New York State Bar Association
Committee On Public Utility Law

SEARCH TOOL: **Click on "Edit" in the top Menu Bar, then click on "Find" and enter a key word or part of the case number.**

January 2012

Report of Pending Court Cases
Involving New York State Utility Law

Prepared by:

Gregg C. Sayre
Frontier Communications

(585) 777-7270
gregg.sayre@frontiercorp.com

TABLE OF CONTENTS

NEW YORK STATE BAR ASSOCIATION

COMMITTEE ON PUBLIC UTILITY LAW

January 2012

Report of Pending Court Cases
Involving New York State Utility Law

PART I: NEW CASES (NOT PREVIOUSLY REPORTED)

(1) Amerivest Partners. v. Pub. Serv. Comm'n and Verizon New York, (Albany County Index No. 5210-11)

By notice of petition and petition dated July 25, 2011, and served by U.S. certified mail pursuant to CPLR 307, Amerivest Partners (Amerivest), a complainant in a pending consumer services case, sought to require a decision with respect to the amount of refunds allegedly owed by Verizon. As a result of a recent Commission decision, Amerivest has withdrawn this proceeding.

By a Determination, issued February 16, 2010, and a Determination on Rehearing, issued June 21, 2010, both in Case 09-C-0360, the Commission had decided that Amerivest , a member of the American Stock Exchange (Amex), was eligible for refunds under a Limited Services Offering (LSO) for digital circuits offered to Amex. By a Determination issued September 19, 2011, the Commission decided the parties' dispute, evidenced by dueling spreadsheets, as to which digital circuits are covered by the LSO. The Commission treated Amerivest as seeking reconsideration of the scope of the prior Determinations, and granted it reconsideration in part. Amerivest then withdrew this proceeding by letter dated September 24, 2011.

(2) Board of Belvedere Park Condo v. PSC and Con Edison (Albany County Index No. 1058-11)

By Notice of Petition and Petition filed February 15, 2011 and served February 17, 2011, Petitioner challenges an October 18, 2011 Commission Determination in Case 06-E-1084. It

alleges that it has wide load factor variations due to intermittent demand meter failure. Petitioner asserts that the Commission improperly 1) relied on Con Edison's explanation that such intermittent failure is rare and not present here; 2) failed to consider its evidence of load factor variations; and 3) did not hold an evidentiary hearing. It alleges that the Commission has found such intermittent failure in other cases and Con Edison had to install a parallel meter to rebut its claims.

This matter was put off until a pending petition for rehearing was decided. After the rehearing petition in Case 06-E-1084 was decided on May 23, 2011, Petitioner reactivated its Article 78 proceeding.

By decision and order dated December 13, 2011, Supreme Court Albany County (McDonough, J.) dismissed a petition by Petitioner Park Belvedere Condominium seeking (1) to set aside a Commission determination sustaining charges billed by Consolidated Edison Company of New York, Inc. (Con Edison) or (2) in the alternative, a formal evidentiary hearing. The court found no basis for overturning the Commission's determination, finding it adequately supported by the record.

In 2000, Petitioner complained Con Edison's demand register was intermittently recording erroneously high demands.[1] It sought refunds and a check meter to test the accuracy of the installed meter. Con Ed did not install a check meter, but tests of the demand register did not reveal any defects.

In February 2006, an informal Hearing Officer sustained the billed charges. On October 18, 2010, the Commission upheld the Hearing Officer, and later denied Petitioner's request for rehearing.

In February 2011, Petitioner commenced this Article 78 proceeding. It argued that the Commission failed to properly consider (1) that Con Edison tests were incapable of establishing that the register did not fail intermittently, and (2) evidence of Petitioner's energy use and level of demand from its electric equipment. Petitioner claimed that Con Edison wrongly removed the register from the premises and tampered with it, and that there were unreasonable and unexplained wide variations in electric load factors. Petitioner also argued that the Commission arbitrarily ignored prior decisions regarding disputed demand meter readings.

---

[1] A "demand register" is the basis for a "demand charge" based on the maximum amount of energy consumed during any 30-minute period during the billing cycle.

The Court accorded due deference to the weight the Commission gave to conflicting evidence presented at the informal hearing and to the Commission's interpretation and application of its prior determinations. Supreme Court found rational the Commission's reliance on 1) meter tests and 2) Con Edison's explanation of the mechanics of typical demand meter malfunctions in determining that the demand register did not malfunction. It also stated that the Commission's determination was detailed, well-supported and an appropriate consideration of Petitioner's arguments and the evidence.

The Court further rejected Petitioner's claim that the Commission irrationally failed to follow its prior decisions. It found that the Commission had explained, in great detail, the differentiating factors between various prior cases as well as the reasoning for reaching the alleged contrary determination in this case. It dismissed Petitioner's claim that Con Edison was required to install a check or parallel meter as wholly unpersuasive.

Finally, the Court rejected Petitioner's request for a formal evidentiary hearing. It concluded that the informal hearing provided a comprehensive and reasoned review of Petitioner's objections.

(3) Ciampa North et al. v. NYPSC and Consolidated Edison Company, (Albany County Index No. 4589-11)

By Notice of Petition and Petition filed July 7, 2011, and served July 8, 2011, a group of landlords challenge a Commission determination on rehearing issued March 21, 2011, in Case 03-G-0743. Briefing in this matter is complete.

The Commission found that the landlords were properly charged a residential rate for dual-fuel interruptible gas service between May of 1996 and January of 2003. It decided that the gas interruptible tariff of Consolidated Edison Company of New York (Con Edison) gave that utility discretion to classify customers in statements filed with the tariff. The Commission further concluded that the utility used that discretion to charge the residential rate to landlords that used gas to serve their tenants and were accordingly exempt from the state Petroleum Business Tax (PBT). Prior to May of 1996 and after January of 2003, the tariff explicitly provided that PBT-exempt landlords were to be charged the residential rate. The Commission decided that Con Edison used its discretion to continue that practice during the intervening period.

Petitioners contend that as non-residential customers they should have been charged the non-residential rate for gas interruptible service. They further allege that the Commission should have adhered to the conclusion in its initial November 22, 2010 Determination that absent explicit application of the residential rate, non-residential customers should be billed on the non-residential rate. They attempt to rely on the Commission institution of a proceeding by order issued March 21, 2011, in Case 11-G-0054, to consider requiring that the gas interruptible tariff, rather than monthly tariff statements, provide descriptions of customer eligibility. Finally, they assert that the tariff statements made them eligible for the non-residential rate, since it treated landlords exempt from the PBT as receiving non-residential rates.

The decision under challenge was reached after a Con Edison rehearing petition. The landlords sought rehearing of the Commission decision on rehearing, and re-rehearing was denied by Determination issued July 18, 2011. The PSC agreed with Petitioners to adjourn this matter to give the landlords time to amend their petition if desired, as well as giving the PSC more time to brief this matter. Petitioners did not amend their petition and briefing was completed on August 26, 2011.

By order and judgment dated December 28, 2011, Supreme Court, Albany County (Devine, J.) dismissed an Article 78 challenge to a Commission determination that Con Edison properly charged non-residential interruptible gas customers residential rates. Prior to 1996, Con Edison's tariff provided that non-residential entities (such as apartment building owners) qualified for the residential interruptible rate by demonstrating that they had obtained a residential energy usage exemption from the state Petroleum Business Tax. These entities benefited because the residential interruptible rate was lower than the non-residential rate.

In 1996, the Commission allowed Con Edison flexibility to compete with alternative fuels through monthly interruptible rate statements. Con Edison's tariff gave the utility discretion to change rates and rate classifications from month to month.

Petitioners, owners of eleven apartment buildings in New York City, signed up for service at the residential interruptible rate sometime before 1996. In March 2000, however, the non-residential interruptible rate became lower than the residential rate. In 2002, Petitioners (through rate consultant URAC) complained to OCS, requesting re-billing at the lower non-residential rate back to March 2000. They argued that the distinction between the rate classifications should have been in the tariff instead of the statements, that the tax exemption was

not a permissible basis for assignment to the residential rate, and that they were, under the tariff, non-residential interruptible customers. They further argued that the statements were ambiguous, so they should have been automatically given whatever rate was lowest.

After initially ruling in favor of Petitioners, the Commission reversed on rehearing, holding that the monthly statements' language properly distinguished the rates upon whether the usage was for residential purposes, rather than upon the customer's status as a residential or commercial entity. The Commission concluded that after 1996, Con Edison continued to apply the residential interruptible rate to non-residential entities that obtained a residential energy usage exemption.

Albany County Supreme Court held that the Commission's interpretation and application of the tariff and monthly statements was rational. It found that the Commission reasonably read the tariff as allowing Con Edison to change its rate classifications, and to provide notice of those changes via the monthly statements (and also through brochures). The Court also concluded that the Commission properly found that Con Edison meant to continue the pre-1996 treatment of non-residential interruptible customers.

Supreme Court also determined that 16 NYCRR 61.3(c)(3), requiring that "all changes in said rates, rules and regulations during the entire period shall be fully and exactly set forth," should be read as applying to changes in tariff statements. It appears that while the Court did not adopt Petitioners' seeming position that 16 NYCRR 61.3(c)(3) precluded use of the statements to modify tariff classifications, it did conclude that the obligation to provide information in a rate proceeding attached to tariff statements as they may be revised. In any event, the Court found that Con Edison had complied with the regulation.

(4) Dynegy Bankruptcy (Southern District of New York)

The Dynegy affiliates that own the Roseton and Danskammer electric generating plants have filed for Bankruptcy in the Southern District of New York. They moved for rejection of sale and leaseback agreements for plant financing pursuant to Bankruptcy Code §365. Their motion argued that rejection would necessitate transfer of the plants to PSEG, which holds the leases. Dynegy and PSEG have resolved the motion by agreeing that PSEG will not take the plants. The financiers of the leases have not accepted the settlement, however.

By stipulated order entered December 20, 2011, the court approved an agreement between Dynegy and PSEG, providing that the leases would be rejected, in return for Dynegy

payments to PSEG, but without any PSEG rights or obligations with regard to plant ownership or operation, and with a commitment by Dynegy that it would operate the plants until it got regulatory approval to cease operation. However, US Bank, as indenture trustee, disputes Dynegy's ability to limit its lease payments by settling with PSEG. US Bank contends the leases are financing vehicles, in which PSEG only has a putative ownership interest and by which Dynegy was able to obtain financing to acquire the plants.

Staff is closely monitoring the bankruptcy case and worked with Central Hudson to provide an affidavit in support of a Central Hudson concern that the Bankruptcy Court not issue any order that would authorize a shutdown of the Danskammer and Roseton plants. The supplied affidavit of Ed Schrom did not get into details, but did mention that the PSC should be able to review any shutdown. In the wake of this pleading Dynegy agreed to continue to operate the plants pending regulatory approval.

Central Hudson also requested an affidavit that would support its case for Dynegy payment of unpaid Central Hudson gas balancing charges. Staff provided Central Hudson with an affidavit of John Sano that explains that gas balancing charges compensate firm customers for gas commodity and associated assets for which firm customers paid.

Dynegy currently has a request pending (Case 11-E-0606) that the Commission declare it need not approve transfer of Dynegy's facilities to PSEG, or, in the alternative, for approval. PSEG and US Bank have appeared in that Commission proceeding. Substantive filings are not due until January 17, 2012. The prevailing bidder in the auction was Media 3 Communications (Media 3) and by various orders the Bankruptcy Court has approved the sale of Empire One to Media 3 and the assignment of the assumed executory contracts to Media 3.

(5) Empire One Telecommunications, Inc., (Bankr., S.D.N.Y., 2010)

Empire One Telecommunications, Inc. (Empire One) is a competitive local exchange carrier with approximately 26 employees providing wholesale and retail communications services, including local, long distance and wireless voice telecommunications, Internet access, and specialized data services for commercial subscribers. It serves customers in the United States, Asia, and other markets.

On February 25, 2010, Empire One filed for voluntary bankruptcy under Chapter 11 of the Federal bankruptcy code. In September of 2010, Empire One filed a plan contemplating the sale of the company, prior to December 31, 2010. On November 1, 2010, Empire One received a

Letter of Intent from Lexicon United Inc. (Lexicon) stating its intention to purchase Empire One. Subsequently, Empire One moved the Court for approval of the sale, subject to a competitive auction process.

In an order issued December 3, 2010, the Court approved the sale of Empire One's assets, and the assignment and/or assumption of unexpired leases and executory contracts, under Section 363 of the bankruptcy code. On December 21, 2010, Empire One filed and served a "Contract and Cure Schedule" identifying the leases and executory contracts that Lexicon intends to assume, and the amount (if any) needed to cure any defaults under such contracts. A sale hearing in bankruptcy court was scheduled for January 19, 2011.

(6) Kings & Queens Residential LLC, et al. v. Con Edison and NYPSC (Kings County 13180/2011)

In their Summons and Complaint filed June 9, 2011, and served upon the Commission June 13, 2011, owners of several multiple dwellings have brought an action for a declaratory judgment and for damages against Con Edison and the Commission for their alleged failure to cooperate with the conversion of the buildings to direct metering and the provision of electricity on a rent-excluded basis. Settlement negotiations between Plaintiffs and Con Edison are continuing.

Plaintiffs alleged the New York State Division of Housing and Community Renewal ("DHCR") approved the transition from rent-included electricity to rent-excluded electricity with direct metering. Plaintiffs further allege that few, if any, tenants have applied to Con Edison for service, and that Con Edison insisted that all the tenants make individual applications for service before Con Edison will oversee and permit the direct metering of any apartments. Plaintiffs allege that: 1) Con Edison has failed to comply with the DHCR Order, and provide just and reasonable rates and safe and adequate service and avoid discrimination under PSL §65; and 2) the Commission has not encouraged efficiency and conservation under PSL §5(2) by its failure to respond to Plaintiff's request that Con Edison be ordered to adopt direct metering.

With respect to their claim against the Commission, Plaintiffs allege that "through their counsel [they] contacted the PSC to complain of Con Ed's failure to abide by the Orders" and "[t]o date the PSC has failed to take any action to direct Con Ed to abide by the Orders." Complaint ¶¶56 & 57. This allegation raises questions of whether Plaintiffs have exhausted

administrative remedies with the Commission. They do not, however, recite any particulars of their contacts or the alleged lack of PSC response.

This case is very similar to one brought in 2006. *Danbury Leasing, L.P. v. Consolidated Edison of New York and Pub. Serv. Comm'n* (Albany County Index No. 6004-06). As part of the settlement in *Danbury Leasing*, Con Edison filed amended tariff leaves, which were approved on May 17, 2007, in Case 07-E-0157. The tariff amendments were supposed to allow the owner of a multiple dwelling to take service under its name for service to apartments where 1) the tenants have a DHCR exemption from rent increases; and 2) DHCR has approved conversion of the multiple dwelling from master metering to direct metering.

The plaintiff building owners in this new court case did not cite these provisions of Con Edison's tariff, which should have resolved their concern. As in *Danbury Leasing*, the PSC moved to change venue to Albany County, convert the action to a special proceeding under Article 78, and dismiss on grounds that: 1) the court lacks subject matter jurisdiction; 2) the Petitioner has failed to state a claim upon which relief can be granted; and 3) the Petitioner should be required to exhaust its administrative remedies. The parties then agreed to remove the case from the Court's calendar to pursue settlement negotiations.

(7) New York City v. Public Service Commission of the State of New York and Con Edison (Albany County Index No. 460-11)

By decision dated December 5, 2011, Albany County Supreme Court (O'Connor, J.) granted, in part, a motion by Con Edison to dismiss as unripe a challenge by the City of New York (City) to a 10-year phase-in of a reallocation of fuel costs of the East River Repowering Project (ERRP). The Court further denied the City's request for transfer of the matter to the Appellate Division. It affirmed a Commission directive based on the record in the Steam Planning Case (09-S-0029) that Con Edison propose a continued reallocation of ERRP fuel costs at the end of the three-year rate plan resolving the Steam Rate Case (09-S-0794).

The East River plant manufactures steam for Con Edison's steam customers, while making electric sales on the New York Independent System Operator (NYISO) at times that are uneconomic, given ERPP's costs. The three-year rate plan proposed by Department of Public Service (DPS) staff, Con Edison and the City provided for a shift in 2012 of $7.5 million of ERRP fuel costs to steam customers from electric customers. The Commission adopted that plan, but provided for a further reallocation of ERRP fuel costs to steam customers (estimated to

total approximately $45 million) by requiring Con Edison to propose a reallocation beginning at the end of the rate plan in September 2013. It adopted the DPS staff position that fuel costs should be reallocated, but used the County of Westchester (Westchester) methodology by allocating to steam customers the fuel costs exceeding revenues from NYISO sales.

The City challenged the Commission decision to require a Con Edison proposal for a further reallocation, claiming, inter alia, that the Commission decision was not supported by the record, inconsistent with the decision to adopt the rate plan and with prior decisions requiring electric customers to bear most of the costs of Con Edison's steam plants and that it was not given adequate notice of the reallocation. The City also asserted that the case should be transferred to the Appellate Division because a hearing was required by statute, and the decision was subject to "substantial evidence" review. Con Edison moved to dismiss the case as unripe, given the need for further proceedings on any proposed reallocation. Intervenor Westchester and ourselves answered on the merits, claiming that no hearing was required by statute and the case should not be transferred.

The Court granted Con Edison's motion in part, finding the City's challenge unripe to the extent it claimed that the Commission had set rates for the period beyond the end of the rate plan. It did find the challenge was ripe to the extent the Commission planned a reallocation of ERRP fuel costs. Supreme Court decided that the evidentiary hearing on reallocation issues in the Steam Planning Case was not required by statute, so this proceeding need not be transferred and the City's challenge to the Commission's decision was to be tested under the "arbitrary and capricious" standard.

The Court found the City's challenge to be without merit. It observed that there was record support for the required proposed reallocation, because both DPS staff and Westchester pressed for ERRP cost reallocation and that the Commission would have a record basis to set rates in 2013 once Con Edison's proposal was filed. The Court further rejected claims of lack of notice, given that the Commission announced in the Steam Planning Case that it would be estimating rates over the next ten years and might adopt rate mitigation options. Supreme Court finally concluded that the Commission had not irrationally deviated from prior policy and from the steam rate plan, which was only the first step in addressing the unfairness of allocating almost all ERRP fuel costs to electric customers.

The background for this litigation is that at hearings held in the Steam Planning Case in September, 2009, DPS staff proposed to allocate ERRP fuel costs based, in part, on elasticities of

demand for electricity and steam, while Westchester proposed to allocate electric production costs in excess of electric revenues to steam customers. The City and Con Edison defended the existing allocation of virtually all East River fuel costs to electric customers.

After that first set of hearings, the Steam Planning Case was combined with the Steam Rate Case for briefing and decision. A subsequent hearing considered steam elasticity estimates in the Steam Planning Case and objections to a three-year rate plan proposed in both the Steam Rate Case and the Steam Planning Case. That three-year plan provided for a $7.5 million shift in East River revenue responsibility to steam customers. Westchester opposed the plan, claiming that electric ratepayers subsidized over $100 million in East River costs, which should be transferred to steam customers over three years.

A Commission Order of September 22, 2010, adopted the three-year rate plan over Westchester's objection. That Order also created a process for implementing the complete shift of an estimated $52 million of annual East River fuel costs to steam customers. The Commission adopted Westchester's "above market" method, which allocated costs to steam customers exceeding revenues from East River electric sales on the New York Independent System Operator, Inc. (NYISO) exchange. The Commission, however, adopted staff's proposal to only reallocate fuel costs. A continuing reallocation of the remaining fuel costs was to be phased in over a period of not more than seven years following the expiration of the three-year plan. Con Edison was directed to propose a phase-in of the reallocation prior to the expiration of the three-year plan.

The City essentially asserts that the DPS staff abandoned its proposed 10-year phase-in of a reallocation of East River fuel costs to steam customers when it agreed to the Joint Proposal. It contends that the Commission set rates for the seven years following the three-year rate plan that are: 1) inconsistent with the rates in the three-year plan, without an explanation of the inconsistency; and 2) lacking record support. The City also claims that the Commission cannot set rates for more than three years and cannot bind future Commissions with respect to rates beyond a three-year period. It further argues that the Commission arbitrarily violated the Settlement Guidelines by not remanding the Joint Proposal in the Steam Rate Case for further consideration of the East River allocation. The City finally contended that the Commission failed to provide the requisite notice under the State Administrative Procedure Act and deprived it of an opportunity to be heard on the allocation.

(8) Rodriguez v. Consolidated Edison and NYPSC (New York County Index No. 11-110493)

By Order to Show Cause dated September 21, 2011 and Verified Petition dated September 9, 2011, Petitioner Glitzer Rodriguez, the owner of a corner building in Brooklyn, seeks to challenge a Commission decision upholding billings by Consolidated Edison Company of New York (Con Edison) for both portions of her building. The PSC has demanded a change of venue from New York County to Albany County.

By a Determination dated January 24, 2011, and a letter denying rehearing dated April 18, 2011, both issued in Case 08-E-1084, the Commission determined that Ms. Rodriguez was properly 1) backbilled for unmetered service to the common area of one portion of her building between March 20, 2004 and June 21, 2005, and 2) made responsible for bills owed for service to the common area and second and third floors of the other portion of her building. Ms. Rodriguez claims that both elements of the rebilling are excessive.

Ms. Rodiguez's challenge is time-barred, since the 4-month Article 78 statute of limitations has run on the denial of rehearing. This matter was also inappropriately brought in New York County. The PSC demanded a change of venue.

The Order to Show Cause was returnable in New York County on September 29, 2011, but was extended to October 27, 2011 as a result of the death in the family of Petitioners' counsel. The PSC was not served with the Order to Show Cause and Petition at their New York City offices by September 26, 2011, as required by the Order to Show Cause, but Petitioner did attempt to make service on that date.

(9) Rusi Holding Co. v. Consolidated Edison and NYPSC (New York County Index No. 110780-2011)

By Notice of Petition and Verified Petition dated September 20, 2011, and apparently filed September 22, 2011, Petitioner Rusi Holding Corp., the owner of a building in the Bronx, challenges a Commission decision allowing Consolidated Edison Company of New York (Con Edison) to backbill for one year of unauthorized service to Petitioner's building. The PSC has demanded a change of venue from New York County to Albany County.

By a Determination dated May 23, 2011, in Case 07-M-1359, the Commission determined that Petitioner could be backbilled for 12 months, the maximum rebilling period when failure to bill a non-residential customer was due to utility deficiency. Petitioner claims

that the rebilling is arbitrary and capricious, given the finding that the utility billing was deficient.

Petitioner did not serve the PSC properly, since it mailed its petition to the PSC. This matter was also inappropriately brought in New York County, with a return date of October 12, 2011.

(10) TD Banknorth, N.A. v. Sherman et al. (Orange County Index No. 97/08)

By a Second Supplemental Summons and Second Amended Complaint dated June 9, 2011, and served June 13, 2011, TD Banknorth (Bank) seeks to foreclose on a mortgage involving water utility assets in the Town of Chester, County of Orange. All parties have answered, but trial has not yet been scheduled. The Bank and another party each claim to hold multiple mortgages on properties owned by the utility and its affiliated developer. At issue are the rights of each mortgagee.

The Bank had sought to foreclose on the mortgage in a previous action, which it withdrew because it discovered that the mortgage had been discharged through consolidation into another mortgage on adjacent lands. *TD Bank, N.A. v. 473 West End Realty Corp. et. al.*. The Bank has now clarified: 1) the property subject to the mortgage obligation; 2) the agreements that comprise the chain of obligations for the mortgage, including a series of loan modifications; and 3) the various parties involved. The Bank seeks, again, to foreclose.

The complaint names the Commission as a defendant because a co-defendant, 473 West End Realty Corp., is a water utility that owns and operates plant on a portion of the premises subject to the mortgage obligation. Real Property Actions and Proceedings Law (RPAPL) §1311(4) makes the Commission a necessary party in a foreclosure of a mortgage "upon any of the public utilities regulated by the public service law [sic]."

In response to the earlier action, the PSC asserted that the underlying mortgage had never been approved by the Commission and was voidable. In this action, the PSC qualified its stance to be that any foreclosure sale should be made subject to Commission approval. The bank evidenced a willingness, prior to its decision to withdraw the earlier case, to get Commission approval for the foreclosure. The to-be-scheduled trial will address which properties are subject to the Bank's mortgage.

PART II: CASE UPDATES TO PENDING COURT CASES

(1) Aviles, Evelyn v. NYS Department of Public Service and Consolidated Edison Company, (Bronx County Index No. 250270-2010)

By Notice of Petition and Petition filed February 22, 2010, and served on March 16, 2010, Ms. Evelyn Aviles challenges a November 2, 2009 decision by a Commission designee upholding a shared meter assessment. Con Edison reported, and the Commission agreed, that gas and electricity was shared at Ms. Aviles' two family dwelling in the Bronx. Ms. Aviles claims that her building was a single-family residence rented to a single tenant who incorrectly complained about a shared meter. Petitioner further asserts that 1) while Con Edison corrected its initial erroneous determination that her building was a two-family dwelling, it nonetheless improperly continued to assess her for a shared-meter condition; and 2) the Commission irrationally found that her building was a two-family dwelling without checking the certificate of occupancy. ~~The return date was June 25, 2010. Briefing is completed.~~

By decision dated October 25, 2010, Supreme Court, Albany County (McDonough, J.) dismissed a landlord's Article 78 challenge to a Commission shared meter determination. Petitioner Evelyn Aviles owns a residential building in the Bronx. In July 2008, Con Edison, following up on a high bill complaint by Ms. Aviles' tenant, found a shared meter condition. The building contained a locked basement not rented by the tenant and to which neither the tenant nor Con Edison had access, but for which the tenant paid utility charges.

Ms. Aviles' primary argument was that the certificate of occupancy describes her premises as a one-family building. The court, however, recognized that under the PSL, a shared meter exists where the tenant is paying for utility service outside the tenant's dwelling. Because Ms. Aviles failed to address the Commission's finding that the tenant was paying for service to the locked basement outside the tenant's dwelling (the portion of the building rented by the tenant), the court found that the Commission's decision was rational and that Ms. Aviles' argument was misplaced.

Ms. Aviles has not appealed.

(2) Core Communications v. Federal Communications Commission, (DC Circuit Docket No. 08-1365); Public Service Commission of the State of New York and People of the State of New York v. Federal Communications Commission (DC Circuit Docket No. 09-1044)

The PSC has challenged the Federal Communications Commission's ("FCC's") decision to assert jurisdiction over the pricing of calls to Internet service providers (ISPs). The United States Court of Appeals for the District of Columbia Circuit had previously overturned FCC decisions that calls to ISPs were not subject to "reciprocal compensation," *i.e.*, payments by Incumbent Local Exchange Companies (ILEC) terminating calls to Competitive Local Exchange Companies (CLECs) delivering those calls.

This time, the FCC determined that calls to ISPs were subject to the reciprocal compensation pursuant to 47 U.S.C. §251(b)(5). The FCC determined, however, that its jurisdiction to set prices for interstate calls to ISPs trumped what otherwise would be state authority to set prices for reciprocal compensation. The FCC set a $.0007 rate per call for termination of calls to ISPs.

The National Association of Regulatory Utilities' Commissioners (NARUC) also challenged the ISP remand decision. The PSC's case and the NARUC case were combined with a case brought by Core Communications, a CLEC serving ISPs and "terminating" (accepting) calls from ILECs to ISPs. Like the PSC, Core disputes the FCC's conclusion that the FCC can displace state authority to set rates for calls by ISPs providers. Core has not sought to limit the scope of §251(b)(5).

By decision dated January 12, 2010, the United States Court of Appeals for the District of Columbia Circuit upheld a decision of the FCC to assert jurisdiction over the pricing of calls to Internet service providers (ISPs). The FCC had asserted jurisdiction over pricing of such calls on the ground that calls to the Internet are interstate calls. The Court found that the FCC's 47 U.S.C. §201 authority over interstate calls was not defeated by the applicability of the reciprocal compensation provision of 47 U.S.C. §251(b)(5) to calls to ISPs. The Court stated (slip opinion at 9) that "Dial-up Internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both §201 and of §§251-252."

Core Communications, supported by the Pennsylvania PUC, filed a petition for rehearing. That petition was denied on March 26, 2010. Core and the Pennsylvania PUC ~~are~~ were each

seeking a writ of certiorari from the U.S. Supreme Court. The Pennsylvania PUC was granted a time extension to August 6, 2010 to file its petition; Core requested an extension to July 26, 2010.

The Supreme Court of the United States has denied certiorari from a decision of the United States Court of Appeals for the District of Columbia Circuit upholding assertion of jurisdiction by the Federal Communications Commission (FCC) over the pricing of calls to internet service providers (ISPs).

(3) Frawley Plaza, LLC et. al v. NYS Pub. Serv. Comm'n, (Albany County Index No. 338-10)

By Notice of Petition and Petition filed January 15, 2010 and served January 19, 2010, Petitioners Frawley Plaza *et. al*. challenge a Commission Order Denying in Part and Granting in Part Petitions for Rehearing and Establishing Further Requirements, issued in Cases 08-E-0836, 08-E-0-837, 08-E-0838 & 08-E-0839 on September 17, 2009. Petitioners are four landlords whose authorization to submeter their buildings was stayed pending further Commission review of the impact of submetering on tenants. Petitioners allege that the stay was arbitrary and capricious because 1) they complied with the Commission's submetering regulations as evidenced by the Commission's grant of authority to submeter; and 2) the Commission a) did not explain its reversal of position in staying authorization to submeter, b) has departed without reason from its prior precedent, and c) has treated similarly situated entities differently.

~~The return date for the Petition was adjourned to May 14, 2010, July 23, 2010, and October 15, 2010, and has been yet again adjourned to February 18, 2011, to permit Petitioners time to see if they can comply with the Commission's requirements for ending the stay.~~The return date for the Petition was adjourned first to May 14, 2010, then to July 23, 2010, October 15, 2010, February 18, 2011 and May 13, 2011, and was yet again adjourned to October 7, 2011, to permit Petitioners time to see if they can comply with the Commission's requirements for ending the stay. By an Order Reinstating Submetering Approval With Conditions, dated August 24, 2011, in Cases 08-E-0836, 0837 and 0839, the Commission lifted the stays on three of Petitioners' four buildings. By an Order Reinstating Submetering Approval at North Town Roosevelt with Conditions, issued October 28, 2011 in Case 08-E-0838, the Commission voted to end the stay of submetering in the fourth building on essentially the same conditions as the other three. Petitioners had previously adjourned the return date to March 2, 2012, which proved

to be just beyond the limitation period for a challenge to the lifting of the stay for the fourth building.

(4) Gitlin, et al. v. Kiamesha Artesian Spring Water Co., (Sullivan County Index No. 1929-06)

By decision and order dated June 16, 2008, Sullivan County Supreme Court (Meddaugh, J.) granted the NYPSC's October 15, 2007 motion to vacate a default judgment against Kiamesha Artesian Spring Water Co. ("Kiamesha"). On September 4, 2007, plaintiff, an accounting firm, obtained a default judgment for $138,000 against Kiamesha, a private water company serving approximately 400 customers near Monticello, New York, based upon a 2002 Kiamesha promissory note that had been issued without Commission authorization. Plaintiff's subsequent enforcement of the judgment (through a restraining notice on Kiamesha's bank account) had left Kiamesha unable to pay its operating expenses, and had jeopardized Kiamesha's ability to provide water service to its customers. In order to ensure that water service would not be terminated, the PSC moved by order to show cause on October 15, 2007 to intervene, vacate the judgment, and lift the restraint on Kiamesha's bank account. In its decision, the court recognized that Kiamesha's 2002 promissory note is void or voidable because it lacked PSC financing approval required by PSL§89-f.

The court's decision also invites the plaintiff to amend its pleadings to address whether it should be permitted to pierce the corporate veil and pursue Kiamesha's owners for restitution on the underlying debt. Finally, the court has enjoined Kiamesha from transferring any asset during the pendency of this action, except for reasonable operating expenses.

Sullivan County scheduled a pre-trial conference for November 12, 2008. The Plaintiff accounting firm asked to depose PSC accounting staff. Justice Meddaugh directed that depositions be completed by April 30, 2009.

The Plaintiff accounting firm deposed Department accounting staff on June 18, 2009. It subsequently moved for summary judgment, in a motion opposed by the defendant water company.

On July 30, 2010, Sullivan County Supreme Court denied a motion for summary judgment against Kiamesha.

Sullivan County's July 30, 2010 decision denied the accounting firm's motion for summary judgment for recovery of its fees. The Court found that Kiamesha's escrow fund for

emergency expenses could not be used to pay the accounting fees and there was no basis for piercing the corporate veil to obtain recovery from Kiamesha's owners.

By decision and order dated April 14, 2011, Supreme Court, Sullivan County (Meddaugh, J.) denied a summary judgment motion of plaintiff Gitlin, Knack & Pavloff (Gitlin), an accounting firm. Gitlin's motion was its third attempt in this case to obtain payment related to a promissory note that defendant Kiamesha Artesian Spring Water Co. (Kiamesha) had issued in 2000 to Gitlin without obtaining Commission consent. In its decision, the Court held that only the Commission can authorize transfer of more than 10% of a water company's stock. It subsequently set August 3, 2011, as the date for trial. The trial was postponed, however, when new counsel for Kiamesha proclaimed it desired to move for summary judgment. No due date has been set for Kiamesha's motion.

Gitlin's first attempt at collection resulted in a 2007 default judgment that the PSC convinced the Court to vacate in 2008 because the note lacked Commission consent. Its second attempt, a summary judgment motion seeking payment either through an escrow account or from Kiamesha's owners personally, was denied.

Its third attempt, the subject of the April 14, 2011 decision, sought summary judgment awarding Gitlin up to 49% of Kiamesha's stock, to the extent needed to satisfy the debt behind the note. The PSC opposed the motion on the ground that the Commission must authorize transfers of more than 10% of Kiamesha's stock pursuant to PSL §89-h(4). The Court denied the motion for failure to meet the standard for summary judgment. Importantly, for the PSC's purposes, however, the Court also held that it lacks authority to order a transfer of more than 10% of Kiamesha's stock, and that any determination by the Court in that regard would be subject to Commission review and consent.

On September 21, 2007, plaintiff, an accounting firm, obtained a default judgment for $138,691.26 against Kiamesha, a private water company serving approximately 378 customers near Monticello, New York. The default judgment was based upon a 2002 Kiamesha promissory note to the accounting firm that had been issued without Commission authorization. Plaintiff's subsequent enforcement of the judgment (through a restraining notice on Kiamesha's bank account) left Kiamesha unable to pay its operating expenses and jeopardized Kiamesha's ability to provide water service to its customers.

