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# Electric Utility Regulation Reform in New York: Economic Competitiveness at the Expense of the Environment?

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COMMENT

**Electric Utility Regulation Reform in New York: Economic Competitiveness at the Expense of the Environment?**

BY JAMES D. ELLIOTT\*

I. Introduction .....	282
II. Brief History of Electric Utility Regulation .....	289
III. Public Utility Regulatory Concepts .....	295
A. Affected with the Public Interest .....	295
B. Natural Monopoly .....	296
C. Regulatory Compact .....	298
D. Cost of Service Regulation .....	298
IV. The First Principle <i>Is</i> the Economic and Environmental Well-Being of New York State ..	300
A. New York Public Service Law .....	301
B. New York Energy Law and The State Energy Plan .....	304
C. New York Public Service Commission Decisions .....	308

\* This article is dedicated in memory of my grandfathers, whose name I carry; to my wife Kelly, for all her love, support and patience through law school; to my Mom, Dad, Wiz & Dorry, for without them I wouldn't be who I am today.

V. Ramifications of the NYPSC's Decisions that Will Sacrifice Environmental Concerns .....	314
VI. Conclusion .....	316

### Table of Acronyms

CPUC .....	California Public Utilities Commission
DSM .....	Demand-Side Management
EPAct .....	Energy Policy Act of 1992
EPB .....	Energy Planning Board
EWGs .....	Exempt Wholesale Generators
FERC .....	Federal Energy Regulatory Commission
FPA .....	Federal Power Act
IOU .....	Investor Owned Electric Public Utility
IPP .....	Independent Power Producer
IRP .....	Integrated Resource Planning
LILCO .....	Long Island Lighting Company
NYPSC .....	New York Public Service Commission
PUA .....	Public Utility Act of 1935
PUHCA .....	Public Utilities Holding Company Act
PURPA .....	Public Utilities Regulatory Policy Act
QFs .....	Qualifying Facilities
SEP .....	State Energy Plan

### I. Introduction

The regulation of electric utilities has sparked considerable debate in many states. In California, for example, on April 20, 1994, the California Public Utilities Commission (CPUC) issued a controversial order stating that it would institute "retail wheeling"<sup>1</sup> in the state, for large electricity con-

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1. Wheeling is defined as "[t]he transmission of electricity by an entity that does not own or directly use the power it is transmitting." Retail wheeling, refers to the ability of a retail customer, e.g., homeowner, small business or industrial manufacturer, to purchase electricity directly from a variety of electricity producers instead of the local distribution utility, e.g., Pacific Gas and Electric. JAN HAMRIN ET AL., NATIONAL ASS'N OF REGULATORY UTIL. COMMISSIONERS, AFFECTED WITH THE PUBLIC INTEREST: ELECTRIC UTILITY RESTRUCTURING IN ERA OF COMPETITION 160 (1994). This definition of retail wheeling may be oversimplified, but will be utilized for the purpose of this comment. Proponents of retail wheeling argue that competition for retail sales of electricity is a panacea. The competitive contracting for electric power will result in "optimal

sumers by 1996 and for residential consumers by 2002.<sup>2</sup> Two weeks later, on May 3, 1994, the chairs of the California State Assembly Natural Resource Committee and the California State Assembly Utilities and Commerce Committee informed the CPUC president that at least eleven state statutes would need to be repealed or amended prior to the implementation of the order.<sup>3</sup> The legislature expressed clear disapproval of the commission's action:

under the circumstances, we consider it something of an understatement when the proposed order states that "we recognize that the Legislature can assist in the timely implementation of our proposal. . . ." President Fessler, we trust that you recognize that the Legislature must be much more than the PUC's "assistant" with "your proposal."<sup>4</sup>

The retail wheeling issue remains an area of considerable debate in California.

However, California is not the only state dealing with the retail wheeling issue. In Michigan, the Public Utility Commission issued an order on April 11, 1994, implementing a

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pricing and consumption of electric power and least-cost pollution control." Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339 (1993). Opponents view retail wheeling as a concerted effort by large industrial consumers to reduce their price of electricity. The concern of opponents is that the lower price paid by industrial consumers would be the result of cost shifting, not cost reduction. CHERYL HARRINGTON ET AL., *THE REGULATORY ASSISTANCE PROJECT, INTEGRATED RESOURCE PLANNING FOR STATE UTILITY REGULATORS* 46 (1994). The term wheeling originated in the natural gas industry and described a situation where a producer uses a gas line owned by another entity to transport gas to a customer. HALL HARVEY & ERIC HEITZ, *THE ENERGY FOUNDATION, RETAIL WHEELING: A BRIEFING FOR FOUNDATIONS* 2 (1994).

2. Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation; Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation; Order Instituting Rulemaking and Order Instituting Investigation, R.94-04-031, I.94-04-032 (Cal. Pub. Util. Comm'n Apr. 20, 1994)

3. Letter from Gwen Moore, Chair of Assembly Utilities and Commerce and Byron D. Sher, Chair of Assembly Natural Resource Committee, to Daniel Wm. Fessler, President, California Public Utility Commission (May 3, 1994) (on file with author).

4. *Id.* at 2.

retail wheeling experiment involving The Detroit Edison Company.<sup>5</sup> On August 26, 1994, Detroit Edison brought suit in the United States District Court for the Western District of Michigan. Detroit Edison sought a declaratory ruling claiming that the Federal Energy Regulatory Commission's (FERC) authority under the Federal Power Act (FPA)<sup>6</sup> preempted the Public Utility Commission from ordering Detroit Edison to provide transmission service to retail wheeling customers.<sup>7</sup> This Michigan retail wheeling order is also far from resolved.

The push for retail wheeling is symptomatic of the changing structure of the electric utility industry. Electricity is no longer exclusively generated by the large, vertically integrated, investor-owned electric public utility (IOU).<sup>8</sup> Independent power producers (IPP),<sup>9</sup> co-generation,<sup>10</sup> and self-

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5. *In re* Association of Businesses Advocating Tariff Equity for approval of an experimental retail wheeling tariff for Consumers Power Company, No. U-10143; *In re* on the Commission's own motion, to consider approval of an experimental retail wheeling tariff for The Detroit Edison Company, No. U-10176, Opinion and Interim Order Remanding to the Administrative Law Judge For Further Proceedings (Mich. Pub. Serv. Comm'n Apr. 11, 1994).

6. Federal Power Act, ch. 285, Part III, § 321 [320] (1920), as added Aug. 26, 1935, ch. 687, Title II, § 213, 49 Stat. 863; Nov. 9, 1978, Pub. L. No. 95-617, Title II, § 212 in part, 92 Stat. 3148, 16 U.S.C. §§ 791a-828c (1995).

7. *Detroit Edison Co. v. Mich. Pub. Serv. Comm'n* (W.D. Mich. filed Aug. 26, 1994).

8. The majority of electricity generated in the United States is generated by privately owned utilities whose shares are traded on the stock market, hence the term "Investor Owned Utility" (IOU). DONALD N. ZILLMAN & LAURENCE H. LATTMAN, *ENERGY LAW* 642 (1983). Electric utilities are said to be "vertically integrated" in that one entity generates, transmits, and distributes the electricity to the end user. Generation, transmission and distribution are three distinct functions capable of being provided by separate entities. HAMRIN ET AL., *supra* note 1, at 23-24. See discussion *infra* part III.

9. Independent power producers of electricity are producers of electricity that are not subject to the same regulations as IOUs and are not subject to the regulatory requirements of the Public Utility Regulatory Policies Act (PURPA). JAMES L. PLUMMER & SUSAN TROPFMANN, *COMPETITION IN ELECTRICITY: NEW MARKETS & NEW STRUCTURES* 7-8 (1990). See discussion *infra* part II.

10. Co-generation refers to the production of both electricity and useful thermal energy from the same process, e.g., the hot exhaust of a stationary fossil fuel burning engine can be fed to a boiler to produce hot water. Because both are produced from the same single process, significant savings in fuel consumption are realized. ZILLMAN & LATTMAN, *supra* note 8, at 684.

generation<sup>11</sup> provide competitive forces in the electricity generation market<sup>12</sup> that barely existed fifteen years ago.<sup>13</sup> Furthermore, the large vertically integrated natural monopoly<sup>14</sup> no longer exists. Yet the natural monopoly remains a fundamental basis for the regulation of public utilities.<sup>15</sup>

A fundamental justification for utility regulation is to minimize the abuses of monopolistic power.<sup>16</sup> Electric utilities are said to be "vertically-integrated," meaning that the same entity owns and is responsible for three separate functions that are essential for the consumer to receive electricity.<sup>17</sup> The three separate functions of electric utilities are the generation of power; the transmission and dispatch of power throughout a geographic territory; and the final distribution<sup>18</sup> of the electricity to the retail consumer.<sup>19</sup> Most discus-

11. Self-generation refers to a generation facility located on an electric retail customer's property designed to provide some or all of the retail customer's electricity needs, obviating or seriously reducing the need for electricity from the IOU. HAMRIN ET AL., *supra* note 1, at 158.

12. Generation is the production of electricity through a generator apparatus or equivalent. One of four basic electric industry functions under consideration for disaggregation in competitive markets. RESTRUCTURING NEW YORK'S ELECTRIC INDUSTRY: ALTERNATIVE MODELS AND APPROACHES, Glossary No. 94-E-0952 (1995) [hereinafter Glossary].

