STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 07-E-1507

Proceeding on Motion of the Commission to Establish a Long-Range Electric Resource Plan and Infrastructure Planning Process.

# Revised All-Parties Report on Recommendations Regarding Review and Implementation of Regulated Reliability Solutions

Contributions by:

Competitive Power Ventures, Inc.
New Athens Generating Company, LLC
NYS Consumer Protection Board
NYS Department of Public Service
Independent Power Producers of New York, Inc.
Multiple Intervenors
New York Independent System Operator, Inc.
New York Transmission Owners
Long Island Power Authority
New York Power Authority
Retail Energy Supply Association
Small Customer Marketer Coalition

Dated: November 14, 2008

**TABLE OF CONTENTS**

# I. Introduction

## A. Purpose and Objective of Report

Pursuant to the New York Public Service Commission's (NYPSC or Commission) December 24, 2007 Order Initiating Electricity Reliability and Infrastructure Planning (December 24 Order), the NYPSC initiated a collaborative process to develop "recommendations regarding the implementation of NYISO's regulatory backstop process for near-term (2012-2013) reliability needs, including the filings and processes that may be required under the schedule allowed by the NYISO CRPP to complete backstop projects."[1] In particular, the NYPSC requested suggestions on a process and "decisional standards" that it could use in selecting a preferred regulated project among various potential solutions to a Reliability Need identified by the New York Independent System Operator, Inc. (NYISO).[2]

The purpose of this Report is to respond to the NYPSC's request for recommendations in the December 24 Order, by proposing a process that will allow for the timely implementation (e.g., review, selection, approval, and construction) of solutions to NYISO-identified Reliability Needs in instances where the NYISO determines that market-based proposals are insufficient to meet the

---

[1] December 24 Order at p. 18. This effort is referred to herein as Initiative II, while Initiative I addressed the parties' recommendations regarding cost recovery and cost allocation of regulated reliability solutions.

[2] December 24 Order at p. 3. The Commission also requested the development of a long-term (ten to fifteen year) electricity resource plan (ERP) to provide any additional guidance regarding Initiative II issues and to address the "long-term energy policies, goals, and needs of New York." This long-term ERP is referred to as Initiative III.

identified needs.[3] This Report is designed to provide the reader with a detailed understanding of the existing NYISO reliability planning process, so that the recommendations contained herein may be put into context.

**B. Summary of Report**

Section two of the Report provides an overview of the NYISO's existing Comprehensive Reliability Planning Process (CRPP), as well as a summary of the current status of the 2008 Comprehensive Reliability Plan (CRP). As discussed below, the 2008 Draft CRP indicates that the first identified Reliability Need date will be in 2013, although sufficient market-based projects have been identified to indicate that those anticipated needs will be met. Therefore, the NYISO does not intend to request that a regulated reliability solution be pursued at this time.

Section three contains a recommended process to be used in reviewing and selecting among the available alternatives that may address an identified Reliability Need in instances where the NYISO determines that market-based proposals are insufficient to meet the identified needs. However, the parties were unable to reach consensus on this process. The primary divergence in the parties' positions centers around the timing of the process, and whether alternative regulated reliability solutions should be considered by the Responsible TOs after issuance of the

[3] LIPA argues that any regulated backstop solution located solely on Long Island should not be subject to this process and indicates that, to the extent that the NYPSC selects a project with increased costs to meet policy goals in addition to reliability, LIPA will consider whether to contribute to those increased costs. However, all statutory requirements would continue to apply, such as Article VII of the Public Service Law.

NYISO's Reliability Needs Assessment, or after the NYISO issues the CRP. An alternative recommended process is presented by the New York Transmission Owners.

Section four addresses the use of relevant criteria and public policy objectives for selecting among the available alternatives to an identified Reliability Need. The parties diverge in how those criteria are applied, with some parties recommending that the NYPSC use cost as a predominant factor in selecting among alternatives.