In order to ensure that water service would not be terminated, the Commission moved by Order to Show Cause, on October 16, 2007, to intervene, vacate the judgment, and lift the

restraint on Kiamesha's bank account. By decision and order dated June 9, 2008, Sullivan County Supreme Court granted the Commission's October 15, 2007 motion to vacate the default judgment. In its June 9, 2008 decision, Sullivan County Supreme Court recognized that Kiamesha's 2002 promissory note is void (or voidable) because it lacked Commission financing approval required by PSL §89-f. The Court's decision invited the plaintiff to amend its pleadings to address whether it should be permitted to "pierce the corporate veil" and pursue Kiamesha's owners for restitution on the underlying debt. Finally, Sullivan County Supreme Court enjoined Kiamesha from transferring any asset during the pendency of this action, except for reasonable operating expenses.

The July 30, 2010 Supreme Court decision thereafter denied the accounting firm's motion for summary judgment for recovery of its fees. The Court found that Kiamesha's escrow fund for emergency expenses could not be used to pay the accounting fees and there was no basis for piercing the corporate veil to obtain recovery from Kiamesha's owners.

The accounting firm then sought an order from Sullivan County Supreme Court requiring Kiamesha's owners to turn over 49% of the company's stock to it. The PSC opposed the request, pointing out that PSL §89-h required Commission approval of the transfer of more than 10% of the stock of a water company to any partnership or person. In reply, Gitlin modified its request to seek only 10% and asked the court to consider staying its proceedings while it seeks Commission consent for an additional 39%. Sullivan County Supreme Court has denied that request and scheduled this matter for trial, but postponed the trial at the request of Kiamesha's new counsel.

(5) Home Depot et. al. v. New York State Public Service Commission and Independent Water Works (Albany County Index No. 2893-10)

By petition filed May 5, 2010 and served May 6, 2010, Home Depot U.S.A. ("Home Depot") and Charles Forman, as trustee for LNT, ("Petitioners, Home Depot et. al.") challenge a Commission Order on Remittal Granting Complaint in Part and Denying in Part, issued on February 2, 2010 in Case 05-W-0707 ("Remittal Order"). Petitioners complain about rates of Independent Water Works (IWW), insofar as the Commission allowed for recovery of $1.0 million in rate base used to provide water service to a shopping mall.

The Appellate Division, Third Department, had remitted the complaint to the Commission for a better explanation as to why Home Depot contracts with the mall developer,

an IWW affiliate, which provided for a Home Depot contribution to mall construction, did not compel elimination of the whole rate base of $1.5 million. *Matter of Home Depot U.S.A. v. New York State Pub. Serv. Comm'n*, 55 A.D.3d 1111 (3d Dep't 2008). In its Remittal Order, the Commission reconciled the various conflicting agreements and decided that Home Depot's actual contribution to water plant ($.5 million) should be treated as customer contributed capital from the October, 2008, date of the Court remittal. The Commission otherwise decided that as a matter of law, IWW was entitled to a return on capital expended in constructing water plant.

This matter was returnable on June 11, 2010. In their petition and supporting brief, Home Depot *et al.* contend that the Appellate Division required the Commission to eliminate IWW's rate base, because the Court concluded Home Depot made a contribution to mall construction. Petitioners also assert that the affiliated developer committed not to recover any rate base, inasmuch as it agreed to use its own equity to complete the shopping mall. Home Depot *et al.* further claim that the Commission held a hearing on the rate at which IWW had the burden of proof, which was not met. Petitioners finally assert that the Commission should have ordered relief back to their June 2005 complaint to the Commission.

In addition to briefing the merits, Petitioners seek a transfer of the case to the Appellate Division. The PSC moved to hold this matter in abeyance, pending Commission resolution of Petitioners' objections to the IWW compliance filing on the Remittal Order. The Commission treated those objections as a request for rehearing and granted rehearing in part on June 18, 2010. The PSC also opposed the request for transfer to the Appellate Division, inasmuch as no trial-type evidentiary hearing was held and none was required as a matter of law.

The Court resolved the various procedural objections by 1) providing Home Depot an opportunity to amend its papers in light of the rehearing decisions, and 2) requiring respondents to brief the case on the merits prior to any decision on transfer. ~~The case has been fully briefed on the merits and Home Depot has requested argument. Albany County has not yet decided whether to hold argument, transfer the case or decide the merits without argument.~~

Petitioners ("Home Depot") have perfected their appeal from a December 30, 2010 decision of Supreme Court Albany County (Lynch, J.), dismissing this Article 78 challenge. They filed their brief on July 22, 2011, and the PSC's responding brief was due on October 7, 2011.

Petitioners are tenants in a Putnam County shopping center served by Independent Water Works (IWW). Home Depot disputes IWW's water rates, claiming that any recovery of rate base used to provide water service to the mall is barred by contracts with the mall developer, an IWW affiliate. They challenge the Commission's Order on Remittal Granting Complaint in Part and Denying in Part, issued on February 2, 2010, in Case 05-W-0707 ("Remittal Order"), which only disallowed IWW's rate base in part.

A 2006 Commission order resolving Home Depot's water rate complaint had been challenged by Home Depot and remitted by the Appellate Division for failure to account for various agreements between Home Depot and IWW. Specifically, the Appellate Division required consideration of whether IWW's rates constituted a double recovery of water system construction costs and compelled elimination of the whole rate base of $1.5 million. *Matter of Home Depot U.S.A. v. New York State Pub. Serv. Comm'n*, 55 A.D.3d 1111 (3d Dept. 2008).

On remittal, the Commission reconciled the agreements by offsetting the amount which Staff found Home Depot had actually paid toward water system construction ($525,142) against IWW's rate base and recalculated the rate prospectively, based on the resulting $1 million rate base. The $525,000 rate base reduction is the same one that Justice Lynch had required the Commission to adopt in Home Depot's prior Article 78 proceeding, and which the Appellate Division directed the Commission to consider in modifying Justice Lynch's decision on appeal. The Commission commenced its prospective rate reduction on the first month after the Appellate Division's decision, instead of after the PSC' subsequent determination on remittal, so as to afford Home Depot the full benefit of the Appellate Division's remittal.

In its December 30, 2010 decision, Albany County Supreme Court held that the Commission's rate reduction and commencement date were rational. It commented that the Commission was guided by the principle that rates are based upon actual costs, and it deferred to the Commission's view that the parties' agreements - particularly the agreement that "all other costs associated with the Site Work shall be borne by Developer" - did not preclude IWW from seeking a return on capital actually expended.

Supreme Court also rejected Home Depot's request to transfer the matter to the Appellate Division for "substantial evidence" review. It held that the Commission's remittal order was a quasi-legislative review of rates, and was therefore governed by the arbitrary and capricious

standard of judicial review, not by the substantial evidence standard. It also observed that the parties had waived evidentiary hearings in the remittal proceeding.

(6) Lefkowitz v. NYPSC, (New York County Index No. 115031-08)

By Notice of Petition and Petition dated November 4, 2008, and delivered to the PSC on November 24, 2008, the owner of a seasonal bungalow colony in Monticello, New York challenges a Commission decision to allow NYSEG to backbill for one year. The Commission Determination in Case 06-E-0967 allowed the maximum correction for deficient utility billing permitted by 16 NYCRR 13.9(c) (12 months from the date of discovery) for NYSEG's use of an incorrect multiplier for Petitioner's demand meter. Petitioner contends that NYSEG unilaterally changed the meter and failed to maintain records of his service application.

The colony's electric meter is configured to measure a fixed fraction of usage (here, 1/40). To convert the meter readings into actual usage, NYSEG applies a "meter multiplier" in its billing system (here, 40). NYSEG, however, had inadvertently applied a meter multiplier of 1 – and had done so for more than three years before it discovered its error. As a result, Petitioner was being billed for only 1/40 of his usage. Consistent with 16 NYCRR 13.9(c), which limits backbilling to one year when underbilling is due to the utility's error, NYSEG backbilled Petitioner for one year, in the amount of $3,183.77.

Petitioner complained to OCS, which initially determined NYSEG's backbilling was correct. An informal hearing officer reversed, inferring that the meter was faulty and NYSEG had a policy of not backbilling for faulty meter operation. NYSEG appealed the hearing officer's decision to the Commission, which held that the meter was accurate, and that NYSEG could backbill Petitioner for one year.

The return date was December 10, 2008 in New York County. The PSC demanded a change of venue. Petitioner responded by agreeing that this matter belonged in Albany County and to adjourn the return date. The PSC answered on the merits, and made improper service and failure to name a necessary party objections in point of law.

By Decision and Order dated June 29, 2009, Albany County Supreme Court (Egan J.) ordered a "traverse hearing" on whether the PSC was properly served in this matter. Petitioner process servers swore to service on "Kendall Hans," a person unknown to the PSC. The PSC stated that service was made on Xendara Haas and denied she was authorized to accept service.

The Court found that neither party had submitted sufficient proof and ordered a traverse hearing to resolve the factual questions of proper service.

At the court hearing Xendara Haas testified in support of the PSC's claim that it was not properly served in November of 2008. Ms. Haas testified that she was aware that she was not authorized to accept service, would have sent anyone advising her that she was being asked to do so to the Secretary's office and has routinely done so in the past. In contrast, the process server appeared in sweat pants, could not testify that he asked the person given the papers if that person was authorized to accept service and did not try to explain his assertion he served "Kendall Hans," who does not appear in the PSC phone book. By Order dated November 4, 2009, Supreme Court, Albany County (Egan, J.) dismissed the NYSEG customer's *pro se* Article 78 challenge. The court upheld the Commission's determination as rational. The court also held that Petitioner's affidavit created a presumption of proper service, and that Ms. Haas' testimony was insufficient to rebut the presumption.

Petitioner appealed to the Appellate Division, Third Department. ~~The matter has been briefed and argued.~~ By decision entered October 14, 2010, the Appellate Division, Third Department affirmed Albany County's dismissal of a nonresidential electric customer's challenge to a Commission backbilling determination. Pro se appellant Sol Lefkowitz, owner of a seasonal bungalow colony, was backbilled by NYSEG after it discovered that it had been billing Mr. Lefkowitz for only one-fortieth of his electric usage, due to NYSEG's entry of the wrong meter multiplier in its billing system (i.e., the meter readings should have been multiplied by 40, but had only been multiplied by 1). Although NYSEG had been underbilling Mr. Lefkowitz for four years, it backbilled for only one year in accordance with 16 NYCRR 13.9(c)(1).

Mr. Lefkowitz argued that NYSEG forfeited its right to backbill because it never provided a service application, and 16 NYCRR 13.9(b)(4) precludes backbilling when the reason for underbilling would be apparent from a service application and the utility failed to provide one. Deferring to the Commission's interpretation and application of its regulations, however, the Court held that the Commission properly rejected Mr. Lefkowitz's argument. It held the Commission reasonably found that a meter multiplier error would not have been apparent from a service application.

Mr. Lefkowitz further argued that the usage for which he was backbilled was far in excess of his usage during prior years and could not have been correct. The Court deferred to the

Commission's factual findings that Mr. Lefkowitz's meter was accurate and that Mr. Lefkowitz had not produced any evidence contesting the accuracy of the meter.

Mr. Lefkowitz sought leave to appeal to the Court of Appeals from the Appellate Division. The PSC opposed his motion. By Order entered January 6, 2011, the Appellate Division denied Mr. Lefkowitz' motion.

(7) Luyster Creek v. NYPSC and Con Edison (Albany County Index No. 6826-07)

In a decision issued June 2, 2010, Albany County Supreme Court (McGrath, J.), upheld the Commission in this challenge to a 2007 Commission declaration that a 2002 approval of the sale of a parcel of land by Con Edison was based on economic development (job creation). The Commission approved the proposed sale of the land for use as an envelope factory as being in the "public interest." However, the prospective purchaser in the as yet unconsummated land transfer now plans a mail-sorting facility. The prospective purchaser claimed that the Commission 1) could not rely on economic development benefits in approving a transfer, and 2) incorrectly construed the 2002 approval as resting on such benefits.

Supreme Court concluded that the Commission could consider economic development benefits under recent case law.[2] It also decided that the Commission properly declared in 2007 that its 2002 "public interest" approval rested on economic development considerations, given that the 2002 order specifically recited the 100 jobs created by the envelope facility and the support of the Queens Borough President. The Court rejected the PSC's contention that Petitioner was mounting an untimely challenge to the 2002 Order.

By way of background, the contract between Con Edison and Luyster Creek stated that the property was being sold for an envelope factory. However, the contract did not make construction a condition of sale. The parties did not propose, and the Commission did not adopt, such a condition on its 2002 approval. Justice McGrath decided that while there was no condition, "the PSC relied on economic development in its public interest finding, and thereafter, placed significant weight on this factor." Decision and Order, at 15.

Luyster Creek's notice of appeal from Albany County Supreme Court's decision was due July 9, 2010.

---

[2] *Matter of New York State Electric & Gas Corp. v. Pub. Serv. Comm'n of the State of New York*, 308 A.D.2d 108 (3d Dep't 2003); *Matter of Niagara Mohawk Power Corp. v. Pub.Serv. Comm'n of the State of New York*, 218 A.D.2d 421 (3d Dep't 1996).

Luyster Creek brought this matter by Notice of Petition and Petition filed August 24, 2007, and served August 28, 2007. On October 23, 2007, a Stipulation Marking Case Off Calendar was filed with the Court. Con Edison and Luyster Creek then engaged in settlement negotiations. After a Commission decision requiring that utilities rebut the presumption that an auction should have been used to sell land,[3] Con Edison broke off negotiations.

After attempts to restart the negotiations proved fruitless, Petitioner reactivated the Article 78 proceeding, pursuant to the stipulation. On February 23, 2010, Albany County Supreme Court dismissed this matter pursuant to CPLR 3404, since it was held in abeyance for more than one year. Albany County made its decision without prejudice to a motion by petitioner, Luyster Creek, to restore the case to the calendar within 30 days. Petitioner so moved, arguing that it had been aggressively pursuing a settlement while the matter was in abeyance. The PSC opposed the motion, in part, insofar as Luyster Creek did not provide an affidavit on the merits of the case. The Court granted the motion to restore before rejecting Luyster Creek's position on the merits in its June 2, 2010 decision.

The Court of Appeals has granted the prospective purchaser of a parcel of land leave to appeal a March 10, 2011 decision of the Appellate Division, Third Dept. Motion No. 2011-428 (June 23, 2011). The Third Dept. affirmed a judgment of Albany County Supreme Court (McGrath, J.), which upheld a 2007 Commission declaration that the 2002 approval of the sale of a parcel of land by Consolidated Edison Company of New York (Con Edison) was based on economic development (job creation).

The prospective purchaser, Luyster Creek, LLC, claimed that the PSC: 1) could not rely on economic development benefits in approving a transfer; and 2) incorrectly construed the 2002 approval as resting on such benefits. The Appellate Division rejected both prongs of Luyster Creek's argument. The Appellate Division concluded that under a "realistic appraisal" of the Public Service Law the Commission was entitled to consider economic benefits as part of its consideration of whether a transfer was in the "public interest" under Public Service Law (PSL) §70, given statutory authority to create economic development rates. The Court also found that under its precedents, the PSC could consider post-transfer economic development benefits.

---

[3] Case 08-M-0930 – Joint Petition of Consolidated Edison Company of New York and Village Academies Network, Inc. for Authority Under Section 70 of the PSL to Transfer Certain Real Property located at 32-42 West 125th Street and 35-39 West 124th Street, New York, NY, Order Approving Property Transfer, issued October 28, 2008.

Matter of New York State Electric & Gas Corp. v. Pub. Serv. Comm'n of the State of New York, 308 A.D.2d 108 (3d Dep't 2003); *Matter of Niagara Mohawk Power Corp. v. Pub. Serv. Comm'n of the State of New York*, 218 A.D.2d 421 (3d Dep't 1996).

The Third Department also decided that the Commission properly declared in 2007 that its 2002 "public interest" approval rested on economic development considerations. The Court found the needed rational basis for the PSC's construction in the parties' urging for reliance on economic development benefits, the 2002 order's citation of the 100 jobs created by a planned envelope manufacturing facility and the support of the Queens Borough President. It rejected Luyster Creek's contention that the Commission relied on transfer price alone, concluding that it relied upon transfer price and economic development benefits. The Appellate Division, finally, upheld the PSC's refusal to consider the economic development benefits of Luyster Creek's changed plans for the property, observing that the Commission was only construing its 2002 approval, and noting any changed plans could be considered in deciding whether to approve of any new transfer agreement between Con Edison and Luyster Creek.

By way of background, the contract between Con Edison and Luyster Creek stated that the property was being sold for an envelope factory, but did not make construction of the envelope factory a requirement of the sale. However, the prospective purchaser in the as yet unconsummated land transfer now plans a mail sorting facility. The Commission approved the proposed sale of the land for use as an envelope factory as being in the "public interest," without conditioning its 2002 approval on construction of the factory.

This case was filed in 2007, but marked off the calendar so Con Edison and Luyster Creek could engage in settlement negotiations. Negotiations broke down after a Commission decision requiring that utilities rebut a presumption that an auction should have been used to sell land. Rather than attempting to satisfy PSC concerns, Luyster Creek sought leave to the Court of Appeals. The Court of Appeals' grant of the motion for leave did not explain the basis for the grant.

The Appellate Division rejected the PSC's argument that Luyster Creek's claims that the Commission lacked authority were time barred because any such claim had to be raised in a challenge to the 2002 order. The Court found that it was only when the PSC declared in 2007 that economic development was an essential basis for its conclusion that the sale was in the "public interest" that the statute of limitations began to run.

(8) National Fuel Gas Distribution Corporation v. NYS Public Service Commission, (Albany County Index No. 3247-08; A.D. 3d Dep't Docket No. 506981)

By Petition filed April 18, 2008, received by the Commission on May 9, 2008, and subsequently deemed to constitute service, National Fuel Gas Distribution Corporation (NFG) challenges a number of aspects of the Commission's decision in NFG's 2007 rate case (Case 07-G-0141). NFG challenges the Commission's decision to require it to modify its tariff with respect to late payment charges to reflect the NYPSC's decision that late payment charges are not owing from customers who are current on deferred payment agreements. (See *National Fuel Gas Distribution Corporation v. NYS Public Service Commission*, (Albany County Index No. 3246-08)).

After some preliminary skirmishing with NFG about whether its Petition had been properly served, the Commission agreed to a return date of June 20th. NFG then subsequently agreed that the case would be subject to transfer to the Appellate Division after the Commission moved for transfer. NFG and the NYPSC have agreed that such transfer should only occur after a Court decision in the companion case (*National Fuel Gas v. NYS PSC* (Albany County Index No. 3246-08)) challenging the Commission's decision that NFG cannot impose late payment charges on residential customers with deferred payment agreements who are timely on their bills.

Concurrent with its decision on the NFG LPC case (Albany County Index No. 3246-08), the court also signed a stipulated order transferring this companion Article 78 (challenging the 2007 NFG rate order in case 07-G-0141) to the Appellate Division, Third Department. National Fuel challenges the Commission's decision to require it to modify its tariff with respect to late payment charges to reflect the Commissions' decision that late payment charges are not owing from customers who are current on deferred payment agreements.

NFG also raised a variety of other challenges to the rate decision. These include that the Commission could not establish an incentive mechanism, improperly failed to remove health care costs from the general pool of costs subject to the general inflation rate, improperly reduced the amount of NFG's workers' compensation expenses for the rate year by 10% and then inflated that expense by the general inflation indicator. National Fuel also contends that the Commission improperly and unreasonably determined NFG's costs of common equity. It further claims that the Commission improperly disallowed $6.2 million in deferred expenses reasonably incurred in connection with environmental investigation and remediation, and improperly eliminated lump sum compensation payments by NFG to its managers.

By decision dated December 31, 2009, the Appellate Division, Third Department, upheld, in part, the Commission's decision in the 2007 National Fuel rate case. The Court 1) dismissed as unripe NFG's challenge to the incentive rates set by the Commission; and 2) upheld the Commission's decision as to National Fuel's rate of return on equity; but 3) reversed and remanded the Commission's decision disallowing NFG's deferral of expenses for coal-gasification SIR costs.

NFG asserted that the Commission does not have statutory authority to establish an incentive mechanism providing for return adjustments for failure to meet service targets, because such a mechanism imposed "penalties." The Appellate Division found the claim to be unripe because the incentive mechanism would not be invoked unless a show cause proceeding was held.

NFG also contended that the Commission improperly and unreasonably determined the cost of equity by relying on a methodology developed in the Generic Financing Decision (GFD). That methodology gave the Discounted Cash Flow (DCF) method twice the weight given the Capital Asset Pricing Model (CAPM). The Appellate Division rejected that claim, concluding use of the weighing was within Commission discretion to set rates. It found use of the GFD weighing supported by the record testimony of Department staff that both methods had biases and an equal weighing would inflate the rate of return. It also found that the GFD methodology was a policy applied case-by-case, and not a fixed, but unpromulgated, "rule."

Finally, National Fuel claimed that the Commission improperly disallowed $6.2 million in deferred expenses, incurred in connection with environmental investigation and remediation, by imputing an 18% increase in the proceeds from a settlement with insurance carriers. NFG's corporate parent had allocated 46% of proceeds from the settlement to NFG on the basis of premiums paid by its subsidiaries to the insurance carriers. The Commission allocated 64% of the proceeds to NFG, based on a report of liabilities for remediation that led to the settlement. NFG sought review, asserting that its parent's 46% allocation of the proceeds was reasonable. The Court accepted this contention as persuasive and modified the Commission decision accordingly. The Third Department observed that the test for prudence of utility conduct is whether that conduct was reasonable based on the utility's knowledge at the time. It concluded that the record did not show a premiums-based allocation methodology was unreasonable, given NFG testimony that the report used by the Commission contained preliminary cost estimates and

was prepared for maximizing the settlement. The Court also observed that 1) the report may not have reflected all claims, and 2) premiums paid by each subsidiary varied based on the number of sites and the amount of coverage. The Court concluded that while a claims-based allocation would have been reasonable, the alternative used by NFG's parent based on premiums paid was not unreasonable. The Appellate Division annulled the Commission's additional imputation of settlement proceeds and reversed and remitted the matter for further proceedings.

~~The PSC moved for leave to appeal this portion of the Appellate Division decision on February 1, 2010. The PSC's brief in the Court of Appeals was due July 28, 2010.~~

By decision issued March 29, 2010, the Court of Appeals has affirmed a decision of the Appellate Division, Third Department, which reversed a Commission disallowance of $6.2 million in expenses National Fuel Gas Distribution (NFG) incurred for Site Investigation and Remediation (SIR) costs. In a split (4-3) decision, the Court agreed with the Appellate Division that there was not "substantial evidence" to support the Commission's conclusion that NFG's corporate parent imprudently allocated only 46% of the proceeds from an insurance settlement to NFG. The Court of Appeals concluded that DPS staff had not adequately met its burden of showing a basis for an imprudence finding. It also agreed with the Appellate Division on the inadequacies of the report of forecast liabilities on which the Commission relied to conclude that a 64% allocation of proceeds to NFG would have been prudent.

In the 2007 National Fuel rate case, the Commission offset deferred SIR expenses with a higher allocation of insurance settlement proceeds that NFG's corporate parent reached with its insurers. The Commission found the corporate parent's "premiums-paid" allocation of 46% imprudent and allocated 64% of the insurance settlement proceeds to NFG based on a report of liabilities that the parent had developed for insurance settlement negotiations. NFG sought review, asserting that its parent's premiums-based allocation of settlement proceeds was reasonable at the time of the allocation.

Like the Third Department, the Court of Appeals observed that the test for prudence is whether utility conduct was reasonable based on the utility's knowledge at the time. The Court of Appeals observed that DPS staff had the initial burden of producing evidence of imprudence. Significantly, it found that the staff testimony that the settlement was not based upon premiums, but other factors, including possible liability, was insufficient to shift the burden of rebutting any inference of imprudence to the utility. The Court apparently concluded as a matter of law that insurers will consider premiums paid and the likelihood of litigation over coverage in deciding

whether to settle. (It also noted that after NFG's settlement it had occasion to rule that similar insurance policies did not cover SIR remediation; thus the Court viewed the settlement as beneficial to ratepayers.) The Court further faulted the Commission for not explaining why estimated liabilities was the only prudent basis for allocation. (In this regard, it noted that the Commission had not adopted the dissent's position that premiums paid were irrelevant since the insurance was not for environmental liabilities.) The Court also observed that it was undisputed that the report used by the Commission contained only preliminary cost estimates and had been prepared for maximizing the settlement.

(9) NYPSC, et al. v. Dep't of Energy, (Second Circuit Docket No. 08-71831, Ninth Circuit Docket No. 08-72644); The Wilderness Society, et al., v. Dep't of Energy, (Ninth Circuit Docket No. 08-71074)

In a petition filed May 8, 2008, in the U.S. Court of Appeals for the Second Circuit, the Commission challenged orders issued by the U.S. Department of Energy ("DOE") which designated two National Interest Electric Transmission Corridors ("NIETC") under Section 216 of the Federal Power Act. One of the NIETCs designated by DOE, the Mid-Atlantic NIETC, includes most of New York State. The inclusion of portions of New York State within the NIETC is significant because, if certain other conditions are met, the Federal Energy Regulatory Commission ("FERC") can issue a permit allowing the construction of interstate electric transmission facilities within the NIETC.

Section 216 of the FPA only allows DOE to designate an NIETC in a "geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers ...." In its petition, the Commission asserted that the DOE failed to comply with the provisions of the statute, to make required findings of fact, or to adequately consider the impacts of its orders on the residents, economy, and environment of New York State. In its comments at the underlying administrative proceeding before DOE, the Commission argued, *inter alia*, that the DOE had no basis for finding that consumers were "adversely affected" by the electric transmission congestion and constraints which DOE identified because DOE failed to identify the costs of such congestion and constraints, or to consider the costs of relieving such congestion and constraints.

On June 9, 2008, the parties stipulated that the matter be transferred to the U.S. Court of Appeals for the Ninth Circuit, which had previously been designated as venue for several earlier-

filed petitions challenging the DOE orders. A Court mediator is attempting to reach agreement among the parties with respect to the number and length of the various briefs, the briefing schedule, and designation of the record.

This case was transferred to the Ninth Circuit, and by order filed July 29, 2008, that Court consolidated this case with other currently pending petitions. After extensive efforts to mediate a briefing schedule failed, the Petitioners, on August 15, 2008, filed a Motion for Establishment of a Briefing Schedule. On August 27, 2008, Respondents filed a response, which, for the most part, accepted the Petitioners' proposed briefing schedule. However, Intervenors on behalf of DOE filed opposition papers on August 27, 2008, proposing a more expedited schedule, with fewer and shorter briefs. On September 4, 2008, Petitioners filed a Reply to Intervenors' opposition.

In an order filed September 9, 2008, the Court granted the Petitioners' motion. Briefing was completed as of May 21, 2009.

Oral argument was held on June 8, 2010. Maureen Leary from the New York State Attorney General's Office conducted that portion of the oral argument relating to the State-petitioners' interests. The consolidated cases are now fully submitted.

On April 29, 2011, the U.S. Court of Appeals for the Ninth Circuit issued its mandate vacating orders of the U.S. Dept. of Energy designating two National Interest Electric Transmission Corridors ("NIETC"), under Section 216 of the Federal Power Act, 16 USC § 824*p*. *California Wilderness Coalition v. U.S.D.O.E.*, Docket No. No. 08-71074 (consolidated) (9th Cir. 2009). Federal Rule of Appellate Procedure 41(b) provides the Court's mandate will only issue seven days after the time to petition for rehearing expires. DOE had obtained an extension of time to petition for rehearing to April 15, 2011. Neither DOE or the industry sought rehearing, or a stay pending a petition for certiorari to the United States Supreme Court, so the mandate issued, vacating the corridors.

In a decision issued February 1, 2011, the Court held that (1) the NIETC designations were unlawful because DOE failed to "consult with affected States" while performing the electric transmission congestion study that was the basis for the NIETC designations; and (2) DOE failed to document the reasonableness of its decision not to prepare an Environmental Impact Statement or Environmental Assessment, pursuant to the National Environmental Protection Act. Holding that each of these errors was not "harmless," the Ninth Circuit vacated the NIETC designations, and remanded the cases to DOE for further proceedings. Because the

Court vacated the NIETC designations, it did not consider the merits of Petitioners' challenges to the specific national corridors, other than as necessary to determine that DOE's procedural errors were not harmless.

In a dissent, Judge Ikuta opined that, because Petitioners did not show that DOE's failure to consult with affected States during the study prevented the States from submitting information or making arguments to DOE, and Petitioners had not shown that DOE would have made a different decision absent the error, there was no prejudice to Petitioners, and the Court was required to uphold DOE under *Shinseki v. Sanders*, 129 S.Ct. 1696, 1704-06 (2009).

The Commission challenged the DOE designations in a petition filed May 8, 2008, in the U.S. Court of Appeals for the Second Circuit. One of the NIETCs designated by DOE, the Mid-Atlantic NIETC, included most of New York State. The inclusion of portions of New York within that NIETC was significant because, if certain conditions were met, FERC could have overriden state decisions with respect to construction of electric transmission facilities and compel construction in a NIETC. The PSC's case was transferred to the Ninth Circuit, and by order filed July 29, 2008, that Court consolidated this case with other pending petitions and made the first filed case, *Wilderness Society et al. v. DOE*, the lead docket.

Section 216(a)(1) of the FPA, 16 U.S.C. §824p(a)(1), required DOE to conduct a study, "in consultation with affected States," of electric transmission congestion. Section 216(a)(2) of the FPA, 16 U.S.C. §824p(a)(2), only allows DOE to designate an NIETC in a "geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers ...." The Commission's petition asserted that the DOE failed to comply with the statute, make required findings of fact, or adequately consider the impacts of its orders. In its comments before DOE, the Commission had argued, *inter alia*, that DOE had no basis for finding consumers were "adversely affected" by the electric transmission congestion and constraints which DOE found, because DOE failed to identify the costs of such congestion and constraints or to consider the costs of relieving such congestion and constraints.

(10) Sprint Spectrum L.P., Nextel of New York, Inc. and Nextel Partners of Upstate New York, Inc. v. NYPSC and Xchange Telecom, Inc. and Xchange Telecom Corp., (Albany County Index No. 3515-10)

By Notice of Petition and Petition filed June 2, 2010, in Albany County Supreme Court and served June 14, 2010, Petitioner wireless carriers ("Sprint") challenged the Commission

decision in Cases 07-C-1541 and 09-C-0370 to establish a rate for the termination of traffic by XChange Telephone Corporation, a competitive local exchange carrier (CLEC). Termination of traffic occurs when one carrier delivers traffic to a local exchange carrier serving retail end users. The Commission set a rate for XChange's termination of traffic pursuant to PSL §97(3). Sprint and other wireless carriers have sought rehearing of the Commission's decision.

In addition to petitioning for rehearing, Sprint has also filed this state court proceeding challenging the Commission's decision, as well as a federal court proceeding **(see separate report)**. Petitioners allege that the order was issued in excess of Commission jurisdiction because federal law, 47 U.S.C. §251(1), does not give the Commission authority to set a rate between a wireless carrier and a CLEC. Sprint also contends that the Commission improperly made its decision without providing for evidentiary hearings and that PSL §97(3) is preempted by federal law.

~~The Commission issued a notice in response to the rehearing petition requesting additional information on the appropriate termination rate for wireless traffic. Responses were recently filed. As such, the parties to this matter negotiated an agreement to hold this matter in abeyance pending Commission disposition of petitions for rehearing. Sprint has filed a motion to hold the case in abeyance and a decision is pending.~~

Termination of traffic occurs when one carrier delivers traffic to a local exchange carrier serving retail end users. The Commission set a rate for XChange's termination of traffic pursuant to PSL §97(3). The Commission issued a notice in response to the rehearing petition requesting additional information on the appropriate termination rate for wireless traffic. Commission staff has recently sought to broker a settlement. Upon Sprint's motion, consented to by the Commission and Xchange, the court has ordered the case held in abeyance.

(11) Sprint Spectrum L.P., Nextel of New York, and Nextel Partners of Upstate New York, Inc. v. Garry A. Brown, et al., NYPSC and Xchange Telecom, Inc. and Xchange Telecom Corp., (S.D.N.Y. Civil Case No. 10-CV-4370)

By Summons and Complaint filed June 2, 2010, Plaintiff wireless carriers ("Sprint") also challenged the Commission decision in Cases 07-C-1541 and 09-C-0370 in United States District Court for the Southern District of New York. Plaintiffs claim that the Commission Order is preempted by the Supremacy Clause of the United States Constitution, inasmuch as 1) 47 U.S.C. §251 does not give the Commission authority to set a rate that would be paid by a

wireless provider, and 2) 47 U.S.C. §332 provides exclusive jurisdiction with regard to negotiations between a CLEC and a wireless provider. Sprint also contends that the Commission's Order is invalid because it purports to set a rate for the termination of interstate traffic. Plaintiffs further assert that the Commission violated state law by 1) converting the XChange petition for declaratory relief into a complaint, 2) acting in excess of its jurisdiction under PSL §97(3), and 3) assuming that all the traffic was intrastate.

The PSC was served with the federal complaint on September 27, 2010. The Court has scheduled a status conference for October 29, 2010, and required a scheduling report by October 22, 2010. The parties negotiated an agreement to stay the case in light of the pendency of rehearing petitions to the Commission, and the Court has approved a stay with six-month status reports. The latest report was filed on June 21, 2011, and stated that Department staff was attempting to facilitate negotiation of the matter.

(12) United States of America v. KeySpan Corp., (S.D.N.Y. Civil Case No. 10-CIV-1415)

On April 30, 2010, the Commission filed comments, pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)–(h), in response to a settlement proposed by the U.S. Dep't of Justice, Antitrust Division, in a civil antitrust enforcement action against KeySpan Corporation. *United States v. Keyspan Corporation*, Proposed Final Judgment and Competitive Impact Statement, 75 *Federal Register* 9946 (March 4, 2010). DOJ proposed settling the matter by having KeySpan pay the United States government a $12 million penalty, as partial disgorgement of KeySpan's wrongful profits from its anti-competitive conduct in the New York City Installed Capacity ("ICAP") market.

