06-M-1017
OH ADR
OGC
A+F
ORE
OE+E
OCS
OEDC
ORMD
Comment

LibertyPower
www.libertypowercorp.com

800 West Cypress Creek Rd., Suite 330
Fort Lauderdale, FL 33309
(866) POWER-99
(866) 769-3799

Honorable Jaclyn A. Brilling, Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

June 4, 2007

Dear Secretary Brilling:

Please accept the enclosed comments of Liberty Power Corp. in NY PSC CASE 06-M-1017 – Proceeding on Motion of the Commission as to the Policies, Practices and Procedures For Utility Commodity Supply Service to Residential and Small Commercial and Industrial Customers.

Liberty Power is submitting one original version of these comments, as well as ten (10) copies. Additionally, copies have been served on all parties to this case listed in the June 1, 2007 Active Party List.

Please do not hesitate to contact me with any additional questions regarding the enclosed. I can be reached directly by phone at 954-598-7032, or via e-mail at nreyneri@libertypowercorp.com.

Respectfully yours,

Nelson Reyneri

Nelson Reyneri
Vice President
Governmental Affairs & Corporate Communications
Liberty Power Corporation
800 W. Cypress Creek Road, Ste. 410
Fort Lauderdale, FL 33309
Direct Tel: 954-598-7032
e-mail: nreyneri@libertypowercorp.com
Main Tel: 954-771-1463
Fax: 954-771-6644

w/enclosures

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

NY PSC CASE 06-M-1017 - Proceeding on Motion of the Commission as to the Policies, Practices and Procedures For Utility Commodity Supply Service to Residential and Small Commercial and Industrial Customers.

INITIAL COMMENTS OF LIBERTY POWER

I. Introduction

Liberty Power ("Liberty") submits these comments in response to the Commission's April 19 *"Order Requiring Development of Utility-Specific Guidelines for Electric Commodity Supply Portfolios and Instituting a Phase II to Address Longer Term Issues"* in Case 06-M-1017 ("Order"). In addition to its own comments, Liberty joins the comments of the Retail Energy Supply Association ("RESA") and the Small Customer Marketer Coalition ("SCMC") submitted in Phase II of this proceeding.

Liberty has been supplying electricity in New York since 2002 and serves more than 20,000 business and residential customers[1] -- mostly in New York City. Liberty's business customers have more than 250,000

---

[1] Liberty Power operates four Commission-licensed electric Energy Service Companies ("ESCOs") in New York (Liberty Power Corp, Liberty Power New York, Liberty Power Holdings and Liberty Power Delaware).

employees and provide goods and services to more than 2 million New Yorkers.[2]

II. Preliminary Statement

In the Order, the Commission opened a review of the issues surrounding the use of long-term contracts by utilities as well as other measures to facilitate the entry of new capacity into New York. Among other things, the Commission noted that it "appears that merchant wholesale market participants in New York City have been unwilling or unable to invest in needed new infrastructure, despite the fact that New York City's wholesale electric market prices are some of the highest in the country."[3]

First, Liberty believes the Commission's desire to consider allowing utilities to enter into long-term contracts as a means to develop new infrastructure is well-intended. However, although the Commission noted in its order that it "appears that merchant wholesale market participants in New York City have been *unwilling or unable*

---

[2] **Liberty internal estimates.**

[3] Case 06-M-1017 – Proceeding on Motion of the Commission as to the Policies, Practices and Procedures For Utility Commodity Supply Service to Residential and Small Commercial and Industrial Customers, *Order Requiring Development of Utility-Specific Guidelines for Electric Commodity Supply Portfolios and Instituting a Phase II to Address Longer Term Issues,* (issued April 19, 2007) at p. 30.

[emphasis added] to invest in needed new infrastructure,"[4] the thrust of the Commission's questions in the Order presumes that these market participants have been "unwilling" to make investments in needed capacity.

In making the presumption that non-utility market participants have been "unwilling" to invest in needed capacity, the Commission asks whether utilities should be allowed to enter into long-term contracts for *existing* or *new* capacity -- a practice that transfers risks from investors to customers.

However, New York's capacity challenge cannot be solved by allowing utilities to enter into long-term contracts. Rather, the true barrier to new capacity in New York is the lack of a comprehensive siting law -- not a lack of will by market participants to invest.

