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**Via Electronic Delivery**

September 10, 2018

Hon. Kathleen H. Burgess  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223-1350

Re: Case 18-E-0130 – In the Matter of Energy Storage Deployment Program

Dear Secretary Burgess:

Please find attached for filing in the above-referenced case the Comments of Independent Power Producers of New York, Inc.

Respectfully submitted,

/s/ Matthew Schwall

Matthew Schwall  
Director, Market Policy &  
Regulatory Affairs  
Independent Power Producers of  
New York, Inc.

Cc: Active Parties

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**BOARD OF DIRECTORS**

Astoria Energy, LLC | Brookfield Renewable Energy Group | Brooklyn Navy Yard Cogeneration Partners | Caithness Long Island, LLC | Calpine Corporation  
Castleton Commodities International | CPV Valley Energy Center | Dominion | Dynegy, Inc. | Eastern Generation | Empire Generating Co. | Entergy Corporation  
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NEW YORK STATE  
PUBLIC SERVICE COMMISSION

Case 18-E-0130 - In the Matter of Energy Storage Deployment Program.

COMMENTS OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.

**I. INTRODUCTION**

On July 17, 2018, the New York State Public Service Commission (“Commission”) issued a notice (“Notice”)<sup>1</sup> inviting comments on the New York State Energy Storage Roadmap and Department of Public Service (“DPS”) and New York State Energy Research and Development Authority (“NYSERDA”) (collectively, the “State Entities”) Staff Recommendations (“Roadmap”)<sup>2</sup> filed in the above captioned proceeding on June 21, 2018 and announcing three technical conferences to solicit stakeholder input. The Roadmap makes numerous recommendations that are intended to achieve Governor Andrew M. Cuomo’s target of deploying 1,500 megawatts (“MW”) of energy storage in New York State by 2025. Some recommendations are directed at reducing “barriers stand[ing] in the way of widespread use of energy storage for services to the bulk electric system” operated by the New York Independent System Operator (“NYISO”) and are proposed for adoption through NYISO processes.<sup>3</sup>

Pursuant to the Notice, Independent Power Producers of New York, Inc. (“IPPNY”) hereby submits its comments on the Roadmap.<sup>4</sup> IPPNY’s fundamental interest is in the continued development and enhancement of reliable and efficient integrated regional wholesale competitive

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<sup>1</sup> Case 18-E-0130, *In the Matter of Energy Storage Deployment Program*, Notice Soliciting Comments (July 17, 2018).

<sup>2</sup> Case 18-E-0130, *In the Matter of Energy Storage Deployment Program*, New York State Energy Storage Roadmap and DPS/NYSERDA Staff Recommendations (June 21, 2018) (“Roadmap”).

<sup>3</sup> Roadmap at 65.

<sup>4</sup> IPPNY’s comments do not necessarily reflect the views of individual members of IPPNY.

electricity markets. With respect to the energy storage proceeding, IPPNY’s interest lies mainly in ensuring that the Commission’s energy storage 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, in which IPPNY’s members participate.

It is encouraging that the Roadmap recommends that owners of peaking units in New York City and Long Island work together with the NYISO, DPS, NYSERDA, and the New York Department of Environmental Conservation (“DEC”) to more fully appreciate how the new nitrogen oxides emissions regulations currently being developed by DEC may impact those units and local system reliability.<sup>5</sup> IPPNY continues to urge coordination between these parties on proposals related to energy storage resources (“ESRs”) and peaking units, particularly with respect to the Roadmap’s recommendation that a stakeholder process be conducted to determine which units are potential candidates for hybridization, repowering and/or replacement.<sup>6</sup>

As discussed below, the Commission should reject the Roadmap’s proposal that ESRs be exempt from the NYISO’s buyer-side market power mitigation rules (“BSM Rules”) in Mitigated Capacity Zones.<sup>7</sup> The Roadmap states that “exposing new storage resources, which have no evidence of an ability to manipulate capacity prices, to [BSM] exposes these resources to the potential of not receiving capacity revenues depending upon how the mitigation tests are applied.”<sup>8</sup> There is no reasonable basis to exempt ESRs from BSM Rules, particularly given that the state has a clearly articulated target of 1,500 MW of ESRs by 2025 and the Roadmap’s

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<sup>5</sup> Roadmap at 62-65.

