S T A T E O F N E W Y O R K

3313

2009-2010 Regular Sessions

I N S E N A T E

March 16, 2009

Introduced by Sen. OPPENHEIMER -- read twice and ordered printed, and when printed to be committed to the Committee on Corporations, Authorities and Commissions

AN ACT creating not-for-profit small business utility boards to advocate small business utility consumer interests

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The Small Business Utility Boards Act is enacted to read as follows:

SMALL BUSINESS UTILITY BOARDS ACT

Section 1. Short title.
2. Legislative intent.
3. Definitions.
4. Creation of corporation; membership.
5. Duties, rights and powers of the corporation.
6. Notification of impending proceedings.
7. Judicial review of regulatory agency decisions; enforcement actions.
8. Funding of the corporation.
9. Board of directors.
10. Duties of the board of directors.
11. Appointment of interim board of directors.
12. Election of directors.
13. Qualifications of candidates.
14. Statement of personal background and positions.
15. Election procedures.
16. Installation of elected candidates.
17. Recall of directors.
18. Vacancies.
19. Officers.
20. Annual membership meeting.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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21. Miscellaneous provisions.
22. Dissolution of corporation.
23. Corrupt practices and conflicts of interest.
24. Penalties.
25. Applicability of the not-for-profit corporation law.
26. Construction.
27. Severability.

Section 1. Short title. This act shall be known and may be cited as the "Small Business Utility Boards Act".

S 2. Legislative intent. The legislature hereby declares that adequate and affordable utility service to small businesses in the state is necessary to guarantee stability and foster growth in this important sector of our economy. Small businesses are responsible for the creation of most of the new employment opportunities in this state, and their continued existence and productivity is in the interest of the state and its citizens. It is the policy of this state to foster and encourage active participation by small businesses in utility matters and to facilitate effective representation and advocacy of their interests before regulatory agencies, the legislature, the courts and other bodies to ensure that public policies affecting the provision, quality and cost of utility service fairly reflects the needs and concerns of these consumers. The legislature finds that such representation can best be secured by the creation of not-for-profit organizations which are under the control of their memberships and solely responsive and responsible to the memberships' goals and that this type of advocacy for small business utility consumers requires the establishment of an efficient funding mechanism whereby such consumers may voluntarily contribute to the organizations.

For these reasons there should be established, not-for-profit corporations known individually as the "Small Business Utility Board, Inc." with the responsibility to promote adequate representation of small business utility consumers; to collect operating funds; to assist in the redress of small business utility consumer complaints; and to provide for small business utility consumer membership in such corporations and small business utility consumer direction of the actions of such corporations.

S 3. Definitions. As used in this act:

1. "Public utility", "utility", "utility company", "public utility company", "utility corporation" and "public utility corporation" means every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, having annual operating revenues in excess of one hundred million dollars, which are engaged in the business of furnishing electric, gas or telephone service if rates for such furnishing or sale have been established or are subject to approval by the public service commission of the state of New York.

2. "Utility services" means electricity, gas and telephone services supplied by a public utility.

3. "Small business" includes any business concern whether or not organized for profit, including but not limited to any individual, partnership, corporation, joint venture, association or cooperative, which:

(a) is independently owned and operated;

(b) is not dominant in its field of operation;

(c) is not an affiliate of a business dominant in its field of operation; and

(d) including its affiliates has one hundred or fewer full-time and/or part-time employees.

4. "Small business utility consumer" means any small business furnished with a utility service by a public utility company.

5. "Regulatory agency" means any local, state, or federal department, commission, office, authority or other public body with the legal authority:

(a) to establish or alter rates or charges for the provision or sale of utility services within this state;

(b) to plan or to approve, reject, or modify plans for the construction of facilities for the production or provision of utility services within this state;

(c) to formulate or review energy policies affecting this state; or

(d) otherwise to regulate the activities of utility companies doing business within this state; provided that local, state and federal courts and legislative bodies shall not be deemed to be "regulatory agencies" for the purposes of this act.