13. The Public Utility Regulatory Policies Act of 1978, Energy Policy Act of 1992, and changes in state regulatory practices broke the IOU monopolistic hold on electric power generation. See discussion *infra* parts II, IV.C.

14. "Natural monopoly" is an economic concept and one justification for government to regulate private enterprises. Un-regulated natural monopolies are not desirable from an economic standpoint because of the potential for economic waste and inefficient allocation of goods to consumers. ZILLMAN & LATTMAN, *supra* note 8, at 134. See discussion *infra* part III.

15. *Munn v. Illinois*, 94 U.S. 113, 126 (1877). *Munn* involved an 1871 Illinois statute that required owners of grain elevators in the city of Chicago to obtain a license, file a schedule of rates and charge no more than the statutory maximum amount. The plaintiff challenged the state statute, claiming that the statute regulated interstate commerce and that he was being deprived of property without due process of law. The Court held that since the grain elevators created a "virtual monopoly," the state of Illinois under its police powers could regulate the elevators. *Id.* at 131-32. See discussion *infra* part III.

16. JOSEPH P. TOMAIN ET AL., *ENERGY LAW & POLICY*, 35-36 (1989).

17. HAMRIN ET AL., *supra* note 1, at 23-24.

18. Distribution is the "delivery of electricity to an end-user through low voltage distribution lines." Glossary, *supra* note 12, at 10.

19. HAMRIN ET AL., *supra* note 1, at 23-24.

sions on utility regulation restructuring<sup>20</sup> treat each of these vertical functions as a separate entity.<sup>21</sup> The lay person views the monopolistic control over a geographic territory as evil because of the ability to demand prices above those which a competitive market<sup>22</sup> would yield. Furthermore, the economist views a natural monopoly as an undesirable economic condition because of the inefficient allocation of resources.<sup>23</sup> Thus, public utility regulation is warranted.

A second justification for regulating public utilities is that the service provided is deemed to be "affected with a public interest."<sup>24</sup> Electricity is essential to the functioning of modern society. Consumers expect there will always be an adequate supply of electricity to meet their needs. Because electricity cannot be economically stored in adequate amounts it must be generated continually. Regulation is designed to assure that sufficient generating capacity<sup>25</sup> is available at all times.

The sources of competition in the generating entity of the electric utility industry will reduce the need for regulatory oversight of this aspect of the utilities' operations. Thus, the question becomes how to legally, efficiently and fairly reduce regulation of electric utilities.

20. Restructuring can be defined as "the reconfiguration of the vertically-integrated electric utility." Glossary, *supra* note 12, at 45. It usually refers to "separation of the various utility functions into individually-operated and owned entities." *Id.*

21. HAMRIN ET AL., *supra* note 1, at 23-24.

22. Competitive market can be defined as "a market in which multiple sellers and multiple buyers interact to buy and sell goods and services, including electricity, ancillary services, and energy services." Glossary, *supra* note 12, at 6.

23. TOMAIN ET AL., *supra* note 16, at 35-36. Resources are defined as "any technology, program or measure that helps meet customer demand for electricity." Glossary, *supra* note 12, at 45.

24. TOMAIN ET AL., *supra* note 16, at 35-36. *Munn v. Illinois*, 94 U.S. 113 (1877), is the seminal case discussing "affected with a public interest" as a justification for government regulation of private enterprise. CHARLES F. PHILLIPS, JR., REGULATION OF PUBLIC UTILITIES 94 (1993). See discussion *infra* part III.

25. Capacity is defined "as a measure to define the electrical output potential of a generating unit, utility or the entire system. Capacity is expressed in units of electrical power, usually megawatts." Glossary, *supra* note 12, at 5.

This comment examines the New York Public Service Commission's (NYPSC) effort to improve the existing electric utility regulatory structure in New York State.<sup>26</sup> On August 9, 1994, the NYPSC instituted Phase II of the Competitive Opportunities case, to evaluate the existing regulatory structure in New York and to determine what improvements can be gained from the increased competition in the electric utility industry.<sup>27</sup>

The overall objective . . . is to identify regulatory and ratemaking practices that will assist in the transition to a more competitive electric industry designed to increase efficiency in the provision of electricity while maintaining safety, environmental, affordability, and service quality goals.<sup>28</sup>

The NYPSC scheduled hearings, briefings and meetings which resulted in nine "Proposed Principles,"<sup>29</sup> designed to guide the transition to a more competitive electric industry.<sup>30</sup>

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26. The New York Public Service Commission (NYPSC or Public Service Commission), an administrative agency established pursuant to the Public Service Law, regulates utility companies that provide a public service. N.Y. PUB. SERV. LAW §§ 1, 5 (McKinney 1989 & Supp. 1995). See discussion *infra* part IV.A.

27. *In re* Competitive Opportunities Available to Customers of Electric and Gas Service and to Develop Criteria for Utility Responses, Order Instituting Phase II of Proceeding, No. 93-M-0229 (N.Y. Pub. Serv. Comm'n Aug. 9, 1994). On November 30, 1994, the case name and number were changed to reflect the fact that the case is now limited to just electric service. *In re* Competitive Opportunities Regarding Electric Service, Order Deciding Petitions for Rehearing and Clarification, No. 94-E-0952 (N.Y. Pub. Serv. Comm'n Nov. 30, 1994) [hereinafter Competitive Opportunities].

28. Competitive Opportunities, *supra* note 27, at 1-2.

29. Pursuant to a schedule adopted September 12, 1994, proposed principles were submitted to the NYPSC by 24 interested parties prior to September 26, 1994. The submitted principles were discussed at all-day meetings on September 29, October 6, October 13 and October 17, 1994. The NYPSC attempted to condense the results of these meetings into nine proposed principles which were sent to all parties on October 19, 1994, for comment. Memorandum from Judith A. Lee, Administrative Law Judge, N.Y. Public Service Commission, to Active Parties in No. 93-M-0229 (Oct. 19, 1994) (on file with author and the NYPSC).

30. *Id.*



On December 22, 1994, the NYPSC issued its Opinion and Order Regarding Proposed Principles To Guide the Transition to Competition.<sup>31</sup> The "First Principle," which is the cornerstone of the nine proposed principles, "cannot be compromised to accommodate the others."<sup>32</sup> The First Principle states "[t]he economic and environmental well-being of New York State is of paramount concern."<sup>33</sup> This comment analyzes this principle in light of NYPSC precedent and New York statutory law.

The NYPSC and New York Legislature have repeatedly linked the goals of economic efficiency<sup>34</sup> and environmental soundness. They found that the New York economy, to be competitive, need not sacrifice the environment. If the NYPSC abandons this simultaneous goal in the Competitive Opportunities case it would contradict its 1) enabling statute, 2) sections of the New York Energy Law, and 3) invite an Article 78 action.<sup>35</sup> Cognizant of the California Legislature's response to CPUC's retail wheeling order, Peter Bradford, Chairman of the NYPSC, and other commissioners in New York, wisely established the First Principle as paramount, linking the environment and the economy. This comment also explores the potential ramifications faced by the NYPSC for a potentially short-term price reduction which violates the First Principle by sacrificing the environment.

Part II of this comment briefly discusses the history of electric utility regulation. Electric utility regulation went largely unchanged for fifty years. However, over the last decade statutory changes at the state and federal level are

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31. *In re* Competitive Opportunities Regarding Electric Service, No. 94-E-0952 (N.Y. Pub. Serv. Comm'n Dec. 22, 1994) [hereinafter Competitive Opportunities II].

32. *Id.* at 8.

33. *Id.*

34. Economic efficiency can be defined as the "optimal production and consumption of goods and services." Glossary, *supra* note 12, at 11.

35. N.Y. CPLR, art. 78 (McKinney 1994). Article 78 of the Civil Practice Law and Rules outlines when and how a state administrative agency decision can be challenged in New York. DAVID D. SIEGEL, *NEW YORK PRACTICE* 870 (1991).

largely responsible for the current state of the electric utility industry.

Basic public utility regulatory concepts are described in Part III. The two fundamental justifications for a government agency to regulate a privately owned corporation are discussed in greater detail. While pervasively regulated, public utilities are entitled to earn a profit through the rates they charge. These rates are arrived at through the ratemaking method known as cost of service regulation. Cost of service regulation and the regulatory compact between the state regulatory body and the regulated entity are described in this part.

Part IV critiques the First Principle with regard to the statutory limitations and precedent. This part illustrates the repeated link in the Public Service and Energy Law of economic competitiveness and environmental protection. Part IV also discusses NYPSC decisions which recognize the compatible goals of environmental protection and greater economic efficiency through increased competition.

Part V explores the ramifications of the NYPSC sacrificing environmentally beneficial practices in the name of competition. The Public Service Law, Energy Law and the most recent State Energy Plan work to ensure that energy efficiency programs are maintained in a restructured industry. This part reviews the susceptibility of a NYPSC decision to judicial review if it fails to maintain energy efficiency programs in a restructured regulatory scheme.

Finally, Part VI concludes that innovative regulatory practices can harvest the benefits of competition while preserving the sound environmental practices of the NYPSC.

