NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 15-E-0302 - Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard

REPLY 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

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Pursuant to the Secretary's notices soliciting, and extending the deadline to file,[1] initial and reply comments in the above-captioned proceeding, Independent Power Producers of New York, Inc. ("IPPNY") hereby offers its reply comments to certain initial comments that were made in response to the Department of Public Service Staff's ("Staff") White Paper on Clean Energy Standard ("CES") filed on January 25, 2016 ("White Paper"). IPPNY submitted its initial comments on the White Paper on April 22, 2016.[2] IPPNY has limited its reply comments to responding to the comments of a small subset of parties.[3]

First, IPPNY addresses the Indicated Joint Utilities' comments,[4] which advocated that electric distribution companies ("EDCs") should be allowed to re-enter the generation business and own large-scale renewable resources ("LSRs"), and proposed a model allowing for utility-owned generation ("UOG"). Second, IPPNY supports the New York Independent System Operator, Inc. ("NYISO") and other commenters that cautioned against the use of, and identified

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[1] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Notice Extending Comment Period (Mar. 8, 2016); Notice of Comment Period for Staff White Paper and Cost Study (Apr. 8, 2016).

[2] Case 15-E-0302, *supra*, Comments of Independent Power Producers of New York, Inc. (Apr. 22, 2016) ("IPPNY Initial Comments").

[3] IPPNY's comments do not necessarily represent the positions of each of its members.

[4] The Indicated Joint Utilities are Consolidated Edison Company of New York, Inc. ("Con Edison"), Niagara Mohawk Power Corporation d/b/a National Grid ("National Grid"), and Orange and Rockland Utilities, Inc.

major issues with, bundled power purchase agreements ("PPAs") as a mechanism to develop the lowest-cost LSRs. Third, IPPNY urges the Commission to deny the request made by H.Q. Energy Services (U.S.) Inc. ("HQUS") and Transmission Developers Inc. ("TDI") to expand the definition of renewable facilities so that large, imported hydropower owned by the Canadian government will become eligible for New York State LSR incentives given the subsidized nature of this resource and its concomitant adverse impact on the structure of this program. As discussed below, the Commission should reject the arguments supporting UOG, long-term bundled PPAs, and CES program participation by Canadian government-owned hydropower.

I. The Commission Should Reject the Indicated Joint Utilities' Proposed "Universal Renewables" Model of UOG.

In their initial comments,[5] the Indicated Joint Utilities proposed what they call the "Universal Renewables" model, under which new LSRs "would be developed and constructed by renewable developers and then transferred to customers, using utilities as the vehicle for financing and long-term ownership."[6] The Indicated Joint Utilities erroneously argue that, if the Commission were to reverse its long-held policies and allow for UOG, they could achieve "significant customer benefits" in the form of fully realized tax benefits[7] and "unique" benefits such as capacity relief "that can best be relied upon when the utility owns the generation asset."[8]

As IPPNY addressed in its initial comments,[9] a regulatory landscape in which utilities own generation assets is inherently anti-competitive and will invariably skew the playing field

[5] Case 15-E-0302, *supra*, Comments of the Indicated Joint Utilities on the Department of Public Service Staff White Paper on Clean Energy Standard (Apr. 22, 2016) ("Indicated Joint Utilities Comments").

[6] *Id.* at 3.

[7] *See id.* at 9.

[8] *Id.* at 10.

[9] *See* IPPNY Initial Comments at 16–26.

against merchant developers in both direct and indirect ways. Whereas merchant projects allocate the risks associated with development to investors, allowing UOG would shift many of those risks to captive ratepayers. Under the Universal Renewables model, a private developer would only shoulder the risks of constructing a particular asset. That asset would then be transferred to a utility, where ratepayers would also inherit the myriad other risks associated with ownership—including, but not limited to, environmental, regulatory, and operational risks. UOG projects may, therefore, have a lower initial cost estimate, but will ultimately lead to higher rates for ratepayers because, unlike a private investor, the utility owner would likely seek uncapped recovery of all its costs. If the Commission were to adopt the Indicated Joint Utilities' proposal, it would create a perverse incentive for utility owners to underbid their projects and recover any cost overruns through rates after those projects have already been selected. Whereas merchant developers must fully assess all potential risks and live with the bids they have made, utility-owned projects can always fall back on ratepayers. The Commission should not burden New York's consumers with the added risks concomitant to UOG.

