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September 22, 2014

By Electronic Mail

Hon. Kathleen A. Burgess
Secretary
NYS 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:

In accordance with the schedule adopted in this proceeding, enclosed for filing with the Commission please find the *Initial Comments of the Retail Energy Supply Association*, in response to the Staff Straw Proposal on Track I issues.

Thank you for your assistance in this matter.

Respectfully submitted,

Retail Energy Supply Association

By: Usher Fogel, Counsel
Usher Fogel, Counsel

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

CASE 14-M-0101

Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision.

**INITIAL COMMENTS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION**

I. PRELIMINARY STATEMENT

A. Introduction

In accordance with the *Ruling Modifying Process for Filing Comments on Track One Staff Straw Proposal*, issued on August 25, 2014, by Hon. Julia Smead Bielawski and Hon. Eleanor Stein, Administrative Law Judges (“Ruling”), the Retail Energy Supply Association (RESA)¹ submits these initial comments with respect to the *Developing The REV Market In New York: DPS Staff Straw Proposal On Track One Issues* dated August 22, 2014 (“Straw Proposal”).

B. Overview

The Commission previously advised the parties that its Vision in this proceeding centered upon use and reliance of free and fair competitive markets to meet the identified energy needs of

¹RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent only those of RESA as an organization and not necessarily the views of each particular RESA member.

consumers. The Straw Proposal, however, departs from this approach and recommends a significant expansion of the existing utility centric regulatory framework where the distribution utility rather than markets and customers will control all critical aspects of the energy infrastructure.

In these comments RESA offers the following recommendations to help steer the direction of this proceeding to achieve a market and customer oriented Vision.

- The Straw Proposal expands and solidifies the utility monopoly position with respect to DER. In its role as DSP the regulated utility should limit its activities to facilitating, promoting and operation of the DER market.
- The data required by market participants can be obtained directly from utilities without the need to establish a new data exchange, as long as the data is provided in a consistent format across utilities.
- The Commission must act to eliminate the barriers that hinder ESCOs from offering voluntary Time-of-Use rates to consumers, and that prevent them from offering DER and DR products in combination with supply offerings.
- The regulated utilities should not be authorized to own or sponsor DER.
- All DER providers participating in the DER market should be subject to the same level of regulatory oversight.
- The Commission should not direct utilities to procure supply-side large scale renewable resources or implement energy efficiency implementation plans that include utility ownership of DER and utility rate recovery.

II. RESA RESPONSE TO THE STRAW PROPOSAL

In accordance with the Ruling, these comments are organized by the section numbers found in the Straw Proposal to facilitate a systematic review by Staff. The comments reflect the numbering for each topic as identified by Staff, and in the order addressed in the Straw Proposal

A. Section I(B)

The Straw Proposal as its overarching vision adopts the structure previously enunciated by the Commission in the Order Instituting Proceeding², which entails the following approach:

The Commission's April 2014 Order Instituting Proceeding proposes a platform to transform New York's electric industry, for both regulated and non-regulated participants, with the objective of creating market-based, sustainable products and services that drive an increasingly efficient, clean, reliable, and customer-oriented industry. Under the customer-oriented regulatory reform envisioned here, a wide range of distributed energy resources will be coordinated to manage load, optimize system operations, and enable clean distributed power generation. Markets and tariffs will empower customers to optimize their energy usage and reduce electric bills, while stimulating innovation and new products that will further enhance customer opportunities.³

As further noted in the Staff Proposal:

Staff finds that the central vision of REV - increasing the use and coordination of DER through markets operated through a DSP – is achievable and offers substantial customer benefits.⁴

This vision entails reliance upon competitive markets to undergird a customer oriented industry. In this environment the goal would be to maximize the level of choice available to consumers for value-added services such as DER and other forms of similar products with the customer rather than the distribution utility the locus of decision making and center of control. However, as presented in the Straw Proposal the approach now advocated departs from one that is focused on a reliance on market forces with the customer as the loci of decision making, and

² Case 14-M-0101 – Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, *Order Instituting Proceeding* (issued April 25, 2014).

³ Straw Proposal, p. 1.

⁴ *Id.*, p. 4.

champions the substantial expansion of the existing regulatory framework where it is the distribution utility rather than markets and customers that will be the driving force.

It is proposed that the DSP function be served by the distribution utility, and this function will include market operations, grid operations, and integrated system planning.⁵ The distribution utility will also be authorized to own the DER facilities. Additionally, the distribution utilities will now integrate energy efficiency into their regular operations and take direct responsibility for the procurement of Main Tier renewables.⁶ Under this construct, the utility will control access and entry to the DER market, act as policeman of the market, compete directly with competitive DER providers and be in control of all planning.