## II. Brief History of Electric Utility Regulation

The regulatory structure of electric utilities established by the Public Utility Act of 1935 (PUA)<sup>36</sup> did not substantially change until the enactment of the Public Utilities Regu-

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36. Public Utility Act of 1935, 49 Stat. 803 (1935).

latory Policy Act of 1978 (PURPA).<sup>37</sup> PUA was enacted to address the unacceptable monopolistic practices that existed in 1932 where three public utility holding companies<sup>38</sup> controlled nearly half of the nation's IOUs.<sup>39</sup>

This situation arose during the late 1920s and early 1930s, when one holding company would own many small utilities in various states.<sup>40</sup> Since the utilities were involved in interstate commerce, the power of the states to regulate their activities was limited to those rare instances where a utility's activities were within a single state's borders.<sup>41</sup> PUA addressed this problem by reorganizing the holding companies, vesting greater power in the states, and allowing for increased regulation of rates and services by both state and federal agencies.<sup>42</sup>

Title I is the Public Utilities Holding Company Act (PUHCA),<sup>43</sup> and Title II is the Federal Power Act (FPA).<sup>44</sup> Section 79k(b)<sup>45</sup> of PUHCA sounded the death knell for the public utility holding companies.<sup>46</sup> This section forced the massive holding companies to divest ownership in any company more than twice removed.<sup>47</sup>

37. Public Utilities Regulatory Policy Act of 1978, 16 U.S.C. § 2601 (1995). This "federal legislation requires utilities to buy electric power from private 'qualifying facilities' at an avoided cost rate." Glossary, *supra* note 12, at 41.

38. "A holding company is an enterprise that owns sufficient stock in another company or in a number of companies so that it may influence the management of the company whose stock it holds." PHILLIPS, *supra* note 24, at 632. In comparison a pure holding company is a stockholding firm only, and is not involved in the actual operation of the utilities. *Id.*

39. Jeffrey D. Watkiss & Douglass W. Smith, *The Energy Policy Act of 1992 — A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 450 (1993).

40. PHILLIPS, *supra* note 24, at 632.

41. *Id.*

42. *Id.* at 634.

43. Public Utilities Holding Company Act, 15 U.S.C. § 79 (1995).

44. Federal Power Act, 16 U.S.C. § 791a (1995).

45. 15 U.S.C. 79k(b) (1995).

46. PHILLIPS, *supra* note 24, at 632. The PUHCA also granted the Securities and Exchange Commission the responsibility of overseeing holding companies' issuance of new securities and purchasing and selling of assets as an additional means to oversee ownership interests. *Id.*

47. PHILLIPS, *supra* note 24, at 633. The PUA required that every "holding company shall cease to be a holding company with respect to each of its subsidi-

While Title I reorganized the holding companies, Title II, was instrumental in the separation of regulatory powers between state and federal agencies. Section 201(a) of the FPA reserves jurisdiction of “the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce” to the federal government.<sup>48</sup> The Federal Power Commission which was subsequently replaced by the Federal Energy Regulatory Commission (FERC), is the agency responsible for the regulation of interstate energy activities.<sup>49</sup> FERC regulates “sales for resale,” as opposed to retail sales or final sales of electricity, which are left to the state agencies to regulate.<sup>50</sup> Section 201 of the FPA specifically limits the power of the commission to that which is specifically delegated to it.<sup>51</sup> The FPA extends federal regulation “only to those matters which are not subject to regulation by the states.”<sup>52</sup> State utility commissions regulate the operation of IOUs, the rates charged by IOUs and the services provided by IOUs.<sup>53</sup>

The first major amendment of the Federal Power Act of 1935 was the Public Utility Regulatory Policies Act of 1978.<sup>54</sup> For the first time, IOUs were required to purchase electric power generated by a group of IPPs known as qualifying facilities (QFs).<sup>55</sup> Not only were IOUs required to purchase power from QFs, but they were also required to supply the QFs with backup power.<sup>56</sup> In an effort to encourage energy production

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ary companies which itself has a subsidiary company which is a holding company.” 16 U.S.C. § 79k(b) (1995).

48. 16 U.S.C. § 824(a) (1995).

49. PHILLIPS, *supra* note 24, at 142 (discussing Federal Energy Regulatory Commission (FERC) inheriting many of the functions of the Federal Power Commission).

50. *Id.*

51. 16 U.S.C. § 824(a) (1995).

52. *Id.*

53. ZILLMAN & LATTMAN, *supra* note 8, at 644.

54. Watkiss & Smith, *supra* note 39, at 451.

55. 16 U.S.C. § 824a-3(a) (1995). PURPA defines QFs as co-generation facilities and small power producers of 80 megawatts or less. QFs are allowed, at avoided cost rates, to sell their output to the local utility. In order to qualify as a QF a certain fuel type must be used to generate electricity. 16 U.S.C. § 796(17)(A) (1995).

56. 16 U.S.C. § 824a-3(a) (1995).

by QFs, Congress exempted QFs from many of the regulatory constraints placed on other power producers.<sup>57</sup> Congress intended QFs to conserve energy resources and reduce the United States' reliance on foreign oil.<sup>58</sup> The statute made it possible for QFs to compete as generating sources of electricity, thereby breaking the IOU monopoly on electric power generation.<sup>59</sup>

Prior to PURPA, QFs and other IPPs fought an uphill battle to sell their electricity.<sup>60</sup> An IPP did not own the transmission lines, therefore it had to attempt to sell its power to the disinterested, monopolistic IOU.<sup>61</sup> Additionally, the non-utility generator was precluded from selling its power directly "to retail customers because it did not have a state retail franchise"<sup>62</sup> from the state administrative agency empowered to regulate retail sales of electricity.<sup>63</sup> By benefitting a specific category, PURPA spawned an industry of electric power generators to compete with IOUs. By 1990, QFs were responsible for an estimated fifty-four percent of new generating capacity in the United States.<sup>64</sup> Although PURPA successfully promoted electric power generation from QFs, many other IPPs were unable to enter the electric generation market until the Energy Policy Act of 1992 (EPAAct).<sup>65</sup>

The EPAAct addressed the concerns of those IPPs not covered by PURPA.<sup>66</sup> From 1978 to 1992, the remaining IPPs did not benefit from the exemptions granted to QFs under PURPA. Thus, they were still subject to the restrictions of the FPA and the Public Utility Holding Company Act

57. 16 U.S.C. § 824a-3(e) (1995).

58. See H.R. REP. No. 543, 95th Cong., 2d Sess. 5-6, 8 (1978); see also STEVEN FERREY, LAW OF INDEPENDENT POWER: DEVELOPMENT/CO-GENERATION/UTILITY REGULATION 4-2 (1989).

59. FERREY, *supra* note 58, at 4-2.

60. *Id.*

61. Watkiss & Smith, *supra* note 39, at 453.

62. *Id.*

63. See discussion *infra* part III. 16 U.S.C. § 824(i) defines the power of FERC and the different types of orders it may issue.

64. Watkiss & Smith, *supra* note 39, at 454 & n.33.

65. Energy Policy Act of 1992, 42 U.S.C. § 13201 (1988 & Supp. 1992).

66. Watkiss & Smith, *supra* note 39, at 455.

(PUHCA).<sup>67</sup> As a result, the remaining IPPs were still faced with trying to sell power to a disinterested IOU and were unable to sell directly to retail customers. The EPAct alleviated this burden by creating a new category of IPPs defined as “exempt wholesale generators” (EWGs).<sup>68</sup>

Under the EPAct, EWGs are exempt from PUHCA restrictions and are permitted to sell and generate power at the wholesale level.<sup>69</sup> The EPAct granted FERC the authority to order the entity owning the transmission lines to allow the power-producer to use the transmission lines for wholesale electricity sales.<sup>70</sup> While authorizing FERC to order wholesale wheeling, the EPAct specifically prohibited FERC from ordering retail wheeling.<sup>71</sup> Increasing competition in the electricity generation market was one aspect of the EPAct’s effort to increase energy efficiency and conserve energy.<sup>72</sup>

The EPAct amended PURPA and required state utility commissions to consider new standards for regulating retail sales of electricity and to adopt the new standard if appropriate.<sup>73</sup> The relevant standards required state commissions to consider implementing integrated resource planning (IRP)<sup>74</sup> and utilizing demand side management resources.<sup>75</sup> The term “demand side management” (DSM) “refers to the man-

67. *Id.* Each “electric utility shall employ integrated resource planning,” in addition to updating all of the plans. *Id.*

68. 15 U.S.C. § 79z-5a (1995). EWG means “any person determined by the Federal Energy Regulatory Commission to be engaged directly or indirectly through one or more affiliates . . . and exclusively in the business of owning and operating or both all or part of one or more eligible facility and selling energy at wholesale.” *Id.*

69. PHILLIPS, *supra* note 24, at 658.

70. 16 U.S.C. § 824i (1995).

71. 16 U.S.C. § 824k(h) (1995). Unless such entity is a federal power market, *etc.* *Id.*

72. *See generally*, PHILLIPS, *supra* note 24, at 657 (describing the various levels at which the Energy Policy Act of 1992 (EPAct) requires increased energy efficiency and conservation).

73. PHILLIPS, *supra* note 24, at 658-60.

74. Integrated Resource Planning can be defined as “a public planning process and framework within which the costs and benefits of both demand and supply side resources are evaluated to develop the least total cost mix of utility resource options.” Glossary *supra* note 12, at 22.

