NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 15-E-0302 - Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard

REPLY COMMENTS 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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Independent Power Producers of New York, Inc. ("IPPNY"), a not-for-profit trade association representing the independent power industry in New York State,[1] hereby briefly responds to certain related arguments made by the Joint Utilities[2] and the City of New York ("NYC")[3] in their comments on the Clean Energy Standard ("CES") Phase 2 Implementation Plan Proposal ("Phase 2 Proposal") filed by Department of Public Service Staff and the New York State Energy Research and Development Authority Staff (collectively "Staff") with the New York Public Service Commission ("Commission") on May 12, 2017.[4] IPPNY requests that the Commission exercise its discretion to accept this response in the interests of having as complete and accurate a record as possible.[5]

[1] IPPNY's comments do not necessarily represent the positions of each of its members.

[2] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Comments of the Joint Utilities on the Clean Energy Standard Phase 2 Implementation Plan Proposal (July 24, 2017) ("JU Comments"). The Joint Utilities are Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

[3] Case 15-E-0302, *supra*, Comments of the City of New York on the Clean Energy Standard Phase 2 Implementation Plan (July 24, 2017) ("NYC Comments").

[4] Case 15-E-0302, *supra*, CES Phase 2 Implementation Plan Proposal (May 12, 2017).

[5] *See, e.g.*, Case 15-E-0452, *Petition of Related Companies and Oxford Properties for Order Regarding Calculation of Contract Demand for Microgrid under Standby Service Rates*, Order Denying Petition (Feb. 22, 2017) (Commission considered unauthorized reply comments because they contributed to the record of the proceeding and were not prejudicial to either party); Case 03-E-0477, *PSEG Power Cross Hudson Corporation*, Declaratory Ruling on the Provision of Standby Service (May 22, 2003) at 2 (Commission considered unauthorized reply comments because it advanced the record in the proceeding).

The Joint Utilities and NYC use their opportunity to comment on the Phase 2 Proposal to advocate for utility ownership of large-scale renewable resources ("LSRs"), even though this argument is an improper collateral challenge to the Commission's Clean Energy Standard Order[6] and, as conceded by NYC, beyond the scope of the Phase 2 Proposal. As discussed below, the Commission should reject decisively arguments that the utilities should be allowed to own LSRs to avoid inhibiting private developers from making substantial investments in new LSRs to serve New York consumers.

I. The Commission Should Continue to Uphold its Long-Standing Policy Generally Prohibiting Utilities from Owning Generation

The Phase 2 Proposal recommends reducing the annual Load Serving Entity ("LSE") Tier 1 Renewable Energy Credit ("REC") obligations for 2018 through 2021 below the LSE obligations that the Commission established in its CES Order.[7] The Phase 2 Proposal explains that the proposed reductions do not affect the procurement targets established in the CES Order or the overall Renewable Energy Standard ("RES") 50% by 2030 goal.[8] Rather, the revised LSE obligations reflect that the preponderance of the early-term RES procurement goals will be met with non-Tier 1 eligible solar PV projects installed through the NYSun program.[9] In addition, there is a three-year lag between the date that Tier 1 RECs are procured in each annual NYSERDA solicitation and the time these RECs become available to meet an LSE Tier 1 REC obligation.[10] Thus, as the first Tier 1 REC solicitation under the CES was issued in 2017, these RECs are not likely to be available to meet LSE procurement obligations until 2020. The Phase

[6] Case 15-E-0302, *supra*, Order Adopting a Clean Energy Standard (Aug. 1, 2016) ("CES Order").

[7] Phase 2 Proposal at 5.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 4.

2 Proposal also proposes criteria for an annual divergence test that would trigger an interim review by the Commission if the supply and demand of Tier 1 RECs "are on diverging paths unlikely to self-correct."[11]

While the Joint Utilities state that the Phase 2 Proposal's adjustment of near-term LSE obligations is "prudent" and support the proposed annual divergence test as a mechanism for addressing any shortfalls in the availability of Tier 1 RECs to meet LSE obligations, the Joint Utilities raise the unfounded concern that shortfalls will occur, which will threaten the ability to meet the RES goal, unless utilities are allowed to own LSRs.[12] The Joint Utilities suggest that they are best able to address any shortfalls in Tier 1 RECs through utility ownership of LSRs "as part of a portfolio approach to new resource procurement that will benefit customers by allowing more resources to be built for the same customer dollars and reducing the long-run costs of the program."[13] In other words, should private developers fail to build new LSRs that provide sufficient Tier 1 RECs to meet the LSE obligations, utilities can come to the rescue if allowed to own and rate-base new LSR projects. The Joint Utilities repeat the argument that they made in their comments in the CES proceeding that utility ownership of LSRs provides savings to customers because utilities have lower financing costs and they will be able to retain the LSRs for the benefit of customers for their entire lifecycle.[14]

NYC posits that the issue of whether utilities should be allowed to own renewable resource remains "unsettled."[15] While NYC concedes that the issue of utility ownership of LSRs

[11] *Id.* at 7.

[12] JU Comments at 3.

[13] *Id.* at 2.

[14] *Id*. at 4.