Currently, investors willing to deploy significant amounts of capital in new power plants consider doing so a risky proposition due to the absence of a comprehensive and streamlined siting process for new generation. It is hard to see how any rational investment bank, power marketer, or ESCO would enter into a long-term contract to finance a new

[4] Ibid.

power plant that has little hope of getting sited and built.

Liberty stands in support of the Commission's, the Administration's, and the Legislature's goal of affordable, reliable and sustainable power and is prepared[5] to build new capacity in New York to meet projected capacity needs.

In fact, Liberty has been planning to build new generation for two years but has been unable to proceed due to the lack of a comprehensive siting process.

Governor Eliot Spitzer has recognized that "streamlined siting is vital."[6] Liberty shares the Governor's concern and is eager for state lawmakers to resolve siting hurdles so it can build new capacity to support its customer base. Once the existing siting hurdles have been cleared, Liberty intends to build power generation that meets the needs of New Yorkers.

History has shown the results of having a comprehensive siting law in place. Since 1999 when New York opened its competitive electric market, 4,200 MW of

---

[5] Over the last five years, Liberty has grown to possess the financial means, technical expertise and customer base to support investments in generation. Liberty has existing relationships with three of the five largest banks in the world that would allow it to finance the project.

[6] Speech of Governor Eliot Spitzer, *"15 by 15" A Clean Energy Strategy for New York*, April 19, 2007.

new capacity has been built[7], with nearly all of those additions created before the Article X siting law expired in 2003.

Once streamlined siting procedures with timelines that are more predictable are put in place, non-utility parties will sign long-term contracts to facilitate the financing of new generation. As seen in other mature markets that have streamlined siting procedures with more predictable timelines, such as ERCOT, natural buyers of wholesale power are eager to procure affordable and clean power for long durations to sell in wholesale markets or serve their customer base

Removing siting hurdles to new generation is the best and fastest way to ensure the best interests of customers and that new capacity is built to meet the projected needs of New York.

It would be unfair to New Yorkers to decide on an approach to building new infrastructure until New York solves its siting problem. Once siting problems are addressed, market solutions to New York's capacity needs will appear and will make any discussion of the need for long term utility contracting moot.

---

[7] New York State Department of Public Service, *Staff Report on the State of Competitive Energy Markets,*

Second, allowing utilities to enter into long-term contracts would harm competition.

In its Statement of Policy on Further Steps Toward Competition in Retail Energy Markets ("Policy Statement") in 2004, the Commission stated: "The benefits of competition, including increased customer choice, should be available to all customers as soon as possible."[8] Liberty agrees with this finding.

Liberty also shares the concern the Commission expressed in the same Policy Statement: "requiring utilities to enter into ongoing, long-term, full-service contracts for its existing commodity customers may be inconsistent with the movement toward a fully competitive marketplace."[9] The Commission should reference this finding as it considers what is in the best interest of New Yorkers.

Allowing utilities to enter into long-term contracts for existing or new capacity raises concerns because of the natural, unfair advantages held by utilities. Guaranteed

---

March 2, 2006, at p. 14.

[8] Case 00-M-0504 – Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, *Statement of Policy on Further Steps Toward Competition in Retail Energy Markets,* (issued August 25, 2004) at p. 4.

[9] Id., at p. 33.

delivery revenues and a captive customer base allow utilities to benefit from superior credit ratings. This unfair credit advantage gives them a leg up when entering into long-term contracts and gives utilities an advantage in locking-up the cheapest generation resources such as base load units.

With utilities having the ability to lock up the cheapest generation, ESCOs must purchase power from producers that are higher cost on the supply stack, which in turn makes it difficult for ESCOs to compete. In the long-term, utility contracting would raise retail prices because ESCOs would be forced to exit the market, thereby removing the downward pressure that ESCOs exert on consumer prices.

Ultimately, retail prices would rise unabated, as competitors would not be present to offer more affordable alternatives to utility prices. In sum, long-term utility contracting would erode competition, and contradict the Commission's goal of allowing market forces to ensure "the provision of safe and reliable energy at just and reasonable rates."[10]

---

[10] Id., at p. 2.

