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Via Electronic Delivery

September 22, 2014

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

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 Initial Comments of Independent Power Producers of New York, Inc., on DPS Staff Straw Proposal on Track One Issues.

Respectfully submitted,

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

By: _____/s/_____
David B. Johnson

cc: Hon. Julia Smead Bielawski (via e-mail)
Hon. Eleanor Stein (via e-mail)
Active Parties (via e-mail)

NEW YORK STATE
PUBLIC SERVICE COMMISSION

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

INITIAL COMMENTS OF INDEPENDENT
POWER PRODUCERS OF NEW YORK, INC., ON
DPS STAFF STRAW PROPOSAL ON TRACK ONE ISSUES

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I. INTRODUCTION

Pursuant to the rulings establishing a comment process issued by Administrative Law Judges (“ALJ”) Eleanor Stein and Julia Bielawski, in the above-captioned proceeding, Independent Power Producers of New York, Inc. (“IPPNY”), hereby offers its initial comments on the DPS Staff Straw Proposal on Track One Issues issued on August 22, 2014 (“Straw Proposal”).¹ IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development, operation, and ownership of electric generators and the marketing and sale of electric power in New York’s electricity markets. As a trade association representing wholesale suppliers, one of IPPNY’s primary missions is the continued development and enhancement of reliable and efficient competitive electricity markets. Well-functioning competitive electricity markets are essential to meeting the State’s needs for electricity at just and reasonable rates.

With respect to the instant proceeding, IPPNY’s interest lies mainly in ensuring that the policies

¹ Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Ruling Posing Questions on Selected Policy Issues and Potential Outcomes, Establishing Comment Process, and Revising Schedule (June 4, 2014) (“June Ruling”); Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision*, Ruling Concerning Track One Schedule and Establishing Technical Conference on Policy Issues (July 30, 2014).

encouraging the development of distributed energy resources (“DER”) are complementary to, and compatible with, the continued functioning of reliable, non-discriminatory, competitive electricity markets in New York.

As discussed below, before policies promoting DER can be implemented, the integration of DER into, and its impact on, the wholesale markets must be studied and rule changes required to address such impacts must be made. Staff should provide more details on its proposal to transition from central procurement of renewable energy credits (“RECs”) by the New York State Energy Resource and Development Authority (“NYSERDA”) from Main Tier resources to bundled contracts for energy and RECs between the utilities and renewable projects. As an initial matter, comprehensive program reviews of the Renewable Portfolio Standard (“RPS”) conducted to date have found that the NYSERDA Main Tier solicitation process has worked as intended. Moreover, more details are needed concerning such issues as how the utilities would conduct statewide, comprehensive solicitations and how each utility’s contracts with such projects would be funded. Staff’s proposal to allow utilities to own DER is flawed because there is no evidence that utility ownership is necessary to develop DER markets and Staff’s proposed mitigation measures will fail to ensure that the utilities will not be able exercise vertical market power (“VMP”) to the detriment of the competitive electricity market and consumers.²

III.D. WHOLESALE MARKET INTERACTIONS

In its Straw Proposal, Staff noted generally that wholesale and retail market rules will need to be aligned relating to demand response aggregation, program eligibility, product valuation, payment protocols, communications technology and procedures, and measurement and verification methodologies. Staff also recognized that “market rules allowing DER participation

² IPPNY’s comments are arranged according to the headings used in the Straw Proposal. IPPNY does not address all of the points raised in the Straw Proposal, and IPPNY’s silence should not be construed that it has no position on any given issue.

at DSP and wholesale levels must be aligned to ensure DER interaction in both areas is efficient and properly valued.”³ However, Staff did not address concerns raised by IPPNY in the committee process that a study must be performed to identify potential adverse impacts of DER on wholesale markets and reliability. For example, Staff expects that the aggregate effect of reduction in peak loads anticipated to result from the REV initiative will drive down capacity requirements and reduce peak energy production needs.⁴ While this may be desirable, its impacts must be measured carefully to ensure that the underlying market design stays intact and remains sustainable. The Distributed System Platform Provider’s (“DSPP”) interaction in the New York Independent System Operator Inc.’s (“NYISO”) markets must not have an adverse effect on, *inter alia*, the NYISO’s day-ahead commitment process, real-time operations, planning processes, demand curve reset processes, and its ability to satisfy all reliability rules and requirements. The integration of DER into, and its impact on, the wholesale markets must be studied as Day One issues.

