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December 13, 2006

The Honorable Eliot L. Spitzer
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Re: Recommendations of the Energy Committee for the State's New Energy
Agenda

Dear Governor-Elect Spitzer:

This letter is respectfully submitted on behalf of the Energy Committee of the New York City Bar Association to provide the Committee's recommendations for several key actions designed to promote a cleaner, reliable, cost-efficient and intelligent energy future for the State. Members of the Committee are drawn from the private, governmental, academic and public interest sectors and represent diverse viewpoints with respect to energy matters affecting New York City and our State. For those reasons, the Committee believes, that these comments and recommendations merit your attention.

One of the most important goals for the new Administration must be to increase the competitiveness of New York State in the regional, national and global economies. We must also look for new avenues of business growth and investment. Renewable and conventional resources, energy infrastructure, energy conservation and electric demand-side control not only support economic growth and efficient production, but also represent new areas for business investment. Charting the energy course for the State should be a collaborative effort among business, government and communities. We look forward to your leadership on many of the energy issues of concern to the residents and businesses of New York.

Reauthorization of Article X

The Committee believes that a specialized process for the siting of power plants is imperative and recommends reauthorization of Article X of the Public Service Law. With the inevitable increase in the demand for power over the next several years, the environmental consequences of continuing to operate old, inefficient facilities and the need to reduce electricity costs, new generation facilities are necessary. Legislation prescribing a distinct and clearly defined process that allows informed siting decisions to be made as expeditiously as possible has proven to be extremely important for all stakeholders, including power producers and host communities.

There has been much debate with regard to various ways to reform Article X. The Committee urges the new Administration and the Legislature to make every attempt to reach consensus on a siting bill, one that provides for a reasonable and fair process, community

involvement, and protection of public health and the environment. The Committee further recommends, as it did in 2002 and 2004, that any siting law enacted should remain effective for at least ten years to avoid the problems that occurred with the sunset of Article X. In addition, because of the environmental and other siting advantages, the more streamlined process for repowering projects which will replace older plants should be preserved within Article X and extended to renewable energy projects. The Committee would be happy to review and comment upon the specifics of any draft Article X legislation proposed by the new Administration.

Incentives for Repowering

The on-site replacement of older, less efficient and dirtier power plants has been promoted consistently by New York City's Task Force on Energy Policy, environmental organizations and community-based environmental justice groups as an effective way to reduce pollution and increase energy capacity. Having a more streamlined permitting process for repowering projects in Article X, as discussed above, will be a helpful incentive but will not address some of the current obstacles for financing power generation. Several power producers have indicated that long-term power purchase agreements (PPAs) with load serving entities are a necessary component for financing such repowering projects. There are important issues, however, raised by the prospect of PPAs generally, including concerns over their impact on competitive retail markets, as further discussed in the concluding paragraph of this letter. Accordingly, the new Administration should seek to have the Public Service Commission (PSC), the New York Power Authority (NYPA) and the New York Independent System Operator (NYISO) review, as a special matter, the value of such PPAs and the mechanisms for requiring them to incentivize repowering projects. The Committee's diverse experience with respect to repowering projects could greatly facilitate the discussion and we would be happy to participate and, if useful, provide a forum in which to discuss these important matters.

There also should be consideration of other mechanisms to encourage repowering like targeted tax credits (such as extending the Clean Energy tax credit allowing for Empire Zone treatment) or expansion of sale of industrial development bonds. While the tax credit issue may entail legislative action, a guidance memorandum to local bonding authorities may be sufficient to alert them to the pending energy needs.

Promoting Clean Energy and Energy Efficiency

a. Expanding the RPS and preserving NYSERDA management of the SBC

There are several existing programs which are designed to encourage renewable energy development. The Committee supports an expansion of the 25% Renewable Portfolio Standard (RPS). Approximately 18% of the State's energy resources are already met with qualifying hydroelectric generation and the rest of the 7% required is anticipated to be met with wind generation. An increase in the RPS will encourage the continued development of a robust renewable generation market in New York including newer technologies such as tidal or wave power and geothermal. The Committee also supports the continued management of the System Benefit Charge (SBC) by NYSERDA. With respect to the SBC, during 2005 and 2006, the Legislature sought to appropriate these funds but each bill was vetoed by the Governor. While some oversight of such programs may be appropriate, the Committee urged both veto decisions because NYSERDA is an effective agency through which to properly channel the funds as earmarked by the PSC.