Today, in response to customer needs, ESCOs give New Yorkers the ability to: purchase power under varying terms; select fixed or variable rates; and include a green component to their power mix. However, if utilities were allowed to enter into long-term contracts, the utilities' market advantage would force ESCOs out of the market, and New Yorkers would be denied access to the choices, the benefits of innovation and the tailored products that result from competition.

Third, and most importantly, allowing utilities to enter into long-term contracts would shift economic risks from the shareholders of power producers to utility customers, and would burden customers with uneconomic contracts and the resulting stranded costs. This result would go against the public interest and the provision of just and reasonable rates.

In its Order, the Commission suggests that allowing utilities to enter into long-term contracts, "could reduce the risk of financing new infrastructure."[11] But reducing the financing risk for power producers would transfer these very risks to customers. **Financing risks should be borne**

---

[11] Case 06-M-1017 – *Order Requiring Development of Utility-Specific Guidelines for Electric Commodity Supply Portfolios and Instituting a Phase II to Address Longer Term Issues,* (issued April 19, 2007) at p. 34.

by the shareholders of power producers and not by New Yorkers.

In any competitive marketplace, risks are borne by those who have an expertise in quantifying those risks, and who stand to profit from taking on those risks. The expertise in predicting future supply and demand dynamics, the obsolescence of power generation technology, and other long-term risks lies with power producers who stand to profit from taking these risks -- not New Yorkers.

Because utilities are generally not allowed to enter into long-term contracts, New Yorkers are presently shielded from out-of-money contracts and stranded costs. Long-term utility contracting burdens customers with the risk that market prices may decrease and customer migration may increase. The resulting stranded costs would have to be paid by someone, and presumably it would be the customer. By forcing customers to absorb these stranded costs, allowing utilities to enter into long-term contracts for *existing* or *new* capacity would prevent customers from capitalizing on savings when prices fall.

New York's decision to protect customers from such stranded costs and inefficient risk allocation has saved customers money. The state's competitive market lowered average residential prices 16% from 1996 through 2004, in real dollar terms. Real prices paid by the typical commercial customers fell 18% while real prices for the average industrial customer fell 15%[12] because of the efficient risk allocation found in competitive markets that don't allow regulated utilities to enter into long-term contracts.

Allowing or requiring utilities to enter into long-term contracts exposes customers to the risk of paying more for power than they would otherwise pay in the competitive market. It also burdens customers with the risk of massively higher bills while not even addressing the top barrier to the construction of new generation in New York: siting.

In summary, New York needs a comprehensive siting law—not long-term contracting by utilities. Long-term utility contracting would harm retail electric competition and burden customers with future uneconomic contracts and resulting stranded costs.

[12] *Staff Report on the State of Competitive Energy Markets*, March 2, 2006, at p. 8.

By relying on market competitors to procure long-term supply, New Yorkers have been freed from billions of dollars in stranded costs or uneconomic contracts. Retreating to an approach where utilities are financing new supply by shifting economic risks to customers would return New York to a 20th-century model where the customer is captive to the choices made by a utility. Under this old model, customers would be exposed to and expected to pay for unwise or uneconomic decisions. That outdated approach would lead to unjust and unreasonable rates that would be needlessly higher than market prices.

Dismantling New York's model competitive market that efficiently allocates economic risks, and replacing it with long-term utility contracts as a solution to the lack of new infrastructure, will neither assure New Yorkers that needed projects would get built nor guarantee just and reasonable rates. Projects would still face the same siting barriers that exist today, but New Yorkers would have to pay for siting and construction risks -- and for the wrong projects.

III. Responses to Questions From the Commission's Order

1. Should there be a statewide integrated resource planning process to examine long term electricity resource needs? To what extent or in what manner would a statewide integrated resource planning process build on or parallel existing reliability planning processes? What time frame should be examined in such a process and what issues should be considered? What is the role of the utilities and other interested parties in the process? How should the process differ from any previous integrated resource planning processes? What processes should be adopted, if any, to ensure that resource portfolios at the utility and statewide level, satisfy overall planning objectives and public policy considerations? How should immediate concerns and long range considerations be addressed?