<sup>6</sup> *Id.* at 64.

<sup>7</sup> The Mitigated Capacity Zones include NYISO Zone J (NYC) and the G-J Locality (the Lower Hudson Valley).

<sup>8</sup> Roadmap at 66.

recommendation that a \$350 million statewide bridge incentive be developed to “accelerate adoption of customer-sited storage and storage sited on the distribution or *bulk systems*.”<sup>9</sup> Installed Capacity (“ICAP”) prices would be severely depressed and otherwise economic, unsubsidized resources would be harmed if ESRs receiving out-of-market payments were exempt from the NYISO’s BSM Rules.

IPPNY was pleased to see the Roadmap acknowledge that competitive ownership of ESRs in Distributed Energy Resource (“DER”) markets is core to Reforming the Energy Vision (“REV”) principles and recommend that the existing limitations on utility ownership be maintained.<sup>10</sup> However, the Roadmap recommends that, if ESRs continue to be subject to BSM Rules, the Commission reconsider whether utility ownership of storage could be a necessary option. As IPPNY has long demonstrated, utility-owned generation (“UOG”) would be a major step backward from years of Commission policy supporting robust competitive electricity markets in New York by generally prohibiting utilities from owning generation.<sup>11</sup> UOG 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 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

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<sup>9</sup> *Id.* at 49 (*emphasis added*).

<sup>10</sup> *Id.* at 7.

<sup>11</sup> 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.

vertical market power (“VMP”) to the detriment of wholesale competitive electricity markets and consumers.<sup>12</sup>

In his 2018 Briefing Books on the State of the State Address and in his Executive Budget, Governor Andrew M. Cuomo directed “state energy agencies and authorities to work together during 2018 to generate a pipeline of storage projects through utility procurements, to advance regulatory changes in utility rates and wholesale energy markets, to incorporate storage into criteria for large scale renewable procurements, and, [sic] to reduce regulatory barriers.”<sup>13</sup> The Roadmap recommends, and IPPNY supports, that NYSERDA’s Renewable Energy Credit (“REC”) procurements continue to encourage energy storage pairing with large-scale renewables.<sup>14</sup>

To the extent the Commission directs investor-owned utilities to procure ESRs, the Commission should direct such procurements to be awarded through a competitive process, such as is the case with utility procurements of Non-Wires Alternatives (“NWA”). Any competitive process should be transparent and make readily available to bidders and the market information regarding which projects are ultimately selected; that way, market participants can decide whether it is worthwhile to participate in the procurement process.<sup>15</sup> A competitive process for the procurement of ESRs and their related products and services allows competition among

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<sup>12</sup> 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 Statement”).

<sup>13</sup> “Building on a Record of Accomplishments,” 2018 State of the State, Governor Andrew M. Cuomo, at 215- 216. <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2018-stateofthestatebook.pdf>

<sup>14</sup> Roadmap at page 62. The Roadmap also recommends that the New York Power Authority “work with customers to prioritize competitive procurements that it can issue on behalf of its customers to cost effectively procure energy storage or paired renewable/storage/efficiency projects that meet its customers’ energy and resiliency needs while also meeting the State’s renewable energy and carbon reduction goals” (at page 58).

<sup>15</sup> IPPNY member experience with NWA procurement processes has been that adequate information regarding winning bidders has not always been made readily available by the procuring utilities.

independent providers of such services to produce the most efficient and least cost outcome for energy consumers.

## **II. THE COMMISSION SHOULD REJECT THE ROADMAP RECOMMENDATION THAT ESRs BE EXEMPT FROM NYISO BSM RULES.**

The ability of markets to send accurate price signals to market participants is critical to the proper functioning of those markets, fostering competition, and ensuring reliability at the most efficient cost. BSM Rules, which have been in place for the past decade, are the NYISO's primary tool to ensure that uneconomic ICAP supply that enters the market in the Mitigated Capacity Zones does not artificially suppress ICAP prices to the detriment of the competitive market and the investors that rely on such market. In ensuring the integrity of market prices and preventing artificial price suppression, the Federal Energy Regulatory Commission ("FERC") consistently has recognized the detrimental effects of price suppression, stating that "mitigating an offer that is below the resource's actual net costs is reasonable, whether that resource lowers the ultimate auction clearing price by 25% or by 1%," because even "a small change in the clearing price from a below-cost offer may harm competition."<sup>16</sup>