b. Net metering

One of the best ways to encourage and facilitate implementation of renewables is with a revamping of the net metering statutes and regulations in New York. New York's current net metering statute is extremely limited.¹ Net metering encourages owners to install distributed generation thereby strengthening reliability, reducing the need for additional infrastructure and potentially reducing power costs. The new Administration should work with the PSC and the Legislature to ensure broader implementation of net metering in conjunction with The Energy Policy Act of 2005 which also addresses net metering service. Moreover, the State should expand the net metering provisions to cover commercial buildings.

c. Solar hot water

The Committee would specifically support policy changes to promote solar hot water and thermal storage installations.² In many countries, solar hot water technology is an obvious choice for energy savings and is shown to be extremely cost-effective. The Committee suggests that NYSERDA prepare a report on the potential contribution of such installations, if widespread, to overall energy savings in New York. The report would identify the best places for use of the technology, whether with single family homes and small residential or commercial buildings, review further tax credit incentives to encourage such installations and devise a plan for increasing use of solar energy for this application.

d. Solar energy legislative protections

There have been examples, primarily in lower density residential neighborhoods, where local resistance has resulted in the denial by local review boards of solar installation proposals. Further, existing solar installations can be rendered ineffective by subsequent growth of vegetation or by physical structures built subsequently which block solar access. Several states have enacted legislation to deal with these issues.³ NYSERDA should investigate and report on the need for legislation that will prevent local zoning ordinances and decisions that unnecessarily restrict the installation of solar technologies and authorize easements to protect against interference with solar installations.

e. Utilizing real estate transfer opportunities

With respect to mechanisms for increasing energy conservation measures in buildings, the Committee believes that the new Administration should explore legislation imposing requirements to perform an energy audit and undertake various straight-forward cost-effective energy conservation measures upon the sale and transfer of real estate involving residential and commercial uses. As transactional costs are otherwise incurred in the context of real estate transfers and benefits received, a unique and attractive opportunity for enhancing energy efficiency is presented that should be utilized.

¹ New York's net metering program applies to residential photovoltaic systems up to 10 kW; qualified farms that generate electricity from systems with a rated capacity of up to 400 kW powered by biogas produced by the anaerobic digestion of agricultural waste, such as livestock manure, farming waste and food-processing wastes; residential wind turbines up to 25 kW; and farm-based wind turbines up to 125 kW. New York electric utilities are only required to accept customers into the net-metering program on a first-come, first-served basis until the total net-metered solar-electric capacity equals 0.1% of a utility's 1996 electric demand. The limit on aggregate biogas system capacity is 0.4% of a utility's 1996 demand, and the limit on aggregate wind system capacity is 0.2% of 2003 demand.

² This is particularly timely as Congress has just extended the residential and commercial solar investment tax credits through 2008.

³ See Cal. Health & Safety Code para. 1759.1, Cal. Gov't Code §65850.5 (limiting authority of municipality to restrict solar installation only where there is a specific, adverse impact on health and safety) and Cal. Pub. Res. Code sec 25980 (The Solar Shade Control Act). See also Fla. Stat. §163.04; Ind. Code §36-7-2-8; Wis. Stat. §236.292(2).

The concept of requiring an energy audit and energy related retrofits upon transfer of property is not new. The City of San Francisco has had a residential energy conservation ordinance since 1982 which requires an energy audit and certain retrofits at the time of sale.⁴ City officials have found an average energy savings of 15% per household since passage of the ordinance. The City of Berkeley not only followed San Francisco's lead but expanded the requirements to the sale or major renovation of commercial buildings.⁵ Traveling in the other direction, in 2002, the European Union issued a directive requiring energy performance certificates not only for new construction but also upon sale or rental of existing buildings.⁶

Even something as simple as disclosure of annual energy costs may have the effect of encouraging simple cost-effective energy conservation measures. Many states, including New York, have real estate property condition disclosure requirements for sellers of property.⁷ These requirements could easily be expanded to include utility bills. Tapping into these opportunities for action upon property transfer, often utilized in the hazardous waste area, could be very effective in reducing energy use in buildings.