75. 16 U.S.C. § 2621(d)(7), (8) (1995).

agement and encouragement by utilities of energy conservation and efficiency among their customers."<sup>76</sup> The EAct amended section 111(d)(8) of PURPA to require state commissions to consider adopting the following standard:

[t]he rates allowed to be charged by a state-regulated electric utility shall be such that the utility's investment in and expenditures for energy conservation, energy efficiency resources and other demand-side management measures are at least as profitable, giving appropriate consideration to income lost from reduced sales due to investments in and expenditures for conservation and efficiency, as its investments in and expenditures for the construction of new generation, transmission and distribution equipment.<sup>77</sup>

The EAct's second attempt to level the playing field between demand-side and supply-side resources required state commissions to consider employing integrated resource planning (IRP).<sup>78</sup> IRP is considered to be:

a planning and selection process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, co-generation and district heating and cooling applications, and renewable energy resources, in order to provide adequate and reliable service to its electric customers at the lowest system cost.<sup>79</sup>

New York adopted the suggestion of the EAct and adopted section 66-i, entitled "electric capacity procurement."<sup>80</sup>

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76. DAN R. WILLIAMS & LARRY GOOD, GUIDE TO THE ENERGY POLICY ACT OF 1992 259 (1994). Where the business is one which is connected with public health and welfare, state government can regulate this business as a reasonable exercise of police power. *Id.*

77. 16 U.S.C. § 2621(d)(8) (1995).

78. 16 U.S.C. § 2621(d)(7) (1995). "Each electric utility shall employ integrated resource planning." *Id.*

79. WILLIAMS & GOOD, *supra* note 76, at 258.

80. N.Y. PUB. SERV. LAW § 66-i (McKinney Supp. 1995). See discussion *infra* Part IV.A.

### III. Public Utility Regulatory Concepts

#### A. Affected With the Public Interest

The “affected with the public interest” concept was first discussed by the United States Supreme Court in *Munn v. Illinois*.<sup>81</sup> Borrowing heavily from Lord Chief Justice Hale, Chief Justice Waite stated:

[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.<sup>82</sup>

Therefore, if an entity chooses to enter a market that produces a good or service which is deemed to be in the public interest, it essentially subjects itself to some level of regulation. Accordingly, the state government is empowered to regulate private enterprise as long as it is acting to protect the “health, happiness, and well-being of the public as a whole.”<sup>83</sup> States are granted this power as part of their broad police powers.<sup>84</sup> The federal government’s power to regulate private enterprises is an extension of its power to regulate interstate commerce.<sup>85</sup>

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81. See generally 94 U.S. 113, 125.

82. *Id.* at 126.

83. *General Elec. Co. v. Wahle*, 296 P.2d 635, 643, 207 Or. 302 (1956).

84. PHILLIPS, *supra* note 24, at 87.

The Tenth Amendment to the Constitution provides that those powers not delegated to the federal government and specifically prohibited to them may be exercised by the states. States have broad authority to legislate for protection of the health, safety, morals and general welfare of their citizens. These are collectively known as the police powers of the states.

*Id.*

85. *Gibbons v. Ogden*, 22 U.S. 1 (1824). For a discussion on the development of the power under the federal commerce clause see Charles P. Light, Jr., *The Federal Commerce Power*, 49 VA. L. REV. 717-28 (1963).



The power of the state and federal government, however, is not omnipotent. From a Constitutional perspective, the state and federal governments' power to regulate is limited by the due process clause of the Fourteenth and Fifth Amendments, respectively.<sup>86</sup> In interpreting the due process clause, the Supreme Court has concluded "that [a] law shall not be unreasonable, arbitrary, or capricious, and that the means [of regulation] selected shall have a real and substantial relation to the object sought to be attained."<sup>87</sup> The problem with a "limitation" such as this is that most businesses could be viewed as affecting a public interest and therefore subject to government regulation.<sup>88</sup> A combination of political, social, economic and legal considerations influence the "affected with a public interest" determination. Therefore predicting which businesses will be regulated is difficult.<sup>89</sup> Consequently, a great variety of businesses are pervasively regulated.<sup>90</sup>

## B. Natural Monopoly

History has shown that a free market unfettered by government regulation, will not always produce the optimum quantity of goods and services.<sup>91</sup> When the market fails, government regulation is one means by which to correct or minimize inefficient distribution of goods and services.<sup>92</sup>

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86. "No person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The Fifth Amendment has been applied to the states through the due process clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1, cl. 3 (the relevant part states "nor shall any State deprive a person of life, liberty, or property without due process of law"). See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 239 (1887) (applying the Fifth Amendment limitation to the states through incorporation of the "Due Process Clause" of the Fourteenth Amendment).

87. *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (upheld New York law that set prices for the sale of milk as reasonable and substantially related to protecting the public health and welfare).

88. PHILLIPS, *supra* note 24, at 116-17.

89. ZILLMAN & LATTMAN, *supra* note 8, at 134.

90. In addition to the typical industries such as electric utilities; water companies, grain elevators, stockyards, and sanitation facilities are deemed to be affected with the public interest. PHILLIPS, *supra* note 24, at 4.

91. TOMAIN ET AL., *supra* note 16, at 34-35.

92. *Id.* This is economic regulation as opposed to social regulation. *Id.*

A primary example of market failure is the existence of a natural monopoly. From a purely economic perspective, a "natural monopoly" is a misnomer.<sup>93</sup> In a purely competitive market, the demand<sup>94</sup> and marginal revenue curves are the same;<sup>95</sup> therefore, a producer will continue to increase output until the marginal cost<sup>96</sup> of production equals marginal revenue.<sup>97</sup> Profit is maximized when marginal cost equals marginal revenue.<sup>98</sup> However, the marginal revenue curve for a monopoly is below the demand curve of the market.<sup>99</sup> The results of this lower demand curve are lower output, higher prices and monopolistic profits.<sup>100</sup>

Electric utilities are often cited as typical examples of a natural monopoly.<sup>101</sup> Building generation stations and operating and maintaining transmission lines and distribution stations is extremely capital intensive, making entry into the market difficult.<sup>102</sup> As the electric utility increases in size, it benefits from economies of scale and is able to reduce the price of services. As a result, it is increasingly difficult for smaller producers to compete. Additionally, it is wasteful and illogical to have multiple sets of electric transmission lines running to each consumer of electricity. To minimize waste and inefficient allocation of resources, electric utilities

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93. See PHILLIPS, *supra* note 24, at 51; Richard Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548-63 (1969). Economists argue that "natural monopolies" do not evolve but are the result of a public policy determination that the public good would be advanced by permitting only one entity to exist in a specific market. *Id.* (citing James R. Nelson, *The Role of Competition in Regulated Industries*, 11 The Antitrust Bulletin 3 (1966)).

94. Demand is defined as "the amount of electricity that must be generated to meet all customer needs." Glossary, *supra* note 12, at 9.

95. TOMAIN ET AL., *supra* note 16, at 36.

96. Marginal cost is "the cost of the utility of providing the next (marginal) kilowatt-hour of electricity, irrespective of sunk costs." Glossary, *supra* note 12, at 29.

97. TOMAIN ET AL., *supra* note 16, at 30.

98. *Id.*

99. *Id.* at 35.

100. *Id.* at 36.

101. TOMAIN ET AL., *supra* note 16, at 36.

102. ZILLMAN & LATTMAN, *supra* note 8, at 134.

have been heavily regulated at the state and federal level since the mid-1930s.<sup>103</sup>

### C. Regulatory Compact

The regulatory compact is an unwritten agreement between the electric utility and the regulating government agency.<sup>104</sup> In New York the regulatory compact exists between the New York Public Service Commission (NYPSC) and the seven electric IOUs which sell electricity.<sup>105</sup> The regulatory compact has two primary components.<sup>106</sup> First, each utility is granted a specific geographic territory over which it has both the exclusive right to sell electricity and the obligation to serve everyone in the utility's service area.<sup>107</sup> In exchange for monopolistic control in a specific geographic region, the utility submits to regulatory oversight from the NYPSC.<sup>108</sup> The rates must be set fairly and nondiscriminatorily.<sup>109</sup> Second, the utilities are permitted to recover, through rates charged to consumers, a fair rate of return on prudent capital expenditures.<sup>110</sup> The traditional rate-making method used by state utility commissions is known as cost of service regulation.<sup>111</sup>

### D. Cost of Service Regulation

For the regulatory compact to be "honored," the rates set by the NYPSC must accomplish two goals simultaneously. First, the rates charged to consumers must be fair and non-

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103. Federal Power Act of 1935, 16 U.S.C. § 791a (1995); Public Utility Holding Company Act, 15 U.S.C. § 79 (1995).

104. PHILLIPS, *supra* note 24, at 21.

105. The seven electric IOUs in New York are Central Hudson Gas & Electric Corp., Consolidated Edison Co. of N.Y., Long Island Lighting Co., N.Y. State Electric & Gas Co., Niagara Mohawk Power Corp., Orange & Rockland Utilities, Inc., and Rochester Gas & Electric Corp. NEW YORK POWER POOL, LOAD & CAPACITY DATA 1 (1995).

106. PHILLIPS, *supra* note 24, at 21.

107. *Id.*

108. *Id.*

109. N.Y. PUB. SERV. LAW § 65(2), (3) (McKinney 1989).

110. PHILLIPS, *supra* note 24, at 21.

111. Cost of service is the pricing based upon the cost of the providers, rather than a market clearing price. Glossary, *supra* note 12, at 8.

discriminatory. Second, the rates must be set so that the revenue generated from sales of electricity covers all of the utility's expenses while allowing a fair rate of return on the utility's prudent capital expenditures.<sup>112</sup>

The total amount of money that must be raised through rates is known as the "revenue requirement,"<sup>113</sup> which is calculated from a relatively simple formula.<sup>114</sup> However, the computation of these individual variables is complex and labor intensive.<sup>115</sup> The rate base is the net amount of capital investment that the utility has prudently incurred or made.<sup>116</sup> It includes the generation facilities, transmission lines, distribution facilities and other equipment required to provide service to customers, minus depreciation.<sup>117</sup> The rate base is of critical importance to the utility because it is the amount upon which a utility may earn its rate of return.<sup>118</sup> Consequently, what is included in the rate base is a much contested issue requiring extensive amounts of regulatory oversight.

