific matters. In particular, the City supports the Joint Utilities' position regarding data on low-income status or program participation based on customer privacy concerns. Next, the City addresses the participation of customers whose utility bills are received and paid for by a social services organization in a CCA program. The CCA Framework Order stated that for such customers, the social services organization, as the ratepayer of record, should make the decision whether to opt out. The City believes this is inconsistent with the goal of empowering customer choice and may also cause administrative burdens for municipalities.

Finally, the City requests clarification that a CCA program can be implemented on a rolling or staggering basis within a particular municipality. The City states that given New York City's large size and overlapping jurisdictions, establishing a targeted or pilot CCA program may be a preferred means to gain experience with CCA before implementing it on a citywide basis. The City requests that the Commission clarify that, under the CCA Framework Order, a municipality can implement a CCA program on a rolling or staggered basis across the municipality through pilots or other targeted enrollment programs

MEGA responds in opposition to NFG's petition and in support of the authorization of CCA programs on a statewide basis with an opt-out model. MEGA writes that NFG fails to meet its burden of requesting a rehearing under 16 NYCRR § 3.7(b). Under 16 NYCRR § 3.7(b), in order to sustain a petition for rehearing, the petitioner must show that "the Commission committed an error of law or fact or that new circumstances warrant a different determination." MEGA states that the NFG 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." MEGA also disputes NFG's claim that State constitutional or municipal law issues may impair the implementation of CCA programs.

In regards to the first of NFG's five allegations, MEGA notes that NFG failed to meet its burden under 16 NYCRR § 3.7(b) in regards to NFG's allegation that the use of the opt-out CCA was factually unsupported within the Order. MEGA points out that the petition offers no facts or testimony incorrectly relied upon by the Commission which informed its decision nor did it introduce any conflicting facts which would invalidate the evidence relied upon by the Commission in its record. Commenting on the third of the five allegations, MEGA writes that NFG's petition regarding their claim that the Order will result in Commission-authored "slamming" also failed to meet its burden under 16 NYCRR § 3.7(b) by being similarly unconfirmed. MEGA argues that the remaining three NRG allegations of errors of law or fact, which are summarized above, are actually mere complaints and disagreements about the policy choice made by the Commission and therefore do not support rehearing. MEGA also disputes NFG's claim that state constitutional or municipal law issues may impair CCA implementation.

DISCUSSION AND CONCLUSION

Rehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination.<sup>1</sup> A petition for rehearing must separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing. NFG's petition for rehearing appropriately alleges errors of law and fact, but fails to demonstrate any actual error. As explained in MEGA's response, NFG neither challenges facts relied on by the Commission in its decision nor offers new information that would invalidate those facts. Much of NFG's filing is instead composed of policy-based disagreements with the Commission's action. Because NFG fails to meet the standard for rehearing and because, as described further below, its arguments for reconsideration are unpersuasive, its petition is denied.

Reconsideration is granted where the petitioner demonstrates that a modification to the prior order would serve the public interest. As discussed below, the Joint Utilities meet this standard with regard to their proposed modifications to data transfers. Furthermore, clarification is provided with regard to issues raised by the Joint Utilities and the City.

Opt-Out CCA Model

NFG's petition fails to demonstrate that the decision to authorize opt-out CCA on a statewide basis is factually unsupported or based on errors. As more fully described in the CCA Framework Order, the decision to permit opt-out aggregation was made after a careful review of the relevant facts and based on thorough consideration of past and existing Commission policies. Both experiences with retail markets and aggregation in New York State, and failed attempts to establish CCA programs

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<sup>1</sup> 16 NYCRR §3.7(b).

through opt-in aggregation in other states, demonstrate that opt-out aggregation is necessary for the success of CCA. Positive results from CCA in other states demonstrate that opt-out CCA programs have been successful where opt-in programs have not.<sup>2</sup> They also demonstrate that residents generally respond positively to opt-out CCA programs when paired with robust outreach and customer education programs.

