NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 15-E-0302 - In the Matter of the Implementation of a Large-Scale Renewable Program.

# COMMENTS OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.

David B. Johnson
READ AND LANIADO, LLP
Attorneys for Independent Power Producers of New York, Inc.
25 Eagle Street
Albany, New York 12207
(518) 465-9313 (tel)
(518) 465-9315 (fax)
dbj@readlaniado.com

Dated: August 12, 2015

NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 15-E-0302 - In the Matter of the Implementation of a Large-Scale Renewable Program.

COMMENTS OF INDEPENDENT
POWER PRODUCERS OF NEW YORK, INC.

## I. INTRODUCTION

On June 1, 2015, the New York State Energy Research and Development Authority ("NYSERDA") filed its report entitled "Large-Scale Renewable Energy Development in New York: Options and Assessment" ("Report") with the New York State Public Service Commission ("Commission") in the above-captioned case. Pursuant to the Secretary's notices soliciting, and extending the deadline to file, comments, Independent Power Producers of New York, Inc. ("IPPNY") hereby submits its comments on the Report.[1] 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.

In its Report, NYSERDA examines the benefits and drawbacks of a series of options to serve as the model for the continued development and procurement of large-scale renewable ("LSR") resources. Despite having already attracted nearly 1,900 MW of LSRs under the Renewable Portfolio Standard ("RPS") through a central procurement process conducted by NYSERDA for renewable energy attributes (referred to in the Report as renewable energy credits or RECs) utilizing fixed per kWh incentive payments under long-term contracts, NYSERDA suggests that changing market conditions require modifications to the current

[1] IPPNY's comments do not necessarily reflect the views of individual members of IPPNY.

approach to ensure LSR resources are procured at "the lowest possible cost while maximizing customer benefits, promoting competition, and animating voluntary markets for renewables to complement public investments."[2] Based on its evaluation criteria and financial modeling, NYSERDA states that the preferred mechanism to support the development of LSRs is an open-source solicitation model whereby a State entity would serve as the soliciting entity and electric distribution companies ("EDCs") would either enter into bundled long-term power purchase agreements ("PPAs") to purchase energy and RECs from private renewable developers or own renewable projects themselves.

At the outset, IPPNY notes that its fundamental interest is in the continued development and enhancement of reliable and efficient integrated regional wholesale competitive electricity markets. With respect to the LSR proceeding, IPPNY's interest lies mainly in ensuring that the Commission's LSR policies are developed in a manner that are consistent with, and do not undermine in any respect, the functioning of non-discriminatory, competitive energy markets in New York and its surrounding regions. As discussed below, IPPNY strongly opposes NYSERDA's proposal that EDCs own renewable generation because it would be a major step backward from years of Commission policy supporting robust competitive electricity markets in New York by generally prohibiting EDCs from owning generation.[3] Utility ownership of generation is contrary to the Commission's long-standing pro-competition policies implemented over the past twenty years that private investors have a greater incentive to lower costs than utilities under cost of service regulation, private investors and their shareholders should bear the

[2] Report at 2.

[3] The two exceptions to the Commission's policy were permitted based on the specific fact pattern presented as follows: (i) retention by Consolidated Edison Company of New York, Inc. ("Con Edison") of a "bundle" of generating assets to support its steam system operations; and (ii) the limited wind generation development found by the Commission to be required to support Iberdrola's acquisition of two of New York's distribution utilities.

risks of generation ownership and transmission and distribution ("T&D") should be separated from generation to eliminate the potential that T&D utilities that own generation could exercise vertical market power to the detriment of wholesale competitive electricity markets and consumers.[4]

IPPNY also opposes NYSERDA's proposal that the State or EDCs be required to purchase energy from LSRs under bundled PPAs because, as IPPNY has long documented, bundled PPAs could insulate LSRs from competitive market price signals and harm the wholesale competitive electricity market. The procurement of LSRs with State incentives should not cause or contribute to out-of-merit dispatch or otherwise alter the current practice of operating the electric system on the basis of economic dispatch subject to meeting reliability concerns. Thus, any procurement obligation should continue to utilize the structure that has successfully been in place for a decade—RECs only purchased on a fixed-price basis—which could include the long-term REC only contracts that NYSERDA has used to date. If, however, the Commission decides to adopt procurement mechanisms that reduce energy price risk to LSR developers, it, at a minimum, must do so in a manner that does not interfere with a LSR developer's incentive to respond to market prices. As discussed below, these issues are complex and should be addressed through the issuance of a white paper followed by a technical conference and a comment period. Preliminarily, IPPNY would note an important component that must be considered is an indexed REC payment approach, which, on one hand, would capture broad market changes in the price of energy while, on the other hand, would continue to

[4] Case 96-E-0900 *et al.*, *In the Matter of Orange & Rockland Utilities, Inc.'s Plans for Electric Rate Restructuring Pursuant to Opinion 96-12,* Appendix I, Statement of Policy Regarding Vertical Market Power (July 17, 1998) ("VMP Order"); Appendix I ("VMP Statement").

encourage LSRs appropriately to respond to market prices—most importantly the need to reduce generation under conditions of negative prices of energy—in the same manner as traditional resources competing in the energy market.

