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Via Electronic Mail

April 5, 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 Section 3.7 of the New York State Public Service Commission's ("Commission") Rules of Procedure, Independent Power Producers of New York, Inc. hereby petitions for rehearing of the Commission's order issued on March 15, 2013 in the above-referenced case.

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

PETITION FOR REHEARING OF
INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.

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Dated: April 5, 2013
Albany, New York

NEW YORK STATE
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Case 12-E-0503 - Proceeding on Motion of the
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PETITION FOR REHEARING OF
INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.

I. INTRODUCTION

Pursuant to Section 3.7 of the New York State Public Service Commission's ("Commission") Rules of Procedure, Independent Power Producers of New York, Inc. ("IPPNY"), a not-for-profit trade association representing the independent power industry in New York State, hereby petitions for rehearing of the Commission's order issued on March 15, 2013 in the above-captioned case.¹ In its March Order, the Commission made a number of findings, including approving, subject to modifications, one element of the February 1, 2013 contingency plan filed by Consolidated Edison Company of New York, Inc. ("Con Edison") and the New York Power Authority ("NYPA" and collectively with Con Edison, the "Proponents") which proposed that the Commission request that NYPA issue a request for proposals ("RFP") to solicit 1350 MW of incremental generation and transmission proposals to be in place by the summer of 2016 to meet the reliability need arising if the Indian Point Energy Center ("IPEC") were required to cease operations.²

¹ Case 12-E-0503, Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, *Order Upon Review of Plan to Issue Request For Proposals* (March 15, 2013) (*hereinafter* "March Order").

² Case 12-E-0503, *supra*, *Compliance Filing of Consolidated Edison Company of New York, Inc. and New York Power Authority With Respect to Development of Indian Point Contingency Plan* (February 1, 2013) (*hereinafter* "Contingency Plan" or "Plan").

As demonstrated below, the Commission committed at least three errors of fact in the March Order which must be corrected on rehearing so that the Commission's evaluation process is fair and non-discriminatory and ensures that any projects that are identified for the Plan are narrowly tailored to address IPEC-specific reliability needs at the lowest cost to consumers.

First, the Commission erred by finding that the Contingency Plan "substantially addresses" the Commission's objectives in this case. As demonstrated by the comments that were submitted in this proceeding on February 22, 2013 by a substantial number of parties, including IPPNY,³ the Contingency Plan fails to comply in many respects with the requirements the Commission imposed on Con Edison in its November 30 Order.⁴ Given the core deficiencies inherent in the Contingency Plan, the Commission does not have sufficient information to take action in this proceeding on a rational basis. Second, the Commission erred by charging NYPA with the initial screening of projects that respond to the RFP given NYPA's inherent conflict of interest as a party that itself has proposed potential solutions and stands to gain financially if its solutions are implemented. Third, the Commission erred by resorting to regulated projects and assigning different standards to the projects proposed by the Proponents as compared to those of the RFP applicants, thereby discriminatorily favoring the Proponents' proposed projects.

³ See, e.g., Case No. 12-E-0503, *supra*, Comments of Independent Power Producers of New York, Inc. (filed February 22, 2013) (*hereinafter* "IPPNY February 22 Comments").

⁴ Case 12-E-0503, *supra*, *Order Instituting Proceeding and Soliciting Indian Point Contingency Plan* (November 30, 2012) (*hereinafter* "November 30 Order"). As the November 30 Order notes in support, in part, of its determinations, the general premise of developing reliability contingency plans for review "to prepare for potential large power plant retirements" was one of the findings listed in the New York Energy Highway Blueprint (*hereinafter* "Blueprint") released in October 2012. See November 30 Order at 2, n.1, citing *Blueprint* at p 42, available at <http://www.nyenergyhighway.com/PDFs/BluePrint/EHBPPT/>.

