

LAW OFFICE

USHER FOGEL  
ATTORNEY AT LAW

557 CENTRAL AVENUE, SUITE 4A CEDARHURST, NY 11516

TEL: 516.374.8400 X 108

FAX: 516.374.2600

CELL: 516.967.3242

E-MAIL: ufogel@aol.com

June 4, 2007

Hon. Jaclyn Brillling  
Secretary  
NYS Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

**Re: 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 – Phase II**

Dear Secretary Brillling:

Enclosed for filing with the Commission please find the original and ten (10) copies of the “Initial Comments of Retail Energy Supply Association and the Small Customer Marketer Coalition” in the above-captioned matter.

Thank you for your assistance in this matter.

Respectfully submitted,

Retail Energy Supply Association and Small  
Customer Marketer Coalition

By:   
Usher Fogel, Counsel

Cc: Active Parties (by electronic mail)

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

**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 – PHASE II.**

**INITIAL COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION AND  
SMALL CUSTOMER MARKETER COALITION**

**I. INTRODUCTION**

On April 19, 2007, the Commission issued its *"Order Requiring Development of Utility-Specific Guidelines for Electric Commodity Supply Portfolios and Instituting a Phase II to Address Longer Term Issues*, in the above-captioned proceeding.<sup>1</sup> Therein, the Commission addressed issues concerning utility hedging practices and instituted a Phase II to this proceeding for the purpose of examining in greater depth issues related to longer term purchases of commodity supply and related planning and acquisition practices. In connection with the Phase II segment of this proceeding, the Commission concluded that an examination would be undertaken of the use of long term contracts and other means to facilitate the entry of new resources that would further the public policy goals of the State and support development of the requisite electric infrastructure. In connection therewith, the Commission invited interested parties to address a series of questions that related to various aspects

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<sup>1</sup> Case 06-M-1017 – Proceeding On Motion Of The Commission As To The Policies, Practices, and Procedures For Utility Commodity Service To Residential and Small Commercial and Industrial Customers, *Order Requiring Development of*

of the electric infrastructure planning and analysis process. These comments are submitted on behalf of the Retail Energy Supply Association ("RESA")<sup>2</sup> and the Small Customer Marketer Coalition ("SCMC") in response to the Commission's invitation to address the identified questions posed in the Order.

## **II. PRELIMINARY STATEMENT**

The Commission is now considering a series of new policy initiatives that have the potential to weaken reliance on competitive market forces in setting and maintaining the electricity infrastructure and instead promote reliance upon a more centralized regulatory planning structure that is based upon the imposition of an integrated resource planning structure coupled with expanded use by utilities of long-term supply contracts. Although presented within the context of the current status of electric infrastructure needs of the State, the "new" policies are little more than old wine in a new bottle --- a veritable throwback to the highly controlled and static regulatory structure that epitomized the electric industry in earlier decades. This approach did not achieve much success in the past and is less likely to prove useful in the current competitive wholesale and retail energy market.

As explained in greater detail below, RESA and SCMC urge the Commission to consider the following critical assessments and recommendations in its deliberations in this proceeding:

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*Utility-Specific Guidelines for Electric Commodity Supply Portfolios and Instituting a Phase II to Address Longer-Term Issues.* (issued April 19, 2007) ("Order").

<sup>2</sup> RESA member companies include Consolidated Edison Solutions, Inc., Direct Energy Services, LLC, Hess Corporation, Liberty Power Corp., Reliant Energy Retail Services, LLC, Sempra Energy Solutions, Strategic Energy LLC, SUEZ Energy Resources NA, Inc., and U.S. Energy Savings Corp. The opinions expressed in this document represent the position of RESA as an organization but may not represent the views of all members of RESA.