A requirement that EDCs procure a percentage of their distribution customers' retail load, as measured through REC purchases from new and existing LSRs from an open, competitive, tradable REC market and through long-term contracts will ensure that renewable resources are responsive to changing energy prices and best achieve the State's renewable energy goals by providing certainty to investors that the State will provide incentives to meet defined targets. IPPNY also supports NYSERDA's proposal to provide State incentives to so-called legacy (such as hydro and wind) LSRs to ensure that their attributes remain in the State and count toward meeting the State's public policy goals. All privately owned generation facilities that currently count toward the New York RPS target (including baseline resources) should be eligible for State incentives in the future.

## II. THE COMMISSION MUST NOT WEAKEN ITS LONG-STANDING POLICY PROHIBITING EDCS FROM OWNING GENERATION.

NYSERDA presented three options of how financing and development of new LSR could be achieved. Under the guise of recommending "flexible procurements to foster competition and ensure the selection of the lowest-cost projects,"[5] NYSERDA argues that "greater competition among all types of project developers and owners is likely to result in the selection of the lowest-cost projects."[6] While acknowledging that its "current financial analysis shows privately-owned projects with bundled PPAs deliver the lowest-cost solution and that financial tools such as

[5] Report at 126.

[6] *Id.*

YieldCos can drive costs down further,"[7] NYSERDA nevertheless theorizes that at some future time circumstances may exist "where Utility-Owned Generation ("UOG") of LSR could achieve the lowest costs."[8]

Of specific concern is what NYSERDA calls "open-source solicitations" under Option 3. These open-source solicitations would feature "head-to-head competition between proposals for PPAs and utility-owned generation."[9] According to NYSERDA, these "open-source solicitations will tend to stimulate broader market participation and competition, and under certain circumstances may be expected to produce more renewable generation at lower cost."[10] NYSERDA further claims that UOG "may have advantages with respect to terminal value ordinarily not present under PPAs where the generation owner owns a project's terminal value (which may be positive or negative, but is likely to be positive)."[11]

NYSERDA states that a key issue for further consideration "is whether utilities should be permitted to own LSR projects and compete with privately-owned projects in an open-source solicitation."[12] While NYSERDA freely admits that UOG presents issues "of comparability and potential bias in evaluation and selection" and "risk transfer to ratepayers,"[13] it summarily dismisses these issues without providing any meaningful analysis. It merely claims that these issues can be mitigated by State oversight and the retention of independent experts. Similarly, NYSERDA outright ignores the importance of years of Commission policy and precedent

[7] *Id.*

[8] *Id.* at 4.

[9] *Id.* at 11.

[10] *Id.* at 16.

[11] *Id.* at 90.

[12] *Id.*

[13] *Id.* at 17.

regarding vertical market power ("VMP") by providing no analysis on VMP concerns associated with UOG. Its only reference to VMP concerns is its single statement that such issue "may call for modifications to existing restrictions on utility generation asset ownership."[14]

As the Commission has found and IPPNY has consistently demonstrated in various proceedings,[15] energy services should be provided cost-effectively by private developers on a competitive basis rather than by EDCs through rate-of-return regulation. This approach ensures that private investors, not captive ratepayers, bear investment risks and that uneconomic projects—whose suppressive impacts may harm the private developers that must rely on competitive markets for their survival—are not developed. It also ensures that EDCs are not able to exercise VMP to the detriment of competitive markets and consumers. The Commission should reaffirm its commitment to these principles by continuing its long-standing prohibition on UOG.

### A. UOG Shifts Investment Risks Back to Captive Ratepayers.

Market-based mechanisms are the best means of procuring resources and services in the most efficient manner. In its seminal opinion issued in 1996 to introduce competitive electric markets in New York State, the Commission adopted its policy endorsing, *inter alia*, the creation of a competitive wholesale generation market.[16] In Opinion 96-12, the Commission determined that competitors would have a greater incentive to lower costs than utilities under a cost-of-

[14] *Id*.

[15] *See* Case 14-E-0302, *Petition of Consolidated Edison Company of New York, Inc. for Approval of Brooklyn Queens Demand Management Program*, Comments of Independent Power Producers of New York, Inc. (Oct. 6, 2014), at 2–3, 14–15; Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, IPPNY Comments (Sept. 22, 2014), at 6, 12–15; Case 14-M-0101, *supra*, IPPNY Comments (July 18, 2014), at 8–16.

[16] Cases 94-E-0952 et al., *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Regarding Competitive Opportunities for Electric Service, Opinion 96-12 (May 20, 1996), at 32 ("Opinion 96-12").

service regulatory regime, which would inure to the benefit of New York's consumers.[17] The Commission also recognized in Opinion 96-12 that the most efficient means of selecting new resources is via the competitive market. Further, the Commission found that one of the primary benefits of competitive markets is that investment risks would shift from captive utility ratepayers to private investors.