V.A.2. SUPPLY-SIDE RENEWABLE RESOURCES

Staff proposed, for the first time in this proceeding, a fundamental change in the way incentives are provided to Main Tier resources under the RPS. Since the RPS was implemented, NYSERDA has acted as the sole central procurement agent for RECs in New York. Through competitive solicitations over the past decade, NYSERDA has awarded numerous contracts to Main Tier projects to purchase RECs at fixed prices. In its Straw Proposal, Staff proposes “that the REC-only program approach should transition to bundled contracts for energy and RECs between the utilities and competitively selected projects.”⁵ Staff stated that “[i]t seems likely

³ Straw Proposal at 35.

⁴ *Id.* at 34.

⁵ *Id.* at 52.

that the mechanism of power purchase agreements is most likely to meet the near term objectives of the Commission and the Draft State Energy Plan.”⁶

Staff does not provide any details on how its proposed power purchase agreements should be structured, *e.g.*, fixed prices, contracts for differences (“CFDs”), indexed contracts, *etc.* Nor does Staff propose how the utilities would recover the costs of these contracts from ratepayers. In prior comments to the New York State Public Service Commission (“Commission”), IPPNY opposed proposals to transition from fixed-price REC contracts to the use of CFDs.⁷ One of IPPNY’s main concerns with CFDs is that they insulate the generator-owner from competitive market prices, making the generator indifferent to market prices that may signal the need to reduce output or curtail service. Another concern is that CFDs shift the risk from developers, who are in the best position to forecast and manage risk, to ratepayers.

These same issues arise with respect to long-term contracts for energy from renewable resources. There is also a question of whether the Commission has jurisdiction to order utilities to enter into contracts with renewable projects to acquire energy at wholesale. Recent United States Court of Appeals decisions have held that state regulatory commissions are preempted by the Federal Power Act from ordering utilities to sign contracts with wholesale generators that

⁶ *Id.*

⁷ The Commission defined CFDs in its July 2, 2014, Order authorizing modifications to the Main Tier contract term:

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

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

establish a wholesale rate.⁸ These are important issues that must be addressed by the parties and considered carefully by the Commission before it decides whether to transition away from the NYSERDA REC-only central procurement model.

That is not to say that IPPNY necessarily opposes all aspects of the recommendation. For instance, in 2009, IPPNY submitted comments that explained that there may be beneficial aspects in shifting the procurement model away from the existing centralized approach to one where procurement obligations are placed on utilities.⁹ However, IPPNY's potential support was premised on the RPS remaining a REC-only procurement program. Due to the complexity of this issue, IPPNY requests that, if Staff decides to proceed with its recommendation, it issue a more detailed white paper outlining all the potential alternatives that are being considered, how such proposal can survive the jurisdictional limitation proscribing the PSC from ordering utilities to sign contracts for wholesale energy, how a utility-driven REC-only procurement approach could be designed, the scope of eligible technologies,¹⁰ whether utilities should be subject to mandatory procurement targets, and then conduct a technical conference on these issues.

VI. MITIGATING MARKET POWER

In their June Ruling, the ALJs solicited comments on questions concerning major Track One policy issues that were intended to provide parties' early input to assist Staff in formulating

⁸ See *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J. 2013), *aff'd sub nom. PPL EnergyPlus, LLC v. Solomon*, Nos. 13-4330, 13-4501, 2014 WL 4454999 (3d Cir. Sept. 11, 2014); *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 840 (D. Md. 2013), *aff'd* 753 F.3d 467 (4th Cir. 2014). The New York Court of Appeals also held that the Commission is preempted by the Federal Power Act from ordering utilities to sign contracts with wholesale generators that are not qualifying facilities under the Public Utility Regulatory Policies Act of 1978. *Consolidated Edison Co. of NY, Inc. v. Pub. Serv. Comm'n. of NY*, 63 N.Y.2d 424 (1984), *appeal dismissed*, 470 U.S. 1075 (1985).

⁹ Case 03-E-0188, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, IPPNY's Comments (Nov. 23, 2009), at 3.