By exempting ESRs from BSM Rules, the NYISO would be allowing uneconomic entry that produces artificially low capacity prices below the Net Cost of New Entry ("CONE"). This, in turn, would prevent the market from sending accurate price signals to new, economic entrants, thereby driving up prices for consumers, inhibiting the very investment the Commission seeks to attract, and threatening reliability in the long term.<sup>17</sup> The NYISO, therefore, has correctly determined that ESRs will be subject to BSM Rules to determine whether such resources should

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<sup>16</sup> *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at 63 (2011).

<sup>17</sup> *Id.* at 102-103.

be subject to an Offer Floor (i.e., the price at or above which ESRs can offer in the ICAP market) - a determination which has been verbally supported by the NYISO's independent Market Monitoring Unit at NYISO stakeholder meetings.<sup>18</sup>

In comments submitted to the NYISO by the State Entities on June 18, 2018, the State Entities argued that the NYISO's proposed application of BSM Rules to ESRs does not satisfy and is in contravention to FERC Order 841.<sup>19</sup> They stated that FERC Order 841 directed the Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") "to remove barriers to the participation of [ESRs] in the capacity, energy, and ancillary service markets operated by [RTOs] and [ISOs]" and that subjecting ESRs to BSM Rules would create an unjust and unreasonable barrier to entry.<sup>20</sup> The State Entities, who are the authors of the Roadmap, maintain that ESRs lack the incentive and ability to exercise market power.<sup>21</sup>

It is true that FERC Order 841 directed the NYISO to develop participation rules that reduce barriers to full ESR participation in the wholesale markets. However, nowhere did FERC say that ESRs should be exempt from BSM Rules or that ESR participation should come at the expense of just and reasonable price formation. Quite the contrary, recent FERC orders indicates that FERC does not favor resource specific exemptions to BSM Rules on the basis that said resources lack the incentive and ability to exercise market power. In an order rejecting two proposals from PJM Interconnection, L.L.C. ("PJM") to modify its capacity market to address increasing

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<sup>18</sup> See NYISO Presentation: Capacity Market Rules for Energy Storage Resources (May 23, 2018), [https://www.nyiso.com/public/webdocs/markets\\_operations/committees/bic\\_icapwg/meeting\\_materials/2018-05-23/Initial%20ESR%20Capacity%20Model.pdf](https://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2018-05-23/Initial%20ESR%20Capacity%20Model.pdf).

<sup>19</sup> State Entities, *Department of Public Service Staff Comments on Proposed Rules to Apply Buyer-Side Mitigation for Energy Storage and DER Market Participation*, (June 18, 2018), [https://www.nyiso.com/public/webdocs/markets\\_operations/committees/bic\\_icapwg/meeting\\_materials/2018-06-01/DPS%20NYSERDA%20Comments%20Proposed%20Mitigation%20of%20ESR%20DER.pdf](https://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2018-06-01/DPS%20NYSERDA%20Comments%20Proposed%20Mitigation%20of%20ESR%20DER.pdf).

<sup>20</sup> *Electric Storage Participation*, 162 FERC ¶61,127 (2018), at 1.

<sup>21</sup> State Entities at 4-5 and Roadmap at 66.

amounts of out-of-market support for resources intended to meet state public policies, such as ESRs, FERC reiterated its previous finding<sup>22</sup> that resources receiving out-of-market support are capable of suppressing market prices, regardless of intent:

Price suppression stemming from state choices to support certain resources or resource types is indistinguishable from that triggered through the exercise of buyer-side market power. Under these circumstances, we no longer can assume that there is any substantive difference among the types of resources participating in PJM's capacity market with the benefit of out-of-market support.<sup>23</sup>

Moreover, FERC went on to qualify its previous findings regarding proposed exemptions to BSM Rules, stating that, with respect to the NYISO's proposal to exempt renewable resources from BSM Rules, its acceptance was premised on those resources having low capacity factors and high development costs and the NYISO limiting the possibility of price suppression by capping the total amount of renewable resources that can qualify for the exemption.<sup>24</sup> ESRs, by their very nature, are not energy limited resources, as they are capable of withdrawing or injecting into the grid at any time, independent of the traditional factors that have defined energy limited resources and that have been the basis of past FERC decisions.<sup>25</sup> As such, ESRs should not be exempt from the NYISO's BSM Rules.