If EDCs are allowed to develop or acquire an interest in cost-of-service, rate-regulated LSR, ratepayers ultimately will be put back in the position of being at risk to shoulder the cost overruns of such projects. As history demonstrates, the risk of such cost overruns is very real. For example, Con Edison's East River Repowering Project, prompted by needs on Con Edison's steam system, had an initial estimated cost of $406 million. However, ratepayers were required to bear final costs of $788.3 million, almost a 100% overrun of original cost estimates.[18] Similarly, Rochester Gas and Electric Corporation's ("RGE") construction of its Rochester Transmission Project (albeit a transmission project) was projected to cost approximately $75.4 million when initially authorized.[19] The estimates subsequently ballooned to $125 million, a 60% increase. In the case of a merchant LSR facility, private investors bear the risk of loss, not consumers. Because they do not have the luxury of an assured regulated revenue steam to cover their costs, they are forced to be more efficient. Problems such as cost overruns and negative impacts on the competitive markets can be avoided by continuing to prohibit EDCs from owning cost-of-service, rate-regulated generation assets.

---

[17] *Id.* at 30.

[18] Case 05-S-1376, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of the Consolidated Edison Company of New York. Inc. for Steam Service*, Order Determining Revenue Requirement and Rate Design (Sept. 22, 2006), at 6.

[19] Case 03-T-1385, *Rochester Gas and Electric Corporation*, Order Granting Certificate of Environmental Compatibility and Public Need (Dec. 16, 2004), at 6.

### B. UOG Chills Private Investment.

The Commission's decision almost two decades ago to restructure New York's energy markets from vertically integrated monopolies to a competitive wholesale and retail market structure was based on the fundamental economic principle that competition brings forth efficiencies, technical advancements, savings, and other benefits, which are unlikely to occur as effectively, if at all, absent the motivation provided by such markets.[20] The results that have been obtained since the Commission took this step demonstrate that the Commission's reasoning was sound. Competitive electric markets have led to more efficient operations, supporting lower utility bills for customers, a better climate for companies seeking to do business in the State, and a healthier state economy overall.

LSR developers should be required to compete with each other to provide products that benefit consumers at a lower cost than can be provided by EDCs. If EDCs are allowed to own LSR and recover costs via cost-of-service rates, it will not only harm the competitive electric markets in the State, as discussed below, but will also chill merchant entrants' future investment in the State, which would do immense harm to the market. As private investment is discouraged, EDCs, which are typically unresponsive to price efficiencies and reluctant to innovate, will dominate the development of LSRs. Once this cycle begins, it will become a self-fulfilling prophecy. Less merchant involvement will produce more monopoly domination, which, in turn, will produce even less merchant investment.

It is impossible to fairly compare the costs and benefits of a proposed project that will obtain cost-of-service, rate-based recovery with a private developer's proposed project that must rely on REC payments and market revenues for cost recovery. NYSERDA's proposed open-

[20] *Id*. at 26.

source solicitation will not result in an even playing field for developers and UOG. A project that is willing to cap the total cost exposure to consumers through a combination of REC and market revenues would ultimately be more beneficial to customers than a cost-based solution that may have a lower initial cost estimate (making it *appear* to be the better choice) but also retains the ability to seek recovery of all costs without limitation. To ensure competing bids are evaluated fairly, the Commission should require that developers of LSR projects offer firm per kWh bids that cap consumers' exposure to project costs. The structure proposed by NYSERDA would provide EDCs the perverse incentive to underbid their projects and have them selected, only to later recover any cost overruns through rates. This structure does not allow for true competition between private developers and UOG because the former would be bound by their bids whereas the latter would not.

In addition, it will be impossible to ensure that EDCs will accurately disclose all of the benefits a renewable project will provide to their T&D systems. For example, an EDC could underbid a non-EDC project because it alone knows that its project will delay needed upgrades to its T&D system and can redirect those "savings" to the project that will otherwise reduce the EDC's costs and allow it to offer a lower bid. Non-EDCs will be at an obvious disadvantage in bidding against EDCs if non-utilities, which have far less knowledge of the T&D system than the EDCs that own and operate the systems, are unable to reflect these cost savings in their bids. Therefore, to ensure that EDCs have no incentive to hide their T&D system cost savings that will result from a LSR project and to promote a level playing field generally, EDCs should be ineligible from participating in LSR solicitations.

The Commission has already considered and rejected a proposal to allow EDCs to own renewable generation. During the 2009 RPS review, the Commission rejected the establishment

of a new "Utility-Sited Tier" to promote small, utility solar photovoltaic facilities that integrate renewable energy generation into the distribution system at strategic locations.[21] Just recently, the Commission reaffirmed its policy prohibiting EDCs from owning small-scale renewables, except in very limited circumstances, in its Reforming the Energy Vision ("REV") policy order. The Commission ruled that "a basic tenet underlying REV is to use competitive markets and risk based capital as opposed to ratepayer funding as the source of asset development. On an ex ante basis, utility ownership of DER conflicts with this objective and for that reason alone is problematic."[22] Consequently, the Commission established the "general rule" that "utility ownership of DER will not be allowed unless markets have had an opportunity to provide a service and have failed to do so in a cost-effective manner."[23]

No such failure has been demonstrated with respect to LSRs. To the contrary, the Report describes the previous NYSERDA RPS solicitations as having been highly competitive and successful. There has been no showing that private developers competing to develop LSRs cannot meet the State's LSR goals at lowest cost. Indeed, NYSERDA previously has confirmed through its analysis that privately-owned projects are the lowest cost solutions.[24] The experience to date has been that private investment has responded to the call for the development of renewable resources. This experience should continue to guide the structure and rules for LSR ownership.

