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Via Electronic Mail

February 22, 2013

Hon. Jeffrey C. Cohen
Acting Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 12-E-0503 – Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans.

Dear Secretary Cohen:

Pursuant to the New York State Public Service Commission's ("Commission") Order Instituting Proceeding and Soliciting Indian Point Contingency Plan, issued on November 30, 2012, in the above-referenced case, Independent Power Producers of New York, Inc. hereby submits its Comments for filing with the Commission.

Respectfully submitted,

READ AND LANIADO, LLP
Attorneys for Independent Power Producers
of New York, Inc.

By: _____/s/_____
David B. Johnson

cc: Active parties (via e-mail)

NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 12-E-0503 - Proceeding on Motion of the
Commission to Review Generation
Retirement Contingency Plans

COMMENTS OF INDEPENDENT
POWER PRODUCERS OF NEW YORK, INC.

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Dated: February 22, 2013
Albany, New York

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NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 12-E-0503 - Proceeding on Motion of the
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COMMENTS OF INDEPENDENT
POWER PRODUCERS OF NEW YORK, INC.

I. INTRODUCTION

On February 1, 2013, Consolidated Edison Company of New York, Inc. (“Con Edison”) and the New York Power Authority (“NYPA” and collectively with Con Edison, the “Proponents”) filed with the New York State Public Service Commission (“PSC” or “Commission”) their proposed Indian Point Contingency Plan (“Contingency Plan”). The Proponents assert that the Contingency Plan, if implemented, is intended to meet electricity needs that could arise if the Indian Point Energy Center’s (“IPEC”) Nuclear Regulatory Commission (“NRC”) licenses are not renewed. Con Edison and NYPA filed the Contingency Plan in response to the Commission’s November 30, 2012 order¹ directing that a contingency plan be developed and filed by Con Edison in consultation with NYPA that would ensure needed resources are in place to address system reliability needs by the summer of 2016, which is the first peak period after the current expiration date of the NRC licenses (the “In-Service Deadline”).²

¹ Case 12-E-0503, Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, Order Instituting Proceeding and Soliciting Indian Point Contingency Plan (November 30, 2012) (“November 30 Order”). The development of reliability contingency plans for review “to prepare for potential large power plant retirements” was one of the Action Items listed in the New York Energy Highway Blueprint (“Blueprint”) released in October 2012. Blueprint at p 48, available at <http://www.nyenergyhighway.com/PDFs/BluePrint/EHBPPT>.

² In its Order, the PSC expressly stated that it would determine whether there was the need for any follow-up after its review of the Contingency Plan. November 30 Order at p 2.

Pursuant to the November 30 Order and the Acting Secretary's Notice Soliciting Comments issued February 13, 2013,³ Independent Power Producers of New York, Inc. ("IPPNY") hereby offers the following comments on the Contingency Plan.⁴ IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development, operation, and ownership of electric generators and the marketing and sale of electric power in New York's electricity markets.

As a trade association representing wholesale suppliers, one of IPPNY's primary missions is the continued development and enhancement of reliable and efficient competitive electricity markets. A well-functioning competitive wholesale electricity market is essential to meeting the State's electric needs at just and reasonable rates. With respect to the instant proceeding, IPPNY's interest lies mainly in ensuring that the Commission's policies on a contingency plan for the potential retirement of IPEC or any other generating facility in the future are complementary, or are the least disruptive, to the continued functioning of reliable, non-discriminatory, federally regulated, competitive wholesale electric markets in New York.

As discussed more fully below, major aspects of the Contingency Plan are flawed or incomplete. Thus, the Commission should reject the Plan and require Con Edison to submit a revised Plan correcting the flaws. First and foremost, while the November 30 Order clearly specified that the only actions required at this juncture were to develop and file the Contingency Plan, the Proponents take a major and unauthorized step farther seeking immediate

³ The Acting Secretary's February 13 Notice directed interested parties to submit comments addressing, at a minimum, the first requested action item in the Contingency Plan, *i.e.*, NYPA's issuance of a request for proposals ("RFP") and related matters. Case 12-E-0503, Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, Notice Soliciting Comments, at p 1-2 (February 13, 2013). IPPNY's comments address the entire Contingency Plan. However, IPPNY reserves the right to file additional comments on the second and third requested action items in response to the forthcoming State Register notices.

implementation of the Contingency Plan. Indeed, the Proponents do so without providing any analyses or other support demonstrating how the Proponents' proposed projects address system needs or demonstrating that such projects are narrowly tailored to address IPEC related reliability needs only.

Thus, the Contingency Plan is an unnecessary and apparent attack on New York's competitive electricity markets and harkens back to the command and control regime that existed before the introduction of competitive markets more than 15 years ago. It furthers Governor Cuomo's policy of shutting down a merchant generator and it ignores the economics of existing and future merchant investment. It proposes to replace economic investments with transmission and generation projects selected by a central planner financed on the backs of captive consumers, foisting on consumers the risks of new investments that the Commission removed in creating competitive markets. It unnecessarily burdens New York consumers with potentially billions of dollars in costs for new utility infrastructure that may not ultimately be needed, thereby bringing on-line uneconomic new entry that may artificially suppress energy prices in the competitive markets to the detriment of existing and new market-based projects for years to come. It also fails to provide the opportunity for efficient market-based proposals to address the reliability issues raised by the potential retirement of IPEC, and by its proposal to guarantee immediate rate recovery to various projects, chills the climate in which such market-based proposals might arise.⁵ If the Commission requires the development of regulated projects without providing an opportunity for merchant proposals, investment in merchant generation will

⁴ IPPNY's comments do not necessarily reflect the positions of all of its members.

⁵ The November 30 Order expressly directed Con Edison to address in the Contingency Plan "[i]dentification and assessment of the generation, transmission and other resources that are currently under development that could, when completed, contribute to meeting the identified reliability needs." See November 30 Order at 6. Thus, clearly, the Commission sought information concerning available market-based solutions. The Contingency Plan, however, is silent in this regard.

likely be impossible because any investor that must internalize merchant risk is at a significant competitive disadvantage to one whose return of, and on, investment is guaranteed.

Further, the Contingency Plan discriminates against private developers in contravention of the Commission's policies and the NYISO's tariff by proposing that Con Edison's energy efficiency, demand response, and transmission solutions receive guaranteed cost recovery at Statewide ratepayer expense for at least five months before private developers are eligible to receive cost recovery for proposed generation and transmission projects that may be more narrowly tailored, more refined in scope, or lower cost. Con Edison should not receive cost recovery for any project in this case unless and until the Commission selects one of its projects after weighing it against private developers' proposed transmission and generation projects. All proposed projects must proceed on an equal footing.

Notwithstanding these competitive concerns, IPPNY recognizes that the Commission may decide in the name of significant advanced planning to approve the first requested action item in the Contingency Plan, which proposes that the Commission issue an order in March 2013 requesting that NYPA issue an RFP to solicit new incremental generation and transmission proposals that could be in place by the In-Service Deadline. Should the Commission elect to do so, it should require a fair, open, and nondiscriminatory RFP available to both existing and new resources. If the RFP is limited to certain types of resources or to only new resources and thus is not pursued through a competitive, non-discriminatory process, cost recovery mechanisms must be designed, and effective market mechanisms must be put into place in the competitive wholesale markets, to prevent such discriminatory procurement from resulting in an award that improperly depresses energy clearing prices for market-based facilities. Cost recovery structures where resources do not have the incentive to bid their costs may skew market clearing prices and

hinder the market's efficient operation. For example, cost recovery structures where resources are bid into the market at less than their true costs (*i.e.*, as price takers) because their costs are otherwise recovered through other mechanisms, may skew dispatch and artificially depress clearing prices, thereby threatening needed existing and new market-based resources.

With respect to capacity markets, if any new generation project is brought on line in New York City as a result of the RFP in this proceeding, it will be subject to the NYISO's buyer-side market power mitigation measures. Given the current surplus conditions in New York City, any such project is likely to be subject to an offer floor bidding requirement.⁶ Moreover, a new Lower Hudson Valley capacity zone Valley capacity zone is likely to be created later this year.⁷ If the Commission determines that a new generation project is needed in the Lower Hudson Valley and it is brought on line as a result of the RFP in this proceeding, such project's capacity bids are also expected to be subject to an offer floor pursuant to the NYISO's buyer-side market power mitigation measures.⁸ The Commission should go forward in this proceeding taking into

⁶ Two of the three new entrants that have undergone mitigation exemption test determinations and gone forward with their projects have been found to be subject to the offer floor bidding requirements. Moreover, the entry of two of these new facilities and the imminent entry of the third with limited generation retirements to counterbalance their entry has resulted in a surplus condition in New York City. Thus, the PSC in this proceeding should recognize the fact that additional generation entry in New York City would also likely be subject to the offer floor bidding requirements. The application of these rules is critical to ensure that capacity market pricing in both New York City and in the New York Control Area is not artificially suppressed.

⁷ The NYISO recently completed its new capacity zone testing and has determined that a new capacity zone must be formed in the Lower Hudson Valley. See, NYISO's Implementation of New Capacity Zone in Class Year Deliverability Studies, ICAP Working Group, at pp 8-10 (released Feb. 14, 2013), available at http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_prlwg/meeting_materials/2013-02-14/Implementation%20of%20NCZ%20into%20Deliverability%20Studies_ICAPWG_02-14-2013_final.pdf. The NYISO is expected to submit a compliance filing designating this new zone by March 31, 2013.

