

Before the  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20554

In re: )  
Comments Regarding ) Matter No. V010003  
Retail Electricity Competition)

**COMMENTS OF ELIOT SPITZER  
ATTORNEY GENERAL OF THE STATE OF NEW YORK**

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## INTRODUCTION

For more than a decade, many states and the federal government have been restructuring the entire electric power industry, seeking to move from the highly regulated monopoly provider model that prevailed for most of the twentieth century to an era of competitive wholesale and retail markets and open access. The Federal Trade Commission ("FTC") has requested comments on the current status of retail electric service competition and how efforts to increase such competition may best be structured.<sup>1</sup> Set out below are the comments of the New York State Attorney General's Office responding to the FTC's request.

## BACKGROUND

Under New York law, the Attorney General's Office has authority to enforce federal and state consumer protection statutes, including two highly flexible New York laws, one that prohibits "deceptive act or practices in the conduct of any business, trade or commerce, or in the furnishing of any service,"<sup>2</sup> and another that outlaws "[f]alse advertising in the conduct of any business, trade or commerce, or in the furnishing of any service."<sup>3</sup> These powerful tools are supported by numerous other statutes addressing specific areas, such as consumer contract comprehensibility,<sup>4</sup> door-to-door sales<sup>5</sup>

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<sup>1</sup> FTC, "Notice Requesting Comments on Retail Electricity Competition Plans" (February 18, 2001).

<sup>2</sup> New York General Business Law § 349.

<sup>3</sup> New York General Business Law § 350.

<sup>4</sup> New York General Obligations Law § 5 - 702.

<sup>5</sup> New York Personal Property Law § 428.

and renewal of contracts.<sup>6</sup> The Attorney General's Office also enforces federal and state antitrust laws and is an independent advocate before federal and state regulatory agencies, such as the New York State Public Service Commission ("NYSPSC") with regard to telecommunication and energy issues.<sup>7</sup>

### **RETAIL ELECTRIC SERVICE DEREGULATION IN NEW YORK**

In New York, retail electric service competition began in the summer of 1998.<sup>8</sup> Each investor owned electric utility made an increasing portion of its retail sales open to competition according to a timetable. As a result, today most New Yorkers have the right to choose a competitive supplier of retail electric service.<sup>9</sup> However, few New Yorkers have switched to competing electric service providers. According to NYSPSC figures, of the 6.3 million electric service customers in the franchise territories of New York's six investor owned utilities,<sup>10</sup> only 229,000 (3.7%) currently use competing

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<sup>6</sup> New York General Obligations Law § 5 - 903.

<sup>7</sup> In most instances, the Attorney General does not represent the NYSPSC. The NYSPSC has its own legal staff.

<sup>8</sup> See <http://www.dps.state.ny.us/retailaccess.htm>.

<sup>9</sup> Pursuant to NYSPSC orders, New York's six investor owned electric utilities (Central Hudson Electric & Gas Corporation; Consolidated Edison Company of New York, Inc.; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Orange and Rockland Utilities, Inc.; and Rochester Gas & Electric Corporation) now permit competition for all their retail customers. Only the Long Island Power Authority ("LIPA") limits the amount of retail electric service competition in its franchise territory. LIPA, an autonomous public authority, is phasing in retail electric service competition on a schedule aimed toward full retail competition for its one million customers by 2003. See, e.g., <http://www/lipower.org/lichoicenew/lichoice1.html>.

<sup>10</sup> Number as of December 2000, the latest date for which complete data is available. [Http://www.dps.state.ny.us/Electric\\_RA\\_Migration.htm](http://www.dps.state.ny.us/Electric_RA_Migration.htm).

retail electric service suppliers. Taken as a separate group, New York residential customers today use competing suppliers at a slightly lower rate (3.4%) than electric service customers *in toto*. Clearly, retail electric service competition is not burgeoning in New York.

