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Via Electronic Mail

May 17, 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 April 19, 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: May 17, 2013
Albany, New York

NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 12-E-0503 - Proceeding on Motion of the
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PETITION FOR REHEARING OF
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I. INTRODUCTION

Pursuant to Section 3.7 of the New York State Public Service Commission’s (“Commission”) Rules and Regulations, 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 April 19, 2013 in the above-captioned case (the “April Order”).¹ In the April Order, the Commission approved the second part of the Consolidated Edison Company of New York, Inc. (“Con Edison”)/New York Power Authority (“NYPA”) February 1, 2013 contingency plan (“Plan”) to address reliability concerns were the Indian Point Energy Center (“IPEC”) required to cease operations.² Among other things, the Commission accepted the proposed project schedules and authorized cost recovery for Con Edison, New York State Electric & Gas Corporation (“NYSEG”), Central Hudson Gas & Electric Corporation and NYPA (collectively, the “Proponents”) for “preliminary planning work” for the Plan’s three proposed Transmission

¹ Case 12-E-0503, Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, *Order Upon Review of Plan to Advance Transmission, Energy Efficiency, and Demand Response Projects* (issued April 19, 2013).

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”).

Owner Transmission Solutions projects (“TOTS”) so that they can be in place to meet electric reliability needs that could arise in the summer of 2016 (the “In-Service Deadline”).³

As a preliminary matter, IPPNY restates its opposition to the Contingency Plan as a threat to New York’s competitive electricity markets hearkening back to the command and control regime that reigned prior to the introduction of competitive markets. The Plan, if implemented, will replace the market-based development of electricity infrastructure with centrally planned uneconomic projects financed by captive consumers. By shifting risks that should remain with investors back to consumers, the Plan’s approach thus subverts one of the primary goals of competitive markets. Subsidizing uneconomic new entry before soliciting market-based proposals to address a reliability need harms the competitive markets. Doing so before any reliability need has even been identified risks artificially suppressing energy prices in competitive markets for years to come. IPPNY therefore reiterates its objection to the Contingency Plan as a whole, although the scope of its instant request for rehearing is limited to the terms of the April Order.

As demonstrated below, the Commission committed a substantial error in the April 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. Specifically, the Commission erred by authorizing the Proponents to proceed with preliminary planning activities for the TOTS projects and by granting cost recovery for those activities.

³ *April Order* at p 15.

Moreover, this premature authorization and grant of cost recovery gives the TOTS projects a head start over any project proposed by private developers, whose proposals have no chance of being selected until September 2013. The Commission also erred by failing to require the Proponents to provide the Commission with firm bids for the TOTS—a requirement imposed on private developers. The Commission’s authorization of the TOTS thereby creates a distinct discriminatory advantage in favor of the Proponents’ projects over any projects proposed by private developers.

II. BACKGROUND

On November 30, 2012, the Commission issued an 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.⁴ The Commission noted that the potential retirement of a significant electric generating facility such as IPEC requires “significant advanced planning,”⁵ and that the size, location, and uncertainties regarding the potential retirement of IPEC requires that a contingency plan be developed now to ensure reliability by the In-Service Deadline in the event IPEC is retired.⁶

The Contingency Plan failed to fully identify and quantify the Indian Point-based system needs. Nonetheless, it proposed a fast track approach proceeding on several parallel paths. First, the Plan called for the Commission to issue an order in March 2013 requesting that NYPA issue an request for proposals (“RFP”) to solicit new incremental generation and transmission

⁴ Case No. 12-E-0503, *Order Instituting Proceeding and Soliciting Indian Point Contingency Plan* (issued Nov. 30, 2012) (*hereinafter* the “November Order”).

⁵ *Id.* at p 2.

⁶ *Id.* at pp 2-3.

proposals that could be in place by the In-Service Deadline.⁷ The Proponents proposed that NYPA and Department of Public Service (“DPS”) Staff evaluate all of the proposed projects, including the TOTS, and then DPS Staff would recommend to the Commission by August, 2013 which projects should move forward to completion.⁸ In an order issued on March 15, 2013 (the “March Order”), the Commission requested that NYPA issue the RFP.⁹ As its title implied, the March Order is ostensibly limited to approving “the proposal by Con Edison and NYPA to issue an RFP in connection with their IPEC Contingency Plan.”¹⁰ As IPPNY has addressed in its first rehearing request in this proceeding filed on the March Order, however, the Commission’s March Order also signals broader approval of the Contingency Plan in its entirety despite extensive evidence of the Contingency Plan’s material deficiency.