Other policy matters are also addressed in section four, including the use of long-term contracts and the potential impacts on competitive markets. The parties' respective positions on these controversial subjects are identified below. Finally, section five of the Report addresses other relevant matters, including permitting/siting issues and ensuring construction of projects.

## II. Existing Comprehensive Reliability Planning Process

### A. Overview of the CRPP

The CRPP is a long-range assessment by the NYISO of both resource adequacy and transmission reliability of the New York bulk power system over five-year and 10-year planning horizons. The objectives of the CRPP are to:

1. Evaluate the reliability needs of the bulk power system;
2. Identify factors and issues that could adversely impact the reliability of the bulk power system,

considering applicable reliability rules and resource adequacy criteria;[4]

3. Provide a process whereby solutions to identified Reliability Needs are proposed, evaluated, and implemented in a timely manner to maintain the reliability of the system;
4. Provide for the development of market-based solutions, while maintaining the reliability of the bulk power system through backstop regulated solutions or alternative regulated solutions, as needed; and
5. Coordinate the NYISO's reliability assessments with neighboring Control Areas.

The first step in the CRPP, which is illustrated in Figure 1 below, is the Reliability Needs Assessment (RNA), which evaluates the adequacy and security of the bulk power system over a ten-year Study Period.[5] When resource adequacy needs are identified, considering applicable reliability rules and resource adequacy criteria, the NYISO identifies the amount of resources in megawatts (known as "compensatory megawatts") and the locations in which they are needed to meet those needs. The NYISO also identifies the Responsible Transmission Owner(s) (TOs) that are obligated to propose regulated "backstop" projects to meet the identified Reliability Need

[4] The reliability of the bulk power system is assessed, and solutions to reliability needs are evaluated, in accordance with existing reliability criteria of the North American Electric Reliability Corporation (NERC), the Northeast Power Coordinating Council, Inc. (NPCC), the New York State Reliability Council (NYSRC), and the NYPSC, as they may change from time to time.

[5] The NYISO's Independent Market Advisor reviews the draft RNA and considers whether market rules changes are necessary to address an identified failure, if any, in one of the NYISO's competitive markets.

and solicits solutions from such TOs.[6] Developers and TOs may submit "alternative" regulated proposals to the NYISO to determine whether such proposals will also meet the identified Reliability Need.[7] The NYISO also solicits market-based responses to the Reliability Need. Market-based and regulated solutions can take the form of transmission, generation, or demand response.[8]

In the second step of the process, the NYISO evaluates market-based, regulated backstop, and alternative regulated solutions to the identified Reliability Need. The NYISO's evaluation of proposed solutions is limited to ensuring that they satisfy reliability criteria, including resource adequacy. Following its evaluation of all proposed solutions, including alternative regulated solutions, the NYISO prepares a Comprehensive Reliability Plan (CRP). The CRP identifies all proposed solutions that the NYISO has found to meet part or all of the identified Reliability Needs.

