

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on August 2, 2017

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman, dissenting
James S. Alesi

CASE 14-M-0101 - Proceeding on Motion of the Commission in
Regard to Reforming the Energy Vision.

ORDER DENYING REHEARING AND
GRANTING CLARIFICATION

(Issued and Effective August 2, 2017)

BY THE COMMISSION:

INTRODUCTION

In response to the Order Adopting Regulatory Policy Framework and Implementation Plan (Track One Order) issued in this proceeding on February 26, 2015, the Alliance for a Green Economy, Binghamton Regional Sustainability Coalition, The Center for Social Inclusion, Citizens' Environmental Coalition, Citizens for Local Power, and People United for Sustainable Housing (PUSH) Buffalo (Petitioners), jointly filed, on March 30, 2015, a timely petition requesting rehearing and/or clarification of the Track One Order (Petition). Petitioners seek modification or clarification of the Track One Order with respect to two issues, utility ownership of distributed energy resources (DER) for low- and moderate-income (LMI) customers and opportunities for participation by members of the public and public-interest stakeholders in subsequent phases of the Reforming the Energy Vision (REV) proceeding.

In accordance with the State Administrative Procedure Act, notice of the Petition was published in the State Register on April 29, 2015.¹ The period for submitting comments in response to the notice expired on June 15, 2015. Many individuals submitted public comments via the Commission website in support of the Petition, specifically urging reconsideration of the Track One Order's provision that would allow investor-owned utilities to own distributed energy resources in low- and moderate-income communities in favor of seeking creative ways to promote local ownership and control over distributed energy resources. Two public commenters opposed the Petition, arguing that the urgency of wide-scale conversion to renewable resources demands that both established utilities and local entities be permitted to develop DER in these communities. Three parties to this proceeding -- Independent Power Producers of New York (IPPNY), the City of New York (City) and the Joint Utilities -- filed comments with respect to the issue of utility ownership of DER. IPPNY filed in support of the Petition, while the City and the Joint Utilities urge reaffirmation of the Track One Order.

Petitioners' claims are rejected because they present no errors of fact or law that would justify rehearing nor do they demonstrate that a modification to the prior order would serve the public interest. However, given that we are approving a pilot program today that would involve utility ownership of DER designed to serve LMI customers,² we offer clarification on the exception to utility ownership of DER as set forth in the Track One Order.

¹ SAPA No. 14-M-0101SP11.

² Case 16-E-0622, Consolidated Edison Company of New York - Petition for Approval of a Pilot Program for Providing Shared Solar Low-Income Customers.

LEGAL AUTHORITY

Rehearing may be sought on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination.³ A petition for rehearing must separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing. Reconsideration is granted where the petitioner demonstrates that a modification to the prior order would serve the public interest.

DISCUSSION

Utility Ownership of DER to Serve LMI Customers

The Track One Order described a vision for a consumer-centric electric industry where markets will develop around DER, resulting in improved system efficiencies, lower costs, increased resiliency and a more climate-friendly energy system. Recognizing that achievement of this vision requires that DER resources be offered on a competitive par with centralized operations and that unrestricted utility participation in DER markets could undermine market development, the Track One Order adopted 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."⁴ Three limited exceptions to this rule were also adopted. Here, Petitioners question the second exception, designed to ensure that, where DER markets did not reach LMI customers, those customers would nevertheless have an opportunity to benefit from DER. The second exception is set forth in the following language:

³ NYPSL § 22; 16 NYCRR §3.7(b).

⁴ Track One Order, p. 68.

The second exception will be where there does not appear to be a developing market for DER and the public interest warrants utility investment that will support such development. One segment that warrants this allowance is low or moderate income customers that can use DER to moderate their energy bills and take advantage of the REV market. Customer advocates have expressed concern that low and middle income customers will not be able to participate in REV benefits, for a variety of reasons including location, premises constraints, and access to capital. This potential is particularly acute in the case of rental customers that cannot control improvements to premises. Where system benefits and/or substantial customer benefits can be achieved with DER projects, in areas that are not being served by markets, utilities will be able to propose programs to achieve them. With that objective in mind, we will instruct the Commission's Consumer Advocate staff to work with low income advocates, utilities and other interested stakeholders to develop these programs for introduction by utilities as part of ongoing REV development. Program details will be filed within [Distributed System Implementation Plans].⁵

Petitioners seek clarification as to whether the words "utility investment" in the first sentence quoted above means that the utility will be able to own DER or whether, instead, the term "investment" contemplates the utilities' providing LMI customers access to financing and other support that would enable LMI customers to own DER themselves.⁶

IPPNY joins in the request for an interpretation that, while utility investment should be allowed, given the potential for market power abuses, utility ownership should be barred in favor of allowing time for market-based solutions to develop to meet the needs of these customers. The City recommends that the Petition be denied on this issue, asserting that LMI customers should have the same opportunity to benefit from the deployment

⁵ Track One Order, pp. 69-70.

⁶ Petition, p. 3 (Petition was submitted unnumbered, numbers imposed beginning with "1" on first page following the cover letter).

of DER as other customers and if private entities are unwilling to serve these customers, utilities should be permitted to do so. The Joint Utilities also take the position that the Track One Order should be reaffirmed in this respect, asserting that the Track One Order anticipates and provides the needed flexibility to give opportunities for LMI customers while also protecting the development of DER markets.