In reality, the scope of the distribution utility footprint will be greatly expanded under the Straw Proposal to include the provision and ownership of products and services that previously were not part of the utility product line, and assume expansive powers and controls over areas that were not previously part of utility operations and are more properly contained in the province of the competitive market. The so called “new” vision rather than encouraging a greater role for competition, market forces and reliance on non-utility players, ends up being little more than a reversion to the old line utility monopoly centric model.

This failure to embrace market forces and customer choice is all the more baffling in light of Staff’s emphatic conclusion that there are a plethora of entities ready, willing and able to engage in the DER expansion program. As noted in the Staff Proposal,

Technology to support the DSP platform is achievable and to a large extent already available. The DER resources needed to support REV objectives are available in the market as evidenced by the rapid growth nationally and in New York of key technology markets and their value can be increased by the reforms proposed here by appropriately valuing the services DERs can provide. The level of interest and engagement in this proceeding as well as Staff’s assessment of the energy landscape indicate that DER

⁵ Straw Proposal, p. 5, 12

⁶ *Id.*, p. 51

providers, Energy Service Companies (ESCOs), and customers are ready in large numbers to participate in emerging DSP markets.⁷

Given these findings it is illogical to push aside market forces and instead embrace a large utility role, which will tend to restrict the growth of competition and customer choice.

This counter intuitive approach that expands and solidifies the utility monopoly position also directly conflicts with and likely undermines several other policy recommendations contained in the Straw Proposal. In connection with the principles governing market design, Staff espouses the following standards:

Fair and open competition – design “level playing field” incentives and access policies to promote fair and open competition.

Minimum barriers to entry – reduce data, physical, financial and regulatory barriers to participation.⁸

Similarly, Staff espouses the importance of encouraging broad market participation,⁹ promoting increased customer choice and opportunity,¹⁰ supporting retail markets and formulating development of new retail services,¹¹ and that customers will “realize the greatest benefits from open, animated markets in which all participants participate on a level playing field...”¹²

It is difficult to understand or even fathom how these laudable goals and policies can be achieved in a meaningful fashion within the structure outlined in the Staff Proposal. The “market” established by the Straw Proposal will allow the distribution utility imbued with monopoly power and guaranteed rate recovery to compete with wholly competitive vendors for the sale to consumers of DER products and services. By its very nature this will not constitute

⁷ *Id.*, p. 4.

⁸ Straw Proposal, P. 16.

⁹ *Id.*, p. 5.

¹⁰ *Id.*, p. 9

¹¹ *Id.* p. 13

¹² *Id.*, p. 15

fair and open competition nor can it be viewed as a level playing field. To the contrary, the market place will be tilted heavily in favor of the monopoly distribution utility to the detriment of market forces and players.

It is important to emphasize that a meaningful new and creative vision will be most effectively achieved through the adoption of policies and practices that support and do not hinder the continuing development of growth of competitive markets for products and services. Ultimately, enabling the provision of energy to become “customer centric” is dependent upon and must be supported by a robust competitive market that presents customers with meaningful competitive opportunities and choices. To this end, the Commission should avoid utility based command and control models that stifle choice, avoid picking winners and losers in the competitive marketplace, conferring subsidies, benefits, or preferences to any a particular vendor, approach, practice or product, or expanding rather than reducing the role of the distribution utility.

B. Section III (A)

Staff recommends that the “incumbent distribution utilities serve as the DSP.”¹³ In view of the importance of relying on market forces, ideally, the DSP should be operated by an independent third party, similar to the manner in which NYISO operates. However, if further analysis (which has not yet been completed) demonstrates that it is cost prohibitive or infeasible to have an independently operated DSP, it may be appropriate as a transitional approach to allow utilities operate the DSP, with safeguards in place.

Nonetheless, it would be prudent given the desire to promote a level playing field to limit the scope of the areas encompassed within the purview of the utility DSP. As currently envisioned in the Straw Proposal the utility will act as the gateway and manager of the DSP,

¹³ *Id.*, p. 18

market products in competition with DER providers and assume all planning for energy efficiency and renewables. Essentially, the utility will now control all material aspects of the DER initiative.

A more cautious approach is called for especially when the utility is being allowed to use its monopoly powers to compete directly with competitive providers. It is recommended that where the distribution utility acts as the DSP, the functions assigned to the DSP be limited to enabling the facilitation, promotion and operation of the DER market, with the emphasis placed on efficiently matching competitive vendors with interested consumers.

C. Section III (B) (1) - Customer Electricity Data

Staff acknowledges the importance of advancing data access in order to support the introduction of DER. As Staff correctly observes, access to system and customer data, “is a prerequisite to successful DER provider development of innovative products and services.”¹⁴ To meet this need, Staff proposes for consideration the use of a “bi-directional electricity data information exchange from data acquisition assets such as meters and DER assets installed on both sides of the meter.” The purpose of this data exchange “is to enhance distribution system monitoring and control, reveal opportunities for near term DER products and services tied directly to customer data, and to support the development of innovative DER products and services to be traded on the DSP market.”¹⁵

Staff initially proposes that the following customer electricity data be made available on an “opt-out basis” to registered DER providers through the exchange:

- The customer’s total electricity usage for the previous 12 months;
- Monthly customer electricity consumption;
- Indicator of whether electricity commodity service is provided by an ESCO or the utility;

¹⁴ *Id.*, p. 24.