⁸ On June 29, 2012, the NYISO filed with the Federal Energy Regulatory Commission ("FERC"), in Docket No. ER12-360, proposed tariff revisions to the NYISO's Market Administration and Control Area Services Tariff to implement buyer-side market power mitigation measures for new capacity zones using the same conceptual framework of the existing market mitigation measures currently applicable to the New York City locality. Protests were filed concerning certain, more narrowly drawn provisions that were proposed. The NYISO's filing remains pending before the FERC at this time. FERC adopted the buyer-side market power mitigation measures for the express purpose of preventing the artificial suppression of capacity prices by new entrants entering the market and offering capacity at a price that is lower than necessary to recover their respective fixed costs. FERC has repeatedly ruled that artificial price suppression is detrimental to the market because it discourages efficient price signals for

account the fact that if the project it requires consumers to fund to meet the In-Service-Deadline does not pass the mitigation exemption determination test, the project's capacity will not clear in the NYISO capacity auctions. If the capacity does not clear, it cannot be used to satisfy a load serving entity's ("LSE") capacity obligation, and the LSE will be required to procure alternative capacity to meet its installed reserve requirement.

In addition, the Commission should require that the RFP is structured so that all transmission and generation proposals are evaluated on a comparable basis.⁹ A project that is willing to cap the total cost exposure to consumers in a long-term contract ultimately may be more beneficial to customers than a cost-based solution that has a lower initial cost estimate but also seeks recovery of all costs without limitation. To ensure competing bids are evaluated fairly, the Commission should require that developers of transmission and generation projects offer firm bids that cap consumers' exposure to project costs.¹⁰ If a developer requires cost recovery of potential cost overruns, it should be required to incorporate the risk of cost overruns in its bid.¹¹

Finally, the Commission should order Con Edison to hold the RFP and enter into a power purchase agreement ("PPA") with the bidder(s) selected by the Commission, not NYPA as

needed new generation investment and fatally undermines the long-term sustainability of the market. *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011); *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,178 (2010); *ISO New England, Inc. and New England Power Pool Participants Committee*, 131 FERC ¶ 61,065 (2010); *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211, *order on reh'g and compliance*, 124 FERC ¶ 61,301 (2008).

⁹ If Department of Public Service Staff ("Staff") is not fully qualified to evaluate bids, the Commission should retain an independent consultant to assist Staff in the selection process.

¹⁰ To address concerns that fixed price contracts may not fully protect consumers from the risk of project cost overruns because a developer may seek additional cost recovery or abandon its project, the developer's financial and technical capability can be monitored through contractual milestones and performance guarantees.

¹¹ Ratepayers would not be required to pay the more than \$350 million of cost overruns incurred by Con Edison in its construction of its East River Repowering Project ("ERRP") had the project been competitively bid in this manner.

proposed in the Contingency Plan. NYPA is not subject to the Commission's jurisdiction. In addition, NYPA has an inherent conflict of interest as a proponent of Contingency Plan transmission projects and the Transco proposal in Case 12-T-0502, Proceeding on Motion to Examine Alternating Current Transmission Upgrades (the "AC Transmission Case"). In both instances, NYPA has a significant financial stake. At the same time, its proposed projects will directly compete with proposed transmission and generation solutions submitted under the RFP. As such, its inherent conflict of interest may cause it to unduly and unfairly influence the RFP process to its favor. While Con Edison has the same conflict of interest, the Commission can exercise its jurisdiction over Con Edison and ensure more oversight over the process if Con Edison conducts the RFP. In addition, having Con Edison conduct the RFP and enter into a PPA may avoid the significant jurisdictional questions and uncertainties (at least as respects its own ratepayers) regarding NYPA's ability to exceed its statutory authority and recover PPA cost from entities other than its own customers, as addressed in Point VI *infra*.

The Contingency Plan is also defective because major aspects of its implementation rely on future actions by the New York State Legislature and FERC over which Con Edison, NYPA, and the Commission have no control. NYPA's participation in the Contingency Plan is dependent on the Legislature enacting amendments to the Public Authorities Law. The Contingency Plan does not provide any guidance or alternative solutions if the Legislature does not enact the required amendments.

The Contingency Plan is further flawed because it proposes that costs for transmission projects be recovered and allocated pursuant to the Public Policy Requirements ("PPR") planning process that the New York Transmission Owners ("NYTOs") and the NYISO jointly

filed with FERC in compliance with FERC's Order No. 1000.¹² As Con Edison and NYPA recognize in the Contingency Plan, however, the Order 1000 Compliance Filing is pending at FERC. It is uncertain when FERC will rule on the filing and whether it will approve the filing without modification. The Contingency Plan fails to provide any detailed alternative cost-recovery and allocation mechanism if FERC does not approve the Order 1000 Compliance Filing without modification before the Contingency Plan's implementation. Indeed, the PSC does not have jurisdiction over cost recovery for transmission projects.¹³

In addition, even if FERC adopted the Order 1000 Compliance Filing without modification, the process proposed in the Contingency Plan for the Commission to adopt a PPR and select a PPR project does not comply with the NYISO's proposed PPR planning process as set forth in the Order 1000 Compliance Filing. Indeed, the Order 1000 Compliance Filing does not make the NYISO's proposed procedures effective until "the completion of the next reliability planning cycle following [FERC's] issuance of a final order approving the[] tariff changes."¹⁴ Thus, the Contingency Plan will foster tremendous uncertainty among ratepayers, utilities, and private developers because any Commission approval of a project for cost recovery may be legally deficient and subject to challenge.

Finally, even if all of these flaws could be corrected, the Contingency Plan itself is substantively deficient. Con Edison has wholly failed to: (i) identify the full nature of the reliability needs at issue; (ii) explain whether and, if so, how each of its proposed projects addresses each identified need; (iii) demonstrate that each of its projects is narrowly tailored to

¹² FERC Docket No. ER13-102, NYISO Order 1000 Compliance Filing ("Order 1000 Compliance Filing")

¹³ Proponents acknowledge this fact when they note in this proceeding and in the AC Transmission Case that the joint Transco transmission project proposal must be filed with the FERC for cost recovery approval.

¹⁴ Order 1000 Compliance Filing at p 67.

address IPEC reliability needs (and thus should be addressed in this proceeding), not just part of its long term transmission planning (and thus should instead be addressed in its own rate cases); and (iv) confirm that other alternatives (including market based proposals) are not more limited in scope, lower in cost or able to be implemented at a later time when more information concerning IPEC's license renewal efforts may be known. Thus, if the Proponents correct the other flaws identified herein and are permitted to proceed forward with the Contingency Plan, the Commission should direct the Proponents to provide this additional information expeditiously as a supplement to their filing.

II. BACKGROUND

A. November 30 Order

In its November 30 Order, the Commission stated that the potential retirement of a significant electric generating facility such as IPEC requires "significant advanced planning."¹⁵ The Commission noted that the size, location, and uncertainties regarding the potential retirement of IPEC requires that a contingency plan be developed now to ensure reliability in the event IPEC is retired.¹⁶ The Commission directed Con Edison to take a limited action in this proceeding—to wit, to develop and file the Contingency Plan. The Commission expressly stated that it would determine whether there was a need for any follow-up after its review of the Contingency Plan.¹⁷

The Commission ruled that the contingency plan must take into account the status of proposed power plants and AC and DC transmission projects, as well as the potential impacts of energy efficiency, distributed renewable generation, demand response, and combined heat and

¹⁵ November 30 Order at p 2.

¹⁶ *Id.* at pp 2-3.

¹⁷ *Id.* at p 2.

power projects.¹⁸ The Commission further ruled that the contingency plan must also include the form of an RFP that would be issued to procure needed resources to address system reliability needs by the summer of 2016, along with "halting mechanisms" in the event it becomes apparent that the IPEC remains operational and replacement capacity is not required as of that time.¹⁹ The Commission emphasized the need to protect consumers from unnecessarily incurring substantial costs in this proceeding.

According to the Commission, the RFP will ensure that any process to procure replacement capacity or comparable facilities will be competitive and, together with the halting mechanism, will assist the Commission in controlling ratepayer cost exposure.²⁰ The Commission stated that suggestions should also be included in the contingency plan where opportunities may exist to improve current regulatory processes to accelerate the project development schedule.²¹

B. The Contingency Plan

Con Edison and NYPA state that the Contingency Plan analyzed the impact that the retirement of IPEC would have on the bulk power system, taking into account the effect of the retirement of Dynegy Danskammer, L.L.C. Units 1-6. Con Edison notes that it unilaterally adjusted the base case assumptions by first assuming its own immediate implementation of an incremental, separately funded, 100 MW energy efficiency ("EE") program (at an estimated cost of \$300 million).²² The Contingency Plan goes beyond the November 30 Order's express

¹⁸ See *id.* at p 5.

¹⁹ *Id.* at pp 5-6.

²⁰ See *id.* at p 6.