6. "Proceeding" means any formal meeting of a regulatory agency or subdivision thereof, including a meeting conducted by an administrative law judge or other agent of the regulatory agency, regarding:

(a) the establishment or alteration of rates or charges for the provision or sale of utility services within this state; or

(b) the establishment, abrogation, or amendment of rules or regulations, or the investigation of or inquiry into activities and procedures of utility companies, concerning small business utility consumers, public utility companies, or energy policies affecting this state, or concerning the conduct of regulatory agency proceedings themselves; or

(c) adjudication of the claims or petitions of small business utility consumers, public utility companies, or other persons or groups of persons; or

(d) certification of the construction or operation of utility plant, including pipelines and transmission lines.

7. "Corporation" means each individual Small Business Utility Board, Inc.

8. "Member" means any small business which meets the requirements for membership in the corporation set forth in section four of this act.

9. "Director" means any member of the corporation duly elected or appointed to the board of directors of the corporation.

10. "Service area" or "utility service area" means the marketing area of each public utility defined in subdivision one of this section, provided, however, that for a public utility that furnishes electric and gas service, "service area" or "utility service area" means the marketing area for such public utility's electric service and the marketing area for such public utility's gas service.

11. "Periodic customer billing" means a demand for payment for utility services by a public utility to a small business utility consumer on a monthly or other regular basis.

12. The "immediate family" of a person means the person and his or her spouse, and their parents, children, brothers and sisters.

S 4. Creation of corporation; membership. 1. There is hereby created one not-for-profit membership corporation in each utility service area to be known individually as the "Small Business Utility Board, Inc." hereinafter referred to as the corporation.

2. The membership of the corporation shall consist of all small business utility consumers in the utility service area which have contributed to the corporation an annual membership fee in such an amount and

at such times as shall be set by the board of directors, provided, that any member may resign from membership.

S 5. Duties, rights and powers of the corporation. 1. The corporation shall:

(a) Represent and promote the interests of the small business utility consumers of this state. All actions by the corporation under this act shall be directed toward such duty.

(b) Inform, insofar as possible, all small business utility consumers about the corporation, including the procedure for obtaining membership in the corporation.

(c) Establish a minimum annual membership fee of at least ten dollars.

(d) Have all rights and powers accorded generally to, and be subject to all duties imposed generally upon, not-for-profit membership corporations under the laws of this state.

2. In addition, the corporation shall have the following rights and powers:

(a) To solicit and accept gifts, loans, grants or other aid in order to support activities concerning the interests of small business utility consumers, except that the corporation may not accept gifts, loans or other aid from any public utility or from any director, employee or agent or member of the immediate family of a director, employee or agent of any public utility.

(b) To seek tax-exempt status under state and federal law.

(c) To conduct, support, and assist research, surveys, investigations, planning activities, conferences, demonstration projects, and public information activities concerning the interests of small business utility consumers.

(d) To contract for services which cannot reasonably be performed by its employees.

(e) To represent the interests of small business utility consumers before regulatory agencies, legislative bodies and other public bodies.

(f) To initiate, to intervene as a party, to maintain, or to otherwise participate on behalf of small business utility consumers in any proceeding which affects the interests of small business utility consumers.

(g) To support or oppose ballot propositions concerning matters which it determines may affect the interests of small business utility consumers.

3. The corporation shall have, in addition to the rights and powers enumerated in this act, such other incidental rights and powers as are reasonably necessary for the effective representation and protection of the interests of small business utility consumers.

4. The corporation shall not sponsor, endorse, or otherwise support, nor shall it oppose, any political party or the candidacy of any person for public office.

S 6. Notification of impending proceedings. Each regulatory agency of this state as defined in subdivision five of section three of this act shall notify or cause notice to be given to the corporation, in advance, of the time, place, and subject of each formal proceeding of the agency in which the corporation may be eligible to participate. The agency shall so notify or cause notice to be given to the corporation at least thirty days before the scheduled date of such proceeding or within five days after the date and calendar for such proceeding is fixed, whichever is later. In addition, the public service commission of the state of New York shall give notice or cause notice to be given within five days to the corporation of any filed statement proposing to modify or increase

rates, services, schedule of rates or any other rating rule or to adopt or amend any rate or service rule or regulation.

