

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

REPLY COMMENTS OF LIBERTY POWER

I. Introduction

Liberty Power (Liberty) submits these reply 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. In addition to its own reply, Liberty joins the reply 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 customers¹ -- mostly in New York City. Liberty's business customers have more than 250,000 employees and provide goods and services to more than 2 million New Yorkers.²

¹ Liberty 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).

² Liberty internal estimates.

II. Reply Comments

A. Staff's Proposal Lacks Flexibility and Would Commit Customers to Paying for Power that Could Become Less Economic and Less Environmentally Desirable

The Commission Staff favors creating a Dynamic Energy Planning Process (DEPP) to meet New York's long-term energy needs.³ This well-intentioned approach would actually expose customers to risks of uneconomic contracts and stranded costs. But worst of all, a DEPP is likely to prevent New Yorkers from accessing new, cleaner sources of generation that may provide renewable power at a lower cost.

Staff argues that DEPP would "ensure public policy goals such as protecting the environment, reducing carbon emissions to combat global warming, and promoting energy efficiency are met."⁴ It is more accurate to say that DEPP could meet *current* policy goals when resource and infrastructure decisions are made. But once firm commitments are made for extended periods -- decades in some cases -- policymakers simply cannot change course in midstream should they wish to emphasize new policy goals over others, or if technological advances or market changes create more cost effective ways to meet those goals.

For example, revolutionary breakthroughs could lower the

³ Comments of Staff, pp. 8-9.

⁴ *Id.*, pp. 4-5.

cost of solar technology, which is currently uncompetitive with other renewable sources of power such as wind energy. Using wind power may seem like today's best option for New York ratepayers to meet carbon and other environmental policy goals, but tomorrow's technological advances in other renewable fuels could make initial DEPP decisions nothing more than subsidization of certain fuel sources through above-market contracts. Today's least-cost alternative could quickly become tomorrow's out-of-market fuel because of rapid technological advancements, and New Yorkers need to be protected from paying above-market costs when policy goals could be met more cost effectively through different generation sources.

New York ratepayers endured the pain of such subsidization in the 1980s under the "Six-Cent Law," as several parties noted in their initial comments.⁵ Even the most collaborative process including Staff, utilities, market participants, stakeholders and other experts cannot accurately predict where relative and absolute generation costs will be five or 10 years down the road. Just as New York policymakers thought 6¢/kwh was a good deal for power at the height of the oil crisis (only to see power prices plummet thus saddling New Yorkers with burdensome

⁵ Comments of Multiple Intervenors, pp. 5-6; Comments of Hess Corporation, p. 6-7; Comments of SUEZ Energy North America, Inc, p. 12; Comments of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation, p. 5.

uneconomic contracts), the DEPP process could leave New Yorkers paying for ridiculously expensive power even as more cost effective sources are developed to meet policy goals. The decisions that come from Staff's DEPP -- no matter how much it is tweaked to be "competitive" by using requests for proposals -- will carry the same risks as the 20th century decisions to buy power on long-term contracts from Qualifying Facilities -- contracts that cost ratepayers billions and nearly bankrupted at least one utility.

Staff asserts that "diversity of fuel sources for generation can be assured" through DEPP,⁶ but that goal could actually be undercut by the DEPP process. Although the DEPP could be crafted to reflect a desirable fuel mix contemporary to the DEPP's development, changes in the costs of fuel would certainly change the optimal level of fuel diversity over the life of the DEPP contracts. Today's DEPP could exclude solar or clean-coal technologies based on their current costs or experimental nature, but within five years those technologies could become the best alternatives to meet environmental goals. Today's DEPP, however, would not reflect that desired fuel mix because the process simply cannot predict changes in costs of technology that will shape tomorrow's optimal fuel mix.

⁶ Comments of Staff, p. 5.

Fuel prices can change rapidly, and decisions to shift generation to more cost effective fuels could not occur under DEPP. Within the last five years, oil prices have spiked over 200% from the \$20/barrel range to over \$70, while natural gas costs have more than doubled from \$3/MMBtu to over \$7/MMBtu. These price spikes, coupled with a long-term decline in wind power costs, have made wind power competitive with dirtier but traditionally cheaper sources of power. However, DEPP could not respond to or capture these changes until existing contracts ended, and thus DEPP would deprive New Yorkers of using cleaner, more environmentally friendly resources when those resources become cost competitive.