²¹ *Id.*

²² Contingency Plan at pp 1-2. As reflected in numerous pleadings, IPPNY supports properly implemented energy efficiency initiatives as an important part of system options. However, Con Edison cannot be permitted to favor

directives by proposing to implement a two-pronged, multi-step, fast track approach that will require at least three separate orders from the Commission authorizing the immediate implementation of, and cost recovery for EE and DR program resources and transmission and generation projects to be in service by the In-Service Deadline.²³

The proposed first prong is that the PSC issue an order in April of 2013 that would direct Con Edison (and New York State Electric and Gas Corporation (“NYSEG”) with respect to one transmission solution) and request NYPA to immediately begin development of, and authorize cost recovery for, three Transmission Owner Transmission Solutions (“TOTS”) so that they can be in place by the In-Service Deadline.²⁴ The three TOTS, two of which are also part of the Transco submission in the AC Transmission Case and all of which Con Edison and NYPA propose will be transferred to and owned by the New York Transmission Company (“NY Transco”) are: (1) the Second Ramapo to Rock Tavern 345 kV Line (at an estimated cost of \$123 million); (2) the Marcy South Series Compensation and Fraser to Coopers Corners Reconductoring Project (at an estimated cost of \$76 million); and (3) the Staten Island Un-bottling (at an estimated cost of over \$300 million).²⁵ Con Edison and NYPA propose that the PSC also find in an order issued in April 2013, on a preliminary basis, that the three TOTS are public policy projects that meet the public policy requirements of New York State, as identified in the November 30 Order and the Blueprint.²⁶ Presumably, the Proponents seek this designation

such a proposal by assuming it to be a base case assumption. Indeed, doing so risks adversely affecting reliability if its efforts ultimately prove unsuccessful and IPEC is required to cease operations. Con Edison’s proposed energy efficiency project, like all other proposed projects in this proceeding, must be assessed together on a level playing field.

²³ *Id.* at p 2.

²⁴ *See id.* at pp 2-4.

²⁵ *See id.*, Exhibits B-D.

²⁶ *Id.* at pp 16-17.

to be able to assert that the NYISO's FERC Order 1000 tariff provisions apply to these projects, an argument that is, in any event, flawed in several material respects as established *infra*.

The proposed second prong of the Plan is that the PSC issue an order in March of 2013 requesting that NYPA issue an RFP to solicit new incremental generation and transmission proposals that also could be in place by the In-Service Deadline.²⁷ Con Edison and NYPA propose that Staff will evaluate all of the proposed projects, including the TOTS, and then will recommend by August of 2013 to the PSC which projects should move forward to completion.²⁸ Inherent in the Contingency Plan is the presumption that some project will go forward immediately, a determination that the Commission expressly has not made.

Their reason for doing so is obvious. Per the Contingency Plan, any project the Commission advances would receive full cost recovery.²⁹ Moreover, the Commission noted in the November 30 Order that halting mechanisms were intended to control ratepayer costs in the event that a project that is being developed to address the potential closure of IPEC is stopped.³⁰ As established by the Proponents, however, any halting mechanism would be quite limited. Specifically, Con Edison and NYPA state that the halting mechanism limits the PSC to stopping any project only until December 31, 2014.³¹ All prudent costs incurred up to the date of the halting order would be recovered by the project developers.³²

²⁷ See *id.* at p 17.

²⁸ *Id.* at pp 17-18.

²⁹ See *id.* at pp 22-29.

³⁰ *November 30 Order* at p 6.

³¹ See *Contingency Plan* at p 26.

³² *Id.* at 29.

Con Edison and NYPA further propose that the PSC issue an order in September of 2013 that, among other things, selects final transmission and/or generation projects to go forward with full cost recovery; determines that developing and implementing an IPEC contingency plan is a state public policy requirement that drives the need for transmission; finds, to the extent that any of the TOTS are selected as final projects, that TOTS projects are public policy projects that meet the specified public policy requirements; and directs that each NYTO impacted by the Contingency Plan modify its retail cost recovery mechanisms to recover transmission costs allocated to it from its retail customers.³³ Importantly, if any projects were approved by the PSC in the proceeding, the Contingency Plan calls for immediate cost recovery from New York consumers outside of normal utility ratemaking.

Con Edison and NYPA propose that the TOTS, and any other selected transmission projects, be included in the PPR planning process outlined by the NYTOs and the NYISO in the NYISO's Order 1000 Compliance Filing. The NYISO's and NYTOs' proposed FERC Order 1000 PPR planning process authorizes the PSC through a defined, two-step, process to: (i) determine public policies that drive the need for transmission upgrades; and (ii) once such a public policy requirement is identified, to select projects that meet these public policy requirements.³⁴ The planning process allows for PPR projects chosen by the PSC to receive cost recovery through the NYISO tariff.³⁵

Con Edison and NYPA aver that to enable the TOTS to move forward, the PSC must: (1) establish a comment period consistent with the requirements of the State Administrative Procedure Act ("SAPA") to review the public policy requirements associated with developing

³³ See *Contingency Plan* at pp 34-35.

³⁴ See NYISO Order No. 1000 Compliance Filing at pp 1-2.

³⁵ See *id.* at Attachment IV Section 31.4.

the Contingency Plan; (2) issue a subsequent order establishing the public policy requirements that drive the need for transmission; and (3) in that same order, determine that the TOTS and other selected projects meet the identified public policy requirements and therefore should proceed to request the necessary local, state, and federal authorization for construction and authorization of the projects.³⁶ It is apparent that the Proponents seek such an order to allow them to trigger FERC Order 1000 cost recovery, a premise that is fatally flawed as addressed *infra*.

The Contingency Plan proposes that the costs of any projects that are authorized by the PSC to go forward will be recovered immediately from ratepayers outside of rate cases. However, the jurisdictional basis for the PSC to order rate recovery from retail customers outside a utility's service territory is not explained. The Contingency Plan states that the NYTOs, on behalf of the NY Transco, will pursue the establishment of a wholesale transmission revenue requirement and FERC-approved rate for the NY Transco projects, including two of the three TOTS projects.³⁷ Once approved by FERC, the NY Transco's revenue requirement will be recovered from all LSEs in the NYISO's control area as specified in the NYTO's January 25, 2013 filing to the PSC in the AC Transmission Case.³⁸ These proposed cost allocation percentages are: Central Hudson Transmission District 5.4%; Con Edison/O&R Transmission District 41.7%; LIPA Transmission District 16.7%; National Grid Transmission District 10.4%; NYSEG/RG&E Transmission District 8.9%; and NYPA 16.9%.³⁹

³⁶ See *Contingency Plan* at pp 5-6.

³⁷ *Id.* at p 23. The FERC-approved rate would be stated in the NYISO's Open Access Transmission Tariff.

³⁸ *Id.* at pp 23-24. The case number referred to is 12-T-0502.

³⁹ See Case No. 12-T-0502, Proceeding on Motion to Examine Alternating Current Transmission Upgrades, *Statement of Intent to Construct Transmission Facilities . . . On Behalf of New York Transco*, at p 22 (filed Jan. 25, 2013).

The Contingency Plan proposes that the NYISO, through its tariff, will be responsible for billing and collecting costs from all LSEs based upon their energy consumption and location.⁴⁰ The NYTOs, in their role as LSEs, will pass the FERC-approved NY Transco charge onto their full service retail customers, as a NYISO charge, consistent with their PSC-approved retail tariffs or, where necessary, under newly approved PSC tariffs.⁴¹ IPPNY does not challenge FERC's authority to review these rates.⁴²

However, the Contingency Plan then suggests that the NYPSC itself has jurisdiction to allocate the costs of these projects Statewide. Specifically, the Contingency Plan proposes that if the PSC selects a generation project to go forward, the developer will be paid by NYPA pursuant to a PPA.⁴³ The Plan proposes that NYPA recover its PPA costs by receiving payments from all LSEs in New York in a manner to be determined by the PSC, in consideration of the public policy value of the project across the State, including LSEs on Long Island.⁴⁴ The Proponents also request that the PSC issue an order "authorizing the recovery through a Commission jurisdictional method by Con Edison and NYSEG of all reasonable and prudent costs incurred in pursuing each TOTS, to the extent such TOTS Costs are not otherwise recovered through the NYISO tariff."⁴⁵ How the PSC could do so in either of these cases given the limits of its

⁴⁰ See *Contingency Plan* at pp 23-24.

⁴¹ *Id.* at p 24.

⁴² The Proponents suggest that the costs of these projects must "be recovered from all LSEs in the NYISO's control area." *Id.* at p 23. However, given that, if any project is approved, it would be a regulated project constructed to address (albeit, here, in anticipation of) a reliability need, it should be recovered from all customers as a component of the transmission and distribution utilities' delivery rates in the same manner that Renewable Portfolio Standard and System Benefits Charges are recovered. As such, the Contingency Plan must be revised to provide for the correct cost recovery vehicle.

⁴³ See *id.* at p 18.

⁴⁴ See *id.* at p 25.