- A centralized energy planning structure designed to replicate or displace market forces distorts the clarity of market signals, may undermine the efficient operation of competitive markets, and can harm the consumer.
- Long term contracts should be discouraged because they result in prices that do not reflect actual market conditions, impair competitive energy market, and create the material risk of burdening customers with stranded cost.
- Approaches that rely on market based solutions are superior to reliance upon administratively mandated long term contracts.
- It is difficult if not impossible for the Commission to accurately project future electric requirements and available resources, thus implementing centralized planning and mandating long term contracts is inappropriate.
- The Commission should avoid reliance upon broad based centralized planning that is burdened with constricting long-term contracts.
- The Commission should develop a more robust and dynamic policy that addresses specific issues related to current market design and provides market based solutions that enable customers to benefit from the competitive market.
- The Commission should consider implementing a study process to determine the types of actions that may satisfy identified planning objectives. Such a study process would need to address and identify the following elements: goals; current market status; physical and financial constraints; impact on competitive markets; interaction with other planning processes; identification of the level of load used in the study; interaction with other regulatory initiatives; political and social obstacles; economic impacts; economic development; and immediate and long range concerns.

- ESCOs should not be required to enter into long term commodity or capacity contracts.
- There is insufficient basis to conclude that the lack of new electric resources is related to the absence of long-term contracts.

### III. RESPONSE TO QUESTIONS POSED BY THE COMMISSION

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 resources 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?*

#### Response to Question No.1:

A centralized energy planning structure designed to replicate or displace market forces distorts the clarity of market signals, may undermine the efficient operation of competitive markets, and can harm consumers. Due to the inherent uncertainty of forecasting, projecting future electric requirements and identifying long term electricity resource needs may result in uneconomic and inefficient decisions. Instead of relying upon a “command and control” centralized planning process that that is burdened with constricting long-term contracts, the Commission should follow a more finely tuned flexible policy that seeks to discern discrete problems and formulate market based solutions and policies. At most the Commission may consider implementing a study process that attempts to ascertain the types of actions that may satisfy identified planning objectives.

A. *Centralized Planning Is Inherently Unreliable*

History has shown that centralized energy planning structures aimed at replicating market forces do not work. Such policies are fraught with great uncertainty, do not result in the most economically efficient investment decisions, and most importantly, force captive customers to pay for what may ultimately prove to be bad investments. At its core, a centralized "command and control" planning process needs to properly identify with precision all of the variables and factors that may affect or have bearing upon prudent and reasonable energy practices. These factors would include estimating: usage levels for all customer classes, impact of energy efficiency measures, economic growth and business activity, weather patterns, cost of energy and capacity, installation of additional generation, global energy demand, local political and social conditions, reaction of energy markets, fuel forecasts, and the cost of greenhouse gas compliance. Thereafter, the Commission would need to determine how all of these various factors will interact with each other and predict the future with some level of certainty. In this respect, it attempts to mimic the competitive marketplace where all of the numerous factors that will determine the appropriate economic decision and action are processed through the interaction of market forces rather than a centralized planning process. Rather than attempting to predict the future, a market design that utilizes more market responsive contract durations is appropriate and will help eliminate the guesswork required with long term planning.

B. *Centralized Planning Has Not Worked in the Past*

In the past, efforts by the State to replicate or displace market forces through the introduction of a command and control energy planning process have resulted in unfavorable outcomes for consumers and utilities. A prime example of this was the introduction of the 6 cent law under which the State determined to promote non-utility generation to meet the State's electric

requirements and further directed imposition of a price cap that would apply to this resource. In effect, the State had determined what resource should be relied upon as well as the price that providers of this generation source were to be paid by consumers. Underlying this planning approach were assumptions about the future trends in electric requirements, pricing, and other elements that affect the retail and wholesale energy markets. Needless to say, this foray into the command and control planning process conflicted with reality and caused a number of utilities to execute uneconomic long term contracts, which ultimately threatened the financial viability of a number of utilities, as well as burdening customers with the cost of these contracts for many decades.<sup>3</sup> This is not an experience we want customers to experience again; however if long term contracts are required there is little assurance that history will not repeat itself. A better solution is to enable the contracts to be dynamic and of shorter term to help ensure customers will not be burdened with out of market contracts for decades to come.