S 7. Judicial review of regulatory agency decisions; enforcement actions. The corporation shall be deemed to have an interest sufficient to maintain, intervene as of right in, or otherwise participate in any civil action, proceeding or appeal for the review or enforcement of any regulatory agency decision or action, or refusal to act, which the corporation determines may substantially affect the interests of small business utility consumers.

S 8. Funding of the corporation. 1. The corporation shall have the authority to prepare and furnish to the public utility that must comply with the provisions of this section, not fewer than twenty-one calendar days in advance of the date of any periodic customer billing of such public utility company, and not more than four times every calendar year, a statement printed in at least nine point type on eleven point lead for inclusion in such public utility company's next periodic customer billing which explains or describes the corporation's nature, purpose, activities, membership fees and membership provisions. In addition to such other information as the corporation may wish to include in such statement, the statement shall explain:

(a) that the corporation is open to membership by small business consumers;

(b) that the corporation is not connected to any utility company or governmental agency;

(c) that the corporation is a not-for-profit corporation directed by its consumer members;

(d) that the purpose of the corporation is to advocate and promote the rights of small business consumers; and

(e) the yearly membership fee.

2. With and in addition to the statement described in subdivision one of this section, the corporation shall have the authority to prepare and furnish to such public utility a card, leaflet, envelope or similar enclosure printed in at least nine point type on eleven point lead for inclusion in such periodic customer billing, which instructs the customer as to the procedures which may be followed to obtain membership in the corporation.

3. The statement and the enclosure described in this section shall be of a size compatible with the utility's mailing envelope, shall have the character of a circular and may not have the character of a bill, statement of account, or personal correspondence, and shall otherwise conform to the specifications of the utility's billing enclosure requirements and procedures. Each public utility company furnished with such statements or other enclosures in accordance with the provisions of this section shall include or enclose such statements or enclosures with the next customer periodic billing which it mails or delivers to each of its customers.

4. The total weight of the corporation's statements and enclosures incorporated pursuant to this section in a customer's periodic billing may not exceed one-half ounce avoirdupois. If the weight of the public utility company's periodic customer billing, when combined with the corporation's statements or other enclosures exceeds one ounce avoirdupois, the corporation shall reimburse the utility for the amount which is the same proportion of the total postage or other delivery cost of the billing as the weight of the corporation's statements or other enclosures is to the total weight of the mailing. The corporation shall promptly reimburse with interest at the utility company's cost of capi-

tal such utility company for all other reasonable handling and enclosure costs in excess of the utility company's normal billing costs which are incurred by the utility company in complying with this section. The corporation may postpone for three months after the date of the first election of directors under section twelve of this act reimbursement of the utility company for all costs incurred through the date of such election. If such utility company is unable to collect any amount due from the corporation under this section within three months after the date such amount is due, that utility company may refuse further requests to mail an enclosure until the amount is paid, unless an action to resolve the dispute with respect to such costs is pending in the appropriate state court.

5. A dispute arising from the operation of this section shall be resolved by negotiations between the corporation and utility, if possible, or by an action commenced in the appropriate state court. Neither the public utility nor the corporation may fail to comply with this act by reason of the existence of such a dispute.

6. No public utility company or officer, employee, or agent of a public utility company may interfere or threaten to interfere with or cause any interference with the utility service of, or penalize or threaten to penalize or cause to be penalized, any person who contributes to the corporation or participates in any of its activities, in retribution for such contribution or participation.

7. No public utility company or officer, employee, or agent of a public utility company may prevent, interfere with, or hinder the activities described in subdivisions one through four of this section.