⁴⁵ See *id.* at p 24.

jurisdiction over transmission rates and wholesale service goes wholly unexplained. To the extent that the competitive solicitation process results in a third party transmission project being selected, the Contingency Plan proposes that the costs associated with each project will be recovered through a NYISO tariff schedule.⁴⁶

III. THE CONTINGENCY PLAN HARMS THE COMPETITIVE MARKET

The Contingency Plan proposes that new transmission, generation, and demand-side measures begin development as soon as this April so that they can be in service by June 2016 (the “In-Service Deadline”) to meet the electricity needs that could arise if IPEC ultimately were required to cease operations.⁴⁷ The Contingency Plan proposes that the cost of these new projects be recovered from ratepayers instead of through the competitive markets. Initially, it must be noted that the Contingency Plan exceeds the November 30 Order’s directives. The Commission expressly limited the scope of the November 30 Order to developing and filing a contingency plan. Immediate implementation was not ordered.

Equally problematic, the Contingency Plan, if implemented, is a vast intrusion into the competitive electricity markets that the Commission has so carefully fostered over the past 15 years. Under the proposed Contingency Plan, if the Commission does not halt development of selected projects by December 31, 2014, the projects will be entitled to full cost recovery if they are completed by the In-Service-Date.⁴⁸ As recognized in the Commission’s November 30 Order and in the Contingency Plan itself, it is uncertain whether IPEC will be required to cease operations because its licenses have not been renewed.⁴⁹ It is highly possible that no one will

⁴⁶ See *id.* at pp 25-26.

⁴⁷ See, e.g., *Contingency Plan* at p 17.

⁴⁸ See *Contingency Plan* at pp 26-29.

⁴⁹ See *November 30 Order* at pp 2-3; *Contingency Plan* at p 12.

know definitively by December 31, 2014 whether IPEC will ultimately be required to cease operations. Thus, if IPEC is not ultimately required to cease operations, substantial investment in new infrastructure will be funded by captive ratepayers and constructed to completion. To the extent these projects are not selected by the Commission via an open and non-discriminatory procurement process that is open to existing and new resources and are not otherwise subject to measures that require their costs to be reflected in the market, they will artificially suppress energy clearing prices to the detriment of new and existing market-based projects.

The proposed Contingency Plan violates the PSC's and FERC's long-standing policy that market-based solutions should be relied upon to meet electricity needs and that regulated backstop solutions should be considered only as a last resort if market-based solutions are unavailable to meet such needs.⁵⁰ This policy is a central tenet of the NYISO's Comprehensive Reliability Planning Process ("CRPP"), which requires the NYISO to give market-based solutions every opportunity to meet an identified reliability need before the NYISO resorts to a regulated backstop solution.⁵¹ The Contingency Plan provides no opportunity for market-based solutions to come forward to meet the In-Service Deadline. Indeed, it ignores the NYPSC's directive to identify pending market-based projects. Instead, it proposes a process that will begin as soon as next month to provide immediate cost recovery at ratepayer expense to developers of transmission and generation projects, effectively chilling any potential market-based solutions that might be capable of meeting the In-Service Deadline. In short, the Contingency Plan

⁵⁰ See, e.g., NYISO OATT Att. Y at Section 31.2.4.1. See also Case 07-E-1507, Proceeding to Establish a Long-Range Electric Resource Plan and Infrastructure Planning Process, *Policy Statement on Backstop Project Cost Recovery and Allocation* (Apr. 24, 2008) (*hereinafter* "Backstop Project Policy").

⁵¹ See *Backstop Project Policy* at p 4 ("[T]he implementation of a regulated backstop solution by the Responsible TO(s) to address a reliability need identified in the NYISO's RNA will not be triggered unless the NYISO determines that a timely solution to an identified reliability need will not be met by market-based projects or local TO plans, and that a regulated solution . . . is necessary.").

inexplicably does not even attempt to determine whether there are any market-based solutions that may be available in time to meet the In-Service Deadline despite the Order's clear mandate.

One of the greatest threats to the competitive markets and impediments to needed investment is the very real risk of regulatory intervention in the markets. Using out-of-market contracts to produce desired economic outcomes, rather than to address real reliability concerns, will gravely undermine the ability of investors to rely on and respond to market signals that reflect the need for capacity additions and will severely increase the risk of investing in merchant capacity. Because such out-of-market solutions erode the underlying market signals, the market will cease to respond which will only lead to the need for more out of market solutions. Thus, the Commission must be very careful to avoid adopting policies that allow long-term contracts to be used to facilitate non-competitive market intervention so as not to establish a self-fulfilling requirement for additional regulatory intervention.

Consistent with this view, to the extent the Commission believes a reliability concern, such as the potential retirement of a large generator, needs to be addressed with out-of-market intervention, the Commission should support efforts of market participants in the NYISO's committee process and at FERC to review the capacity market design and implement mechanisms that may be needed to ensure the market will provide economic signals sufficient to retain needed existing facilities and to site new resources in New York when they are needed. If a reliability need is identified, market-based solutions should be favored to correct it. If insufficient market-based solutions are proposed, it is important that an investigation ensue to determine why such solutions were not proposed. Indeed, the NYISO's current Attachment Y provisions already provide for such review.⁵²

⁵² See NYISO OATT Att. Y at Section 31.3.2 *et seq.*

The proposed Contingency Plan also violates the Commission's policy that if a regulated backstop solution is required to meet a reliability need, the Commission will select a backstop solution after evaluating, on a comparable basis, the utility's proposed regulated backstop solution and private developers' alternative regulated backstop solutions that may include generation, transmission and demand response.⁵³ The Contingency Plan proposes that the Commission authorize Con Edison to recover at least \$300 million from its ratepayers to fund incremental energy efficiency and demand response programs without the Commission comparing the cost/benefits of these programs with the costs/benefits of transmission and generation projects proposed by private developers. Con Edison accomplishes this result by erroneously folding its incremental energy efficiency program into the base case assumptions, rather than properly treating it as one of the potential solutions to be considered.⁵⁴

The Plan is also discriminatory because it proposes that the Proponents' proposed transmission projects receive immediate cost recovery approval from the Commission when they begin development as early as April 2013 while private developers of generation and transmission projects will not know whether their projects will be awarded cost recovery until as late as October 2013. If the Proponents' transmission projects need cost recovery approval as

⁵³ See *Backstop Project Policy* at p 4 ("Under the CRPP, the Responsible TO(s) will provide a regulated backstop solution to address a reliability need identified in the NYISO's RNA. The regulated backstop solution provided by the Responsible TO(s) may be a transmission, generation and/or demand-based solution, and may provide for implementation directly by the Responsible TO(s) or by other means. Other parties have the opportunity to submit alternative regulated solutions for consideration.").

⁵⁴ In their Contingency Plan, Con Edison and NYPA claim that the November 30 Order directed that energy efficiency "be taken into consideration in developing the amount of the deficiency that would result from the retirement of IPEC." See Contingency Plan at p 10. However, the November 30 Order did not, in fact, direct Con Edison and NYPA to incorporate energy efficiency into the base case study assumptions that were used to identify the Indian Point-related reliability need. Rather, it directed Con Edison and NYPA to examine the degree to which energy efficiency could mitigate reliability needs. See November 30 Order at 6-7. Thus, the November 30 Order effectively tracks the manner in which the NYISO addresses reliability needs. The NYISO's OATT, Attachment Y, expressly provides that, when reliability needs are identified, generation, transmission and demand response all must be considered as eligible solutions. Con Edison is well aware of this fact given that it recently joined together with other Responsible Transmission Owners to propose energy efficiency initiatives as part of the potential reliability backstop solutions that were identified in the NYISO 2012 Comprehensive Reliability Plan.

early as April to make solutions available by the In-Service Deadline, it is unreasonable and discriminatory to require private developers to have their projects available by the In-Service Deadline but make them wait until October for cost recovery assurances. If Con Edison has a five to six month head start on cost recovery, it will make it more difficult for the Commission to select alternative private developer projects because it will not want to be seen wasting ratepayers' investments in Con Edison's projects. The Commission should deny Con Edison's request for preliminary cost recovery approval for its proposed incremental energy efficiency and demand response programs and the TOTS. Con Edison should be entitled to cost recovery only if the Commission determines some action must be taken, selects each of these projects after weighing them against private developers' proposed transmission and generation projects, and finds that each of these projects is narrowly tailored to address only IPEC related reliability needs and there are no better alternatives (*i.e.*, alternatives more limited in scope, having a lower cost or able to be implemented at a later time).

IV. THE CONTINGENCY PLAN LACKS ANY LEGAL BASIS TO SEEK COST RECOVERY FOR TRANSMISSION PROJECTS UNDER THE NYISO TARIFF

As discussed in Section II, the Contingency Plan proposes that the costs of the transmission projects selected by the PSC be recovered through the NYISO tariff pursuant to the PPR planning process. The Contingency Plan fails to conform to the terms of the NYISO tariff in multiple respects. First, although it advances its proposals as responses to a need driven by a PPR, the Contingency Plan neglects to address the fact that the FERC has yet to approve the NYISO's Order 1000 compliance filing.⁵⁵ Moreover, even assuming *arguendo* that FERC

⁵⁵ See FERC Docket No. ER13-102. As noted, *supra*, at note 14 and accompanying text, the NYISO has asked for an effective date for these tariff provisions well after FERC acts on its filing. Thus, even if FERC were to act on the NYISO's filing in the near term, the FERC Order 1000 provisions will not become effective and be implemented in the period of time that the Proponents claim that the PSC must issue orders in this proceeding. In addition, as noted

ultimately approves the NYISO's Order 1000 compliance filing without any material modification, this proceeding does not qualify as a "public policy requirement," and therefore, FERC's Order 1000 does not apply to it. In any event, the Contingency Plan does not comply with the NYISO's procedures for either identifying PPRs or evaluating solutions once a PPR has been confirmed. Moreover, the Contingency Plan fails to reconcile that the currently effective NYISO tariff does not provide for cost recovery in instances where projects are developed to meet PPR-driven needs. Under the currently effective tariff, Con Edison and NYPA would have to advance their projects as necessary to satisfy either an economic or reliability-based need in order to obtain cost recovery and allocation to LSEs in New York. They have made no showing whatsoever that their proposed projects are economic, and have fallen far short of demonstrating that the Contingency Plan is narrowly tailored to, or is the most cost-effective means of meeting an identified reliability need.