Rather than seek to use out-of-market mechanisms to support the Governor's ESR goal, the Commission should direct DPS Staff to work through the NYISO stakeholder process, in which it has voting power, to develop capacity market participation rules that value the unique

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<sup>22</sup> *ISO-New England*, 135 FERC ¶ 61,029 at 170-71 (2011).

<sup>23</sup> *PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) ("PJM MOPR Order").

<sup>24</sup> PJM MOPR Order at 48.

<sup>25</sup> Notably, FERC has yet to issue an order on the NYISO's proposed tariff changes to exempt up to 1,000 MW of renewables from BSM per Class Year. IPPNY and the Electric Power Supply Association ("EPSA") protested the NYISO's proposed tariff changes. *Joint Protest of IPPNY and EPSA*, (Docket No. ER16-1404), (May 31, 2016).



reliability attributes of ESRs so that the NYISO may develop attractive market products that all ESR developers may compete to provide. The Commission may also consider supporting in the next Demand Curve Reset process a Net CONE that is determined using an ESR as the proxy peaking unit technology.

### **III. THE COMMISSION MUST UPHOLD ITS LONG-STANDING POLICY PROHIBITING UOG, INCLUDING UTILITY OWNERSHIP OF ESRs.**

While acknowledging the Commission’s findings in its REV Track One Order that unrestricted utility participation in the DER markets would present a greater risk of undermining markets than a potential for accelerating market growth and clearly stating that UOG is not the “first best choice” for ESR development, the Roadmap leaves the door open for utilities to reenter the generation business if ESRs are not exempted from BSM Rules.<sup>26</sup> As the Commission has found and IPPNY has consistently demonstrated in various proceedings,<sup>27</sup> most recently in the Commission’s Offshore Wind proceeding,<sup>28</sup> energy services should be provided cost-effectively by private developers on a competitive basis rather than by utilities through rate-of-return regulation. This approach ensures that private investors, not captive ratepayers, bear investment risks and that uneconomic projects—whose suppressive impacts adversely harm the private developers that must rely on competitive markets for their survival—are not developed. It also ensures that utilities are not able to exercise VMP to the detriment of competitive markets and consumers. The Commission should reaffirm its commitment to these principles by

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<sup>26</sup> Roadmap at 8.

<sup>27</sup> See, e.g., 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.

<sup>28</sup> Case 18-E-0071, *In the Matter of Offshore Wind Energy*, Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement (July 17, 2018).

continuing its long-standing prohibition on UOG, including prohibiting utilities from owning ESRs. Going forward, in order to provide least cost outcomes for energy consumers and to accelerate market growth, energy storage projects should be developed and owned only by independent providers of energy storage services selected through a competitive process that ensures lowest cost to electricity consumers.

#### **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.<sup>29</sup> In Opinion 96-12, the Commission determined that competitors would have a greater incentive to lower costs than utilities under a cost-of-service regulatory regime, which would inure to the benefit of New York's consumers.<sup>30</sup> 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.<sup>31</sup>

If, in addition to the other out-of-market activities that are threatening the NYISO wholesale competitive markets, utilities are allowed to develop or acquire an interest in cost-of-service, rate-regulated ESRs, 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 and ratepayer harm is very real. For example, Con Edison's East River Repowering

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<sup>29</sup> 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").

<sup>30</sup> *Id.* at 30.

<sup>31</sup> *Id.* at 30-31.

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.<sup>32</sup> 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.<sup>33</sup> The estimates subsequently ballooned to \$125 million, a 60% increase. In the case of a merchant renewable facility or other resource, private investors bear the risk of loss, not consumers. Because they do not have the luxury of an assured regulated revenue stream 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 utilities from owning cost-of-service, rate-regulated generation assets.