By locking-up supply over long-term contracts -- even in modest amounts -- New York customers would lose the flexibility to adjust their generation mix to rapidly changing prices and technologies. Staff asserts that "long-terms contracts are a flexible tool that accommodate a number of goals."⁷ In the most basic terms, nothing about a long-term contract is flexible. Load serving entities entering the contract agree to pay a generator a set price for energy over a fixed number of years. Once the contract is struck, there is typically little room for either party to adjust the pricing or energy terms. New York

⁷ Id., p. 9.

ratepayers being supplied through long-term contracts would simply not have the flexibility to abandon long-term contracts if other alternatives arise that could meet policy goals more economically, efficiently or cleanly.

For every megawatt locked-up in a long-term contract, New Yorkers would be denied the opportunity to serve that megawatt of load through cleaner, more cost effective generation that may be developed. This risk is especially high considering the rapid changes in technology and fuel prices that can occur in less than five years, the minimum length of a long-term contract as defined in this proceeding. Longer contracts lasting 10-20 years are even riskier and would deny New Yorkers the benefits of environmental and efficiency advancements for decades.

The development of the combined cycle combustion turbine illustrates the need for flexibility so consumers can access cleaner, lower-cost power immediately when it is developed. Combined cycle technology transformed the electric industry nearly overnight, producing cheaper, less polluting power than coal- and oil-fired plants that had previously been favored. With wholesale restructuring, market forces gave customers access to these cleaner, lower-cost sources of power, and helped reduce pollution while saving customers money.

However, had customers' resource needs already been locked-up through integrated resource planning or other long-term commitments, customers would have been stuck receiving dirtier, costlier power. Restricting customers' access to rapid technological changes in this fashion is simply inconsistent with the desired policy goals of renewable and sustainable power at just and reasonable rates.

By keeping today's current market structure, developers of cleaner and lower-cost power generation technology can serve customers because customers' load is not locked away on out-of-market contracts. Developers that can meet customers' tastes and preferences for green resources can find non-utility bilateral partners for output, or, if technological advances drive down costs, can sell into the New York ISO's energy markets at a lower spot on the bid stack. This market system ensures New Yorkers can always access the best generation that most cost effectively meets their policy goals.

B. Staff and Other Parties Have Not Proven a Need for Integrated Resource Planning or Long-Term Utility Contracts

Staff asserts that "the current market structure has not attracted, and does not seem likely to attract, a sufficient number of new entrants intending to build new merchant

generation or transmission infrastructure."⁸ Similar views are shared by the Consumer Protection Board and New York City.⁹

This assertion ignores the New York Regional Interconnect (NYRI) merchant transmission line that, if built, would add 1,200 MW of transfer capacity into the lower Hudson Valley -- more than double projected needs in 2011.¹⁰ But NYRI's transmission project is emblematic of the real challenges facing new infrastructure development -- siting. Despite its potential to meet growing capacity needs downstate and reduce downstate power prices, the project has faced fierce opposition from local residents and politicians. It is this opposition to new infrastructure that has ground new generation development in New York to a halt since the expiration of the Article X siting law. It is not the market structure that is keeping generation developers away from building in New York City, as the staff argues. Instead, as discussed in Liberty's Initial Comments,¹¹ insurmountable siting obstacles have kept developers from responding to clear market signals that would otherwise

⁸ Comments of Staff, p. 8.

⁹ Comments of New York State Consumer Protection Board, pp. 4-5; Comments of New York City, p. 6.

¹⁰ New York ISO, *2007 Reliability Needs Assessment*, March 16, 2007, pp. 14-15.

¹¹ Comments of Liberty Power, pp. 3-5.

encourage new generation in New York City and other capacity-constrained areas.

Staff, while acknowledging siting, environmental and other physical barriers to building new generation and long-term contracting among non-utility parties,¹² fails to explain how new infrastructure would be any more assured under DEPP than under the current market structure.

New York's competitive market met resource adequacy needs for nearly a decade before Article X expired in 2003. The staff does not address the 4,200 MW of new generation built in New York since 1996 under a competitive environment free from the risks of command-and-control planning.¹³ The current lack of progress in updating New York's infrastructure coincided with the expiration of the Article X siting law and not the end of traditional utility or integrated planning. In short, the staff has failed to prove that market forces are not identifying and responding to New York's critical needs.

Staff merely asserts the market has failed, but does not explain how DEPP or long-term contracting would overcome siting obstacles that have been the true barrier to new capacity. Projects designated under the DEPP will face the same siting

¹² Comments of Staff, p. 11.