To clarify, the second exception would permit utility ownership of DER. As the general rule bans that ownership, the exceptions to the rule contemplate situations where the utility will be authorized to own DER. The meaning is also evident from the Track One Order where it is stated: "To summarize, utility ownership of DER will only be allowed under the following circumstances . . . [including where] a project will enable low or moderate income residential customers to benefit from DER where markets are not likely to satisfy the need."⁷ "Ownership" is then broadly defined as including "owning, leasing, contracting, or other forms of direct sponsorship."⁸

Petitioners go on to request, in the event that the Track One Order's second exception does indeed mean that utilities may own DER, that the exception be limited to utility investment as Petitioners define it rather than utility ownership. Petitioners argue (1) it is premature to assume DER markets will not develop for LMI customers or that utility ownership would be the best way to address the problem; (2) the exception is too broad because LMI customers represent approximately 50% of New Yorkers; and (3) the exception is not

⁷ Track One Order, p. 70.

⁸ Track One Order, p. 70 n 79.

supported by the record because it was not set forth in the Staff Track One Straw Proposal.⁹

Neither Petitioners, IPPNY, nor the public comments in support of the Petition identifies any error of law or fact, or any new circumstances that warrant a different determination. First, Petitioners contend that the analysis in the Track One Order did not adequately take into account the fact that DER markets may reach LMI customers through programs and efforts apart from utility ownership, and request that the second exception be stayed "until the outcomes of REV Track 2 and other related proceedings are clearer."¹⁰ To the contrary, the evolving nature of REV and DER markets was specifically considered in crafting the second exception, as is evident from the limitation of the exception to only those situations "where markets are not likely to satisfy the need" and "in areas not being served by markets."¹¹ As the Joint Utilities acknowledge in their comments, these programs will be developed in collaboration with the participation of the Department of Public Service (DPS) Staff's Consumer Advocate, low-income advocates, utilities and other interested stakeholders, thus providing an opportunity for alternatives to outright utility DER ownership to be considered. Indeed, the details of any proposal for utility DER ownership for the benefit of LMI customers will be subject to Commission review to ensure that such proposals are in the best interest of consumers after considering all factors, including alternate proposals and current market conditions.

⁹ Case 14-M-0101, Reforming the Energy Vision, Developing the REV Market in New York: DPS Staff Straw Proposal on Track One Issues (filed August 22, 2014) (Track One Straw Proposal).

¹⁰ Petition, p. 4.

¹¹ Track One Order, pp. 69, 70.

The intent in creating the LMI exception was to enhance the potential for LMI customers to participate in DER, not to limit it. The second exception in no way precludes LMI customers or communities from owning DER. Petitioners and the public commenters in support are nevertheless concerned that utilities will preempt LMI customers from having an ownership interest. This is a reasonable concern, and is consistent with the Track One Order's emphasis on customer engagement and choice. Consistent with these pro-consumer policies, the processes outlined in the Track One Order to ensure that utility ownership of DER resources is in the public interest will further the shared intent of the Commission and Petitioners.

Next, Petitioners and IPPNY point out that, depending on the definition of moderate income, LMI customers could be construed to represent approximately 50% of New Yorkers and, thus the exception may be overbroad and carry with it the potential for utilities to abuse market power. As discussed, any program developed by the utility to own DER for LMI customers will be subject to Commission review and include a showing that the proposal fulfills a need and is in the public interest. Under these circumstances the risk of the exception swallowing the rule as expressed by Petitioners and IPPNY does not exist.

Petitioners' final assertion is that the second exception is not supported by the record because it was not specifically included in the Track One Straw Proposal. This does not constitute an error of law warranting rehearing inasmuch as the Commission is free to craft its own directives and solutions based upon the entire record, regardless of Staff's recommendations. Not every Commission directive need originate with a proposal from a party, but may be the result of the Commission's independent review of the record.

Accordingly, the application for rehearing as it pertains to the second exception is denied.

Future Public Involvement

Petitioners' requests that we establish more particularized processes for public involvement in REV raise no issues that would provide a ground for rehearing. In any event, these concerns are unfounded. Since REV's inception, working groups and other forms of public input have provided important insight and remain invaluable to the process as the proceeding moves forward. In the dynamic context of REV it is inadvisable to fix dates certain for comment periods and public hearings in the context of a Commission Order. Such dates are typically left to the discretion of the Secretary in order to retain flexibility and, in fact, additional processes have been set in motion, new REV-related proceedings have commenced and the schedule has been modified by the Secretary since the Track One Order was issued. The REV proceeding is characterized by and benefits from robust and far-reaching public involvement. This public participation has included working groups, technical conferences, a REV seminar series at academic institutions, public statement hearings in cities across the state, and comments filed by thousands of New Yorkers. We remain committed to involve the public as REV continues to move forward. Public comment is welcomed at any time during the pendency of this, or any, proceeding.

The Commission orders:

1. Rehearing of the Order Adopting Regulatory Policy Framework and Implementation Plan issued February 26, 2015 in this proceeding is denied.

2. The Order Adopting Regulatory Policy Framework and Implementation Plan issued February 26, 2015 in this proceeding is clarified to the extent discussed in the body of this Order.

3. This proceeding is continued.

By the Commission,

KATHLEEN H. BURGESS
Secretary