Moreover, allowing UOG would be a major reversal of nearly two decades of Commission policy. The Commission has long held that: (i) private investors have a greater incentive to lower costs than utilities under cost-of-service regulation; (ii) private investors and their shareholders should bear the risks of generation ownership; and (iii) transmission and distribution ("T&D") should be separated from generation to eliminate the potential that utilities that own generation could exercise vertical market power ("VMP") to the detriment of wholesale competitive electricity markets and consumers.[10] The Indicated Joint Utilities' Universal

[10] 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) ("VMP Order"); Appendix I ("VMP Statement").

Renewables proposal calls on the Commission to discard these long-standing policies and the sound reasoning that has led the Commission to consistently deny UOG as an anti-competitive practice.

The Indicated Joint Utilities assert, without citing any specific examples, that "many developers" develop projects "primarily with the aim of finding buyers and then transferring the project to those buyers upon completion."[11] The Indicated Joint Utilities provided no evidence that companies with the expertise and experience to develop LSRs will be interested in, and willing to bear the risks of, constructing turn-key projects and then walking away from their investment. The Universal Renewables proposal ignores that most private developers are in the business of owning and operating projects and will be competing to develop projects that they will own and operate in the State. Indeed, in their earlier comments, the Indicated Joint Utilities recognized this as a major concern. They stated that "conducting both processes in parallel may encourage developers to selectively bid projects to the detriment of customers, by offering only the best performing, more profitable sites in the PPA solicitation, while at the same time bidding only those less economic projects to the utility purchase solicitation."[12] The Indicated Joint Utilities also fail to mention that the major developers of wind energy projects in the Country are not in the build-transfer business but rather develop projects to own and operate them on an ongoing basis.[13] The Commission should, therefore, dismiss the Indicated Joint Utilities' unsupported assertions that competition among private developers hoping to sell a turn-key renewable asset to a utility will keep costs in check.

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[11] Indicated Joint Utilities Comments at 8.

[12] Case 15-E-0302, *supra*, Comments and Responses of the Indicated Joint Utilities (Aug. 12, 2015), at 10.

[13] *Ownership & Rankings*, Am. Wind Energy Assoc. (2014), http://www.awea.org/AnnualMarketReport.aspx?ItemNumber=7421.

The Indicated Joint Utilities also argue that there are "numerous unique benefits" of utility-scale solar "that can best be relied upon when the utility owns the generation asset."[14] The Universal Renewables proposal is short on specifics, but discusses "the opportunity to realize tax benefits for customer [sic]," capacity relief, and the potential for associated transmission deferral.[15] Such statements are troubling because they suggest that utilities have access to information relating to how, for example, "[b]enefits and services from solar can be better targeted to where they are needed most, and can be built at the needed scale,"[16] but that the utilities are withholding that information from private companies. A utility's withholding of important information from its competitors would allow the utility to use its unique knowledge of its transmission and distribution system to unfairly benefit the generation side of its business. Such conduct is an exercise of VMP and aptly demonstrates, as IPPNY demonstrated in its initial comments, why the Commission should prohibit UOG. Indeed, in its recent order adopting a policy framework for the integration of distributed energy resources in the State in its Reforming the Energy Vision proceeding, the Commission adopted policies to require transparency of utility distribution system information to avoid information asymmetry in the market.[17] Assuming private developers have access to the utilities' information regarding their systems, there is no reason UOG should have any unique advantages over privately-owned facilities.

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[14] Indicated Joint Utilities Comments at 10.

[15] *Id.* at 9-10.

[16] *Id.* at 10.

[17] Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Order Adopting Regulatory Policy Framework and Implementation Plan (Feb. 26, 2015) at 67; *see also id*. at 41 ("For competition to flourish, the market must be transparent and provide DER providers and end use consumers with the system need and price information as well as sufficient regulatory certainty so that all may invest and participate with confidence.").

