

GERALD A. NORLANDER, ESQ.

Executive Director

The Public Utility Law Project

The events in California and in the Con Edison territory last summer are reframing dialogue on electric industry restructuring in the consumer movement around the country. The majority of the states, despite the cheerleading of the "RED Index," have not gone far down the restructuring road, and those that began are dramatically slowing their pace. The debate is shifting to whether restructuring is a "big mistake" or a "bad idea."

The "big mistake theory" is that a good idea, restructuring, was implemented incorrectly, and the wholesale market California relied upon was flawed. Similarly, it is argued that the New York Independent System Operator's markets are flawed, but if we can just tweak them and improve them we can get market power out, and then they will work as intended to drive wholesale rates down.

The "bad idea theory" is that the poolco markets upon which divestiture and restructuring hinged haven't

worked in England, they haven't worked in Canada, and they haven't worked in California. They're not working in New York and they're not likely to work anytime soon to create a reasonable wholesale market price for electricity that retail rate makers can rely upon in setting retail rates.

Today we have destabilized prices in the Con Edison territory and no one can tell you what the price will be next summer. This adversely affects households and businesses that are energy dependent. The New York ISO has suggested that if we have a hot summer and if grid conditions are not ideal, we may be faced with shortages. Yet there are no firm plans for Con Edison to create the adequate supply it is required to provide under our laws, and it's uncertain who will be the next one who steps up to the plate to meet demand.

There is a market for stable priced electricity at predictable rates and reliable supply. Communities and states with stable rates are advertising that now and recruiting businesses to locate there. How many of you, if you were siting a new operation or expanded operation, would choose Los Angeles or New York City? That's a trick question because Los Angeles did not deregulate. In Los Angeles, the utility owns its own power plants and has a surplus of generation. It doesn't need to rely upon the wholesale markets. It has adequate supply, and it has a plan

for building new plants. The L.A. utility is repaying its debt by selling its energy surplus into the wild ISO markets, advertising its reliability by putting out news releases everyday, and stimulating articles about how the hot tubs are still bubbling; they haven't had a blackout, and they're helping to keep the lights on elsewhere, where the private sector utilities deregulated.

The proponents of electric restructuring offered New York consumers a new vision. It was a time of energy surpluses, and cheap energy was readily available in 1997. Expenditures on conservation measures could be reduced because the market would provide that, and we could rely upon the wholesale markets to supply cheap energy to customers who hadn't switched. If there was some volatility, the market would step forward and cure the problem by offering stable prices. That was the vision, but the reality today, five years later, is that there is no realistic choice for most customers except the very largest. We have in the Con Edison area particularly unstable spiking rates and some blackout possibilities.

The California experience deserves attention. There are at least three important lessons and three comparisons that I think we should make. I don't want to get into the issue of who is to blame for the problems. The first lesson is that generation has slipped over the line from state

regulation to federal regulation and the federal regulators are not setting just and reasonable rates. The ISO markets operating under federal jurisdiction have in California been found not to yield just and reasonable prices; yet the FERC has held that it lacks power to fix the prices. Their advice to the states is, "Why are you buying so much at our convenience store? Why don't you make bilateral contracts and so forth?" This was not the model offered in 1997, which was to create a liquid, transparent spot market and put as much of the energy as we could through it. New York very wisely did not encourage all its utilities to buy excessively on the spot market. Con Edison has gone down that road and is far too reliant on spot market purchases, like San Diego last summer. For now, the lesson is to rely as little on spot markets as we can.

Lesson two: We can control energy costs if we don't divest the generating plants. In this respect, Rochester and Los Angeles are comparable. Rochester Gas and Electric has not sold its plants, has frozen its energy prices at less than three cents, and has had no spikes or shortages. Similarly, the LA utility kept its power plants and has had no rate increases for nine years.

The third lesson is that retail price caps can work if the utilities hedge their risks. Compare NYSE&G with the two California utilities on the verge of bankruptcy. All had

fixed retail prices; all divested or began to divest their generating plants. The difference is that the California utilities agreed to meet a future retail price without securing long term wholesale supply, placing themselves at the mercy of the volatile new spot market. In contrast, NYSE&G sold its plants, but its 8k statement says they've hedged their commodity risk. Thus, the company offers stable prices to consumers, unaffected by the volatility that harmed Con Edison's customers last summer. NYSE&G established a firm price that is known, residential customers can rely on it, and it's the price competitors have to beat.

New York is in a unique position because we never did deregulate—our laws are the same as before. There are interesting questions whether the new electric companies now certified to run the divested power plants have duties under state law to act in the public interest and serve customers in accordance with statutory requirements, including the provision of adequate service at reasonable rates.

For those who are interested, an expanded version of my remarks can be found at the Public Utility Law Project website (http://www.pulp.tc/html/big_mistake.html).

Thank you.