The Commission noted that, because DOJ did not show how much KeySpan profited, the Court was unable to evaluate whether the proposed settlement would be in the public interest. The Commission asserted KeySpan's gains were likely nearly $68 million, and therefore the $12 million settlement would not prevent KeySpan's unjust enrichment, nor deter such conduct. Finally, the Commission argued that, because the consumer costs (in the form of excessive electricity costs) caused by KeySpan's anticompetitive conduct may have exceeded hundreds of millions of dollars over a two-year period, settlement proceeds should be used to benefit ratepayers.

On June 11, 2010, DOJ filed its response to the various comments, and urged that the Court enter a Final Judgment reflecting the proposed $12 million settlement. The NYPSC then

made a motion to file a Reply to the DOJ's Response to its prior comments. That motion was granted, and the PSC's Reply was accepted by the Court, on August 12, 2010. Subsequently, the Court scheduled a status conference for October 12, 2010. Although the PSC is not a "party" to the case, it obtained the Court's permission to participate in the October 12, 2010 status conference to the limited extent of responding to any questions from the Court about the PSC's filings.

By decision dated February 2, 2011 the United States District Court for the Southern District of New York approved a proposed consent decree with respect to an allegedly illegal contract that KeySpan Corporation ("Keyspan") had entered into with Morgan Stanley (the "Keyspan Swap"). The U.S. Dept. of Justice, Antitrust Division, brought a civil antitrust enforcement action against KeySpan for alleged anti-competitive conduct in the New York City Installed Capacity ("ICAP") market. *United States v. Keyspan Corporation*, Proposed Final Judgment and Competitive Impact Statement, 75 *Federal Register* 9946 (March 4, 2010). DOJ proposed settling the matter by having KeySpan pay the United States government a $12 million penalty, as partial disgorgement of KeySpan's wrongful profits from the "swap."

The Southern District approved the $12 million penalty, even though KeySpan cleared $49 million from the swap, because the issues were complex, discovery would have been extensive, and expensive, and DOJ could not expect full damages. The Court accepted DOJ's theory that the remedy was limited to divesting KeySpan of its gain, rather than compensating ratepayers, and noted that, according to DOJ, the swap was a "hedge" rather than a profit center.[4] The Southern District found $12 million a sufficient deterrent (at 25% of KeySpan's net revenues under the swap), particularly since market participants are now on notice that they are potentially subject to disgorgement.

The Court also declined to adopt a remedy aimed at compensating consumers which "would be speculative and ignore the Government's theory of the case." Slip opinion at 15. The Court found putting the money in the Treasury is "within the public interest" and accepted DOJ's argument that "return[ing] [the money] to New York City consumers" would raise filed rate doctrine concerns. Slip opinion at 15. The Court made no express mention of giving the money

[4] DOJ's position was that, if KeySpan had competed, its sales revenues would have been greater, based on a greater volume of sales; the swap merely offset KeySpan's losses due to new entry and KeySpan's continued bidding at the cap.

to NYSERDA for general ratepayer relief, as the PSC proposed.

On April 30, 2010, the Commission filed comments, pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)–(h), in response to the proposed settlement. The Commission noted that, because DOJ did not show how much KeySpan profited, the Court was unable to evaluate whether the proposed settlement would be in the public interest. The Commission asserted KeySpan's gains were likely nearly $68 million, and therefore the $12 million settlement would not prevent KeySpan's unjust enrichment nor deter such conduct. Finally, the Commission argued that, because the consumer costs (in the form of excessive electricity costs) caused by KeySpan's anticompetitive conduct may have exceeded hundreds of millions of dollars over a two-year period, settlement proceeds should be used to benefit ratepayers.

PART III: CASES WITH NO UPDATE

(1) Advanced Medical and Alternative Care, P.C., et al v. New York Energy Savings Corp., et al. (Kings County Index No. 9693-2008)

In a Verified Complaint filed March 25, 2008, Plaintiff Advanced Medical and Alternative Care, P.C. ("Plaintiff") sought to bring a class action against Defendants New York Energy Savings Corporation, its parent corporation U.S. Energy Savings Corp., Energy Savings Income Fund (collectively, "ESCO Defendant"), and Consolidated Edison Company of New York, Inc. ("Con Edison"). Plaintiff alleges Defendants engaged in materially deceptive and misleading business practices, and false advertising, in violation of the NY General Business Law, in marketing electricity to small commercial premises. On May 16, 2008, the Commission filed a motion to intervene on behalf of Con Edison, on the ground that it has primary jurisdiction over Con Edison's customer billing practices, and practices relating to the release of customer information.

Plaintiff alleges the ESCO and Con Ed misled Plaintiff into believing the ESCO would save them money on energy, when in fact the ESCO did not. Plaintiff alleges the ESCO's Customer Agreement (which includes extended contract terms (48 & 60 months) and a liquidated damages provision for early termination) violates public policy and is void as a matter of law because it is coercive, unfair and punitive. Plaintiff alleges Con Ed improperly double-bills consumers for charges payable to both Con Ed and the ESCO, and improperly releases customers' confidential billing information to the ESCO.

The Commission sought to intervene because of the claims against Con Edison. As part of its motion, the Commission submitted a proposed Answer, with objections in point of law. On June 11, 2008, Defendant Con Edison moved to dismiss the complaint on the grounds that (1) the Commission has primary jurisdiction over the claims against Con Edison; (2) Plaintiff's claims are barred by the filed-rate doctrine; and (3) Plaintiff failed to state a claim against Con Edison. On May 16, 2008, Defendants Energy Savings Income Fund and New York Energy

Savings Corp. moved to dismiss for lack of personal jurisdiction, and failure to state a claim, or, in the alternative, to stay the action and compel arbitration.

August 6, 2008, was the return date for various motions, including the PSC's motion to intervene on behalf of Defendant Con Edison. However, the Plaintiff did not oppose Con Edison's Motion to dismiss.

The Defendant ESCOs, however, have argued that this dispute should be remanded to the PSC for resolution. On July 29, 2008, the PSC accordingly filed an Affirmation in Response to Plaintiff's Cross-Motion to Certify a Class Action, which sought to clarify the PSC's position in the case, and the nature and extent of the Commission's regulation of Energy Services companies within New York State. A decision on the various motions is pending.

By Judgment entered January 9, 2009, following a Decision, Judgment and Order entered December 15, 2009, Kings County Supreme Court has stayed this action in which Plaintiff Advanced Medical and Alternative Care, P.C. sought to bring a class action against an ESCO, New York Energy Savings Corporation, its parent corporation U.S. Energy Savings Corp., and Energy Savings Income Fund. The Court held that the arbitration agreements between the ESCO and its customers were enforceable. The Court accordingly granted a motion for a stay to permit arbitration as to New York Energy Savings Corp.

The Court also granted the motion of Defendant Energy Savings Income Fund to dismiss for lack of personal jurisdiction. A motion for class action certification was denied as moot.[5]

Plaintiffs then appealed, but did not perfect. By Order dated September 24, 2009, the Second Department granted them until October 14, 2009, to perfect. They did not timely perfect and their appeals were accordingly dismissed by Order dated February 19, 2010.

(2) AG-Energy, L.P. v. New York Public Service Commission and St. Lawrence Gas Company (Albany County Index No. 10184-09)

AG-Energy, L.P. ("AG Energy"), a steam utility, had a dispute with St. Lawrence Psychiatric Center ("SLPC"), an Office of Mental ("OMH") facility located in Ogdensburg, NY over the price for steam paid by OMH. AG-Energy asserted that it is unable to economically provide steam at the contract rate it negotiated with OMH prior to National Grid's buyout of its

[5] By Order dated August 6, 2008, the parties had stipulated that Consolidated Edison Company of New York, Inc. would be dismissed as a party, which mooted the PSC's motion to intervene on its behalf.

parallel PURPA electricity sales agreement. It filed a complaint in the New York State Court of Claims alleging OMH breach of the contract.

AG-Energy agreed not to press a cause of action seeking, *inter alia*, a directive from the Court of Claims that OMH secure an alternate source of steam. The PSC intervened and moved to dismiss that count in AG-Energy's amended complaint, or in the alternative, refer it to the Commission under the doctrine of primary jurisdiction. The PSC's motion was not opposed.

By decision and order dated April 16, 2010, Supreme Court, Albany County (Teresi, J.), dismissed AG-Energy, LP's Article 78 petition challenging a Commission order that modified, in part, a gas transportation contract between AG-Energy and St. Lawrence Gas Co.

AG-Energy operates a former PURPA cogeneration plant that no longer generates electricity. It now only produces steam heat for State hospital and prison facilities in Ogdensburg. It complained to the Commission that because it no longer uses large quantities of gas, it should not have to pay St. Lawrence for transportation of a minimum quantity of gas regardless of usage (the contract's "minimum take provision"). It further alleged that the minimum take provision had resulted in overpayments, which should be applied toward its obligation to repay St. Lawrence's costs of extending the gas main to AG-Energy's facility (the contract's "monthly facilities charge"). The Commission's order modifying the contract (issued Sept. 21, 2009 in Case 09-G-0320) eliminated the minimum take provision, but upheld the monthly facilities charge.

The Court held that the Commission properly distinguished the two provisions, as AG-Energy's amount of usage is irrelevant to St. Lawrence's construction costs. The Court declined to consider AG-Energy's overpayment argument, as it had not been raised before the Commission. It also recognized that relief as to prior overpayments is precluded by the filed rate doctrine.

The St. Lawrence/AG-Energy contract was negotiated in 1992 for transportation of gas to AG's Energy co-generation facility when AG-Energy was a Sithe subsidiary. The facility generated electricity for sale to Niagara Mohawk Power Corporation. The St. Lawrence Psychiatric Center, operated by the New York State Office of Mental Health (OMH), was the steam host.

AG-Energy ceased selling electricity to Niagara Mohawk in 1998 pursuant to the Master Restructuring Agreement between that utility and various generators. AG-Energy was acquired

by Alliance Energy in 2005. It stopped generating electricity in 2007; it now only provides steam to OMH.[6]

In its February 2009 petition, AG-Energy claimed that its gas transportation agreement with St. Lawrence should be modified to reflect the reduced usage of gas resulting from the changes in the Ogdensburg facility. The Commission, however, only eliminated the "minimum take" provision of the contract in its September 2009 Order. The Commission decided that the St. Lawrence charge for facilities constructed to serve the AG-Energy facility remained reasonable. It further concluded that it could only modify the contract prospectively; that is, it could not consider alleged past losses by AG Energy.

AG-Energy did not appeal. Instead, it has reached a settlement with St. Lawrence on a schedule for payment of its obligation.

(3) Alcan Aluminum Corporation, d/b/a Rolled Products Company v. NYS Public Service Commission and New York Telephone v. NYS Public Service Commission, et al. (Index No. 1548-97)

On June 8, 1994, the plaintiff instituted an action in the Northern District of New York State's Federal District Court for a declaratory judgment that the Commission's exercise of jurisdiction over sales of electricity by Sithe/Independence Power Partners (a qualifying facility) to Alcan is preempted by the Public Utility Regulatory Policies Act (PURPA) and regulations of the Federal Energy Regulatory Commission (FERC) implementing PURPA. Alcan argues that it and Sithe constitute two integral parts of a single qualifying facility and, therefore, Sithe's sales to Alcan cannot be regulated by a state regulatory agency. The action has been held in abeyance pending completion of a Commission decision on a petition for rehearing of Case 94-E-0136, the certification proceeding of Sithe/Independence Power Partners, L.P.

(4) Alessi v. Acampora, NYPSC and Long Island Power Authority (Albany County Index No. 07-2098)

By Notice of Petition and Petition served March 15, 2007, Petitioner challenges a Commission decision to decline to review fuel surcharges assessed by the Long Island Power Authority. He contends the Commission is able to review LIPA fuel surcharges, because the Public Authorities Control Board made Commission review of major LIPA rate changes a

---

[6] AG-Energy's dispute with OMH allegedly arising from the buyout is described in No. 22 below.

condition of approval of certain LIPA projects and the NYPSC Chairman as of 1998 agreed to that review.

By decision dated September 14, 2007, Albany County Supreme Court (Connolly, J.) has upheld the Commission's decision that the Long Island Power Authority (LIPA) is exempt from Commission rate review. The Commission had declined to grant LIPA an advisory opinion on the correctness of LIPA's rates following criticism by the State Comptroller of LIPA's use of fuel surcharges to recover costs. Petitioner Alessi argued that LIPA was subject to Commission jurisdiction as a result of a Public Authorities Control Board (PACB) resolution approving LIPA's takeover of Long Island Lighting Company.

Supreme Court concluded that the plain language of Public Authorities Law (PAL) §1020-s precludes Commission jurisdiction over LIPA's rates and the statute was not superseded by the PACB resolution and recommendations of the State Comptroller. It also decided that a former Chairman could not expand Commission jurisdiction by offering a plan for compliance with the PACB resolution. The Court observed that the statute provided for oversight by the PACB and the State Comptroller, and the Commission lacks jurisdiction until PAL §1020-s is amended.

(5) AT&T Corp. v. FCC (D.C. Cir. No. 99-1538); Covad Communications Co. v. FCC (D.C. Cir. No. 99-1540)

By decision released December 22, 1999, the Federal Communications Commission (FCC) granted the request of Bell Atlantic-New York to provide InterLATA service in New York pursuant to Section 271 of the Telecommunications Act. American Telephone & Telegraph Corporation (AT&T) and Covad Communications Company (Covad) have challenged the FCC's decision and sought a stay. The NYPSC has moved to intervene in support of the FCC and opposed a stay. By Decision dated August 1, 2000, the United States Court for the District of Columbia Circuit upheld the FCC's decision. The D.C. Circuit concluded, inter alia, that the FCC properly (1) found the Commission relied upon TELRIC principles in setting interconnection rates; (2) looked at the entire universe of loops in measuring New York Tel performance, instead of just DSL-capable loops, given the newness of DSL service; and (3) reasonably drew a line defining acceptable "hot cut" performance based on Commission factual findings. AT&T has petitioned for rehearing en banc.

(6) Babb. v. Con Edison & PSC, (Kings County Supreme Court Index No. 13144/09) / Possible Remand (Albany County Index No. 5818-09)

By Order to Show Cause dated June 10, 2009, returnable in Kings County (Brooklyn) on July 10, 2009, a Brooklyn landlord, Mrs. Frances Babb, challenges *pro se* a Commission decision not to hear a complaint that Consolidated Edison Company of New York (Con Edison) improperly found, assessed and set up a special account for a shared meter condition. The Commission declined to hear the complaint because the landlord did not complain to the Commission within 45 days of the utility's notice of a shared meter condition as required by Public Service Law (PSL) §52(4)(d). The landlord alleges no notice of Con Edison's determination that a shared meter existed and that, in fact, no such condition existed, as shown by an inspection by the landlord's electrician.

The NYPSC demanded a change of venue to Albany County and the Order to Show Cause was adjourned to permit litigation of their motion to change venue. Petitioner did not consent to a change, but did not file the necessary affidavit that Kings County was the proper venue. The PSC accordingly sought to change venue to Albany County in that County. The PSC's motion was not opposed and was granted. Petitioner requested oral argument on whether her complaint to the Commission was timely, and that argument was heard in Albany County on December 7, 2009.

By Order dated February 18, 2010, Supreme Court, Albany County (McNamara, J.) dismissed this *pro se* Article 78 petition by Ms. Babb. The Commission rejected her complaint as untimely because she did not complain within 45 days after a utility decision on a shared meter condition. Albany County did not decide whether the Commission's decision was proper, even though Ms. Babb waited nearly a year to complain. Rather, it dismissed the proceeding because Kings County Supreme Court directed her to personally serve the Commission, but she sent her papers via certified mail. Albany County ruled that Ms. Babb failed to satisfy the Kings County order and CPLR 312, and dismissed the case.

(7) Berkshire Telephone Corporation et al. v. Sprint Communications Company and New York Public Service Commission, (Western District of New York, Index No. 05-cv-6502-CJS)

By summons and complaint filed September 26, 2005, served on the Commission September 30, 2005, and amended on December 22, 2005, a group of incumbent providers of telephone local exchange service ("the Independents") challenge Commission decisions in Cases

05-C-0170 et al., to require them to interconnect with Sprint, a competitive provider of telephone local exchange service. The Independents claim that they have no obligation to interconnect with Sprint under federal law, because it will not itself be providing local telephone service, but has contracted with another entity, which is providing such local service. They also complain that the Commission improperly decided other issues, for instance that Sprint could obtain reciprocal compensation for traffic it delivers to them.

A pre-hearing conference was held February 28, 2006. On March 8, 2006 a scheduling order was signed settling April 3, 2006, as the date for Plaintiffs to file their Summary Judgment motions. The parties have filed their motions for Summary Judgment. Oral argument was held on September 13, 2006.

By decision dated October 27, 2006, the United States District Court for the Western District (Siragusa, J.) granted motions for summary judgment of the New York State Public Service Commission (PSC, Commission) and Sprint Communications, Inc. ("Sprint") in a challenge brought by a group of rural Incumbent Local Exchange Companies (Berkshire, et al.). The Commission decided that: (1) Sprint is a "telecommunications carrier" within the meaning of the Telecommunications Act of 1996 (1996 Act) insofar as it provides telephone services in concert with Time Warner Cable (TWC), and as such, is entitled to an interconnection agreement and the benefits of interconnection (dialing parity, directory listings, number portability and reciprocal compensation); and (2) the "local exchange area," for purposes of the interconnection agreement includes Extended Area Service (EAS).

The Court found that the PSC lacked a record basis for finding that Sprint "held itself out indiscriminately" to provide the same elements of telecommunications services to all potential cable companies (like TWC), but credited the PSC's conclusion that Sprint and TWC, "together, are providing local exchange service to end users," "even though the end users deal directly only with TWC." It also held that Sprint is entitled to act "on behalf of itself and TWC" in securing an interconnection agreement and benefits. Finally, the Court noted that it was undisputed that the PSC has the authority to determine what the "local calling area" would be for a given interconnection agreement and since a prior PSC Order on which Berkshire, et al. relied did not pertain to either: (1) interconnection agreements; or (2) competing carriers, the PSC's use of the EAS as the local exchange area was rational.

Plaintiffs have not filed an appeal.

(8) Bernas v. Flynn and NYS Public Service Commission (Eastern Dist. of New York (Index No. 2:05-CV-05102-ADS-ARL)

By summons and complaint filed November 10, 2005, which the PSC received by certified mail on November 14, 2005, a user of Cablevision's public access channel seeks to challenge the Commission's July 22, 2005 decision in Case 05-V-0310 in the United States District Court for the Eastern District of New York. Plaintiff claims the Commission's approval of Cablevision's administration of "first-come, first served" access through a mail-in system, with ties broken by a random mailing, violates state and federal gaming laws because Cablevision's tie-breaker is a prohibited "lottery."

The PSC moved to dismiss for lack of a federal question, failure to state a claim, and ineffective service of process, and asked the Court to abstain because of the availability of Article 78 review under state law. Plaintiff made a counter-motion for summary judgment. Those motions remain pending.

Plaintiff had sought a change of venue, which was denied by the Court on its own motion. Plaintiff filed a notice of appeal of that denial, even though the decision was not final or a reviewable interlocutory order (28 U.S.C. §§1291-92), which was dismissed by the Second Circuit. In addition, another case brought on the same facts against Cablevision was dismissed in December by the same Judge, with leave to amend.

(9) Best Payphones, Inc. v. NYPSC (Albany County Index No. 3464-03)

By Notice of Petition and Petition filed June 6, 2003 and served with a supporting brief on June 23, 2003, a provider of public payphones challenged a Commission policy that only gives complaining customers refunds for six years before the filing of a complaint with the Commission. Petitioner argued that Verizon billed Petitioner for municipal surcharges in violation of Verizon's tariff since June of 1987, when service began, and Petitioner was entitled to refunds back to that date.

An Order to Show Cause wherein Petitioner sought to expand the PSC's administrative record was argued on November 14, 2003. By decision issued January 5, 2004**,** Albany County Supreme Court has required the NYPSC to supplement the record in this matter with 1) a stipulation settling a dispute about interest on refunds and 2) documentation of staff conversations with Verizon that led to an alleged utility concession that the Commission mentioned in its order. The Court rejected Petitioner's claim that the stipulation was a new order

that extended its time to name Verizon as a party. However, it decided that petitioner had a due process right to be informed of the "ex parte" contacts.

Petitioner challenged the PSC's compliance with the Albany County Court's directive that the record be supplemented. By decision issued October 21, 2004**,** Albany County Supreme Court denied Petitioner's request to reargue a July 1, 2004 decision of Supreme Court (Clemente, J.). The Court rejected Petitioner's claim that a Department Affidavit submitted pursuant to the Court's January 5, 2004 decision, contained new information. The Court ordered Petitioner to file its reply papers on the merits by October 31, 2004.

Best filed a series of Orders to Show Cause to extend the time to file its reply, in light of the withdrawal of its counsel. On January 6, 2005, Best was granted 30 days to find new counsel and file its reply. On January 28, 2005, Supreme Court (Clemente, J.) dismissed petitioner's fourth Order to Show Cause attempting to avoid filing a reply brief, but granted its request to hire new counsel. On February 7, 2005, Bet Payphones complied with the court's order and submitted its reply.

By decision dated May 26, 2005, Albany County Supreme Court (Clemente J.) reversed a February 2003 PSC decision with respect to the computation of refunds owed by Verizon to a provider of independent payphones. Petitioner, Best Payphones, contended that from 1987 to 1998 Verizon (and its predecessors) violated the utility's tariff by levying municipal surcharges on Best Payphones when Best Payphones, but not Verizon, was liable to New York City for taxes on revenues from its payphones. The Commission followed its general six-year limitations period for refunds on customer overbilling complaints, absent fraud, and required that Best Payphones receive refunds from 1992 to 1998.

The Supreme Court reversed the PSC's decision. It imputed a finding to the Commission that a 1996 complaint by another reseller meant Verizon knew Best Payphones was not subject to the surcharge. The Court concluded that the PSC decision resulted in "double taxation" of Best Payphones, which was liable for taxes to the City even after paying Verizon the surcharges.

In July 2005, the PSC and Verizon filed notices of appeal with the Third Department, claiming that the Supreme Court (1) failed to follow legal precedent upholding the PSC's established 6-year refund policy, and (2) erred by failing to dismiss Best's petition for failure to join all necessary parties within the 4-month statute of limitations.

By Memorandum and Order decided and entered November 22, 2006, the Appellate Division, Third Department, granted the appeal of the Commission and Verizon, reversed a June 13, 2005 judgment of Supreme Court, Albany County (Clemente, J.), in favor of Best Payphones, Inc., and dismissed Best Payphones' Article 78 proceeding. The Third Department concluded that Verizon was a necessary party because Best Payphones sought to require Verizon to pay additional refunds in a customer complaint. It found that Best Payphones' unexcused failure to name Verizon as a party before expiration of the statute of limitations required dismissal.

The Court did not address the substantive question of whether the Commission rationally followed its general policy of awarding a six-year refund in complaints about utility billings. Best Payphones, a reseller of telephone services, had claimed that it was entitled to an additional five years of refunds beyond the six years provided by the Commission because Verizon had not followed the New York City Administrative Code in requiring resellers to pay surcharges recovering Verizon's New York City revenue taxes. Albany County Supreme Court had imputed a finding to the Commission that a 1996 complaint by another reseller meant Verizon knew Best Payphones was not subject to the surcharges. Supreme Court concluded that the PSC decision resulted in "double taxation" of Best Payphones, which was liable for taxes to the City, even after paying Verizon the surcharges.

Best Payphones served a motion for leave to appeal to the Court of Appeals on December 27, 2006. By Order entered March 22, 2007, the Court of Appeals denied the motion seeking leave to appeal and awarded costs.

(10) Cablevision Systems Long Island Corporation v. Village of Massapequa Park, Board of Trustees of Massapequa Park, and Verizon New York Inc. (Supreme Court, Nassau County, Index No. 16555/05)

Cablevision filed a hybrid Article 78/declaratory judgment proceeding in October 2005, seeking to void the Village of Massapequa Park resolution awarding Verizon a cable television franchise on the grounds that the Open Meetings Law was violated and Cablevision was denied due process. The Supreme Court granted the defendants' motions to dismiss in January 2006. Cablevision filed a notice of appeal to the Second Department in February 2006.

(11) Central Hudson Gas & Electric Corporation v. Assessor of Town of Newburgh, Board of Review of Town of Newburgh and Town of Newburgh (Supreme Ct A.D.

2d Dep't 2009-09185, 2009-02021; Orange Cty, Index No. 4903/01, 4521/02, 4800/03, 4530/04)

Petitioner Central Hudson Gas & Electric Corporation ("CHGE") challenged the Town of Newburgh's real property tax assessments of its electric transmission lines and substations and gas pipelines for tax years 2001 through 2004. Supreme Court Orange County entered judgment December 23, 2008 after a non-jury trial. The property was deemed "specialty" property because, amongst other factors, it was unique and unmarketable. Thus, the cost approach was the only appropriate appraisal technique. Both the Petitioner's and Respondent's engineer-appraisers used a combination of the "quantity survey method" and "trended original cost method" to value the property. Both calculated similar reproduction cost new values. The main difference between the two appraisals was depreciation, specifically the estimate of average service lives.

The Petitioner overcame the presumption of validity of the assessments by submitting substantial evidence - a detailed and competent appraisal report that demonstrated the existence of a valid and credible valuation dispute. Meanwhile, the court went so far and rejected Respondent's appraisal report because it was unreliable, produced by an unqualified and unknowledgeable non-appraiser, full of errors, and used disfavored appraisal methodologies.

Regarding depreciation, the court agreed with the straight-line method, individual component physical lives, and net salvage value techniques. However it expressed concern over too low depreciation floors and average services lives. Accordingly, the court held for the Petitioner's appraisal, but with a 10% downward adjustment to depreciation.

On May 18, 2010, the Second Department reversed and remanded for consideration of evidence of the cost of acquiring any easements necessary to the reproduction of the subject transmission lines. The Appellate Division also reversed the Supreme Court's assessment of some of the parcels at an amount less than requested by the Petitioner, CHGE. The Appellate Division affirmed the trial court's decision that CHGE overcame the presumption of validity of the assessments.

(12) Cinergy, et al., v. Federal Energy Regulatory Commission ("FERC") (D.C. Cir. Case No. 04-1238 (filed July 16, 2004))

PULP, Public Citizen, Colorado Office of Consumer Counsel, Rhode Island Attorney General, New Mexico Attorney General, Utah Committee of Consumer Services, and the

National Consumer Law Center, are challenging FERC's market - based rate regime in this case arising from FERC orders adopting "market behavior rules" in an effort to address rate manipulation by sellers with "market based rate" authorization. Petitioners contend, inter alia, that FERC's wholesale electricity market rate system violates statutory rate filing requirements which the agency lacks power to waive. Motions made in 2005 by FERC (seeking voluntary remand) and by Cinergy (to stay reply briefing and argument due to possible repeal of the market manipulation rules), have been denied by the court.

(13) Citizens for the Hudson Valley v. NYS Board on Electric Generation and the Environment (A.D. No. 87929)

On September 8, 2000, Citizens for the Hudson Valley, Janessa Nisley and Jay Carlisle challenged the Board's decision granting a certificate to Athens Generating Company (AGC). The Petitioners have also asked the Court to review other determinations by the permanent Article X Board and the NYPSC. The Petition essentially contends that:

1. The plant was not selected pursuant to an approved procurement process and is not consistent with the State Energy Plan;

2. The Board erred when it determined that the Athens plant is in the public interest;

3. The certificate is invalid because it is based on DEC's water permit, which failed to comply with the State Environmental Quality Review Act (SEQRA);

4. DEC's selection of dry cooling as the best technology available substantially modified AGC's application, requiring further proceedings before the Board;

5. The Board unduly restricted the consideration of alternative sites and improperly shifted to intervenors the burden of proving the superiority of alternatives; and

6. The Board's determination to override the Town of Athens' local zoning ordinance requirements violated the municipal home rule provisions of the State Constitution.

The Petition also challenges the PSC's 1998 decision that competition is an approved procurement process for new electric generating capacity, and the permanent Article X Board's adoption of a rule, 16 NYCRR 1001.2(d)(2), providing that private applicants (which lack the power of eminent domain) need not present alternative sites they do not own or have under option.

The record was filed on September 18, answers were filed on October 11, and petitioners filed their initial brief and appendix on November 28, 2000. Responding briefs and appendices

were filed on January 5, 2001, and petitioner's reply brief was filed January 23, 2001. Oral argument was held on February 20, 2001.

The Appellate Division, 3d Dept, on April 12, 2001 affirmed the Siting Board's June 2000 opinion and order issuing a certificate of environmental compatibility and public need to construct the Athens electric generating facility. This was the first judicial review of a matter arising under Article X of the Public Service Law, and the Board's position was upheld in all respects, including waiver of local law, evaluation of alternatives, and visual impacts and related environmental issues. See 281 A.D. 2d 89, 273 N.Y.S. 2d 532.

(14) City of New York v. Verizon (Supreme Court, County of New York, Index No. 402961-03)

The City of New York commenced an action to require that Verizon negotiate a franchise with the City for the provision of telephone services in New York City. The federal district court remanded it to state court. Verizon filed a motion to dismiss, which is fully briefed and pending before Judge Gammerman.

(15) City of Rome v. Verizon (Supreme Court, Oneida County)

The City of Rome commenced an action in State Supreme Court seeking a declaratory judgment that Verizon was obligated to negotiate the terms of a new agreement to utilize the City's rights-of-way. Verizon removed that action to the federal court for the Northern District of New York and responded that the City's proposed terms violate the Telecommunications Act of 1996 (the "Act"). The Court granted Verizon's motion to dismiss, finding that the City's proposed provisions have the effect of prohibiting Verizon from providing interstate or intrastate telecommunications services and, accordingly, the City's agreement as a whole violates section 253(a) of the Act. On March 25, 2004, the Court of Appeals for the Second Circuit vacated the judgment of the District Court for lack of subject matter jurisdiction and instructed the District Court to remand the case to the New York State Supreme Court, Oneida County. In January 2006, the state Supreme Court granted Verizon's motion for Summary Judgment. The City filed a notice of appeal to the Fourth Department in March 2006. The appeal was perfected in June 2006.

(16) Clean Air Market Group v. Pataki, et al. (U.S. District Court for the Northern District of N.Y. Index No. 00-CV-1738) 2d Circuit Docket No. 02-7519(L))

Chapter 36 of the Laws of 2000 added a new Section 66-k to the Public Service Law that seeks to halt sales of sulfur dioxide emission allowances by New York utilities to generators in other states that use them to emit sulfur that falls as acid rain on the Adirondacks. The statute requires utilities that sell SO_2 allowances to upwind states to pay New York an amount equivalent to the price it receives, to be used by the New York State Energy Research and Development Authority to fund energy efficiency and other public benefits. Utilities can avoid such payments if they restrict the sales of their SO_2 allowances to upwind sources in their contracts.

By summons and complaint dated November 15, 2000, the Clean Air Markets Group, a consortium of utilities, brokers and trade associations, challenged the statute in Federal District Court on constitutional grounds. They argued that the law violates the Supremacy Clause because it is allegedly preempted by the Federal Clean Air Act, which created the SO_2 allowance trading program and that it violates the Commerce Clause by restricting interstate commerce in allowances. The PSC moved for Summary Judgment. Opposition to its motion and Plaintiffs' cross-motion for Summary Judgment was filed March 23, 2001. Arguments were heard on June 22, 2001.

On April 9, 2002, the United States District Court for the Northern District of New York (Hurd, J.) declared New York's Air Pollution Mitigation Law (Pub. L. 2000, Ch.36) unconstitutional, finding 1) that the Clean Air Markets Group (CAMG), a coal-marketing consortium, had standing to challenge the statute; 2) the law is preempted by the federal Clean Air Act; and 3) the law violates the Commerce Clause. The court reasoned that CAMG had standing because the value of sulfur-dioxide (SO2) allowances to generators of a CAMG member, NRG, in the 14 states that most affect New York ("Upwind States"), was reduced by 5% because of the law. The court further held that in collecting the sale proceeds of New York SO2 allowances to the Upwind States and attaching a restrictive covenant to them, the law conflicted with the federal Clean Air Act by 1) discouraging sales to Upwind States under what was intended to be a national SO2 allowance trading system, and 2) attempting to reduce available, federally-assigned, SO2 trading allowances through state regulation. The court found the statute violates the Commerce Clause because it 1) gives in-state SO2 allowances preferred status over Upwind State SO2 allowances by not surcharging SO2 allowance sales to in-state utilities, and 2) attempted to isolate New York from the national economy and the national

problem of SO2 emissions by restricting the movement of SO2 allowances between New York and Upwind States. Finally, the court discerned that it was unlikely that any New York company would sell to a Upwind State because doing so would force them to forfeit the proceeds of their SO2 allowance sales; therefore the expected "benefit" of the statute – to fund SO2 mitigation initiatives with forfeited proceeds – was virtually nonexistent.

The NYPSC has appealed. The U.S. Court of Appeals, Second Circuit, upheld the Northern District of New York's decision granting Plaintiff's motion for Summary Judgment in vacating Public Service Law section 66-k. The Second Circuit found that the "Air Pollution Mitigation Law" interfered with the "full purposes and objectives" of the Clean Air Act by restricting New York generators from selling their credits to "any" person. In light of its decision on preemption, the Court of Appeals chose not to reach the Commerce Clause issue.

(17) Community Network Services v. NYS Dept. of Public Service (Albany County Index No. 4184-04)

By petition filed July 16, 2004, and served July 23, 2004, Petitioner challenges Commission decisions in a billing dispute with Verizon. It asserts that the Commission should have given it a greater refund on a monthly line charge, not have credited a 1996 "settlement" as a basis for refusing to order refunds on unpaid lines and addressed the restoration of petitioner's service.

In a decision dated February 8, 2005, Albany County Supreme Court (Teresi, J.) confirmed the Commission's decision in a (second) Community Network Services Article 78 petition regarding its customer complaint with Verizon (See Community Network Services v. PSC (Albany County Index No. 6589-02).

The court upheld as rational the PSC's decisions to (1) use a method other than the one recommended by CNS for calculating refunds for Centrex service, and (2) let stand an informal agreement between CNS and Verizon for refunds due for lines CNS ordered that were never installed.