The Universal Renewables proposal would allow the Indicated Joint Utilities to effectively dominate the ownership of LSRs, ushering in a new era of vertically integrated monopolies. Such a step would undermine the painstaking work the Commission has undergone over the last two decades shepherding New York's transition to competitive energy markets. Due to the unfair advantages UOG affords utilities, allowing the practice would likely discourage private investment.[18] This would begin a vicious cycle as less merchant involvement produces more monopoly domination, which, in turn, produces even less merchant investment. The Commission has consistently found that energy services are provided most cost-effectively by private developers on a competitive basis, not through rate-of-return regulation.[19] Private investors, not captive ratepayers, should bear the investment, operating and other risks associated with new LSR development and ongoing operations, thereby decreasing the likelihood that uneconomic projects with harmful, price-suppressive impacts damage New York's competitive markets. Furthermore, preventing UOG ensures that utilities cannot exercise VMP to the detriment of competitive markets and consumers. The Commission should, therefore, reaffirm its commitment to competitive markets and reject the Indicated Joint Utilities' Universal Renewables UOG proposal.

II. The Commission Should Reject Staff's Proposal Requiring EDCs to Purchase Energy from LSRs under Bundled PPAs.

IPPNY raised its opposition to mandating long-term, bundled PPAs as a component of the CES program in its initial comments, demonstrating that such agreements "could insulate

[18] *See, e.g.*, *id.* at 67 ("[The Commission is] persuaded that unrestricted utility participation in DER markets presents a risk of undermining markets more than a potential for accelerating market growth.").

[19] *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, *supra*, Comments of Independent Power Producers of New York, Inc. (Sept. 22, 2014), at 6, 12–15; Case 14-M-0101, *supra*, Comments of Independent Power Producers of New York, Inc. (July 18, 2014), at 8–16.

LSRs from conducting their operations consistent with competitive market price signals and harm the wholesale competitive electricity market."[20] IPPNY respectfully suggested that the Commission should, instead, continue to call for renewable energy credits ("RECs") on a fixed price per kWh basis.[21] Other commenters, including the NYISO, the entity charged with reliably operating the system and administering the markets, the Joint Utilities and the New York Power Authority ("NYPA"), offered similar comments.

The NYISO noted, for example, that bundled PPAs "obscure additional consumer funded payments to renewable resources and impede the market's ability to procure the most efficient resources that minimize costs to consumers."[22] Moreover, the NYISO averred that long-term, bundled PPAs "mute the market signals that should be driving generation resource development."[23] Bundled PPAs prevent markets from receiving accurate signals about a particular resource's economic viability. In the absence of such signals, markets cannot respond efficiently. Deprived of efficient markets, consumers ultimately bear the risk and, over the long term, higher costs that will result when a given resource is not be economically viable.[24]

NYPA's comments also recognized the danger that PPAs pose to properly functioning markets. NYPA, the owner and the operator of the two large, baseloaded, hydropower projects that produce a substantial portion of New York's zero-emission energy each year, cautioned that, "[i]f the CES allows eligible resources to generate RECs when market prices for its energy are

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[20] IPPNY Initial Comments at 5.

[21] *Id.*

[22] Case 15-E-0302, *supra*, Comments of the New York Independent System Operator, Inc. (Apr. 22, 2016), at 8 ("NYISO Comments").

[23] *Id.*

[24] *Id.*

negative, those resources may replace existing resources that receive lower or no REC value."[25] NYPA further noted that the risk of distortion in the energy market and grid operations is "especially acute if the CES pursues bundled [PPA] structures, as PPAs give generators no incentive to seek high-demand times and locations."[26] NYPA, in fact, tied its concerns to the real world impact bundled PPAs would have on existing zero-emission resources, noting that negative pricing could lead to hydropower projects "spilling" water to avoid losing money during negative pricing periods.[27]