---

[21] Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Authorizing Customer-Sited Tier Program Through 2015 and Resolving Geographic Balancing and Other Issues Pertaining to the RPS Program (Apr. 2, 2010), at 34–35.

[22] Case 14-M-0101, *supra*, Order Adopting Regulatory Policy Framework and Implementation Plan (Feb. 26, 2015), at 67.

[23] *Id.* at 68.

[24] Case 03-E-0188, *supra*, Order Authorizing Customer-Sited Tier Program Through 2015 and Resolving Geographic Balancing and Other Issues Pertaining to the RPS Program (Apr. 2, 2010), at 34–35.

### C. The Commission Determined that the Most Effective Way to Allay VMP Concerns Arising from UOG Is to Prohibit UOG.

The Commission's VMP Policy "established a rebuttable presumption that ownership of generation by an affiliate of a utility would unacceptably exacerbate the potential for vertical market power."[25] Consistent with long-standing Commission policy, EDCs should continue to be proscribed from owning generation in New York State, including LSR. IPPNY has been a strong supporter of the VMP Policy Statement, which requires the separation of generation from EDCs to eliminate the potential that EDCs that own generation could exercise VMP to the detriment of wholesale competitive electricity markets and consumers.[26] The Commission's VMP Policy Statement assures energy market participants considering doing business or making further investments in the State that the Commission is committed to a competitive electric market. The Commission stated: "[v]ertical market power occurs when an entity that has market power in one stage of the production process leverages that power to gain advantage in a different stage of the production process. A [EDC] with an affiliate owning generation may, in certain circumstances, be able to adversely influence prices in that generator's market to the advantage of the combined operation."[27]

The Commission identified the potential for VMP in two instances. First, VMP could be exercised when an EDC owns generation in its own service territory. The Commission was concerned that the EDC could use its control of the T&D system to favor its own generation or thwart its competition by either lowering competitors' revenues or raising their costs. Second,

---

[25] Cases 96-E-0900 et al., *In the Matter of Orange & Rockland Utilities, Inc.'s Plans for Electric Rate Restructuring Pursuant to Opinion 96-12*, Statement of Policy Regarding Vertical Market Power (July 17, 1998), App. I, at 1–2 ("VMP Policy Statement").

[26] *Id.*

[27] *Id.* App. I, at 1.

VMP could be exercised when an EDC owns generation that is located on the high side of a transmission constraint. The Commission was concerned that the T&D utility could use its control of the transmission system to increase constraints and raise the value of its generating assets.

The Commission found that, in a wholesale or retail competitive model, generation and energy service functions should be separated from T&D, wherever feasible, to eliminate concerns related to the exercise of VMP and best meet the interests of ratepayers. The Commission determined that total divestiture of generation was the clearest way to allay concerns about VMP and avoid anti-competitive behavior (such as favored treatment of affiliates and cross-subsidies among affiliates in both competitive and monopoly environments).[28] Finding that separating ownership of generation from T&D was preferable to seeking to rely upon regulatory controls and enforcement mechanisms because the latter was incapable of timely identifying and remedying the potential for abuse, the Commission established a rebuttable presumption that separation of these functions was required.[29] The first paragraph of the VMP Statement summarizes the Commission's findings:

> In creating a competitive electric market, the Commission has viewed divestiture as a key means of achieving an environment where the incentives to abuse market power are minimized. Recognizing that vigilant regulatory oversight cannot timely identify and remedy all abuses, it is preferable to properly align incentives in the first place.[30]

[28] Opinion 96-12 at 64–65.

[29] VMP Policy Statement, App. I at 1.

[30] *Id.* (emphasis added.)

In addition, the Commission stated that divestiture would help create a larger number of competing generating companies, which would result in a more dynamic market.[31]

The Commission therefore strongly encouraged the EDCs to divest their generation. It adopted VMP, a step which ultimately occurred and was sanctioned at the Commission in the utility-specific rate and restructuring cases. To avoid the adverse impacts that would result from the exercise of VMP on both the continued development of competitive markets and, concomitantly, consumers, the Commission established strict VMP guidelines in the VMP Policy Statement which expressly provide that the proponent of a proposal to own both transmission and generation would face a very high hurdle in its Section 70 proceeding, namely, it must overcome the rebuttable presumption that such dual ownership would unacceptably exacerbate the potential for VMP. The Commission ruled:

> To guard against undesirable incentives, a rebuttal [sic] presumption will exist for purposes of the Commission's Section 70 review of the transfer of generation assets, that ownership of generation by a T&D company affiliate would unacceptably exacerbate the potential for vertical market power. To overcome the presumption the T&D company affiliate would have to demonstrate that vertical market power could not be exercised because the circumstances do not give the T&D company an opportunity to exercise market power, or because reasonable means exist to mitigate market power. Alternatively, the T&D company would need to demonstrate that substantial ratepayer benefits, together with mitigation measures, warrant overcoming the presumption.[32]

The Commission's policy has been implemented with great success. Except in the limited instance of generation associated with addressing the steam system in New York City, the T&D utilities have divested their generation, the vast majority of new generation has been

[31] Opinion 96-12 at 65.