8. No person shall use any list of contributors to the corporation, nor any part of such list, for purposes other than the conduct of business of the corporation as prescribed in this act. No person shall disclose any such list or part thereof to any other person unless there is substantial reason to believe that such list or part thereof is not intended to be used for the lawful purposes described in this act and the board of directors approves such action. Any person who violates this subdivision shall be subject to a civil penalty of not more than ten thousand dollars.

S 9. Board of directors. 1. The affairs of the corporation shall be managed by a board of directors consisting of twelve members.

2. The directors shall serve without salary, but each director may be entitled to reimbursement for actual and necessary expenses. The board of directors shall establish standard allowances for mileage, room and meals and the purposes for which such allowances may be made and shall determine the reasonableness and necessity for such reimbursements.

3. The term of office for members of the board of directors shall be three years and no member shall serve more than two consecutive terms. One-third of the directors first elected shall serve for a one-year term; one-third of such directors shall serve a two-year term; and one-third of such directors shall serve a full three-year term.

4. No director shall, either directly or indirectly, be employed for compensation as a staff member or consultant of the corporation.

5. Any director who shall handle, disburse, or receive money on behalf of the corporation shall be bonded. Such bond shall be a cost to the corporation.

S 10. Duties of the board of directors. The board of directors shall have the following duties:

1. to establish the policies of the corporation regarding appearances before the public service commission of the state of New York, other

regulatory agencies, the courts, and other public bodies, and regarding other activities which the corporation has the authority to perform under this act;

2. to maintain up-to-date membership rolls, and to keep them in confidence to the extent required by the provisions of section eight of this act;

3. to keep minutes, books and records which shall reflect all the acts and transactions of the board of directors;

4. to make all reports, studies and other information compiled by the corporation pursuant to paragraph (c) of subdivision two of section five of this act, and all data pertaining to the finances of the corporation, available for public inspection during regular business hours;

5. to maintain for inspection by the membership quarterly statements of the financial and substantive operations of the corporation;

6. to cause the corporation's books to be audited by a certified public accountant at least once each fiscal year, and to make the audit available to the general public;

7. to prepare, as soon as practicable after the close of the corporation's fiscal year, an annual report of the corporation's financial and substantive operations to be made available for public inspection;

8. to report to the membership at the annual membership meeting on the past and projected activities and policies of the corporation;

9. to employ such staff as the directors deem necessary to carry out the purposes of this act;

10. to hold regular meetings, including meetings by telephone conference, at least once every three months on such dates and at such places as it may determine. Special meetings may be called by the president or by at least one-quarter of the directors upon at least five days' notice. One-half of the directors plus one shall constitute a quorum. All meetings of the board of directors and of its committees and subcommittees shall be open to the public. Complete minutes of the meetings shall be kept;

11. to annually approve a budget for the corporation's operations for the following fiscal year;

12. to make an annual report to the members explaining the activities and expenditures of the corporation over the past year;

13. to make available to each member, upon request and under guidelines established by the board which shall protect personal privacy, all papers, records, documents and other material in the possession of the corporation; and

14. to carry out all other duties and responsibilities imposed upon the corporation and the board of directors by this act.

S 11. Appointment of interim board of directors. 1. Within ninety days after the effective date of this act an interim board of directors shall be appointed by the governor, to serve until a board of directors is first elected. If the number of members of the corporation fails to reach the level required by section twelve of this act within two years of the appointment of the complete interim board of directors, the corporation shall be dissolved and shall wind up its affairs after having satisfied its debts, liabilities and obligations to the extent possible from funds made available to the corporation.

2. The method of appointment of interim directors shall be as follows: four shall be appointed by the governor; three shall be appointed by the governor from a list containing no less than five names submitted by the temporary president of the senate; three shall be appointed by the governor from a list containing no less than five names submitted by the

speaker of the assembly; one shall be appointed by the governor from a list of not less than five names submitted by the minority leader of the senate; and one shall be appointed by the governor from a list of not less than five names submitted by the minority leader of the assembly. All nominees shall be owners of small businesses. Individuals considered for appointment to the interim board shall have the same qualifications as candidates for the board of directors pursuant to section thirteen of this act, and shall, to the extent possible, represent each region of the service area.