¹⁵ *Id.*

- Service classification according to the utility tariff;
Installed Capacity (ICAP) tag, which indicates the customer’s peak electricity demand;
- The number of meters associated with the customer;
- Account information that clearly identifies the customer service to a mapped distribution feeder or other distribution system identifier;
- Additional market information relevant to energy use collected by the utility or authorized third party, such as census data, weather, energy audit data, or other; and
- Other data needs as identified by the Commission.¹⁶

Market participants seeking data from the exchange would be subject to registration requirements to be subsequently developed by the Commission. Staff further notes that customer – specific usage that is more granular than total monthly usage may reveal information that the customer expects to be private and therefore should only be shared with the exchange on an opt-in basis from the customer.¹⁷

The importance of timely access to customer data cannot be overstated, and therefore Staff is correct to emphasize the importance of this matter in the Straw Proposal. There are, however, a number of concerns associated with the proposal to set up a new stand-alone data exchange.

There is an overriding need to obtain critical customer electricity data in an expeditious, timely and standardized format. Thus, the Commission in concert with interested parties must establish a standardized listing of specific data elements that can be provided to the DER provider on a regular basis without delay or argumentation. This calls for standardization of access to the data and provision thereof to the DER provider quickly and without delay.

It is unclear whether it is necessary to establish a new additional bureaucratic organization like an exchange to achieve this goal. All of this data is within or can become within the possession of the local utility, an entity with whom the DER provider and existing ESCOs will continue to have an interactive relationship. Therefore it may be more efficient to simply establish a standard list of data elements and a standard method by which these data elements will be provided by the utility to

¹⁶ *Id.*

¹⁷ *Id.*, p. 24, FN 22.

the requesting DER provider quickly and efficiently. This can be done without setting up an entirely new structure.

To set up a new organization acting as a data exchange will take time, resources and interpose an additional layer of bureaucracy in the data dissemination process. History has shown that this can lead to delay, errors and higher costs.

The view expressed by Staff that “more granular” customer data should only be shared “with the affirmative consent of the customer” is premature and ill-advised.¹⁸ It is exactly this type of granular data (which Staff apparently defines to include usage information beyond total monthly usage) that may be most critical for a customer investigating DER options. In this context, for example, the customer’s time of use is of extreme importance, as many DER measures are designed to reduce the customer’s peak usage levels within the month. In reality the time and level of use of use may be as if not more important than data reflecting total monthly usage. Thus, it should be made available on the same opt-out basis.¹⁹

It is also at this time premature to limit the exact data elements that would be subject to opt-out or opt-in treatment. Instead, the Commission in consultation with the parties should develop a list of important customer data elements that are needed to successfully buttress the DER program and all of these elements would be subject to opt-out treatment.

Finally, the net-metering tariffs continue to be growing impediment to ESCO supply options in support of behind the meter generation because they force the value of the net metering credits through the utility’s supply obligation, even if the customer is supplied by an ESCO. This prevents ESCOs from combining innovative DER/commodity product bundles since it removes the economic value of the DER from the equation.

¹⁸ *Id.*

¹⁹ It is also difficult to comprehend why a customer would attach a greater expectation of privacy to time of use data than to total monthly usage data.

ESCOs are willing and able to offer various “value added” products to our traditional supply offerings, be they time dependent pricing, demand response, DER, etc., but we need the utilities to provide us with the proper metering and settlement data in order to pass along the ‘value’ to the customer.

D. Section III (B) (2) – Time of Use (“TOU”) Rates.

Staff recognizes that TOU rates are beneficial in encouraging customers to reduce electricity usage during peak periods through cost signals that appropriately reflect the higher cost of usage during peak periods versus usage during non-peak periods.²⁰ It notes that that in New York most high-volume commercial and industrial customers are subject to mandatory time-of-use pricing, and all customers have the option to choose TOU pricing; however broader acceptance of optional TOU pricing has been very limited.²¹ Staff recommends that “Utilities should revisit their time-of-use rates for mass market customers seeking to develop and provide easy-to-understand interval rates and tools for customers to easily determine the benefits of those rate designs for their individual needs.”²² This aspect of the Straw Proposal is inadequate and fails to address an important directive made by the Commission in the most recent Con Edison electric rate proceeding.²³

The Straw Proposal focuses entirely upon what actions must be taken by the utilities to further the use of TOU pricing. The focus is once again placed only upon what the monopoly utility must do and the associated remedial actions that may be required. Staff overlooks entirely the critical issue of what is required in order to enable market forces and entities such as ESCOs