As NFG notes, in a February 25, 2016 order the Commission found that the retail energy markets were failing to provide sufficient benefits to mass market customers, made substantial revisions to market rules, and established a process for further changes.<sup>3</sup> Portions of that order were, however, vacated by the Supreme Court of New York, Albany County, and further action regarding retail markets is pending before the Commission. Moreover, as noted in the February 25, 2016 order, CCA programs have the potential to mitigate many of the issues with retail energy markets and substantially increase benefits to mass market customers. Given the potential benefits of CCA programs, and the continued operation of retail energy markets while the Commission considers further action, delaying the authorization of CCA programs is unnecessary and even potentially harmful. For that reason, the CCA Framework Order was not premature.

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<sup>2</sup> Detailed discussion experiences with CCA in other states appears in the Staff White Paper appended to the order initiating the CCA Proceeding. Case 14-M-0224, Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs, Order Instituting Proceeding and Soliciting Comments (issued December 15, 2014).

<sup>3</sup> Cases 12-M-0476 et al., Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State, Order Taking Actions To Improve The Residential And Small Non-Residential Retail Access Markets (issued February 25, 2016).

NFG argues that the opt-out model is particularly inappropriate for gas service, as compared to electric service, for three reasons: REV is focused on electric utilities; most CCA programs in other states are electric-only; and there are examples of successful opt-in gas aggregations. As an initial matter, while many of the specific initiatives within REV focus on electric utilities, its overall goal is to reform and modernize the entire energy sector. Other REV policies have included gas utilities or gas usage, such as the reform of utility energy efficiency programs and the establishment of a fuel-neutral Clean Energy Fund.<sup>4</sup> In addition, CCA stems not only from REV but also from the Commission's retail market policies, which include both gas and electric service.

While gas service has not been included in CCA programs in other states except for Ohio, a CCA program that includes gas has the potential to create many of the benefits that support the implementation of CCA programs, including increased bargaining power for residential customers, fixed rates, and negotiated terms. NFG's examples of opt-in municipal aggregation of gas purchase fail to demonstrate that opt-out treatment is unnecessary. NFG only offers two examples of municipalities offering this service, one of which no longer does so. Despite the potential for such opt-in municipal aggregation existing for more than 15 years, its adoption has been extremely limited.

NFG also argues that NFG service class "SC 3 General," which includes both mass market and non-mass market residential

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<sup>4</sup> Cases 14-M-0094 et al., Proceeding on Motion of the Commission to Consider a Clean Energy Fund, Order Authorizing the Clean Energy Fund Framework (issued January 21, 2016); Cases 15-M-0252 et al., In the Matter of Utility Energy Efficiency Programs, Order Authorizing Utility-Administered Gas Energy Efficiency Portfolios (issued June 19, 2015).

customers, should not be included on an opt-out basis. While many CCA programs are expected to focus on mass market customers, they may nonetheless provide benefits to large customers. Furthermore, as NFG notes, those customers are generally sophisticated regarding energy purchasing decisions; they are therefore well-equipped to evaluate an opt-out letter and make an informed decision to opt-out or join the CCA. Nonetheless, as discussed below, NFG is free to propose, in comments on a particular Implementation Plan, that the Commission restrict eligibility for the CCA program proposed by the Plan to a narrower group of customers.

It is unnecessary to enlist a third party to run the opt-out program. In crafting the outreach strategy and opt-out letter, the municipality, CCA Administrator, and ESCO are subject to the requirements in the CCA Framework Order, the details of their Implementation Plan, as approved or modified by the Commission after stakeholder comment, and Staff review of the opt-out letter itself. In addition, the municipality will always retain the ultimate responsibility for compliance. These protections will ensure that the opt-out process is run honestly and effectively with a goal of fully informing all eligible residents and guaranteeing that those who wish to opt out have the opportunity to do so. To add a third party would add unnecessary cost without offering material benefits to the community or residents.