A. The Order 1000 Compliance Filing Has Not Yet Been Approved by FERC.

Initially, it must be noted that the NYISO's FERC Order 1000 Compliance Filing has not yet been approved by FERC. Embarking on actions and employing procedures envisioned by that filing before FERC has ruled would be premature for two primary reasons. First, actions to implement certain procedures set forth in the NYISO's proposed tariff revisions—most notably concerning the role of the PSC—have not been implemented because the relevant parties are sensibly awaiting FERC's ruling. Second, some parties, including IPPNY, protested critical aspects of the NYISO's compliance filing, which, if FERC acts on those protests, will affect whether this proceeding could possibly be eligible to rely upon those provisions and will substantially limit the PSC's role in the PPR planning process.

infra, protests were filed challenging a substantial number of the NYISO's proposed provisions, making the provisions that ultimately will be implemented uncertain at this time.

Chairman Garry A. Brown of the PSC, in a letter to the NYISO submitted with the NYISO's Order 1000 Compliance Filing, recognized that the PSC's proposed role in the NYISO's PPR planning process "would require the development of procedures that would be used by DPS Staff and the NYPSC in undertaking their respective roles and responsibilities."⁵⁶ However, Chairman Brown also recognized that it was premature to begin developing such procedures before FERC had acted on the NYISO's compliance filing, stating, "the scope and timing of the NYPSC's proceeding may depend on what actions are ultimately taken by the NYISO and FERC."⁵⁷ The Chairman wisely noted that "FERC may determine that certain modifications or clarifications are necessary to comply with Order[s] No[.]. 1000 and 1000-A, and may provide useful guidance on how the NYPSC should consider crafting its procedures."⁵⁸ Consequently, the PSC has yet to develop any such procedures. Furthermore, Chairman Brown's letter indicates that when the PSC does develop such procedures, it would not seek to implement them unilaterally but rather "looks forward to working with the NYISO and interested stakeholders to develop a transmission planning process that addresses New York's public policy requirements, consistent with FERC's directives."⁵⁹ Given that the PSC has recognized that even the development of PPR-related planning procedures would be premature before FERC rules on the NYISO's compliance filing, it must surely agree that advancing actual PPR-related projects under the auspices of that filing likewise must be premature.

Nor should FERC's approval of the NYISO's compliance filing be considered a foregone conclusion. Multiple parties spanning across a number of market sectors, including IPPNY, filed

⁵⁶ See NYISO Order No. 1000 Compliance Filing Attachment II, *Letter of New York State Public Service Commission Chairman Garry A. Brown to Steven G. Whitley dated September 27, 2012*.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

protests with FERC challenging aspects of the filing and its compliance with Order 1000.⁶⁰

Among other things, the matters at issue before FERC include the filing's proposed definition of PPRs and the role of, and discretion afforded to, the PSC in identifying PPR-driven needs and developing projects to meet those needs.⁶¹ To proceed with approval of PPR projects before FERC has ruled on these critical matters risks invalidating the PSC's determinations if FERC rejects NYISO's filing. This level of risk creates even more uncertainty as to whether a transmission project selected by the PSC under the Contingency Plan will ultimately be able to recover its costs as a solution to a PPR-driven need.

Given that the FERC has not yet acted on the NYISO's Order 1000 Compliance Filing, the Commission cannot reasonably issue an order approving any project in this proceeding that presumes that its developer may be eligible to recover its project costs from New York consumers under Order 1000 based principles. Until FERC either approves or rejects the NYISO's proposed Order 1000 tariff amendments, any proposed contingency plan is required to comply with the currently effective NYISO planning provisions if cost recovery is sought under the NYISO's tariffs. Under the current tariff, new projects have two available avenues to secure regulated cost recovery: (i) a project must meet an identified reliability need that is not being adequately addressed by a market-based solution; or (ii) a project must meet an economic need and be approved by 80% of its beneficiaries. The Commission should, therefore, deny the Proponents' request to authorize any project in this proceeding on the basis that it is a new PPR-driven transmission project that is eligible to recover its costs under FERC Order 1000.

⁶⁰ At least half a dozen parties filed protests in response to the NYISO's Order 1000 Compliance Filing, Docket No. ER13-102, viewable on FERC's website.

⁶¹ See, e.g., Protest of Independent Power Producers of New York, Docket No. ER13-102, at pp 15-29 (filed Nov. 26, 2012).

B. The Issues on Which the PSC Has Based This Proceeding Do Not Constitute a PPR as Defined in the Proposed Order 1000 Compliance Filing, and Therefore, the NYISO's FERC Order 1000 Provisions, When They Become Effective, Cannot be Applied to It.

In the November 30 Order, the Commission states that it has determined that “the value of a Reliability Contingency Plan to address reliability concerns associated with the closure of the nuclear power plants at the Indian Point Energy Center is increasingly apparent.”⁶² Based on this premise, the Commission establishes that this proceeding is initiated for the sole purpose of soliciting an IPEC reliability contingency plan.⁶³ The Commission concludes that the development of additional reliability contingency plans that may pertain to other facilities will be addressed in the future.⁶⁴ Given the scope and nature of this proceeding as defined by the PSC, it does not meet the NYISO's proposed definition of a “public policy requirement,” and thus projects proposed in response to this proceeding cannot qualify for FERC Order 1000 treatment.

In its Order 1000 compliance filing, the NYISO included a new term in OATT, Attachment Y to define “Public Policy Requirements” that are eligible under FERC Order 1000 as follows: “A federal or State statute or regulation, including a NYPSC order adopting a rule or regulation subject to and in accordance with the State Administrative Procedure Act, or any successor statute, that drives the need for expansion or upgrades to the New York State Bulk Power Transmission Facilities.”⁶⁵ As reflected by the NYISO in its compliance filing, the NYISO's proposed definition raised substantial concerns in the stakeholder process because it

⁶² See November 30 Order, at pp. 1-2.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 2. The November 30 Order is unclear whether the PSC is suggesting that it would initiate separate proceedings for each generating facility in the State. If the PSC were to proceed in the future in this vein, each of these additional proceedings would also fail to meet the definition of a “public policy requirement” under the NYISO's tariffs.

⁶⁵ See NYISO Order 1000 Compliance Filing Attachment IV Section 31.1.1 (emphasis added); *see also*, NYISO Filing Letter at 39.

went beyond the parameters established by FERC in Order 1000. Specifically, FERC established a more narrow scope in Order 1000, mandating that “Public Policy Requirements” be defined as “a federal or State statute or regulation.” In an effort to support why expanding this definition to include “NYPSC orders...subject to and in accordance with [SAPA]” still met the Order 1000 requirements, the NYISO explained, “This limitation provides that the Public Policy Requirements are identified pursuant to a rule of general application intended to establish statewide policy.”⁶⁶ The NYISO further explained that its proposed definition “does not allow a Public Policy Requirement to be defined in a NYPSC order issued in an adjudicatory or licensing permitting proceeding.”⁶⁷

To meet the NYISO’s definition, the rule in question must be “subject to...SAPA”, *i.e.*, as the NYISO itself further clarified its proposal, it must be “a rule of general application intended to establish statewide policy.”⁶⁸ It is indisputable that this proceeding aimed at one generator – and, for that matter, any other proceeding that the Commission elects to initiate at some future time aimed at another generator on a “one-off” basis – falls far short of meeting the NYISO’s definition. By its structure, FERC’s Order 1000 was intended to address federal and State public policy initiatives. By limiting FERC’s Order 1000 definition to “laws and regulations,” FERC clearly intended for the public policy requirements in question to be limited to those public policy initiatives that had been broadly considered through a legislative process

⁶⁶ See NYISO Filing Letter at 39 (emphasis added).

⁶⁷ *Id.*

⁶⁸ While it is true that the PSC recently noticed one aspect of the Contingency Plan in the State Register under SAPA (*i.e.*, it acted in accordance with SAPA), this action does not cure the underlying deficiency that the proceeding itself does not qualify under the NYISO’s definition because it is not a rule of general application. In this regard, IPPNY would direct comparison for example to PSC rules of general applicability that establish Statewide policy, *e.g.*, its RPS proceeding and its EEPS proceeding, which are properly subject to the NYISO’s definition of a PPR.

or as the result of a broadly considered, comprehensive regulatory process. Such processes, by definition, must be general in their application. FERC's Order 1000 was not intended to arm States to address situations on a one by one basis at their whim.⁶⁹ Thus, this proceeding does not meet the NYISO's proposed definition of "public policy requirement" even if the FERC were to accept it in its expanded form over the protests filed by parties to that proceeding. As such, FERC's Order 1000 provisions, when they become effective under the NYISO's tariffs, cannot be applied to it.