It is axiomatic that forecasts will be wrong. Generally, the longer the forecast period, the greater the difference between actual and the forecast. It is no different for the Commission. The inability to develop forecasts that reliably predict future energy trends both in the short and long term, is a fact of life in the Commission's rate making process. As the Commission itself underscored in the hedging portion of the Order, the commodity price that had been offered by NYSEG for its residential fixed price option went from 6.21 cents per kWh for the 24-month period ending December, 2004, to 7.48 cents per kWh for the 24-month period beginning January, 2005, an increase of 21%, and the price increased again by approximately 17% percent for the period beginning January, 2007.<sup>4</sup> These considerable increases were neither predicted with any

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<sup>3</sup> See, e.g., Case 94-E-0098 – Niagara Mohawk Power Corporation, *Opinion and Order Adopting Terms of Settlement Agreement Subject to Modification and Clarification*, Opinion No. 98-8 (issued March 20, 1998) at p. 8, where the utility absorbed \$2 billion in losses over five years to resolve the financial burden of its above-market IPP contracts.

<sup>4</sup> Order, p. 7, FN. 6.

accuracy by the Commission nor were they representative of any forecast that had been previously made by either utility, Commission, or the other interested party in that proceeding.

The pattern associated with the overall movement of energy commodity and capacity costs and supplies over the past decades has failed to be discerned by any precise or reliable forecast and in many instances has come as a surprise to the regulators as well as market participants. By way of analogy, the Commission and its Staff have experienced the difficulty of developing forecasts of costs that are reasonably predictive of reality in setting rates for a utility--- with the clear understanding that the reliability and certainty of the forecast is highly questionable. Imagine how much more complex the task becomes if instead of merely attempting to set rates, the Commission now undertakes the process of predicting, with some level of accuracy, all of the factors that may have bearing upon development of the energy markets and the requisite electric infrastructure.

C. *The Commission Should Rely Upon Market Based Solutions to Redress Any Identified Deficiency.*

In view of these considerations and historical precedents, the institution of a centralized planning approach should be used only as a last resort when no other rational solutions appear viable. However, such a scenario is, in our view, not in play in the current circumstances. A more prudent approach that recognizes the limitations associated with attempting to replicate or displace competitive markets is to identify the specific market based deficiency in the infrastructure process and then establish market based incentives or practices that could, if implemented, address this perceived deficiency. This narrower but ultimately potentially more effective approach focuses on identifying and addressing specific discrete problems and then fashioning market based responses and solutions. This solution avoids the pitfalls of developing long-term forecasts and estimates which, by their nature, are unreliable.

D. *The Need for Planning Can be Satisfied By Implementing a Study Process*

In the event some form of statewide integrated planning process is deemed necessary by the Commission, RESA and SCMC recommend that a *study process* should be the approach used to attempt to ascertain what types of actions would best satisfy overall planning objectives and public policy considerations. In this regard, the study process would be distinct from an implementation or acquisition program. The objective would be to identify, in a systematic fashion, all of the various planning and public policy goals that need to be satisfactorily addressed. Once this information is presented, a separate process would then be needed to determine the best approach to satisfying these identified goals and public policies.

Following are some suggested key elements that the study must include in order to reach well informed decisions about how to proceed.

**Goals.** It is critically important for the Commission to identify with some specificity the exact energy related policy goals that the study process is intended to address. The most effective approach is first to precisely identify the perceived deficiency and then implement an appropriate market based solution or incentive to rectify the deficiency or identified goal.

Once the specific goals are identified it is also extremely important to prioritize the public policy considerations and planning objectives, which may conflict with one another. In addition, for the study process to provide meaningful results, it is imperative that all affected parties, including consumers, utilities, ESCOs, and other energy providers, be allowed to participate and express their views in a meaningful manner.

