

READ AND LANIADO, LLP

ATTORNEYS AT LAW
25 EAGLE STREET
ALBANY, NEW YORK 12207-1901

(518) 465-9313 MAIN
(518) 465-9315 FAX
www.readlaniado.com

KEVIN R. BROCKS
DAVID B. JOHNSON
SAM M. LANIADO

KONSTANTIN PODOLNY

HOWARD J. READ
PATRICK A. SILER
Of Counsel

Via Electronic Delivery

June 15, 2015

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

Re: Case 14-M-0101 – Proceeding on Motion of the Commission in Regard to Reforming
the Energy Vision.

Dear Secretary Burgess:

Please find attached for filing in the above-referenced case the Response to Petition for
Rehearing and Clarification of Independent Power Producers of New York, Inc.

Respectfully submitted,

READ AND LANIADO, LLP
Attorneys for Independent Power Producers
of New York, Inc.

By: _____/s/_____
David B. Johnson

NEW YORK STATE
PUBLIC SERVICE COMMISSION

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

RESPONSE TO PETITION FOR REHEARING AND
CLARIFICATION 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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NEW YORK STATE
PUBLIC SERVICE COMMISSION

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

**RESPONSE TO PETITION FOR REHEARING AND
CLARIFICATION OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.**

Pursuant to Section 3.7 of the Public Service Commission’s (“Commission”) Rules of Procedure,¹ Independent Power Producers of New York, Inc. (“IPPNY”) hereby submits the following response to the Petition for Rehearing and Clarification² of 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 (collectively “Petitioners”) of the Commission’s February 26, 2015 Order Adopting Regulatory Policy Framework and Implementation Plan in the above-captioned proceeding.³ The Commission Secretary issued its “Notice Concerning Petition for Rehearing” on April 10, 2015, extending the response time to the Rehearing Petition to June 15, 2015 pursuant to 16 NYCRR §3.3(a)(1). In their Rehearing Petition, the Petitioners seek rehearing and/or clarification on utility ownership of distributed energy resources (“DER”) for moderate and low-income customers. Specifically, Petitioners request that the Commission clarify that the low and moderate income exception to the general prohibition of utility DER ownership, *i.e.* that

¹ 16 NYCRR § 3.7 (2015).

² Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Petition for Rehearing and/or Clarification Submitted by 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 (Mar. 30, 2015) (“Rehearing Petition”).

³ 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).

utility investment in DER would be allowed in certain circumstances, does not mean that utilities will be allowed to own the DER.⁴ In addition, the Petitioners request that the Commission reconsider the exemption, because as written it can be interpreted too broadly, to allow utility ownership of DER in a vast number of circumstances, to the detriment of competitive markets.⁵

As IPPNY has consistently demonstrated in this and other proceedings,⁶ energy services should be provided cost-effectively by private developers on a competitive basis rather than by transmission and distribution (“T&D”) utilities through rate-of-return regulation. This ensures that private investors, not captive ratepayers, bear investment risks, and that uneconomic projects, which may harm the private developers that must rely on competitive markets for their survival, are not developed. It also ensures that T&D utilities are not able to exercise vertical market power to the detriment of competitive markets and consumers. The Commission should reaffirm its commitment to these principles by clarifying that T&D utilities were not meant to own DER under the described exception, or by greatly narrowing the exception as described in the Rehearing Petition.

I. BACKGROUND

Prior to the institution of this proceeding, the Commission directed New York State Department of Public Service Staff (“Staff”) to begin a process to reconsider New York’s

⁴ Rehearing Petition at 9.

⁵ *Id.* at 5.

⁶ See Case 14-E-0302, Comments of Independent Power Producers of New York, Inc. (Oct. 6, 2014), at 2–3, 14–15; Case 14-M-0101, *supra*, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, IPPNY Comments (Sept. 22, 2014), at 6, 12–15 [“IPPNY September Comments”]; Case 14-M-0101, *supra*, IPPNY Comments (July 18, 2014), at 8–16 [“IPPNY July Comments”].

regulatory paradigms and markets.⁷ As a result, a Staff Report and Proposal⁸ was issued, which formed the basis for instituting this proceeding on April 25, 2014.⁹ The proceeding was separated into two tracks, with Track One focused on developing distributed resource markets, and Track Two focused on reforming utility ratemaking practices. On August 22, 2014, Staff issued a Straw Proposal for Track One which, in addition to party comments, articulated the basis for the Policy Order.¹⁰ Following the issuance of the Straw Proposal, numerous comments and reply comments were filed, including those of IPPNY, explaining that T&D utilities should be foreclosed from owning DER, except in very limited circumstances.