As discussed at length in its initial comments[28] and in the UOG section above,[29] IPPNY believes that the risks associated with developing energy resources must properly rest with private investors who are able to compete in a fair and efficient market and are thereby incented to provide the lowest-cost alternative. And, as the NYISO accurately pointed out, artificial "incentive constructs"—like long-term, bundled PPAs—do not eliminate the risks associated with LSR development, but rather shift that risk from developers to consumers.[30] Bundled PPAs leave consumers on the hook for higher costs even if prices in the energy market decrease or if the resource's market performance is not competitive with other lower-cost alternatives.[31]

Moreover, in addition to being economically inadvisable, requiring EDCs to enter into PPAs may be constitutionally impermissible under the Supremacy Clause. On April 19, 2016, the United States Supreme Court affirmed the Fourth Circuit Court of Appeals' decision holding

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[25] Case 15-E-0302, *supra*, Comments of the New York Power Authority (Apr. 22, 2016), at 15 ("NYPA Comments").

[26] *Id.*

[27] *Id.* at 15 n.32.

[28] *See* IPPNY Initial Comments at 5, 13–16.

[29] *See supra* Section I.

[30] *See* NYISO Comments at 10.

[31] *Id.*

that states are preempted by the Supremacy Clause from ordering utilities to sign contracts with wholesale generators that establish a wholesale rate because jurisdiction over wholesale sales rests exclusively with FERC.[32] The *Hughes* decision is new case law and its ultimate effects on the regulatory landscape are yet to be fully defined. But, no matter what its effect, any program that the Commission implements for New York State must ultimately be consistent with *Hughes*. As the Joint Utilities cautioned, potential jurisdictional challenges to State-mandated bundled PPAs, at a minimum, will introduce business and program risk to the market, thereby hampering the goal of encouraging private long-term investment and undermining the CES program itself.[33] In the face of the uncertainty regarding PPAs that the *Hughes* decision creates, including potential litigation, the Commission should err on the side of a solution that does not impose mandates with respect to wholesale energy purchases rather than risk its program running afoul of *Hughes* and FERC's exclusive jurisdiction under the Federal Power Act. IPPNY agrees with the NYISO's comments that bilateral transactions for unbundled RECs "are the appropriate incentive for renewable resources in areas with competitive energy markets such as New York."[34]

The Commission should therefore reject Staff's recommendation to require EDCs to purchase wholesale services from LSRs through bundled PPAs.

III. Canadian Government-Owned Large-Scale Hydropower Should Remain Ineligible for New York State LSR Incentives.

Both HQUS, the United States subsidiary of the Canadian state-owned Hydro-Québec ("HQ"), and TDI, the developer of the proposed Champlain Hudson Power Express ("CHPE")

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[32] *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016).

[33] *See* Joint Utilities Initial Comments at 15–16.

[34] NYISO Comments at 9.

transmission project running from Canada to New York City,[35] argued in their comments for the explicit eligibility of large-scale hydro for New York's CES. Such eligibility would require the expansion of the existing definition of eligible renewable facilities which Staff proposed to be used for the CES program to include "all environmentally sound resources; not limited to low-impact run-of-river facilities and upgrades to existing resources with no new storage impoundments."[36] NYPA and the NYISO also favored the expansion of eligibility for Canadian hydro resources, arguing that "[b]oth new and existing hydroelectric facilities should be eligible under the CES without regard to size or type of facility."[37] NYPA also expressed its support for expanding eligibility to include new impoundment facilities.[38]

The Commission should reject this expansion of New York's CES eligibility and maintain the scope of existing definition for "hydroelectric" adopted for the RPS in 2004.[39] Allowing the expansion for which HQUS and TDI argue would subvert Staff's efforts to achieve the policy goals that underlie the 50 by 30 mandate. For example, such an expansion would fail

[35] The CHPE is a 1,000 megawatt high-voltage merchant transmission line being proposed to interconnect Quebec, Canada with New York City.

[36] Case 15-E-0302, *supra*, Comments of H.Q. Energy Services (U.S.) Inc. (Apr. 22, 2016), at 2 ("HQUS Comments"). As proposed in CES Appendix C, eligible hydro resources would be limited to facility upgrades with no new storage impoundment (eligibility limited to the incremental production associated with the upgrade), and Low-Impact Run-of-River with no new storage impoundment.