¹⁰ Most recently IPPNY filed comments on July 18, 2014, in Case 14-M-0094, *Proceeding on Motion of the Commission to Consider a Clean Energy Fund*, reiterating a long-standing position that both new and existing resources should be eligible for support provided by the RPS (and now the Clean Energy Fund).

its policy recommendations in its Straw Proposal, which, following party input, will be presented to the Commission. One of the major policy issues on which the ALJs sought comment was whether transmission and distribution (“T&D”) utilities should be able to own DER. In its report and proposal issued on April 24, 2014, DPS Staff invited parties to comment on its proposal, which stated that it may be desirable for the T&D utilities to be permitted to own DER.¹¹ In its comments submitted on July 18, 2014 (“July 18 Comments”), IPPNY demonstrated that T&D utilities would be in a position to exercise VMP if they were allowed to own DER, especially if the Commission adopted Staff’s proposal that the T&D utilities act as the DSPP. IPPNY advocated that Staff recommend to the Commission that it continue its long-standing policy of prohibiting T&D utilities from owning generation by barring T&D utilities from owning DER that can either offer energy and capacity into the wholesale market or reduce the energy and capacity that utilities must procure for their retail customers. IPPNY also advocated that the Commission should rely on market-based mechanisms to incent the development of DER and not subsidize their costs by using cost-of-service rate recovery.

In its Straw Proposal, Staff correctly recognized that T&D utilities would have an improper incentive to exercise VMP if they own DER but proposed that an absolute prohibition against utility engagement in DER “would also deny the potential benefit of DER growth that is needed to develop an asset base for DER markets.”¹² Rather than impose an outright ban on T&D utility ownership of DER, as advocated by IPPNY, Staff proposed that the exercise of VMP can be appropriately mitigated to allow ownership of DER under certain circumstances. Staff identified advantages and disadvantages of utility ownership of DER and, in an attempt to

¹¹ 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), at 43 (“Staff Report”).

¹² Straw Proposal at 70.

balance these pros and cons, Staff proposed market power mitigation measures that would allow utility ownership under certain circumstances. With respect to advantages, Staff makes the unsupported assumption that utility ownership of DER is necessary to facilitate “[o]ne of the principal, immediate imperatives of REV,” which is “the expeditious growth in DER penetration of the New York energy market.”¹³

First, IPPNY disagrees that one of the imperatives of REV should be the rapid deployment of DER. As IPPNY stated in its July 18 Comments, the development of DER should not be incented for its own sake because it would result in more penetration of DER than is warranted by the savings and may have unintended adverse impacts on existing facilities. DER penetration levels should depend on clear and transparent evidence that the underlying benefits of proposed resources exceed their costs and the costs of any alternatives. Staff recognized this core principle in its Straw Proposal: it stated that “[a] sound benefit-cost analysis (BCA) framework is required to support policy, investment, and pricing choices as the implementation of REV moves forward.”¹⁴ Staff proposed a list of principles to develop a BCA framework and noted that this task “requires significant additional work and stakeholder engagement.”¹⁵ Staff stated:

The BCA framework developed should include further specification of what benefits and costs to include, methodologies used to value those benefits and costs, input assumptions to be used, and the application of the BCA framework. Further, it should reflect where reasonable quantifications of benefits and costs are possible, a discussion of qualitative benefits and costs where reasonable quantification is not possible, and a

¹³ *Id.* at 68.

¹⁴ *Id.* at 42.

¹⁵ *Id.* at 48.

recommendation for ways to assess risks faced by potential deviations in the value of those benefits and costs.¹⁶

At this point in the REV proceeding, there is no method to determine whether development of DER is justified as the necessary input assumptions and value methodologies have yet to be developed. Therefore, Staff's belief that rapid deployment of DER is "imperative" is based on the purely speculative assumption that extensive amounts of DER will be justified under the BCA framework ultimately adopted.¹⁷ While Staff has identified specific examples of DER proposals to defer distribution investment,¹⁸ it is not at all clear that there are numerous locations on the distribution system that are congested and can benefit from installation of DER.