The court further dismissed CNS' claim that the PSC did not address restoration of CNS' service. The court found that (1) the PSC did address the issue; and (2) CNS' attempt to dispute Verizon's claim that CNS had been dissolved in bankruptcy was never before the PSC and, therefore, CNS has not exhausted its administrative remedies. CNS appealed to the Third Department. By decision dated August 10, 2006, the Appellate Division, Third Department,

affirmed the February 8, 2005 order of the Albany County Supreme Court (Teresi, J.), which dismissed an Article 78 challenge to a PSC order dated March 18, 2004.

The PSC had denied certain refunds sought by Community Network Services, Inc. ("CNS") against Verizon, New York. The Third Department held that there was "ample record evidence" providing a rational basis for the PSC's finding that, because the parties had settled their dispute back in 1996, no further refunds were due CNS.

The Third Department also held that the PSC had a rational basis for denying CNS's claim for service restoration because the record evidence showed that CNS had been dissolved for failure to pay taxes and was, therefore, only entitled to carry on business for the purpose of winding up its affairs.

(18) Concord Associates, L.P. v. NYPSC and Kiamesha Artesion Spring Water Company (Albany County Index No. 4427-01); Third Dept. Docket No. 91731

By Order to Show Cause dated July 26, 2001 and filed and served July 27, 2001, Concord Associates challenge a Commission Determination that it is required to pay a flat rate of $22,000/month for water service to its hotel complex for the period January 29, 1999 through June 30, 1999. Petitioner claims the tariff of the Kiamesha Artesian Spring Water Company only applied that flat rate to the prior owner of the hotel property and that it never asked for service under the rate. It further asserts that the rate is unreasonable, as evidenced by a Commission decision to adopt a flat rate of $13,000/month for service to the Concord complex, effective July 1, 1999.

By Decision and Order dated January 22, 2002, Supreme Court Albany County (Canfield, J.) denied Concord Associates' request to annul and reverse the Commission determination that the tariff rate in effect at the time Concord took service applied until changed. The Commission had argued that Concord's petition was barred by the filed rate doctrine and that their interpretation of the tariff was rational. Justice Canfield dismissed the petition, with $100.00 costs, on grounds advanced by the Commission. By letter dated February 20, 2002, Concord served its Notice of Appeal and Pre-Calendar Statement.

The Appellate Division has affirmed a Supreme Court holding that confirmed the Commission's decision that the tariff of Kiamesha Artesian Spring Water Company, Inc. would apply to a purchaser of the Concord Hotel. In response to the purchaser's contention that the tariff was limited by name to the prior owner and was unjust as applied to the new owner, the

Court agreed with the Commission that "[a] party acquiring property on which a tariff has been set is subject to that tariff". It also noted that the tariff's rate cannot be collaterally and retroactively assailed as unreasonable.

(19) Connecticut Department of Public Utility Control v. Federal Energy Regulatory Commission (D.C. Circuit Docket Nos. 07-1375, 07-1460, 08-1175)

In this lawsuit, the Connecticut Department of Public Utility Control ("CDPUC") challenges FERC orders that assert jurisdiction to set the Installed Capacity Requirement (ICR) for the New England-ISO. "The ICR ... is a measure of the installed generating capability that load-serving entities ... must procure. It is expressed as a percentage of the forecasted peak loads ... and includes an Installed Reserve Margin (IRM) which is also a percentage of forecasted peak load."[7] FERC claimed jurisdiction because Section 206 of the Federal Power Act allows FERC to regulate "practices affecting" FERC-jurisdictional wholesale rates, and, according to FERC, the level of the ICR "directly affects the determination of the clearing price in [FERC's] capacity market."

New York State has an interest in this litigation because setting the reserve margin is central to ensuring the "safe and adequate" provision of electricity, as required under PSL §65.[8] FERC's claim of jurisdiction raises the spectre of inconsistent Federal/State reserve margins, which would cause uncertainty and confusion. The Commission accordingly joined in an amicus curiae brief of the National Association of Regulatory Commissioners ("NARUC") in support of the Connecticut Department of Public Utility Control.

NARUC filed its amicus brief on July 2, 2008. NARUC argued that FERC does not have jurisdiction to set the ICR because 1) the Federal Power Act prohibits FERC from regulating generation facilities, ordering the construction of generating facilities, or from setting or enforcing standards for the "adequacy or safety" of the electric system; and 2) the ICR is both a

---

[7] FERC Docket ER07-429-001, Order On Rehearing And Clarification, 122 F.E.R.C. ¶61,153, at ¶4 (February 21, 2008).

[8] In a recent order, the NYPSC exercised jurisdiction to set the IRM for the New York Control Area "first as a matter of adequacy, and alternatively as a matter of reliability. . . ." Case 07-E-0088, Order Adopting Installed Reserve Margin for the New York Control Area for the 2008-2009 Capability Year, at p. 12 (Issued February 29, 2008) [Adopting a 15% IRM].

requirement for construction of generation facilities and an "adequacy" standard. The NYPSC was one of the signatories on that brief.

On August 11, 2008, Respondent FERC filed its brief. On September 2, 2008, briefs were filed by Intervenors and *Amici Curiae* in support of FERC. Reply briefs by CDPUC and Intervenors in Support of CDPUC were filed September 22, 2008. Oral argument was scheduled for May 12, 2009.

In a decision dated June 23, 2009, the D.C. Circuit dismissed the petitions for review. The Court gave *Chevron* deference to FERC's assertion of jurisdiction, and held that FERC may set capacity market prices based on a particular reserve margin. It found that FERC's act of estimating the reserve margin for purposes of setting capacity prices did not amount to "direct [Federal] regulation" of generation facilities (which is prohibited under the Federal Power Act), because the reserve margin does not require the construction of generation facilities, or the procurement of capacity. Even if FERC sets the reserve margin, States retain the right to require, or forbid, construction of new generating facilities, and to require or forbid load serving entities from procuring additional capacity. Thus, the Court viewed the reserve margin not as a capacity "requirement" but only as a "peak demand estimate" used by FERC to set capacity market prices. The Court went on to say that under its precedent FERC also has jurisdiction to set deficiency charges if load serving entities fail to make adequate capacity purchases, because capacity purchasing decisions within an integrated bulk power system affect FERC-jurisdictional transmission rates, without directly implicating generation facilities.

The CDPUC asked the U.S. Supreme Court for certiorari. On January 11, 2010, the U.S. Supreme Court denied the CDPUC's petition for *certiorari* to review the decision of the United States Court of Appeals for the District of Columbia Circuit. NARUC had filed an amicus brief in support of the petition.

(20) Consolidated Edison Company of NY, Inc. v. United States of America (04-00033C); Niagara Mohawk Power Corporation v. United States of America (04-0124C); Niagara Mohawk Power Corporation, NYS Electric & Gas Corporation, Rochester Gas & Electric Corporation, Central Hudson Gas & Electric Corporation v. United States of America (04-0125C); Power Authority of the State of New York v. United States of America (00-703C); Rochester Gas & Electric Corporation v. United States of America (04-0118C) (United States Court of Federal Claims)

New York utilities who divested their nuclear generating assets brought individual suits in the United States Court of Federal Claims in Washington for damages associated with the

federal Department of Energy's breach of contracts entered into in 1983 that obligated DOE to begin removal of spent nuclear fuel from individual nuclear plant sites no later than January 31, 1998. Pursuant to the Nuclear Waste Policy Act of 1982, DOE had entered into separate contracts with each nuclear utility to provide spent fuel disposal services. Since 1983 DOE has assessed fees against nuclear utilities amounting to $750 million annually, over $40 million from New York nuclear utilities. Even though DOE announced that it would default in 1996, it has continued to assess fees at the same annual rate, and has announced that it intends to continue doing so through at least 2020. To date, DOE has collected in aggregate over $23 billion (including accumulated interest), and has spent approximately $7 billion on development of its long-delayed Yucca Mountain spent fuel repository in Nevada. In connection with the divestitures of nuclear units, the purchasing merchant generators accepted assignment of the defaulted DOE contracts and the going-forward fee payment responsibilities. In these cases the selling New York utilities allege that the terms of the divestiture transactions were adversely affected by the DOE breach. The majority of nuclear utilities nationwide brought suits against DOE prior to the expiration of the statute of limitations in January 2004, and 66 spent nuclear fuel cases are now pending in the Court of Federal Claims. The nuclear utility trade association, the Nuclear Energy Institute, has estimated that damages for the entire U.S. nuclear industry will aggregate $50-100 billion. The lawsuits are being aggressively defended by the Department of Justice on behalf of DOE, and all such cases are expected to remain pending for at least several years.

(21) Consolidated Edison Company et al. v. Federal Energy Regulatory Commission ("FERC") (D.C. Circuit Index No. 02-1503 et al.)

Con Edison, Niagara Mohawk, RG&E and the NYISO appealed a FERC decision denying the NYISO the authority to recalculate the prices for non-spinning reserves that were artificially inflated due to market flaws and the exercise of market power during the January through March 2000 period. Oral argument was held on September 13, 2003. The Court issued its decision on November 7, 2003. The Court found certain errors in FERC's decision and remanded the case to the Commission for further explanation and action.

(22) Consolidated Edison Co. of New York v. NYPSC (Albany County Index No. 2354-01); National Fuel Gas Distribution Corp. v. NYPSC (Albany County Index No.

2329-01); Orange and Rockland Utilities, Inc. v. NYPSC (Albany County Index No. 2355-01)

These three Article 78 proceedings challenge a December 21, 2000 order of the Commission implementing the revisions to the tax laws, which, among other things, applied a state income tax to utility earnings. The December Order was meant to be an abbreviated order, with a more comprehensive order to follow. The Commission issued the more comprehensive order on June 28, 2001. These cases have been adjourned without date, because of pending petitions for rehearing of the June Order. Per the 2nd Qtr 2008 PSC Report, this matter is adjourned indefinitely.

(23) Consolidated Edison Company of New York, Inc. v. NYPSC (Albany County Index No. 7500-00)

By petition filed and served December 11, 2000, Consolidated Edison Company of New York, Inc. challenges an August 9, 2000 Commission decision implementing Chapter 190 of the Laws of 2000. Chapter 190 precluded Con Edison from recovering costs related to a February 15, 2000 outage of the Indian Point 2 (IP2) nuclear plant. Con Edison asserts that the August 9 order unlawfully used a 95% IP2 capacity factor in computing outage-related costs, as opposed to a 73.5% capacity factor. Characterizing the Commission's 1997 rate opinion as a utility/Commission settlement, or contract, Con Edison alleges use of the 95% capacity factor abrogated the contract; lacked a rational basis; and violated due process. The matter has been held in abeyance. It will probably be reactivated if the Commission prevails in Consolidated Edison Co. v. Pataki (U.S. District Court for the Northern District of NY; Index No. 00-CV-1230 (LEK) (RWS); 2d Cir. Docket No's 00-9358(L), 00-9426(CON), 00-9442(CON).)

The return date on this case has been put over to a date in September. It will likely be dismissed as a result of a settlement reached between the parties. Per the 2nd Qtr 2008 PSC Report, this matter is adjourned indefinitely.

(24) County of Suffolk v. NYPSC (Albany County Index No. 1009-07)

By petition filed and served on January 30, 2007, the County of Suffolk challenges the NYPSC's November 9, 2006 declaration in Case 06-M-0878 that the acquisition of Keyspan by National Grid will not have a significant environmental impact requiring preparation of an Environmental Impact Statement pursuant to the State Environmental Quality Review Act

(SEQRA). The County alleges that the impacts of the merger will be significant because of issues of manufactured gas plant remediation and electric generation plan repowering, and that the NYPSC improperly failed to provide notice to the County, an involved agency. Petitioner seeks an injunction against any further consideration of the merger. The County initially did not serve Keyspan and National Grid. The County amended the petition and the matter was adjourned to April 27, 2007 for filing of papers.

By decision dated June 19, 2007, Albany County Supreme Court (Zwack, J.) dismissed the Article 78 Petition. The Court found that the NYPSC had complied with the procedural and substantive requirements of the State Environmental Quality Review Act (SEQRA). Supreme Court ruled that the NYPSC properly classified the proposed merger as an "Unlisted" action under SEQRA, and that, because Suffolk County was not an "involved agency," it was not entitled to notice of, or participation in, the PSC's SEQRA review. The Court also found that the NYPSC had identified relevant areas of environmental concern, taken the required "hard look" at potential environmental impacts, and provided a "reasoned elaboration" for its decision not to require an EIS. Because the PSC complied with SEQRA, Suffolk County failed to establish an entitlement to injunctive relief. In light of its disposition of the merits, Supreme Court did not reach the PSC's objection that Suffolk County's challenge was not ripe for judicial review because the PSC had not approved the merger.

(25) County of Suffolk v. NYPSC (Albany County Index No. 7099-06)

By Notice of Petition and Petition filed October 19, 2006, and served on November 1, 2006, the County of Suffolk challenged the Commission's decision in Case 06-M-0587 not to examine the use by the Long Island Power Authority (LIPA) of adjustment clauses to recover certain costs. The Petition alleged that while the Commission declined to act because the Public Authorities Law § 1020-s precluded PSC jurisdiction over LIPA's rates, the Public Authorities Control Board (PACB) has required that LIPA rate increases of more than 2.5% be approved by the Commission.

The PSC agreed with Suffolk County to remove the matter from the Albany County Supreme Court calendar. The stipulation permitted either party to restore the case on 45 days' notice.

A group led by Assemblyman Alessi, which did participate in Case 06-M-0587, has challenged the November 13, 2006 denial of rehearing in that Case (See Alessi v. Acampora

(Albany County Index No. 07/2098)). The PSC, therefore, restored this case to the calendar on the same return date as the Alessi case, and on May 23, 2007, filed a motion to dismiss for failure to state a claim, join LIPA as a party and to exhaust remedies before the Commission (since Suffolk was never a party).

In a companion order to the *Alessi* decision (Albany County Index No. 2098-07) also reported, also dated September 14, 2007, Albany County Supreme Court (Connolly, J.), again upheld the Commission's conclusion that the Long Island Power Authority (LIPA) is exempt from Commission rate review. Petitioner County of Suffolk had argued that public policy required PSC review of LIPA's rates. Supreme Court concluded that the plain language of Public Authorities Law (PAL) §1020-s precluded Commission jurisdiction over LIPA's rates and the statute was not superseded by a resolution of the Public Authorities Control Board (PACB). The Court observed that the statute provided for oversight by the PACB and the State Comptroller, and the Commission lacks jurisdiction until PAL §1020-s is amended.

The Court did not reach the NYPSC's objections that Suffolk County had never appeared before the Commission or named LIPA as a party to this Article 78 proceeding.

(26) County of Westchester v. Helmer (Albany County Index No. 3220-00)

By petition dated May 29, 2000, the County of Westchester and various County officials brought an Article 78 proceeding challenging the NYPSC's decision not to preclude Consolidated Edison Company of New York, Inc. (Con Edison), pending a prudence review, from recovering fuel costs relating to the Indian Point 2 nuclear plant outage. They claim that the PSC should have stayed fuel cost recovery and found Con Edison grossly negligent in light of the undisputed fact it did not replace its steam generators. Petitioners argue a 1982 Con Edison lawsuit against Westinghouse, contending the Indian Point 2 steam generators were defective, provides conclusive proof of Con Edison's gross negligence.

The matter was argued on July 7, 2000. By letter dated August 29, 2000, the County informed the Court of the pending federal court proceeding (Con Edison v. Pataki) and requested that a decision be deferred until the federal court proceeding is finally adjudicated.

By Decision and Order dated January 4, 2001, the Supreme Court, Albany County (Bradley, J.) dismissed a petition challenging the PSC's decision not to stay operation of Consolidated Edison's fuel adjustment clause ("FAC"). Westchester sought the stay pending a prudence review of Con Edison's February 15, 2000 shutdown of its Indian Point 2 nuclear

power plant (IP2). The Court found that, because PSC review of the reasonableness of Con Edison's actions was continuing, its decision not to stay the FAC was non-final and thus not subject to Article 78 review. Moreover, the Court held that Westchester failed to show the PSC's decision was arbitrary or exceeded its jurisdiction, finding that the PSC's "substantial likelihood" standard for a stay "essentially tracks the standard relied upon by the Courts of this state for granting injunctive relief." The Court further noted that the Third Department in Abrams v. Consolidated Edison held "under virtually identical facts" that Con Edison's FAC should not be suspended pending a final PSC determination as the FAC charges are subject to refund if there is an imprudence finding. The Court accordingly rejected Westchester's claim that Abrams was distinguishable. Finally, citing Matter of Niagara Mohawk (66 N.Y.2d 83), the Court dismissed Westchester's request for declaratory relief as improper. Westchester filed a Notice of Appeal on February 13, 2001.

(27) Court Challenge to Federal Energy Regulatory Commission - Order No. 636 (D.C. Cir.)

On March 14, 1995, LILCO and a number of other gas utilities filed a joint brief in the United States Court of Appeals for the D.C. Circuit seeking to reverse and remand several aspects of Federal Energy Regulatory Commission ("FERC") Order Nos. 636 et seq. This series of FERC orders, the latest of which, issued on November 27, 1992, was intended to end a regulatory process that began in 1988, is designed to "restructure" or unbundle services provided by the natural gas industry along more competitive lines.

On July 16, 1996, the United States Court of Appeals for the D.C. Circuit issued a lengthy decision that essentially upheld FERC's Order No. 636 restructuring of the gas pipeline industry. The Court remanded several issues to FERC for further consideration, including allowing pipelines 100% recovery of their eligible and prudent gas supply realignment costs.

On February 27, 1997, FERC issued an order on the matters remanded by the Court of Appeals for the D.C. Circuit. New York's Public Service Commission ("NYPSC") and other parties have filed a *certiorari* petition with the Supreme Court. One of the key issues of concern to the NYPSC is the FERC's assertion of jurisdiction over gas capacity release. The Supreme Court has yet to rule on the petition.

(28) Crucible Materials Corp. v. NY Power Authority (3d Dep't No. 503364, formerly Albany County)

On April 17, 2008, the Appellate Division, Third Department modified a May 17, 2007 Albany County judgment in a proceeding brought to compel the NY Power Authority ("NYPA") to comply with the Power For Jobs law, Economic Development Law § 189. The Power for Jobs program, administered by NYPA, allowed recipients to obtain low-cost power either by contract with NYPA or by rebates of some of the cost of purchasing power directly from their local utilities. The statute was amended a number of times, including a provision for restitution in situations where the NYPA contracted prices were higher than those of the local utilities. The NYPA interpreted the amendments by limiting the amounts of rebates and restitution available to participants, including an interpretation that the rebate and restitution programs were mutually exclusive. This Article 78 case resulted. Albany County dismissed the petition and further held that petitioners buying power from the NYPA had no standing to contest the NYPA's calculation of the rebate option for participants buying power from local utilities. The Third Department reversed, holding that the NYPA incorrectly calculated the amount of rebates and that the petitioners had standing because they had the right to obtain a reimbursement and then elect to participate in the rebate program. The Third Department sustained the NYPA's determination of the time frame in which restitution payments were to be made.

(29) CTC Communications Corp. v. Verizon New York Inc. (Supreme Court, New York County, Index No. 116196-2005)

In November 2005, CTC filed a complaint in Supreme Court, alleging that that Verizon breached the parties' 1999 resale agreement by refusing to grant CTC volume, term, and other discounts under that agreement on lines on which CTC also receives Corporate Rewards discounts. Verizon moved to dismiss, and that motion has been fully briefed and argued.

(30) Danbury Leasing, L.P. v. Consolidated Edison Co. of New York and NYPSC (Albany County Index No. 6004-06)

By Summons and Complaint filed August 14, 2006, and served upon the Commission August 24, 2006, the owner of a building with a single meter for all electricity used by its tenants seeks to bring an action for a declaratory judgment and for damages against Consolidated Edison Company of New York ("Con Edison") and the Commission for alleged failure to cooperate with efforts to convert the building to direct metering, and billing, of the tenants. The New York State Division of Housing and Community Renewal ("DHCR") approved the transition to direct

metering, but Con Edison has insisted that the tenants sign individual applications for service. Plaintiff alleges that 1) Con Edison has failed to a) comply with the DHCR Order and b) provide safe and adequate service and avoid discrimination under the Public Service Law §65; and 2) the Commission has not encouraged efficiency and conservation under Public Service Law §5(2) by its failure to respond to Plaintiff's request that Con Edison be ordered to adopt direct metering.

This matter was originally brought in Queens County. On September 13, 2006, the PSC moved to change venue to Albany County, convert the action to a special proceeding under Article 78, and dismiss on the ground that the court lacks subject matter jurisdiction, and the Petitioner has failed to state a claim upon which relief can be granted, and further requiring Petitioner to exhaust its administrative remedies. On September 20, 2006, Con Edison also moved to convert, change venue, and dismiss. The return date for the motions was October 27, 2006, but by stipulation dated October 16, 2006, the parties agreed to remove the case from the Court's calendar to pursue settlement negotiations.

As part of a settlement, Con Edison filed proposed amended tariff leaves, which were approved on May 17, 2007, in Case 07-E-0157. The tariff amendments allow the owner of a multiple dwelling, for which the DHCR has approved conversion from master metering to direct metering, to take service under the owner's name for service to apartments where the tenant has a DHCR exemption from rent increases. Per the 3rd Qtr 2008 PSC Report, this matter is adjourned indefinitely.

(31) Deer Park Fire District v. NYPSC and Broadview Networks, (Albany County Index No. 1150-09)

By notice of petition and petition filed and served February 13, 2009, a user of private lines challenges a Commission determination in Case 06-C-0575, issued July 18, 2008, and reaffirmed on rehearing on October 21, 2008, with respect to the refund period for an inoperable analog private line circuit. The Commission read the tariff of BridgeCom (the predecessor to co-respondent Broadview) as only providing three months of refunds prior to a complaint to BridgeCom. Petitioner claims that it should get an additional year and a half of refunds back to the date of switchover from Verizon to BridgeCom.

Petitioner argued that the Commission irrationally departed from its 1985 *Bellevue Hospital* decision. That decision created various presumptions as to when lines were disconnected by New York Telephone in a case where that utility had no records as to when lines

were disconnected. Petitioner contends that *Bellevue Hospital* and the Verizon tariff implementing it create an inference that Deer Park's private line circuit had been terminated before switchover, when it was replaced by a digital one. The Commission found 1) *Bellevue* was distinguishable because it arose in a situation where New York Telephone inequitably attempted to defeat refunds in a cutover from New York Telephone equipment to that of a competing vendor, 2) the Bellevue Hospital decision was not of generic applicability, 3) BridgeCom's tariff was controlling, and 4) Given BridgeCom's lack of control of the facilities, it reasonably required the customer to identify lines not in service when it took over Verizon's service.

This matter was returnable March 20, 2009. The PSC's answer, brief and record were served March 13, 2009. Petitioner sought an extension of time to serve reply papers on April 16, 2009. The PSC's surreply papers were due April 24, 2009 and the return date was May 1, 2009.

By decision dated June 19, 2009, Supreme Court Albany County (McDonough J.) dismissed this challenge by a user of private lines to a Commission determination with respect to the refund period for an inoperable analog private line circuit. The Court concluded the Commission's decision was not contrary to the plain language of the applicable tariff or otherwise irrational.

Albany County Supreme Court concluded that the Commission had adequately distinguished this matter from *Bellevue Hospital,* and that case did not create a binding rule for cases of missing telephone utility records. The Court also concluded that the BridgeCom tariff on its face did not 1) provide for refunds back to the date of switchover or 2) require BridgeCom/Broadview to seek refunds from Verizon. Finally, the Court upheld the Commission's conclusion that the timing of the disconnection of the line was a matter of speculation.

(32) Dynegy Power Marketing, Inc. v. Federal Energy Regulatory Commission (D.C. Circuit Index No. 02-1009)

In this proceeding, Dynegy and other electric power marketers challenge the Federal Energy Regulatory Commission's ("FERC's") decision to approve the decision to approve the New York Independent System Operator's (NYISO) measures for mitigating exercises of market power by generation owners, known as the Automated Mitigation Procedures (AMP). The NYPSC's motion for intervention was granted by the D.C. Circuit on February 22, 2002.

By decision dated April 23, 2003, the United States Court of Appeals for the District of Columbia Circuit dismissed as moot a Dynergy challenge to a decision by FERC to allow the New York Independent System Operator to adopt an automated procedure for mitigating market power. The Court reasoned that the challenged order expired by its terms on October 31, 2001. It observed that Dynergy had filed a separate challenge to a May 31, 2002 order indefinitely extending the automated migration procedure and could obtain relief if it were successful in that challenge.

The NYPSC intervened in support of FERC on the merits of this matter.

(33) East End Property Co. v. Acampora, NYPSC, Long Island Power Authority and Caithness Long Island (Albany County Index No. 2180-07)

By Notice of Petition and Verified Petition filed and served March 15, 2007, Petitioner, the owner of a real estate development in the Town of Brookhaven, challenges the NYPSC's decision in Case 05-E-0098 to grant a Certificate of Public Convenience and Necessity for the construction and operation of the Caithness electric generating station. Petitioner alleges that the Certificate is unlawful because LIPA (1) has not adequately protected itself from excessive project costs, (2) improperly segmented SEQRA review by failing to consider impacts of the gas pipeline serving the plant, and (3) failed to adequately consider impacts of construction on a rare pine barren ecological community in doing its SEQRA analysis.

On April 12, 2007, the other respondents and the PSC filed motions to dismiss because identical SEQRA claims against lead agency LIPA were litigated in, and dismissed by, Supreme Court, Nassau County, and are therefore barred by collateral estoppel and res judicata; and in any event, as an involved agency under SEQRA, the PSC was not required to augment LIPA's review of the project under SEQRA. Further, the PSC is barred from considering financial impacts upon LIPA's ratepayers because it has no rate jurisdiction over LIPA. The matter was returnable on May 18, 2007.

By decision dated October 4, 2007, Albany County Supreme Court (McDonough, J.) dismissed an Article 78 petition challenging the Commission's order granting a Certificate of Environmental Compatibility and Public Need and financing approval to Caithness Long Island, LLC, for construction and operation of a 346 Mw electric generating station in Suffolk County. The output of the Caithness facility is to be sold to the Long Island Power Authority (LIPA). Petitioner, the owner of an apartment complex located near the generating plant, alleged that the

Commission: 1) should have considered a) the plant's valuation prior to approving financing; and b) the competitiveness of the Long Island market before affording lightened regulation; and 2) violated the State Environmental Quality Review Act (SEQRA) by improperly a) segmenting review of the plant's fuel gas supply line; and b) following LIPA in not requiring a Supplemental Environment Impact Statement (SEIS) with respect to the impact of the generating plant on an allegedly rare ecological community on the plant site.

The Court dismissed the claims with respect to financing and lightened regulation because they go to LIPA's rates, over which the Commission lacks jurisdiction. The Court dismissed most of the SEQRA claims on grounds that they had already been resolved in LIPA's favor in litigation in Nassau County Supreme Court. It allowed claims that the Court perceived as being directed to the Commission's SEQRA analysis to proceed. Those remaining SEQRA claims were, however, dismissed for failure to state causes of action, in that the gas line was subject to FERC, rather than Commission review, and that as a SEQRA "involved agency" the Commission was not only entitled to rely upon LIPA's findings as "lead agency," but was bound by LIPA's decision not to require a SEIS.

East End has appealed Albany County's decision. Caithness, LIPA and the Commission have cross-appealed to the extent the Court did not dismiss all SEQRA claims as being barred by collateral estoppel arising from the Nassau County decision. East End asked the Appellate Division, Third Department, for a two-month extension of time to perfect, given its appeal of the Nassau County decision to the Second Department. By decision dated December 18, 2007, the Second Department upheld LIPA's SEQRA analysis.

By Decision and Order entered March 7, 2008, the Appellate Division, Third Department, accepted a discontinuance of appeals and cross-appeals of Albany County's October 4, 2007 decision. Petitioner East End had appealed the decision insofar as it upheld the Commission's grant of a Certificate of Public Convenience and Necessity to the Caithness electric generating station. Caithness, LIPA and the Commission cross-appealed to the extent the Court did not dismiss all SEQRA claims as being barred by collateral estoppel arising from a Nassau County decision upholding LIPA's SEQRA analysis.

Letters dated January 24, 2008, signed by all of the parties, were then treated by the Third Department as applications to withdraw and discontinue the appeals and cross-appeals. Those applications were granted by the Court's March 7, 2008 Decision.

(34) Edison Mission Energy, Inc.; Edison Marketing & Trading, Inc. v. Federal Energy Regulatory Commission (DC Circuit Case No. 03-1228)

Petitioner challenges FERC's development of permanent automated mitigation measures to limit exercise of market power on wholesale sales or the exchange administered by the New York independent system operator. The Commission intervened in support of the Federal Energy Regulatory Commission's ("FERC's") decision to adopt those automated procedures. The U.S. Court of Appeals for the District of Columbia overturned FERC's approval of the New York ISO's Automated Mitigation Procedure (which, in effect, automatically reduced price spikes in excess of an historic average price). The Court observed that in previous orders FERC had expressed a concern that AMP might mitigate price increases based on true scarcity rather than market power, and its approval of AMP upstate despite that concern was unreasonable. The Court also relied on an alleged conclusion of the NY ISO market monitor, David Patton, that the NY market upstate was "workably competitive." FERC's AMP orders were vacated and remanded.

The NYPSC filed a petition for rehearing to (1) clarify that in New York City, which is not "workably competitive," the AMP should remain in place; and (2) to seek remand only, and not vacatur, with respect to the operation of the AMP upstate because (a) FERC can easily explain its rationale on remand given the record for what the court saw as a conflict; and (b) because, even in the "generally competitive" upstate region, times of power constraints require an AMP. Con Edison also filed a petition on the first issue and the NYISO petitioned on both.

By order issued March 24, 2005, the Court granted clarification that the AMP was only affected upstate, but denied the petitions for remand without vacatur. It stated that its motion was without prejudice to a motion for stay of the vacatur.

By decision dated May 10, 2005, the District of Columbia Circuit denied Commission and NYISO motions not to vacate the NYISO's use of an automated mitigation procedure upstate. The Court had previously found that automated mitigation upstate conflicted with FERC's belief that the upstate market was "generally competitive." It then granted a PSC and NYISO motion to allow the automated mitigation procedure to continue in New York City and responded to Commission and NYISO rehearing requests that automated mitigation remain in effect Upstate while the case was remanded to FERC by directing the PSC to ask for a stay of the vacatur of the use of automated mitigation. The Court has rejected the PSC's motion that the

matter be remanded to FERC without vacating automatic mitigation. The vacatur and remand both took effect on May 17, 2005.

(35) Edna Fernandez and Cornelia Benton v. NYS Division of Housing and Community Renewal and NYPSC (New York County Index No. 401768-2008)

In a petition dated June, 2008, and notarized on July 23, 2008, pro-se petitioners challenged a June 30, 2006 order of the Commission that granted Rachel Bridge Corp.'s application to sub-meter electricity at several apartment houses that it owned, and in which petitioners resided. Petitioners attempted service on the Commission by regular mail to the Office of General Counsel. The petition set venue of the proceeding in Supreme Court, New York County.

In response, on August 20, 2008, the Commission filed a motion to dismiss, and memorandum in law in support of the motion, based on the following grounds: 1) the proceeding was untimely commenced; 2) the petitioners failed to obtain personal jurisdiction over the Commission, and 3) the petitioners failed to join Rachel Bridge Corp. as a necessary party. In the alternative, the Commission requested that venue of the proceeding be changed to Albany County.

By order entered July 30, 2009, Supreme Court, New York County (Kornreich, J.) dismissed an Article 78 challenge to a Commission submetering order (Case 04-E-0103). Petitioners are tenants in one of the buildings that had been submetered in accordance with the order. The Court dismissed the petition as to the Commission for improper service. Petitioners (acting *pro se*) had attempted to serve the Commission by mailing their papers, via regular mail, to the Office of General Counsel.

Petitioners simultaneously challenged an order of the New York State Division of Housing and Community Renewal (DHCR). After the Commission approved submetering, the DHCR's order permitted the building owner to exclude utility charges from rent. Petitioners' challenge to the DHCR order was denied on the merits.

Petitioners, by notice mailed September 23, 2009, appealed New York County's decision to the First Department. By an order adopted at a December 22, 2009 Term, the Appellate Division, First Department, has dismissed Petitioners' appeal from a July 12, 2009 Order of the Supreme Court, New York County (Kornreich, J.). Petitioners' notice of appeal was untimely since it was mailed on September 23, 2009, more than 35 days after mailing of the notice of

entry of the New York County decision. The DHCR moved to dismiss the appeal for lack of timeliness, as did the NYPSC. The First Department granted the PSC's motions.

(36) EMF Lawsuits against LILCO (Sup. Ct. Nassau and Suffolk Cos.)

LILCO is currently defending three lawsuits that seek to recover monies for the alleged loss of market value to plaintiffs' residential properties caused by the presence of electro-magnetic fields from LILCO power lines that run adjacent to or nearby these properties. All three complaints allege causes of action sounding in inverse condemnation and trespass. One suit is pending in Supreme Court, Nassau County and seeks $359,000 in damages. The other two suits are pending in Supreme Court, Suffolk County and seek damages of $285,000 and $270,000, respectively. All three actions are in the early stages of discovery.

(37) Gallagher et al. v. Brown, Notice of Intent to File Claim in Court of Claims.

By a Notice of Intention to File Claim received by the Chairman on November 19, 2009, Ms. Carol Gallagher, an attorney, and her law firm state an intent to file a claim in the Court of Claims against Chairman Brown. The claim is for allegedly libelous statements made by the Commission in limiting reimbursement of attorneys' fees in its Order Denying Petition for Reconsideration and Order Authorizing Financing and Surcharge, respectively issued August 20, 2009 and January 16, 2009, in Case 08-W-0775. Ms. Gallagher and her firm brought an Article 78 proceeding challenging the Orders in Case 08-W-0775, which was dismissed on statute of limitations grounds. [*See* separate *Gallagher v. Brown* report.] They have now filed a notice of claim in the Court of Claims, and the Department of Law (DOL) will be handling this tort case.

(38) Gallagher v. Brown, Index No. 10551-09 (Alb. Co. Sup. Ct. 2009)

In a decision and order dated May 3, 2010, Supreme Court, Albany County (Zwack, A. J.), dismissed a challenge by the attorneys for Pheasant Hill Water Corporation (PHWC) to two Commission orders limiting recovery of legal costs. The challenged orders allowed PHWC to only spend $100,000 of the proceeds of a New York State Environmental Facilities Corporation (EFC) grant and loan on legal costs related specifically to that financing. Acting Supreme Court Justice Henry F. Zwack held that all of Petitioners' claims were time-barred because Petitioners failed to timely challenge the first Commission order.