In terms of electricity used by the customers who have switched, New York retail electric service competition looks even less robust. Assuming total retail electricity consumption of 116,450,000 megawatt-hours ("mWh") per year within the territory served by New York investor owned utilities,<sup>11</sup> customers of competitive suppliers use only 1.2% (1,391,000 mWh).<sup>12</sup> Broken out separately, the amount of electricity used by New York residential customers who have switched to competing suppliers is an almost invisible 0.1% (124,000 mWh).<sup>13</sup>

There is little reason to believe that retail electric service in New York is growing from its current market share. While not conclusive, comparison of NYSPSC figures for New York customers using competitive retail electric service providers in December 1999 with those using competitive providers in December 2000 suggests that competition is stuck. In the eighteen months between the beginning of retail electric service competition in New York and December 1999, competing retailers picked up at least 123,998 customers using 1,296,000 mWh of electricity.<sup>14</sup> In 2000, the number of

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<sup>11</sup> Compare NYSPSC, *Financial Statistics of the Major Investor-Owned Utilities in New York State 1999*, p. 39, with [Http://www.dps.state.ny.us/Electric\\_RA\\_Migration.htm](http://www.dps.state.ny.us/Electric_RA_Migration.htm).

<sup>12</sup> [Http://www.dps.state.ny.us/Electric\\_RA\\_Migration.htm](http://www.dps.state.ny.us/Electric_RA_Migration.htm).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

customers using competitive suppliers increased by 105,282 (84.9%) but the amount of electricity used by the customers increased by only 95 mWh (7.3%).<sup>15</sup> Stated as a percentage of total electricity sold retail in the territories of New York's investor owned utilities, in all of 2000 competitors gained only 0.00008% of the market, while in the first eighteen months of competition the competitors took 1.2% of that market. For all practical purposes, retail electric service competition in New York ground to a halt in 2000.<sup>16</sup>

The NYSPSC has not yet published updated electric retail service competition figures that extend into 2001. These figures, when published, might conceivably show a surge in competition. However, we have not yet seen any indication of an increase in retail electric service competition in New York in this year.<sup>17</sup>

### NEW YORK STATE CONSUMER PROTECTION

To date, the New York State Attorney General's Office has seen a low, but increasing level of

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<sup>15</sup> *Ibid.*

<sup>16</sup> We do not address here the reasons for the limited development of retail electric service competition in New York.

<sup>17</sup> The available evidence appears to indicate that retail competition with New York energy utilities is not faring well. For example, after struggling for over a year, a competing natural gas retailer in Western New York went bankrupt early in the 2000 -2001 heating season. Its customers were all returned to the incumbent gas utility, the provider of last resort. This business failure cost the competitive company's customers \$800,000 they had prepaid under a levelized payment plan. In addition, we have observed that during the past twelve months several competing retail electric service providers have ceased accepting new residential customers in New York.

consumer problems related to competitive retail electric service. In 1998, the first year of retail electric service deregulation, we encountered only two such problems. In one instance we obtained a criminal fraud conviction of an individual who was collecting "deposits" for electric service even though the individual neither was authorized to operate an electric service company nor had made any other preparation for providing retail electric service. In the other instance, a somewhat naive individual approached consumers and attempted to sign them up as customers of what was an illegal pyramid scheme based in another state. It is not clear that this individual knew that the business he was representing was a fraud and there was no evidence that this individual signed up any customers or collected any funds. Immediately upon our contacting him, the individual ceased his solicitations.

In 1999, a competitive retail electric service company failed to follow New York law governing the renewal of expiring consumer service contracts, by failing to provide clear and coherent notice of the automatic renewal clause in the customers' contracts. We resolved this matter under the Attorney General's longstanding authority to enter into binding administrative settlements.<sup>18</sup> The company agreed to comply in all future transactions with the applicable law regarding notifying its customers of their right not to renew, and paid \$25,000 in costs. All indications are that the company is honoring the settlement.

In 2000, we received our first complaints about retail electric service "slamming" (switching a customer's electric service provider without the customer's authorization), deceptive advertising claims

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<sup>18</sup> New York Executive Law § 63(15).

by competitive electric services, telemarketing abuses involving electric service and failure to follow door-to-door sales rules when marketing retail electric service. We have received between 150 and 200 such complaints involving two such providers, as well as a smaller number of complaints against other competitive providers. Our investigation into these companies is proceeding.

### **MAINTAINING STATE AUTHORITY**

To date, we have found that existing federal and New York laws provide us the tools needed to address consumer abuses in the marketing and provision of competitive retail electric service. However, we are cognizant of the fact that competitive retail electric service is far from a mature market. Indeed, in New York this market has barely begun developing. We recognize that if competition expands, new and unanticipated consumer abuses may appear, and that new abuses may require new law to address novel circumstances. If so, the new law should be tailored to existing New York consumer protection statutes, which over time have been crafted to New York conditions. We therefore urge that, if federal legislation concerning retail electric

service competition is considered, such legislation be drafted to complement and not to replace or limit state law.

Respectfully submitted,

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