**Current Status.** Before deciding what needs to be changed, it is important to accurately identify the current status of the electric infrastructure and related markets, both on a statewide and

individual utility basis. To a degree, some of this information has already been incorporated in the NYISO planning process.<sup>5</sup> In order to know where we are going, we must first know where we are, and this necessitates an accurate examination and identification of the existing electric infrastructure and related energy market factors.

**Political/Social Obstacles.** While not necessarily subject to precise quantification, it is extremely relevant to at least attempt to ascertain what political or social obstacles or barriers may inhibit the implementation or achievement of any of the policy or energy goals identified in the study process. Issues such as the absence of an Article X siting statute, NIMBY, conflicting political priorities, increasing costs, and other such factors, may engender barriers that could overwhelm or delay achieving any policy or goal sought through the study process. One has only to reflect upon the numerous projects that have engendered significant local opposition to fully comprehend the importance of this issue in the energy study process.<sup>6</sup>

**Constraints.** The study process also needs to identify the variegated physical, financial or practical constraints that, unless alleviated, would restrict or preclude the implementation of any particular measure or resource implementation as identified in the study.

**Impact on Competitive Markets.** The Commission has long supported the development of viable and sustainable competitive markets, which promote economic efficiency and yield consumer benefits. In response to this long standing policy, energy markets have grown and developed to a significant degree. Currently, there are approximately 90 ESCOs serving more than 1.3 million customer accounts and supplying more than 40% of the electricity used by customers

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<sup>5</sup> The NYISO found that 250 to 500 mW of capacity is needed downstate by 2011 and 1500 to 2000 mW is needed on a statewide basis by 2016 to satisfy reliability criteria. Order, p. 35, FN. 30.

<sup>6</sup> See, e. g., the public controversy raised Case 06-T-0650 – Application of New York Regional Interconnect for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the Public Service Law.

within the service territories of New York's investor owned utilities.<sup>7</sup> Obviously, with the underlying competitive markets playing such an important role in the State's electric market, any study process must take this into account and also identify the impact of any of its analyses and recommendations upon the competitive wholesale and retail markets. Retail competition has placed downward pressure on prices, produced environmental benefits through offering of green power and energy efficiency measures and most importantly given customers the power to choose.

**Interaction With Other Planning Processes and Commission Initiatives.** The Commission should also acknowledge and attempt to assimilate the various planning processes that are also implemented by other energy bodies and governmental entities as part of the study process. For example, New York City has recently issued an energy plan ("PlaNYC") under which it has proposed that the City's energy requirements be met in a certain prescribed manner which does not include the construction of any new generating facilities in the City. In addition, as noted above, the NYISO has also instituted a reliability planning process, which would also have bearing upon the Commission's considerations. These are merely two examples of ongoing planning activities undertaken by important entities in the State of New York. The study process needs to reflect these planning efforts and also underscore and identify whether and to what extent the goals and policies of these alternative planning bodies may differ from or conflict with the approaches identified in the integrated study process.

Similarly, the Commission has embarked on a number of regulatory initiatives that will for the foreseeable future materially impact both the supply and use of electricity. The RPS goals requiring 25% of the State's power requirements to be met with renewable resources by 2011 established in 2004 will directly affect the level and type of generation sources available in New

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<sup>7</sup> 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, p. 4). ("Retail Markets Order")

York.<sup>8</sup> The Commission's recent effort to increase the role and impact of energy efficiency reduce electricity usage by 15% from expected levels by 2015 is another example.<sup>9</sup> The study process will need to assimilate these and other similar programs that can dramatically impact both the available supply and use of electricity in the long-term.