II. BACKGROUND

The Commission issued the November 30 Order directing that Con Edison, in consultation with NYPA, develop and file a contingency plan to address the potential that IPEC would be required to cease operations if IPEC's Nuclear Regulatory Commission ("NRC") licenses are not ultimately renewed.⁵ The Commission directed the Proponents to produce a plan to address the resultant system reliability needs by the summer of 2016, the first peak period after the current expiration date of the NRC IPEC licenses (the "In-Service Deadline"). The Commission noted that the potential retirement of a significant electric generating facility such as IPEC requires "significant advanced planning,"⁶ and 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.⁷ Thus, the Commission commenced this proceeding to solicit a contingency plan, specifying that it would determine whether there was the need for any follow-up following its review of the plan.⁸

To provide for the significant advanced planning that the Commission identified was required in the November 30 Order, the Commission ordered that the contingency plan must include information in a number of material areas including:

- An analysis of the extent, timing and characteristics of any reliability needs on the system;

⁵ In its November 30 Order, the Commission expressly established that it was "not making any determinations or taking any positions regarding the potential closure of [IPEC]." *Id.* at 3, n.3.

⁶ *Id.*

⁷ *Id.* at pp 2-3.

⁸ *Id.* at p 2.

- The status of proposed power plants and AC and DC transmission projects that could contribute to meeting such identified needs; and
- The potential mitigative impacts of energy efficiency, distributed renewable generation, demand response, and combined heat and power projects.⁹

The Commission further ordered that the contingency plan must also include the form of an RFP that would be issued to procure resources to address system reliability needs by the summer of 2016, along with “halting mechanisms” in the event it becomes apparent that IPEC remains operational and replacement capacity is not required as of that time.¹⁰ The Commission emphasized the need to protect consumers from unnecessarily incurring substantial costs in this proceeding.

In response to the November 30 Order, the Proponents filed the proposed Contingency Plan. The Contingency Plan goes beyond the November 30 Order’s express directives to develop and file a plan by proposing a multi-step, fast track approach that will proceed on two parallel paths and will require at least three separate orders from the Commission authorizing the immediate implementation of, and cost recovery for, an incremental \$300 million energy efficiency (“EE”) and demand-reduction (“DR”) program, as well as transmission and generation projects to be in service by the In-Service Deadline.¹¹ The Contingency Plan proposes that an order approving the Proponents’ projects be issued initially on an unprecedented “preliminary basis” followed by later orders establishing final project approvals.

⁹ *See id.* at p 5.

¹⁰ *Id.* at pp 5-7.

¹¹ *Id.* at p 2.

On the first path, the Plan called for the Commission to issue an order in April 2013 that would direct Con Edison – joined by, with respect to one transmission solution, New York State Electric and Gas Corporation (“NYSEG”) – and request NYPA on a preliminary basis to immediately begin development of, and authorize cost recovery for, three Transmission Owner Transmission Projects (“TOTS”) to be in place by the In-Service Deadline at a \$500 million cost to consumers.¹² The three TOTS, two of which are also part of the Transco submission in the AC Transmission Case¹³ 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; (2) the Marcy South Series Compensation and Fraser to Coopers Corners Reconductoring Project; and (3) the Staten Island Un-bottling.¹⁴ As proposed by the Plan, the Commission would determine in the April Order, *inter alia*, 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.¹⁵

On the second path, the Plan called for the Commission to issue an order in March 2013 requesting that NYPA issue an RFP to solicit new incremental generation and transmission

¹² *See id.* at pp 2-4. The Commission requested, rather than directed, that NYPA undertake these actions because, as IPPNY discussed at length in its February 22 Comments, and as the Contingency Plan itself establishes, the Commission has no jurisdiction over NYPA (or LIPA).

¹³ *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) (*hereinafter* “AC Transmission Case”).

¹⁴ *See id.*, Exhibits B-D.