Petitioners filed an untimely request for rehearing of the Commission's first order imposing the limitations at issue. The Commission exercised its discretion to consider whether to provide Petitioners relief from that first order, in large part because of claims that the order interfered with the EFC financing. The Commission ultimately denied reconsideration in its second order, although it clarified the first order. Petitioners then brought an Article 78 proceeding within four months of that second order denying reconsideration. Even though their challenge was more than four months after the first order, Petitioners sought to challenge that first order. They claimed the Commission should have allowed PHWC to spend up to $250,000 of the EFC moneys to pay for unbilled legal services.

Albany County Supreme Court granted the Commission's motion to dismiss the Article 78 proceeding because Petitioners' claims were time-barred. The Court held that Petitioners challenged the merits of Commission's first order and not any new determinations in the second order denying reconsideration. It also held that Petitioners failed to state any claim against the Commission's exercise of discretion to deny reconsideration. Finally, the Court held that Petitioners' untimely application for rehearing did not render the Commission's first order "non-final" and, therefore, did not toll the running of the four-month statute of limitations.

Petitioners did not file a notice of appeal.

(39) Garner, Ruth, Lowell Kelsey, et al., and Village of Potsdam, Town of Stockholm, et al., and Alliance for Municipal Power v. NYPSC (Albany County Index No. 1063-03)

A coalition of municipal officials and ratepayers, municipalities and the Alliance for Municipal Power, a planned North Country municipal utility, have challenged the Commission's decision not to deaverage Niagara Mohawk costs for the purpose of calculating exit fees. Petitioners have also raised challenges to the legality of an exit fee.

The matter was returnable May 16, 2003.

By Decision and Judgment entered on October 29, 2003, Albany County Supreme Court (Kavanagh, J.) dismissed a lawsuit by the Alliance for Municipal Power (AMP), 17 municipalities in Franklin and St. Lawrence Counties and 29 individuals challenging the Commission's decision not to use deaveraged (*i.e.*, municipality-specific) costs in the calculation of exit fees under Niagara Mohawk's Rule 52. The Court determined that although none of the

individual petitioners had standing, AMP was properly delegated authority by the municipalities to act in their behalf and could bring this lawsuit.

The Court then held that petitioners' challenges to the Commission's decision to allow Niagara Mohawk to charge exit fees, as well as the decision to use deaveraged costs in the calculation, were beyond the statute of limitations. As to this latter issue, the Court also found that the Commission's rationale was neither arbitrary nor capricious.

Petitioners have appealed, but have not perfected.

(40) Glendora v. Brooklyn Community Access Television et al. (E.D.N.Y. No. 1-02-03253-(CBA)(LB))

On June 3, 2002, the United States District Court for the Eastern District of New York docketed a complaint by Glendora Buell ("Glendora") alleging denial of her rights under state law to broadcast on a public access channel. The Commission, Chairman and various employees were named, among other defendants, for allegedly not enforcing Glendora's public access rights. The Court Clerk construed the papers as an attempt to state a cause of action under the Racketeer Influenced and Corrupt Organizations (RICO) Acts.

The complaint is one of a series of handwritten pleadings, without summons or index numbers and purportedly filed in different Courts, that have been mailed to the NYPSC since February. Glendora moved for a default judgment against all defendants, returnable July 22, 2002. The NYPSC opposed the motion for default judgment on grounds that it was under no obligation to waive service. The NYPSC has advised the Court it will move to dismiss once it decides that Glendora has satisfied a prior order precluding her from filing cases without judicial approval.

By Memorandum and Order dated March 10, 2003, the United States District Court for the Eastern District of New York (Amon, J.) dismissed, with one exception, a *pro se* action by Glendora Buell ("Glendora") with respect to use of the public access cable channel in Brooklyn. The NYPSC had previously opposed a Glendora motion for default judgment in this matter. The Court denied that motion and dismissed all claims against the Commission and its officers and employees.

The Court did permit Glendora to amend her complaint to provide an explanation as to why she wanted the administrator of the Brooklyn public access cable channel and its officers

and employees to broadcast her telephone number. It dismissed claims against Cablevision and its officers, employees and lawyers.

(41) Heritage Hills Sewage Works Corporation v. Town Board of the Town of Somers and Heritage Hills Society Ltd. (Appellate Division, 2d Dep't, Docket No. 2007-04010)

This is the second time the February 2004 sewer rate decision by the Somers Town Board is before the Appellate Division, Second Department. In its first decision, the Second Department reversed the Supreme Court finding that the Town's decision, made just after twelve midnight at a meeting that began the evening before, had not allowed the sewer company's rates to go into effect by default and remitted the proceeding to the Supreme Court "to review the administrative record and determine whether the Town Board's determination lacked a rational basis and was arbitrary and capricious." 33 A.D.2d 615, 616, 822 N.Y.S.2d 303, 305 (2d Dept 2006).

On March 30, 2007, the Supreme Court, County of Westchester, affirmed the decision of the Town Board and dismissed the Article 78 Petition of Petitioner-Appellant, Heritage Hills Sewage Works Corporation ("HHSWC"). The Supreme Court found the Town Board's determination was rationally based, was reasonably supported by the record, and did not deny the HHSWC rates that were "fair, reasonable and adequate" as required by Transportation Corporations Law § 121.

HHSWC appealed. In the second appeal, HHSWC claimed that the Town Board erred in applying an Earnings Base Capitalization ("EB/Cap") adjustment to its rate base and in directing that the payments from developers for the use of excess capacity in the sewer treatment plant be shared on an 80%/20% basis with ratepayers.

Oral argument was held on May 29, 2008. The Appellate Division, 2nd Dept, on September 2, 2008, affirmed the Town Board's decision with respect to the rates set and rate base, but reject prospective adjustments to rate base. The Court found that the Town Board's determination to partially grant the sewage works corporation's rate-increase application, by approving a 3.8% rate increase for sewage treatment services, was rational and was not arbitrary and capricious and that the rate increase provided for fair, reasonable, and adequate rates that were just and reasonable. However, the Court rejected the Town Board's determination to prospectively allocate to the customers 80% of any future revenue that might have been

generated by the corporation's sale of excess sewage treatment capacity. The Court found it irrational, arbitrary, and capricious since the Town Board could only rationally make an allocation with respect to new customers when, and if, new customers were added by the corporation. See 54 A.D.3d 673, 863 N.Y.S.2d 255.

(42) Hirner, et al. v. NYPSC (Albany County Index No. 5805-07; New York County Index No. 107660/07)

By Petition served on the Attorney General on June 29, 2007, three tenants in a New York City apartment building converted to submetering challenge the Commission's approval of the submetering in Case 03-E-0598. Petitioners contend that the Commission's approval was unlawful because the tenants were not given adequate notice of the proposed submetering. They further contend that their challenge to the Commission's August 12, 2005 denial of their petition for rehearing is timely because the decision was not sent to their counsel, but to them.

The matter was returnable in New York County on August 8, 2007. On July 26, 2007, the PSC moved for change of venue to Albany County and, if granted, to dismiss the matter because 1) it was untimely; and 2) the building owners were not named as parties. Petitioner agreed, by Stipulation dated August 1, 2007, to change venue to Albany County. On August 20, 2007, the parties entered into a scheduling stipulation 1) setting a new return date of September 14, 2007, with an associated briefing schedule; and 2) removing Petitioner Milton Norris as a party.

Petitioners thereafter only belatedly filed an affirmation in Albany County in opposition to the PSC's motion for dismissal of the Petition. On September 14, 2007, the PSC filed its reply brief in support of its motion to dismiss.

By letter to Petitioner, dated November 15, 2007, Albany County Supreme Court stated that the forty-one (41) exhibits to the Petition were not in the Court's files, and gave the Petitioner until December 12, 2007 to supply them or the matter would be decided without them. To the PSC's knowledge, Petitioners did not supply those exhibits.

In a decision dated April 14, 2008, Supreme Court, Albany County (Devine, J.) dismissed, as time-barred, an Article 78 petition challenging Commission orders approving the sub-metering of electric service in a residential apartment complex in New York City. Petitioners, tenants in the sub-metered buildings, contended the Commission's orders were

unlawful because the tenants had not been given adequate notice of the proposed sub-metering plan.

The Court found that the Article 78 petition was time-barred because it was not filed until May 31, 2007, approximately twenty months after the Petitioners received notice of the Commission's order. The Court rejected a claim that the 4-month limitations period was tolled by virtue of the fact that the Commission did not give Petitioners' counsel notice of the PSC's decision. The limitations period was not tolled, the Court found, because Petitioners' counsel never properly filed a Notice of Appearance with the Commission.

Petitioners have not appealed.

(43) Home Depot U.S.A., Inc. and LNT, Inc. v. NYPSC and Independent Water Works (Albany County Index No. 211-07)

By petition filed January 11, 2007, and served January 19, 2007, tenants of a shopping center in the Town of Southeast, Putnam County, challenge a NYPSC decision not to reduce rates charged in the shopping center by Independent Water Works, Inc. (IWW). The PSC rejected contentions that tenants of the center should not be charged for IWW's return on capital because they allegedly contributed to the construction of water plant for the center. It noted that the contracts between petitioners and the developer did not specify that contributions for construction would be used for water plant (Cases 05-W-0707 and 06-W-1080).

Petitioners assert that the NYPSC cannot construe the contracts between them and the developer of the center with respect to the disposition of contributions made for construction. They also contend that the PSC's construction of the contracts is contrary to New York law and to the record evidence before it. Petitioners further argue that the PSC did not properly apply its "initial rate concept" under which inflated home prices will be deemed to have paid for water company plan when a developer charges low initial water rates.

Oral argument was held on May 4, 2007. By decision dated October 26, 2007, Albany County Supreme Court (Lynch, J.) reversed, in part, a Commission decision not to reconsider rates charged by Independent Water Works, Inc. (IWW). The Court held that the Commission properly decided not to retrospectively revisit the rate, and could construe a real estate contract allegedly affecting utility service, but abused its discretion by not relying on the contract to adjust rates prospectively.

IWW is affiliated with Emgee Highlands Corporation ("Emgee"), the developer of a shopping mall in Putnam County. The Petitioners claim that the mall's anchor tenant, Petitioner Home Depot, made a $5.8 million payment for "site costs," in a real estate contract with the developer. Petitioners claim, inter alia, that in return for that payment Emgee agreed to bear the costs of the balance of the development including the costs of the water system and thereby eliminated any ability it may have had to include the water plant in its affiliate's rate base. In the alternative, Petitioners claim that Home Depot's payment was a contribution in aid of construction of a water plant, which meant that IWW could not have included that portion of the funds paid by Home Depot in rate base. In 2006, the Commission rejected this contention and declined to revisit its 2002 decision recognizing a rate base of $1.5 million. Cases 05-W-0707, et al., Order Dismissing Complaint and to Show Cause, issued September 11, 2006. It found that the "filed rate doctrine" precluded revisiting the rate and that there was no proof that the payment was a contribution in aid of construction that should be imputed to the water company. The Commission noted that while Home Depot and the developer recognized the Commission's authority to set rates, they never explicitly provided that the payment for site costs was a contribution in aid of construction.

Supreme Court agreed that the Commission could not revisit the rate retroactively and rejected the position of Home Depot and another tenant that the Commission did not have authority to look at the real estate contract in setting rates. It decided, however, that the Commission should have revised the rate prospectively. The Court found that, based on the real estate contract, the Commission irrationally adopted the developer's position that the payment for "site costs" was for a leasehold interest in the mall and properly treated as equity by the developer. It observed that the Commission's decision was apparently contradicted by the contract's definition of site costs as including components of the water plant. The Court also observed that the Commission Staff had identified approximately $525,000 in water plant investment as being traceable back to the tenants' payments for site costs, and accepted petitioners' "'secondary' argument that the PSC erred in failing to account for Home Depot's reimbursement contribution to the cost of the water system." Notices of Appeal were filed with Albany County Supreme Court by the Commission and IWW on December 7, 2007.

Petitioners ~~have~~ cross-appealed. Oral argument ~~is scheduled for~~ was held on September 2, 2008. The Appellate Division, 3rd Dep't, by Memorandum and Order entered on October 23,

2008, reversed only so much of the judgment of the Supreme Court that required the PSC to deduct a certain sum from rate base and remanded the matter to the PSC for a decision consistent with its findings. The Appellate Division did not overturn the Supreme Court determination that Home Depot's payment was a contribution and that rates should have been revised prospectively. Moreover, the Petitioners' primary argument was that, since Emgee had agreed to bear all other site costs not paid by Home Depot, IWW had no rate base. The Appellate Court found that "the determination offers no rational basis for the PSC's failure to consider Emgee's commitment under the terms of the Development Agreement to bear all cost associated with site work which were not covered by Home Depot's $5,820,000 contribution to site cost" and found "no rational basis for the PSC to disregard the clear language of the development and lease agreement between Home Depot and Emgee in favor of Emgee's tax and accounting treatment of the funds on its books. The decision by the PSC implementing the Order of the Court is pending.

(44) Huntley Power, LLC, Dunkirk Power, LLC and Oswego Harbor Power, LLC. v. NYS Public Service Commission and Niagara Mohawk Power Corporation (Albany County Index No. 1624-04)

By Notice of Petition and Petition filed and served on March 23, 2004, various wholesale generators owned by NRG challenge the Commissioner's adoption of a Niagara Mohawk standby rate tariff. Petitioners contend that the tariff is preempted by federal law to the extent it applies to wholesale generators served at the transmission level that self-supply power.

The parties have stipulated that this case challenging Niagara Mohawk's application of standby rates to wholesale generators be held in abeyance, pending review of FERC orders (Niagara Mohawk v. FERC, D.C. Circuit Index Nos. 04-1227, 1229 and 1231.) Per the 3rd Qtr 2008 PSC Report, this matter is adjourned indefinitely.

(45) Illinois Public Telecommunications Association (New York and Others) v. Federal Communications Commission (D.C. Cir.)

The D.C. Circuit has overturned in part the Federal Communications Commission's (FCC) decision implementing the payphone provision (Section 276) of the Telco Act. The Court concluded that the Commission acted arbitrarily and capriciously in (1) selecting rates of compensation for access code and 800 calls; (2) requiring only large interexchange carriers to be payphone station providers; (3) failing to provide for interim compensation for 0+ (calls made to

operators) on inmate calls; and (4) valuing assets transferred by the Bell Operating Companies to affiliates.

(46) Incorporated Village of Poquott, et al. v. Cahill, Helmer et al. (Suffolk County Index No. 02-7359; 2d Dep't Docket No. 2003-03250)

By Order to Show Cause granted ex parte on March 12, 2002, the Village of Poquott and certain of its residents obtained a temporary restraining order against KeySpan Energy Development Corp. from constructing a two-turbine facility on land to be condemned by the Long Island Power Authority in the Village of Port Jefferson. Poquott mainly asserts that LIPA violated SEQRA by declaring itself lead agency for environmental review, and by issuing a negative declaration for the project based on a lengthy environmental assessment form rather than preparing an environmental impact statement.

Poquott also challenges the Chairman's Declaratory Ruling that the facility would not constitute a major electric generating facility within the meaning of Section 160(2) if its net electric output to the grid does not exceed 80 MW. The Village asserts that the capacity of the facility is its 94 MW nameplate capacity, that the Board's jurisdiction must be determined by adding the capacity of the new facility to the 385 MW capacity of existing units operated at the Port Jefferson complex by KeySpan Generation (an affiliate of KeySpan Energy Development Corp.), and that the capacity of all of the units should be added together in any event because LIPA may eventually own all of KeySpan's generators. Poquott further challenges DEC's air emission permits and argues that certain local permits were required from the Village.

The restraining order was vacated on March 15. A hearing on whether a preliminary injunction should be granted was held on March 21 and the Judge reserved decision. Meanwhile, Poquott has asked the Appellate Division, Second Department for permission to appeal from the order of Supreme Court vacating the stay, and has made a separate preliminary injunction request to that Court. The return date in the Appellate Division was April 18.

The NYPSC filed an answer, record and brief on the merits. The Appellate Division, Second Department, has denied the Village of Poquott's motion for permission to appeal from an order of Supreme Court, Suffolk County, vacating a temporary restraining order against construction of the KeySpan/LIPA Port Jefferson peaking facility. The Second Department also denied Poquott's de novo request to that Court to enjoin construction of the power plant.

By Order to Show Cause dated April 19, 2002, Supreme Court denied Petitioner's further application for injunctive relief without prejudice to renew, and severed all claims against the Public Service Commission relating to the certificate of public convenience and necessity granted for the Port Jefferson Facility. Temporary relief was again denied on April 25, 2002, after further argument.

By Memorandum Decision and Order dated October 23, 2002, Supreme Court, Suffolk County dismissed, with costs, a petition by the Village of Poquott, certain individuals and a health advocacy group seeking to overturn regulatory approvals by various state agencies relating to construction of a new generating facility by a subsidiary of KeySpan Corporation in the Village of Port Jefferson. The Court rejected Petitioners' challenges to (1) an environmental assessment conducted by the Long Island Power Authority (LIPA) that included an analysis of fine particulates (PM2.5); (2) LIPA's condemnation of the parcel on which KeySpan built the power plant; (3) air emission and water discharge permits issued by the Department of Environmental Conservation (DEC); and (4) a Siting Board Declaratory Ruling that Article X was inapplicable so long as KeySpan made a legally binding commitment in its DEC permits and in a Certificate of Public Convenience and Necessity issued by the PSC to keep the combined output of the plant's turbines below 80 megawatts. The Court noted that the Siting Board ruling could have been severed and sent to the Albany County Supreme Court along with Petitioners' claim against the PSC's Certificate, but that the PSC and the Siting Board, although they both reside in the Department of Public Service, are distinct agencies. Justice Lifson held that it was not arbitrary and capricious for the Siting Board to follow its prior determination that the generating capacity of a power plant should be measured by its actual output to the electric system, rather than its potential capacity, which the Court noted was upheld in Matter of UPROSE v. Power Authority of the State of New York, 285 A.D.2d 603 (2d Dep't 2001). The Court also held that the Siting Board's decision to view the output of the new turbines as separate and distinct from the output by existing KeySpan generators in Port Jefferson was not arbitrary and capricious.

The Second Department has upheld the Siting Board's decision not to take jurisdiction over a Long Island Power Authority (LIPA) turbine operated at 79.9 MW. It unanimously affirmed Suffolk County Supreme Court's dismissal of a challenge to a declaratory ruling issued by the Siting Board. The Second Dept. held that the Siting Board's interpretation of the term

"generating capacity" was both realistic and reasonable. LIPA's SEQRA analysis and DEC's issuance of air and water permits were also upheld.

Petitioner filed a motion asking for leave to appeal from the Court of Appeals. On September 15, 2005, the Court of Appeals did not grant the motion for leave to appeal in this challenge to the Siting Board's decision not to take jurisdiction over a Long Island Power Authority (LIPA) turbine operated at 79.9 MW. The Second Department had unanimously affirmed Suffolk County Supreme Court's dismissal of a challenge to a declaratory ruling issued by the Siting Board. It held that the Siting Board's interpretation of the term "generating capacity" was both realistic and reasonable. LIPA's SEQRA analysis and DEC's issuance of air and water permits were also upheld.

Petitioner had planned to withdraw its motion for leave due to an expected settlement with LIPA and Keyspan. The parties, other than the PSC, were working on a settlement, but their efforts did not bear fruit. The Court of Appeals therefore restored this case to its motion calendar. It decided that the motion for leave to appeal the denial of a preliminary injunction was subject to dismissal as a challenge to a non-final order and denied the remainder of the motion.

(47) Independent Payphone Association, Inc. et al. v. NYS Public Service Commission (Albany County Index No. 691-00)

By Notice of Petition and petition served February 3, 2000, the Independent Payphone Association of New York, Inc. and Teleplex Coin Communications, Inc. have challenged a Commission decision not to preclude directory assistance (DA) providers, such as local exchange companies, from charging payphones for DA services. Now that the Federal Communications Commission has preempted state rate regulation of payphones, the Commission can no longer restrict payphone providers from charging end users for DA, and has accordingly decided not to continue preventing providers of wholesale DA services from charging payphones for DA. IPANY, et al. challenge the rationality of the Commission's decision and the Commission's compliance with the State Administrative Procedure Act and allege the effect of the decision will be undue discrimination by incumbent DA providers that also own payphones. Petitioners have agreed to hold the matter in abeyance until the filing of tariffs implementing the decision. Per the 2nd Qtr 2008 PSC Report, this matter is adjourned indefinitely.

(48) Independent Power Producers of New York, Inc. v. NYS Public Service Commission and Niagara Mohawk Power Corp. (Albany County Index No. 1542-00)

By Notice of Petition and Petition dated March 16, 2000, the Independent Power Producers of New York, Inc. (IPPNY) challenge a November 17, 1999 Commission decision in Cases 94-E-0098 and 94-E-0099, adopting a Niagara Mohawk tariff that provides for recovery of deviation penalties charged by the New York Independent System Operator (NYISO) from generating facilities selling energy to Niagara Mohawk. IPPNY contends that the tariff violates the Public Utility Regulatory Policies Act (PURPA), and is otherwise unlawful, insofar as it applies to sales of energy from Qualifying Facilities governed by PURPA 210. The Commission's November 17, 1999 order that adopted the tariff providing for recovery of deviation penalties stated (at 13) that "[t]hese penalties are the product of the ISO tariff, a matter subject to [Federal Energy Regulatory Commission] jurisdiction, and the QFs should present their arguments against it to FERC. If, as the QFs point out, the ISO tariff is already being revised to eliminate the delivery deviation penalty for generators selling under contract to utilities, then the issue can be solved merely by requesting that FERC act expeditiously on the matter." It appears from the IPPNY petition that the QFs are attempting to pursue their remedies with the NYISO and at FERC. Out of an expectation that a NYISO tariff filing at the Federal Energy Regulatory Commission, which would not impose deviation penalties on QFs, will moot this matter, IPPNY did not make its petition returnable until July 28, 2000. The matter was subsequently adjourned without date. Per the 3rd Qtr 2008 PSC Report, this matter is adjourned indefinitely.

(49) Indian Land Claim Litigation (2d Cir. Docket Nos. 02-6111(L) et al.)

Two recent decisions involving Indian claims to New York land have been issued by the Supreme Court and the Second Circuit. Both are of interest to any utilities who have property rights which may fall within the claim area of several Indian tribes now suing the State and other entities for return of that land and damages relating to its wrongful appropriation and trespass.

Most of these claims are based on the theory that the land at issue at one time belonged to one group of Native Americans and was over time ceded or sold by them to the State pursuant to treaties which never received the federal approval required under the Nonintercourse Act (25 U.S.C. § 177). At present, there are no less than five pending litigations in which Indian entities

(such as Oneida, St. Regis, Cayuga, Onondaga and Shinnecocks) are asserting land claims to thousands of acres in New York State.

In The City of Sherrill v. Oneida Indian Nation, 125 S. Ct. 1478 (2005), a case which is not technically a land claim litigation, the Supreme Court held that the New York Oneida Tribe was not immune from paying property taxes simply by purchasing property within the area (about 300,000 acres) they claimed in other pending lawsuits. In an 8-1 decision issued on March 29, 2005, the Court found that the defense of laches defeated the Oneida's request for equitable relief prohibiting the collection of property taxes. Significant to that finding was the Oneidas' 250-year delay in asserting that claim, the distinctly non-Indian character of the land and its inhabitants and the State and local governments' continuous control of this area over the last two centuries. The Court made clear that the proper method to obtain tax immunity for land purchased by the Tribe was to apply to the Bureau of Indian Affairs under 25 U.S.C. § 465 and have the Bureau acquire the property at issue in trust for the Tribe.

Relying heavily on the Sherrill decision, the Second Circuit in a 2-1 decision concluded that laches, traditionally viewed as a defense to an equitable claim, was also available to bar the claim for damages asserted by two other Indian tribes (as well as the United States on their behalf) for the wrongful possession of 64,000 acres in New York State. Cayuga Indian Nation of New York v. George Pataki, 2005 U.S. App. LEXIS 12764 (2d Cir June 28, 2005). The Court found that the possessory claim of the Cayugas, grounded in ejectment, was as disruptive as the one made in Sherrill and should be barred because it had not been asserted for over two centuries. As a result of that decision, a $248 million verdict (including $211 million in interest) in favor of the Cayugas was reversed and judgment entered dismissing the claim in its entirety.

In view of the vigorous dissent and the importance of the issue, it is likely that the Second Circuit's decision will receive further judicial scrutiny by a full panel of the Circuit and/or the Supreme Court itself.

The reporter requests interested committee members to bring future developments to the reporter's attention.

(50) Isaac, Sarah v. NYS Department of Public Service and Consolidated Edison Company of New York, Inc., (Albany Co. Index No. 1037-10) (Queens County Index No. 2322-10)

By decision dated May 14, 2010, Supreme Court, Albany County (Zwack, A.J.), granted the Commission's unopposed motion to change venue, and upon such change, to dismiss as time-barred, a landlord's challenge to a "shared-meter" determination. The Court agreed that the petition was not timely brought within four months of the Commission decision as required by CPLR 217(1).

By Order to Show Cause dated January 29, 2009, and Petition verified January 27, 2010, Ms. Sarah Isaac, a landlord in Queens, sought to bring an Article 78 proceeding challenging a September 24, 2008 Commission decision that her appeal of a "shared-meter" determination was untimely. This matter was originally returnable in Queens County on February 9, 2010. Petitioner also sought a stay of termination of electric service pending hearing and determination of this case.

The PSC demanded a change of venue to Albany County and Petitioner did not respond. The PSC then moved in Albany County for change of venue, and for dismissal on statute of limitations grounds. Petitioner did not oppose the PSC's motion for change of venue and dismissal and has not appealed.

(51) Jericho Water District v. One Call Users Counsel, et al. (Nassau County Index No. 03-006699)

By Summons and Complaint filed April 30, 2003, and served on the Commission on June 2, 2003, a water district claims it should be allowed to participate without payment in the "One Call" system for identification of underground utility facilities prior to excavation. Plaintiff asserts it is a municipality exempt for paying the costs of its participation under General Business Law (GBL) Section 761, subdivision 3. Plaintiff sued the Chairman in his capacity as head of the Department of Public Service, which adopts rules governing the "One Call" system. GBL Section 766.

The NYPSC demanded a change of venue on the grounds that Plaintiff should not have been able to evade the use of Article 78 proceedings to challenge Commission decisions in Albany County. The NYPSC also stated its intent to move to dismiss for failure to exhaust administrative remedies and to state a cause of action against the Commission. In response, Plaintiff amended its complaint to delete the Chairman as a defendant.

(52) Kaled Management, et al. v. NYPSC & Con Edison (Albany County Index No. 10114-07)

By Notice of Petition and Petition filed and served December 31, 2007, real estate management companies challenge the Commission's denial of refunds for alleged misbilling at general, rather than residential, rates of apartments they use for employees. Petitioners also contend that they were wrongly denied informal hearings on their complaints.

Consolidated Edison Company of New York (Con Edison) billed Petitioners' apartments at general electric commercial rates after oral service applications, but then advised Petitioners in writing that apartments used for employee housing would be placed on the residential electric rate. After Petitioners notified Con Edison that the apartments would be used for employee housing, Con Edison placed the apartments on residential rates prospectively, but denied Petitioners refunds. Petitioners complained to the Commission that Con Edison should have provided refunds at the residential rate. They sought informal hearings, which were not provided.

The Commission upheld the lack of informal hearings and Con Edison's decision not to provide refunds. It concluded that the informal hearing officers could have given Petitioners no relief, since prior Commission and court decisions have upheld Con Edison's handling of service applications. Specifically, Con Edison could use a verbal application process and then advise nonresidential customers that residential rates would be available upon application for any apartment used as an employee residence. The Commission also concluded that there was no evidence that Con Edison was using the verbal application process to deny customers residential rates.

In a decision dated May 28, 2008, Albany County Supreme Court (Connolly J.) upheld a Commission determination not to provide customers informal reviews with respect to the issue of whether the customers were given "adequate assistance" in picking the most advantageous rate by utility brochures sent after turn-on of service. Commission regulations governing customer complaints generally provide customers with an ability to seek an informal hearing or review. The Commissioner denied the customers in this case informal reviews, based on established Commission precedent that brochures notifying customers of more advantageous rates defeat any customer right to seek rebilling.

Petitioners, owners of multiple dwellings, are Con Edison customers that sought residential rates insofar as service was provided for their employees. The customers advised Con Edison at various times after the turn-on of service that they were eligible for residential rates

pursuant to a Con Edison tariff provision allowing such rates for “superintendents’ apartments.” Con Edison rebilled the customers prospectively, but denied retroactive rebilling based upon information provided to the customers after turn-on about the availability of residential rates for their employees’ residences.

Petitioner sought refunds from the Commission. They were denied refunds by Office of Consumer Services (OCS) staff and then not provided an informal hearing when they sought to challenge the OCS initial determination. The Commission upheld the denial of an informal hearing, concluding that well-established precedent supported the lack of entitlement to refunds in situations where owners of multiple dwellings were advised of the availability of residential rates by a brochure after turn-on of service. The Commission also decided there was no requirement of an informal hearing under Commission regulations.

(53) Kantrowitz, Goldhammer & Graifman, P.C. and Weiss & Yourman v. NYS Electric & Gas Corporation and NYPSC (Albany County Index No. 3251-04)

By Order to Show Cause and Petition filed and served on June 3, 2004, the petitioning law firms seek to preclude payment by New York State Electric and Gas of refunds to seasonal customers that allegedly arise from petitioners' efforts unless petitioners are paid a portion of said refunds.

A decision dated May 3, 2004 (KCLR Land Corp. v. PSC) found petitioners, as counsel in that matter, had not preserved a claim to relief for the "class" of seasonal customers. Petitioners observe that the Commission is now moving to provide refunds to the other seasonal customers and claim a lien on any such refunds.

On June 3, 2004, Justice McNamara denied a temporary restraining order precluding payment of refunds because the customers to whom refunds are owed have not yet been identified or the refunds computed and he was skeptical of the merits of petitioners' claims. By Judgment and Decision dated November 8, 2004, Justice Louis Benza denied the above petition, which sought to establish a Judiciary Law 475 charging lien and/or constructive trust in the amount of 33% of the refunds owed all demand-billed, seasonal NYSEG ratepayers. The petitioners are attorneys who brought a class action lawsuit in Sullivan County dismissed due to PSC primary jurisdiction. They were ultimately successful in obtaining a refund pursuant to a Commission June 2003 determination for 2 complainants (KLCR and Har Nof, 2 bungalow communities in Sullivan County). KLCR and Har Nof then brought an, as yet unsuccessful,

Article 78 petition claiming that the Commission improperly did not award refunds to all NYSEG ratepayers similarly situated to KLCR and Har Nof (No. 23).

In this case, petitioners sought attorneys' fees from all NYSEG refunds regardless of an attorney /client relationship. Petitioners claimed that based on "common law" they provided a "substantial benefit" to all demand billed, seasonal ratepayers who would not have received a refund, but for their effort. The Court determined that such theories and a charging lien were not applicable to the facts of this matter and that all such NYSEG ratepayers would be identified and rebilled pursuant to a March 2004 Office of Consumer Services (Jean Lowe) directive.

Petitioners have perfected their appeal and oral argument was held January 9, 2006. By Memorandum and Order decided and entered on March 9, 2006, the Appellate Division, Third Department, affirmed the dismissal by Albany County Supreme Court (Benza, J.) of a petition seeking a judiciary charging lien and/or constructive trust to receive attorneys fees, costs, and disbursements from NYSEG ratepayers with whom Appellants, a law firm, did not have an attorney/client relationship. Appellants represented particular overcharged NYSEG ratepayers before the PSC and Court, and obtained refunds for them. Petitioners' attempt to gain refunds for the class of similarly situated customers was rejected by the Third Department, but eventually all similar NYSEG ratepayers were awarded refunds by an Office of Consumer Services directive to NYSEG. The Appellants sought attorneys' fees from all affected ratepayers under common law theories of "common fund/substantial benefit." They claimed that as a result of their efforts all the affected ratepayers got a refund, and therefore, all such ratepayers should pay Appellants a 1/3 contingency fee. The Third Department affirmed the dismissal, holding that this was not an "exceptional case" in which "dominating reasons of justice" trigger recovery, given that Appellants received attorneys' fees from approximately 38 ratepayers who eventually retained Appellants and the PSC exercised its primary jurisdiction, as previously upheld by the courts, to mandate the refund. Petitioners moved for leave to appeal to the Court of Appeals on April 17, 2006. The PSC opposed the motion, and by decision dated June 29, 2006, the Court of Appeals denied the motion with costs.

(54) Kerr, Evan H. v. NYS Public Service Commission and Consolidated Edison Co. of New York (Queens County Index No. 12722-03)

By petition filed on May 22, 2003, in Queens County and service attempted by regular mail received June 9, 2003, Petitioner sought to challenge a Commission decision that eliminated

certain Con Edison charges against him. Mr. Kerr argued that he should have been given additional credit for a shared meter condition. The NYPSC moved to dismiss for untimely and improper service and to change venue if the case is not dismissed.

By decision dated September 19, 2003, Supreme Court Queens County dismissed this proceeding for improper service because Petitioner did not accomplish personal or some other service permitted by the CPLR. Mr. Kerr has appealed. By decision dated March 9, 2004, Queens County transferred venue to Albany County.

Mr. Kerr moved to transfer venue back to Albany County. The PSC opposed and cross-moved for a stay of proceedings pending the Second Department decision. By decision dated August 4, 2004, Albany County has denied a motion to change venue and stayed this matter pending resolution of an appeal to the Second Department. By decision dated August 16, 2004, the Second Department dismissed the appeal for failure to prosecute.

By decision dated November 22, 2004, Albany County Supreme Court denied a motion to reopen the August 4, 2004 decision that denied a motion to change venue and stayed this matter pending resolution of an appeal to the Second Department. Movant claimed he had been treated as defaulting, but the Court rejected that claim. A December 1, 2004 letter from the court noted that a reply affidavit on the motion was untimely.

(55) KeySpan-Ravenswood, Inc. v. Federal Energy Regulatory Commission (D.C. Circuit Case No. 02-1115)

KeySpan and Orion petitioned the U.S. Court of Appeals for the D.C. Circuit for review of the Federal Energy Regulatory Commission's ("FERC's") orders concerning NYISO translation of price caps on installed capacity (ICAP) into price caps on unforced capacity (UCAP). The NYISO price caps are used for mitigation of market power for generating units within New York City. The Public Service Commission moved to intervene. The motion for intervention was granted by order filed June 13, 2002.