In order to oversee the rate setting of public utilities located in New York, the NYPSC employed 685 people and spent almost \$53 million dollars in 1991.<sup>119</sup> The rate setting process has become extremely adversarial, requiring lengthy

112. PHILLIPS, *supra* note 24, at 21.

113. *Id.* at 165.

114. The rate formulation and explanation of the variables is as follows:

$$R = O + (V - D)r$$

**R** is the utility's total revenue requirement or rate level. This is the total amount of money a PUC [public utility commission or public service commission] says that a utility is entitled to earn.

**O** is the utility's operating expenses.

**V** is the gross value of the utility's tangible and intangible property.

**D** is the utility's accrued depreciation. Combined, (V-D) constitute the utility's rate base.

**r** is the rate of return a utility is allowed to earn on its capital investment or on its rate base.

*Id.* at 166.

115. PHILLIPS, *supra* note 24, at 138.

116. TOMAIN ET AL., *supra* note 16, at 164-66.

117. *Id.* at 170.

118. *Id.* at 203.

119. PHILLIPS, *supra* note 24, at 138 (represents figures for entire NYPSC staff which regulates all utilities, not just electric utilities).

rate cases with a room full of lawyers before an administrative law judge.<sup>120</sup> In order to take advantage of increased competition in the generation of electricity, NYPSC's effort to restructure electric utility regulation, presents an opportunity to improve what has become a costly and arduous task.

#### IV. The First Principle *Is* the Economic and Environmental Well-Being of New York State

The First Principle is consistent with the powers and duties imposed upon the NYPSC pursuant to the Public Service Law. The principle states, "[t]he economic and environmental well-being of New York State is of paramount concern here."<sup>121</sup> The First Principle treats the economy and the environment as one concern, not as two separate entities. Entwining the economy and the environment in one guiding principle reflects a common theme found throughout New York Public Service Law and New York Energy Law. This common theme requires the NYPSC, acting on behalf of the public good, to protect the environment while fostering economic development<sup>122</sup> within New York State.

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120. See generally PHILLIPS, *supra* note 24, at 17-21. Until the early 1970s, investors purchased utility stocks because the dividends paid by the stocks were all but guaranteed because the regulation by public utility commissions ensured that the utility companies "earned a fair rate of return" on their capital expenditures. The oil embargo in the early 1970s was largely to blame, for the first time in 89 years, Consolidated Edison Company of New York "failed to pay quarterly dividends on its common stock." *Id.* at 17 n.61. The problems related to the oil embargo were exacerbated by huge cost overruns in the construction of nuclear powered generation stations and disallowances for certain imprudent expenditures. *Id.* at 17-21. Advocates on behalf of consumers and the environment, each with their own agenda, began to take part in the rate cases to ensure that their interests, not just the interests of the shareholders, were considered in the rate-making process. *Id.* at 18-19.

121. Competitive Opportunities II, *supra* note 31, at 8.

122. Economic development is any activity that involves the increase or enhancement of the economy's capacity for the production of goods and services and the creation or retention of employment opportunities, including, but not limited to the establishment or expansion of business, investment in the expansion or modernization of business facilities and actions that improve the competitiveness of businesses or groups of businesses.

Glossary, *supra* note 12, at 11.

## A. New York Public Service Law

The NYPSC is an administrative agency of the State of New York established by the Legislature pursuant to the Public Service Law enacted in 1989.<sup>123</sup> The NYPSC has the “paramount purpose of protecting and enforcing the rights of the public.”<sup>124</sup> In furtherance of its primary directive, the NYPSC is empowered to regulate the management and operation of entities providing a public service. Further, the NYPSC ensures that the regulated entities comply with all provisions of law and orders of the commission.<sup>125</sup> The NYPSC, operating as the alter ego of the Legislature,<sup>126</sup> primarily serves a legislative purpose.<sup>127</sup> Despite its broad powers, the NYPSC “can exercise only such powers as have been specifically conferred by statute, together with those incidental powers which may be requisite to effectually carry out powers actually granted.”<sup>128</sup>

Environmental and economic concerns are linked in the initial grant of jurisdiction.<sup>129</sup> Article 1 imposes a duty on the NYPSC to:

encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs . . .

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123. N.Y. PUB. SERV. LAW § 4(1) (McKinney 1989). The Public Service Law of New York consists of ten articles. Article 1 creates the Department of Public Service and Public Service Commission and broadly defines the rights and responsibilities of these state agencies. The remaining Articles in the Public Service Law detail how the Commission is to regulate the particular types of utility service companies, e.g., liquid petroleum pipeline corporations, water companies, telephone companies and electric utility companies. Article 4 contains the specific provisions relating to the operation of electric utilities and the rates they can charge for electricity.

124. *People v. Pub. Serv. Comm'n*, 141 N.Y.S. 1018 (1913).

125. *People ex rel. New York, N.H. & H.R. Co. v. Willcox*, 94 N.E. 212 (N.Y. 1911).

126. *Montalvo v. Consol. Edison Co.*, 460 N.Y.S. 2d 784 (App. Div. 1983), *aff'd* 462 N.E.2d 149 (1984). “In its rule making capacity,” NYPSC functions pursuant to the legislative powers. *Id.*

127. *Pub. Serv. Comm'n v. Norton*, 109 N.E.2d 705, 708 (1952).

128. *Village of Boonville v. Maltbie et al.*, 283 N.Y.S. 460, 465 (App. Div. 1935) *reargument denied*, 285 N.Y.S. 1052, *aff'd* 4 N.E.2d 209 (1936).

129. N.Y. PUB. SERV. LAW § 5 (McKinney 1989 & Supp. 1995). The Legislature, through § 5 creates the jurisdictional powers and the duties of the NYPSC. *Id.*

for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.<sup>130</sup>

The NYPSC is charged with the responsibility of ensuring that entities subject to its regulation are guided by three primary concerns: (1) economic efficiency, (2) public safety, and (3) environmental conservation.<sup>131</sup> Article 1, section 5, entitled "jurisdiction, powers and duties of public service commission," is the only section of the Public Service Law that specifically addresses the duties and responsibilities of the Public Service Commission. Further, subdivision 2 of section 5 is the only subdivision that specifically addresses the duty of the Public Service Commission.<sup>132</sup> This scant guidance for the Public Service Commission is purposeful. The NYPSC, as the Legislature's alter ego, is entrusted to establish, by whatever means it deems appropriate, electricity rates that are just and reasonable.<sup>133</sup> While the NYPSC is granted broad authority in the setting of rates, section 5, subdivision 2 requires that NYPSC must function in a way that protects the environment, promotes economic efficiency and ensures public safety.

The First Principle's construction is similar to that of section 5, subdivision 2. In the same way that subdivision 2 of section 5 requires all NYPSC actions be guided by environmental, economic and public safety concerns, the First Principle, linking the environment and the economy, is of

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130. *Id.*

131. *Id.*

132. *Id.* Section 5 contains five subdivisions; subdivision 1 and 3 list activities which the NYPSC has jurisdiction over. *Id.* Subdivision 4 grants the NYPSC the power to exempt an association of homeowners owning and operating a water plant or water-works from the provision of the Public Service Law if the water is being distributed only to customers having an interest in the operation. N.Y. PUB. SERV. LAW § 5 (McKinney 1989 & Supp. 1995). Subdivision 5 was added by the legislature in 1993 requiring the NYPSC "to develop a plan to maximize the use of telecommuting to conserve energy." *Id.* § 5(5) (McKinney Supp. 1995).

133. *City of Rochester v. Rochester Gas & Elec. Corp.*, 134 N.E. 828, 830 (1922) (interpreting the NYPSC discretion under § 65, subd. 1 of the Public Service Law).

paramount concern and “cannot be compromised.”<sup>134</sup> There are nine additional Proposed Principles which have not been finalized and are presently being debated in the Competitive Opportunities case.<sup>135</sup> Although the NYPSC has broad authority to guide the transition to a more competitive electric industry, final resolution of these nine guiding principles must not compromise New York’s economy or its environment.

In 1992, the New York State Legislature enacted various amendments to the Public Service Law and the Energy Law to strengthen and focus the interconnectedness of the economy and the environment. The actions of the New York State Legislature to amend these laws paralleled those of Congress’ enactment of the Energy Policy Act of 1992. The Legislature also codified the IRP principles in section 66-i entitled “Electric Capacity Procurement.”<sup>136</sup> Section 66-i requires that electric utilities,

prior to entering electric capacity purchase contracts, including investments in new construction, repowering of life extension of electric generating facilities, and demand-reducing measures, [electric utilities] should consider reasonably available sources and suppliers of electric capacity and demand reducing measures, and should select the source or sources which best serve the public interest, taking into consideration such factors as ratepayer impacts, system reliability, environmental impacts, conservation of energy resources, preservation or creation of economic opportunities, fuel efficiency, fuel availability and diversity, and public health and welfare.<sup>137</sup>

This section grants the NYPSC the power to prescribe the guidelines, rules and regulations necessary to ensure that electric capacity is acquired in a manner consistent with sec-

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134. Competitive Opportunities II, *supra* note 31, at 8.