### **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.<sup>34</sup> The Commission's basis for the decision to move towards competitive markets was sound, but the follow-through has not been consistent with the concepts behind restructuring. Properly designed competitive electric markets (where out-of-market activities are not prevalent) lead to more efficient operations,

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<sup>32</sup> Case 05-S-1376, *Consolidated Edison Company of New York, Inc.*, Order Determining Revenue Requirement and Rate Design (Sept. 22, 2006), at 6.

<sup>33</sup> See Case 03-T-1385, *Rochester Gas and Electric Corporation*, Order Granting Certificate of Environmental Compatibility and Public Need (Dec. 16, 2004), at 4.

<sup>34</sup> Opinion 96-12 at 26.

lower utility bills for customers, a better climate for companies seeking to do business in the State, and a healthier State economy overall.

Accordingly, at a minimum, ESR developers should be required to compete to provide products that benefit consumers at a lower cost than can be provided by utilities. If utilities are allowed to own ESRs and recover costs via cost-of-service rates, it will harm the competitive electric markets in the State, as discussed below, and will also further chill the already fragile merchant investment community from making future investments in the State, which would do immense harm to the market. As private investment is discouraged, utilities, which are typically unresponsive to price efficiencies and reluctant to innovate, will dominate the ownership of ESRs. 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.

If the Commission decides that ESRs should be awarded contracts through competitive procurements, it should not allow utilities to participate if they will ultimately own the ESRs. 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 contractual payments and market revenues for cost recovery. A project that is willing to cap the total cost exposure to consumers through a combination of contractual payments and properly designed competitive 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.

In addition, it will be impossible to ensure that utilities will accurately disclose all of the benefits an ESR project will provide to their T&D systems. For example, a utility could underbid

a non-utility 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 utility’s costs and allow it to offer a lower bid. Non-utilities will be at an obvious disadvantage in bidding against utilities if non-utilities, which have far less knowledge of the T&D system than the utilities that own and operate the systems, are unable to reflect these cost savings in their bids. Therefore, to ensure that utilities have no incentive to hide their T&D system cost savings that will result from an ESR project and to promote a level playing field generally, utilities should be ineligible from participating in solicitations for these projects.

The Commission has already considered and rejected proposals to allow utilities to own renewable generation. During the 2009 RPS review, the Commission rejected the establishment of a new “Utility-Sited Tier” to promote small, utility-owned solar photovoltaic facilities that integrate renewable energy generation into the distribution system at strategic locations.<sup>35</sup> The Commission reaffirmed its policy prohibiting utilities from owning small-scale renewables, except in very limited circumstances, in its 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.”<sup>36</sup> 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

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<sup>35</sup> 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.

<sup>36</sup> Case 14-M-0101, *supra*, *Order Adopting Regulatory Policy Framework and Implementation Plan* (Feb. 26, 2015), at 67.

cost-effective manner.”<sup>37</sup> As noted above, the Commission most recently rejected UOG in its Offshore Wind Order, consistent with its long-standing policies.<sup>38</sup>

There has been no showing that there is a shortage of private developers that will compete to develop ESR projects. The experience to date has been that private investment has responded to the call for the development of renewable resources,<sup>39</sup> and, in fact, there are at least a half dozen ESR projects in the NYISO’s interconnection queue.<sup>40</sup> This experience should continue to guide the structure and rules for ESR ownership.

### **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 a T&D company affiliate would unacceptably exacerbate the potential for vertical market power.”<sup>41</sup> Consistent with long-standing Commission policy, utilities should continue to be proscribed from owning generation in New York State, including ESRs. IPPNY has been a strong supporter of the VMP Policy Statement, which requires the separation of generation from utilities to eliminate the potential that utilities could exercise VMP to the detriment of wholesale competitive electricity markets and consumers.<sup>42</sup> The Commission’s VMP Policy Statement assures energy market participants, who are considering doing business or making further

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<sup>37</sup> *Id.* at 68.

<sup>38</sup> Offshore Wind Order at 38.