¹³ New York State Department of Public Service, *Staff Report on the State of Competitive Energy Markets*, March 2, 2006, p. 14.

hurdles that current market-driven projects face, and the DEPP will simply burden customers with higher risks while not facilitating actual steel in the ground. In New York City, Staff proposes delegating siting and permitting responsibility to Consolidated Edison (ConEd) prior to the issuance of a request for proposal,¹⁴ but Staff does not justify how ConEd would have any greater success overcoming siting obstacles, environmental regulations and local opposition to infrastructure projects than bidders responding to the request for proposals.

Staff's proposal to allow utilities to recover costs from long-term contracts executed under the DEPP should be rejected because it would expose customers to higher costs. Staff argues that failure to provide rate recovery is a, "substantial barrier," to long-term contracting by utilities,¹⁵ but this "barrier" is actually a necessary and beneficial customer protection. Where cost recovery is guaranteed, utilities would have no incentive to find least-cost solutions or keep costs down, since their shareholders will not be burdened with higher costs; customers would pick up the tab.

This danger is especially high where cost recovery would be allowed up-front, when the utility enters the contract. As

¹⁴ Comments of Staff, p. 26.

¹⁵ Id., p. 18.

discussed above, the DEPP cannot predict the least-cost or most preferable fuel mix. Staff's suggestion that cost recovery is needed up-front is a tacit admission that the prudence of entering into contracts under DEPP will change over time, and that today's prudent contracts and best projects could become tomorrow's above-market white elephants whose unwise costs should not be recovered. The staff's solution to avoid this problem is to guarantee that ratepayers pick up the costs of potentially uneconomic contracts up-front -- a 180-degree reversal of current policies. The Commission should instead shield customers from this burden by rejecting the DEPP approach and relying on market forces to assure resource adequacy and policy goals, an approach that would protect customers from uneconomic contracts.

New York City asserts that utilities and state agencies are the only parties capable of entering long-term contracts to support infrastructure development. New York City also claims that ESCOs, wholesale marketers and financial intermediaries do not possess the ability to make commitments supporting generation development. This assertion is simply not true as shown by the 78,000 MW of generation being developed in ERCOT

without state or regulated utility counterparties.¹⁶ Much of the planned capacity is being financed by offtake agreements with ESCOs, wholesale marketers and financial intermediaries, or is being built on a purely merchant basis. Clearly, utilities and state agencies are not the only vehicles that can support new generation development.

New York City argues that ESCOs' load is too volatile and small to support long-term contracts with generation developers, but even medium-sized ESCOs have enough stable load to support purchasing the full capacity from an intermediate power plant while the dozen largest ESCOs can individually support the development of new base load plants.

Finally, Staff and other parties have not shown why risky processes such as DEPP and its accompanying long-term contracts are needed to achieve policy goals. New York has already implemented policies to achieve green energy usage through the Renewable Portfolio Standard, which does not burden ratepayers with as many risks. A similar process should be evaluated for energy efficiency or fuel diversity needs before embarking on an outdated and dangerous command-and-control DEPP process.

¹⁶ ERCOT System Planning Division, *Monthly Status Report to Technical Advisory Committee, Reliability and Operations Subcommittee for March 2007*, p. 1.

C. New York Should Not Return to Rate-Based Generation

Central Hudson, New York State Electric & Gas (NYSEG) and Rochester Gas and Electric (RG&E) suggest allowing utilities to build new rate-based generation to meet resource adequacy needs.¹⁷ The Commission should dismiss this suggestion because utility-built and operated projects burden ratepayers with excessive costs compared to competitively built projects. A utility-built project in New York recently cost ratepayers nearly 100% more than initially projected, or an additional \$380 million dollars, as the NRG Companies noted in their initial comments.¹⁸ A proposed coal-fired power project by Duke Energy in North Carolina would have cost customers over \$1 billion more than initially estimated¹⁹ -- prior to the start of construction -- before state regulators ultimately rejected Duke's plans. Central Hudson, NYSEG and RG&E have not justified exposing customers to these cost overruns when, as discussed in Liberty's Initial Comments and these Reply Comments, market solutions will meet resource adequacy needs when siting is available.

¹⁷ Comments of Central Hudson Gas & Electric Corporation, pp. 9-10; Comments of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation, p. 8.

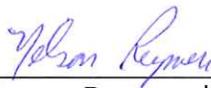
¹⁸ Comments of the NRG Companies, p. 6.

¹⁹ [Raleigh] News & Observer, *Power plants face a setback*, February 24, 3007, Available at <http://www.newsobserver.com/114/story/545424.html>

III. 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 always have access to technological advances, the cleanest, lowest-cost generation, and the accompanying just and reasonable rates.

Respectfully submitted,
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