C. The Contingency Plan Does Not Comply with the NYISO's Order 1000 Structure for Addressing PPR Projects.

Even assuming *arguendo* that the NYISO's Order 1000 Compliance Filing is accepted by FERC without material modification and this proceeding could be found to constitute a "public policy requirement" under the NYISO's tariff when FERC's Order 1000 provisions become effective, which it cannot, these tariff provisions add "a new planning process to consider transmission needs driven by Public Policy Requirements."⁷⁰ As established by the NYISO's tariffs, this planning process includes, *inter alia*, the identification, evaluation of, the cost allocation methodology for, and the selection of transmission solutions to address transmission

⁶⁹ Although Con Edison's position is not altogether clear, the Compliance Filing asks the NYPSC to enter an order in April of 2013, finding that the November Order and/or the New York Energy Highway Blueprint establish Public Policy Requirements within the meaning of the NYISO's October 2012 Compliance Filing and, by extension, Order No. 1000. (See Contingency Plan, p. 4.) Con Edison then requests that the NYPSC establish a public comment period, "to solicit comments on the proposed public policy requirement of developing an Indian Point Contingency Plan." Thus, whereas FERC Order No. 1000 contemplated Public Policy Requirements driven by enacted statutes and regulations promulgated "by a relevant jurisdiction" (i.e., matters that had already been subjected to notice and comment) and whereas Order Nos. 1000-A and 1000-B adhered to those limitations, Con Edison's Compliance Filing advances the misplaced notion that a NYPSC order that was not subjected to notice and comment before it was issued, and, incredibly, the Energy Highway Blueprint issued by a Task Force lacking any statutory or regulatory jurisdiction or authority, somehow "establish" Public Policy Requirements. This is a significant departure from FERC's Order 1000 mandates. In any event, while discrete aspects of what Con Edison requests the NYPSC to "direct" may require notice under SAPA in the future were the NYPSC to grant such request, the scope of this proceeding as it has been structured by the PSC certainly does not constitute a "rule of general application" as envisioned by the NYISO in its Compliance Filing and therefore cannot serve to identify an actionable PPR.

⁷⁰ NYISO Order No. 1000 Compliance Filing at pp 1-2.

needs driven by PPRs.⁷¹ Importantly, the NYISO's tariff expressly provides that PPR-driven projects must be subject to a two-step process: first, "identification of transmission needs driven by [PPRs] that should be evaluated by the ISO;" and second, "requests for specific proposed transmission solutions to address those needs driven by [PPRs] identified for evaluation, and the evaluation of those specific solutions."⁷²

Even assuming that the issues in this proceeding constitute a rule of general applicability as required by the NYISO's definition of a PPR, which, as demonstrated *supra*, they do not, the process of identifying PPR-driven needs consists of several steps under the proposed terms of the Order 1000 Compliance Filing. First, the NYISO must allow for 60 days at the start of each "Public Policy Planning Cycle" for any party, including the NYISO itself, to propose a transmission need it believes to be driven by a PPR. At the end of the 60 day period, the NYISO must post all submitted proposals to its website, after which the tariff calls for it to submit the proposals to the DPS/PSC.⁷³ The DPS is then to review all the proposals according to procedures developed by the DPS to ensure that the process is "open and transparent" and that NYISO and interested parties may have a "meaningful opportunity to participate."⁷⁴ After this review process, the proposed tariff requires the DPS to release a written statement "that identifies the relevant [PPRs] driving transmission needs and explains why it has identified the

⁷¹ See NYISO Order No. 1000 Compliance Filing Attachment IV Section 31.4.1 providing that "The Public Policy Requirements planning process shall consist of two steps...". The multi-stage design for this process is also reflected in the NYISO's depiction of the Public Policy Requirements Planning Process which sets forth five objectives for this process. See NYISO Order No. 1000 Compliance Filing Attachment IV Section 31.1.5.

⁷² See *id.* at Section 31.4.1.

⁷³ See NYISO Order No. 1000 Compliance Filing Attachment IV at Section 31.4.2.

⁷⁴ See *id.* at Section 31.4.2.1. As noted *supra*, the DPS procedures have not yet been developed.

transmission needs driven by [PPRs] for which transmission solutions will be evaluated by the ISO.”⁷⁵

The process that has culminated in the filing of the Contingency Plan does not meet the requirements outlined in the NYISO’s Order 1000 compliance filing. First, the NYISO has not announced the start of a “Public Policy Planning Cycle”—indeed, since FERC has not yet approved the NYISO’s compliance filing, the institution of any such planning cycle would be premature.⁷⁶ Second, even if the PSC’s November 30 Order instituting this proceeding were to be construed as the start of the 60-day Public Policy Planning Cycle window, it is not in keeping with the proposed tariff because it was initiated by the PSC—not the NYISO—and it directs respondents to submit their comments to the PSC, not to the NYISO, as outlined in proposed Section 31.4.2 of the NYISO’s compliance filing. Third, the November 30 Order does not allow for any party to propose a transmission need it believes to be driven by a PPR. Rather, the PSC, without an associated process to define the PPR, unilaterally dictates that the November 30 Order’s purpose “is to address reliability concerns specific to only the potential retirement of IPEC.”⁷⁷ Finally, the DPS cannot yet have developed appropriate procedures to review proposals submitted to identify transmission needs driven by PPR in accordance with the amended tariff because that tariff’s terms have not yet been approved by FERC. The NYISO’s compliance filing envisions the completion of all of these steps, none of which has been adequately adhered to in this case. Once completed, a specific PPR-driven transmission need is

⁷⁵ *Id.*

⁷⁶ Even if FERC had acted on the NYISO’s compliance filing, the NYISO has requested an effective date “upon the completion of the next reliability planning cycle following the Commission’s issuance of a final order approving these tariff changes.” Therefore, assuming NYISO’s requested effective date were granted, these provisions will not be effective until the 2014 Comprehensive Reliability Planning Process is completed.

⁷⁷ *November 30 Order* at p 1.

identified. It is only at this point in the process that the NYISO—not the PSC—may request and evaluate proposed solutions to meet such identified need.

Specifically, once the DPS identifies a specific PPR-driven transmission need, the proposed tariff revisions call for the NYISO to “request and evaluate specific proposed transmission solutions.”⁷⁸ The NYISO is to provide a 60-day period in which transmission owners (“TOs”) and other developers may propose solutions to meet that need.⁷⁹ The proposed tariff permits the PSC to request that a particular TO propose a particular solution to a PPR-driven need, but the tariff states that such a request is intended only “[t]o ensure that there will be a response,” not to replace the NYISO’s general request for solutions or to foreclose the opportunity of other developers to submit proposals.⁸⁰

Next, the NYISO is required to evaluate, with stakeholder input, each of the proposed solutions to the PPR-driven need, comparing “the costs and benefits of the proposed transmission solutions, and impacts of the proposed transmission solutions on ISO-Administered markets.”⁸¹ The tariff foresees the evaluation process as one of “collaborative governance,” and requires the NYISO to submit a draft report of its evaluation to both the Transmission Planning Advisory Subcommittee (“TPAS”) and the Electric System Planning Working Group (“ESPWG”) for review and comment.⁸² Once the TPAS and ESPWG complete their review, the NYISO must submit a subsequent draft report reflecting any revisions to the Business Issues Committee and the Management Committee “for discussion and an advisory vote.”⁸³ After the Management

⁷⁸ NYISO Order No. 1000 Compliance Filing Attachment IV at Section 31.4.3.

⁷⁹ *See id.* at Section 31.4.3.1.

⁸⁰ *See id.* at Section 31.4.3.3.

⁸¹ *Id.* at Section 31.4.4.

⁸² *See id.* at Section 31.4.6. NYISO’s draft report is also meant to be available to “any interested party.” *Id.*

⁸³ *Id.*

Committee vote, the NYISO must present a final draft reflecting both committees' input to both the NYISO Board and the Market Monitoring Unit.⁸⁴ The Board may either approve the report as-is or propose its own modifications. Finally, if the Board approves the report, the NYISO "shall issue the report to the marketplace by posting it on its website."⁸⁵ While issues with the NYISO's Order 1000 Compliance Filing were raised in protests, the NYISO's proposed structure was intended to provide for a meaningful review and a level playing field designed to identify the best solution if a PPR driven need were identified.

The proposed Contingency Plan clearly does not meet the requirements outlined in the NYISO's Order 1000 Compliance Filing. Even if the November 30 Order can be interpreted as the identification of a PPR-driven transmission need, the proposed tariff clearly requires: (i) the NYISO to provide a 60-day period during which any TO or other developer may propose a solution to that need; and (ii) developers to file proposals with the NYISO for evaluation. The NYISO has provided no such period. Rather, the PSC has directed a particular TO to file a proposed solution with the Commission. No filings were made to the NYISO for evaluation.⁸⁶ Furthermore, the Contingency Plan's accelerated timeline, which asks that its proponents be guaranteed cost recovery as early as April 2013, falls radically short of allowing for the time necessary to comply with the proposed tariff's collaborative governance requirements.