[37] NYPA Comments at 13; NYISO Comments at 13. Neither party spoke to the subsidization issue. The NYISO also strongly advocated "fashion[ing] the most economic solution to a clean energy future that fully utilizes wholesale competitive electricity markets while maintaining system reliability on behalf of all New York customers" (*see* NYISO Comments at 14), and, thus, its support for the Commission to further evaluate Canadian hydropower must be taken in the full context of its comments.

[38] *See* NYPA Comments at 13–14.

[39] Appendix B contained within the Commission's September 24, 2005 order addresses eligibility under the RPS program. Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Order Regarding Renewable Portfolio Standard (Sept. 24, 2004), Appendix B. As discussed in IPPNY's August 12, 2015 comments in this case, 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. Case 15-E-0302, *supra*, Comments of Independent Power Producers of New York, Inc. (Aug. 12, 2015), at 25.

to account for the significant environmental impact of new impoundment, the considerable carbon footprint of large-scale projects, or the substantial environmental impacts associated with the construction of transmission lines running down from Canada through New York's major water bodies (*e.g.*, Lake Champlain and the Hudson River). As noted in the Draft Supplemental Environmental Impact Statement, "conventional store-and-release hydropower projects have prominent environmental impacts on river systems and the plants and animals that are connected to and rely on river systems," and "[h]ydropower today is more focused on opportunities to develop new sources of energy that do not require the construction of new dams or projects that result in significant alteration of rivers and streams."[40] Staff has crafted the definitions and categories of eligible resources with both deliberation and care. The Commission should not discard the results of those deliberations, particularly to accommodate subsidized Canadian government-owned hydropower and the costly new transmission facilities necessary to deliver that power to statewide load centers.

IPPNY has consistently opposed the Commission adopting policies that would force New York State ratepayers to subsidize the Canadian government's construction of hydroelectric plants or that would result in "socialized" facilities impacting New York's markets.[41] IPPNY maintains that, overall, markets only work effectively when participants in those markets operate on an equal footing. The introduction of a socialized, government-owned resource into an administrative, tier-based program significantly skews the playing field, disadvantages private, competitive merchant projects, and adversely affects the underlying competitive markets.[42] TDI,

[40] Case 15-E-0302, *supra*, Draft Supplemental Environmental Impact Statement (Feb. 23, 2016), at 5-42.

[41] *See, e.g.,* Case 10-T-0139, *Champlain Power Express, Inc*., Initial Brief of IPPNY (Apr. 22, 2012), at 52–54.

[42] Indeed, in the Cost Impact Analysis, Staff attempts to gloss over the massive construction costs of the TDI project, and hence obscure the true costs of this option, by performing a cost analysis for a "high imports" scenario

as the developer of CHPE, has committed to developing that project on a merchant basis rather than at ratepayer expense, and the project's Article VII Certificate is expressly conditioned on that commitment.[43] If, in fact, CHPE needs New York State incentives through the CES program or otherwise, which necessarily will be funded by New York ratepayers, it should not have made such a commitment. If, conversely, Canadian hydro is as economic a proposition as its developers have maintained, the question of its eligibility for incentives under the CES should be moot—its owners should have no issue making competitive bids into a free and fair competitive wholesale market.

IPPNY would note that the most efficient and cost effective solution is to implement a market-based program in which all non-emitting resources are permitted to participate on an equal footing. However, if an administrative construct is implemented, incentive payments under the CES program must not be paid to Canadian government-owned hydropower.

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case with the TDI-identified $2.2 billion project cost simply "assumed 100% socialized." Case 15-E-0302, *supra*, Clean Energy Standard White Paper Cost Study (Apr. 8, 2016), at 212.

[43] Case 10-T-0139, *Champlain Power Express, Inc*., Order Granting Certificate of Environmental Compatibility and Public Need (Apr. 18, 2013), Joint Proposal ¶ 122.

IV. Conclusion

For the foregoing reasons, IPPNY respectfully requests that the Commission continue its opposition to UOG, reject Staff's recommendation to require EDCs to enter into long-term, bundled PPAs, and maintain the scope of the current definition of eligible hydro resources.

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: *David B. Johnson*______________________
David B. Johnson

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