[32] VMP Policy Statement, App. I at 1–2.

developed by independent power producers, and a competitive wholesale electricity market now operates in New York.

The Commission subsequently has reaffirmed its VMP Policy Statement since the EDCs divested most of their generation approximately 15 years ago. In 2007, the Commission found the joint proposal to support the merger of National Grid and KeySpan to be deficient because it would have permitted National Grid to own generating facilities. In its order addressing the National Grid/KeySpan proposed merger issued on September 17, 2007, the Commission rectified this deficiency by identifying the additional requirement that, *inter alia*, National Grid must agree to divest the 2,450 MW Ravenswood generating facility portfolio as an express condition to approval of the merger.[33] In establishing this condition, the Commission noted, "[f]or more than 12 years, this Commission has taken numerous actions to develop competitive markets for generation products in New York. The long-term goal is that customers should be able to obtain generation products by paying prices resulting from a fully competitive generation market in lieu of regulated prices (or rates) based on the costs of generation."[34] Finding other alternatives insufficient to adequately address VMP concerns, the Commission held: "We agree with IPPNY and others that a decision by us to rely solely on regulatory solutions would signal and in fact would amount to a weakening of our resolve to ensure a competitive generation market and its attendant benefits."[35]

[33] Case 06-M-0878, *Joint Petition of National Grid PLC and KeySpan Corporation for Approval of Stock Acquisition and Other Regulatory Approvals*, Order Authorizing Acquisition Subject to Conditions and Making Some Revenue Requirement Determinations for KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island (Sept. 17, 2007).

[34] *Id.* at 128.

[35] *Id.* at 134.

The Commission also reaffirmed its VMP Policy Statement when it conditioned its approval of Iberdrola's acquisition of RGE and New York State Electric and Gas Corporation ("NYSEG") on the divestment of any and all fossil-fueled generating assets in New York State owned, and the prohibition of the future construction or acquisition of any fossil-fueled generation in New York, by Iberdrola and its affiliates.[36] While the Commission allowed NYSEG and RGE to develop a limited amount of wind generation in their service territories, such action was specific to the facts and circumstances of the merger at hand, was required to support the merger's approval (by providing substantial ratepayer benefits of $275 million) and was contingent upon the generation being owned by affiliates separate from the EDC and the imposition of VMP mitigation measures.

The Commission should continue to prohibit EDCs from owning any generation facilities in New York State, including LSRs, to guard against the exercise of VMP so long as private investors are willing and able to develop projects in New York. Unlike the case in Iberdrola where it provided $275 million in ratepayer benefits as a condition of the Commission's merger approval, there are no significant ratepayer benefits being offered by any EDCs that could not be provided by private investors to offset harm that will be caused by the EDCs' potential exercise of VMP if they own LSRs. Indeed, NYSERDA admits that its analysis shows that privately-owned projects are the lowest cost solutions.[37]

At the LSR Technical Conference, some EDC representatives claimed that UOG provides more value to the State and ratepayers than privately owned generation because the value of

[36] Case 07-M-0906, *Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.*, Order Authorizing Acquisition Subject to Conditions (Jan. 6, 2009).

[37] *Id.*

UOG is captured for the State and ratepayers for the life of the project, but the value of privately owned generation terminates after contract expiration. This statement is not a valid basis to support UOG because there is no reason contracts could not be executed with private developers to ensure RECs are dedicated to New York State for the life of a project. As the Report states, "[s]olicitations may be structured to incorporate terminal value in the evaluation and encourage PPA bidders to offer proposals which provide terminal value (through options to extend the PPA term at specified prices and/or options to purchase the generator)."[38]

## III. THE COMMISSION SHOULD REJECT ANY PROCUREMENT APPROACH THAT WOULD INSULATE LSRS FROM REAL TIME WHOLESALE ENERGY MARKET PRICES.

NYSERDA's preferred procurement approach includes a structure whereby EDCs for the first time would enter into long-term bundled PPAs for energy and RECs. NYSERDA proposes, as an alternative, that a State entity procure RECs through long-term contracts that would provide a contract for differences ("CFD") pricing mechanism, whereby payments would vary inversely with energy prices.[39] NYSERDA prefers these approaches over the existing fixed-price REC pricing mechanism because PPAs and CFDs would reduce financing costs for the

[38] Report at 134.

[39] The Commission defined CFDs in its July 2, 2014, Order authorizing modifications to the Main Tier contract term:

> A CFD contract provides a variable attribute (REC) payment that is tied to wholesale electric prices. When a renewable generator combines a REC payment with the payment it receives from selling its energy output into the New York Independent System Operator's (NYISO) spot market, the generator receives a combined revenue stream that is stable compared to the revenue stream it would otherwise get from the combination of a fixed-price REC payment with fluctuating wholesale energy prices. When wholesale energy prices fall, the generator gets an increase in his RPS incentive. When wholesale prices rise, the generator's incentive payment decreases.

Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Authorizing Modifications to the Main Tier Solicitation Contract Term (July 2, 2014), at 3 n.3.

development of LSRs by providing greater revenue certainty to LSR developers and would also provide a long-term hedge on energy prices to retail consumers.[40]

IPPNY has long opposed basing incentive programs on pricing mechanisms that insulate generators from competitive market prices, such as CFDs and long-term fixed price energy contracts. Moreover, while NYSERDA suggests the bundled PPA structure would provide a long-term hedge on energy prices for retail consumers, NYSERDA fails to address the fact that consumers will be fully exposed to higher payments when the locational based marginal prices ("LBMPs") fall (*e.g.*, as has been the case this spring and summer in the face of very low natural gas prices). In short, these bundled PPAs shift the energy price risk from developers, who are in the best position to forecast and manage risk, to ratepayers. Indeed, the exposure to such risk will significantly undercut—if not entirely eliminate—any claimed benefits associated with reduced financing costs.

Equally important are the adverse system impacts that will result if such a structure was put into place. IPPNY has opposed bundled PPA contracts because they can make generators participating in these programs indifferent to market prices that may signal the need to reduce output or curtail service to assure the reliability of the electric system. By its very design, the wholesale electricity market structure in New York values energy when and where it is needed most. Divorcing the payment to the generator from the market price results in the generator choosing to keep operating when its output is harming the system. If generators are not responsive to market price signals and continue to operate when their output may threaten system reliability, the New York Independent System Operator ("NYISO") is forced to take out-of-

[40] The State can also reduce financing costs to LSR developers by providing more low interest loans to LSRs through New York's Green Bank. The Clean Energy Fund Information Supplement indicates that one focus of the Green Bank includes LSR technologies and that the Green Bank has received proposals from utility scale projects.

market actions to maintain the reliability of the system. The costs of the NYISO's actions are not reflected in market prices but are recovered in additional uplift payments from consumers. This activity distorts competitive market price signals, harms the efficiency of the market, and is more expensive for consumers.

IPPNY has also raised the question of whether the Commission has jurisdiction to order EDCs to enter into contracts with renewable projects to acquire energy at wholesale. Recent United States Court of Appeals decisions have held that state regulatory commissions are preempted by the Federal Power Act from ordering utilities to sign contracts with wholesale generators that establish a wholesale rate.[41] Early in the development of the RPS program, the Commission considered long-term REC contracts with a CFD pricing mechanism. IPPNY objected to the use of CFDs in comments submitted previously to the Commission because that approach will harm the efficiency and competitiveness of wholesale electricity markets. IPPNY reiterates its prior comments for the Commission's consideration in this proceeding and notes that its concerns apply equally to long-term energy contracts.

By and large, traditional generators within the NYISO bid positive values for incremental energy because they can save fuel costs by reducing their generation levels. At any time that the NYISO markets produce a negative price, the market is indicating that one or more transmission elements on the electric system are overloaded and the NYISO does not have sufficient generation that can be backed down quickly enough to relieve the overload. In those instances,

[41] *See PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J. 2013), *aff'd sub nom. PPL EnergyPlus, LLC v. Solomon*, Nos. 13–4330, 13–4501, 2014 WL 4454999 (3d Cir. Sept. 11, 2014); *PPL EnergyPlus. LLC v. Nazarian*, 974 F. Supp. 2d 790, 840 (D. Md. 2013), *aff'd* 753 F.3d 467 (4th Cir. 2014). The New York Court of Appeals also held that the Commission is preempted by the Federal Power Act from ordering utilities to sign contracts with wholesale generators that are not qualifying facilities under the Public Utility Regulatory Policies Act of 1978. *Consolidated Edison Co. of NY, Inc. v. Pub. Serv. Comm'n. of NY*, 63 N.Y.2d 424 (1984), *appeal dismissed*, 470 U.S. 1075 (1985).

the only way that the NYISO can relieve the overload is to back down the cheapest generation. It is important at these times that the generators' payments reflect the NYISO prices so that it will be in their economic interest to respond to the negative prices. Requiring LSR resources to be subject to the real-time prices ensures that they are serving their own best interests by reducing energy when that is needed by the system.

It is possible to use a more complicated variation of CFDs by attempting to determine the premiums that are implicit in each of the total price bids and to rank the bids based upon minimizing the premium. NYSERDA notes in its Report that "[s]olicitations can be implemented to take into consideration the value of energy based on location and transmission constraints, thus providing strong signals to renewable energy developers to site their projects in suitable locations."[42] However, this approach would require the REC purchaser to estimate future wholesale market revenues that would apply to each bidder in each location across the duration of its contract and thus calculate the future REC costs or benefits for when the price of power in a location is higher than the contract price, thereby giving ratepayers a REC-related credit instead of cost. Not only would the purchaser have to estimate wholesale energy costs in general, but it also would have to estimate the amount that each bidding renewable resource would deliver at different times of the year and at different times of the day and the value of the energy at the times that the resources are delivering the energy. Finally, the purchaser would be required to estimate the amount of installed capacity that each renewable resource would provide and the value of that capacity.