[15] NYC Comments at 2.

is beyond the scope of the instant proceeding, NYC, nevertheless, advocates in its comments for utility ownership for the same reasons argued by the Joint Utilities.[16] NYC argues that utilities have "inherent advantages" over private developers because they can pass on costs to captive ratepayers.[17] NYC further argues that, if the Commission approves utility ownership of LSR, the Commission should impose higher LSE obligations on utilities than on non-utility LSEs because utilities can build LSRs "more quickly and at less cost" than private developers.[18]

As IPPNY has repeatedly demonstrated in the CES and the Reforming the Energy Vision proceedings, allowing utility ownership of generation is contrary to the Commission's long-standing pro-competition policies implemented over the past twenty years because (i) private investors have a greater incentive to lower costs than utilities under cost of service regulation, (ii) private investors and their shareholders should bear the risks of generation ownership, and (iii) transmission and distribution should be separated from generation to eliminate the potential that utilities that own generation could exercise vertical market power to the detriment of wholesale competitive electricity markets and consumers.[19] In its recommendation to the Commission in the CES proceeding on this matter, Staff agreed with IPPNY, stating "that there was no basis to deviate from the policy direction adopted in the REV Framework Order that generally prohibits utility ownership of generation resources."[20]

In the REV Framework Order, the Commission ruled that the risk of utility ownership of distributed energy resources undermining markets was greater than the potential benefit of utility

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[16] *Id*.

[17] *Id.* at 2-3.

[18] *Id*. at 3.

[19] Case 15-E-0302, *supra*, Comments of IPPNY (Aug. 12, 2015); Case 15-E-0302, *supra,* Reply Comments of IPPNY (Sep. 14, 2015); Case 15-E-0302, *supra*, Comments of IPPNY (Apr. 22, 2016); Case 15-E-0302, *supra*, Reply Comments of IPPNY (May 13, 2016).

[20] CES Order at 42.

ownership to accelerate market growth.[21] The Commission concluded that utility ownership was contrary to REV's basic tenet that competitive markets and risk-based capital should be relied on to finance development, as opposed to ratepayer funding, and that potential utility ownership would chill private investment due to the utilities' incumbent advantages. The Commission stated that "[m]arkets will thrive best where there is both the perception and the reality of a level playing field, and that is best accomplished by restricting the ability of utilities to participate."[22]

Contrary to the Joint Utilities' and NYC's arguments, the Commission very much settled the matter of whether utilities can own LSRs in its CES Order, choosing, as it did with respect to distributed energy resources in its REV Framework Order, to "rely on markets where feasible, as the best long-run approach to reducing costs and promoting innovation."[23] The Commission rejected arguments supporting utility ownership of LSRs, agreeing with IPPNY's comments and Staff's recommendation that "utility owned generation… has the potential to inhibit entry by other market participants, which can result in less competition and higher costs in the long-run."[24] As NYC recognizes in its comments, utilities may have lower financing costs than private developers because utility revenue requirements are largely guaranteed by the Commission, and the Commission allows utilities to recover cost overruns of projects so long as they are prudently incurred. NYC completely ignores, however, that if utilities can develop or acquire an interest in cost-of-service, rate-regulated LSR, ratepayers ultimately will be put back in the position of being at risk of shouldering the cost overruns of such projects. NYC's request that the Commission impose a higher LSE obligation on utilities than non-utility LSEs, if

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[21] 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) at 67 ("REV Framework Order").

[22] *Id.*

[23] CES Order at 102.

[24] *Id.* at 100.

granted, will tilt the playing field heavily in favor of utility ownership, meaning more cost overruns, less competition, and ultimately higher costs to consumers. As NYC's and the Joint Utilities' arguments were considered and rejected by the Commission in its CES Order, they are an improper collateral attack of the order and must be rejected.

Further, the Joint Utilities' should not be permitted to raise their arguments here because of their claimed threat that RES goals may not be met without utility ownership. The Joint Utilities' argument that utility ownership is effective in meeting the RES goals because the outcomes of the CES program "are unknown and more certainty is needed" implies that the private market will fail to meet the RES goals. It is not sufficient to claim "market failure," however, without demonstrating that private developers were given a clear and defined opportunity to meet the need for generation. Allowing utilities to own LSRs if the private market does not develop sufficient LSRs to meet the LSE obligations would give the utilities a perverse incentive to limit development of LSRs by private developers in New York by, for example, obstructing in-State development through uneven administration of interconnection studies, contract negotiations, or otherwise so that the Commission will be more inclined to declare a market failure and turn to the utilities to develop and own LSRs in New York.

Therefore, when examining any potential future REC procurement shortfalls as part of the annual divergence test, the Commission should not consider utility owned generation without first conducting a close inspection of the REC solicitation and related market design to understand why competitive entities did not respond. The Commission should also consider the status of interconnection requests at the New York Independent System Operator and applications under Article 10 of the Public Service Law to ensure that the proposed Phase 2

Proposal LSE obligations are realistic considering the time it may take for applicants to complete these processes.

For the foregoing reasons, the Commission should reject the Joint Utilities' and NYC's arguments supporting utility ownership of LSRs.

Respectfully submitted,

READ AND LANIADO, LLP
25 Eagle Street
Albany, New York 12207
(518) 465-9313 (tel)
(518) 465-9315 (fax)

Attorneys for
Independent Power Producers
of New York, Inc.

By: *David B. Johnson*
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