Second, the Plan called for the Commission to issue an order in April 2013 which would (a) direct the development of an incremental 100 MW energy efficiency (“EE”) / demand response (“DR”) / combined heat and power (“CHP”) program at a cost of \$300 million;¹¹ (b) direct Con Edison—joined by, with respect to one transmission solution, NYSEG—and request NYPA to immediately begin development of, and authorize cost recovery for, the TOTS; and (c)

⁷ See Case No. 12-E-0503, *Compliance Filing of Consolidated Edison Company of New York, Inc. and New York Power Authority With Respect To Development of Indian Point Contingency Plan* at p 17 (issued February 1, 2013) (hereinafter “Contingency Plan”).

⁸ *Id.* at pp 17-18.

⁹ Case No. 12-E-0503, *Order Upon Review of Plan to Issue Request for Proposals* (issued March 15, 2013) (hereinafter “March Order”).

¹⁰ *March Order* at p 3.

¹¹ By the express terms of the Plan, it appears that Con Edison is proposing that the Commission give its final approval for the Energy Efficiency Project in the April Order thereby cordoning it off from competing with other solutions offered in the RFP process. For the reasons already documented by IPPNY, Con Edison’s attempt to accord special treatment for its own Energy Efficiency Project cannot be sanctioned.

find, on a preliminary basis, that the TOTS meet public policy requirements.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 The Plan estimated the cost of the TOTS to consumers at \$500 million, producing a total uncapped Plan price tag of an estimated \$800 million. As proposed by the Plan, the Commission’s April Order would determine that the three TOTS meet the public policy requirements of New York State as identified in the November 30 Order and the New York Energy Highway Blueprint.¹⁵

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 *Contingency Plan*, Exhibits B-D.

¹⁵ *Id.* at pp 16-17.

III. THE APRIL ORDER

In its April Order, the Commission determined that it is “consistent with the jurisdictional utilities [Con Edison and NYSEG]’s core responsibilities to ensure safe and adequate service to move forward with preliminary planning and development of the TOTS projects.”¹⁶ The Commission reiterated its finding from the March Order that the TOTS will “contribute toward addressing the potential reliability deficiency” if IPEC were required to cease operations.¹⁷ The Commission summarily accepted the proposed project schedules and, based upon such schedules, found that the Proponents should undertake preliminary planning as soon as possible because not doing so would “greatly diminish” the likelihood of the projects being able to address reliability needs arising from IPEC’s closure.¹⁸ Recognizing the deficiencies still inherent in the record at this stage of the proceeding, the Commission established that it expected Proponents to file additional information specifying the contribution of the TOTS projects toward the capacity deficiency estimates to ensure that the TOTS are evaluated “on a comparable basis with qualifying RFP responses.”¹⁹

¹⁶ *April Order* at p 6.

¹⁷ *Id.* at p 7.

¹⁸ *Id.*

¹⁹ *Id.* at p 15.

The Commission’s April Order also specified that its approval for cost recovery for the TOTS was limited to the costs of preliminary planning activities. It capped the amount recoverable for those activities at \$10 million, subject to prudence review, to limit ratepayers’ exposure to unnecessary costs “if the TOTS projects are not preferred when compared with the potential generation and/or transmission projects that respond to the RFP.”²⁰

Turning to cost allocation and cost recovery issues, the Commission acknowledged that using the NYISO’s FERC Order 1000 public policy planning process was not feasible.²¹ Additionally, the Commission stated that costs for the TOTS should be allocated according to “beneficiaries pay” principles.²² The Commission found that the Plan would primarily benefit zones in southeast New York, not statewide, and that therefore the default load-ratio share proposed for cost allocation in the Plan was not appropriate. The Commission directed DPS Staff to develop a straw proposal on cost recovery and cost allocation for further comment.²³

Finally, the Commission’s April Order determined that the Plan’s proposed EE/DR/CHP program lacked sufficient specificity in a number of areas. The Order directed Con Edison to work with the New York Energy Research and Development Authority (“NYSERDA”) and NYPA to submit a revised plan within 45 days of the Order’s issuance.²⁴

²⁰ *See id.* at pp 8-9.

²¹ *Id.* at p. 14.

²² *Id.* at p 11.

²³ *Id.* at pp 11-12.

²⁴ *Id.* at pp 21-22.

IV. ARGUMENT

A. **The Commission's Authorization of the TOTS Projects Is Unjustly Discriminatory because It Provides A Significant Advantage To Those Projects Over the RFP Proposals.**

The Commission's April Order gives preferential treatment to the TOTS projects—from which the Proponents of the Plan stand to reap a substantial benefit—by giving those projects a five month head start over any proposed RFP projects, which will not be evaluated and eligible for cost recovery until at least September 2013.

As an initial matter, it must be noted that the Commission lacked adequate information to authorize preliminary planning work on the TOTS projects on even an interim basis. As the Commission itself concedes in the April Order, it does not presently have the most basic information concerning these projects – namely, the degree to which they will address Indian Point-based system needs. Nor has the Commission even directed such information to be filed until the end of May.