¹⁵ *Id.* at pp 16-17. As IPPNY demonstrated in its February 22 Comments, the RCP Proceeding does not qualify as a “public policy requirement” even under the more expansive definition that the NYISO and the NYTOs have proposed in their joint FERC Order 1000 compliance filing in FERC Docket ER13-102. (*See* IPPNY February 22 Comments at 24-26, citing FERC Docket ER13-102, *New York Independent System Operator, Inc.*, “Compliance Filing” (dated October 11, 2012).) Nor, in any event, does the RCP Proceeding comply with the two-staged process for identifying and addressing public policy requirements defined by the NYISO/NYTO FERC Order 1000 compliance filing. (*Id.* at 26-31.)

proposals that could be in place by the In-Service Deadline.¹⁶ The Proponents proposed that Department of Public Service (“DPS”) staff evaluate all of the proposed projects, including the TOTS, and then recommend to the Commission by August, 2013 which projects should move forward to completion.¹⁷

The Commission’s March Order requested that NYPA issue the RFP. Ostensibly, at least as implied by its title, the March Order is limited to the second prong of the Plan, approving “the proposal by Con Edison and NYPA to issue an RFP in connection with their IPEC Contingency Plan.”¹⁸ As further discussed *infra*, however, the Commission’s March Order also includes far more broad sweeping findings signaling, *e.g.*, broader approval of the Contingency Plan itself in its entirety without in any way countering the extensive evidence provided by the parties in their comments in this proceeding that the Contingency Plan is so materially deficient that there is no rational basis to take any dispositive action on the substance of it.

III. ARGUMENT

A. The Contingency Plan Fails To Comply With The Requirements Of The November Order And Is Therefore Substantively Deficient.

Although the March Order approves only the terms of the Proponents’ Contingency Plan relating to the RFP in its ordering paragraphs,¹⁹ the March Order also contains a number of additional findings that the Commission attempts to use to support its actions. For example, in language throughout the November Order, the Commission more broadly accepts the information contained in the Contingency Plan as sufficient. Indeed, the March Order repeatedly

¹⁶ *See id.* at p 17.

¹⁷ *Id.* at pp 17-18.

¹⁸ *March Order* at p 3.

¹⁹ *March Order* at p 3.

establishes that the Contingency Plan was responsive to the November Order and met that Order's requirements. While the Commission makes these determinations, the Commission failed to rebut in any way the numerous comments demonstrating that, in fact, the Contingency Plan is substantively deficient and falls far short of meeting the November Order's requirements.

There are a number of places in the March Order where the Commission summarily asserts its view that the Contingency Plan adequately addresses the requirements of the November Order. For example, in the March Order the Commission accepts the Contingency Plan as "responsive to our November 30 Order and consistent with Con Edison's responsibilities to ensure safe and adequate service."²⁰ Later, the March Order states that the Contingency Plan "substantially addresses the Commission's interest in assuring that a plan is being developed to ensure safe and adequate service in the event IPEC ceases operations."²¹ The March Order does not limit its assessment of the Contingency Plan's adequacy to the RFP process but includes the TOTS and EE/DR proposals, finding that "[the] proposal to proceed on parallel tracks, with the goal of identifying resources that can be available by summer of 2016, meets the basic objectives of our November 30 Order."²² Even later, in response to New York City's comment that the RFP, as currently structured, calls for substantially more information than the Proponents have provided for the TOTS and that this lack of information will hinder a fair comparison of the TOTS to the RFP responses, the Commission stated that "[g]iven the short time left before the

²⁰ *Id.*

²¹ *Id.* at p 7.

²² *Id.* at pp 7-8.

2016 reliability need date, and the time required to construct new resources, we find that the detail provided in the [Contingency Plan] is sufficient at this time.”²³

Contrary to the Commission’s multiple summary assertions of the Contingency Plan’s compliance with and responsiveness to the November 30 Order, the Contingency Plan, in fact, fails to meet many of the November Order’s requirements and is therefore substantively deficient. Multiple commenters, including IPPNY, demonstrated the Contingency Plan’s deficiencies at length in their comments.²⁴ Those deficiencies include, but are not limited to, the failure “to take into account the status of proposed power plants and AC and DC transmission projects;”²⁵ failure 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;”²⁶ failure to quantify with any specificity the degree to which each of the Proponent’s proposed projects addresses the IPEC-related resource adequacy or reactive power impacts; failure to consider any alternative projects or, if such projects were considered, to discuss why those projects did not address the reliability needs; failure to demonstrate that its proposals are narrowly tailored to address IPEC-specific

²³ *Id.* at pp 19-20.