f. Revise the Energy Code

Finally with respect to the May 2002 New York State Energy Conservation Construction Code, the Committee recommends that it be revised to reflect the more recent versions of the International Energy Conservation Code and the most recent standards promulgated by ASHRAE that have been issued since the Code was developed. A timetable should also be established within the Code for review of the Code at regular intervals to ensure its maximum effect. California revised its energy code in 2005 to reflect the most recent version of the International Code and in September 2006 added new performance standards for cool roofs. There is already an update scheduled for 2008.⁸

Demand-Side Management – Differentiated Pricing – Emergency Planning

Controlling demand will reduce wholesale electricity prices. With installed capacity costs and the functioning of the primary wholesale electricity market on a market-clearing basis, the higher the demand for electricity, the higher the price. It has been estimated that as little as a one percent year-round reduction in daily peak demand would result in a ten percent reduction in annual wholesale electric prices. While the value of the reduction may be higher in the summer, savings are also realized from demand reduction even in the winter. Similarly, while reducing demand may impact prices more dramatically downstate, it nevertheless is important statewide. Moreover, reducing peak electric demand will have salutary effects such as postponing, with its attendant environmental benefits, the necessity of constructing and upgrading new transmission and distribution lines and new power plants.

Demand reduction can be achieved in several ways such as introducing new equipment and control systems or through power pricing methods. New equipment might obviously include retrofit lighting, efficient appliances and motors, on-site cogeneration, or other similar measures.

⁴ See Chapters 12 and 12A of the San Francisco Housing Code. Costs are capped at \$1300 for a single or two-family home.

⁵ City of Berkeley Municipal Code § 19.72.030 (includes exemptions if shown to be not cost-effective or hardship).

⁶ Eur. Parl. and Council Directive 2002/91/EC art. 7, 2003 O.J. (L 001) 65-71, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0091:EN:HTML>.

⁷ Real Property Law Sec. 462.

⁸ See Cal. Code Regs tit. 24 (2005) (California's Energy Efficiency Standards for Residential and Nonresidential Buildings), *available at* <http://www.energy.ca.gov/title24/index.html>. The new performance standards for cool roof coatings are at section 118. The docket number for the 2008 update is 05-BSTD-2 and background, notices, and reports can be found at <http://www.energy.ca.gov/title24/2008standards/index.html>.

Rebate programs, grants and tax incentives continue to be effective to encourage the use of such energy efficiency techniques. Time differentiated or real time pricing of electricity is also proving to be a cost-effective scenario for reducing electricity costs. While time differentiated pricing is used in many places throughout the world, the United States has been slow to embrace the concept. In New York, for example, only very large customers (1500 KW) are required to purchase electricity on a real time basis. Other customers may do so only on a voluntary basis but NYSEDA incentives are necessary to fund the purchase of advanced interval meters.

Real time pricing needs to be further explored and promoted by New York State. Sending the right price signals to the end user (i.e., higher prices at peak) will be very effective in reducing electricity use. Such price signals also encourage end users to invest in the equipment mentioned above that will further reduce peak demand.

In addition, as part of an effective demand side management program, utilities should be required to prepare an emergency plan for mandatory reductions and effective communication in a crisis. Curtailment programs, both mandatory and voluntary, should be promoted in a fair and transparent manner. Developing an understanding of respective roles in advance of an emergency is imperative to avoid significant power disruptions.

Issuance of New Executive Order

a. Broad Based Sustainability Executive Order

The Committee recommends that an executive order be issued setting sustainability as a broad goal for all government operations. Such orders have been issued by several other states including Massachusetts⁹ and Oregon¹⁰. While there is great benefit to the specificity of Executive Order 111, requiring action on a set of discrete and important energy steps, it does not address many areas that impact directly on energy usage such as waste reduction, water conservation, and smart growth. A broad sustainability executive order would serve to create an impetus for state agencies to focus on all aspects of their internal operations that impact on energy, use their creativity and, ultimately, lead by example. Agencies should be required to submit a plan at least biannually presenting how they will address the requirements of this new order and report on what has been achieved. Innovative ideas should be rewarded. Such a broad sustainability order would serve not only to advance energy goals but also to address other environmental concerns.