The CFD approach also is problematic because it is unlikely that the purchaser would be able to develop objective criteria for ranking and choosing among bidders. The use of CFDs, by

[42] Report at 70.

their nature, requires myriad assumptions to be made about the underlying value of factors that will drive the wholesale value of energy and about each individual bidder's expected energy delivery.

In 2010, New York State Department of Public Service ("DPS") Staff proposed a CFD straw proposal that addressed some of the concerns that IPPNY raised in opposition to CFDs. In the event that the Commission decides to pursue a CFD approach—which, as detailed herein and in past IPPNY submission at length, it should not—such an approach must, at a minimum, include certain structural requirements to limit adverse impacts to reliability and the markets. Staff's proposal would index CFDs to monthly average real-time energy prices in Zone C. This approach would capture the broad market changes in the price of energy, without making resources immune to when and where they deliver energy. As the average Zone C price rises, the REC price would be reduced. Likewise, if the average Zone C price falls, the REC price would be increased. Since the adjustment to the REC is based upon the monthly average change in the Zone C price, it preserves the incentive to produce energy, when it is most valuable, while protecting consumers from paying for RECs if energy prices rise to levels where that payment no longer is necessary. Because REC payments would not vary with short-term fluctuations in energy prices, renewable resources would be encouraged appropriately to respond to market prices in the same manner as traditional resources competing in the energy market. The proposal also encouraged generators to locate their resources where the underlying value was highest because that would enable them to bid the lowest price relative to Zone C.

This approach would also reduce the risk of forecasting errors that could cause the purchaser to mistakenly select less efficient resources because the purchaser would only be

required to forecast prices in Zone C to select winning bidders.[43] The bidders would be required to account for, and absorb, the differences between their location value and the value of energy in Zone C. It would also require the developers to account for the value of energy when the resource would be expected to generate and the average value of energy in Zone C. The bidders are in the best position to make these estimates and appropriately should bear the risk as to the ultimate accuracy of their estimates.

DPS Staff also proposed that CFD payments would only be made for MWhs produced during hours in which bus prices at the generator's location exceed zero. This approach would ensure that renewable resources are not encouraged to operate when the system has too much generating capacity on-line. Like all other resources participating in the NYISO's energy market, renewable resources should be required to make payments to the NYISO if they do not follow NYISO market signals and produce energy when prices are negative.

Though DPS Staff's CFD proposal provided important components to assuage many of the concerns that IPPNY raised in its comments, additional factors that the Commission should consider in deciding whether or not to adopt CFDs at this time still exist. First, Staff's CFD proposal still shifts the risk of low energy prices from developers to the purchaser and, ultimately, ratepayers, even though it protects ratepayers from energy price spikes such as those during the 2014 polar vortex. CFDs may not appear risky for ratepayers now because energy prices are relatively low and may likely rise thereby reducing the payments the purchaser will be required to make to winning bidders, although IPPNY would note, while the risk may be limited, the total payments ratepayers are forced to bear are higher if energy prices stay low and the fact

[43] IPPNY notes that, if RPS solicitations are targeted to New York City and Long Island renewable resources, it would be more appropriate to use CFDs keyed off of real-time energy prices in New York City and Long Island Zones, rather than Zone C, due to the wide disparity between upstate and downstate capacity prices.

that the ratepayers know about them in advance is likely to be of little solace. By the time CFDs are adopted and utilized in contracts, however, energy prices may have risen significantly. Ratepayers, thus, may face higher risk at that juncture that the prices could drop and the payment levels will be higher than expected. Moreover, the fact that energy prices ultimately may rise also may be taken into consideration by entities bidding under the existing RPS fixed price system, thereby eliminating any potential that the shift to a CFD based payment will provide ratepayers any savings even under today's relatively low energy prices. Conversely, ratepayers could be subject to a higher contract price if energy prices fall significantly. This tradeoff comes with the certainty that a CFD provides, but, admittedly, would provide greater revenue certainty to LSR developers.

IPPNY has sought to identify some of the core issues with a CFD structure but there may be other issues as well. Due to the complexity of this issue, IPPNY requests that, if the Commission is inclined to proceed with a CFD pricing mechanism, it should order DPS Staff to develop a white paper and hold a technical conference to examine how a REC-only procurement approach could be designed to reduce energy risk to LSR developers while ensuring LSRs are responsive to fluctuating wholesale energy market prices. The Staff white paper should be provided far enough in advance of the technical conference to allow interested parties to develop their own presentations in response, and these presentations also should be allowed to be provided at the technical conference. Additionally, the process should allow for initial and reply comments from interested parties after the technical conference.

## IV. THE COMMISSION SHOULD ADOPT A TARGET-DRIVEN PROCUREMENT APPROACH TO PROVIDE GREATER CERTAINTY TO LSR DEVELOPERS AND LEGACY LSRS.