Indeed, in the Contingency Plan, the Proponents erroneously suggest that the PSC could issue a subsequent order that would both establish that IPEC retirement constitutes a public policy requirement that drives the need for transmission and -- in the same order -- determine that their proposed transmission projects (and other selected projects) meet such identified

⁸⁴ See *id.* at Section 31.4.7

⁸⁵ *Id.*

requirements.⁸⁷ However, as reflected in the NYISO's Order 1000 Compliance Filing, the projects ultimately chosen are clearly intended to be the subject of full review after the public policy requirement at issue has been identified. By impermissibly proposing to collapse the designation of a public policy requirement and the identification of projects to address such requirement into one order, the Contingency Plan fails to adequately provide for such review.

All told, the distance between the procedures for PPR-driven projects outlined in the NYISO's Order 1000 Compliance Filing and the methods by which the Contingency Plan are being proposed could hardly be greater. Thus, the fact that the proposal does not properly qualify for consideration as a solution to a PPR-driven need, let alone for cost recovery under the proposed tariff, compels the Commission to deny the Proponents' requests for expedited approval. Indeed, given that the NYISO's FERC Order 1000 provisions cannot apply to the Contingency Plan, the PSC itself has no jurisdiction to grant Proponents' requests for guaranteed cost recovery for transmission projects.

D. The Contingency Plan Does Not Meet the Requirements of the NYISO Tariff's Reliability Planning Process.

To proceed under the NYISO's current tariff provisions, the Proponents must demonstrate that the Contingency Plan meets the requirements to qualify as either an economic or a reliability need. In the November 30 Order, the PSC clearly attempted to frame its call for an IPEC-specific contingency plan in reliability terms, stating that "the value of a Reliability Contingency Plan to address reliability concerns associated with the closure of the nuclear power plants at the Indian Point Energy Center is increasingly apparent."⁸⁸ Despite the Proponents' ill-

⁸⁶ The Proponents' reference in the Contingency Plan that it relied upon a NYISO study base case to conduct its reliability analyses falls far short of an actual NYISO evaluation of filed proposals.

⁸⁷ See Contingency Plan at 29-30.

⁸⁸ *November 30 Order* at pp 1-2.

formed attempt to use the PSC’s stated reliability concerns to support their claimed PPR-driven need, whether the Contingency Plan’s projects are proper must be analyzed under the current tariff’s framework for reliability projects if the Proponents seek to assert a reliability need as the basis for their actions.

The NYISO tariff’s Comprehensive Reliability Planning Process (“CRPP”) expressly provides market-based solutions the opportunity to meet a reliability need before resorting to a regulated backstop solution.⁸⁹ Only in instances where the NYISO determines that a sufficient market-based solution is not available in a timely manner to address the identified reliability need may the NYISO trigger a regulated back-stop solution akin to what is being proposed in the Contingency Plan.

In addition, when neither a market-based nor a regulated backstop solution can address a particular reliability need in a timely manner, the tariff calls for the NYISO to “set forth its determination that a Gap Solution is necessary in the CRP.”⁹⁰ Where the threat to the reliability of the power system is “imminent,” the NYISO, after consultation with the DPS, also may request the Responsible TO to submit a Gap Solution proposal outside of the normal planning cycle.⁹¹ The Gap Solution may include generation, transmission, or demand side resources.⁹² In addition to the Responsible TO, the NYISO’s tariff provides “[a]ny party may submit an alternative Gap Solution proposal” for consideration by the NYISO and DPS.⁹³ Per the NYISO’s tariff, the NYISO must evaluate each submitted proposal to determine whether it

⁸⁹ See NYISO OATT Att. Y at Section 31.2.4.1. *See also Backstop Project Policy* at p 4 (“[T]he implementation of a regulated backstop solution by the Responsible TO(s) to address a reliability need identified in the NYISO’s RNA will not be triggered unless the NYISO determines that a timely solution to an identified reliability need will not be met by market-based projects or local TO plans, and that a regulated solution . . . is necessary.”).

⁹⁰ See NYISO OATT Att. Y at Section 31.2.5.10.1.

⁹¹ *Id.* at Section 31.2.5.10.2.

⁹² *Id.*

addresses the identified need. The tariff requires that Gap Solutions be temporary, designed to be “compatible with permanent market-based proposals.”⁹⁴

Under this framework, the Contingency Plan is deficient for a variety of reasons whether the issue at hand is characterized as an identified reliability need or a Gap Solution. First, the NYISO is in the process of completing its 2012 CRP process. The NYISO has not identified a reliability need associated with IPEC. Moreover, as respects a Gap Solution, the procedure by which the Contingency Plan was solicited diverges from that outlined in the tariff substantially. The tariff prescribes that the NYISO must determine that a Gap Solution is necessary and must request a proposal; here, the PSC made both the determination of need and the request for a solution in its November 30 Order with hardly a mention of the NYISO or its role in the process.⁹⁵

Furthermore, the very existence of a reliability need is, at this point, entirely speculative and certainly is not imminent. Proceedings have been commenced requesting IPEC license renewals. Those proceedings are going forward in due course. Entergy has indicated that it will continue to actively pursue IPEC license renewal.⁹⁶ No concrete information exists to find that IPEC will be required to cease operations.

As established, *infra*, even using the 2012 RNA base case as the basis to form the study assumptions, the Contingency Plan fails to identify the specific reliability needs at issue fully or quantify in any way how each of Con Edison’s proposed projects will contribute to solving those needs. Given the highly speculative nature of assuming that IPEC will be required to retire,

⁹³ *Id.* at Section 31.2.5.10.4.

⁹⁴ *Id.* at Section 31.2.5.10.5.

⁹⁵ The *November 30 Order* mentions the NYISO only once, on p 10.

those base case assumptions may not even accurately reflect system conditions if IPEC ultimately were required to cease operations. No basis was claimed in the Contingency Plan – and, most assuredly, no basis exists – to assert that the potential that IPEC may be required to retire raises an imminent threat to reliability.

The Contingency Plan’s deficiencies extend further than the procedural missteps of originating with the improper institution and the attempting to solve a problem that may never exist. The Proponents have failed to demonstrate that no other, perhaps more cost-effective measures are available to address the potential reliability need. In addition, the proposed TOTS do not include sufficiently detailed timelines with the major milestone schedule required by the NYISO tariff.⁹⁷

Whether it is advanced as a proposed solution to a transmission need driven by Public Policy or by concerns of system reliability, the Contingency Plan suffers from fatal deficiencies. It does not adhere to the scheme proposed for the development of PPR-driven projects in the NYISO’s Order 1000 compliance filing, even if it is assumed that FERC will ultimately accept that filing. Nor does it comply with the terms of the tariff currently in effect relating to the development of projects that address reliability needs. In light of the high degree of uncertainty concerning exactly how such a project should proceed and how the projects’ developers might seek to recover the costs of development, the Commission should reject the Contingency Plan.

V. THE CONTINGENCY PLAN IS SUBSTANTIVELY DEFICIENT

Even assuming *arguendo* that the issues identified in Section IV can be corrected, the Contingency Plan itself is substantively deficient in a number of material respects. Specifically,

⁹⁶ Case No. 12-E-0503, Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plan, Comments of Entergy Nuclear Fitzpatrick, LLC . . . Addressing the February 1, 2013, Proposed Joint Reliability Contingency Plan, at p 7 (filed February 22, 2013).

⁹⁷ See NYISO OATT Att. Y at Section 31.2.4.2.1.

the November 30 Order expressly delineated key points and eleven specific items that Con Edison was required to address in its reliability contingency plan.⁹⁸ The Contingency Plan fails to address many of these requirements.

For example, as noted *supra*, the PSC directed Con Edison to “take into account the status of proposed power plants and AC and DC transmission projects...”⁹⁹ Per the November 30 Order, Con Edison was required to identify and assess projects “that are currently under development that could, when completed, contribute to meeting the identified reliability needs.”¹⁰⁰ Con Edison did not.

Likewise, the November 30 Order specifically directed Con Edison to provide an analysis of the “extent” and “characteristics of the reliability needs that would arise if Indian Point Units 2 and 3 were retired.” The Proponents did not attach any analysis or studies (redacted or otherwise) to the Contingency Plan. Indeed, the Contingency Plan itself only provides one figure – a claimed MW need of 1,350 MW to 1,375 MW.¹⁰¹ Even that figure is artificially skewed by the fact that Con Edison unilaterally chose to improperly propose to fold a new, incremental, separately funded, 100 MW energy efficiency program (with a price tag of \$300 million) into the base case assumptions, not to offer it as a proposed solution to be considered on an equal footing with all other proposed solutions. In addition, the Contingency Plan does not quantify any reactive requirements at all, notwithstanding the fact that the November 30 Order itself identified reactive capability concerns.¹⁰²

⁹⁸ *November 30 Order* at 5-8.

⁹⁹ *Id.* at p 5.

¹⁰⁰ *Id.* at 5-6.