New York should not use a statewide integrated resource planning process to examine long-term electricity resource needs. The Commission has asked an important question -- whether there is a need for a rational and comprehensive decision-making approach to guide the future of New York electricity infrastructure. It is critical to understand that a "rational and comprehensive decision-making approach"[13] is not best achieved through a command and control model such as integrated resource planning. Most economists would agree that the best and most rational decisions are made by parties that bear the risks of those decisions, and New York's current reliance on market competitors to make decisions and bear the risks regarding new supply infrastructure that accomplishes this goal.

The Commission stated, "while competition can be more effective than regulation, competitive markets may not automatically yield results that would further the public policy needs of the state regarding electric supply infrastructure."[14] New York's ineffective siting process is the primary reason that competitive markets have not automatically yielded new capacity.

In fact, competitive markets responded to New York's capacity needs when there was an effective siting process in place, as non-utility investors built new infrastructure. Since the start of the New York ISO's wholesale market in 1999, competitors have built 4,200 MW of new generation,[15] enough to power about 4 million homes. In other words, competitive markets combined with a workable siting law -- not integrated resource planning -- yielded almost 10 times what the New York ISO predicts is needed for New York City by 2011.[16]

---

[13] Public Service Commission press release, *PSC Requires Development of Hedging Guidelines for Utilities*, April 18, 2007, at p. 3.

[14] Id., at p. 3.

[15] *Staff Report on the State of Competitive Energy Markets*, March 2, 2006, at p. 14.

[16] New York Independent System Operator, *Comprehensive Reliability Planning Process 2007 Reliability Needs Assessment*, March 16, 2007, at p. 14 (Zone J).

Astoria's Queens repowering project is another example that siting is the true hurdle for the construction of new power projects -- not the lack of integrated resource planning nor utility long-term contracts. In this case, a 1,200 MW expansion is being underwritten by a company that is not affiliated with a utility, illustrating that new competitors are eager to sign long-term contracts with new capacity when construction can actually proceed. This expansion represents twice New York City's projected 2011[17] needs and more than 10% of New York City's peak demand.[18]

In Texas, where siting hurdles have been reduced, the results are clear. Developers have requested permission to build 78,000 MW of new generation[19] -- without the need for long-term contracts signed by regulated utilities or integrated resource planning. Additionally, developers of 4,571 MW of new capacity have made a firm commitment with ERCOT to built projects by completing and signing interconnection agreements.[20] In this same way, non-utility competitors including Liberty Power will help build new

---

[17] Id.

[18] Id., at p. 8.

[19] ERCOT System Planning Division, *Monthly Status Report to Technical Advisory Committee, Reliability and Operations Subcommittee for March 2007*, p. 1.

[20] ERCOT Quick Facts, May 2007, Available at

power plants in New York once siting barriers are removed.

New York must not return to an economically risky and outdated model for deciding its future energy infrastructure needs. Integrated resource planning amounts to having policymakers guessing on the future needs of New Yorkers, and that is too large of a risk to place on customers. Just and reasonable rates cannot be obtained by using utilities' or policymakers' best guesses on the future impacts of:

- Load growth
- Energy efficiency and demand-side management
- Fuel costs
- Greenhouse gas and other environmental regulations
- Construction costs
- Economic growth
- Weather patterns
- Global energy demand
- Local political and social conditions

New York's current industry structure, which relies on market signals to drive new infrastructure investment, protects New Yorkers from paying unjust rates that result from building the wrong kind of infrastructure in the wrong

---

http://www.ercot.com/news/presentations/2007/ERCOT%20Quick%20Facts%205-21-07.pdf location at the wrong time. These risks are most efficiently borne by those who stand to gain the most from the investment decisions, and for this reason, shareholders of generation developers, financers and operators should assume these risks instead of customers.

Long Islanders will remember the painful experience of the Shoreham Nuclear plant, a product of utility planning and decision making. Building the nuclear plant seemed like a good idea in the 1970s when it was commonly believed among industry professionals that nuclear power would be "too cheap to meter," but a changing climate and rising costs meant the plant was built but never delivered a single electron to customers. Meanwhile, customers paid nearly $6 billion to build and decommission the plant without it ever commercially operating.

The Shoreham experience shows that even coordinated utility planning can get it wrong, and does not guarantee just and reasonable rates. The problem is, under utility planning, customers bear the brunt of poor decisions or even honest forecasting mistakes, and are powerless to avoid these costs.