As discussed in the Report, the Commission has not imposed binding incremental procurement targets on NYSERDA to procure RECs from LSRs. IPPNY supports shifting the

procurement model away from the existing non-binding centralized approach to one where binding procurement obligations are placed on EDCs subject to a spending cap based on Commission-established annual budgets. EDCs should be required to procure RECs on an annual basis equivalent to a percentage of their retail distribution load requirements. EDCs should be required to procure RECs through long-term contracts to support development of new LSRs. To ensure compliance with EDC procurement obligations, the Commission should impose an alternative compliance payment ("ACP") mechanism which would require EDCs to pay a specified penalty for failing to meet their percentage REC targets. Any ACPs collected would be added to the following year's budget. This procurement mechanism will provide a clear signal to LSR developers of New York's commitment to provide a steady stream of incentives to encourage investment in project development and operations to meet the Commission's goals in a timely manner and ensure that ratepayer expenditures are bounded by the Commission's budget.

As the Report recognizes, the current RPS structure lacks commitments from LSRs whose benefits are accounted by the State toward meeting its goal but are not being compensated, in some instances, for those benefits. IPPNY agrees that the lack of a long-term requirement adds uncertainty for LSR developers, which is reflected in higher prices in procurement contracts. To have a continuity of investment, both existing and new independent in-State renewable energy resource projects should be eligible for the LSR incentive program. Obtaining new resources will allow the State to continue to make progress toward meeting its renewable goals. Providing incentives to existing resources will help ensure that the existing progress towards the State's goal is maintained and that associated investment is retained in a viable and sustainable manner in the State.

Resources coming off of NYSERDA contracts should be able to renew a REC contract at the prevailing market rate. Otherwise, when contracts with existing resources expire, the overflow of RECs into the voluntary renewable market would saturate that market and put downward pressure on the price of RECs. Additionally, out-of-State sales could increase, further eroding the baseline of renewable energy in this State. To reach the targeted renewable goals without substantially increasing the cost of the program, it is important that we not "lose ground" off the baseline unnecessarily. EDCs could begin running standard REC auctions where existing projects bid to sell RECs to EDCs. These auctions could be designed to ensure EDC purchases are maintained at a level to meet their percentage targets, with non-bypassable charges to ensure recovery of costs. Alternatively, or in addition, a spot market for RECs could be developed in New York to provide a market for legacy LSRs to sell their RECs to EDCs. This market could be new, or it could involve strengthening the current voluntary market, and done in such a way that there are market-based signals for renewable energy in the State.

## V. THE COMMISSION SHOULD MAINTAIN AND EXPAND LSR INCENTIVE ELIGIBILITY FOR PRIVATELY-OWNED RENEWABLE RESOURCES.

Consistent with Section 1-103(12) of the New York State Energy Law, renewable energy resources under the LSR program and the Clean Energy Fund should include "sources which are capable of being continuously restored by natural or other means or are so large as to be useable for centuries without significant depletion and include but are not limited to solar, wind, plant and forest products, wastes, tidal, hydro, geothermal, deuterium, and hydrogen." RPS Main Tier program eligibility[44] also includes in-State facilities that utilize biogas, biomass, liquid biofuel,

[44] Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Approving Implementation Plan, Adopting Clarifications, and Modifying Environmental Disclosure Program (April 14, 2005), Amended App.B, at 1–3.

fuel cells, hydroelectricity (30 MW or less with no new storage impoundment), solar, tidal ocean, wind, as well as maintenance resources. Fuel cells, solar and wind also are eligible under the RPS Customer-Sited Tier. In deciding which in-State technologies should be eligible for incentives under the LSR program and the Clean Energy Fund, the Commission should build upon the list of technologies that are enumerated in that Energy Law definition. There has been no demonstration that any technologies, such as fuel cells, that are currently eligible for RPS incentives should become ineligible for such incentives.

The RPS program eligibility should be expanded under the LSR program to encourage independent in-State hydro facilities that have counted towards the RPS goals to date. One way to aid additional responsible hydroelectric development in New York State is to provide LSR incentives to independent in-State hydro assets, regardless of vintage, that are smaller-scale run-of-river resources, which often have been deemed low-impact by an independent entity. The operating characteristics of today's smaller-scale lower-impact hydro are often much different from when these facilities first were developed. To become certified, for example, hydro owners voluntarily make significant capital and operational investments to reduce the environmental impacts of their facilities. Once the investments are completed, these facilities then must undergo a rigorous review to prove that they have satisfied numerous low-impact criteria, including river flows, water quality, fish passage and protection, watershed protection, threatened and endangered species protection, cultural resource protection, recreation, and facilities recommended for removal. These standards are based on the most recent, and most stringent, mitigation measures recommended for hydro dams by expert state and federal resource agencies, even if those measures are not a requirement for operating.

Respectfully submitted,

READ AND LANIADO, LLP
25 Eagle Street
Albany, New York 12207
(518) 465-9313 (tel)
(518) 465-9315 (fax)

Attorneys for
Independent Power Producers
of New York, Inc.

By: ____/s/_____
David B. Johnson

Dated: August 12, 2015