By Opinion dated November 18, 2003, the U.S. Court of Appeals for the District of Columbia (by Rogers, J.) vacated FERC orders establishing a methodology for the New York Independent System Operator's calculation of the price cap for New York City's electric capacity market. The Court found that FERC did not adequately explain its decision to allow use of the most recent twelve months of outage data in estimating a generating unit's availability. The Court noted that there may be good reasons why FERC rejected the petitioners' claim that FERC

should use longer periods which allegedly "smoothed out" outages. The Court concluded that, by failing to state those reasons, FERC denied petitioners the chance to respond thereto. Accordingly, the Court has vacated the challenged orders and remanded the cases to FERC.

(56) Keyspan-Ravenswood, LLC v. Federal Energy Regulatory Commission (DC Cir. Court of Appeals Docket No. 07-1517)

By Petition dated December 20, 2007, Keyspan-Ravenswood, LLC (Ravenswood), owners of merchant generation, challenges two orders of the Federal Energy Regulatory Commission ("FERC") in Docket No. ER-07-748. Petitioner claims that FERC erred in (1) accepting the NYISO Tariff Filing regarding the Minimum Oil Burn Rule (MOB Rule) without making a merits determination on Ravenswood's contention that the rate was unjust, unreasonable, and unduly discriminatory; (2) ruling that it is precluded under Section 205 of the Federal Power Act and appellate decisions from considering related items necessary to maintaining fuel switching capabilities; (3) ruling it was only deciding on the allowance for recovery of incremental commodity costs of fuel oil, rather than the broader filing made and acknowledged by the NYISO; and (4) deferring treatment of the MOB Rule generators' storage and delivery infrastructure costs, allegedly creating a rate that was unjust, unreasonable, and unduly discriminatory.

The PSC moved to intervene in support of FERC and the NYISO. Per a scheduling order issued September 22, 2008 by the D.C. Circuit, the PSC's initial brief was due on February 6, 2009, and the PSC's final brief was due March 13, 2009.

The United States Court of Appeals for the District of Columbia Circuit has upheld the FERC orders accepting the "Minimum Oil Burn Rule" of the New York Independent System Operator (NYISO). That rule provides for recovery of variable costs generators incur for burning oil when a switch to oil is needed for system reliability.

(57) KeySpan-Ravenswood, Inc. v. NYPSC and Consolidated Edison Co. of New York, Inc. (Albany County Index No. 3317-01; 3d Dep't Docket No. 93175)

By Notice of Petition and Petition dated June 7, 2001 and served June 8, 2001, KeySpan-Ravenswood challenges a decision that the PSC has jurisdiction over the delivery of electricity to wholesale generators for their equipment and buildings. Orion Power New York challenged the PSC's initial declaratory ruling in an Article 78 proceeding (Orion Power New York G.P., Inc. v. Public Serv. Comm'n (Albany County Index No. 548-01)), and KeySpan challenged the

Commission's denial of rehearing. KeySpan asserts its position is supported by a Federal Energy Regulatory Commission decision which was issued after the order denying rehearing and allegedly required netting of a wholesale generator's need for station power against its total generation output.

By decision dated April 2, 2002, Albany County Supreme Court (Cannizzaro, J.) confirmed a Public Service Commission Declaratory Ruling (issued September 29, 2000), whereby the Commission found that it had jurisdiction over retail electric service provided to wholesale generators (such as start-up and station power) for which the Commission could set stand-by rates. The court further found that the Commission did not unduly discriminate against petitioners by not imposing a stand-by rate on the remaining Con Edison and New York Power Authority generators. In construing aspects of the Declaratory Ruling that overlap with federal orders, the Court held that to the extent the Declaratory Ruling could be construed in concert with FERC orders, in allowing generators to meet their retail energy needs through either on-site or remote self-supply, it was upheld.

To the extent it conflicts with FERC orders in ruling that retail transmission is never implicated in providing retail electric service to wholesale generators, it was vacated. KeySpan-Ravenswood has filed a Notice of Appeal at the Third Department and several requests for extension of time to perfect its appeal pending finality in a decision by the Federal Energy Regulatory Commission on the same issues which would render the appeal here moot.

On October 13, 2003, KeySpan-Ravenswood perfected its appeal of Albany County Supreme Court's confirmance (Cannizzaro, J.) of a PSC Declaratory Ruling asserting jurisdiction over Con Edison's stand-by rates. Con Edison has made a motion to strike most of KeySpan-Ravenswood's appeal because of a settlement it reached with KeySpan. The NYPSC has supported the motion. The PSC made a motion to convert the one remaining issue to a declaratory judgment action. The appeal will proceed after the Appellate Division decides Con Edison's and the PSC's motions.

The Court decided to consider Con Edison's motion to strike most of KeySpan-Ravenswood's appeal because of a settlement it reached with KeySpan along with KeySpan's appeal. The matter was argued March 23, 2004. After oral argument on March 23, 2004, the Appellate Division ruled on the appeal on May 6, 2004, affirming the lower court's decision and finding that the issues on appeal are moot in light of the settlement between KeySpan and Con

Ed and FERC's recent approval of that settlement. However, it observed that the possibility that Keyspan-Ravenswood might be a self-supplying transmission level customer did not defeat Albany County Supreme Court's conclusion that PSC assertion of jurisdiction was in "substantial harmony" with FERC rulings.

(58) KLCR Land Corp. and Har Nof, Inc., et al. v. NYPSC (Albany County Index No. 6603-03)

In a petition filed and served October 17, 2003, KLCR Land Corp. and Har Nof, Inc. allege the Commission failed to provide appropriate relief to a class of seasonal customers misbilled by NYS Electric and Gas Corporation. The Commission provided Petitioners six years of refunds for NYSEG's noncompliance with its tariff with respect to demand charges for seasonal customers. Petitioners contend that they should have been given more than six years of refunds and that the Commission should have created a class of seasonal customers entitled to relief.

By Judgment and Decision dated May 3, 2004, the Court denied Petitioners' Article 78 proceeding. Petitioners argued that the Commission's June 20, 2003 Order 1) limiting refunds to be paid to certain NYSEG ratepayers to six years from the date NYSEG had notice of the complaint, and 2) not awarding class-wide relief was arbitrary, capricious, and an error of law. The PSC argued that the Petitioners failed to preserve their appeal to the Commission concerning class-wide relief and that the six-year refund period was an appropriate use of discretion absent a finding of fraud. The Court held that Petitioners' failure to cross appeal to the Commission on the issue of class-wide relief did not preserve the issue for judicial review and judicial deference was afforded the PSC's determination to award six years of refunds from the date NYSEG was put on notice of the complaint. Therefore, the Court denied Petitioners' claims in their entirety.

Notice of Entry was served on May 12, 2004. On May 20, 2004, Petitioners filed their Notice of Appeal to the Appellate Division, Third Department and perfected their appeal on February 18, 2005. Oral argument was held on June 7, 2005.

By decision dated July 28, 2005, the Appellate Division, Third Department, affirmed an Albany County Supreme Court judgment that the Commission 1) properly declined to order relief to a class of seasonal electric customers allegedly overbilled by NYS Electric and Gas Corporation; and 2) limited the complaining individual customers to six years worth of refunds. The Third Department concluded that 1) the individual complainants had failed to exhaust

administrative remedies inasmuch as they did not ask the Commission for class-wide relief; 2) the Commission's policy of limiting refunds to six years in the absence of fraud was reasonable; and 3) complainants had not adequately asserted a claim of fraud that would have triggered the Commission's exception to its six-year limitation. Petitioners did not move for leave to appeal.

(59) Maldonado v. Acampora and Con Edison (New York County Index No. 401718/07)

By Notice of Petition and Petition filed March 29, 2007, and served on the Attorney General on March 30, 2007, Petitioner, an apartment dweller in New York City, challenges a decision by the NYPSC's designee to halve a Con Edison backbill to Petitioner for shared meter charges. The PSC's designee found that Mr. Maldonado's apartment was supplied with electricity through the meter of another apartment. Pursuant to the Shared Meter Law, Public Service Law section 52, the designee concluded Con Edison should backbill Mr. Maldonado for half of the service supplied to the other apartment's meter for a total charge of $4,400. The designee determined that Con Edison was time-barred from backbilling the other apartment tenant.

Mr. Maldonado contends that the decision is arbitrary and capricious for alleged unlawful failures to: 1) explain the basis of the backbill; and 2) credit his backbill for Con Edison's assessment of the landlord for 12 months of shared meter charges.

On May 1, 2007, the PSC moved to change venue to Albany County Supreme Court. On May 3, 2007 the PSC filed its Answer, Record and Brief with New York County. By decision dated July 19, 2007, Supreme Court, Albany County, granted the NYPSC's unopposed motion to change venue from New York County to Albany County. The Albany County Special Term Clerk made October 19, 2007 the return date in this matter. On October 12, 2007, a Stipulation Discontinuing Proceeding, dated September 27, 2007, executed by all the parties, was filed in Albany County Supreme Court.

(60) Marin v. Niagara Mohawk and William Flynn (Oneida County Index No. CA2004-001087)

By Summons and Complaint received by the NYPSC on May 17, 2004, Mr. Marin is apparently attempting to bring, pro se, a combined civil action and Article 78 proceeding in Oneida County. Mr. Marin complains about Niagara Mohawk's provision of service to a

building in Utica and alleges that the Commission has refused to maintain service while the dispute is pending before it.

By Decision/Order dated July 27, 2004 (Lamont, Acting Justice), Albany County Supreme Court granted the PSC's June 10, 2004 motion to sever, change venue to Albany County, and dismiss all claims against the NYPSC. The PSC's motion sought to sever any claims against the Commission from claims against Niagara Mohawk, transfer those claims, which were being improperly brought in Oneida County Supreme Court, to Albany County Supreme Court, and dismiss them based on the Petitioner's failure to exhaust his administrative remedies and lack of personal jurisdiction.

The Decision/Order held that the Commission was not properly served with the Petition and the Petitioner failed to exhaust his administrative remedies. It was entered on August 9, 2004, with Notice of Entry served on all parties on August 10, 2004. A Notice of Appeal has not been filed.

(61) McGuinness v. NYS Electric & Gas Corporation (Tompkins County Sup. Ct. Index No. 2005-0279)

On October 14, 2005, Tompkins County Supreme Court (Relihan, J.) dismissed this class action in which the Public Utility Law Project ("PULP") sought damages for NYSEG's assessment of late payment charges on customer arrears subject to deferred payment agreements. The Court had asked for the PSC's views about NYSEG's motion to dismiss based on the "filed rate" doctrine. The PSC advised it that the Department will present a recommendation to the Commission on 1) NYSEG's 1999 petition for rehearing/response to a show cause order on a Commission conclusion that the tariff is unlawful (Case 99-M-0074), and/or 2) NYSEG's revision of its tariff to remove the late payment charges, effective January 1, 2006. Tompkins County decided that the action was barred by the "filed rate" doctrine because NYSEG's tariff remained in effect due to "protracted inattention" by the Commission.

Plaintiff appealed the judgment dismissing the complaint to the Appellate Division. The matter was then settled prior to perfection of the appeal, which has been discontinued. NYPSC staff presented a recommendation on the NYSEG filing in Case 99-M-0074 and/or on NYSEG's revised tariff. Likewise, National Fuel Gas Distribution Corporation proposed revising its tariff, subject to approval of its petition for deferral of lost late payment charges. NYSEG's tariff was permitted to become effective. By Order dated December 21, 2007, in Case 99-M-0074, the

Commission decided that late payment charges on DPAs were unlawful and directed NFG to cancel its tariff.

(62) MCI Telecommunications Corporation v. New York Telephone Company et al. (Northern District of New York Index No. 97-CV-1600 (LEK))

In a decision issued March 7, 2001, Judge Kahn decided New York Telephone's and MCI's challenges to the Commission's opinion on the 1997 MCI/NYT interconnection agreement. He rejected the Commission's assertion that the Court lacked jurisdiction, concluding, inter alia, that recent Supreme Court precedent using the Eleventh Amendment to the United States Constitution to bar suits against states was inapplicable.

With respect to the merits, Judge Kahn remanded NYT's challenge to a Commission decision allowing MCI to collocate remote switching modules in NYT central offices for further proceedings, finding the Commission had neither justified such collocation as "necessary" under federal law nor properly invoked state law. Judge Kahn upheld the Commission's position on two MCI challenges – to the level of switching rates and to a requirement that MCI give NYT access to MCI rights of way – and one NYT challenge – to a Commission requirement that emergency network outages be restored within one hour. Judge Kahn also decided not to resolve MCI's claim that NYT had to give it access to "dark" (unlit) fiber optic cable for the time being in order to give the parties time to negotiate. MCI Telecommunications Corporation et al. v. New York Telephone Company et al., 134 F. Supp.2d 490 (N.D.N.Y. 2001).

The PSC filed a protective appeal on the 11th Amendment issue because of pending Supreme Court litigation. On May 20, 2002, the Supreme Court decided that the doctrine of Ex Parte Young permitted federal court review of an arbitration decision. Verizon Maryland, Inc. v. Public Service Commission of Maryland, Docket No. 00-1531. The PSC therefore withdrew its appeal of Judge Kahn's decision.

MCI subsequently asked the Court to decide the question of access to "dark fiber" in light of an FCC decision requiring access. The PSC argued that the issue should be remanded to the Commission to deal with the issue in the first instance.

By decision dated June 21, 2004, the Northern District of New York remanded to the Commission a question about whether MCI's interconnection agreement should be amended to incorporate a right of access to dark fiber. That right was created by an FCC decision issued

after Commission arbitration of MCI's interconnection agreement. NYT's tariff provides for access, but MCI wanted to incorporate that right in its agreement.

The Court rejected Verizon's argument that the case was moot, noting there was a dispute as how MCI would gain access. It adopted the PSC's position that the issue should be remanded to it for an initial decision. The Court did not accept MCI's arguments that the Commission had no expertise in the area and had already decided the question. It found that 1) the Telecommunications Act of 1996 envisioned that states would first arbitrate disputes and 2) the issue was unripe without Commission action, and reasoned that the PSC should be able to take official action.

(63) Mount St. Mary's Cemetery v. NYPSC and Con Edison (Albany County Index No. 1419-07)

By notice of petition and petition filed and served on February 16, 2007, Petitioner, a cemetery, challenges NYPSC decisions in Case 02-E-0773 not to require Consolidated Edison Company of New York (Con Edison) to re-bill Petitioner as if electric service to its chapel was provided at a residential space heating rate. From 1990 to 1997, Petitioner was billed through one meter at a general residential rate for both its chapel and administration building. In 1997 Petitioner reconfigured its internal wiring so that Con Edison could separately meter the chapel, but claims it should have been able to get a residential space heating rate for the chapel earlier.

The NYPSC concluded that there was no evidence that Con Edison erred in the mid-70s when it installed one meter to provide service to Petitioner's chapel and administration building, especially since one meter for both buildings was permitted by the utility's tariff and governing procedure. Petitioner argues that the PSC arbitrarily and capriciously permitted Con Edison to evade its duty to assist Petitioner in choosing the most beneficial rate, based on an inference from the lack of separate chapel metering.

By decision dated September 20, 2007, Albany County Supreme Court (Hard, J.) dismissed an Article 78 petition challenging the Commission's denial of retroactive rebilling of an electric service account. Petitioner, a cemetery located in Queens, asserted that in 1977, Consolidated Edison Company of New York unreasonably failed to advise that Petitioner could obtain cheaper electricity by reconfiguring its internal wiring. The Commission determined that petitioner failed to meet the burden of proof, because the relevant events occurred 20 years prior to the filing of its claim, well beyond Con Edison's reasonable retention of records. The Court

afforded deference to the Commission's assignment of the burden of proof, interpretation of tariffs and inferences concerning technical issues, and found a rational basis for all three.

(64) National Association of State Utility Consumer Advocates, et al. v. Federal Communications Commission, et al. (Ninth Circuit Docket Nos. 05-71238, 05-71315, 05-71542 and 05-72953)

The National Association of State Utility Consumer Advocates (NASUCA), the Minnesota and Ohio Public Utility Commissions and the NYPSC have challenged the FCC order preempting Minnesota regulation of providers using Voice over Internet Protocol to make phone calls. The cases were filed in different Circuits (Eighth, Sixth and Second), but transferred to the Ninth Circuit because the California Public Utility Commission was the first to file. The NASUCA case was identified as the lead docket in the Ninth Circuit once California withdrew. The remaining Petitioners have moved to transfer the cases to the Eighth Circuit.

The parties are awaiting a decision on the motion for transfer.

(65) National Fuel Gas Distribution Corp. v. NYPSC, (Albany County Index No. 3246-08)

By Verified Petition and Complaint filed April 18, 2008 and received by the Commission in what was subsequently deemed to be service on May 9, 2008, National Fuel Gas Distribution Corporation (NFG) challenges the Commission decision in Case No. 99-M-0074 that the Company cannot charge late payment charges to customers who have signed deferred payment agreement, unless payment is due and owing under the agreement. The Commission stated its view in a January 22, 1999 order, but did not put that decision in effect pending a chance by the utilities to comment on its legal analysis. The Commission concluded that Public Service Law §42(1), which permits late payment charges on the "unpaid balance of any bill," did not allow late payment charges on customers with deferred payment agreement since their right to pay in installments meant there was no "unpaid balance on any bill."

The Commission subsequently evaluated utility filings objecting to its analysis. On December 21, 2007 it rejected those comments and directed NFG to file tariffs consistent with its order in the pending NFG rate case.

NFG has challenged the Commission's construction. The matter was returnable June 20, 2008. (See *National Fuel Gas v. NYS PSC* (Albany County Index No. 3247-08) for a discussion of the procedural issues). In a decision dated August 14, 2008, and entered August 19, Supreme Court

Albany County (Zwack, J.) denied a National Fuel Gas (NFG) challenge to a Commission order prohibiting NFG from imposing late payment charges (LPCs) on arrears owed by customers who have entered into deferred payment agreements (DPAs). At issue was the Commission's interpretation of PSL §§ 37(1) and 42 to mean that the "unpaid balance of any bill" upon which LPCs may be charged is only the current monthly balance due under a DPA. That is, an LPC could be charged only when a customer fails to pay his/her monthly DPA installment, and would only be assessed upon any past-due DPA installments. NFG had argued that PSL §§ 37 & 42 permit utilities to assess LPCs on the entire amount of arrears owed to the utility.

Supreme Court held the plain meaning of the words "unpaid balance" in PSL § 42 does not include arrears. It further held that even if the statute was unclear, the Commission's interpretation involves specialized knowledge and therefore is entitled to deference. Finally, the Court held that the Commission's decision to preclude LPCs on DPAs after years of inaction did not constitute a change in position; and in any event, the Commission's explanation for its decision was satisfactory.

By notice served September 16, 2008, NFG appealed to the Third Department.

National Fuel Gas Distribution Corporation (NFG) has not pursued its appeal. It has abandoned its appeal by not perfecting within nine months of the appeal.

(66) National Fuel Gas Distribution Corp. v. NYPSC (Albany County Index No. 8031-07)

National Fuel Gas Distribution Corporation and the Commission have agreed that National Fuel's challenge to the Commission's Order Granting Appeal, issued September 25, 2007, in Case 07-G-1041, was moot. Albany County Supreme Court (Connolly, J.) had signed an Order to Show Cause making the return date for this matter October 26, 2007, but denied National Fuel's request for a stay of the Commission's Order. Once Department Staff reviewed the material pursuant to the Order, it decided not to ask for further production.

National Fuel had claimed that the Commission erred in requiring production of a report prepared for the utility's attorneys. It asserted that the document is protected as a settlement offer and by the attorney-client and attorney work product privileges, and that the Commission erred in deciding that the document was material prepared for litigation for which DPS Staff had shown a need.

(67) New Roc Parcel 1A, LLC v. United Water New Rochelle Inc. (Westchester County Index No. 19350-2008)

By complaint filed September 3, 2008, New Roc Parcel 1A, LLC (New Roc), the developer of a New Rochelle luxury high-rise complex known as "Trump Plaza" (Trump), seeks to enjoin United Water New Rochelle, Inc (UWNR) from terminating water service to the complex. The PSC has moved to intervene in this action and to request a primary jurisdiction referral to the Commission.

This matter initially came to the Commission in 2007 as a petition by UWNR for a declaratory ruling that New Roc must pay a contribution in aid of construction (CIAC) for offsite water system improvements needed to accommodate service to Trump. UNWR's petition was resolved by a March 26, 2008 Commission order approving a Joint Proposal, under which New Roc was to pay a CIAC of approximately $500,000 within ten days of the issuance of the order. UNWR had already completed the improvements; however, New Roc has not yet paid the CIAC.

On September 2, 2008, Trump complained to the Office of Consumer Services (OCS) that the water provided by UWNR was "aesthetically undesirable." Trump's complaint asserted that New Roc was withholding the CIAC payment because of poor water quality, and that UWNR was threatening to terminate water service for nonpayment of the CIAC. New Roc then commenced this action on the following day.

On September 25, 2008, the PSC filed a motion for a primary jurisdiction referral, because enforcement of the Joint Proposal raises regulatory and policy issues. Therefore, the Commission, rather than the court, should determine the proper means to enforce the Joint Proposal.

By Order entered November 7, 2008, Supreme Court, Westchester County (Lefkowitz, J.) granted the PSC's motion to intervene and for a primary jurisdiction referral. At issue was whether the Commission should hear disputes involving a Commission-adopted joint proposal and enforce that proposal by service termination.

In March 2008, the Commission adopted a joint proposal settling a dispute (Case 07-W-0774) over a contribution in aid of construction (CIAC) to be paid to United Water New Rochelle by the developer of a luxury condominium project (New Roc), for upgrades in water service necessary for the project (Trump Towers). Trump Towers management complained to OCS that the water quality was unacceptable. After United Water threatened termination of service for nonpayment of the CIAC, New Roc commenced this action. New Roc sought to

prevent termination based on the pendency of Trump Towers' complaint and assertions that termination was precluded by Commission regulations.

OCS dismissed Trump Towers' complaint, and Trump Towers did not pursue it by seeking an informal hearing. United Water petitioned the Commission for enforcement of the joint proposal. Trump Towers and New Roc opposed that petition.

The PSC argued that: 1) the Commission should construe and enforce the Joint Proposal; and 2) the dispute potentially involves application of Commission rules to complex facts. In a one-paragraph order, the Court referred the matter to the Commission "to first permit [it] to render an expert's opinion on the issues raised which are clearly within its jurisdiction."

New Roc did not appeal. On March 23, 2009, the Commission issued a declaratory ruling in Case 07-W-0774 stating that United Water could terminate New Roc for failure to pay the CIAC. The Commission declared that United Water must follow the procedures of the multiple dwelling rules and allow occupants to pay "current charges" to avoid termination. It appears that United Water and New Roc have reached a settlement following the PSC decision.

(68) New Rochelle Telephone Corp. (E.D.N.Y. Bankr. Petition No. 8:08-bk-75221)

The debtor in this Chapter 11 bankruptcy proceeding, New Rochelle Telephone Corp. (New Rochelle) is a competitive local exchange carrier. It retails local exchange services that it acquires from Verizon at wholesale through a contract for services formerly known as "UNE-P." New Rochelle filed its petition after Verizon threatened to terminate wholesale services, due to alleged arrears to Verizon in excess of $2 million. Prior to petitioning for bankruptcy relief, New Rochelle had unsuccessfully attempted to obtain an order from Supreme Court, Suffolk County, enjoining Verizon from terminating service, based upon claims that New Rochelle's contract with Verizon entitled New Rochelle to arbitration of the dispute.

On November 10, 2008, the US Bankruptcy Court for the Eastern District of New York declined to convert New Rochelle's bankruptcy proceeding from Chapter 11 (reorganization) to Chapter 7 (liquidation), on the following three conditions:

1. New Rochelle had to pay Verizon a $75,000 cash deposit by Thursday, November 13 at 5:00 p.m., and another $75,000 cash deposit by Thursday, November 20 at 5:00 p.m.
2. New Rochelle must pay all post-petition obligations in full and on time.
3. New Rochelle had to present to the court a bona-fide purchase offer by December 5, 2008 to effectuate its "exit strategy" of finding a buyer.

New Rochelle made the required cash deposits. Rather than provide the court with the required bona fide purchase offer by close of business December 5, 2008, it filed a motion to seal. It claimed that it had four offers, but confidentiality clauses precluded it from revealing the identities of the offerors or their offering prices. Verizon opposed the motion on the grounds that NRTC merely had four "expressions of interest," not firm offers, and concealment of the buyer information prevents Verizon from determining whether NRTC had complied with the Court's condition.

The court denied NRTC's motion, and NRTC subsequently filed four purchase offers on December 16, 2008. The PSC did not file comments on those offers, finding all the offerors satisfactory.

On December 22, the court held that the offers were not sufficiently firm or detailed, and gave NRTC until January 23 to move to sell its assets. It also required NRTC to pay another $50,000 cash deposit to Verizon by January 6.

The Court granted the PSC's request to authorize the bankruptcy trustee to operate the business for 60 days after any liquidation order in order to comply with the PSC's customer notice requirements, as well as those of New Jersey, Pennsylvania and the FCC. The Court's 60-day authorization will afford sufficient time to notify customers if liquidation does occur. The PSC will be in contact with the trustee to ensure that customers are provided notice.

The United States Bankruptcy Court for the Eastern District of New York determined that New Rochelle would not be able to find a buyer. It thereupon ordered liquidation of the debtor on January 9, 2009. Customers were given 30 days notice of the liquidation prior to termination of service.

(69) New York Regional Interconnect v. Pataki, et al. (Northern Dist. of NY Docket No. 07-CV-00122)

By complaint filed February 1, 2007, Plaintiff New York Regional Interconnect ("NYRI") challenges a 2006 amendment to the Transportation Corporations Law ("TCL"), which precludes use of eminent domain authority by a "merchant transmission line" which meets certain criteria. NYRI has applied to the NYPSC for an Article VII Certificate, which, if granted, would provide it condemnation authority under state law. It claims that the amendment was aimed at it in violation of the Equal Protection and Bill of Attainder Clauses of the United States Constitution. NYRI also claims that the amendment attempts to punish it for filing an

application for a transmission line in violation of the Due Process, Commerce and Supremacy Clauses of the U.S. Constitution. Finally, NYRI seeks a declaration that it is not subject to the statute.

Among the defendants were the current and former governors, members of the Legislature and the Commissioners. Inasmuch as the PSC's responsibility under Public Service Law §12 is limited to defending the Public Service Law, the PSC agreed to have the Attorney General (AG) represent the Commissioners in this matter. The AG answered on April 26, 2007. Negotiations to remove the Commissioners and other parties as defendants failed and the AG moved to dismiss the case on the pleadings. It claimed, *inter alia*, that the matter is not justiciable until the Commission decides the Article VII proceeding, since NYRI cannot condemn until it has an Article VII certificate.

Plaintiff NYRI had applied to the Commission for an Article VII Certificate. Under state law, Eminent Domain Procedure Law §206(B), the grant of a certificate would allow NYRI to commence eminent domain proceedings, unless the TCL Amendment applies to it. NYRI had claimed that the amendment was aimed at it in violation of the Equal Protection and Bill of Attainder Clauses of the United States Constitution. It also claimed that the amendment attempted to punish it for filing an application for a certificate for a transmission line, in violation of the Due Process, Commerce, and Supremacy Clauses of the U.S. Constitution. Finally, NYRI sought a declaration that it is not subject to the statute.

By a bench decision issued on October 26, 2007, the U.S. District Court for the Northern District of New York (McAvoy, J.) granted the New York State Attorney General's Motion for Judgment on the Pleadings and dismissed a challenge to a 2006 amendment to the Transportation Corporations Law (TCL). That amendment (TCL 11[7]) precludes use of eminent domain authority by a "merchant transmission line" which meets certain criteria.

(70) NYS Electric & Gas Corporation and Rochester Gas & Electric Corp. v. NYS Public Service Commission, (Albany County Index No. 1535-06)

By Notice of Petition and Petition filed and served March 2, 2006, New York State Electric and Gas Corporation (NYSEG) and Rochester Gas & Electric Corporation (RG&E) challenge the Commission's Order with respect to ESCO referral programs, which required NYSEG and RG&E to begin a collaborative approach on development of such a program.

Petitioners contend that the Order exceeds the Commission's statutory authority and lacks an evidentiary foundation, thus seeking a permanent injunction against its enforcement.
The Petition was returnable on May 5, 2006, but the parties agreed to adjourn the matter to July 14, 2006. The PSC's Answer, Memorandum of Law (including objections in point of law), and Record were filed and served on June 16, 2006. Petitioners' Reply and Response to Objections in Point of Law was served June 30, 2006. The PSC's subsequent Reply in Support of their objections in point of law was due July 10, 2006. The matter was argued on August 15, 2006. By decision issued December 21, 2006, Albany County Supreme Court dismissed a challenge to the Commission's December 22, 2005 adoption of guidelines for referral programs for Energy Service Companies ("ESCOs"). Petitioners claimed that the Commission lacked authority to compel utilities to adopt programs allegedly designed to force customers away from utility commodity supply and that there was no evidence supporting adoption of such programs.

The Court concluded (at 6-7) that "the PSC's promulgation of ESCO referral programs fulfills the statutory mandate to foster the cooperative performance of long-range programs for the performance of public service responsibilities with economy, efficiency and care for the public safety by promoting competition in an industry historically dominated by monopolies." Supreme Court also decided that the Commission's adoption of ESCO referral programs was not arbitrary and capricious, reasoning that the Commission was leveling the playing field for ESCOs, while providing for recovery of utility costs, and that the degree of competition serving the public interest was a matter for the Commission to decide.

(71) NYS Electric & Gas Corporation v. Flynn and NYPSC (Albany County Index No. 1695-06)

By Notice of Verified Petition and Complaint filed and served March 9, 2006, New York State Electric and Gas Corporation (NYSEG) challenges the Chairman's decision not to recuse himself from hearing the pending NYSEG rate case. Petitioner claims that the Chairman's statements and actions with respect to retail competition demonstrate bias and seeks to pursue an Article 78 proceeding and a declaratory judgment action to compel recusal.

On April 21, 2006, the PSC served a Motion to Dismiss stating 1) that NYSEG's Article 78 proceeding is unripe inasmuch as the Chairman's decision can only be challenged at the end of the NYSEG rate case; 2) NYSEG fails to state a cause of action; and 3) NYSEG is not entitled to either a preliminary or a permanent injunction.

On May 5, 2006, Petitioners served a Brief in Opposition to the PSC's Motion to Dismiss. On May 17, 2006, the PSC served its Reply Brief in Support of its Motion to Dismiss. The motion was returnable on May 26, 2006 and argued in chambers on June 19, 2006.

By decision dated July 24, 2006, Albany County Supreme Court (Sackett, J.) dismissed the case. The Court granted the PSC's motion insofar as it sought dismissal of the Article 78 proceeding as premature because the Commission had not yet issued decisions in the proceedings in which recusal was sought, and therefore the Chairman's alleged bias had not yet been reflected in a "final and binding" decision that could be challenged in an Article 78 proceeding. The Court also concluded that NYSEG could not maintain a declaratory judgment action because it did not challenge the constitutionality of a statute or regulation. It further denied NYSEG a preliminary injunction because NYSEG had not shown a likelihood of success on the merits of the recusal claim. The Court did not reach the PSC's second basis for dismissal, which was that NYSEG was incorrectly attempting to apply the standard for recusal in an adjudicatory proceeding to a rulemaking involving legislative facts.

(72) NYS PSC v. Federal Energy Regulatory Commission (D.C. Circuit Docket No. 08-1366, consolidated with Docket Nos. 08-1368, 08-1369, 08-1370, 08-1372)

By Petition dated November 20, 2008 and docketed November 25, 2008, the Commission challenged a Federal Energy Regulatory Commission ("FERC") decision not to adopt a proposal to allow certain state required instances of self-supply (such as the purchases of renewables, or demand response) to meet installed capacity requirements. The PSC has, however, sought to stay briefing in this matter, which FERC will not oppose, until after the PSC sees the DC Circuit decision in *Connecticut Department of Public Utility Control v. FERC* (D.C. Circuit Docket Nos. 07-1375, 07-1460, and 08-1175).

FERC has also moved for a stay of briefing because of the pendency of petitions for rehearing of its mitigation order (including the PSC's petition). By Order dated March 6, 2009, the Court granted the motions to hold the case in abeyance. Subsequent FERC motions have sought continuation of the abeyance.

On May 20, 2010, FERC issued an order granting, in part, requests for clarification and rehearing in certain of the underlying dockets. On June 10, 2010, FERC filed an unopposed motion to hold these cases in abeyance for an additional three months, to allow for identification and consolidation of any additional petitions for review that may be filed. On June 23, 2010, that

motion was granted by the Court, and the parties were directed to file new motions to govern future proceedings by August 23, 2010.

Subsequently, in response to a petition newly-filed by NRG challenging FERC's May 20, 2010 order and the earlier ICAP orders, FERC moved to dismiss or consolidate with the earlier-filed cases and hold the NRG petition in abeyance. A decision on that motion is still pending.

The New York Independent System Operator (NYISO) has addressed the alleged power of buyers in the New York City market to suppress prices by providing for mitigation of such pricing power. The NYISO rules provide for a price floor of 75% of the cost of new entry. Further, the NYISO provides that uneconomic new capacity will not count against NYISO capacity requirements. This policy has the effect of potentially penalizing state resources, such as demand response or renewables, that are below the price floor and would otherwise count toward capacity requirements.

The PSC petitioned FERC for rehearing on this point, claiming, *inter alia*, that FERC's acceptance of the NYISO proposal violates state jurisdiction over adequacy of service. FERC rejected the PSC's petition for rehearing, but held out the possibility of an exemption.

The PSC challenged the FERC decision on the grounds of infringement of state jurisdiction over adequacy, and the irrationality of making load serving entities pay twice for capacity. *CDPUC v. FERC* will affect the PSC's challenge insofar as it asserts that state authority over adequacy precludes FERC from setting a reserve margin.

The PSC's petition was first filed and became the lead docket for consolidated challenges to the FERC order, including challenges by Consolidated Edison Company of New York and the New York Power Authority, which, like the Commission are concerned about buyer-side mitigation. The FERC decision was also challenged by Astoria Generating and TC Ravenswood LLC, which are suppliers in the NYISO market. The PSC has intervened in support of FERC's decision against these sellers.