Second, IPPNY strongly disagrees that the T&D utilities' ownership of DER is necessary to accomplish the rapid deployment of DER, even if such deployment is justified by a BCA. Staff makes the unsupported claim that "[d]irect utility participation in DER can accelerate the transformation to a more fully distributed electric grid . . . by leveraging existing ratepayer-funded assets and in-house expertise related to system planning, design and operations, and customer communications."¹⁹ Staff claims that utilities "have direct access to customers, credibility as a familiar energy provider, and knowledge about their distribution systems to identify where and how DER can be integrated with the greatest effect."²⁰ Staff further claims that "[u]tilities can identify and demonstrate new DER technologies that are reliable and

¹⁶ *Id.* at 49.

¹⁷ IPPNY notes that throughout the stakeholder meetings to develop the lists of products and services that could be offered by DER, parties were careful to stipulate that any claimed benefits of these products and services were merely hypothetical until proven otherwise.

¹⁸ Straw Proposal at 10.

¹⁹ *Id.* at 68.

²⁰ *Id.*

effective, thereby helping customers adapt to and exploit these technologies.”²¹ Staff also states that utilities can use their economies of scale to provide financing for DER at relatively low cost and that ownership of DER would give them “experience and confidence” in how DER integration will impact the reliable operation of the distribution system.²² Finally, Staff claims that utilities can avoid revenue erosion by owning DER because the revenues from the customer and associated costs and benefits “accrue to all ratepayers.”²³

The utilities’ knowledge about their distribution systems, their relationships with their customers, and their claimed ability to educate customers should not be used as justification to allow them to develop and own DER for the purpose of rapidly deploying DER.²⁴ While utilities may know their distribution systems better than any other entity at this point in time, the Commission should not allow them to use this information to their advantage and to the detriment of their competitors in developing DER. Indeed, Staff has identified this information asymmetry as “a classic barrier to new market development and entry of new market participants” that must be mitigated by requiring the utilities to share information with their competitors.²⁵ Staff recommended that:

The Commission should require utilities to develop and expand universal and transparent access to system data through the information exchange described in the customer engagement section. This will enable DER product developers to determine

²¹ *Id.*

²² *Id.* at 69.

²³ *Id.*

²⁴ It is troubling that Staff would seek to justify the utilities’ ownership of DER based on the utilities’ knowledge of their distribution systems when it has been Commission policy for years to prohibit utilities from owning generation on utility-owned transmission systems. Staff’s same argument could have been used to justify utility ownership of generation on the transmission system, but after years of experience with successful private investment in generation, that argument is obviously absurd.

²⁵ Straw Proposal at 75.

where distributed energy resources would provide the most value to the grid and are most easily able to interconnect.²⁶

Once this information is provided to all merchant developers on a non-discriminatory basis, there is no reason why DER built by T&D utilities would offer any greater benefit than DER built by private developers. No evidence exists to support Staff’s implicit assumption that private developers competing to offer DER products and services cannot meet the Commission’s DER goals. There has been no shortage of willing merchant developers of new generation projects to meet the State’s needs despite the fact that the T&D utilities have been out of the generation business for more than a decade and have not participated in any of the Renewable Portfolio Standard procurements to date.²⁷

Staff correctly recognized that “[l]ong-term success in animating a DER market in our state depends on leveraging private capital and spreading risk beyond ratepayers.”²⁸ If utilities are allowed to exploit their asymmetric access to information to the detriment of their competitors, even for the short term to speed the deployment of DER, it will have the opposite effect because it will discourage the very private investment that is necessary to achieve the Commission’s policy goals. As Staff correctly noted, “[u]nrestricted utility ownership of DER could, even if immediately successful, stifle the growth of an innovative, competitive DER

²⁶ *Id.* at 76.