This head start will unavoidably result in multiple advantages inuring to the Proponents, including, primarily, the ability of the projects to more easily achieve the In-Service Deadline. The Commission states plainly in the April Order that “in order to be available, if needed, by the June 2016 in-service date, [the TOTS Proponents'] preliminary planning activities should be undertaken as soon as possible.”²⁵ The Commission's statement seems to recognize that, if made to compete on a level playing field with alternative proposals such as those likely to be submitted in the RFP, the Proponents' projects would fall short of the November Order's requirements by failing to meet the In-Service Deadline. If the Proponents' projects require immediate action to

²⁵ *April Order* at p 7.

meet the deadline, it is likely that a number of other market participants have similar projects that might resolve the potential reliability need by the In-Service Deadline only if acted on immediately. The April Order's approval of the TOTS gives the Proponents a green light but forces private developers with competitive proposals to wait until August for review and until September for selection of their projects, by which point the TOTS will be five months farther along.

The Proponents will also receive unjust advantages with regard to both cost containment and cost recovery. Under the April Order, the Proponents may begin to incur costs toward the development of the TOTS for which they have already been granted recovery. Consequently, when DPS Staff evaluate the TOTS against alternative projects submitted pursuant to the RFP, the scales will be weighted in favor of the TOTS. RFP projects that seek to recover costs will require the allocation of additional funds, whereas the TOTS will have already reaped the benefits of the head start that incurring \$10 million of ratepayers' funds provided to them. Not to select the TOTS projects at that stage would be wasteful because it would amount, essentially, to discarding \$10 million and receiving nothing in return. Obviously, this situation puts the RFP projects at a significant disadvantage when finally reviewed by Staff in August.

Furthermore, the Contingency Plan, as proposed and approved by the Commission, requires that respondents to the RFP submit more detailed proposals than the Proponents have offered for the TOTS. Among those details, the Plan requires proposals to include offers with pricing that is firm through December 31, 2013, and to specify what contribution the proposed solution will make toward meeting the capacity deficiency. Arbitrarily and capriciously, in its April Order the Commission authorized the TOTS to proceed despite recognizing that "the Con

Edison/NYPA Filing does not specify the contribution of the TOTS projects toward capacity deficiency estimates.”²⁶ The Commission concedes that the Proponents must provide such information to DPS Staff to enable evaluation on a comparable basis, but somehow fails to recognize that—among other flaws—its preliminary approval of the projects absent this information itself prevents a true, non-discriminatory comparison of the projects and lacks a rational basis. 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.²⁷

In an attempt to justify this preferential treatment, the Commission asserted in the March Order 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, including considering differences in cost certainty, it is neither necessary nor appropriate to provide identical cost recovery provisions for each.”²⁸ The Commission reiterated this position in the April Order, stating that “the need to conduct both short-term and long-term planning arises directly from [Consolidated Edison and NYSEG’s] fundamental obligation” to provide and maintain safe and adequate service, and therefore it was reasonable for those utilities to prepare for a potential IPEC retirement “for all the reasons we stated in our November 30 Order and March 15 Order.”²⁹ This is not a reasonable basis to subject non-utility projects to different

²⁶ *Id.* at p 15.

²⁷ 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.

²⁸ *March Order* at p 18.

²⁹ *April Order* at p 6.

treatment than that afforded the TOTS projects because there has been no demonstration that it would be impossible to develop a solution to meet the In-Service Deadline unless the Proponents obtain up front cost recovery for preliminary development activities for the TOTS.

While the Commission states that it “expects” that the Proponents will file “the additional TOTS information needed to assure there is a comparable level of information for all proposals is available,” the Commission did not require the Proponents to provide firm bids for the TOTS as it required private developers to provide in response to the RFP. If the Proponents are allowed to recover cost-overruns for the TOTS while private developers are forced to bear the risk that their costs may exceed their bid prices, the Proponents will have an incentive to knowingly and artificially underestimate their costs.³⁰ The Commission may then select the TOTS projects based on these artificially lowered estimates when, in fact, the generation and transmission projects proposed in response to the RFP would ultimately be lower in cost or more narrowly tailored to the particular reliability need than would the TOTS.

The Commission’s order establishes a harmful precedent that regulated transmission owners will be provided an unfair advantage over non-utility developers in future competitive procurements. Rather than provide a discriminatory advantage by approving specific projects it acknowledges could not compete on a level playing field, the Commission should, on rehearing, reverse its decision to approve up to \$10 million in cost recovery for the TOTS. To ensure that the TOTS are fairly evaluated against the private developer proposals submitted in response to

³⁰ 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.

the RFP, the Commission should also require the Proponents to provide the Commission with firm bids for the TOTS and make clear in its order that cost overruns will be disallowed.

IV. CONCLUSION

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

Respectfully submitted,

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