

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

**Case 12-E-0503 - Proceeding on Motion of the Commission to Review
Generation Retirement Contingency Plan**

**PETITION FOR REHEARING AND RECONSIDERATION OF
THE RETAIL ENERGY SUPPLY ASSOCIATION**

I. INTRODUCTION

In accordance with Public Service Law Section 23 and 16A NYCRR Section 3.7, the Retail Energy Supply Association (RESA)¹ petitions for rehearing and reconsideration by the Commission of that portion of the *Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests* that established the recovery methodology of the costs associated with the Transmission Owner Transmission Solution (“TOTS”) projects.²

¹RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² Case 12-E-0503 - Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plan, *Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and recovery, and Denying* (issued November 4, 2013) (“Order”).

II. PRELIMINARY STATEMENT

The Commission on April 19, 2013, directed the Department of Public Service Staff (DPS Staff) to prepare a cost allocation/cost recovery straw proposal applicable to implementation of the Indian Point Contingency Plan for review and comment by the parties in this proceeding.³ For the TOTS projects, DPS Staff proposed that “cost recovery be provided through rate base treatment of the transmission plant in the rate case of the TO building the project.” The NYTOs proposed that the costs be recovered through a charge levied by the NYISO to each individual Load Serving Entity (“LSE”). The Commission concluded that while it commended DPS Staff’s significant efforts in developing the June Straw Proposal..... for purposes of cost recovery for the TOTS projects, we support the NYTOs’ proposed cost allocation/recovery approach for these projects.”⁴

RESA urges the Commission to reconsider this determination regarding cost recovery of the TOTS projects. As will be demonstrated herein, this determination and acceptance of the cost recovery mechanism advocated by the NYTOs is erroneous, inconsistent with Commission precedent and highly uncompetitive.

³ Case 12-E-0503, Generation Retirement Contingency Plans, *Order Upon Review of Plan to Advance Transmission, Energy Efficiency, and Demand Response Projects* (issued April 19, 2013).

⁴ Order, p. 34. “NYTO” refers to the New York Transmission Owner.

III. THE NYTO COST RECOVERY MECHANISM IS INCONSISTENT WITH COMMISSION PRECEDENT AND POLICY

The underlying purpose of this proceeding and examination and adoption of the proposed TOTS projects related entirely to redressing the concerns regarding the reliability of electric service arising from the governmental mandated forced closure of the competitive Indian Point power plants. As the Commission noted:

Recent experience suggests that the development of Reliability Contingency Plans to address reliability concerns in the event of generator retirements is an important initiative that the Department and the Commission should encourage. In particular, the value of a Reliability Contingency Plan to address reliability concerns associated with the closure of the nuclear power plants at the Indian Point Energy Center is increasingly apparent. . . . In this order, we are commencing a proceeding to solicit a Reliability Contingency Plan for the Indian Point Energy Center.⁵

The Commission further elaborated on the goals sought to be advanced with the governmental sponsored effort to force the shutdown of the Indian Point facilities.

The potential retirement of a significant electric generating facility, such as the Indian Point Energy Center, requires significant advanced planning. Specifically, the size, location, and uncertainties regarding the potential retirement of the Indian Point Energy Center warrant such planning activities at this time. We agree there is a need to develop a contingency plan now to ensure reliability in the event the Indian Point Energy Center is ultimately retired.⁶

⁵Case 12-E-0503, Generation Contingency Plans, *Order Instituting Proceeding And Soliciting Indian Point Contingency Plan* (issued November 30, 2012) (Nov 30 Order") at pp. 1-2.

⁶ Nov 30 Order, pp. 2-3; see also, April 19 Order, pp. 1-2.

It is thus evident that the TOTS projects are not specifically designed to address a market based need for additional transmission capacity arising from the interplay of free and unfettered market forces.

The contingency plan and construction of the TOTS facilities are solely related and directed to serving the public policy goal enunciated by New York State which contemplates the forced retirement of the Indian Point generating facilities and the attendant requirement to maintain the reliability of electric service in New York. It is regulatory public policy, rather than competitive market forces, which is the basis for and drives the need for these proposed facilities. Consequently, the cost recovery mechanism should mirror the non-market based function that is being served by the TOTS projects.

The lack of any market or competitive justification for these projects is manifestly demonstrated by the fact the owner of the Indian Point facilities is actively litigating the relicensing of the facilities before FERC and does not appear ready to discontinue operation of the facilities unless forced to do so by government diktat.

When addressing the appropriate cost recovery mechanisms for projects undertaken to comply with a mandated public policy goal, rather than arising from competitive market forces, the Commission has consistently directed that the costs be included in utility delivery rates and recovered from all delivery customers.