<sup>39</sup> In a press releases issued by Governor Andrew Cuomo’s press office on March 9, 2018, it was noted that NYSEERDA evaluated 88 applications from 30 developers for Clean Energy Standard Tier 1 REC contracts, providing NYSEERDA the opportunity “to select the best and most cost-effective proposal.” <https://www.governor.ny.gov/news/governor-cuomo-announces-formal-request-new-york-exclusion-federal-offshore-drilling-program>

<sup>40</sup> NYISO Interconnection Queue, (August 29, 2018)

[https://www.nyiso.com/public/markets\\_operations/services/planning/planning\\_resources/index.jsp](https://www.nyiso.com/public/markets_operations/services/planning/planning_resources/index.jsp)

<sup>41</sup> VMP Policy Statement at 1–2.

<sup>42</sup> *Id.*

investments in the State, that the Commission is committed to a competitive electric market. The VMP Policy Statement discussed the problem with potential VMP:

Vertical 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 utility 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.<sup>43</sup>

The Commission identified the potential for VMP in two instances.<sup>44</sup> First, VMP could be exercised when a utility owns generation in its own service territory. The Commission was concerned that the utility 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, VMP could be exercised when a utility 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 functions, 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).<sup>45</sup> Finding that separating ownership of generation from T&D was preferable to relying on regulatory

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<sup>43</sup> *Id.* at 1.

<sup>44</sup> *Id.*

<sup>45</sup> Opinion 96-12 at 64–65.

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.<sup>46</sup> The first paragraph of the VMP Statement summarized 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.<sup>47</sup>

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.<sup>48</sup>

The Commission, therefore, strongly encouraged the utilities to divest their generation.<sup>49</sup> And it ultimately adopted divestiture as the path forward, 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 that 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

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<sup>46</sup> VMP Policy Statement at 1.

<sup>47</sup> *Id.*

<sup>48</sup> Opinion 96-12 at 65.

<sup>49</sup> *Id.*



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.<sup>50</sup>

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 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 utilities 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 proposed merger, 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.<sup>51</sup>

The Commission explained why it adopted this condition:

For 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

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<sup>50</sup> VMP Policy Statement at 1–2.

<sup>51</sup> Case 06-M-0878, *National Grid PLC & KeySpan Corp.*, 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).

competitive generation market in lieu of regulated prices (or rates) based on the costs of generation.<sup>52</sup>

Finding other alternatives insufficient to adequately address VMP concerns, the Commission held that “[w]e 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.”<sup>53</sup>

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: (i) the divestment of any and all fossil-fueled generating assets in New York State owned by Iberdrola and its affiliates; and (ii) on the prohibition of the future construction or acquisition of any fossil-fueled generation in New York.<sup>54</sup> 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 utilities and the imposition of VMP mitigation measures.<sup>55</sup>

Utility ownership of ESRs would present the same VMP concerns the Commission had related to utility use of the T&D systems. A utility could favor its own ESRs by using the T&D system to thwart its competition by either lowering competitors’ revenues or raising their costs. Likewise, VMP could be exercised when a T&D utility uses its control of the transmission

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<sup>52</sup> *Id.* at 128.

<sup>53</sup> *Id.* at 134.

<sup>54</sup> Case 07-M-0906, *Iberdrola, S.A. et al.*, Order Authorizing Acquisition Subject to Conditions (Jan. 6, 2009).

<sup>55</sup> *See id.* at 95–100, 137.

system to increase constraints and raise the value of its ESR assets. The Commission should prohibit utilities from owning any generation facilities in New York State, including ESRs, to guard against the exercise of VMP.

#### **IV. CONCLUSION.**

For the foregoing reasons, the Commission should:

- i. reject the Roadmap's proposal that ESRs should be exempt from NYISO BSM Rules;
- ii. work through the NYISO's stakeholder process to develop market participation rules for ESRs;
- iii. reject the recommendation that UOG of ESRs be allowed in the absence of an ESR exemption to BSM Rules;
- iv. require that any procurement of ESRs be conducted via a competitive process; and
- v. require DPS to work together with owners of peaking units in New York City and Long Island, the NYISO, NYSERDA, and the DEC to more fully appreciate the impacts to those units and local system reliability of the new nitrogen oxide emissions regulations currently being developed by DEC and to urge coordination on proposals related to ESRs and peaking units, particularly with respect to the Roadmap's recommendation that a stakeholder process be conducted to determine which units are potential candidates for hybridization, repowering and/or replacement.

Respectfully submitted,

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