The PSC sought to petition for review as "People of the State of New York" and the "Public Service Commission of the State of New York." FERC objected to the party status of "People et al.," because that entity did not seek rehearing in what may be an apparent confusion with the State of New York. The PSC did not object to FERC's motion to dismiss People et al. on condition that FERC acknowledge NYPSC standing. The court granted FERC's motion to dismiss *People at al.* in its March 6, 2009 Order.

(73) Niagara Mohawk v. Federal Energy Regulatory Commission, et al (D.C. Circuit Docket Nos. 04-1227, 04-1229, 04-1231, 05-1033, 05-1043, 05-1044, 05-1046 and 05-1047 [Consolidated])

Niagara Mohawk, Central Hudson and the Public Service Commission petitioned for review of four FERC decisions in which the Federal Energy Regulatory Commission ("FERC") has (1) asserted jurisdiction over wholesale generators' end-use station power services; and (2) approved a NYISO tariff that allows generators to apply only FERC-jurisdictional delivery rates to end-use delivery services (such rates do not include a retail stranded cost component or other retail costs incurred by T&D companies on behalf of wholesale generators). The PSC was denied Intervenor status out-of-time in Case 04-1227, but is a Petitioner in Case 05-1043, and an Intervenor in Case 05-1044. (Its petition for Intervenor status in Case 05-1144 is pending.) On September 22, 2005, the PSC and other petitioners submitted their initial briefs. On January 17, 2006, the PS and other petitioners submitted reply briefs. Final briefs were filed February 7, 2006. On June 23, 2006, a three-judge panel of the District of Columbia Circuit Court of Appeals dismissed petitions from utilities and the PSC challenging FERC's decision to use monthly "netting" which allows wholesale generators to avoid paying retail charges for electricity provided for "station use" (operation of the generators' facilities). FERC adopted netting of station output against station use over a month to determine whether state-jurisdictional retail transactions occurred. Such averaging over a one-month period effectively defeated state jurisdiction over most such transactions by eliminating periods when generators had no output, and thereby precluded imposition of stranded costs on the generators.

The Court recognized (slip opinion at 10-11) that the NYPSC's "statutory argument is not insubstantial," finding that FERC had not explained why a retail sale is not occurring when a generator takes station power from the grid. It concluded, however (slip opinion at 11-12), that Petitioners' willingness to accept hourly netting was, in fact, a concession that FERC could impose monthly netting under the Federal Power Act. The Court also concluded that FERC could exempt wholesale generators from the FERC Order 888 provision that stranded costs could be imposed on commercial and industrial users.

On August 4, 2006, the PSC filed a Petition for Panel Rehearing and Rehearing *En Banc*, as did Niagara Mohawk and an Intervenor in Support. The D.C. Circuit denied the PSC's Petition for Rehearing *En Banc* on October 23, 2006.

The PSC filed a petition for a writ of certiorari with the U.S. Supreme Court. NARUC, the State of California and 14 other states filed in support of the petition as an *amicus curiae*. Most recently, FERC, through the Solicitor General of the United States, and a group of merchant generators have opposed the petition for certiorari. The United States Supreme Court denied the NYPSC's petition for certiorari on April 30, 2007.

(74) Opportunities Unlimited of Niagara et al. v. NYPSC and NYSEG (Albany County Index No. 5619-05)

By Notice of Petition and Petition served on September 15, 2005, Opportunities Unlimited of Niagara and Warren Washington ARC challenge a Commission decision that they should not be rebilled on residential time-of-use rates for 1994-98, before their election of residential time-of-use rates in 1998. Petitioners observe that the Commission found that NYSEG failed to follow a 1993 Commission order requiring that they be given notice of the availability of residential time-of-use rates pursuant to amendments to Section 76. They allege that the Commission should have relied on usage after their 1998 election and arbitrarily decided that there was insufficient evidence of what their bills would have been between 1994 and 1998 had they elected time-of-use rates, or even if they would have so elected.

By Decision and Judgment dated May 19, 2006, entered on May 23, 2006, Supreme Court Albany County (Teresi, J.) denied all claims stated in the Article 78 Petition against the Commission and NYSEG and dismissed the proceeding in its entirety.

Petitioners, not-for-profit entities licensed to operate Supervised Living Facilities (SLFs), brought a consumer complaint in 1998 against NYSEG claiming they were entitled to a refund from 1993, the date PSL §76 was amended to require SLFs to be charged residential gas and electric rates. In 1994, entities with usage similar to Petitioners were required to be charged at a mandatory Time-of-Use (TOU) residential rate. Petitioners claimed that they never received notice from NYSEG in 1993 that they were entitled to switch to the residential rate that would have been changed to a mandatory TOU rate in 1994, and therefore, they were entitled to a refund from the date such notice should have been given. NYSEG prospectively put the Petitioners on the residential TOU in 1998, but refused to give a refund.

In 2003, the Commission determined that NYSEG failed to give proper notice and ordered a refund from 1993 to 1994 for the difference between the conventional residential rate and the non-residential rate Petitioners were charged. However, following Commission refund

policy, and given the lack of contemporaneous TOU billing information and the controversial nature of TOU rates, the Commission did not award a refund from 1994 to 1998 because it could not reasonably determine if Petitioners would have chosen to be on the mandatory TOU residential rate in 1994, when they could have so elected, and it could not reasonably calculate a refund. Petitioners sought rehearing and introduced their TOU meter data from 1998 to 2003 and claimed that their usage pattern was the same from 1994 to 1998, and therefore, an estimated refund amount could be determined. The Commission denied rehearing in May 2005, again stating the above deficiencies.

Petitioners brought an Article 78 petition claiming the Commission's determinations were arbitrary and capricious and requested a refund from 1994 to 1998. By the above-mentioned decision, Supreme Court deferred to the expertise of the Commission concerning billing and found that the Commission had a rational basis not to award a refund from 1994 to 1998, given the lack of contemporaneous meter data and the controversial nature of TOU billing. Further, the Court determined that the Commission distinguished this case from Commission precedent and that the Commission properly found that NYSEG had correctly charged the Petitioners the non-residential conventional rate from 1994 to 1998.

The Petitioners had until June 29, 2006 to file a Notice of Appeal. The PSC has not received an appeal.

(75) People of the State of New York and NYS Public Service Commission v. Federal Energy Regulatory Comm'n, (Second Cir. Docket No. 07-2983-ag); Piedmont Environmental Council, et al. v. Federal Energy Regulatory Comm'n (Fourth Cir. Docket No. 07-1651)

The NYPSC petitioned the United States Court of Appeals for the Second Circuit for review of the Federal Energy Regulatory Commission ("FERC") Orders concluding that FERC may issue a construction permit for an electric power transmission line within a National Interest Electric Transmission Corridor (NIETC) after a State has lawfully denied a permit for the same line within one year of an application. *Order Denying Rehearing*, entered May 17, 2007, 119 FERC ¶61,154; *Order No. 689*, entered June 16, 2006, 117 FERC ¶61,202, both captioned, *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Docket No. RM 06-12.

A similar challenge was filed in the Fourth Circuit by an opponent of the Dominion electric transmission line on July 10, 2007, two days before the PSC's challenge was filed on

July 12, 2007. Two other challenges were filed in the District of Columbia Circuit, by the opponents of the New York Regional Interconnect ("NYRI") line (*see* NY Interconnection v. Pataki, N.D.N.Y. Docket No. 07-CV-00122), and the Minnesota Public Utilities Commission. The PSC's challenge and the two pending challenges in the D.C. Circuit were consolidated in the Fourth Circuit pursuant to 28 U.S.C. §1112(a)(1), inasmuch as the Fourth Circuit challenge was the first filed.

The Court permitted the opponents of the NYRI line to file a separate brief from the other petitioners. Petitioners' briefs were filed November 26, 2007. Responding briefs were filed January 31, 2008, and reply briefs were filed February 20, 2008.

The PSC's Joint Brief with Piedmont and Minnesota argued that FERC's interpretation of 16 U.S.C. §824p(b)(1)(C)(i) is contrary to the 1) plain language of that subsection, insofar as FERC has effectively read the emphasized language out of the statutory provision that its permitting authority is triggered if a State has "withheld approval <u>for more than 1 year</u> after the filing of an application . . ."; and 2) structure of 16 U.S.C. §824p(b)(1), which creates specific conditions on FERC's ability to grant permits for siting of electric transmission lines. The PSC also argued that (1) the decision was contrary to a tenet of construction that legislative intent to preempt should not be inferred; and (2) the legislative history did not support FERC. The PSC's Joint Reply Brief argued that FERC is not entitled to judicial deference; that its interpretation is contrary to the plain statutory language, as well as applicable rules of statutory construction; and that FERC's interpretation is not reasonable.

The case was argued on September 24, 2008. By decision issued February 18, 2009, the United States Court of Appeals for the Fourth Circuit reversed a FERC decision on the scope of its "backstop" authority for siting of electric transmission lines. Federal Power Act (FPA) §216 permits FERC to exercise its authority to certify a transmission line if a state has "withheld approval for more than one year . . .". FPA §216(b)(1)(C)(i). FERC decided that language meant that it could certify a line if a state denied approval within one year.

The Fourth Circuit rejected FERC's construction and decided FERC could not assert jurisdiction in such a situation. It analyzed "withheld" as being different than "denied" and decided reading "withheld" to mean "denied" would make the statutory phrase nonsensical. It also observed that Congress carefully specified five circumstances where FERC could act to certify a line. It thus found a measured role for FERC, cutting against a broad construction of FPA §216(b)(1)(C)(i).

The Court granted petitions for review from the Piedmont Environmental Council, the Minnesota PUC, the NYPSC and the Communities Against Regional Interconnect (CARI). CARI also prevailed insofar as it challenged FERC's decision not to consult with the Council on Environmental Quality in promulgating regulations implementing its "backstop" siting authority. The Court did not, however, accept CARI's argument that FERC had to do an environmental review before it issued the regulations.

Judge Traxler dissented on the construction of FPA §216(b)(1)(C)(i). The Fourth Circuit remanded the case to FERC for further proceedings consistent with the Court's decision.

The United States Court of Appeals for the Fourth Circuit has denied petitions for rehearing of its decision that a state denial of a transmission line application within one year is not reviewable by FERC. The Order denied rehearing on grounds that no member of the Court has asked that the full Court be polled.

Intervenors supporting FERC (EEI *et al.*) petitioned for certiorari on September 17, 2009. The brief opposing certiorari of Piedmont, the NYPSC and the Minnesota PUC was filed October 21, 2009. CARI and FERC obtained extensions of time to respond. CARI responded on November 19, 2009 and adopted the brief of Piedmont *et al.*

FERC replied on December 14, 2009. It agreed with EEI that the Fourth Circuit was wrong on the merits. FERC argued, however, that certiorari should not be granted because other Circuits should first speak to the construction of FPA §216(b)(1)(c)(i) and there were substantial questions as to whether Piedmont *et al.* had standing and whether the cases were ripe.

The United States Supreme Court denied a petition for certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit concluding that a state denial of a transmission line application within one year is not reviewable by FERC. The Court did so in a decision list issued January 19, 2010, after FERC opposed any grant of certiorari. (Case 09-343 *Edison Electric Inst., et al. v. Piedmont Environmental, et al.*).

(76) People of the State of NY and NYS Public Service Commission v. Federal Energy Regulatory Commission (D.C. Circuit Docket No. 05-1033)

By Petition filed February 5, 2004, the Commission challenged the Federal Energy Regulatory Commission's ("FERC's") decision that Niagara Mohawk could not charge standby rates to the Nine Mile Plant. It is expected that this challenge will be consolidated with other

challenges to FERC's station power decisions (see Niagara Mohawk v. FERC, D.C. Circuit Nos. 04-1227, 04-1229 and 04-1231).

(77) Picciuca v. Con Edison & Department of Public Service, (Queens County Index No. 22745-2009; Albany County Index No. 7723-09)

By Order to Show Cause dated August 25, 2009, and Verified Petition dated August 17, 2009, both served September 1, 2009, and returnable in Queens County on September 9, 2009, Petitioner Joseph Picciuca challenges as excessive a $4,000 assessment for a shared meter condition at his rental property in Queens. Mr. Picciuca alleges the Commission erroneously dismissed his complaint as untimely (because he did not complain within 45 days of the utility's notice of a shared meter). According to Mr. Picciuca, he did not receive Con Edison's notice of the 45-day deadline for filing a complaint with the Commission because Con Edison erroneously mailed the notice to his rental property, and it was not forwarded to him by his tenant. The Order to Show Cause provides for a stay of service termination at the rental property pending a hearing.

The PSC served a demand for change of venue to Albany County on Petitioner's counsel. The matter was adjourned, by stipulation of the parties, as modified by the Court, until October 21, 2009, conditioned on a continued stay of service termination. Petitioner later agreed to move the matter to Albany County, but Con Edison objected because of its concerns about continuation of the stay. The PSC accordingly moved for change of venue in Albany County.

By Decision and Order dated November 24, 2009, Albany County Supreme Court (Platkin J.) required a change of venue in this matter to Albany County. The Court found that the law is clear that venue in a proceeding challenging a Commission decision belonged in Albany County. The Court granted a stay of termination for 20 days following service with notice of entry of the decision. Transfer of the case to Albany County is pending.

(78) Pinkney v. Con Ed, NYCHA, et al. (Bronx County Index No. 1255-06)

Ms. Pinkney, a customer of Consolidated Edison Company of New York, seeks to add the Commission to a court dispute with Con Edison, which is apparently about higher charges as a result of a shift to receiving energy from an ESCO. She accordingly sent Office of General Counsel a hand-written *pro se* motion seeking to add the Commission as a party, which the NYPSC opposed.

By decision dated and entered November 7, 2007, Bronx County Supreme Court (Saks, J.) denied Plaintiff's request for a preliminary injunction against disconnection of her electric service by Consolidated Edison Company of New York.

The Court's November 7, 2007 decision stated that Ms. Pinkney's motion to vacate a prior dismissal remained to be decided, but Bronx County then denied Ms. Pinkney's motions to set aside the default and to make the PSC a party, on December 4, 2007. By decision dated February 29, 2008, Bronx County Supreme Court (Saks, J.) denied Plaintiff's motion for reargument of that Court's prior denial of a preliminary injunction against disconnection of her electric service by Consolidated Edison Company of New York. The Court rejected Ms. Pinkney's claim that Con Edison is discriminating by charging her for electricity when other New York City Housing Authority tenants are not. It referred Ms. Pinkney to her administrative remedies with the Commission, insofar as she alleged Con Edison had not justified its billings.

To date the First Department has not docketed Ms. Pinkney's appeals of Bronx County's November 7, 2007 order denying a preliminary injunction, or of the February 28, 2008 order denying her motion to reargue.

On February 24, 2009, the Appellate Division, First Department dismissed Ms. Pinkney's appeal for failure to timely perfect. Ms. Pinkney was appealing a decision dated February 29, 2007, in which Supreme Court, Bronx County (Saks, J.) denied her motion for reargument of that Court's prior denial of a preliminary injunction against disconnection of her electric service by Consolidated Edison Company of New York (Con Edison). The Court rejected Ms. Pinkney's claim that Con Edison discriminated against her by charging her for electricity when it did not charge other New York City Housing Authority tenants. The Court referred Ms. Pinkney to her administrative remedies with the Commission, insofar as she alleged Con Edison had not justified its billings.

Ms. Pinkney has subsequently attempted to revive her claims by pleadings in the Southern District of New York. The PSC has not responded to her filings, which it deems nugatory.

(79) Porter v. Public Service Commission and Verizon New York (New York County Index No. 101591-04

By Notice of Petition and Petition served on the Attorney General on February 13, 2004 and Notice of Amended Petition and Petition served on the PSC on February 23, 2004, Petitioner

has attempted to challenge a decision by Department of Public Service intake staff on his consumer complaint. The PSC has agreed to accept service and that the matter should be brought in Albany County. Per the 3rd Qtr 2008 PSC Report, this matter is adjourned indefinitely.

(80) Potenza v. Molinari, et. al. (Eastern District of New York (Index No. CV-03-5534 (CBA))

Plaintiff John Potenza has sued the Staten Island Borough President, the administrator of the Staten Island cable public access channels, a Staten Island cable provider and the Chairman, in the Eastern District of New York. Plaintiff complains he has been denied his right to use the public access channel in violation of the Federal Constitution. His cause of action against the Commission alleges state law claims (violation of Commission "first-come, first-served" regulations). By order dated June 8, 2006, District Court Judge Amon approved voluntary dismissal of that cause of action. On June 9, 2006, Judge Amon approved voluntary dismissal of the cross-claims filed by Staten Island Community Television, one of the Defendants on the "first-come, first-served" cause of action, against the other Defendants.

These notices of dismissal follow motions to dismiss filed by the "first-come, first-served" Defendants, including the Commission.

On March 31, 2006, the District Court denied motions to dismiss the federal claims and granted leave to amend these claims. A schedule for motions to dismiss the "first-come, first-served" causes of action was adopted at a pre-motion conference on April 26, 2006. Those motions went forward after Plaintiff rejected a suggestion that he withdraw the state "first-come, first-served" causes of action. By voluntary dismissal, Plaintiff then withdrew all claims against the PSC with prejudice. Additionally, cross-claims by Staten Island Cable Television, Inc. were withdrawn without prejudice.

(81) Powerline Coalition, et al. v. NYPSC and Central Hudson

A Coalition of parties opposed to the upgrading of an existing Central Hudson transmission line have challenged the Commission decision allowing the upgrading. The Commission moved to dismiss the petition as untimely. The Commission's motion to dismiss was denied, with leave to renew. Petitioner's motion for a stay of construction was also denied. The case will be argued in the Appellate Division.

(82) Raitport, Eli v. Con Edison and Maureen O. Helmer (Kings County Index No. 32562-02; Albany County Index No. 6145-02)

By Order to Show Cause dated August 19, 2002 and Complaint dated August 12, 2002, Mr. Eli Raitport has commenced a civil action against the Commission and Con Edison in Kings County. He apparently alleges that Con Edison is harassing him by threatening to disconnect service, though he or the Department of Social Services pays his bills. Mr. Raitport also alleges Maureen Helmer has breached her duty to protect him from Con Edison and attaches letters to various Commission personnel. He seeks a temporary restraining order against Con Edison and punitive damages of $5,000 against both defendants.

The NYPSC moved in Albany County to change venue to Albany. By decision dated November 27, 2002, Albany County Supreme Court (Kavanaugh, J.) granted the Chairman's motion to change venue in the above-captioned matter from Kings County and to dismiss. Plaintiff sought to preclude termination of his electric service and to get punitive damages for an alleged failure to properly investigate his complaint against Con Edison. The Court concluded that this matter should have been brought as an Article 78 proceeding and that it should be transferred to Albany County. The Court dismissed the matter inasmuch as Petitioner attempted to obtain punitive damages against the Chairman and had failed to exhaust his administrative remedies. Mr. Raitport appealed to the Second Department following Kings County's corresponding dismissal.

By decision and order dated August 18, 2003, the Second Department dismissed Petitioner Raitport's appeal of a Kings County decision as academic because of an Albany County decision dismissing Mr. Raitport's Article 78 proceeding for failure to state a cause of action and exhaust administrative remedies. The PSC had moved that the matter be transferred to the Third Department because Mr. Raitport was, in effect, seeking to appeal the Albany County decision. Mr. Raitport's motion for reargument was denied.

(83) Reagans Mill Sewer Company, Inc. v. Town Board of Town of Dover (23 A.D.3d 563, ___ N.Y.S.2d ___, (2d Dep't Nov. 21, 2005)

On November 21, 2005, the Second Department affirmed the sewer rates set by the Town of Dover ("Dover") for Reagans Mill Sewer Company, Inc. ("RM Sewer"). Towns set private sewage-works corporation's rates pursuant to Transportation Corporations Law § 121. RM

Sewer had requested a 106% increase from the Town of Dover. The Town approved a 1.24% increase.

During the 15 year period that its affiliates developed the service area, RM Sewer did not request a rate increase nor inform prospective purchasers that the sewer rates that were being charged were substantially less than its affiliate utility would request when the subdivision was completed. On June 12, 2003, after construction and sales in the subdivision were effectively finished, RM Sewer requested the 106% increase that is the subject of these proceedings.

On September 9, 2003, Dover granted rates to RM Sewer based upon an 11% pre-tax rate of return. Dover found RM Sewer's consultant's rate of return arguments lacking and improperly based. Dover's rate of return was based upon, then recent, rate of return allowances granted by the New York State Public Service Commission ("PSC") to small water utilities.

Dover, also, refused to recognize additions to rate base that were not reflected in the utility's initial rates. Dover rejected most of the additions to rate base finding that (1) the alleged "true-up" of plant in service had, prior to the rate application, been treated on the utility's books as a contributed property; (2) the utility had not demonstrated that it had invested in the additions, that the investment would have been prudent, and that the alleged investment was consistent with the utility's prior books and records, and (3) the proposed increase in rate base was inconsistent with accepted rate making policy; *i.e.*, the PSC's Initial Rate Policy.

RM Sewer filed an Article 78 proceeding appealing Dover's decision claiming that the decision was arbitrary and capricious and that the company was not afforded a fair hearing. On September 27, 2004, the Honorable Lester B. Adler, A.J.S.C., issued a Decision, Order & Judgment that affirmed Dover's decision by dismissing the Article 78 Petition. The Supreme Court found that the town board's determination was rationally based, provided an adequate factual basis for its conclusions, did not deny RM Sewer fair, reasonable, and adequate rates, and did not deny a reasonable rate of return on its investment. The Court also found that the utility was given ample opportunity to submit support for its rate request and to comment and criticize the analysis and recommendations and rejected RM Sewer's claims that the rate was set in violation of due process and in a discriminatory manner.

RM Sewer appealed to the Appellate Division, Second Department. The Appellate Division found that the rates set by Dover were rational and were not arbitrary and capricious; that Dover's decision provided for "fair, reasonable and adequate rates"; and that "considered in its

entirety, the determination [of Dover] is 'just and reasonable' because it ensures the petitioner's financial integrity and ability to attract capital." 23 A.D.3d at ___, ___ N.Y.S.2d at ___ (citations omitted).

(84) Sagamor Sewer Corp. v. Town of East Fishkill (Westchester County Index No. 5474/08)

Sagamor Sewer Corporation ("Sagamor") moved pursuant to Article 78 for a judgment annulling the determination of the Town of East Fishkill that denied Sagamor's petition requesting an increase in the rates. On December 23, 2008, Judge Bellantoni, A.J.S.C., Supreme Court, Westchester County, set aside the determination of the Town and approved the rates as filed.

The Transportation Corporations Law § 121 directs that a town must agree to "fair, reasonable and adequate rates" for sewer service provided by a sewage-works corporation serving within its boundaries. The statute provides no other guidance for what must be included or excluded for the rates that will be charged. Judge Bellantoni surveyed the relevant case law and explained that rates must include an allowance for the expenses incurred plus a profit on investment and explained how reasonable profits may be determined for private utilities.

This is the second case in 2008 that interpreted TCL § 121. The first, also reported here, was decided in September in the Appellate Division, Second Department. In *Heritage Hills Sewage Works Corp. v. Town Bd. of Town of Somers*, 54 A.D.3d 673, 863 N.Y.S.2d 255, 256 - 257 (2d Dep't, 2008), the Appellate Division upheld the rates set by the Town of Somers.

(85) Scott, et al. v. Bell Atlantic Corp. and Bell Atlantic Internet Solutions (Sup. Ct., New York County)

On February 11, 2000, a class action complaint was filed against Bell Atlantic Corporation ("BAC") and Bell Atlantic Internet Solutions ("BAIS"). The six named plaintiffs purport to bring this action on behalf of a class of all persons who purchased DSL services from defendants but failed to receive the high-speed, reliable, easy to install and use Internet service that Bell Atlantic promises. The complaint alleges that defendants make false representations in their advertisements and marketing materials. The complaint also alleges that defendants have oversold the service, resulting in bandwidth shortages. Plaintiffs allege violations of the New York deceptive trade practices and false advertising statutes, breach of warranty and breach of contract.

On March 31, 2000, the defendants moved to dismiss the complaint. On October 12, 2000, the motion was denied. On May 10, 2001, the Appellate Division reversed and dismissed the Scott complaint.

On July 2, 2002, the Court of Appeals affirmed the Appellate Division order in Scott to the extent that it held that Section 349 of the General Business Law does not apply extraterritorially. The Court, however, reinstated the Section 349 claims of the plaintiffs who had received service in New York.

Two additional class actions making similar allegations have been consolidated with the Scott case and the consolidated case is proceeding in New York County Supreme Court.

Another purported class action making similar allegations, Forrest v. Verizon Communications Inc., has been filed in the Superior Court for the District of Columbia. On July 27, 2001, the Court dismissed the Forrest case on forum non conveniens grounds. That order was affirmed on August 29, 2002. A class certification motion is pending.

(86) Sts. Cyril & Methodius and St. Raphael Church v. NYPSC and Con Edison (Albany County Index No. 5085-06)

By Notice of Petition and Petition filed August 4, 2006, and served August 7, 2006, Petitioner challenges a Commission decision not to require Con Edison to rebill it at a commercial gas rate. On October 1, 2004, Con Edison's gas tariff was amended to permit religious entities like Petitioner eligible for residential rates under §76 to be served at residential electric rates and commercial gas rates. Previously the gas tariff had required that customers taking residential electric service be served as residential gas customers. Petitioner contends that the Commission decision not to require rebilling for the period before October 1, 2004, allowed Con Edison to discriminate against it because religious entities billed separately for gas and electric service could be on commercial gas rates, while Petitioner was not permitted that option because it was tendered a single bill for gas and electric service.

By Judgment dated January 4, 2007, Supreme Court (McNamara, J.) dismissed the petition in this Article 78 proceeding. Petitioner, a religious organization eligible for residential rates pursuant to PSL 76, claimed that Con Edison's alleged practice of allowing customers to be billed for gas and electric service separately was discriminatory and granted an undue preference in violation of PSC 65(3) and 66(12)(d). Petitioner received electric service at the residential rate and requested that it be billed for gas service at the nonresidential rate.

The Commission decided in Case 01-G-1054 that the gas tariff precluded Petitioners from receiving gas service at the nonresidential rate when electric service was provided at the residential rate. On rehearing, the Commission found that Con Edison's normal practice was to bill customers for both services on a single account and Petitioners' assertion to the contrary was insufficient to establish discriminatory billing practices. Supreme Court agreed, holding that the Commission had a rational basis to maintain that Petitioners' assertions were vague and speculative and that the Commission rationally concluded that Petitioners' assumption that they would be allowed to receive the nonresidential rate if each service was billed separately was not proof of a discriminatory practice.

Petitioner did not appeal.

(87) In re Telergy (N.D.N.Y. Bankruptcy Case Nos. 01-66379 through 01-66388)

The NYPSC has appeared in the Telergy bankruptcy to protect service to customers. By order dated December 14, 2001, the Bankruptcy Court for the Northern District of New York ordered that a Trustee be appointed to liquidate Telergy. The Trustee is to comply with the Commission's "Mass Migration Guidelines" to the extent reasonably practicable, unless it obtains Bankruptcy Court approval otherwise.

Thereafter there followed extensive negotiations and a series of Court dates in which the Trustee expressed concerns he would not have enough cash to operate the system and was having trouble finding a buyer willing to pay enough for the system. An entity having use rights on the Telergy system offered funding, while the Commission argued that continued operation was required to comply with state law.

The Bankruptcy Court approved a sale of the Telergy system at a hearing held March 25, 2002, with closing expected to occur April 10, 2002. In light of its decision to remand for lack of authority, the D.C. Circuit did not reach the other issues in the case. Those issues included the NYPSC's challenge to the Remand Order's directive that Incumbent Local Exchange Carriers seek recovery of shortfalls in revenues from Internet-bound traffic, an interstate service, from intrastate customers.

(88) TransGas Energy Systems, LLC, v. NYS Board on Electric Generation Siting and the Environment, (A.D. 2d Dep't Docket No. 7404-08)

By petition filed in the Second Department on August 12, 2008, TransGas Energy Systems, LLC (TransGas) challenges the Siting Board's ("Board's") July 15, 2008 denial of rehearing of its March 21, 2008 order dismissing TransGas' application to construct an electric generating facility on an eight-acre site on the East River in the Williamsburg section of Brooklyn.

TransGas currently seeks to pursue three causes of action. First, it challenges the Board's determination that it lacks authority to override a denial of consent by the City of New York ("City") to occupy its streets with steam and water lines required to support one of TransGas' proposed facilities. Second, TransGas challenges the Board's determination that it was not statutorily required to hold evidentiary hearings on TransGas' application amendment requesting consideration of a proposed redesign that would place much of the project underground. Finally, TransGas maintains that the Board improperly determined that TransGas' proposed underground oil storage tank conflicts with City zoning and is incompatible with public health, safety and welfare. TransGas dropped another cause of action that the Board impermissibly delayed informing TransGas of its position concerning its lack of authority to override the City's denial of consent to occupy City property.

TransGas did not name New York City as a respondent even though the First Cause of Action bore on the City's claimed property rights. The PSC therefore demanded that the City be joined as a necessary party. This demand generated a variety of procedural developments, *e.g.* 1) TransGas' amendment of its Petition to name the City, albeit without conceding the City was a necessary party; 2) a City Motion to dismiss the proceeding for failure to name it as a necessary party before expiration of the Statute of Limitations; and 3) the PSC's filing of an amended Answer again claiming that the City was a necessary party.

The December 15, 2008 Order required the City and Brooklyn Parties to file answers to the TransGas petition. TransGas objected to the answer of local plant opponents (the "Brooklyn Parties"), insofar as they claimed the Board lost jurisdiction over TransGas' amendment of its application as a result of the expiration of Article X. The Brooklyn Parties did not pursue that argument in briefing, however.

The Appellate Division, Second Department upheld the Siting Board's March 21, 2008 decision, and July 15, 2008 rehearing decision, dismissing TransGas' Article X application to site an electric generation facility in Brooklyn. The Board had dismissed TransGas' application

for failure to obtain the consent of the City to install water and steam pipes in streets and other municipal property. It reasoned that Article X does not empower it to grant such consent over the City's objection. The Second Department agreed that granting of rights to occupy property is not within Article X's regulatory scheme.

In addition, the Second Department denied TransGas' claim that it was entitled to evidentiary hearings on an amendment to its Article X application. The Court held that Article X does not require separate hearings on an amendment, where the Board can make a decision on the record made at hearings on the original application. The Second Department also decided not to dismiss the proceeding for failure to timely name the City as a necessary party. The Court concluded that the purpose of its proceeding was not to adjudicate the City's property rights. TransGas filed a motion for leave to the Court of Appeals.

On January 12, 2010, the Court of Appeals denied the motion of TransGas for leave to appeal a decision of the Appellate Division, Second Department. That motion was opposed by the City, the Brooklyn Parties and the NYPSC.

(89) 212 East 85th Street, et al. v. NYPSC, et al. (3d Dep't, Docket No. 505590; Albany County Index No. 1901-08)

By Notice of Petition and Petition filed and served March 10, 2008, owners of an apartment building in New York City challenge a Commission declination of jurisdiction in Case 07-E-0939 over whether Con Edison can install transformers in the sidewalk outside their building. Petitioners dispute the Commission's conclusion that the New York City Department of Transportation is the permitting entity. They rely on: 1) a New York County decision that allegedly referred this matter to the Commission; and 2) an arbitration by former Commissioner Weiss of a dispute over cost responsibility for the transformer installation, needed for expansion of an adjacent office and theatre building.

By Decision and Order dated August 1, 2008, Supreme Court, Albany County (Cahill, J.) dismissed a challenge to a Commission determination (Case 07-E-0939) in which the Commission stated that it did not have jurisdiction over whether electric transformers could be installed beneath the sidewalk outside of Petitioners' building in New York City to serve the needs of a neighboring expanding business. The Court observed that since the Commission did not have jurisdiction, a hearing was not required.

Supreme Court further concluded that Petitioners were not entitled to notice of an arbitration conducted by then-Commissioner Weiss of a dispute between Consolidated Edison and the neighboring business concerning the installation of, and cost-responsibility for, the transformers. The Court also stated that petitioners need not be served with the arbitration decision because it was not an order of the Commission, and therefore, Public Service Law (PSL) § 23(1) was not applicable.

Finally, because Petitioners did not properly file an application for relief with NYCDOT regarding the installation of the transformers, Supreme Court decided they failed to exhaust administrative remedies and there was no administrative determination for the Court to review. Petitioners filed a notice of appeal. By Memorandum and Order dated March 26, 2009, the Third Department upheld the Commission's determination that it lacked jurisdiction over a dispute concerning the placement of electrical transformers in a New York City sidewalk. Petitioner 212 East 85th Street owns a building across the street from another building undergoing expansion. In 2004, Commissioner Weiss arbitrated a dispute between the expanding building's owners and Consolidated Edison Company of New York, Inc. (Con Edison) over the need for additional transformers to accommodate the expansion and agreed with Con Edison that additional transformers were needed. Petitioner subsequently learned that Con Edison was planning to locate a transformer in the sidewalk in front of its building. It petitioned the Commission to enjoin construction, arguing that Commissioner Weiss had allowed placement of the transformer without any input from Petitioner.

The Commission determined that it lacked jurisdiction over the excavation of the sidewalk for transformer installation, and that the City had jurisdiction pursuant to its charter. Petitioner brought a challenge in Supreme Court, Albany County, which held that the Commission had a rational basis for declining jurisdiction.

The Third Department affirmed. It found that Commissioner Weiss did not specify the locations of the transformers. It also held that Albany County properly found a rational basis for declining jurisdiction, given the City's clear authority over the locations of electrical facilities in its public sidewalks.

(90) United States Telephone Association v. Federal Communications Commission (DC Circuit Docket No. 03-1310)

On August 21, 2003 the Federal Communications Commission released its Triennial Review decision. Challenges were filed in a variety of circuits. All proceedings were assigned to the Eighth Circuit (Eschelon Telecom, Incorporated, v. Federal Communications Commission, et al. (Eighth Circuit Docket No. 03-3212)), but that Court sent the matter to the D.C. Circuit on September 30, 2003 and the case was recaptioned in the D.C. Circuit.

The NYPSC intervened in support of the FCC where it deferred decisions under federal law to the states and sought review of the Triennial Order to the extent the FCC indicated it could override state decisions made under state law. The D.C. Circuit has required the PSC to brief and argue the case with other state utility regulatory Commissions. The matter will be argued January 28, 2004.