In 2003 the Commission implemented the statewide Renewable Portfolio Standard (“RPS”) pursuant to which the level of generation in the State had to include a set level of renewable power by certain targeted dates. To achieve these RPS goals, it was necessary to provide for reimbursement and recovery of above-market generation costs. The Commission authorized full cost recovery of these charges through an equivalent volumetric charge that would be included in the utility delivery rate and applied to all customers including full service utility customers and those taking commodity services from an ESCO.⁷

The Commission followed a similar approach in connection with the establishment and funding of the Energy Efficiency Portfolio Standard (“EEPS”) in 2008. To promote the public policy of improving energy efficiency in New York, the Commission authorized the utilities working with NYSERDA to implement a variety of regulatory based programs that would improve end-use efficiency by residential, commercial and industrial customers. The Commission authorized the investor owned utilities to commence collection, through the System Benefits Charge (SBC), of the funding needed support the EEPS.⁸ Thus, the entire EEPS cost recovery mechanism was

⁷ Case 03-E-0188- Proceeding on Motion of the Commission Regarding a Renewable Portfolio Standard, Order Regarding Retail Renewable Portfolio Standard (issued September 24, 2004 , Appendix E.

⁸ Case 07-M-0548 - Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, Order Establishing Energy Efficiency Portfolio Standard and Approving Programs (issued June 23, 2008) at p. 3.

centered on the SBC that was included as part of the utility delivery rate structure and applied on an equivalent basis to all delivery customers.

Tellingly, in this proceeding the Commission has adhered to the same cost recovery approach with respect to the Energy Efficiency, Demand Reduction and Combined Heat/Power programs that are designed to offset the forced retirement of the Indian Point facilities. In this regard, the Commission directed that the utility “....delivery customers pay a surcharge to cover the cost of these projects... through the Monthly Adjustment Clause”, which “.... is used to collect various costs from all of Con Edison’s delivery customers.”⁹

The Staff cost recovery proposal is entirely consistent with the established Commission precedent. Staff applies a rational nexus between cost incurrence and recovery for the TOTS projects. In this case, cost recovery as proposed by Staff is effectuated through inclusion of the TOTS facility costs in rate base and subsequent reflection of the return on these capital assets in the delivery rates of the utilities.

The Staff approach is in accord with the methodology for rate recovery adopted by the Commission for RPS and EEPs, which underscores that for public interest related projects the established full cost recovery mechanism involves the application of an equivalent charge incorporated in the utility delivery rate or separately stated within the delivery rate billing structure, and applied to all delivery customers.

⁹ Order, p.36.

The NYTO recovery mechanism approved by the Commission, however, is at odds and inconsistent with the established Commission cost recovery precedent and policy. Under the NYTO approach the costs would be allocated individually to each Load Serving Entity (LSE) including ESCOs through an NYISO charge and then presumably separately applied by each LSE to retail customers under a retail rate mechanism.¹⁰ Essentially, the fact that these costs are neither induced nor incurred due to market forces is ignored and cost recovery will proceed erroneously as if the TOTS projects are market based rather than created solely by the intervention of government policy.

Accordingly, in view of the established Commission policy previously enacted and also applied in this proceeding, it is unreasonable and in error to adopt the NYTO cost recovery mechanism in place of the more consistent and rational cost recovery mechanism developed by DPS Staff.

IV. THE RECORD DOES NOT ESTABLISH A RATIONAL BASIS SUPPORTING ADOPTION OF THE NYTO COST RECOVERY PROPOSAL

The Commission provides the following justifications for supporting adoption of the NYTO TOTS cost recovery proposal.

¹⁰ Order, p. 35; Compliance Filing of Con Edison dated February 1, 2013 at pp. 23-5

The NYTOs, however, disagree with DPS Staff's proposed approach and claim that the use of the NYISO tariff to allocate and recover transmission costs is more efficient. The NYTOs argue that the NY Transco charge will be recovered from retail ratepayers in a manner that resembles the current way investor owned NYTOs recover other NYISO charges, such as NYISO Rate Schedule 1 and the NYPA Transmission Adjustment Charge. The NYTOs further contend that their method provides greater certainty and transparency than the June Straw Proposal.¹¹

The NYTO assert that their approach "is more efficient" than the mechanism proposed by DPS Staff. However, upon closer examination it is clear that there is no greater efficiency associated with the NYTO approach. As posed by the NYTO the TOTS cost recovery would entail initially obtaining approval from the Commission of the total level of costs that could be recovered¹² and then setting a recovery charge that would be included in the NYISO tariff. Thereafter such charge would be applied to all LSEs, including the utilities. Finally, each LSE would apply the charge to retail customers through its retail rates. This process entails involvement by the NYISO, applying the rate to all LSEs (Utilities and ESCOs) and application of the charges separately by each ESCO to each ESCO customer's bills and by utilities to the portion of the retail rates approved by the Commission. In sum, pursuant to this process numerous LSEs, including all ESCOs and utilities will apply LSE specific charges to each of their customers.

¹¹ Order, p. 34

¹² Order, p. 18.