3. The interim board of directors shall:

(a) As soon as possible after appointment, organize for the transaction of business.

(b) Inform the small business utility consumers of the service area of the existence, nature and purpose of the corporation, and encourage small business utility consumers to join the corporation, to participate in the corporation's activities and to contribute to the corporation.

(c) Elect officers.

(d) Employ such staff as the directors deem necessary to carry out the purposes of this act.

(e) Make all necessary preparations for the first election of directors, oversee the election campaign and tally the votes.

(f) Solicit funds for the corporation.

(g) Designate by a random method the length of the term of office of each director position to be filled after the first election of directors.

S 12. Election of directors. 1. Not more than sixty days after the membership of the corporation reaches one thousand small businesses, the interim board of directors shall set a date for the first general election of directors and shall so notify each member. The date set for such election shall be not less than four months nor more than eight months after such notification. Each subsequent election shall be held not less than eleven months nor more than thirteen months after the last preceding election. The date of such elections shall be fixed by the board at least four months in advance of the date chosen for the election.

2. To be nominated for election to the board of directors a candidate must:

(a) meet the qualifications provided in section thirteen of this act; and

(b) (i) be nominated by a majority of the directors present and voting; or

(ii) circulate a petition for nomination no more than ninety days preceding the election and file the petition with the corporation no later than thirty days prior to the election. The petition for nomination shall be signed by at least one hundred of the members located in the service area. Upon receipt of nominating petitions, the board of directors shall certify such petitions.

S 13. Qualifications of candidates. 1. No present employee, director, shareholder, bondholder, consultant, attorney, accountant, or the spouse of such person, of any public utility doing business in this state or of the power authority of the state of New York and no employee of the public service commission of the state of New York shall be eligible to be a director. No candidate for the board of directors may hold an elective public office or be a candidate for an elective public office.

2. To be eligible for election to the board of directors a candidate must:

(a) be an owner or majority stockholder of a small business;
(b) meet the qualifications for candidates;
(c) be a member of the corporation; and
(d) submit a statement of personal background and positions.

S 14. Statement of personal background and positions. A candidate for election to the board of directors shall submit to the board of directors, not later than sixty days prior to the election, on a form to be provided by the board of directors, a statement concerning his or her personal background and positions on issues relating to regulated public utilities or the operations of the corporation.

S 15. Election procedures. 1. The board of directors shall send or have sent to every small business member, to be postmarked no later than twenty days before the date fixed for a special or general election, the following:

(a) an official ballot listing all candidates for the board of directors; and

(b) a biography of each candidate including a statement of personal background and positions.

2. Each small business utility consumer who is a member of the corporation on the thirtieth day preceding a special or general election may cast a vote in such election by returning his or her official ballot, properly marked, to the principal office of the corporation by eight p.m. on the date fixed for the election. Voters shall cast their votes for no more than the number of nominees to be elected at such election and all voting shall be done by secret ballot. The candidates receiving the most votes shall be declared elected.

3. The board of directors may prescribe rules for the conduct of elections and election campaigns not inconsistent with this act.

S 16. Installation of elected candidates. The president of the board of directors shall install in office within thirty days after the election all elected candidates who meet the qualifications prescribed in this act.

S 17. Recall of directors. Upon receipt by the president of the board of directors of a petition to recall any director, with the valid signatures of at least thirty percent of the small business members of the corporation, the board of directors shall call a special election to be held not fewer than four months and not more than six months after receipt of the petition, for the purpose of electing a director to serve out the term of the recalled director; provided, that no director may be recalled within six months of his or her election. A director may become a candidate in an election following his or her own recall. A director recalled shall continue to serve until the installation in office of his or her successor.