²⁴ *See, e.g.*, IPPNY February 22 Comments at Section V; see also Case No. 12-E-0503, *supra*, Comments of the City of New York on the Indian Point Contingency Plan, at 12-15 (filed February 22, 2013) (hereinafter “NYC February 22 Comments”) (presenting a chart depicting each of the November 30 Order requirements and how, if at all, the Contingency Plan addresses each of these requirements and establishing that, absent the information that the PSC had identified, the PSC could not issue orders that had a rational basis).

²⁵ *November 30 Order* at p 5.

²⁶ *Id.* at p 6. For example, as the Entergy entities established in their Comments, while NYISO studies have long identified reactive power as well as resource adequacy needs associated with the loss of Indian Point which the November 30 Order itself also highlighted, the Contingency Plan provides no information concerning the reactive power needs. (*See* Case No. 12-E-0503, *supra*, Comments of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear Operations, Inc. Addressing the February 1, 2013 Proposed Joint Reliability Contingency Plan (filed February 22, 2013).

reliability needs;²⁷ and failure to protect New York consumers from unnecessarily incurring substantial costs.²⁸

Indeed, because the Contingency Plan was so glaringly deficient in meeting the requirements of the November 30 Order, the City of New York included a chart in its February 22 comments tracking for the Commission each requirement delineated in the November 30 Order and the degree to which the Contingency Plan had complied (or, in more instances, not complied) with such requirements.²⁹ Given the dearth of information that was actually included in the Contingency Plan, the City of New York asserted, “. . .the only appropriate and rational next step in this proceeding is for the PSC to direct Con Edison (in consultation with NYPA) to revise or supplement the Contingency Plan by addressing, in full, each of the 11 topics listed above and recited in the November 30 Order.”³⁰ While the March Order includes a section entitled “Adequacy of the Filing,”³¹ the Commission inexplicably fails to even identify – much less rebut – the City of New York’s chart or to otherwise provide any basis for its summary assertions that the Contingency Plan “substantially addresses” the November 30 Order.

Equally problematic, the Commission expressly cites to Entergy’s documented point that the Contingency Plan does not delineate the full scope and nature of the system impacts.³² Nevertheless, the Commission establishes in a footnote, “[f]or purposes of the IPEC Contingency Plan, we accept Con Edison and NYPA’s determination that the deficiency would amount to

²⁷ *Id.* at pp 1-2.

²⁸ *Id.* at p 6.

²⁹ *See* NYC February 22 Comments at pp 13-14.

³⁰ *Id.* at p. 15.

³¹ *See* March Order at pp 7-8.

³² *Id.* at 12.

1350 MWs.”³³ In so doing, the Commission now ignores its own statements in the November 30 Order highlighting the fact that “New York City and southeastern New York rely not only on the energy produced by [Indian Point], but also on its supply of “reactive capability” to support energy transfers into the downstate region....”³⁴ A plan to address a situation cannot reasonably be developed if the situation itself is not quantified. Indisputably, defining the level of need is a threshold question. This information has not been provided.

Likewise, in the March Order, the Commission summarily asserts, “[w]e understand from the Filing that even if all three of the TOTS projects were implemented, they would not fully eliminate the reliability deficiencies resulting from an IPEC closure. Therefore, other proposed solutions will likely be needed.”³⁵ However, the Commission provides no cite to where this information allegedly is contained in the Filing. As Entergy demonstrated in its February 22 Comments, Con Edison, in fact, failed to delineate the degree to which each of its proposed projects would address the – not fully quantified – system needs.³⁶ Thus, there is no adequate basis for the Commission’s “understanding” in the record in this proceeding nor is there sufficient information for the Commission or the parties to this proceeding to identify the level of this allegedly residual need. This is the most basic of information to develop a plan. It has not been provided.

³³ *Id.* at n.6 (citations omitted).

³⁴ *November30 Order* at n.5. Similarly, in setting the level of need at 1,350 MW, the Commission also ignored the point raised by Entergy and others that Con Edison’s unilateral decision to first adjust the base case by assuming an incremental 100 MW of energy efficiency and then to identify other solutions based on such revised base case was a material departure from proper planning procedures and was in error.