Contrary to NFG's argument, the CCA Framework Order's partial waiver of UBP provisions would not permit ESCOs to improperly enroll customers without violation of the UBP. The provisions are waived only to the extent that the actions taken by the ESCO, the municipality, and the CCA Administrator comply with the CCA Framework Order. If an ESCO that is selected to provide service for a CCA program enrolls a customer without

offering that customer sufficient opportunity to opt out, the enrollment would constitute a violation of UBP Section 5(K) and subject the ESCO to an enforcement action, as appropriate.

The City expresses concerns about the decision to place the responsibility for choosing whether or not to opt-out on a social services organization where that organization is receiving and directly paying a resident's electric bill. The City's concerns are reasonable, as the nature and details of such social services programs may vary widely from municipality to municipality. For that reason, if a municipality or CCA Administrator believes that it would be appropriate for the residents rather than the social services organization to make the opt-out decision in its program, the Implementation Plan should explain that and propose a method for permitting those residents to do so. The Commission will evaluate that proposal as part of its consideration of the Implementation Plan.

Municipal Authority

NFG's request that the Commission seek a formal opinion from the New York State Attorney General or New York State Comptroller is misplaced. Responsibility for compliance with statutory and constitutional requirements on municipal activities lies with municipalities. The Commission has no authority to declare that an action is or is not consistent with those requirements. To the extent that any uncertainty exists about the application of any State statutory or constitutional requirements, they are best addressed by municipal counsel, who are free to request further informal opinions on the matter if they deem it necessary. As demonstrated by the request for an informal opinion submitted by the Town of Bedford during the implementation of the Sustainable Westchester Pilot and the analysis in MEGA's comments on NFG's petition, municipalities and the organizations that work with them are ready and able to

analyze these legal issues and to request guidance where necessary.

#### Partial Participation of Municipalities

The CCA Framework Order was designed to offer municipalities as much flexibility as possible in order to allow them to implement programs meeting their unique characteristics and needs. Allowing municipalities to implement CCA programs on a partial or phased basis is consistent with this design. Municipalities may choose a partial or phased approach as a pilot of CCA, to manage the implementation process given a large geographic footprint or overlapping jurisdictions, or for another reason beneficial to their program. Where a phased or partial approach is being used, the Implementation Plan should identify what portions of the municipality or municipalities will initially be included, explain whether customers in other parts of its jurisdiction will be permitted to participate on an opt-in basis, include a detailed outreach plan that will inform residents throughout the municipality of the program and its geographic limits, and contain information on whether and in what time frame the program will be expanded.

#### Modifications to Data Provided

The Joint Utilities propose two changes to the data sets described in the CCA Framework Order, including the elimination of phone numbers from the transfer of customer-specific data to support opt-out notifications and the elimination of APP or low-income status from the transfer of customer-specific data after enrollment. They explain that both requirements represent an intrusion on customer privacy not needed for the proper functioning of CCA programs, and also raise legal and regulatory concerns. No party opposed these modifications.

While customer phone numbers could be used to enhance an opt-out process, no municipality, potential CCA Administrator, or ESCO in New York has made specific proposals for such usage. Furthermore, such an approach would likely be costly, and unsolicited calls may be considered more irritating than informative for residents. For those reasons, as well as the privacy concerns expressed by the Joint Utilities, phone numbers will not be included in any of the data transfers by default. If a municipality or CCA Administrator believes that receiving telephone numbers will enhance their program while addressing the issues described above, its Implementation Plan may request that telephone numbers be provided. The Commission will then determine, based on review of the Implementation Plan and any comments received on the Plan, whether telephone numbers should be transferred. Alternately, the municipality may have telephone numbers available in its own records, rendering such a request unnecessary.

The CCA Framework Order required that APP status be included in the data set for customers who did not opt out. The primary purpose of this inclusion was to permit CCA Administrators and ESCOs to comply with any special provisions regarding service to low-income customers, which were being considered in a proceeding pending at the time of the CCA Framework Order. Since the CCA Framework Order, the Commission has issued an Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies.<sup>5</sup> In that order, the Commission determined that CCA programs would not be subject to any rules specific to the treatment of low-income customers.