135. *Id.* at 9.

136. N.Y. PUB. SERV. LAW § 66-i, *supra* note 80.

137. *Id.* at subd. 1.



tion 66-i.<sup>138</sup> Subsequent to the enactment of section 66-i,<sup>139</sup> electric utilities in New York are obligated to evaluate supply-side resources<sup>140</sup> as well as demand-reducing measures. Section 66-i acknowledges that investing in supply-side resources, often powered by environmentally damaging fossil fuels, may not be the most cost-effective, environmentally wise means of meeting future generating capacity needs. Subdivision 1 of section 66-i requires that electric utilities consider at least nine factors when deciding how to meet future energy needs.<sup>141</sup> Three reoccurring themes, which are articulated in greater detail in the nine factors, are (1) environmental protection, (2) economic competitiveness and (3) public welfare.<sup>142</sup>

## B. New York Energy Law and The State Energy Plan

1992 was an active year for the New York Legislature in the energy efficiency arena. In conjunction with section 66-i of the Public Service Law, the New York Legislature adopted Article 6, Energy Planning.<sup>143</sup> Sections 6-102 and 6-103 created a State Energy Planning Board (EPB) charged with the responsibility of formulating a State Energy Plan (SEP).<sup>144</sup> The three volume SEP produced in October 1994, consists of

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138. *Id.* at subd. 3. Subdivision 3 also requires that any NYPSC action associated with acquiring electric capacity shall be reasonably consistent with the State Energy Plan. *Id.* See discussion *infra* part IV.B.

139. N.Y. PUB. SERV. LAW § 66-i, *supra* note 80. This section was enacted July 24, 1992. *Id.*

140. Electricity generated from the burning of coal, oil, natural gas and nuclear fusion are examples of supply-side resources.

141. *Id.* at subd. 1. The environmental factors are environmental impacts and conservation of energy resources. The economic factors are ratepayer impacts, preservation or creation of economic opportunities, fuel efficiency, fuel availability and diversity. The public welfare factors are system reliability and the public health and welfare. *Id.*

142. *Id.*

143. N.Y. ENERGY LAW art. 6 (McKinney Supp. 1995). In conjunction with adopting Article 6 of the Energy Law and section 66-i of the Public Service Law, the New York Legislature adopted or amended State Finance Law § 97-tt, Environmental Conservation Law §§ 8-0109, 8-0111, 17-0701, 17-0823, 19-0305, 49-0307, and Public Service Law § 66-c. N.Y. ENERGY LAW § 6-102, HISTORICAL AND STATUTORY NOTES (McKinney Supp. 1995).

144. N.Y. ENERGY LAW § 6-104 (McKinney Supp. 1995).

1066 pages of information “to provide strategic policy guidance for energy decision-makers to meet future energy requirements over the 20-year planning period (1992-2012).”<sup>145</sup>

Article 6 describes in great detail what must be included in the SEP, not the least of which is a twenty year forecast to predict (1) demand for electricity, natural gas, coal and petroleum products; (2) the energy supply requirements needed to satisfy that demand; and (3) the “identification and analysis of the costs, risks, benefits and uncertainties of energy supply source alternatives, including demand-reducing measures, for satisfying energy supply sources.”<sup>146</sup> Section 6-106 requires the electric utility companies, among others, to aid in the process of formulating the SEP and requires them to submit volumes of detailed information.<sup>147</sup> Section 6-104 requires the SEP to include:

a statement of energy policies and long-range energy planning objectives and strategies appropriate to achieve . . . the least cost integration of energy supply sources and demand-reducing measures for satisfying energy supply requirements, giving due regard to such factors as ratepayer impacts, security and diversity of fuel supplies and generating modes, protection of public health and safety, adverse and beneficial environmental impacts, conservation of energy and energy resources and the ability of the state to compete economically.<sup>148</sup>

In contrast to the broad, general powers bestowed upon the Public Service Commission, the New York Legislature expressly required the EPB to consider numerous factors and reach conclusions regarding how to best meet the future en-

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145. ENERGY PLANNING BD., *NEW YORK STATE ENERGY PLAN, VOLUME I: SUMMARY REPORT 1* (1994) [hereinafter *SEP VOL. I*].

146. N.Y. ENERGY LAW § 6-104(2) (McKinney Supp. 1995).

147. N.Y. ENERGY LAW § 6-106 (McKinney Supp. 1995). The information submitted consists of a single long range plan for future operations including: forecasts of electricity supply requirements, existing electricity supply sources and recommended additions and or demand reducing measures for satisfying these predicted requirements. *Id.*

148. N.Y. ENERGY LAW § 6-104(2)(d) (McKinney Supp. 1995).

ergy needs of New York.<sup>149</sup> The Legislature's detailed guidance for the EPB may be explained by the ambitious goals and objectives of the SEP. The fundamental purposes of the SEP are:

- to promote economic growth by improving the economic competitiveness of business and industry in New York;
- to continue progress toward achievement of environmental goals in a cost-effective manner;
- to encourage expanded consumer choice and diversity in meeting energy service needs; and
- to ensure that consumers continue to have access to safe, reliable and adequate energy supplies at reasonable cost.<sup>150</sup>

Specific recommendations in the SEP fulfill these fundamental purposes. The SEP directs the IOUs to "implement cost-effective DSM [demand-side management] programs . . . to achieve the 1990 goal of statewide electricity reductions of 8-10 percent from projected levels by the year 2000, and 20 percent by the end of the planning period."<sup>151</sup> Additionally, the "Guiding Principles" of the SEP Summary Report state that New York should "[e]nsure that energy decisions address both near- and long-term environmental and economic competitiveness considerations."<sup>152</sup> The SEP is replete with language that requires future energy policy to embrace economic competitiveness and environmental protection. The abundant detail pertaining to the SEP ensures that the EPB does not pronounce lofty public policy goals without specific factual findings to support its conclusions and recommendations. Volume III of the 1994 SEP consists of ten "supply assessments" which contain "forecasts, long-range planning goals and guiding principles, planning objectives and recommendations . . . [that] will guide energy-related decisions to be made by the public and private sectors within the

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149. N.Y. ENERGY LAW § 6-102 (McKinney Supp. 1995).

150. SEP VOL. 1, *supra* note 145, at 1.

151. SEP VOL. 1, *supra* note 145, at 4.

152. *Id.* at 11.

State.”<sup>153</sup> The Supply Assessment for electricity alone is 145 pages long, contains 107 tables and 154 charts and graphs.<sup>154</sup> Section 6-104, subdivision 3 reveals the importance of the SEP’s extensive factually based findings. It also lends credence to the proposition that the Legislature provided the detailed guidance in the Energy Law so that the SEP would be more than simply amorphous public policy goals.

Section 6-104, subdivision 3(b) requires that “[a]ny energy-related action or decision of a state agency, board, commission or authority shall be reasonably consistent with the forecasts and the policies and long-range energy planning objectives and strategies contained in the plan.”<sup>155</sup> Failure on the part of a state agency or commission to act consistently with the SEP violates New York State Energy Law.<sup>156</sup> The subdivision proceeds to describe that for a state agency or commission to act in a way inconsistent with the SEP, yet be deemed in compliance with the Energy Law, it must find “that the relevant provisions of the plan are no longer reasonable or probable based on a material and substantial change in fact or circumstance, and a statement explaining the basis for this finding.”<sup>157</sup> The state agency, board or commission desiring to act contrary to the SEP has the burden to demonstrate why the SEP no longer accurately depicts the economic and regulatory conditions of New York. This feat is not easily accomplished in light of the extensive factual information and research upon which the SEP is based.

The language of subdivision 3(c) of section 6-104 indicates that the Legislature intended the EPB to ultimately decide which state agency actions are unreasonably inconsistent with the SEP.<sup>158</sup> Subdivision 3(c) states:

[n]o action . . . of a state agency . . . shall be deemed by a court of law to be unreasonably inconsistent with . . . [the

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153. ENERGY PLANNING BD., NEW YORK STATE ENERGY PLAN, VOLUME III: SUPPLY ASSESSMENTS (1994) [hereinafter SEP VOL. III].

154. *Id.*

155. N.Y. ENERGY LAW § 6-104(3)(b) (McKinney Supp. 1995).

156. N.Y. ENERGY LAW § 6-106 (McKinney Supp. 1995).

157. *Id.*

158. N.Y. ENERGY LAW § 6-104(3)(c) (McKinney Supp. 1995).

SEP] unless a determination to this effect is made by the board, [i.e., the EPB] upon its own initiative or following the referral of the issue to the board by a court after the commencement of a proceeding challenging such action.<sup>159</sup>

The EPB consists of the Commissioner of the State Energy Office, the Chair of the Public Service Commission and the Commissioner of Environmental Conservation.<sup>160</sup> Requiring the EPB to review any state agency decisions deemed unreasonably inconsistent with the SEP is appropriate in light of the complexity of issues involved. This section does not require EPB review of state agency actions considered reasonably consistent with the SEP.<sup>161</sup>

### C. New York Public Service Commission Decisions

The Legislature's 1992 statutory modifications to the Public Service Law and Energy Law codified many policies that the NYPSC had embraced years earlier. In 1988 the NYPSC recognized that DSM programs yield substantial benefits to the local economy as well as to the environment (DSM/IRP Order).<sup>162</sup>

During the summer of 1988, the New York Public Service Commission issued two influential decisions. The first decision signed on June 3, 1988, ordered the seven IOUs to formulate guidelines for capacity bidding and to draft requests for proposals (Bidding Order).<sup>163</sup> The NYPSC concluded that the creation of a bidding process would be a desirable means by which to evaluate the various third-party producers of electricity.<sup>164</sup> The Bidding Order opened up the generation function of the IOUs to competition.<sup>165</sup>

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159. *Id.*

160. N.Y. ENERGY LAW § 6-102 (McKinney Supp. 1995).

161. *Id.*

162. *In re* Opinion and Order Concerning Integrated Planning and Ratemaking Issues, No. 29409 (N.Y. Pub. Serv. Comm'n July 26, 1988) [hereinafter DSM/IRP Order].