**Identification of the Level of Utility Load to be Used in the Planning Process.** The current energy market is markedly different than the scenario at play in prior decades. Today, in excess of 40% of New York's electric usage is served not by the traditional utilities but by competitive ESCOs, with an even greater percentage supplied by ESCOs in specific utility service territories. In the future, that percentage will likely increase as more and more customers choose to be supplied by someone other than the distribution utilities under the Commission's jurisdiction.<sup>10</sup> Therefore, it is appropriate to specifically identify the level of utility load that will be considered in the study process in light of the continued growth of retail access.

**Economic Impacts.** The study process should also incorporate an economic analysis of the various alternative approaches that are identified in the study process. This economic analysis would seek to identify the various costs and benefits associated with each identified alternative so as to provide some indication of what the overall impact each of the alternatives would present in the event it were to be adopted or implemented. In this regard, the economic review would also be expanded to include an analysis of the economic impact upon the financial condition of the affected utility, the utility's ability to obtain needed capital at reasonable rates, as well as the ultimate cost impact upon the body of consumers. It is also important to note that many of the utilities in the State of New York will be accessing the capital markets repeatedly over the next decade in order to

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<sup>8</sup> Case 03-E-0188 – Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, Order Approving Renewable Portfolio Standard Policy (issued September 24, 2004) (“Renewable Portfolio Order”).

<sup>9</sup> Case 07-M-0548 – Proceeding on Motion of the Commission Regarding an Energy Efficiency Standard, Order Instituting Proceeding (issued May 16, 2007).

finance improvements and enhancements to their distribution infrastructure. For example, Consolidated Edison of New York, Inc. recently submitted a rate filing seeking to increase electric rates by approximately \$1.2 billion with a primary driver of the rate increase being needed increases to its electric distribution infrastructure

**Economic Development.** It is imperative that the study process also gauge how proposed alternatives will impact economic development throughout the State. Without a robust and viable economic infrastructure, the planning process becomes irrelevant and the achievement of the various public policy goals will become a nullity. Therefore, an analysis of the impact of the various alternatives to meeting the study goals and planning policies must also be factored into the overall examination conducted through the study process.

**Immediate Versus Long Range Concerns.** As part of its prioritization of the overall public policy goals, the study should also identify whether the concerns that need to be addressed are immediate or long term problems. In this sense, a further prioritization of the study process would identify matters that must be addressed on a more immediate basis, versus those that, while of importance, have a longer time horizon for which an appropriate solution can be developed and implemented. The timeframe of the study should be calibrated to maximize the reliability of the results of the study process, recognizing that a longer timeframe decreases the reliability of the study results.

The study process described above would in addition to the Commission include participation by utilities, customers and ESCOs. It differs from previous resource planning practices in that it expands the number of goals or policies that should be considered, emphasizes the importance of examining the impact upon competition, provides for greater focus upon utility rates

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<sup>10</sup> In this regard, Con Edison has reported a material decline in the utility's commodity purchases from 2004 to 2006 "primarily due to customers migrating from full-service to retail access." (Case 07-E-0523, Pre-filed Testimony of Joseph A. Holtman, pp. 6-7.

and related financial burdens upon customers and utilities, and seeks reliance upon market solutions to address any perceived failure.

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?*

*Response to Question No. 2:*

Long-term utility supply contracts should be discouraged because they harm consumers by impairing the competitive energy market, creating the material risk of burdening consumers with recovery of stranded costs. Moreover, if the utility's default price for electricity is to be set in any way incorporating the pricing in the long term contract it would result in prices that are not market reflective and thereby impair the competitive retail markets. The longer the term over which prices are "fixed" through contract, the greater the probability that the price will diverge from the market – when contract exceeds market customers will over-pay for their usage or, when market exceeds contract, consumers will receive a price signal that their power is less expensive than it actually is, resulting in over-use. A long term contract design that does not send appropriate market signals will not only impact the competitive market, but will place unnecessary obstacles on the ability of the Energy Efficiency initiatives adopted by the Commission to flourish. Without accurate market signals, customers are not fully apprised as to when and how to conserve. Given the harm to consumers, it is unreasonable to resort to long-term contracts as a means of correcting any perceived deficiency without first trying a market-based corrective approach.