²⁷ Numerous parties submitting comments on the Staff Report opposed Staff’s proposal that utilities own DER, and none of these commenters suggested that DER goals could not be met solely by non-utility developers. *See* Comments of 38 North Solutions, LLC (July 18, 2014), at 5–6, 8; Comments of Alliance for a Green Economy et al. (July 18, 2014), at 1, 5; Comments of Citizens for Local Power (July 18, 2014), at 6–7, 9; Comments of Direct Energy Services, LLC (July 18, 2014), at 5–7; Comments of ENE (July 18, 2014), at 6–8; Comments of IGS Energy (July 18, 2014), at 4, 6–7; Comments of Multiple Intervenors on Track 2 (July 18, 2014), at 17–18; Comments of Northeast Clean Heat and Power Initiative (July 18, 2014), at 4; Comments of Schrag (July 18, 2014), at 4; Comments of SolarCity Corp. (July 18, 2014), at 2, 4–5, 8–9, 10, 15–16; Comments of EnergyNext, Inc. et al. (July 21, 2014), at 3; Comments of Infinite Energy, Inc. (July 21, 2014), at 14–15; Comments of NRG Energy, Inc. on Track 1 (July 21, 2014), at 1, 3–4, 5–6; Comments of NRG Energy, Inc. on Track 2 (July 21, 2014), at 1, 8–9, 12–14, 17; Comments of Microgrid Resources Coalition (July 29, 2014), at 4–6, 9–11.

²⁸ Straw Proposal at 70.

market for the longer term.”²⁹ Private developers will lose confidence in New York and invest in projects in states more friendly to competition if the T&D utilities are allowed to own DER. Staff’s claim that utilities can develop DER at lower costs due to their economies of scale is similarly unavailing. As Staff correctly indicated in its list of disadvantages, “[i]f utilities are allowed to own DER, their relatively lower business risk will enable them to undercut some competitors who do not enjoy the utilities’ lower costs of capital. Utility ownership risks crowding out new investment in New York DER.”³⁰

Staff’s claim that utility ownership of DER would give utilities “experience and confidence” in how DER integration will impact the reliable operation of the distribution system is also without merit.³¹ There is no evidence that the utilities cannot adequately study how DER will impact their systems if the DER is owned by third parties. Indeed, Staff’s claim is a red herring because it ignores that the utility, acting as the DSPP, will be required to dispatch DER in the same manner no matter its ownership. Finally, Staff’s claim that utilities can avoid revenue erosion by owning DER is nothing more than a concession to the utilities, which fear that private investment in DER will harm their business models by reducing the throughput on their T&D systems. As Staff discussed in the Staff Report, revenue decoupling mechanisms and fixed retail rates for recovery of T&D costs can be used to ensure utilities adequate rate recovery of grid costs.

Thus, Staff’s claimed advantages of utilities owning DER are without merit. With no documented advantages, nothing exists to be weighed against the numerous disadvantages of

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 69.

taking this tack to determine whether and how utilities should be allowed to overcome the presumption that their ownership of DER will unacceptably exacerbate the potential for VMP.

With respect to disadvantages of utility ownership of DER, Staff identified many of the VMP concerns that IPPNY raised in its July 18 Comments. According to Staff:

These concerns include (1) the potential for a utility-provided platform to maintain barriers, such as burdensome interconnection requirements and outmoded tariffs, to robust entry into the market by DER providers; (2) potential reluctance of a utility-provided platform to provide the system or customer data needed by DER providers to succeed; and (3) the potential for functional competitive advantage on the part of the utility/platform regardless of utility behavior.³²

Staff attempted to balance these concerns with its perceived benefits and arrived at a proposal that permits T&D utilities and their affiliates to own DER under certain circumstances. Staff proposed that utilities can directly participate in DER with respect to energy efficiency programs and “generation or storage located on utility distribution property.”³³ Staff proposed that other proposed utility engagement in DER must be addressed in utility Distributed System Implementation Plans that meet the following conditions:

- the proposal must address a substantial system need;
- the proposal must demonstrate why the benefits of utility engagement outweigh the market power concerns, with reference to the factors discussed above; and
- where the proposal involves ownership, it must include a competitive solicitation for construction and operation, absent compelling circumstances.³⁴

Finally, Staff proposed different market mitigation measures with respect to the participation of unregulated utility affiliates in DER. Staff recognized that utilities would have a

³² *Id.* at 67.

³³ *Id.* at 72.

³⁴ *Id.* at 73.

strong incentive to favor their unregulated affiliates' projects because they earn unregulated returns, but it proposed that only structural separation methods are necessary to mitigate market power because "the participation of utility affiliates can enhance DER markets."³⁵

In addition to these conditions, Staff recommended various measures to mitigate the ability of utilities to exercise market power through their authority to: (1) review and approve distributed energy resource interconnection applications, (2) control the distribution and dispatch of resource bids, and (3) provide distribution system data. Staff proposed standardized interconnection requirements for new distributed generation and Staff monitoring of the utility interconnection approval process for larger interconnections. Staff proposed that DPS "observe dispatch procedures to ensure fairness; and should audit market dispatch results data when appropriate or necessary."³⁶ Staff also proposed that utilities be required to develop and expand universal and transparent access to system data.