²⁰ *Id.*, p. 28

²¹ *Id.*

²² *Id.*

²³ Case 13-E-0030, et. seq. - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc., *Order Approving Electric, Gas and Steam Rate Plans in Accord with Joint Proposal* (issued February 21, 2014) (“Con Edison Order”).

to offer TOU rate options to consumers. The Staff silence on this issue is all the more deafening given that the vision adopted in this proceeding seeks to encourage market participation by promoting increased customer choice and opportunity, and supporting retail markets.²⁴ It defies logic to rhetorically espouse support for strong market choice and then ignore addressing the policies and actions that are required in order to allow market players to offer TOU services on an even playing field.

The silence on this important issue is all the more disconcerting as Staff and the Commission were previously advised in the recent Con Edison electric rate proceeding (Case 13-E-0030) that serious obstacles exist to ESCO's ability to offer optional or voluntary TOU products and services.

ESCOs actively seek and desire to offer all consumers the opportunity to obtain value-added products and services associated with the application of time of use pricing, demand response products, DER products and the like, all of which depend upon receiving the proper usage data in a timely fashion from the utilities. ESCOs are especially skilled and knowledgeable in this area and can significantly aid the Commission in spreading TOU pricing options and for residential customers. Nonetheless, there exist solidified substantial and overpowering competitive barriers that effectively preclude ESCOs from offering VTOU²⁵ service products to consumers in the service territory of Con Edison and potentially other service territories.

The potential expansion of VTOU rates engenders significant competitive concerns among ESCOs that participate in the Con Edison Consolidated Utility Billing System ("CUBS") program, under which the Company issues one bill for utility and ESCO charges. Although

²⁴ *Id.*, p. 5, 9 and 15

²⁵ VTOU stands for Voluntary Time of Use pricing.

ESCOs may provide time-dependent (TOU) supply products in the Con Edison service territory to larger customers under a dual-bill arrangement, (for residential customers where a single bill is vital,²⁶ they cannot offer TOU products due to the operational limitations that Con Edison places on ESCOs utilizing this billing program. This creates problems not just for residential customers but also for non-residential customers behind Con Edison.

In addition, it is noteworthy that in other service territories, ESCOs are able to offer TOU products more readily (at least to larger C&I customers who have interval meters), but ESCOs struggle to offer effective time dependent products and services to larger C&I customers as effectively in the Con Edison service territory because of Con Edison's redundant socket/shadow meter reading and other billing issues.

The CUBS program utilizes a Rate Ready system which requires the ESCO to provide the applicable rate to be charged to the customer for the entire preceding billing cycle a number of days *prior* to the end of the billing cycle. This prevents the ESCO from knowing how much and when the customer used energy during the entire billing period. Therefore, the ESCO does not know the total actual volume or time periods of usage during the billing cycle, including the time of use, prior to being required to provide the billing rate under the present Con Edison operational rules.

This places the ESCO at a distinct and overpowering competitive disadvantage to Con Edison especially with respect to the provision of TOU based commodity service. Essentially, Con Edison can offer and bill customers for TOU service as it will know the customer's entire time differentiated usage for the billing period *prior* to issuing the bill. In contrast, an ESCO offering a TOU supply price (and wanting to utilize the consolidated utility billing service) will

²⁶ It is our understanding that virtually all residential retail access customers participate in CUBS. It is well accepted that consolidated billing is the most cost-effective means to bill small customers.

not be in the same position and, in fact, will not know the total billing period time differentiated usage *prior* to being required to provide its rate under CUBS.

As a consequence, ESCOs are unable to pass through the impact of TOU based products when utilizing the present Con Edison Rate Ready billing service. In effect, ESCOs are forced to supply a rate for billing purposes without knowing how much electricity was used by the customer and the level of use that occurred during the time differentiated periods. This obviously places the ESCO in an impossible position as it is being forced to “guess” what the time differentiated billing rate should be for the billing cycle. The Commission would never allow such a billing process for full service customers. It is highly improper and anti-competitive to try and compel ESCOs to operate under a different standard.

The Straw Proposal fails to address this discriminatory pattern which was previously identified and discussed at length in the Con Edison rate proceeding.

Furthermore, the Commission in the Con Edison proceeding acknowledged the need and importance to address the un-level playing field between ESCOs and the utilities with respect to the provision of VTOU products and services, and stated that this would be subsequently addressed in amore generic fashion. As the Commission stated:

While we recognize the ESCOs' arguments that obstacles exist to ESCO participation in the retail VTOU market, we are not persuaded that these rate proceedings are the appropriate forum for their ultimate resolution or that they warrant delaying the implementation of the new VTOU program. Con Edison already has a VTOU rate in place and the issues identified by the ESCOs are neither new, nor necessarily specific to Con Edison customers. *In our view, these issues should be grappled with in a generic proceeding where we might consider a cost/benefit analysis of implementing changes to facilitate retail VTOU competition on a state-wide basis.*²⁷

²⁷ Con Edison Order, p. 60, italics added.