The vehicle of long-term contracts also cannot be viewed as a harbinger of stable, low cost retail energy rates. As recently noted by the Pennsylvania Public Utility Commission when considering the use of long-term contracts by default service providers (“DSPs):

In conclusion, we are generally skeptical of the DSP’s ability to beat the market over periods of time greater than one year. Incumbent EDCs have simply not provide any real record in this or other default service proceedings to show that they can anticipate changes in market prices, and take advantage of this information to obtain consistently lower prices through long-term contracts compared to short-term spot market purchases.<sup>11</sup>

Additional skepticism concerning the efficacy of long-term contracts was also broached by the Public Service Commission of Maryland in its deliberations regarding the ability of long-term contracts to provide rate stability. In this regard the Commission concluded:

The Commission concurs with the parties that rate stability is an important policy goal generally... Recent experience suggests that longer term fixed prices do not contribute to that goal; indeed they create a false sense of complacency that costs are in fact stable, followed by a painful transition when rates are finally adjusted to reflect current costs.<sup>12</sup>

The questions of whether and under what conditions utilities should resort to long-term contracts are fundamentally related to the particular facts and circumstances associated with the problem or concern identified in the study process and the likelihood that no other viable alternative is available.<sup>13</sup> Long-term supply contracts cannot be realistically viewed as a magic elixir that will in all cases resolve the State’s energy concerns. One only needs to be reminded of the take-or-pay exposure many natural gas utilities had that resulted from long-term natural gas contracts entered into in the 1970s and 1980s, to see the unintended (and expensive for consumers) results attendant

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<sup>11</sup> Docket No. L-00040169 – Rulemaking Re Electric Distribution Companies’ Obligation to Serve Retail Customers at the Conclusion of the Transition Period Pursuant To 66 Pa. C.S. Section 2807 (e) (2), *Final Rulemaking Order*, (May 10, 2006) at p. 25.

<sup>12</sup> Case No. 9056 – In the Matter of the Commission’s Investigation Into Default Service for Type II Standard Offer Service Customers, *Order No. 81019*, p. 16.

to such long-term arrangements. At best, long-term contracts merely constitute an option that must be carefully reviewed on a case by case basis, but should properly be rejected in most cases since far better alternatives exist.

In this light, it makes little sense to conclude that long-term contracts should be used, for example to facilitate the construction of additional plant or enhance energy efficiency, without first ascertaining what is the specific need related to plant capacity or energy efficiency, whether there is any market failure that prevents achieving the specific goal of additional energy efficiency or electric capacity, and whether there are available market solutions to address the concern. This same process would apply to all of the other goals identified in the question such as the need for new generation, fuel diversity, transmission congestion, etc.

In sum, depending on the particular facts and circumstances, other approaches which primarily rely upon market solutions may and most likely will be the best approach to addressing any perceived concern rather than the use of long-term contracts.

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?*

*Response to Question No. 3:*

Under no conditions should load-serving entities such as ESCOs be required or mandated to enter into long-term commodity or capacity contracts. Such a policy would strike at the heart of customer choice. An ESCO's very survival depends on its ability to develop products and services that customers desire. ESCOs do not dictate products to customers; they offer products that

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<sup>13</sup> By way of example, if it assumed that additional in-city generation is needed to serve load in New York City, requiring the utilities to execute long-term supply contracts may be of little value if additional generating stations

customers demand. As such, an ESCO's supply portfolio is developed in response to its assessment of what the customers desire based upon the individual preferences of the customer base. Therefore the ESCO supply portfolio should not and cannot be the subject of state mandates as it is tied to meeting individual customer preferences --- a key feature of the competitive market. Ultimately, restricting or mandating the specific supplies to be acquired by an ESCO would undermine the competitive marketplace which is inconsistent with the Commission's long stated policy supporting the development of viable and sustainable competitive markets.<sup>14</sup>