Staff's proposed mitigation measures are flawed and will fail to curb the ability of utilities to exercise VMP, which will harm the competitive market and consumers and will ensure that private investors steer clear of the New York markets. As IPPNY discussed in its July 18 Comments, the Commission found that in a wholesale or retail competitive model, generation and energy service functions should be separated from T&D, wherever feasible, to eliminate concerns related to the exercise of VMP and best meet the interests of ratepayers. The Commission determined that total divestiture of generation was a clear way to allay concerns about VMP and avoid anti-competitive behavior (such as favored treatment of affiliates and

³⁵ *Id.*

³⁶ *Id.* at 74.

cross-subsidies among affiliates in both competitive and monopoly environments).³⁷ The Commission established a rebuttable presumption that separation of generation from T&D was required because it found that such separation was preferable to relying upon regulatory controls and enforcement mechanisms to avoid the potential for abuse.³⁸ The first paragraph of the VMP Statement summarizes the Commission's findings:

In creating a competitive electric market, the Commission has viewed divestiture as a key means of achieving an environment where the incentives to abuse market power are minimized. Recognizing that vigilant regulatory oversight cannot timely identify and remedy all abuses, it is preferable to properly align incentives in the first place.³⁹

The VMP Policy Statement rejected arguments that the Commission, Federal Energy Regulatory Commission ("FERC") and the NYISO would have sufficient control over T&D utilities to prevent the exercise of VMP. The VMP Policy Statement stated:

While the utilities are correct that regulatory controls and enforcement mechanisms exist, the degree to which these mechanisms can be effective is subject to debate. For example, the NYISO can recommend, and FERC or this Commission can direct, that a utility reinforce its transmission system. That utility, however, must go through the siting process for authorization, and its role as a possibly reluctant sponsor could introduce complexities and delays in the process. It is also difficult for regulators to detect an inappropriate failure to act when critical information resides with the T&D utility.⁴⁰

Staff's proposal to allow utilities to own DER on their own distribution system property is based on its purely speculative assumption that utility ownership is necessary for the rapid deployment of DER and pays lip service to these legitimate concerns. Staff's purported public

³⁷ Cases 94-E-0952 et al., *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion No. 96-12, Opinion & Order Regarding Competitive Opportunities for Electric Service (May 20, 1996), at 64–65.

³⁸ Cases 96-E-0900 et al., *Statement of Policy Regarding Vertical Market Power*, (July 17, 1998), App. I at 1 ("VMP Policy Statement").

³⁹ *Id.*

⁴⁰ *Id.*

benefit falls far short of the grounds that the Commission has required to rebut the presumption of the exercise of VMP. 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 in the VMP Policy Statement 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 stated:

To guard against undesirable incentives, a rebuttal [sic] presumption will exist for purposes of the Commission's Section 70 review of the transfer of generation assets, that ownership of generation by a T&D company affiliate would unacceptably exacerbate the potential for vertical market power. To overcome the presumption the T&D company affiliate would have to demonstrate that vertical market power could not be exercised because the circumstances do not give the T&D company an opportunity to exercise market power, or because reasonable means exist to mitigate market power. Alternatively, the T&D company would need to demonstrate that substantial ratepayer benefits, together with mitigation measures, warrant overcoming the presumption.⁴¹

The Commission reaffirmed its VMP Policy Statement when it conditioned its approval of Iberdrola's acquisition of Rochester Gas and Electric Corporation ("RGE") and New York State Electric and Gas Corporation ("NYSEG") on the divestment of any and all fossil-fueled generating assets owned in New York State, and the prohibition of the future construction or acquisition of any fossil-fueled generation in New York, by Iberdrola and its affiliates.⁴² While the Commission found that the VMP presumption had been rebutted and, therefore, allowed the

⁴¹ *Id.* at 1–2.