³⁵ *March Order* at 14.

³⁶ *See* Entergy February 22 Comments at 11-12.

In an obvious attempt to gloss over the Contingency Plan's clear deficiencies, the Commission states that the Proponents "would submit the same information regarding the TOTS [as that requested in the RFP] to DPS Staff, so that all proposals can be evaluated on a comparable basis,"³⁷ and that it "expect[s] Con Edison and NYPA to provide the same level of information as will be required from RFP respondents in accordance with the RFP time frame."³⁸ Even if the Proponents were permitted to augment the Contingency Plan at such a late juncture, an approach patently unfair to RFP respondents, the supplementation of the Contingency Plan with just this information still falls far short of providing all of the information that the Commission requested in its November Order and on which it needs to make an informed decision.

Even more problematically, in the March Order, the Commission has requested that NYPA proceed promptly to issue its RFP.³⁹ Yet in response to the evidence establishing that the Contingency Plan had failed to quantify the reliability needs that must be addressed if IPEC were required to cease its operations,⁴⁰ the Commission states, "[t]he computation of the expected deficiency and/or explanation of the derivation of the deficiency (including the individual criteria violations and their specific system impacts) should be further updated and refined prior to the conclusion of DPS Staff's evaluation of RFP response."⁴¹ Requiring project developers to respond to an RFP without first fully defining the needs at issue is prejudicial to them. The Proponents likely already had this information available to them when they developed their own

³⁷ *March Order* at p 4.

³⁸ *Id.* at p 14.

³⁹ In fact, NYPA posted the RFP on its web site on April 3, 2013.

⁴⁰ *See, e.g.*, IPPNY February 22 Comments at p 35.

⁴¹ *See* *March Order* at 12 (*emphasis added*).

projects which will compete with the RFP responses head to head. The fact that the Commission did not direct the Proponents to supplement the Contingency Plan to provide this information before RFP responses are due to all parties only serves to ensure that this process will be skewed in favor of the incumbent utilities.

Signaling its broad support for the sufficiency of the Plan's terms despite its glaring deficiencies, the Commission has indicated that it intends to proceed on the Proponents' "parallel tracks." For example, the Commission states in the March Order that it plans to address the proposed development of the TOTS Projects (including the request for immediate cost allocation and recovery) at its April 2013 session. Yet, if the Commission were to adhere to the Plan's proposed schedule going forward, the Commission and the parties to this proceeding will, by definition, be acting without a full and complete record. Because the Commission cannot have a rational basis to proceed without a full record, the Commission must issue an order on rehearing finding that the Contingency Plan is deficient and directing Con Edison (assisted by NYPA, as necessary) to expeditiously supplement it to provide the information required by the November 30 Order.

B. Given its Role As A Proponent Of The Contingency Plan And A Sponsor Of Proposed Projects, NYPA Cannot Be Permitted To Screening Or Evaluate Responses To The RFP.

In the March Order, the Commission held that the Contingency Plan's designation of NYPA to "issue an RFP for new generation and transmission solutions" is a "reasonable initial step."⁴² While rejecting certain aspects of the Plan's proposed evaluation process as intruding on the role of DPS Staff, the Commission nevertheless gave NYPA the role of "screen[ing] the

⁴² *March Order* at p 10.

timely proposals for completeness and conformance to the RFP requirements.”⁴³ The Commission also cedes to the Plan’s Proponents a prominent role in creating the RFP’s final form.⁴⁴

NYPA, as a co-sponsor of the Joint Plan and potential beneficiary of the TOTS Projects identified therein (some of which NYPA also advances as reliability solutions in Case 12-T-0502), has an obvious financial stake in seeing those projects come to fruition. Putting the Plan’s Proponents in the position to structure the form of the RFP and then initially screen RFP responses before they may be passed onto DPS Staff for review provides the Proponents with considerable discretion and, of necessity, a significant degree of judgment over the RFP applicants. As a sponsor of proposed projects against which RFP applicants will compete, neither NYPA nor Con Edison should be endowed with such “gatekeeper” authority.