The Straw Proposal fails to come to grips with the Commission’s stated directive and makes no effort to develop proposals or recommendations “to facilitate retail VTOU competition on a state-wide basis.”²⁸

In view of the foregoing, the Straw Proposal should be corrected and modified to address the obstacles that hinder ESCO participation in the retail VTOU market and to facilitate meaningful retail VTOU competition throughout the State.

E. Section III (C) and Section VI (A) - DER Providers

1. Utility Ownership of DER

The Straw Proposal indicates that the authorized DER providers would include “regulated utilities” as well as ESCOs, energy management companies and other varieties of for-profit and non-profit entities.²⁹ As further elaborated by Staff, the regulated utilities would be “allowed to own DER...”³⁰ In recognition of the serious concerns regarding market power emanating from utilities owning DER, the Straw Proposal recommends that market power concerns be addressed by establishing certain guidelines that would govern such behavior.

As noted in the Straw Proposal:

For direct activities of regulated utilities:

- The following limited forms of direct utility participation in DER are permitted:
 - sponsorship and management of energy efficiency programs; and,
 - generation or storage located on utility distribution property.
- other proposals for engagement in DER must be specified in utility Distributed System Implementation Plans and must 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

²⁸ To our knowledge this particular issue has not been resolved in any other pending proceeding including Case 12-M-0476, Residential and Small Nonresidential Retail Energy Markets, Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State (issued October 19, 2012).

²⁹ Straw Proposal, pp. 32-33

³⁰ *Id.*, p. 5

- where the proposal involves ownership, it must include a competitive solicitation for construction and operation, absent compelling circumstances.³¹

The Straw Proposal fails to provide any reasonable justification for allowing regulated utilities to own DER in addition to their overarching role as the DSP for the entire State.

Staff avers that there are advantages associated with the ownership of DER by regulated utilities. Initially it is asserted that utilities are well-positioned to contribute to the expeditious growth of DER. As noted in the Straw Proposal:

They 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. Direct utility participation in DER can accelerate the transformation to a more fully distributed electric grid. Utilities can achieve these ends by leveraging existing ratepayer-funded assets and in-house expertise related to system planning, design and operations, and customer communications. Utilities can identify and demonstrate new DER technologies that are reliable and effective, thereby helping customers adapt to and exploit these technologies.³²

The inherent advantages associated with the status of a regulated utility based upon their predominant and pervasive status within the service territory documented by Staff are, of course, well known and actually militate in favor of *restricting* their activities in the DER market which is purportedly intended to rely upon market forces operating on a competitive playing field. Nonetheless these listed “advantages” can be applied effectively and efficiently without the utility owning the DER products and services.

The utility’s direct access to customers, credibility as an energy provider, in-house knowledge and other assets can all be deployed to “accelerate the transformation to a more fully distributed electric grid”,³³ without the utility actually owning the DER products and services. The

³¹ *Id.*, pp. 72-3

³² *Id.*, p. 68

³³ *Id.*, p. 68

utility in its role as DSP can work cooperatively with all registered³⁴ competitive DER providers to meet the established DER goals within an established time frame. By way of example, the utility can use its large footprint to help educate customers and work with vendors to increase penetration of DER in accordance with the goals developed by the utility in its DSP role. These efforts do not in any way require that the utility ultimately own or operate the DER product or service.

In fact this type of approach has been used successfully in a variety of areas entailing the promotion of energy efficient use – the purpose of DER --- among all consumers. With respect to the development and penetration of energy efficiency and renewable measures, the Commission established an Energy Efficiency Portfolio Standard (“EEPS”) for each utility which was achieved by each utility developing a specific program to increase the level of energy efficiency products and services obtained and purchased by consumers primarily from vendors operating within the program facilitated by the utility.³⁵ Similarly, utilities have sponsored programs to increase the efficiency of heating equipment or fostering conversions from alternate fuels. Once again, these programs have been earmarked by utility facilitation and oversight but the actual measures have been owned by vendors not the utility.

It is equally clear that there are a plethora of vendors of all stripes in “large numbers” who are ready, willing and able to promote the use of energy products and services throughout the State.

As Staff noted:

DER providers may include a broad range of entities that have the potential to reach multiple end use customers, have the technical capacity to manage installation or financing of DER assets, and the ability to aggregate DER services and plans for purposes of market participation. These may include energy management companies, regulated utilities (subject to market power restrictions described below), solar

³⁴ The Staff Proposal recommends that all DER providers be registered with the Commission (Straw Proposal at p. 32).