163. *In re* Opinion and Order Concerning Bidding, Avoided-Cost Pricing, and Wheeling Issues, No. 29409 (N.Y. Pub. Serv. Comm'n June 3, 1988) [hereinafter Bidding Order].

164. *Id.* at 7.

165. Bidding Order, *supra* note 163.

A month and a half later, the NYPSC issued the second critical order. On July 26, 1988, the NYPSC issued an order that required the seven IOUs to formulate DSM plans and engage in integrated resource planning (IRP).<sup>166</sup> The DSM/IRP Order recognized: (1) the tremendous benefits of DSM; (2) the difficulty of quantifying benefits; (3) that these benefits are received by customers, society, and shareholders alike; and (4) that the current cost of service regulation fails to recognize these benefits.<sup>167</sup> The Bidding Order and DSM/IRP Order initiated two trends in the electric utility industry that have collided with each other in the Competitive Opportunities case. On the one hand, capacity bidding fostered competition in the generation of electricity and helped create a competitive market, reducing the need for regulation. On the other hand, DSM and IRP are not designed for the competitive marketplace and are designed to insure the lowest cost over the long term for entities that exhibit the characteristics of natural monopolies.

Capacity bidding process adoption interjected market forces into the determination of the appropriate price which IOUs were to pay QFs for the power they generate.<sup>168</sup> Prior to capacity bidding, the price paid by IOUs to QFs for their power was determined by an administrative agency. This price was based on the estimated "incremental cost"<sup>169</sup> to the IOU of obtaining additional power supply.<sup>170</sup> The "incremental cost" or "avoided cost" is the additional cost "to an electric utility of electric energy or capacity or both which, but for the purchase from the [QF], such utility would generate itself or purchase from another source."<sup>171</sup> FERC requires IOUs to submit sufficient data to calculate an IOU's avoided cost.<sup>172</sup> This data is accessible to the general public and the calcula-

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166. DSM/IRP Order, *supra* note 162.

167. *Id.* at 38-40.

168. FERREY, *supra* note 58, at 9-3.

169. Incremental cost is "the additional per unit cost that would be incurred in supplying another increment of power from that source to the composite system load." Glossary, *supra* note 12, at 21.

170. FERREY, *supra* note 58, at 9-3.

171. 18 C.F.R. § 292.101(6) (1994).

172. 18 C.F.R. § 292.302 (1994).

tion of a utility's avoided cost is overseen by a state regulatory agency, e.g., the NYPSC.<sup>173</sup> Capacity bidding obviates the need for this regulatory oversight.<sup>174</sup> The price of additional generating capacity is what the avoided cost calculation purports to simulate.<sup>175</sup> The calculation of an IOU's avoided cost becomes unnecessary because the winning bid price, a product of market forces, determines the price of additional generating capacity.<sup>176</sup>

The 1988 Bidding Order opened the door to competitive forces in the electricity generation market in New York. This door swung wide open in 1992 with the enactment of the EPAct. An entirely new category of IPPs, relieved of the regulatory constraints of PUHCA, were able to compete for new generating capacity.<sup>177</sup> New York continues to acquire new generating capacity according to the bidding process and expects new IPP projects to provide over 4500 megawatts<sup>178</sup> of electricity in 1995.<sup>179</sup> The July 26, 1988, DSM/IRP Order was of great importance for two reasons. The order marked the first time that the NYPSC recognized the substantial economic benefit to be gained through implementation of cost-effective DSM programs.<sup>180</sup> Prior to this order, the NYPSC focused only on the immediate effects rather than the long term benefits of DSM programs regarding electricity rates paid by customers.<sup>181</sup> The NYPSC acknowledged that although short term rate impacts of DSM programs must be

173. *Id.* at § 292.302(b)(1).

174. FERRY, *supra* note 58.

175. *Id.*

176. *Id.*

177. See discussion *supra*, part II.

178. Megawatt is the "unit by which the rate of production of electricity is often measured: one megawatt (MW) equals one million watts." Glossary, *supra* note 12, at 30.

179. SEP Vol. 1, *supra* note 145, at 6.

180. DSM/IRP Order, *supra* note 162. Prior to this Order, the NYPSC required the IOUs in New York to develop Conservation programs. Proceeding to Inquire into the Benefits to Ratepayers and Utilities from Implementation of Conservation Programs that will Reduce Electric Use, No. 28223 (N.Y. Pub. Serv. Comm'n May 21, 1984). The approach adopted by the order in 1984 considered only the immediate effects of DSM programs on rates. DSM/IRP Order, *supra* note 162, at 37.

181. DSM/IRP Order, *supra* note 162, at 37.

considered, such a myopic focus failed to realize the substantial long term benefits to be gained by DSM programs.<sup>182</sup> In addition to curtailing environmental degradation caused by electric power generation, the NYPSC credited DSM programs with the ability “to extend finite resources, . . . to enhance the competitiveness of local industry by reducing its energy costs, . . . [and] to increase control over electricity bills offered to customers.”<sup>183</sup>

Furthermore, the DSM/IRP Order stated that “it is important that utilities not regard DSM programs as something that pits their customers’ interests (and those of society at large) against their own.”<sup>184</sup> Under traditional cost of service regulation, IOUs have a disincentive to invest in DSM programs because they “can lose revenues and profits from sales not made as a result of successful energy efficiency programs.”<sup>185</sup> Consequently, IOUs subject to traditional cost of service regulation are placed in an unenviable position. On the one hand, they are responsible to their shareholders to be profitable by selling as much electricity as possible.<sup>186</sup> On the other hand, the NYPSC, acting on behalf of the citizens of New York, requires IOUs to reduce sales of electricity through DSM programs.<sup>187</sup> Yet, the critical realization in the DSM/IRP Order is that traditional cost of service regulation is responsible for pitting customer/societal interests against shareholder interests, not the DSM programs. The DSM/IRP Order acknowledged that lost sales due to DSM programs are a legitimate concern, “but the way to resolve it is through revised ratemaking, not through de-emphasis of conservation.”<sup>188</sup> The NYPSC’s concluding remarks on DSM programs requested that IOUs “propose ratemaking innovations in their annual DSM plans . . . such that DSM programs that benefit customers are also rewarding to stockholders.”<sup>189</sup>

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182. *Id.* at 38.

183. *Id.* at 37-39.

184. *Id.* at 40.

185. HARRINGTON ET AL., *supra* note 1, at 49.

186. *Id.*

187. *Id.*

188. DSM/IRP Order, *supra* note 162, at 40.

189. *Id.*



In an effort to remove disincentives for IOUs to invest in energy conservation and align consumer, shareholder and societal interests, the NYPSC has periodically required the IOUs in New York to submit Long-Term Demand-Side Management Plans,<sup>190</sup> Integrated Resource Plans<sup>191</sup> and Long-Run Avoided Cost Plans.<sup>192</sup> The NYPSC has remained steadfast in its support of DSM programs and innovative means which ensure that the pursuit of energy conservation by utilities is as profitable as the pursuit of supply-side resources.<sup>193</sup> In a recent order that approved the 1993-1994 New York IOUs' DSM plans, the Commission stated that even when there is an excess generating capacity, as is presently the case in New York,

[c]ost-effective DSM programs reduce the overall cost to New Yorkers of energy services, reduce a utility's long-term total revenue requirement and thus reduce customer's overall bills, reduce reliance on imported fuels, and reduce environmental impacts.<sup>194</sup>

As recently as June 7, 1994, the NYPSC supported Long Island Lighting Company's (LILCO) cost-effective DSM programs as a valuable resource. It found that significant reduc-

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190. *See generally* Electric Utilities Conservation Programs, Order Directing the Submittal of Annual Demand Side Management Plans, No. 28223 (issued initially on September 22, 1987, revised by the DSM/IRP Order and reinstated in part each year under No. 28223 until 1994, when the NYPSC incorporated DSM plan review in each utility's individual rate case).

191. *In re* to Examine Integrated Resource Plans of Electric Utilities, 92-E-0886 (N.Y. Pub. Serv. Comm'n June 30, 1993) (order accepting 1992 integrated resource plans submitted by the seven IOUs in New York).

192. *In re* to Review Long-Run Avoided Cost Estimation Policies and Methods, Order Instituting Proceeding, No. 93-E-0912 (N.Y. Pub. Serv. Comm'n Oct. 20, 1993) (initiating a review of current long-run avoided cost estimations and requesting improvements to the existing process).

193. *In re* Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric Service, No. 92-E-0108 (N.Y. Pub. Serv. Comm'n Feb. 2, 1993) (Appendix B, at 9) (order adopting innovative rate adjustment mechanisms that provide a positive incentive for Niagara Mohawk Power Corporation to actively pursue cost-effective DSM programs).