In contrast, following the DPS Staff model, the Commission will first approve the overall level of costs that may be recovered by the utilities. Thereafter, the approved cost will be incorporated in the utility rate base where the utility will be able to earn a return on and of its investment. Such return will become part of the utility's regulated delivery rate and applied to all delivery customers served by the utility.

The Staff approach is clearly more efficient. First, the involvement of setting a NYISO rate is avoided. Second, the responsibility of setting and billing for the TOTS costs will reside entirely with the utility and not dispersed among a large number of disparate LSEs. Third, as the utility serves all delivery customers on the system even those served by an ESCO for commodity service, there will be no need for all of the LSEs to develop and bill retail customers for TOTS related costs. Fourth, each utility will invoke the established rate base model that is used for recovery of all capital related utility projects. The DPS Staff model, therefore allows for one source in each service territory to bill and reach all retail customers using an established rate setting model.

Moreover, it will minimize overall administrative costs as it will allow for cost recovery from a single mechanism rather than requiring recovery from many diffuse sources, each of whom will need to establish a separate billing and recovery mechanism.

The claim that the NYTO approach would “offer greater certainty and transparency” than the DPS Staff mechanism, is equally invalid.

In both cases, the Commission will first examine and then advise the proponents of the total level of costs that it will allow to be recovered from retail customers. Thus, certainty of the total approved cost will be established by the Commission regardless which cost recovery model is applied.

The rate base inclusion for the TOTS costs will be carefully monitored by the PSC through the regulated rate setting process to ensure that the utility obtains the authorized recovery and ratepayers are charged the appropriate costs. This will further enhance the “certainty” and “transparency” of the TOTS recovery process.

Further, under the NYTO approach the recovery process will entail within each service territory allocating and billing for the TOTS costs among numerous LSEs, many of whom are fully competitive enterprises whose rates and charges are not regulated by the Commission. In contrast under the DPS Staff approach within each service territory only one entity ---the delivery utility--- will be the sole entity billing for and recovering the TOTS charges from all retail delivery customers. Such a more focused and less disparate billing recovery mechanism is more “transparent” and “certain” than the approach advocated by the NYTOs.

In sum, the record provides no support for the assertion that the NYTO approach is more efficient, certain or transparent than the method advocated by the DPS Staff.

V. **THE NYTO COST RECOVERY MECHANISM WILL DISCRIMINATE AGAINST COMPETITIVE ESCOS**

ESCOs provide competitive commodity supply service to retail customers. Their charges are designed and do reflect the competitive cost of supply electricity. In this manner they compete against each other as well as the utility. However, their ability to compete on even terms against the utility is degraded if they are compelled to include non-competitive based costs in their charges. These types of charges are not tied to any competitive market developments or caused by market changes. Instead, as previously noted they are the result of government policies or mandates which operate apart and outside of the competitive energy market. When faced with such charges, customers may opt to remain with the utility or migrate from ESCO to utility commodity service. In either event, the ESCO may lose customers and diminish its economic viability.

In contrast, the utility remains largely indifferent from an economic perspective if the customer chooses to take commodity service from the ESCO as its profitability is solely related to its delivery rates and commodity costs are recovered on a pass-through basis. Furthermore, through the Commission's rate setting process it is essentially guaranteed full recovery of all costs associated with the TOTS projects. Consequently, the ESCO will be forced to compete with the utility in an uneven competitive market.

This lack of competitive parity becomes exacerbated by the failure of the NYTOS to clearly delineate the specific rate structure that will be used to recover the approved TOTS costs. The NYTOs merely aver that the "NY Transco charge will be recovered

from retail ratepayers in a manner that resembles the current way investor owned NYTOs recover other NYISO charges....."¹³ There is not a clear indication whether such charges will be incorporated as part of the utility's commodity charge or recovered through a delivery type rate component and eliminated entirely from the commodity charge.¹⁴ If the charges are not included in the utility's commodity charge, the ESCOs' competitive posture will be further seriously undermined as they will be forced to compete against a utility commodity charge that does not include the TOTS costs while the ESCO will be compelled to include the TOTS related charges in its commodity charge.

It is thus apparent that application of the NYTO cost recovery mechanism will place an undue and improper burden on the competitive retail energy market.

VI. CONCLUSION

In view of the foregoing considerations, which demonstrate that the NYTO TOTS cost recovery approach contradicts established Commission precedent, is not supported by any rational basis in the record, and will unduly burden the competitive retail energy market, RESA recommends that the Commission reconsider its prior determination and adopt a cost recovery mechanism presented by DPS Staff in this proceeding..

¹³ Order, p. 35

¹⁴ In contrast, with respect to the EE programs, it is specifically represented that the costs will be recovered through the Con Edison Market Adjustment Charge which is applied to all delivery rate customers. Order, p. 36.

Respectfully submitted,

Retail Energy Supply Association

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