Furthermore, imposing such a restriction would be unduly discriminatory and anti-competitive. If the Commission directs utilities to enter into long-term contracts,<sup>15</sup> each utility is assured through the ratemaking process codified under the Public Service Law, that absent a finding of imprudence it will be authorized to recover the entire cost of that contract from its captive consumers. Thus, utilities can recover the costs associated with long-term contracts regardless of their economic viability or whether they conform to customer preferences. No such guaranty however, would apply to an ESCO that becomes subject to a similar commodity supply mandate. In the event the ESCO enters into a long-term arrangement that turns out to be uneconomic there is no guarantee of rate recovery, instead the ESCO faces financial ruin due to the procurement of an uneconomic contract. Once again the end result would be to undermine the competitive marketplace, and thus impact the consumers' ability to choose the products and services they desire from an array of supplies.

From a general policy perspective, long-term contracts do not serve the public interest. Consumers will not have the robust competitive market place until more market responsive contracts are utilized. Furthermore, the end users and the state cannot fully benefit from the

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cannot be built in New York City and efforts to secure additional transmission capacity are also futile.

<sup>14</sup> Retail Markets Order, p. 5.

<sup>15</sup> See, Public Service Law, Sections 65 and 66.

demand side management and other conservation measures until accurate pricing signals are available. Long term contracts cannot help achieve these goals. Moreover, requiring ESCOs to enter into such contracts not only undermines the notion of consumer sovereignty under which competition operates, but also threatens to transform ESCOs into quasi-utilities. Such a situation ill serves the public, would undermine competition, and reduce the product offerings available to consumers.

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

**Response to Question No. 4:**

Initially, it is appropriate to note that in Question 1 the Commission only referenced a planning rather than a resource procurement process; thus the issue of resource procurement was not even raised in the initial question.

The study process would identify the appropriate goals, policies, and concerns that need to be addressed and then in turn provide in a separate phase an attempt to assess and identify the most effective and efficient means of addressing those goals, policies and concerns. In the first instance, an effort would be made to rely upon market forces to meet these goals and concerns rather than addressing the matter through imposition of mandates concerning supply acquisition. In any event, statewide planning or any study process should incorporate an assessment of statewide and local concerns and needs. The Commission together with other appropriate agencies would play an important role in providing the necessary regulatory oversight.

5. *1. What barriers, if any, exist that discourage long-term contracts for development of new electricity resources? 2. 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? 4. How could those incentives be structured consistent with the goal of acquiring the most cost-effective resources?*

Response to Question No. 5:

This question presumes without appropriate foundation that long-term contracts are necessary or desirable for the development of new resources. *A priori* it is not reasonable to conclude that any barriers exist that discourages long-term contracts for the development of new electricity resources. The perceived absence of such contracts may be more primarily related to customer or market preferences as well as market signals and the fundamentals of the operation of the marketplace. For example, ESCOs transact with customers on a daily basis and attempt to tailor their supply products to meet the needs of their customer base. Some customers are comfortable dealing with pricing that is developed on a more real time basis and do not incorporate or subject themselves to long-term constraints, potential risks and cost increases. Ultimately ESCOs will provide and serve the stated needs of consumers and will tailor their products whether of a long or short term nature to address such market preferences.

Based on testimony of Leslie Biddle, Managing Director of Goldman Sachs at the May 8, 2007 FERC Conference on Competition in Wholesale Power Markets, there are new power plants that are being built with financing in ranges far less than the ten to twenty year range that some parties have advocated in this proceeding.<sup>16</sup> Similarly, lenders have entered into financial arrangements with the owners of electric resources of a long term nature under which the assets are

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<sup>16</sup> See transcript at page 134, lines 7-18 “The two power plants, two greenfield power plants that are being built are Plum Point and Longview, and neither of those were built with 20 year PPAs from industrials, or the authorities ... And that way that those contracts are actually being established in the market right now is that they're going in and stepping in for almost like a bridge contract, where it's five to seven years...”

monetized and financial backing is given to refinance or otherwise restructure the ownership of the facilities. These long-term financial arrangements at the wholesale level between the financial company and the owners of the electric resource exist without intervention by the Commission; instead they are based upon a financial analysis of the asset itself which is deemed sufficient to support a long-term financial arrangement between the financial institution and the owner of the electric resource. These same financial entities also enter into financial arrangements of varying lengths from short to long terms with ESCOs for energy and capacity.