³⁵ Case 07-M-0548 - Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, *Order Establishing Energy Efficiency Portfolio Standard and Approving Program*, issued June 23, 2008.

providers and energy efficiency companies, local governments entities, not-for-profit corporations, housing associations, banks and registered financial institutions, energy improvement districts, telecommunications companies, real estate developers, and others.³⁶

This large pool of available DER providers is also supported by the finding of Staff that such providers are ready to actively participate in the DER market.

The level of interest and engagement in this proceeding as well as Staff’s assessment of the energy landscape indicate that DER providers, Energy Service Companies (ESCOs), and customers are ready in large numbers to participate in emerging DSP markets.³⁷

The Straw Proposal also avers that allowing the utility to own the DER “can reduce the risk of revenue erosion”. As explained by Staff if the utility owns the asset behind the meter, “the customer is retained, and revenues from that customer, as well as costs and benefits of the asset, accrue to all ratepayers.”³⁸ This alleged advantage is unpersuasive. The benefits of the asset in terms of improved energy usage will accrue to all ratepayers regardless of who owns the asset. To the degree that the customer will still require service from the utility after the DER measure is installed no additional benefit is conferred by the utility owning the DER. What Staff overlooks is that ownership of the DER creates the potential for serious financial risk to all ratepayers if the investment by the utility of public revenues in DER fails to achieve profitability. And this level of risk can be substantial in view of the DER goals adopted by the Commission. It should be noted that past attempts by regulated utilities to dabble in competitive markets with ratepayer funds have not been very profitable.

The notion that utility ownership is needed to give utilities “experience and confidence in how the integration of DER will affect the reliable operation of distribution systems”³⁹ is equally unpersuasive. This type of experience and knowledge can be similarly obtained and be available if

³⁶ *Id.*, pp. 32-3.

³⁷ *Id.*, p. 4.

³⁸ *Id.*, p. 69.

³⁹ *Id.*, p. 69.

the utility does not own the DER. Remember, as proposed, the utility as DSP will be in control of every aspect of the DER program including planning, operation, monitoring and real time markets. Under this wide rubric it will easily be able to glean the requisite knowledge, experience and confidence even without ownership of DER.

The Staff Proposal repeatedly underscores the concern of a utility applying undue market power in the role of DSP and through ownership of DER products and measures.⁴⁰ To address this concern Staff recommends that utility DER ownership be limited to energy efficiency programs, and generation or storage projects located on utility distribution property; all other projects must be specified in a the Utility Implementation Plan and meet certain criteria.⁴¹ Although these limitations move in the right direction they fail to address the fundamental underlying concern and basically create loopholes by which a utility can own any type of DER project or measure.

Under the Straw Proposal, the regulated utility as the DSP will now control every aspect of the DER program, including, but not limited to: control of platform functions including scheduling and dispatch; control of access to its network, including interconnection and access to both system and customer data; planning of DER requirements; and operation of real-time market.⁴² To this overwhelming status, the Straw Proposal would add the utility's direct commercial involvement and ownership with distributed energy resources. In this construct the position of the utility will be dominant and overwhelming from a competitive standpoint.

As Staff recognizes, coupled with this dominant market position, the regulated utilities already have direct access to customers, credibility as a familiar energy provider, and knowledge about their distribution systems to identify where and where and how DER can be integrated with the

⁴⁰ *Id.*, p. 21, 67-8.

⁴¹ *Id.*, pp. 72-3.

⁴² *Id.*, p. 67

greatest effect.⁴³ Given these factors, even if the utility does *not* attempt to misuse its monopoly position, it is clear that the utility will still be able to stifle competition simply by exercising the powers it is provided as the DSP and due to its inherent position as a regulated distribution utility.

Under these conditions, the DER market will be fundamentally and entirely tilted in material favor to the utility. In no way would the ensuing market reflect “fair and open” competition or a “level playing field” as promised in the Straw Proposal.⁴⁴ It will in fact become the domain of the utility thereby stifling increased customer choice and opportunity. Staff asserts that customers will realize the greatest benefits from open, animated markets in which all participants participate on a level playing field and which provide clear signals for benefits and costs of participants’ market activity.⁴⁵ Obviously if the utility in addition to all of its other advantages can be engaged in the ownership of DER resources, the ensuing program will not be characterized as an open, animated market where all participants compete on a level playing field.

The protective measures advanced by the Straw Proposal do not provide much succor for competitive vendors seeking to enter this market.

Direct utility participation is permitted *without* limitation or restriction with respect to the sponsorship and management of energy efficiency programs (“EEP”) and any generation or storage located on utility distribution property.⁴⁶ The term EEP is quite broad and can include a wide swathe of different measures, products and services within its ambit. And it with respect to EEP that much attention will be focused as it is an area where vendors and customers already have much exposure. Thus without any limitation, the utility will be conferred with a dominant position in the especially valuable EEP market.

⁴³ *Id.*, p. 68

⁴⁴ *Id.*, p. 16.

