

The Moreland Commission on Utility Storm Preparation and Response Issues Its Interim Report

January 11, 2013

On January 7, 2013, the Moreland Commission (the “Commission”), established to examine utility response to the devastation of super-storm Sandy, presented to Governor Andrew Cuomo its Interim Report. The Interim Report outlines recommendations for the future of the Long Island Power Authority (“LIPA”) and improving New York’s power utility companies’ preparedness and responsiveness to future major storms.

The Commission’s recommendations were developed following a review of practices, and interviews with personnel, state employees, organizations and government officials. The Commission also held three public hearings in Nassau, Suffolk and New York counties, at which testimony from members of the public, industry experts, business owners, and representatives from critical infrastructure entities was taken.

Recommendations discussed in the Interim Report address restructuring Long Island’s electric utility service, utility oversight, and enforcement mechanisms, the process for planning, preparing and responding to major storms, and streamlining State energy programs.

LIPA

The Interim Report asserts that the Commission uncovered numerous examples of overlapping roles, conflicting messages to the public and confusion about accountability and responsibility resulting from LIPA’s delegation of its day-to-day responsibility to an outside contractor. The Commission contends LIPA’s attempt to transfer its responsibility to provide safe and reliable service to a contractor is not in the best interest of Long Island residents and urges an alternative be immediately considered. The Commission considered three possible alternatives, including the privatization of LIPA, which would require the company to sell its assets to a private company allowing the company to be regulated by the State, rather than regulating itself as it does now; streamlining LIPA by allowing LIPA to manage its day-to-day operations; and transferring ownership and operation of LIPA’s system to the New York Power Authority.

Of the three options, the Commission recommends privatization, in part because it would place the new service provider under the stronger regulatory environment recommended by the Commission.

Utility Oversight and Enforcement Mechanisms

The Commission's Interim Report concluded that the Public Service Commission ("PSC") "does not adequately utilize its existing statutory authority to full effect" and "[the PSC's] existing statutory enforcement authority is inadequate and should be strengthened and updated." As a result, the Interim Report recommends:

1. authorizing the PSC to levy administrative penalties against each utility for violations of PSC orders and regulations or upon a finding that such utility has failed to provide safe and adequate service under a "reasonable business" standard and basing such penalties on a percentage of revenues rather than the current fixed penalty of \$100,000 per day;
2. requiring the PSC to issue an order that directs the utility to implement management audit recommendations that the PSC finds to be reasonable;
3. requiring the PSC to issue an order enforcing compliance with recommendations for emergency management plans;
4. creating a dedicated PSC auditing unit;
5. creating a dedicated unit to investigate and enforce utility compliance with PSC orders and recommendations, and utility tariffs;
6. authorizing the PSC to formally review the performance of a utility to provide safe and adequate service and to revoke the utility's Certificate of Public Convenience and Necessity, after substantial due process is exercised;
7. increasing the Department of Public Service ("DPS") staffing and undertaking a review of budgetary levels to ensure they are sufficient to carry out the core functions of the PSC;
8. requiring senior officers of each utility company to annually certify to the PSC that the utility is acting in compliance with all applicable State laws, rules, regulations, orders, and procedures, including the requirement to provide safe and adequate service; and
9. ensuring that appointees to the PSC have demonstrated competence in some aspect of utility regulation as well as a concern for the public well-being.

Improving Preparedness and Responsiveness to Future Major Storms

The Interim Report emphasizes that a dependable supply of energy is critical to health and safety and notes that as energy system first responders, public utilities must have the ability, capacity, and will to act quickly and effectively. The Commission's Interim Report offered a number of recommendations related to the utilities planning, preparing and responding to emergency situations.

First, the Commission recommends directing the PSC to dedicate staff to meeting the statutory mandate of annually reviewing all utility storm plans, issue enforcement orders and allowing penalties against utilities that fail to comply with PSC issued storm plan recommendations. The second recommendation is that the PSC be required to annually certify to the Department of Homeland Security and Emergency Services ("DHSES") that utility storm plans are sufficient to ensure timely and safe restoration of energy services after an emergency. Third, the Commission recommends that the PSC and DHSES be required to participate in annual drills associated with utility storm plans. The requirement to implement such drills will help identify deficiencies in planning, resources, and coordination. Finally, the Commission recommends that consideration be given to statutorily

authorizing the PSC to initiate a civil penalty proceeding administratively, including in those situations where a utility has failed to file or properly implement a storm plan.

Streamlining State Energy Programs

The Interim Report found that there is overlap in at least two of the State's energy agencies – the PSC and the New York State Energy Research and Development Authority (“NYSERDA”), resulting in a reduction in the effectiveness of State government. The Commission contends that eliminating overlaps and streamlining functions would allow each entity to focus on core missions, therefore reducing inefficiencies and waste.

The Commission offers a number of suggestions for eliminating the overlap of functions including:

1. a unified management structure to provide for greater efficiencies and coordination with respect to policy-making and direction;
2. synchronization of the clean energy program administration efforts between NYSERDA and DPS;
3. creating a single office combined of both NYSERDA and DPS staff related to energy markets, policy and planning, and emergency response to help provide for coordinated and more effective implementation of these activities; and
4. clearly delineating responsibilities between NYSERDA and the utilities with respect to energy efficiency activities.

Next Steps

The Commission notes in its Interim Report that it will now enter the second phase of its assignment – investigating all New York utility power providers' response to the recent storms – by issuing subpoenas, demanding documents, interviewing witnesses, and conducting public hearings. A Subcommittee of the Commission will examine the challenges associated with managing the costs of storm hardening activities. The final report of the Commission is expected to outline what changes, if any, should be made to the PSC regarding qualifications and compensation of the PSC's Commissioners and will review the potential need for a new ratepayers' advocacy entity.

For more information, visit www.moreland.ny.gov or contact Brian FitzGerald, Gregory Nickson or your Cullen and Dykman relationship partner.

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