Moreover, experience has shown that the energy and investment community can support the introduction of new generation resources without the need to resort to long-term contracts. in other states indicates. Recently the Electric Reliability Council of Texas, Inc., received proposals for the installation of 78, 000 MW of new electric capacity which also included 25,000 MW of wind generation.<sup>17</sup>

There has also been no demonstration for the need to establish credits or incentives to support long-term contracts and neither has there been any demonstration that resorting to long-term contracts would support acquiring the most cost effective resources.

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<sup>17</sup> See, ERCOT System Planning Division, Monthly Status Report to Technical Advisory Committee, Reliability and Operations Subcommittee for March 2007, p. 1.

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?]*

*Response to Question No. 6:*

It is problematic to allow government interference with what are purely market-based relationships. The government should not attempt to restrict the type of resources a supplier would acquire or impose other conditions affecting what are normally commercial matters related to run of the mill contractual relationships between consenting and independent buyers and sellers. In the event however, that the Commission identifies based upon the results of the study process that certain limitations or restrictions are warranted then they should be implemented in such a manner as to minimize interference with the competitive market. The specific steps that would need to be taken to limit the anti-competitive impacts of any particular contract would be a function of the specific circumstances or problem that implementation of those contractual provisions were intended to redress. Therefore in the abstract it is not useful to speculate as to the specific corrective or mitigating factors that would be needed to redress potential anti-competitive impact; nonetheless, it would be necessary to carefully analyze this factor once a specific contract limitation was deemed to be appropriate for implementation.

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?*

*Response to Question No. 7:*

At this point it is difficult to fashion a useful response absent a clear idea of what are the specific goals that are intended to be addressed as well as the feasibility from a practical perspective of implementing any particular measure or approach. However, as indicated in the response to Question No. 2,<sup>18</sup> the pricing of the long term contract should not be incorporated into the utility's default price for electricity, as doing so would result in prices that are not market reflective and thereby impair competitive markets.

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?*

*Response to Question No. 8:*

At this point it is difficult to fashion a useful response absent a clear idea of what are the specific goals that are intended to be addressed as well as the feasibility from a practical perspective of implementing any particular contract.

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<sup>18</sup> *Supra*, p. 13.

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?*

Response to Question No. 9:

RESA and SCMC will not address this issue at this time but reserve the right to comment on Question 9 in the future.

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?*

Response to Question No. 10:

RESA and SCMC will not address this issue at this time but reserve the right to comment on Question 10 in the future.

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

Response to Question No. 11:

It is respectfully submitted that once a particular concern or problem is identified in the study process the preferred approach should be to rely upon market solutions or development of market incentives as the means by which the problem or concern would be addressed. Under this approach consideration is given to meeting any particular goal or addressing the problem outside

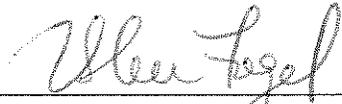
reliance upon monopolies and instead focuses on market responses that expand the pool of potential participants as well as providing redress in a more economically efficient manner.

**IV. CONCLUSION:**

RESA and SCMC appreciate the opportunity to address the important issues raised in this proceeding and it is respectfully requested that the Commission adopt policies consistent with the views and recommendation expressed herein.

Respectfully submitted,

Retail Energy Supply Association and  
Small Customer Marketer Coalition

By:   
Usher Fogel, Counsel

Dated: Cedarhurst, New York  
June 4, 2007