This $6 billion hit to customers' wallets was the result of resource planning where the utility decides what kind of plant to build, and similar to long-term utility contracting, returning to integrated resource planning would expose customers to similar costs.

Compare the $6 billion Shoreham experience with the rush to build gas-fired generation in the late 1990s. Critics of competition point to the build-out of gas generation during the 1990s as a sign that market forces will not produce the right kind of fuel mix or long-term planning. But when gas prices rose, and gas-fired plants became uneconomic, it was shareholders of independent power producers -- not customers -- who had to absorb the costs. Unlike the Shoreham experience, customers were protected from having to cover the costs of poorly planned generation. Competition -- and the general lack of rate-based utility contracts -- protected customers and ensured that they paid just and reasonable rates.

2. Should major regulated electric utilities be required or encouraged to enter into long-term contracts, with existing generators, proposed generators, and other entities, that facilitate the construction of new generation, the development of additional energy efficiency, the development of additional renewable generation resources, the re-powering of existing generation, or the relief of transmission congestion? Should such contracts be entered into for the purposes of improving

fuel diversity, mitigating market power, or furthering environmental policies?

Regulated electric utilities should not be allowed to enter into long-term contracts for existing or new capacity and/or energy because it would not ensure the provision of safe and reliable energy at just and reasonable rates. Allowing or requiring utilities to enter into such contracts would expose customers to higher risks and distort New York's competitive markets, ultimately weakening competitive pricing and driving up prices for consumers.

First, if new long-term utility contracts were rate-based, customers would be exposed to billions of dollars in new risks if utility decisions turn out to be unwise or uneconomic, as was the case in the past. For the last decade, New York regulators and policymakers have agreed that just and reasonable rates were most efficiently assured through competition, and acted to free customers from these risks by ending the use of long-term contracts for which consumers are the backstop for new investment risks. New York should not return to an outdated system that unjustly shifts these risks to customers.

New Yorkers already endured the burden of huge stranded costs during the transition to full retail competition, and allowing or requiring long-term utility contracting would simply renew New Yorkers' pain with those costs. Customers could be forced to bear price and migration risks under long-term utility contracting, depriving them of access to the lowest-cost power.

Secondly, long-term utility contracting could jeopardize the freedom that millions of New Yorkers now enjoy in being able to switch to the most affordable electric supplier. If utilities are guaranteed cost recovery for contracts -- even where uneconomic -- any potential change in the utility's customer base would raise problems concerning cost allocation, cost recovery, and thereby the justness and reasonableness of retail rates.

For example, upon a long-term contract becoming uneconomic due to declining market prices, rational utility customers would leave the utility in search of alternate, cheaper suppliers. This migration could harm remaining customers because they would be expected to pay a bigger share of the uneconomic contract costs to cover the utility's purchase costs.

The only way for remaining customers not to pay these higher costs would be to limit or burden customers that migrate. The Commission could then be forced to impose a burdensome exit fee on migrating customers -- a penalty which would defeat the purpose of shopping and competitive pricing and would thereby deprive customers of falling prices in the marketplace.

Alternatively, the Commission could be forced to impose burdensome shopping windows on migration, allowing customers to shop only in designated periods so the utility has a chance to recover its contract costs. Such a policy would deprive customers of the benefits of lower prices and simply force customers to pay more for power than they actually need to pay. This approach, which creates unjust and unreasonable rates, is not a policy that benefits New Yorkers.

Third, as the Commission noted in its Order, long-term utility contracts "provide the opportunity for utilities to undertake anticompetitive activities to disadvantage ESCOs."[21]

Allowing regulated electric utilities to enter into long-term contracts under a rate-base would create what economists refer to as a "moral hazard". With guaranteed cost recovery at their disposal, utilities could sign deals

[21] Case 06-M-1017 – ***Order Requiring Development of Utility-Specific Guidelines for Electric Commodity Supply Portfolios and Instituting a Phase II to Address Longer Term Issues,*** **(issued April 19, 2007) at p. 34.**

at price points that competitors lacking cost recovery would not rationally sign. That behavior would inflate wholesale power prices since utilities would be willing to pay an extra-market premium that rational wholesale customers lacking guaranteed cost recovery would not pay. This market distortion would prevent competitors from getting needed supplies at a fair market price. Further, the guaranteed recovery could induce utilities to over-procure power in hopes of locking up supply. These actions would deprive competitors of a level playing field to compete for low-cost supply.