b. Executive Order 111

Executive Order 111 involving renewable energy procurement, alternative fueled vehicles, and green buildings, and Executive Order 142, involving the use of biofuels, are limited and should be expanded. The Committee recommends that a new and more comprehensive Executive Order be issued with the following provisions:

Expand green building requirements for new and renovated state buildings and require USGBC LEED certification procedures and certification to a minimum of silver. This will clarify the requirement from the existing requirement that agencies follow “guidelines” to the “maximum extent possible” and provide the rigor necessary for effective implementation. Experience has demonstrated that self-certification is not enough.

⁹ Massachusetts Executive Order 438 (State Sustainability Program) (July 23, 2002), *available at* http://www.mass.gov/envir/Sustainable/program/pdf/eo_438.pdf.

¹⁰ Oregon Executive Order EO-03-03 (A Sustainable Oregon for the 21st Century) (June 17, 2003), *available at* http://www.sustainableoregon.net/execOrder/sustain_eo.cfm.

Require agencies that rent in commercial buildings to seek out opportunities in green buildings whenever possible, and allow a reasonable rent premium for locating in such a building. Regardless of the ultimate location, agencies should require delivery of an energy audit and disclosure of building commissioning practices as part of the lease agreement.

Expand the obligations on existing buildings by requiring energy audits, additional commissioning protocols, training of building staff on energy management, and consulting NYSERDA on funding options, all of which should lead to a defined goal of 25% more efficiency than the current State Energy Code.

Require all public authorities to include sustainability guidelines with RFPs (ESDC, State housing agencies, NYPA). It is critical that State initiated projects support and promote high performance building and smart growth.

In addition to setting goals for government operations, set overarching goals for the State as a whole with respect to energy issues and with respect to the pollutants generated by energy generation and usage. To assist in accomplishing these statewide goals, the Committee further recommends that the role of the Advisory Council on State Energy Efficiency be expanded or that a new advisory commission be established.

Further Comments

In our discussion of incentives for repowering, we touched on the concept of long-term contracts to encourage financing of such projects. The need for and propriety of PPAs as a general matter in the current energy market environment should be part of a larger discussion of whether utility portfolio management is appropriate, and, if so, what form it should take as it might include a combination of long and short term contracts, purchases on NYISO's day-ahead and real-time spot market, as well as comprehensive demand side management programs. Some interested parties argue that PPAs represent the only mechanism for obtaining financing for large power plants; others argue they would be an unnecessary interference with the functioning and future development of competitive retail markets and are not certain to lead to increased generation. The PSC is currently analyzing utility portfolio management models (Case No. 06-M-1017). In order to address these important issues in detail, the Energy Committee is currently preparing a report on electricity restructuring. We expect the report to be complete in early January 2007 and will forward it to the Administration. The report will address whether government should take steps to encourage construction of new generation and transmission in New York State and assess the appropriate role for government in the planning process. New York has been a leader in advancing competition in energy markets and our comments will be offered to help move the market and increase energy supply given current demand and financial realities.

The Committee would be pleased to discuss with you further the recommendations presented in this letter and stands ready to assist in any way on these and other important energy matters.

Respectfully,

New York City Bar Association
Committee on Energy

Edna R. Sussman, Esq.
Chair

Cc: The Honorable David Patterson, Lieutenant Governor-Elect
The Honorable Sheldon Silver, Speaker, New York State Assembly
The Honorable Joseph L. Bruno, President Pro Tempore and Majority Leader, New York State Senate
The Honorable Paul D. Tonko, Chair, Assembly Committee on Energy
The Honorable James W. Wright, Chair, Senate Committee on Energy and Telecommunications
Ashok Gupta, NRDC, Co-Chair, Energy and the Environment Transition Committee
Cara Lee, The Nature Conservancy, Co-Chair, Energy and the Environment Transition Committee
Angela Sparks-Beddoe, Energy East Management Corporation, Co-Chair, Energy and the Environment Transition Committee

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* These committee members took no role in the preparation of this letter.