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit overturned the FCC's Triennial Review Order (TRO). Among other things, the court has reversed and vacated and remanded the FCC's nationwide impairment finding regarding mass-market switches and transport elements.

A prior D.C. Circuit decision required more "granular" (individual market) determinations of whether the position of competitive local access providers (CLECs) would be "impaired" if they did not obtain access to facilities of incumbent local exchange companies (ILECs). The FCC attempted to comply with that directive by delegating impairment findings to the state utility commissions. The Court found that the FCC's decisions regarding mass market switches and transport elements were flawed as a result of the unlawful delegation to the states and remanded with a directive that the FCC's decision would be vacated within sixty days.

The states also contended that the FCC could not preclude them from requiring access where not prohibited by the Telecommunications Act of 1996. The Court rejected that contention as unripe for appellate review.

(91) URAC v. NYPSC (Albany County Index Nos. 7956-04, 7957-04 and 7958-04)

By Petitions filed and served December 23, 2004, URAC Corp., a rate consultant, has brought three Article 78 proceedings with respect to Office of Consumer Services (OCS) procedures for handling customer complaints.

In No. 7956-04 URAC challenges a Commission decision (Case 04-5-1096) that OCS can extend the time for appeals to the Commission until after an Informal Hearing Officer rules on a reconsideration request. It asserts that reconsideration is not available and the only remedy

is appeal under 16 NYCRR § 12.13 [which permits the Commission to remand cases to informal hearing officers].

URAC asserts in No. 7957-04 that the Commission arbitrarily declined to rule on URAC's request for a declaration that an alleged OCS staff practice of not providing rate consultants "directives" that utilities rebill contradicts 16 NYCRR § 12.4 (initial decisions provided to customers). The Commission had stated that petitioner was inadvertently not provided with the initial decision; that initial decision was still being prepared.

Finally, in No. 7958-04 URAC alleges that the Commission's rejection of URAC's claims of violations of its due process rights (04-M-1283) was an error of law. URAC asserts that it has not been timely informed of or received all information exchanged between OCS staff and utilities during the initial investigation stage. Therefore, it claims that its alleged due process rights to be heard at the initial stage of the complaint process have been violated.

The return date for all three cases was February 18, 2005. The PSC's papers were due February 11, 2005 and it had the option of a sur-reply due on the return date.

By Decisions and Judgments dated May 20, 2005, Albany County Supreme Court (Stein, J.) dismissed all three URAC Article 78 petitions challenging various aspects of the Office of Consumer Services consumer complaint handling procedures.

In Index No. 7956-04, the Court upheld the Commission's Declaratory Ruling that an informal hearing officer can accept a party's request for reconsideration, thereby extending the 15-day period to appeal to the Commission. In Index No. 7957-04, it upheld the Commission's determination to decline to rule because the failure of OCS Staff to inform URAC of an initial OCS complaint decision was due to an isolated instance of administrative oversight and URAC presented no evidence that such failure to inform was a regular practice or procedure. In Index No. 7958-04, Supreme Court upheld the Commission's Declaratory Ruling that Staff does not have to release information received from a utility until OCS Staff renders an initial determination, at which time Staff forwards the complete complaint file to the complainant. The Court observed that parties have access to Staff's file during the complaint investigation and can make copies of information in those files if it/they so desire, which is all the due process to which they are entitled. In all decisions, the Court granted the Commission deference to interpret its regulations, including the consumer complaint procedure regulations.

The above Decisions and Judgments were entered on May 24, 2006, and Notice of Entry was served May 25, 2005. To date, no Notices of Appeal have been received.

(92) US Datanet Corporation, (N.D.N.Y. Bankr. Case No. 08-32560-5)

On March 20, 2009, the United States Bankruptcy Court for the Northern District of New York issued an order approving a proposed sale of US Datanet to Warwick Valley Mobile Telephone Company. The Commission issued a One Commissioner Order approving the sale on March 31, 2009 in Case 09-C-0255.

(93) Verizon New York Inc. v. Covad and NYPSC (N.D.N.Y. Index No. 04-CV-0265) (GLS, DRH)

By summons and complaint filed and served March 11, 2004, Verizon has challenged the Commission's June 26, 2003 Arbitration Order (Case 02-C-1175). It disputes requirements that (1) Verizon be subjected to mandatory commercial arbitration, and (2) the status quo be maintained during the pendency of a dispute concerning a change of law where Verizon is no longer obligated to provide access to its facilities.

All parties moved concurrently for Summary Judgment in July 2004. The PSC and Covad maintained that 1) the Court only had jurisdiction to determine that the interconnection agreements complied with the requirements of 47 U.S.C. 251 and 252; 2) the agreements complied with those sections; and 3) the Arbitration Order was virtually identical to a 2002 AT&T Order and, therefore, reasonable and followed the intent of the 1996 Act to foster competition and curb ILEC's monopolistic tendencies. On January 9, 2005, oral argument was held before District Judge Gary Sharpe who reserved his decision.

By Memorandum-Decision and Order dated February 3, 2006, Judge Sharpe 1) reversed the Commission's adoption of an agreement clause that required Verizon to engage in binding arbitration before a third-party commercial arbitrator on issues affecting end-users; and 2) upheld the Commission's adoption of a clause requiring the parties to adhere to the agreement where there is "change of law" until a court, the PSC or the FCC decided how that change affects the parties' obligations where the change is not self-executing, and the parties cannot agree how to effectuate the change.

With respect to the "binding arbitration" clause, the Northern District stated that 47 U.S.C. 252(b)(4)(C) "provides that 'a state commission *shall* resolve each issue by imposing

appropriate conditions as required to implement the Act and FCC regulations' (Emphasis supplied by the Court)." It observed that the Covad clause differed from one in an AT&T agreement where the PSC, not a commercial mediator, arbitrated disputes, found the clause changed the parties' rights under the 1996 Act and concluded that the PSC decision to delegate its authority to resolve disputes was contrary to the Act.

With respect to the "change of law" clause, the Court rejected Verizon's argument that the clause would allow the PSC to alter the date of a "change of law" and adopted the position of Covad and the PSC that the disputed clause was intended to prevent unilateral discontinuance of service by Verizon and did not permit Covad to ignore changes in law. The Northern District concluded that the PSC reasonably attempted to prevent uncertainty and unilateral self-interested changes until a judicial or administrative ruling on the effect of a change. It noted FCC orders in which that agency observed its changes were not self-executing and had given parties to interconnection agreements time to adjust.

The PSC has not appealed the Court's decision regarding binding arbitration to the Second Circuit. There has been no appeal by Verizon on the "change of law" clause.

(94) Vlahos v. PSC and Consolidated Edison, (New York County Index No. 114609-08, Albany County Index No. 9592-08)

By Notice of Petition and Petition mailed on October 30, 2008, an owner of rental property in Queens has brought an Article 78 proceeding challenging a July 18, 2008 Commission decision (Case 07-E-1540) that he was appropriately billed shared meter charges. Mr. Vlahos claims that a tenant, Pedro Barona, occupied the whole house and was responsible for all bills. The Commission rejected those contentions based on Consolidated Edison reports that there was a basement apartment and the meter serving Mr. Barona registered an unidentified load.

The PSC demanded a change of venue from New York County to Albany County. Petitioner failed to respond to their demand. They accordingly moved in Albany County to change venue and dismiss for inadequate service. The PSC has also asked New York County Supreme Court to stay the case pending disposition of their motion. In the meantime, the return date was adjourned to January 29, 2009, by stipulation.

Albany County Supreme Court dismissed this case for failure to oppose the PSC's Motion to Dismiss. The PSC had sought to transfer this case from New York County to Albany

and upon Transfer to Dismiss. The Petitioner opposed neither the PSC's Motion to Change Venue nor the PSC's Motion to Dismiss, but moved to set aside its default in a motion returnable April 30, 2009.

By Order dated June 22, 2009, Albany County (Cahill, J.) denied Petitioner's motion to vacate the default judgment in this matter. The Court found that Petitioner had offered neither a reasonable excuse for failing to oppose the Commission's motion to dismiss, nor any meritorious defense regarding improper service. Petitioner appealed on July 17, 2009, and had until April 17, 2010 to perfect. Since Petitioner did not perfect its appeal, it should be deemed abandoned.

(95) Vonage Holdings Corp. v. NYPSC (S.D.N.Y. Index No. 04-CV-4306) (DFE)

On May 21, 2004 the NYPSC ordered Vonage Holdings Corp., a Voice over Internet Protocol (VoIP) provider, to file a tariff, an application for a Certificate of Public Convenience and Necessity and any requests for waivers of PSC regulations within 45 days. Vonage filed an action in the Southern District of New York to enjoin the Commission from applying state regulation to Vonage. On June 30, 2004, Magistrate Judge Douglas F. Eaton stated his intent to stay the PSC's order as of July 2, 2004 unless the compliance date of July 6, 2004 was extended to allow Vonage and PSC Staff time to negotiate a preliminary injunction precluding enforcement of the PSC order, but reflecting commitments by Vonage to cooperate on resolving questions about is 911 service. Judge Eaton indicated that the Commission should take no further action until at least January 2005 to give the FCC time to rule on several VoIP cases before it. On July 1, 2004, the PSC issued an order extending the compliance date to July 20, 2004. On November 12, 2004 the FCC issued an Order preempting the imposition of State certification, tariffing and other regulatory requirements on Vonage and similar VoIP providers. This Order has been appealed to various Circuit courts by the NYPSC, Minnesota PUC, California PUC, PUC of Ohio, and the National Association of State Utility Consumer Advocates.

At a follow-up conference on December 13, 2004, Vonage stated it desired to move for a permanent injunction in light of the FCC decision preempting an order of the Minnesota Commission regulating Vonage's rates and entry. The NYPSC argued that the FCC's Minnesota decision was not controlling because the Commission's regulation of Vonage's rate and entry was pro forma, the FCC had not resolved the NYPSC's real concerns, including Vonage's provision

of E911, and the PSC was satisfactorily cooperating with Vonage on E911 and the preliminary injunction should therefore remain in effect.

The Southern District has now denied Vonage's December 2004 request for a permanent injunction by a decision dated December 14, 2005. Judge Eaton noted that Vonage proposed modifying the conditions on which the FCC relied in its Minnesota Vonage Order and stated that Vonage was not harmed by the cooperation required by his order. He anticipated that the preliminary injunction would remain in effect until the FCC concludes its rulemaking with respect to VoIP issues, but stated that the parties could ask for modification of the injunction's terms.

(96) Vonage Holdings Corporation v. NYPSC (Albany County Index No. 5735-04)

Vonage has sued the NYPSC in state court in order to preserve claims under the State Administrative Procedure Act that it did not raise in its federal lawsuit. The case was stayed pending resolution of its federal action. (See Vonage Holdings Corp. v. NYPSC (S.D.N.Y. Index No. 04-CV-4306) elsewhere in this report.) Per the 4th Qtr 2008 PSC Report, this matter is adjourned indefinitely.

(97) Williams et al. v. New York State Department of Corrections et al., (Albany County Index No. 1763-08)

By Order to Show Cause dated March 17, 2008 and received on April 29, 2008, Petitioner seeks, as pertinent, to challenge a decision of the Office of Consumer Services (OCS) that the Commission lacked jurisdiction over Petitioner's complaint and that OCS could not identify an entity with jurisdiction. It appears from the documents attached to the Order to Show Cause that Petitioner, an inmate, contends that the Commission should have arbitrated his attempt to obtain an interconnection agreement from Verizon.

By decision dated October 10, 2008, Supreme Court, Albany County (Ceresia, J.) rejected a motion of Jomo Williams to add the Commission to a pending Article 78 proceeding. The Court decided both Mr. Williams' motion for joinder and the Commission's motion to dismiss were moot because it dismissed the main action against DOCS. It nevertheless reviewed and discussed these motions on their merits, and agreed with the Commission's arguments to deny joinder and dismiss.

Mr. Williams, an inmate at Upstate Correctional Facility, claimed to be starting an Internet business from his prison cell. He initiated this proceeding against DOCS because it denied him Internet access. Mr. Williams subsequently attempted to join the Commission as a respondent, claiming that it unlawfully failed to mediate his dispute with Verizon over whether he could obtain an interconnection agreement under the Federal Telecommunications Act (Telecom Act).

The PSC opposed joinder of the Commission, and also moved to dismiss as against the Commission on the grounds that: 1) Mr. Williams failed to exhaust his administrative remedies (as the Commission had not then acted on his appeal of OCS's decision that the Commission lacked jurisdiction); 2) the Telecom Act's exclusive remedy for a state's alleged failure to mediate is to petition the FCC to preempt and act in place of the state; and 3) Mr. Williams is not eligible for Telecom Act interconnection because he is not a telecommunications carrier (a position confirmed by the Commission when it denied Williams' appeal to the Commission).

Albany County Supreme Court agreed the exclusive remedy for the Commission's alleged failure to act was review by the FCC. The Court further agreed that Petitioners failed to exhaust administrative remedies before the Commission. The Court therefore denied the motion for joinder and dismissed the Commission's motion for dismissal of the case as moot.

Petitioner sought to move for permission to appeal to the Appellate Division. The Appellate Division rejected his motion for leave as unnecessary. On December 16, 2008, the Appellate Division denied Petitioner's motion for reconsideration and for permission for leave to appeal to the Court of Appeals.

(98) Worldcom, Inc. v. FCC (D.C. Cir. Index No. 01-1218)

The NYPSC joined three other states in petitioning for review of the FCC's Remand Order In the Matter of Implementation of the Local Competition Provisions in the Telecom Act of 1996, Intercarrier Compensation for ISP-Bound Traffic. The Commission joined the case to challenge the Remand Order's directive that Incumbent Local Exchange Carriers seek shortfalls in revenues from Internet-bound traffic, an interstate service, from intrastate customers, as being a violation of the separations doctrine of Smith v. Illinois Bell (282 U.S. 133). Oral argument was held on February 12, 2002.

On May 3, 2002, the United States Court of Appeals for the District of Columbia Circuit remanded the Federal Communications Commission's second attempt to justify excluding calls

to Internet service providers (ISPs) from reciprocal compensation arrangements. The FCC's Remand Order, In the Matter of Implementation of the Local Competition Provisions in the Telecom Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, attempted to respond to an earlier D.C. Circuit remand by relying on 47 U.S. C. § 251(g) for authority to "carve out" traffic to ISPs and adopt a "bill-and-keep" arrangement. The D.C. Circuit concluded that 47 U.S.C. § 251(g) did not provide the FCC authority and again remanded. The Court did not, however, vacate the FCC's "bill and keep" solution, because it might be justified by other statutory provisions.

PART IV: CASES DELETED THIS REPORT

(4) TD Bank, N.A. v. 473 West End Realty Corp. et. al. (Orange County Index No. 2010-003242)

(10) Indeck-Corinth v. Paterson, DEC, NYSERDA & PSC (Saratoga County Index No. 2009-369; Albany County Index No. 5280-09)

Cases Deleted In Previous Reports:

November 2010 Report:

(1) AG-Energy, L.P. v. State of New York, (Ct. Claims No. 116631)

Previous Reports:

(28) East Midtown Coalition, et al, v. PSC (Albany County Index No. 8170-02)

(75) Town of Riverhead v. Long Island Power Authority (Supreme Court Suffolk County, Index No. 03-25040)

(83) Waterside Plaza, LLC v. NYPSC (Albany County Index No. 7654/05), formerly Belkin, Burden, Wenig & Goldman v. NYPSC (New York County Index No. 114514/2005)

(7) Jordanville Wind LLC, et al. v. NYPSC (Albany County Index No. 10038-07); Town Bd. of Warren, et al. v. NYPSC (Albany County Index No. 10039-07)

(19) Watkins a/k/a Amano v. NYPSC and Brooklyn Community Access Television (Albany County Index No. 9216-06)

(15) Nicholson et al. v. New York Public Service Commission and KeySpan, (Albany County Index No. 3279-08)

(10) Level 3 Communications v. Acampora, et al., (NDNY 1:08-cv-98-GLS-DRH)

(12) Marin, et al. v. City of Utica (9th Cir. No. 07-17281, formerly D. Ariz. Case No. 4:05-CV-775), formerly In re: Marinkovic (Bankruptcy District of Arizona Case No. 02-0378; Adversary Proceeding Docket No. 05-182)

(13) Nicholson, et al. v. NYPSC, et al. (Albany County Index No. 9864-07)

(15) Nicholson et al. v. New York Public Service Commission and KeySpan, (Albany County Index No. 3279-08)

(14) Orange & Rockland Utilities, Inc. v. NYPSC (Albany County Index Nos. 1264-08 and 5067-07)

(17) Summerhays et al. v. NYPSC (Albany County Index No. 9035-06)

(1) Acocella, Nicola v. NYS Public Service Commission (Westchester County Index No. 02-13960, Albany County Index No. 6099-02)

(3) All State Energy, Inc. v. Interstate Energy Resources, Inc. et al. (Westchester County Index No. 11757/00)

(4) Alliance for Municipal Power, a/k/a Retail Service Communities, et al. v. NYS Public Service Commission (Albany County Index No. 5913-98)

(5) Aronson v. NYS Public Service Commission

(6) Association of Cable Access Providers v. NYPSC, et al. (Albany County Index No. 512-02)

(11) Blumenthal v. Federal Energy Regulatory Commission ("FERC") (DC Circuit Docket No. 03-1006)

(12) Briggs v. Lake Louise Marie Water, et al.

(14) Central Hudson, et al. v. NYS Public Service Commission (Albany County Index No. 2839-95)

(15) Century House Historical Society, et al. v. NYS Public Service Commission

(18) City Council of New York v. Giuliani (New York County Index No. 403341-98)

(20) City of Oswego, City of Cohoes, City of Fulton, New York Conference of Mayors, et al., v. NYS Public Service Commission (Supreme Court, Albany County, Index No. 2115-98, filed April 21, 1998)

(25) Connetquot School District v. NYS Public Service Commission and LILCO

(28) Consolidated Edison Communications v. NYPSC and Telergy Metro L.L.C. (Albany County Index No. 6234-01)

(29) Consolidated Edison Company of New York, Inc. v. Board of Standards and Appeals of the City of New York, Chairman/Commissioner James Chin, Vice chair/Commissioner Satish Babbar, Commissioner Mitchell Korbey, and Commissioner Peter Caliendo, each sued in his official capacity, Respondents (Supreme Court, New York City, Index No. 114964/02)

(31) Consolidated Edison Co. v. NYS Public Service Commission (Index No. 2839-95)

(32) Copicotto, Leonard v. NYS Public Service Commission and Consolidated Edison Co. of New York (Albany County Index No. 1400-00)

(33) Council of the City of New York v. NYS Public Service Commission (Albany County Index No. 3214-99; A.D. No. 88981)

(34) County of Suffolk v. LILCO (87 CV-0646 (JBW); 2d Cir. Docket No. 00-7473)

(35) County of Suffolk v. NYS Public Service Commission and Long Island Power Authority f/k/a Long Island Lighting Company (Albany County Index No. 4362-99)

(38) County of Westchester v. Helmer, et al. (Albany County Index No. 1893-01)

(40) County of Westchester v. Helmer (Albany County Index No. 3895-00)

(43) Dominion Telecom, Inc. v. NYPSC and Consolidated Edison Company of New York, Inc. (Albany County Index No. 5655-03)

(48) Evans, Arthur Pro Se v. NYS Public Service Commission and NYS Public Service Commission (Albany County Index No. 5735-99)

(49) Federal Communications Commission, et. al. v. SBC Communications Inc. (5th Circ.)

(50) Feinman v. NYS Public Service Commission (Albany County Index No. 3037-01)

(59) Iroquois Energy Management, LLC (Westchester District Bankruptcy Case No. 00-15609B)

(66) LILCO et al., v. The Assessor of the Board of Assessment Review for the Town of Brookhaven, et al.

(67) Lockport v. New York State

(68) Mann v. The Home Depot (E.D.N.Y. Index No. CV-99-1702)

(70) Matter of Application of National Fuel Gas Distribution Corporation (Erie County Index No. 2001-9350)

(73) National Fuel Gas Distribution Corp. v. NYS Public Service Commission (Albany County Index No. 1572-00)

(79) Person v. AT&T, President of AT&T and NYPSC (New York County Index No. 601791-01)

(80) Phipps Houses Services, Inc. on behalf of Presbyterian Hospital v. NYPSC and Consolidated Edison Company of New York, Inc. (Albany County Index No. 1868-02)

(89) Texas Office of Public Utility Counsel, et al. v. Federal Communications Commission and USA; Case No. 97-60421 (and consolidated cases) (5th Cir.) --- [previously "NY v. FCC (5th Cir.)"]

(67) Locksley v. Niagara-Mohawk, State of New York Department of Public Service, Columbia County Sheriff Dept., (Columbia County Index No. 10277-05)

(68) Mancuso, et al. v. Consolidated Edison Co. of New York, Inc. (SDNY Docket No. 93 Civ. 0001)

(70) Marin, et al. v. City of Utica (D. Ariz. Case No. 4:05-CV-775), formerly In re: Marinkovic (Bankruptcy District of Arizona Case No. 02-0378; Adversary Proceeding Docket No. 05-182)

(73) MCI Telecommunications Corporation v. New York Telephone Company et al. (Northern District of New York Index No. 97-CV-1600 (LEK))

(74) Mount Carmel Associates v. NYPSC and Consolidated Edison Co. of NY (Albany County Index No. 6752-01)

(75) Multiple Intervenors, International Brotherhood of Electrical Workers ("IBEW") Locals 83, 97 and 503 and Utility Workers Union of America, Local 1-2 v. Dept. of Environmental Conservation (Index No. 5348-03)

(76) Multiple Intervenors v. NYS Public Service Commission (Albany Co. Index No. 4891-02)

(79) National Fuel Gas Distribution Corp. v. NYS Public Service Commission and Nornew Energy Supply, Inc. (Fourth Dep't, Docket No. OP00-00890)

(80) National Fuel Gas Distribution Corp. v. NYPSC (Albany County Index No. 6712-04)

(81) NYS Electric & Gas Corporation v. NYS Public Service Commission, Corning Incorporated and Nucor Steel Auburn, Inc. (Albany County Index No. 5137-02); (Third Dep't Docket No. 93449)

(84) Norcon Power Partners v. Niagara Mohawk; Sterling v. Niagara Mohawk (2d Cir. Index No. 96-7283)

(85) Northern States Power Corp. v. U.S. Department of Energy; State of Michigan v. U.S. Department of Energy (U.S.S. Ct. Index No. 98-1065)

(87) Orion Power New York GP, Inc. v. NYS Public Service Commission (Albany County Index No. 548-01)

(88) O'Sullivan, Donald v. KeySpan and the NYS Public Service Commission (Nassau County Supreme Court Index No. 023109/99)

(89) Pena d/b/a R&G Laundromat and R&G Laundromat, Inc. v. NYS Public Service Commission and Con Edison (Kings County Index No. 17783-95; Albany County Index No. 3204-97)

(90) People of the State of New York v. Federal Energy Regulatory Commission ("FERC") (Index No. 98-1100) (D.C. Circuit)

(91) People of the State of New York v. Federal Energy Regulatory Commission ("FERC") (2d Cir. Index No. 98-4276)

(92) People of the State of New York, et al. v. Federal Energy Regulatory Commission ("FERC") (Supreme Court No. 00-568)

(95) Philadelphia Corporation, et al. v. Niagara Mohawk Power Corp. (17 hydroelectric energy-production companies) (Supreme Court, Warren County, 1993)

(99) Powerline Coalition v. NYS Public Service Commission - AD 79209 (Third Dept.)

(101) Pudlin v. NYS Public Service Commission, et al. (Southern District of New York – No Index Number Assigned)

(104) Riverkeeper, Inc. v. Central Hudson Gas & Electric Corporation (U. S. District Court, Southern District of New York 99 Civ. 2356 (BDP))

(105) Riverkeeper, Inc., et al. v. NYS Board on the Siting of the Major Electric Generating Facilities (Index No. 2322/99)

(106) Rochester Gas & Electric Corp. v. NYS Public Service Commission (Albany County Index No. 3030-03)

(107) Rochester Gas & Electric Corp. v. NYS Public Service Commission (Albany County Index No. 6531-97)

(108) Rochester Gas and Electric Corp. v. NYPSC (Albany County Index No. 6616-96)

(109) Rosquist, George v. Consolidated Edison Co. of New York, Inc., et al. (Docket No. 99 CIV 1531) (Index Nos. 99-7435, 99-9230)

(111) Soren Management, Inc. v. Public Service Commission and Con Edison (Supreme Court Albany County)

(112) Suffolk County Department of Public Works v. NYS Public Service Commission

(113) TAPS v. Federal Energy Regulatory Commission ("FERC") (D.C. Cir. Index No. 97-1715)

(116) Town of Plattsburgh, New York and Town of Beekmantown, N.Y. v. NYS Public Service Commission, Charter Communications, VII, LLC and Falcon First Cable of New York, Inc., (Albany County Index No. 5052-02)

(118) Turner, Franconia Village, et al. v. NYPSC and Consolidated Edison Company of New York, Inc. (Albany County Index No. 3927-01)

(119) United New York Water v. NYS Public Service Commission (3rd Dep't Docket No. 77632)

(121) Uprose and New York Public Interest Research Group, Inc. v. Sunset Energy Fleet, LLC, et al. (Albany County; Kings County Index No. 8368-04)

(123) Vanda Restaurant Corp. v. NYS Department of Public Service and Public Service Commission (N.Y. County Index No. 114032-96)

(127) Word of Life Fellowship v. Niagara Mohawk Power Corp. and NYS Public Service Commission (Albany County Index No. 1795-00)

(3) Jordan v. NYPSC (Kings County Index No. 29548/06)

(13) Westchester ARC, et al. v. NYS Public Service Commission and Consolidated Edison Co. of New York (Albany County Index No. 7586-05)

(4) City of New York v. PSC and Con Edison (Albany County Index No. 5004-04)

(7) Morrone v. Cablevision Systems Corporation, et al. (Eastern Dist. of NY Index No. CV 05-0898-ADS-ARL)

(8) Bentley v. NYS Public Service Commission (New York County Index No. 01-110039)

(49) Evans, Arthur v. NYPSC et al. (Southern District of N.Y., Index No. 99-CV-6018; 2d Cir. Index No. 01-7658)

(50) Evans, Arthur, individually, and d/b/a Family Telephone Network, and in behalf of individual public users of news and entertainment services broadcast via Verizon's InfoFone Services v. NYPSC, NYS Dept. of Public Service, and Verizon, Inc. (Albany County Index No. 411-03); Evans, Arthur v. Thorn, et al. (Albany County Index No. 1433-04)

(146) Yankee Atomic Electric Co. v. U.S.

(32) County of Rockland v. NYS Department of Environmental Conservation, Siting Board, et al. (Rockland County Index No. 4960-01)

(41) Dugena, Renato v. NYS Public Service Commission, Brooklyn Union and Con Edison (Queens County Supreme Court Index No. 20509/99)

(45) Electricity Consumers Resource Council v. Federal Energy Regulatory Commission (D.C. Circuit Docket No. 03-1449)

(47) Energy Association v. NYS Public Service Commission (Supreme Court (Albany County, Index No. 5830-96); 3d Dep't Index No. 78608)

(55) Goldberg v. Cablevision, et al. (E.D.N.Y. No. 01-CV-4223 (ADS, ESB)

(56) Greenberg, Jack d/b/a BDS Holding Co. v. Consolidated Edison Co. of NY, et al. (Westchester County Index Nos. 1168/00, 2623/00; Albany County Index No. 2623-00)

(57) Grenga v. NYS Department of Social Service (c/o Public Service Commission) and Niagara Mohawk Power Corporation (Albany County Index No. 7093-02)

(58) Hudson View Waterworks Corp. (S.D.N.Y. 97-B-32585)

(65) Ingham, Michael, et al. v. NYS Public Service Commission (Suffolk County Index No. 98-16618)

(66) Iowa Utilities Board, et al. v. Federal Communications Commission, et al. (Index Nos. 96-3321 et al. (8th Cir.)

(68) Jemzura, Raymond v. Mikoll et al. (Northern District of New York No. 99-CV-710 (NAM/GLS)); Second Circuit Docket No. 00-6228

(76) LILCO v. Office of Supervisor of Town of North Hempstead, et al; LILCO v. Office of Supervisor of Town of Oyster Bay, et al.; LILCO v. Office of Supervisor of Town of Hempstead, et al.

(85) Metromedia Energy, Inc. v. Consolidated Edison, Inc. et al. (Southern District of New York, 99 CIV 10598 (SAS))

(94) New Haven Temple SDA Church v. Consolidated Edison Corp. [sic] (S.D.N.Y.)

(95) New York Institute of Legal Research v. NYS Board on Electric Generation Siting and the Environment (Appellate Division, Second Department Index No. 2002-01725)

(97) NYS Public Service Commission and AT&T Communications of New York, Inc. v. OnTera, Inc. d/b/a OnTera Broadband f/k/a Dualstar Communication Inc. (Albany Co. Index No. 4706-02)

(98) NYS Public Service Commission v. Federal Communications Commission

(99) NYS Dept. of Public Service v. Town of Beekmantown (Albany County Index No. 3914-02)

(100) Niagara Mohawk v. FERC and NYPSC (Case No. 95-CV-634 (N.D.N.Y.); Second Circuit Index No. 01-6215)

(101) Nokit Realty v. NYS Public Service Commission and Cable Commission

(16) NYS Electric & Gas Corporation v. NYS Public Service Commission (Albany County Index No. 3270-04)

(117) Sibersky v. Consolidated Edison and Department of Public Service (New York County Index No. 403490/98)

(118) Sithe/Independence Power Partners v. NYS Public Service Commission

(124) Tower Owners, Inc. v. NYS Public Service Commission (Albany County Index No. 6341-98)

(131) URAC v. NYS Public Service Commission (Albany County Index No. 819-98)

(12) Chladek, James, d/b/a Metro Access, Dynatech Communications Inc., Entertainment Technologies Ventures, Inc. Info Products, Inc. et al. v. Verizon NY Inc., the Public Service Commission of the State of New York and the State of New York, (S.D.N.Y. No. 02-CV-2355)

(20) Community Network Service, Inc. v. NYS Dept. of Public Service and Verizon New York, Inc. (New York County Index No. 01-19386) (Albany County, Index No. 6589-02)

(106) Public Utility Law Project v. NYS Public Service Commission (Sup. Ct., Albany Co. Index No. 2331-98)

(107) Public Utility Law Project of New York, Inc., and Grendal Bland v. NYS Public Service Commission, et al. and Central Hudson Gas and Electric Corp. (Albany County Index No. 6502-98)

(108) Public Utility Law Project of New York, Inc., Sandra Myers and Janie Bellamy v. NYPSC, et al. and Niagara Mohawk Power Corporation (Albany County Index No. 4131-98)

(109) Public Utility Law Project, et al, v. NYS Public Service Commission and NYS Electric & Gas (Supreme Court, Albany County (Index No. 3646-98), filed July 2, 1998

(110) Public Utility Law Project, et al. v. NYS Public Service Commission and Rochester Gas & Electric Corp. (Supreme Court, Albany County, Index No. 1652-98, filed March 26, 1998)

(111) Public Utility Law Project, et al., v. NYS Public Service Commission and Consolidated Edison Company of New York, Inc., et al, (New York State Supreme Court, Albany County Index No. 894-98, filed February 20, 1998)

(11) Independent Payphone Association of New York, Inc. and Teleplex Coin Communications, Inc. v. NYS Public Service Commission (Albany County Index No. 413-01)

(18) Town of Cortland, et al. v. NYPA, et al. (Sup. Ct. Westchester Co.)

(19) Uprose, et al. v. New York Power Authority, Helmer, et al. (Kings County Index No. 4705-01) (Second Dept Index No. 01-03661)

(22) Village of Bergen, et al. v. New York Power Authority (FERC) (Sup. Ct. Niagara Co.)
(5) National A-1 Advertising v. Public Service Commission and Verizon New York (Albany County Index No. 1266-04)

(6) PDQ Phone, Inc. and Pilgrim Telephone, Inc. v. NYS Public Service Commission and Verizon New York (Albany County Index No. 1391-04)

(13) Incorporated Village of Poquott, et al., v. NYS Public Service Commission et al. (Albany County Index No. 4988-02)

(128) Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP (U.S. Supreme Court, No. 02-682)

(8) Boumoussa, Anthony d/b/a Fast Car Wash v. NYPSC and Consolidated Edison Co. (Albany County Index No. 1845-99)

(10) Bright Acres Water Co. v. NYS Public Service Commission

(19) Consolidated Edison Company of New York, Inc. v. Allstate Insurance Company, et al. (Court of Appeals Motion No. 956, New York County Index No. 98-600142)

(26) Consolidated Edison Company v. Pataki (U.S. District Court for the Northern District of NY; Index No. 00-CV-1230 (LEK) (RWS); 2d Cir. Docket No's 00-9358(L), 00-9426(CON), 00-9442(CON))

(27) Consolidated Edison Company of New York, Inc. v. United States (S.D.N.Y.)

(32) County of Suffolk et al. v. Long Island Power Authority et al. (Eastern District of NY Case No. 98-5996)

(47) Franconia, et al, v. NYPSC and Consolidated Edison Company of New York, Inc. (Albany County Index No. 3927-01)

(51) Greystone Hotel Co. v. NYS Department of Public Service and Con Edison (New York County Index No. 116929-02)

(52) Highpoint Condo II Corp. v. NYPSC and Consolidated Edison Company of New York, Inc. (Albany County Index No. 1867-02)

(59) IPPNY v. NYS Public Service Commission

(74) National Fuel Gas Distribution Corporation v. NYS Public Service Commission (Albany County Index No. 491-02)

(20) Town of Brookhaven v. NYS Board on Electric Generation Siting and the Environment (2d Dept. Case # 2002-10512)

(8) Westchester County, et al. v. NYPSC, et al. (Albany County Index No. 5365-03)

Gregg C. Sayre
Associate General Counsel – Northeastern & Midwest Regions
Frontier / Citizens Communications
180 South Clinton Avenue
Rochester, NY 14646
Tel: (585) 777-7270
Fax: (585) 263-9986
E:Mail: ***Gregg.Sayre@FTR.com***

Gregg's Assistant:

Holly James
Legal Assistant
Tel: (585) 777-7041
E:Mail: ***Holly.James@FTR.com***