3. Should Load Serving Entities other than utilities, including the New York Power Authority and the Long Island Power Authority, be required or encouraged to enter into long-term contracts as described above? What role, if any, might entities other than Load Serving Entities play in such resource procurement?

Non-utility load serving entities should not be required to enter into long-term contracts. Doing so would force a command and control, one-size-fits-all approach on one of the most dynamic retail electric markets in the nation. That practice would in turn impose a unilateral procurement strategy on all competitors and deny some competitors their competitive advantage of excelling at executing short-term arrangements.

ESCOs now sign contract lengths that are appropriate to their business models, and more importantly, customers' desires. New York's "incremental and flexible approach"[22] to restructuring the electric market has attracted over 100 ESCOs into New York.[23] The Commission's embrace of the need for ESCOs to have flexibility has allowed ESCOs to create diverse and dynamic product choices. These innovative and flexible products have prompted over 800,000 electricity customers to shop for power.[24] That model should not be changed.

4. Should resource procurement, as described in Question 1, be coordinated on a statewide basis? What regulatory oversight, if any, would be appropriate?

Resource procurement should not be coordinated on a statewide basis and should be left instead to market

---

[22] Case 00-M-0504 – Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets and Fostering Development of Retail Competitive Opportunities, *Statement of Policy on Further Steps in Retail Energy Markets,* (issued August 25, 2004) at p. 18.

[23] Case 07-M-0458 – Proceeding on Motion of the Commission to Review Policies and Practices Intended to Foster the Development of Competitive Retail Energy Markets, *Order On Review Of Retail Access Policies and Notice Soliciting Comments*, (issued April 24, 2007) at p. 4.

[24] New York Public Service Commission, March *2007 Electric Retail Access Migration Reports*, March 2007.

forces. Competitors should be left to decide individually in their strategies whether to coordinate planning statewide.

If New York did pursue integrated resource planning with a role for long-term utility contracts, regulatory oversight would be essential to ensure that utilities were not signing contracts simply to keep competitors from accessing supplies in a manner that is most efficient. As will be discussed in response to Question 6, this oversight would be a difficult, complex and inexact task that would have little practical effect in preventing abuse, principally because of the difficulty of proving utilities' intent.

5. What barriers, if any, exist that discourage long-term contracts for development of new electricity resources? What other barriers exist, if any, for the development of new electricity resources? Should incentives beyond what exist today be created to encourage entry into long-term contracts generally, or to foster the development of any particular type of resource? How could those incentives be structured consistent with the goal of acquiring the most cost-effective resources?

As discussed in the answer to Question 1, siting is *the* principal barrier to long-term contracting and the development of new electricity infrastructure. A rational competitor will not sign a long-term contract with a project that does not have a realistic chance of being built due to siting problems.

Aside from the siting issue, no other major barriers exist to long-term contracting as it presently stands. ESCOs and other non-utility competitors have the financial wherewithal and ability to enter into long-term contracts. They simply have not done so recently because New York does not have a siting law. Accordingly, New York should not adopt market-distorting incentives to encourage long-term contracts, but should instead remove siting barriers.

6. Should constraints be imposed that would, under certain circumstances, restrict the resource types eligible for long-term contracts, limit the length of contract terms or establish the content of other contract conditions? What steps should be taken to limit any anti-competitive impacts long-term contracts might create?

Policing long-term utility contracting would be a daunting task for the Commission and one that is more simply addressed by not opening the door for abuse in the first place. The Commission should remain faithful to its policy of prohibiting utilities from entering into long-term contracts for supply to ensure that consumers can buy power in a fair and competitive marketplace.

Otherwise, the Commission would be forced to make judgment calls about utilities' contracting behavior. It would be difficult to prove that certain long-term utility contracts were indeed struck to keep competitors from accessing supply. Utility decisions are traditionally "black box" in nature, and proving the intent behind a utility's behavior is nearly impossible.