IPPNY opposed utility ownership of DER, pointing out that Staff’s proposed mitigation measures would fail to curb utility vertical market power and would have a chilling effect on private investment in New York. IPPNY also demonstrated that Staff’s assertion that utility ownership may be necessary for rapid deployment of DER is unsupported and that private investors, if provided an open and fair field to play on, are capable of rapid deployment.

The Commission agreed, stating that “unrestricted utility participation in DER markets presents a risk of undermining markets more than a potential for accelerating market growth.”¹¹

The Commission further established that “a basic tenet underlying REV is to use competitive

⁷ Case 07-M-0548, *Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard*, Order Approving EEPS Program Changes (Dec. 26, 2013).

⁸ Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, DPS Staff Report and Proposal (Apr. 24, 2014).

⁹ Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Order Instituting Proceeding (Apr. 25, 2014).

¹⁰ Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Developing the REV Market in New York: DPS Staff Straw Proposal on Track One Issues (Aug. 22, 2014).

¹¹ *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, *supra* note 2, at 67.

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.”¹² 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.”¹³ Several exceptions to this general rules were also developed. At issue here is what the Rehearing Petition refers to as the “Second Exception.” That exception is for circumstances 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. . . . 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.¹⁴

The Commission further stated, that “utilities will be allowed to partner with community groups and/or invest directly in distributed resource projects on premises of low and moderate income customers, to target system needs and enhance the participation of low and moderate income customers.”¹⁵

As described in the Rehearing Petition, the Commission should clarify that “invest” does not mean “own,” but instead means “providing access to financing or other support to allow low-

¹² *Id.*

¹³ *Id.* at 68.

¹⁴ *Id.* at 69.

¹⁵ *Id.* at 87.

income and moderate-income people to own distributed energy resources themselves.”¹⁶ To the extent that the Commission did intend to allow utility ownership of DER in this instance, the Commission should reconsider this exception, because (1) it is premature to assume that DER markets will not develop for low and moderate income people, or that utility ownership is the best way to address this lack of development when/if it occurs; and (2) the exception is overly broad, since low and moderate income customers constitute a substantial portion of the State’s population and a large portion of the electricity market. Should the exception remain, it will allow utility ownership of DER extensively, thereby eroding the Commission’s general rule that “utility ownership of DER will not be allowed.”¹⁷

II. THE COMMISSION SHOULD GRANT THE REHEARING PETITION AND REAFFIRM ITS COMMITMENT TO ENCOURAGING COMPETITIVELY PROCURED MARKET-BASED SOLUTIONS.

First, the Commission should reaffirm that utility ownership “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.”¹⁸ As pointed out in the Rehearing Petition, there is no evidence in the record to support the contention that market-based, DER solutions will not develop for low and moderate income customers. Neither is there support for the contention that utility ownership is the best way to address this lack of development when/if it occurs. While it may be true that there are currently substantial barriers to distributed energy resource ownership by low and moderate income people, those barriers are being addressed. Specifically, as noted in the Rehearing Petition,

¹⁶ Rehearing Petition at 5.

¹⁷ *Id.* at 68.

¹⁸ Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, *supra* note 2, at 68.

“numerous proposals have been submitted or are forthcoming to address the gaps in access to the benefits of energy efficiency and renewable energy for low-income people and low-income communities.”¹⁹ The Commission must allow these processes to run their course before allowing utilities to own DER to serve low and moderate income customers. As IPPNY has repeatedly demonstrated in the past, market-based solutions are clearly preferable to utility-owned DER. The Commission has agreed by allowing utility owned DER only as a last resort to remedy market failure.²⁰ No such failure has been demonstrated in this case.

As described in the Rehearing Petition, while low and moderate income is not defined, a conservative estimate is that this includes about 50% of all New York customers. If that is indeed the case, this exception threatens to swallow the rule. The Commission should safeguard the guiding principle that utility ownership of DER will only be allowed if the markets fail to supply the desired level of cost-effective DER penetration. Otherwise, the investment risks will be unjustifiably shifted to the very customers DER implementation is designed to benefit and will discourage private investors from entering the market to provide DER services.

¹⁹ Rehearing Petition at 6.

²⁰ *Id.*

III. CONCLUSION

For the foregoing reasons, the Commission should grant the Rehearing Request as discussed above.

Respectfully submitted,

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Albany, New York 12207
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(518) 465-9315 (fax)

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of New York, Inc.

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