¹⁰¹ *See* Contingency Plan at 9-10.

¹⁰² *See* November 30 Order at n.5. Reactive capability impacts also have long been identified in the NYISO’s reliability studies. *See, e.g.*, NYISO 2012 Reliability Needs Assessment (dated September 18, 2012); *see also*

The Contingency Plan is also substantively deficient because it fails to quantify on any level – much less with specificity – the degree to which each of Con Edison’s proposed projects addresses the IPEC-related resource adequacy or reactive power impacts. Nor does Con Edison identify whether there were other alternatives studied and, if so, why they were not selected. As the transmission provider in the affected area, Con Edison is the most familiar with the system and is uniquely situated to provide this information. It did not.

The Commission specified in its November 30 Order that it initiated this proceeding to address IPEC-specific reliability needs.¹⁰³ Yet absent additional information it is impossible for the Commission and the parties to this proceeding to ascertain whether Con Edison’s four proposed projects are narrowly tailored to address IPEC-related issues. While Con Edison may indeed have identified these projects as part of its long term transmission planning, Con Edison must be required to pursue these projects in its own rate cases where interested parties can fully vet them unless it can demonstrate that each of these projects is designed to address IPEC-specific reliability needs. In addition, absent additional information, it is impossible for the Commission and the parties to this proceeding to ascertain whether there are other alternatives to each of Con Edison’s proposed projects that are either lower in cost or more narrow in scope.

In a similar vein, the Proponents summarily assert that the RRT Project can meet the 2016 date if it receives approval of its amended Environmental Management and Construction Plan by Q1 2014. They further assert that the MSSC Project must complete its major licensing and permitting by the end of 2013 to meet the 2016 date. Lastly, they assert that the SIU Project

NYISO 2010 Reliability Needs Assessment (dated September 2010). Both Con Edison and NYPA were extensively involved in the stakeholder discussions that reviewed these studies.

¹⁰³ *Id.* at 1-2.

can meet the 2016 date if the project begins this spring.¹⁰⁴ No supporting data or further details are given to explain or confirm these proposed starting dates. While Gant Charts are provided for each project in the exhibits appended to the Contingency Plan, these charts are very high level (by year only) and also lack any specific details explaining how these time lines were derived or describing the steps associated with each identified task. Nor does Con Edison indicate whether there are other alternatives that are able to be implemented later in time when more information may be available concerning the IPEC license renewal proceedings.

The Commission emphasized in its November 30 Order that New York consumers must be protected from unnecessarily incurring substantial costs in this proceeding.¹⁰⁵ In this proceeding, Con Edison and NYPA request that the NYPSC require New York consumers to incur costs for projects prior to full review, acknowledging that these projects ultimately may be halted. Such relief would be extraordinary. Particularly given the facts that any IPEC-related reliability needs are, at best, speculative and the Proponents are requesting that any project that receives final approval in this proceeding must be granted full cost recovery outside of the utility rate cases, it is critical that the Commission conduct a full review of all proposals. Thus, the Proponents must be directed to file additional information expeditiously to address the issues highlighted herein and to conform with the requirements of the November 30 Order.

VI. THE CONTINGENCY PLAN IS DEFECTIVE BECAUSE MAJOR ASPECTS OF ITS IMPLEMENTATION RELY ON FUTURE ACTIONS OVER WHICH CON EDISON, NYPA AND THE COMMISSION HAVE NO CONTROL.

The Contingency Plan's proposals concerning cost recovery, particularly those relating to NYPA and LIPA, exceed the PSC's jurisdiction and rely on the occurrence of events beyond the control of the Proponents or the Commission. Specifically, for the Contingency Plan's proposed

¹⁰⁴ See Contingency Plan at 15.

¹⁰⁵ November 30 Order at p 6.

cost recovery methodology to even be lawful,¹⁰⁶ two events must first take place: (1) FERC must approve the NYISO's Order No. 1000 compliance filing without substantial alteration; and (2) the New York State Legislature must amend the Public Authorities Law or pass alternate legislation to permit NYPA and LIPA to participate in NY Transco as full equity owners and to grant the PSC the power to allocate development costs to public power authorities. The likelihood of whether these events will occur is unforeseeable with any certainty. The Commission has no jurisdiction to approve the cost recovery proposals contained in the Contingency Plan, and thus, also should not approve the proposed projects.

The first obstacle to the Contingency Plan's cost recovery proposal is the NYISO's Order 1000 Compliance Filing. That filing provides for the recovery of costs for PPR-driven projects, but, as discussed above,¹⁰⁷ FERC has yet to rule on whether the NYISO's proposals indeed comply with Order 1000. Its cost recovery provisions are, in fact, at issue. Absent a clear ruling from FERC detailing what methods of cost recovery are permissible for PPR-driven projects (even presuming projects in this proceeding could qualify as PPR-driven projects -- which they do not), the Commission cannot reasonably assume that the Contingency Plan's proposed methodology will be viable, and thus, the Commission should not approve the projects at this time.

The second obstacle to the proposed cost recovery methodology concerns the Contingency Plan's approach to NYPA and LIPA. NYPA and LIPA, as public authorities, are not subject to the PSC's jurisdiction or the provisions of New York's Public Service Law.¹⁰⁸ As

¹⁰⁶ For the reasons established *supra*, projects approved in this proceeding do not qualify for FERC Order 1000 funding.

¹⁰⁷ See section IV.A., *supra*.

¹⁰⁸ See N.Y. Pub. Auth. L. § 1014 (McKinney 2013).

such, NYPA and LIPA are not subject to the PSC's 2008 Policy Statement on Backstop Project Cost Recovery and Allocation, which suggested that the PSC was permitted "to transfer PSC specified retail ratepayer funds to the project developer."¹⁰⁹ In fact, NYPA and LIPA were specifically exempted from the Backstop Project Policy provisions.¹¹⁰

The Proponents seem to have acknowledged on some level the statutory restrictions that NYPA faces. The Contingency Plan points out that "NYPA can accept costs only to the extent that NYPA's contracts with its customers allow recovery of such costs." Yet to address this issue the Proponents fail to acknowledge the limits of the PSC's statutory authority.

Specifically, the Proponents urge the PSC to adopt a designated "NYPA Cost Recovery Mechanism" for costs associated with the TOTS projects.¹¹¹ The NYPA Cost Recovery Mechanism, as proposed, would allocate some portion of the projects' costs to LSEs and utilities, require those LSEs and utilities to collect the costs from their ratepayers, and remit the funds collected to NYPA.¹¹² However, such a procedure would both exceed the PSC's statutory authority and amount to an impermissible expansion of NYPA's statutory authority provided by the Public Authorities Law, which specifically limits NYPA's cost recovery authority to its customers.¹¹³

Furthermore, the Contingency Plan proposes to have the Commission allocate some portion of the projects' costs to LIPA even though, as the Proponents admit, LIPA is a "non

¹⁰⁹ See *Backstop Project Policy*, Draft All-Parties Report p 11.

¹¹⁰ *Id.* at p 12 ("NYPA and LIPA costs will be recovered through a separate mechanism.").

¹¹¹ See *Contingency Plan* at pp 22-24.

¹¹² See *id.* at p 25. As noted, *supra*, because these would be regulated charges, they must be collected by the T&D utilities as part of T&D rates, not by LSEs or the T&D utilities in their respective roles as the providers of last resort.

¹¹³ See N.Y. Pub. Auth. L. § 1005 (McKinney 2013).

Commission-jurisdictional entit[y].”¹¹⁴ Indeed, related filings by the Transco parties highlight that legislative action is necessary to allow NYPA and LIPA’s participation in the NY Transco. In their Statement of Intent filed on behalf of the NY Transco, the NYTOs pointed out that “several governmental approvals are necessary to advance [the Transco Projects] to completion,” including “enactment of legislation to enable NYPA and LIPA to participate in the NY Transco as full equity owners.”¹¹⁵ The Commission cannot allocate costs to a “non-Commission jurisdictional entity” because such an allocation would be an impermissible expansion of jurisdiction over that entity. The Contingency Plan, then, seems to propose that the PSC adopt its cost recovery provisions and simply trust that the Legislature will amend the relevant laws to make such provisions proper. The actions of the State Legislature are subject to a wide variety of influences and are, ultimately, beyond the PSC’s control. The Commission must not approve a plan that relies on the occurrence of such tenuous and uncertain action.

Each of the Contingency Plan’s cost recovery proposals either exceeds the PSC’s jurisdiction on its face or relies on largely uncertain grounds, but any of those proposals, if acted upon, would substantially open the door to State subsidization of the entry of new projects into the market. Such a process of attempting to pick winners and manipulate the market harms competition and thus violates the competitive principles on which New York’s energy market functions.

¹¹⁴ See *Contingency Plan* at p 25.

¹¹⁵ Case 12-T-0502, Proceeding on Motion to Examine Alternating Current Transmission Upgrades, *Statement of Intent to Construct Transmission Facilities . . . On Behalf of the New York Transco*, at p 3 (Jan. 25, 2013).

VII. CONCLUSION

The Commission should reject the Contingency Plan and require Con Edison to submit a revised Plan correcting the flaws and providing the additional information as discussed herein.

Respectfully submitted,

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Dated: February 22, 2013
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