Allowing NYPA to have the ability to cull out projects that threaten to provide more attractive alternatives to the TOTS Projects fails to recognize NYPA’s incentive to act in its own best interest. NYPA’s conflict of interest, compounded by the Commission’s lack of jurisdiction over NYPA, will distort and taint the RFP process. The March Order thus unnecessarily creates the risk that the initial screening of the RFP applicants will be conducted unfairly to the ultimate harm paradoxically of the very New York consumers who the Commission emphasized in the November 30 Order must not be forced to bear unnecessary costs.⁴⁵

⁴³ *Id.* at p 11.

⁴⁴ *See id.* at p 20 (noting the Commission’s “expectation” that DPS Staff would “work with” the Proponents on this final form).

⁴⁵ IPPNY addressed the conflict of interest created by giving the Proponents a role in evaluating RFP applicants in its comments on the Contingency Plan. *See IPPNY Comments* at pp 6-7.

Indeed, on some level, the Commission itself acknowledged the Proponents' inherent conflict of interest in the March Order, cautioning that “[b]ecause Con Edison and NYPA have proposed transmission projects that may or may not be selected, we agree . . . that DPS Staff should oversee the RFP evaluation process with the assistance of an independent outside consultant.”⁴⁶ However, the Commission then dismisses this problem by analogizing the role of the Commission and DPS Staff here to the role that they play with the New York Independent System Operator (“NYISO”) in evaluating regulated reliability backstop solutions as part of the NYISO’s Comprehensive Reliability Planning Process (“CRPP”). In so doing, however, the Commission failed to account for the critical distinction that NYPA has no role – initial screening or otherwise – in the evaluation and selection of regulated backstop solutions under the CRPP.⁴⁷

Moreover, providing for oversight by DPS Staff and an independent consultant does not cure this fatal flaw. First, as specified in the March Order, NYPA would be charged with the initial screening process, and thus, could eliminate RFP responses before they even made it to the DPS Staff evaluation stage. Second, the March Order fails to mandate that the “independent consultant” shall have the power and authority to control the RFP process and, if necessary, to exclude NYPA and/or Con Edison from deliberating over projects that are intended to compete with the TOTS or any other projects Transco advanced in Case 12-E-0502.

Despite its recognition of the Proponents' conflict of interest, the Commission nevertheless specified in its March Order that NYPA should initially screen the RFP applications. The fox must not be put in charge of the hen house. Indeed, as IPPNY noted in its

⁴⁶ *March Order* at p 21.

⁴⁷ *See id.* at pp 21-22.

comments, permitting NYPA to have this role is further complicated by the fact that the Commission has no jurisdiction over NYPA and cannot therefore exercise its regulatory authority to oversee its actions to ensure that consumers are not harmed.⁴⁸ Consequently, on rehearing, the Commission should order that the RFP evaluation process must be conducted only by uninterested parties – DPS Staff and, if necessary, independent outside consultants selected through an RFP process conducted by DPS Staff alone.⁴⁹

C. The Commission’s Implementation Of The Contingency Plan Is Discriminatory Because It Defaults To Regulated Backstop Solutions and Fails To Evaluate All Proposed Solutions On A Level Playing Field.

Pointing to the size of the risk and the time necessary to prepare for replacements, the Commission asserts that the process that it is defining in this proceeding must supplant the NYISO’s reliability planning processes. However, the Commission’s approved structure for the NYPA RFP established in the March Order turns on its head the long-accepted principle in New York, expressed in the NYISO’s FERC-approved tariff, that seeking market based solutions to electricity needs is the preferable approach. Under the FERC-approved regulatory structure for New York, regulated backstop solutions are only considered as a last resort if market-based solutions are inadequate. By blessing the Plan in this regard, the March Order impermissibly side steps these long-standing rules.

In its November 30 Order, the Commission directed that the plan prepared by Con Edison should address, “[I]dentification and assessment of the generation, transmission, and other

⁴⁸ See *IPPNY Comments* at pp 6-7.