This challenge can be seen most clearly in the debate over open access transmission tariffs at the Federal Energy Regulatory Commission ("FERC"). In non-organized markets, competitors have complained of abuse in the decade since FERC's landmark Order 888, which was to provide competitors with non-discriminatory access to the nation's transmission system. Although FERC twice admitted in orders that its original Order 888 left the door open to discrimination[25], competitors faced a difficult and costly fight in proving this discrimination at FERC because utilities could simply justify their actions with black box data. Because of this potential for abuse, but the inability of competitors to

[25] *Chairman Joseph T. Kelliher's Statement on Open Access Transmission Tariff (OATT) Reform*, May 18, 2006, Available at http://www.ferc.gov/press-room/statements-speeches/kelliher/2006/05-18-06-kelliher-E-1.asp.

verify abuse claims, FERC decided that reforms and more effective regulations were needed to prevent discrimination.[26] A similar dilemma would await the Commission. Allowing long-term utility contracts would open the door for abuse without the Commission having the ability to police and verify contracts.

7. Should restrictions or guidelines be imposed on the resource procurement practices employed in selecting the resources that would be acquired under the long-term contracts?

Long-term contracts should not be entered under a command and control system. Accordingly, when contracts are struck in the free market, no restrictions should be placed on them. However, if New York pursues a return to rate based contracts, restrictions would be needed to ensure competition is not harmed. Developing these restrictions and rules would be a cumbersome, inexact and risky process, and the preferable solution is to keep the current market paradigm.

8. How should long-term contract costs be recovered from customers, and should different recovery mechanisms be developed based on the type of resource that is acquired under the contract, the length of the contract, or other factors?

---

[26] Id.

Long-term contract costs should not be recovered from customers. As mentioned before, cost recovery would expose customers to new risks and also open the door for potential abuse, resulting in unjust and unreasonable retail prices. Backing a utility's long-term contracts with customers would give the utility an immediate advantage in competing for contracts as its monopoly customer base would make the utility a lower credit risk, giving the utilities lower borrowing costs while transferring the economic risks to the customers, as described in our preliminary statement.

9. What procedures should be followed in reviewing a long-term contract and in establishing its qualification for cost recovery? Under what circumstances, if any, should recovery of contract costs be pre-approved?

Cost recovery should not be allowed for long-term contracts. Customers were freed from the burden of paying for money-losing contracts by relying on market forces to procure new supply. Customers should not be returned to a model where risks are shifted onto them and away from the investors who will profit from long-term contracts.

10. Can long-term contracts (energy and/or capacity) be harmonized with existing NYISO rules for energy and capacity markets, and with potential NYISO forward capacity markets? If so, how can they best be harmonized? What changes to NYISO market rules, if any, would be necessary or appropriate for the purpose of accommodating long-term contracts? Should NYISO market rules recognize or ameliorate the impact, if any, of long-term contracting on the NYISO capacity prices paid existing generators, or, if amelioration is appropriate, should it be accomplished through non-NYISO mechanisms?

The best solution for New York is to avoid such harmonization problems by allowing competitors to meet New York's infrastructure needs. Policymakers should resist the urge to return to allowing utilities to enter long-term contracts or other command and control regulation.

"Changing [New York ISO] market rules, and the consequences such changes can sometimes bring, provide continuing risks and uncertainties for investors," the Commission noted in its Order.[27] Accordingly, radically changing New York's approach to securing new capacity by allowing or requiring utilities to sign long-term contracts would require arduous and complex changes to ISO rules which would only produce greater regulatory uncertainty for investors. This regulatory uncertainty would prevent new capacity from getting built.

11. Are there any other creative solutions that might be considered to address the issues identified herein?

Liberty has no comments at this time but reserves the right to address this question in reply comments.

IV. Conclusion

Liberty appreciates the opportunity to address the important issues raised in this proceeding and respectfully requests that the Commission adopts policies consistent with the views and recommendations requested herein to ensure customers receive just and reasonable rates and are not exposed to unnecessary risks and higher costs.

Respectfully submitted,

Liberty Power

By: ______________________
Nelson Reyneri
Vice President of
Governmental Affairs

Dated: Fort Lauderdale, Florida
June 4, 2007

---

[27] Case 06-M-1017 – *Order Requiring Development of Utility-Specific Guidelines for Electric Commodity Supply Portfolios and Instituting a Phase II to Address Longer Term Issues,* (issued April 19, 2007) at p. 31.