⁴² Case 07-M-0906, *Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.*, Order Authorizing Acquisition Subject to Conditions (Jan. 6, 2009), at 78–79.

joint ownership of T&D and wind generation in the service territories of RGE and NYSEG, it did so because the generation would be owned by affiliates separate from the T&D utilities, VMP mitigation measures would be imposed, and ratepayers would be provided substantial ratepayer benefits of \$275 million.

Unlike the guaranteed \$275 million payment to ratepayers in the Iberdrola case, any potential ratepayer benefits of utility ownership of DER on distribution system property is highly speculative and is impossible to quantify. Staff’s statement that “it is likely there will be circumstances in which some forms of utility engagement are of clear benefit to customers,” such as the siting of DER at utility distribution facilities, ignores that private developers are fully capable of building and owning DER located at, or adjacent to, such facilities and can provide the very same benefit to customers.⁴³ As IPPNY discussed in its July 18 Comments, the Commission’s long-standing policy is that market-based mechanisms are the best means of procuring resources and services that benefit the distribution system in the most efficient manner and that one of the primary benefits of competitive markets is that investment risks shift from captive utility ratepayers to private investors. Consistent with these principles, even if the Commission were to allow utilities to own DER in some limited manner, utilities should not be allowed to receive cost of service rates for DER unless and until a competitive solicitation was first held, the utility was required to provide access to its distribution facilities to locate DER on the same terms and conditions under which it would proceed, and the utility-proposed DER was the most cost effective proposal among all of the competing alternatives and satisfied the Commission’s BCA. Notably, one of Staff’s proposed near-term, no regrets actions recommended that utilities be required to hold competitive solicitations for DER. Staff

⁴³ Straw Proposal at 72.

recommended that the Commission order each utility to indicate which of its capital projects are likely candidates for deferral or avoidance through the procurement of DER alternatives and that “[t]his proposal should include a plan for a competitive DER procurement process and for making available customer usage data sufficient to allow potential DER providers to effectively participate and offer viable solutions.”⁴⁴ To put all parties on an equal footing, the utilities should be required to specify that all parties will have the same access to their distribution sites as one of the parameters of their competitive solicitation processes.

Staff’s additional ground for blanket approval of utility ownership of DER that “an *ad hoc* project-by-project approach to this issue would create uncertainty and would be cumbersome and untimely to administer” is also without merit.⁴⁵ First, an *ad hoc* approach is already required to determine whether a project is justified under the BCA, so a requirement that a utility demonstrate that it has rebutted the VMP presumption should not be an unduly burdensome requirement on a project-by-project basis. Second, the conditions that Staff proposed for utility ownership of DER on facilities other than distribution facilities requires just such an *ad hoc* approach by requiring the utility to demonstrate that each project addresses a substantial system need, the benefits of utility engagement outweigh the market power concerns, and, where the proposal involves ownership, a competitive solicitation for construction and operation must be included. Assuming private developers are given the same access to utility distribution property as utilities, a DER project sited away from a utility’s distribution property could be just as beneficial as one sited on such a property. No sound basis exists to distinguish between projects sited at utility distribution facilities and those cited elsewhere. Nor is there any basis to

⁴⁴ *Id.* at 79.

⁴⁵ *Id.* at 72.

distinguish between utility and unregulated utility affiliates.⁴⁶ Staff's proposed conditions should apply to all instances of proposed utility engagement in DER, including DER proposed by unregulated utility affiliates in the utility's service territory.

Staff's proposed measures to mitigate market power by having Staff monitor interconnection and dispatch procedures are inadequate to protect against the exercise of market power. As recognized by the Commission in its VMP Policy Statement, exercises of market power are difficult to detect. If the Commission allows utilities to own DER, it will need to develop and staff an entirely new organization to detect and enforce VMP violations. The effectiveness of this new, untested organization to detect market power violations and to impose appropriate remedies would be highly uncertain and would not quell legitimate perceptions from merchant investors that the deck is stacked in favor of the utilities in New York. Thus, utility ownership of DER will serve as a major roadblock to the Commission's goals as private investment in DER is chilled.

Respectfully submitted,

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⁴⁶ Staff's purported justification that unregulated utility affiliates "can enhance DER markets" is no basis to reduce the burden the utility has to demonstrate that it has overcome the VMP presumption.