194. Order Concerning 1993 and 1994 Demand Side Management Plans and HIECA Business Plans, No. 92-E-0621 at 4 (N.Y. Pub. Serv. Comm'n Mar. 19, 1993).

tions in LILCO's investments in DSM programs will result in increased costs to LILCO's entire system.<sup>195</sup> LILCO argued that a 67% reduction in its DSM budget for 1994 was necessary to enable the company to respond to competition.<sup>196</sup> The NYPSC estimated that long term total costs to LILCO ratepayers would be increased by \$34 million dollars if LILCO were allowed to reduce the DSM budget by 67%.<sup>197</sup> The NYPSC denied the DSM budget reduction and concluded that the short term impact on rates must be balanced against the long-term benefits of DSM programs.<sup>198</sup>

While the NYPSC has improved upon cost of service regulation through implementing long range DSM plans<sup>199</sup> and IRP,<sup>200</sup> the current regulatory structure is ill-suited to deal with the competitive forces present today. These forces were first introduced in New York State by the Bidding Order in 1988.<sup>201</sup> The Competitive Opportunities case is the NYPSC's attempt to revamp the regulatory structure in the generation of electricity. It seeks to reap the economic benefits of increased competition without sacrificing the environmentally beneficial regulatory reforms such as IRP and DSM.<sup>202</sup> The First Principle espoused by the NYPSC represents that objective.

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195. Petition of Long Island Lighting Company for a modification of four electric ratemaking mechanisms currently in effect for the 1994 rate year that began December 1, 1993, No. 93-E-1045 (N.Y. Pub. Serv. Comm'n June 7, 1994).

196. *Id.* at 4.

197. *Id.* at Attachment A-13.

198. *Id.* at Attachment A-16.

199. DSM/IRP Order, *supra* note 162.

200. *Id.*

201. Black & Pierce, *supra* note 1, at 1341. The article reviews the history of electric utility regulation and describes two radically different visions of regulation which have developed in the past decade. *Id.* One vision is characterized as "competitive contracting and market-based environmental regulation." *Id.* The other vision is critically cast as "central planning . . . [which] bears an uncomfortable resemblance to the systems previously used to govern the economics of Eastern Europe and former Soviet Union." *Id.* at 1342.

202. Competitive Opportunities II, *supra* note 31, at 7.

## V. Ramifications of the NYPSC Sacrificing Environmental Concerns

The State Energy Plan's (SEP) findings and recommendations strongly suggest that energy conservation measures be preserved and that continued emphasis on implementing cost effective DSM is beneficial to New York's economy and environment. The recent orders that have come from the NYPSC even require this. Any restructuring by the Commission that fails to incorporate the substantial benefits of demand-side management programs or fails to promote further energy conservation will possibly subject the NYPSC to judicial review through Article 78 proceedings.<sup>203</sup> The courts should find that the NYPSC acted arbitrarily if there is no evidentiary basis for its decision.<sup>204</sup> If the NYPSC fails to follow the recommendations in the SEP and its own recent orders, it will be easier for an aggrieved party to prevail in an Article 78 proceeding to obtain a reversal of the Commission's decision and the decision will be remanded.<sup>205</sup>

The "facts" that the NYPSC must consider before reaching its decision are contained in the massive documentary ev-

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203. SIEGEL, *supra* note 35, at 870. Article 78 proceedings are the primary device used by the public to challenge NYPSC decisions.

204. *Matter of Lefkowitz v. Pub. Serv. Comm'n*, 377 N.Y.S.2d 671 (App. Div. 1975), *aff'd*, 360 N.E.2d 918 (N.Y. 1976); *see*, *Pell v. Bd. of Educ.*, 313 N.E.2d 321, 325 (N.Y. 1974) (In determining the requisite for judicial review of administrative disciplinary hearings of public employees, the court noted that the courts cannot review the facts "as to weight of evidence, beyond seeing to it that there is 'substantial evidence' in the administrative record). *Id.* (quoting HENRY COHEN AND ARTHUR KARGER, *POWERS OF THE NEW YORK COURT OF APPEALS*, § 108 at 460 (1952)). *See also*, 1 N.Y. JUR., *ADMINISTRATIVE LAW* §§ 177, 185. The result is the same when there is a question of the agency's exercise of discretion. "[T]he courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'" (COHEN AND KARGER, *POWERS OF THE NEW YORK COURT OF APPEALS*, 460-61; *see also*, 8 JACK B. WEINSTEIN ET AL., *NEW YORK CIVIL PRACTICE*, ¶ 7803.04 (1992)) (emphasis in original); *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 413 N.E.2d 359, 360 (N.Y. 1980).

205. "The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." *Pell v. Bd. of Educ.*, 313 N.E.2d 321, 325 (N.Y. 1974) (*citing* N.Y. JUR. *ADMINISTRATIVE LAW*, § 184 at 609); *see also* SIEGEL, *supra*, note 35, at 870.

idence set forth in the SEP.<sup>206</sup> Furthermore these findings of the SEP are consistent with the NYPSC's continued support of DSM and IRP.<sup>207</sup> The SEP specifically acknowledged that there are competitive forces present in the electricity generating industry and yet still determined that the electric utility companies should continue to strive for and implement cost-effective DSM programs "to achieve the 1990 goal of state-wide electricity reductions of eight to ten percent from projected levels by [the year] 2000."<sup>208</sup> The conclusions in the SEP are based on substantial documentation of numerous research findings. If the NYPSC chooses to ignore those findings it certainly would appear that its decision would be without a "sound basis" in reason, and therefore, in violation of the "arbitrary or capricious standard."<sup>209</sup> Such arbitrary or capricious rulings by the NYPSC would almost certainly be remanded by the courts for further findings in accordance with the facts established in the SEP and recent Commission decisions. The issues facing the NYPSC in the Competitive Opportunities case with regard to competitive pressures are essentially the same as those faced by the EPB. The legislature ensured the concerns of the NYPSC would be represented by making the chair of the NYPSC one of the three members of the EPB.<sup>210</sup> Hence, this would seem to place an even greater burden on the NYPSC to disprove that a decision lacking DSM and other energy conserving measures was not arbitrary.

By enacting section 6-104, subdivision 3 of the Energy Law, the Legislature also guaranteed that the SEP findings would be given adequate consideration by the NYPSC.<sup>211</sup>

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206. ENERGY PLANNING BD., NEW YORK STATE ENERGY PLAN (1994) (containing 1066 pages in a three volume text, supply the NYPSC with ample evidence of why it should proceed with DSM measures in mind).

207. See discussion, *supra* part IV. B.

208. SEP VOL. 1, *supra* note 145, at 4; see also, ENERGY PLANNING BD., N.Y.S. ENERGY PLAN: ISSUE REPORTS VOLUME II 38-9 (1994).

209. Pell v. Bd. of Educ., 313 N.E.2d 321, 325 (N.Y. 1974) (referring to whether a particular agency "action is without foundation in fact" quoting from 1 N.Y. JUR., ADMINISTRATIVE LAW, § 184, 609; citing Matter of Colton v. Berman, 234 N.E.2d 679, 681 (N.Y. 1967)).

210. N.Y. ENERGY LAW § 6-102(1) (McKinney Supp. 1995).

211. N.Y. ENERGY LAW § 6-104(3) (McKinney Supp. 1995).

Failure on the part of the NYPSC to address the findings of the SEP and describe why the "relevant provisions of the plan [which] are no longer reasonable or probable based on a material and substantial change in fact or circumstance"<sup>212</sup> will contravene the Energy Law. A determination of the NYPSC contrary to law should be annulled.<sup>213</sup>

In addition, section 6-104 shifts the burden of persuasion to the NYPSC. The court will not normally substitute its own judgment for that of the NYPSC.<sup>214</sup> However, section 6-104 places the burden on the NYPSC to demonstrate that a material and substantial change in fact or circumstance has occurred in order for the NYPSC to act in a way inconsistent with the SEP. The NYPSC is granted the power to determine rates as the alter ego of the Legislature<sup>215</sup> and the court is not to pass judgment on the wisdom of the rate making process. Rather, the court ensures that the NYPSC exercises only such powers as conferred upon it by statute.<sup>216</sup> The specific finding of the SEP, which requires electric utilities to pursue cost-effective DSM, and section 6-104, impose an additional burden on the NYPSC in the Competitive Opportunities case. Any regulatory reform that the NYPSC institutes must preserve the aspects of the current regulatory structure that permits demand-reducing measures to compete equally with supply sources and must ensure that electric utilities continue to pursue cost-effective DSM programs.

## VI. Conclusion

The First Principle announced by the NYPSC in the Competitive Opportunities case is a move in the right direction. The NYPSC must reaffirm its commitment to environmental protection and economic competitiveness in deciding

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212. *Id.*

213. *Lefkowitz v. Pub. Serv. Comm'n*, 377 N.Y.S.2d 671 (1975), *aff'd*, 360 N.E.2d 918 (1976).

214. *City of Rochester v. Rochester Gas & Elec. Corp.*, 134 N.E. 828, 832 (1922).

215. *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 413 N.E.2d 359, 360 (1980).

216. *City of Rochester*, 134 N.E. at 832 (1922).

the final nine guiding principles. The revelation articulated eight years earlier by the NYPSC in the DSM/IRP Order that “the way to resolve [lost sales to DSM programs] . . . is through revised ratemaking, not through de-emphasis on conservation” rings true today. Increased competition in the generation of electricity does not reduce the environmental and economic benefits of DSM. The way to benefit from competition in the generation of electricity is through revised ratemaking, not through de-emphasis on energy efficiency and conservation.