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<sup>5</sup> Case 12-M-0476, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State, Order Regarding the Provision of Service to Low-Income Customers by Energy Service Companies (issued July 15, 2016).

That determination renders the provision of low-income status unnecessary. To avoid unnecessarily broaching consumer privacy with regard to low-income status, low-income status will not be included in any of the data transfers.

The CCA Framework Order required that opt-out letters include notification that the APP status of customers who did not opt-out would be provided to the selected ESCO. Because that data will no longer be transferred, opt-out letters should no longer include that notice.

Opportunities to Comment

The Commission hereby clarifies that each Implementation Plan will, after it is submitted by a municipality or CCA Administrator, be noticed for comment consistent with the State Administrative Procedure Act. In approving, modifying, or rejecting an Implementation Plan, the Commission will consider all comments submitted by interested parties, including the Joint Utilities. Parties are free to comment on any aspect of the plan, including whether the proposed eligibility rule is over- or under-inclusive. It is important to note, in order to address the concerns raised by Good Energy, that this formal notice and comment process will apply to each CCA program, not to each individual municipality, and that CCA programs are not required to resubmit their Implementation Plan in order to add municipalities. A CCA program that is under consideration by the Commission or that has received Commission approval may add municipalities once those municipalities have taken steps, consistent with the CCA Framework Order, to join the CCA by filing a certification of local authorization with the Secretary to the Commission.

The Joint Utilities petition also requests that the Commission clarify that utilities can participate in the development of the New York State Energy Research and

Development Authority (NYSERDA) CCA Toolkit. As the Joint Utilities explain, utilities have unique and valuable insight to offer on how CCA programs can best be implemented in their individual systems. On August 19, 2016, NYSERDA sent a letter to the Secretary stating that the CCA Toolkit is available on NYSERDA's website and explaining that it will be a dynamic and evolving resource.<sup>6</sup> The letter includes contact information for NYSERDA Staff members working on the Toolkit. Utilities are encouraged to work with NYSERDA to update and improve the Toolkit and are also welcome to develop supplemental guidance documents.

The Commission orders:

1. The transfers of data that Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., KeySpan Gas East Corporation, The Brooklyn Union Gas Company, National Fuel Gas Distribution Corporation, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid (National Grid), Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (collectively, the Affected Utilities) are required to perform, pursuant to Ordering Clause No. 3 of the Commission's April 21, 2016 Order in this proceeding, are modified as follows:

- a. The Affected Utilities shall not include telephone numbers in the customer-specific data transferred to the municipality or Community Choice Aggregation Administrator to support the mailing of opt-out notices; and

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<sup>6</sup> Case 14-M-0224, supra, Community Choice Aggregation Program Toolkit (filed August 19, 2016).

b. The Affected Utilities shall not include low-income status (also sometimes described as Assistance Program Participant (APP) Status) in the transfer of customer-specific data of customers who do not opt out.

2. The opt-out letter required pursuant to Ordering Clause No. 8 of the April 21, 2016 Order shall not state, as was required in the body of that Order, that information on a customer's APP Status will be provided to the selected energy service company if that customer does not opt out.

3. Municipalities are permitted to run Community Choice Aggregation (CCA) programs in only a portion of their jurisdiction. A municipality that intends to do so shall explain in its Implementation Plan what part of its jurisdiction the CCA program will include, whether customers in other parts of its jurisdiction will be permitted to participate on an opt-in basis, whether it intends to consider expansion of the CCA program to its entire jurisdiction, and, if so, in what timeframe it anticipates performing that consideration.

4. The requests for rehearing, reconsideration, or clarification of National Fuel Gas Distribution Corporation and the Joint Utilities are granted to the extent discussed in the body of this Order and are otherwise denied.

5. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS  
Secretary

CASE 14-M-0224

Commissioner Diane X. Burman, abstaining:

As reflected in my comments made at the October 13, 2016 session, I abstain from voting on this item.