⁴⁵ *Id.*, p. 15

⁴⁶ *Id.*, p. 72.

Further, the utility may become engaged through direct participation in all other areas so long as it is included in an approved implementation plan.⁴⁷ As part of this process, the utility will need to show a substantial need for the project and why the benefits of utility engagement outweigh market power concerns. None of these will present much of an obstacle to the utility. As a practical matter it will only seek to enter this new area if there is a clear and discernible market for this product or service; thus substantial need will be easy to demonstrate. Moreover, the utility will be able to rely upon the analysis and considerations set forth in the Straw Proposal (pp. 67-73) to demonstrate why market concerns should not be dispositive.

In summary, the regulated utility should not be allowed to be engaged in the direct ownership or operation of DER products and services. If ESCOs are simply provided with the right information in a timely manner and in a common format, they will bring forward the kind of innovative and engaging products and services that the PSC envisions being available.

2. Regulation of DER Providers

In addition to ESCOs, the Straw Proposal recognizes that other entities may be engaged in the marketing and operation of DER services and products. These entities could include for example, “solar providers and energy efficiency companies, local government entities, not-for-profit corporations, housing associations, banks and registered financial institutions, energy improvement districts, telecommunications companies, real estate developers, and others.”⁴⁸ Although ESCOs are regulated by the Commission and subject to the provisions of the Uniform Business Practices (“UBP”), the regulatory status of other DER providers has yet to be addressed and clarified. Staff recommends that “DER providers participating in DSP markets should be

⁴⁷ *Id.*, p. 72.

⁴⁸ *Id.*, pp. 32-3.

subject to some degree of Commission oversight.”⁴⁹ This is a reasonable proposal and should be adopted.⁵⁰

Currently under the UBP, ESCOs desiring to participate in the commodity market are subject to the standards codified in the UBP, which regulates in some of the following areas: eligibility/registration (Section 2); handling of customer data (Section 4); changes in providers/contractual requirements (Section 5); dispute resolution (section 8); and marketing standards (Section 10). This regulatory structural framework addresses the key components associated with the provision of value-added services and DER in addition to commodity. Consequently it appears to be adaptable for the DER market and can be the template for regulatory oversight of DER providers.

Staff correctly observes that as is the case with ESCOs, the Commission “has a strong interest in protecting consumers and legitimate service providers from bad actors in the market.”⁵¹ The UBP is specifically designed to address these valid concerns and has been continuously updated to reflect on-going real time experience. The use of the UBP template will thus help the Commission ensure that consumer interests are respected and proper marketing behavior is followed by all DER providers.

Additionally, it will help maintain a level playing field by applying the same regulatory standards to all DER providers and not inappropriately and inequitably only require ESCOs to meet the UBP type standards.

F. Section V (1)-(3) Building the DSP Market

1. Renewables

⁴⁹ *Id.*, p. 33

⁵⁰ DER developers should *not* be regulated to the extent they develop DER resources that do not participate in the DSP market.

⁵¹ *Id.*, p. 33.

In a far reaching modification of existing policy, Staff recommends that purportedly as a transition toward market-based approaches to increase levels of efficiency and renewables, utilities “should integrate energy efficiency into their regular operations and should take responsibility for procurement of Main Tier renewables.”⁵²

With respect to renewables, it is proposed that that “procurement of supply-side large scale renewable resources become the responsibility of the utilities.”⁵³ Under this process, Staff envisions “bundled contracts for energy and RECs between the utilities and competitively selected projects.”⁵⁴ This approach should not be adopted.

Initially it is important to underscore that the existing programs and methodologies for securing renewables in the State have been quite successful and fully adequate to have met all the goals established by the Governor and the Commission. It makes little sense to abandon what has been an efficacious more market based program with a new untested large scale foray by utilities into the wholesale market which is fraught with serious risks.

This serious and wide ranging expansion of the regulated utility function further cuts across the grain of what was to be a vision that encompassed reliance on market forces and development of competitive choice in relation to a customer centric model; instead there appears to be a reversion to wholly traditional monopoly regulation where the regulated utility controls almost if not all critical elements of the electricity infrastructure in the State.

Under this new procurement proposal, the Commission would in reality effect a reversal of a long standing policy that mandated the utility exit from the wholesale market and ownership of generation assets. Now the utilities will enter into large scale bundled contracts for energy and RECs with renewable projects. As envisioned in the Straw Proposal, the utility would now

⁵² *Id.*, p.5.

⁵³ *Id.* p. 51.

⁵⁴ *Id.*, p. 52.

become a major player with respect to massive amounts of new generation. This will also act to interfere with the orderly development of the wholesale market as the utility will now be using its monopoly rate recovery mechanisms to sustain the cost of projects that may be unsustainable from a market perspective and significantly exceed the cost of other generation alternatives. Further, it can place other non-utility parties seeking access to renewable supplies at a competitive disadvantage as they will not have the luxury of a utility rate recovery mechanism.