S 18. Vacancies. When a director dies, resigns, is disqualified, or otherwise vacates his or her office, except as provided in section seventeen of this act, the board of directors shall select, within three months, a successor to serve for the remainder of the director's term of office. Any director may nominate any qualified person as successor. The board of directors shall select the successor from among those nominated, by a two-thirds majority of the remaining directors present and voting. The successor shall be installed in office by the president of the board of directors.

S 19. Officers. 1. At the first regular meeting of the board of directors at which a quorum is present and subsequent to the initial appointments of directors, and at the first regular meeting of the board of directors at which a quorum is present subsequent to the installation of

new directors following each annual election, the board shall elect by majority vote of members present and voting from among the directors a president, a vice-president, a secretary, and a treasurer. The board shall also have the power to elect a comptroller and such other officers as it deems necessary.

2. Officers shall be installed by the president immediately upon their election. The term of office for officers shall be one year; provided that an officer may resign, or may be removed from office by a two-thirds vote of all the directors. After an officer's term of office has expired, the officer shall continue to serve until his or her successor is installed.

3. When an officer dies, resigns, is removed, or otherwise vacates his or her office, the board of directors shall elect a successor to serve out such officer's term of office.

4. The officers shall exercise such powers and perform such duties as are prescribed by this act or are delegated to them by the board of directors.

S 20. Annual membership meeting. An annual meeting of the membership shall be held on a date and at a place within the utility service area to be determined by the board of directors. All members shall be eligible to attend, participate in and vote at the annual membership meeting. The meeting shall be open to the public.

S 21. Miscellaneous provisions. 1. Nothing in this act shall be construed to limit the right of any individual or group or class of individuals to initiate, intervene in, or otherwise participate in any proceeding before any regulatory agency or court; nor to require any petition or notification to the corporation as a condition precedent to such right, nor to relieve any utility agency, court or other public body of any obligation, or affect its discretion to permit intervention or participation by a consumer or group or class of consumers in any proceeding or activity, nor to limit the right of any individual or individuals to obtain administrative or judicial review.

2. The intervention or participation of the corporation in a proceeding or activity shall not affect the obligation of any regulatory agency or other public body to operate in the public interest.

S 22. Dissolution of corporation. If membership in the corporation falls below one thousand small businesses, the directors shall forthwith dissolve such corporation in accordance with article 10 or 11 of the not-for-profit corporation law. Completion of the winding up of the affairs of the corporation in accordance with the dissolution mandated by this section shall result by operation of this act in the automatic creation of a new corporation pursuant to section four of this act but winding up of affairs mandated pursuant to section eleven of this act shall be final and not result in the creation of a new corporation.

S 23. Corrupt practices and conflicts of interest. 1. No member may offer or give anything of monetary value to any director, employee or agent of the corporation if the offer or gift influences, or is intended to influence, the action or judgment of the director, employee or agent of the corporation in his or her capacity as director, employee or agent of the corporation.

2. No director, employee or agent of the corporation may solicit or accept anything of monetary value from any member if the solicitation or acceptance influences, or is intended to influence, the official action or judgment of the director, employee or agent in his or her capacity as director, employee or agent of the corporation.

3. Any member who knowingly and willfully violates this section shall be subject to a civil penalty of not more than ten thousand dollars.

4. The board shall remove from office any director, employee or agent violating the provisions of this section.

S 24. Penalties. A violation of any provision of this act pertaining to conduct by a utility or officers or employees thereof shall be subject to a civil penalty of not more than ten thousand dollars for each violation.

S 25. Applicability of the not-for-profit corporation law. The not-for-profit corporation law applies to the corporation; provided, that if any provision of the not-for-profit corporation law conflicts with any provision of this act, the conflicting provision of the not-for-profit corporation law shall not apply in such case. If any provision of this act relates to a matter embraced in the not-for-profit corporation law but is not in conflict therewith, both provisions shall apply.

S 26. Construction. This act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed to effect its purposes.

S 27. Severability. If any clause, sentence, paragraph or part of this act or the application thereof be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder, and the application thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered.

S 2. This act shall take effect immediately.