⁴⁹ IPPNY would note that NYPA submitted a request for trade secret protection in this proceeding that indicated that NYPA had conducted the solicitation to obtain bids from prospective independent consultants. See Case 12-E-0503, “Request For Exemption From Disclosure” (March 12, 2013). Given its interests in this proceeding, NYPA also should not play any role whatsoever in the solicitation of, or the selection and award to, the independent consultants that are used in this proceeding.

resources that are currently under development that could, when completed, contribute to meeting the identified reliability needs.”⁵⁰ The vast majority of electric generation and transmission projects that are “currently under development” are merchant projects, yet the Joint Plan merely advances – and the RFP process seems to be designed to solicit – a slew of new regulated projects that would be entitled to immediate cost recovery at ratepayer expense. In short, the RFP process approved by the March Order ignores the potential for market-based solutions and threatens to erode proper market signals.

In addition, in the March Order, the Commission specified that it “largely [had] accept[ed] the proposal to conduct an RFP on the terms and schedule suggested in the Filing...”⁵¹ The RFP schedule set forth in the Contingency Plan provides that RFP projects will not be evaluated and eligible for cost recovery until at least September 2013. Yet, in the March Order, the Commission states that it plans to address the proposed development of the TOTS projects and their associated cost allocation and recovery at the Commission’s April session. Thus, the TOTS projects, from which the Plan’s Proponents stand to reap a substantial benefit, will have a five month head-start. Indeed, if the Commission approves cost allocation and cost recovery for the TOTS projects in April and the Proponents begin to incur costs toward the development of those projects, all alternative projects submitted pursuant to the RFP will be at a significant disadvantage when finally reviewed by Staff in August. On rehearing, the Commission must put all potential projects on the same time line.

Moreover, the Contingency Plan, as proposed and approved by the Commission, requires that respondents to the RFP submit offers with pricing that is firm through December 31, 2013.

⁵⁰ March Order, p. 6.

⁵¹ *Id.* at pp 10-11.

As at least one commenter on the Plan pointed out, to achieve an accurate comparison of the TOTS projects to those proposed by RFP respondents, the same terms should apply to each.⁵² However, in the March Order, the Commission established that it took the cost estimates for the TOTS projects to be “good faith estimates, rather than ‘not-to-exceed-values’,” thereby defining a process whereby the TOTS projects and any RFP projects would be subject to different standards.⁵³ Thus, this aspect of the Plan unfairly favors the TOTS projects.

In an attempt to justify this preferential treatment, the Commission asserted that alternative regulated project developers “do not have the same regulatory responsibilities as the Transmission Owners [(“TOs”)],” and that although it would direct DPS Staff to evaluate TO and RFP projects on “as comparable a basis as possible, . . . it is neither necessary nor appropriate to provide identical cost recovery provisions for each.”⁵⁴ This is not a reasonable basis to treat non-utility projects differently than the TOTS projects. If the Proponents are allowed to recover cost-overruns for the TOTS while private developers must bear the risk that their costs exceed their bid prices, the Proponents will have an incentive to underestimate the costs of their projects to get themselves declared the winning solutions.⁵⁵ The Commission may select the TOTS projects based on these “estimates” when, in fact, the generation and transmission projects proposed in response to the RFP may ultimately be lower in cost or more narrowly tailored to the particular reliability need than the TOTS. Rather than approve an RFP it recognizes as discriminatory, the

⁵² See Case No. 12-E-0503, *supra*, Comments of West Point Partners, LLC, at pp 1-2 (filed February 22, 2013) *March Order* at p 18.

⁵³ *March Order* at p 18.

⁵⁴ *Id.*

⁵⁵ 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 had the project been competitively bid and subject to the same firm pricing rules that are imposed on RFP respondents in this case.

Commission should order the Proponents to conduct an open, fair, and non-discriminatory RFP in which all new and existing projects, including the TOTS, proceed on a level playing field. Such an RFP would better serve the interest of promoting competition in New York's energy markets and ultimately create the greatest benefit for New York's consumers.

IV. CONCLUSION

For the reasons discussed above, the Commission should grant IPPNY's Petition for Rehearing of the March Order.

Respectfully submitted,

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