This new proposal also creates significant and material financial risks for utility ratepayers. Currently, through the RPS/NYSERDA process, utility ratepayers are exposed through the SBC to the RPS premium or REC needed to sustain the selected projects.⁵⁵ Thus, even where the cost of the renewable is out-of-market, the ratepayer's exposure is basically limited to the premium. However under the scheme where the utility is assigned the procurement of renewables, the cost exposure to ratepayers increases dramatically to cover the cost of the "bundled contracts for energy and RECs"⁵⁶, the total cost of which will now be flowed through utility rates and recovered from ratepayers. The potential negative impact on utility energy costs and the cost burden of ratepayers is underscored by the following real life example. Staff admits that the comparative cost posture of renewables has declined substantially due to the continued "low gas prices". As noted by Staff:

Continued low natural gas prices result in reduced wholesale revenues for projects, exacerbating financing and hedging difficulties, and ultimately drive up ratepayer premiums to develop renewable energy.⁵⁷

In other words, as the cost of renewables has significantly exceeded the cost of gas fired generation, reflection of market forces decreases the economic viability of such projects and puts

⁵⁵ *Id.*, p. 52.

⁵⁶ *Id.*

⁵⁷

upward pressure on the costs needed to sustain such projects. If as forecasted this low cost gas price trend continues, the cost of renewables will continue to be largely out-of-market, but now under the new approach ratepayers would be saddled with the high cost of the bundled contract for renewable energy and RECs. This will lead to continued and growing rate shock (especially as the level of renewable procurement rises) and as well forcing energy costs ever higher. In concert these factors will make it even more costly to do business in New York.

This approach also creates significant uncertainty with respect to the retail commodity market that is now open to ESCOs and in which the customer can choose to purchase commodity from their vendor of choice. How will these bundled purchases of large scale renewable projects affect the retail market that remains available to ESCOs? How will it impact on the cost to compare for a customer considering service from an ESCO. None of these important factors are considered in the Straw Proposal.

At its core, this approach seeks to manipulate the utility's monopoly power and captive rate recovery mechanism to sustain the viability of renewable projects that exceed the cost of alternatives. New York has seen this movie before and the end result is well known. In prior decades the State passed a 6 cent law which guaranteed the price for PURPA projects. This price turned out to be above-market resulting in utility's being forced to purchase uneconomic power and unnecessarily driving utility rates higher and higher. It took many years for the utilities and ratepayers to extricate themselves from that regulatory mess. It beggars common sense to go down that terrible path once again.

2. Energy Efficiency

With respect to energy efficiency measures the Straw Proposal recommends that the utilities “prepare and submit energy efficiency transition implementation plans (ETIPs) no later than March 31, 2015.”⁵⁸ The funding for utility efficiency programs would be transitioned, following the expiration of current surcharge authorization, and because efficiency programs will be integrated into normal utility operations, rather than being funded through a surcharge the funding will be recovered in the same manner as other operating expenses.⁵⁹ Per this recommendation, energy efficiency will become part of the utility asset structure and funded through utility rates.

In connection therewith, it is important to note that under the Straw Proposal direct utility participation is permitted without limitation or restriction with respect to ownership, sponsorship and management of energy efficiency programs.⁶⁰ In sum the utility will now own and directly manage EEP, include these activities as part of the utility assets and recover the costs thereof through utility rates. This utility-centric and dominating approach suffers from a number of serious infirmities.

The existing programs and methodologies for increasing the penetration and use of EEP have been quite successful and have satisfied the identified goals established by the Commission.⁶¹ This has been achieved without the utility in a large fashion undertaking ownership and operation of energy efficiency projects or including the cost thereof in utility

⁵⁸ *Id.*, p. 51.

⁵⁹ *Id.*, p. 53.

⁶⁰ *Id.*, p. 72.

⁶¹ See, generally, 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, and subsequent orders of the Commission in this docket.

rates. It is illogical to abandon a market centric program with a new untested large scale acquisition plan by the regulated utilities in the energy efficiency market.

Additionally, the Straw Proposal once again moves away from reliance upon market forces and customer choice and instead falls back upon regulated utility model where customers will be served by assets acquired by utilities with the costs thereof subject to rate recovery from ratepayers.

This energy efficiency proposal also has the potential to increase financial risks for utility ratepayers. Under the new construct, the utility will now own the energy efficiency resources and thereby shift cost recovery thereof to ratepayers via utility rates. This is in contrast to the current model and what would occur in a market based approach whereby the competitive vendor not utility ratepayers would need to cover the capital and operating costs associated with energy efficiency products and services.

III. CONCLUSION

RESA appreciates the opportunity to submit these comments and assist the Commission in its efforts to address the needs and concerns of ratepayers.

Respectfully submitted,

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