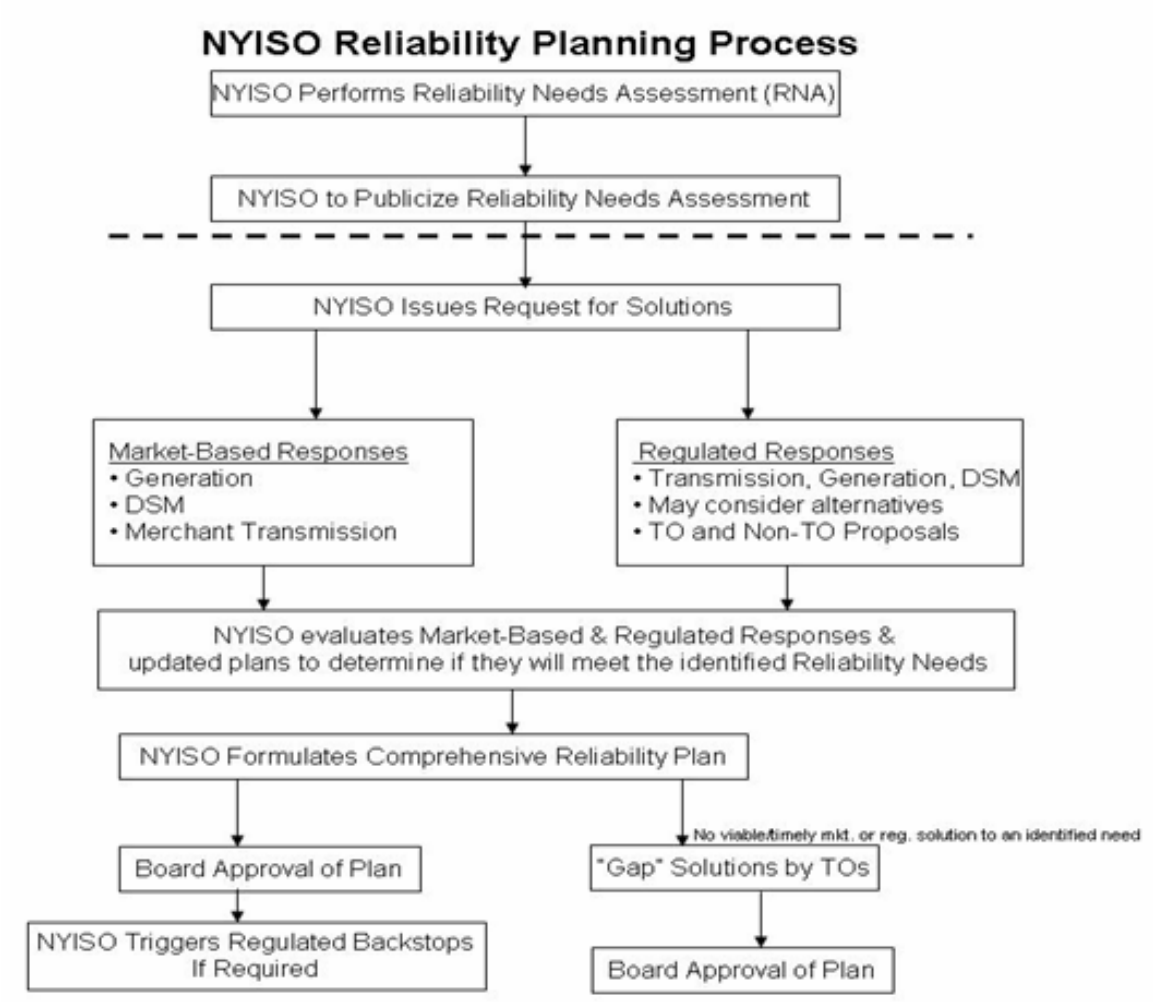
---

[6] The Responsible TOs will normally be the TOs in whose Transmission District(s) the NYISO identifies a Reliability Need.

[7] While regulated backstop solutions refer to proposals by Responsible TO(s), alternative regulated solutions refer to proposals by other developers or TO(s) not acting in the capacity of a Responsible TO. Regulated solutions refer to any proposal other than market-based proposal.

[8] Market Participants may submit at any time optional suggestions for changes to NYISO rules or procedures which could result in the identification of additional resources or market alternatives suitable for meeting Reliability Needs.

Figure 1: NYISO Reliability Planning Process




The CRPP is based on the fundamental precept that market-based solutions should be the first choice to meet an identified Reliability Need, and the recognition that a "regulated" solution should only be implemented in instances where a market-based solution will not be available to meet the identified need.

The NYISO has adopted criteria for evaluating the viability of market-based, regulated backstop, and alternative regulated solutions. These criteria are set forth in Section 2.2, 2.3 and 2.4 of the NYISO's CRPP

Manual. The CRPP Manual is posted on the NYISO's website, at the following link:

http://www.nyiso.com/public/webdocs/documents/manuals/planning/CRPPManual120707.pdf.

If the NYISO determines that there are sufficient market-based projects to meet the identified need in a timely manner, it will be so stated in the CRP. If, however, the NYISO deems market-based projects to be insufficient, it will similarly be indicated in the CRP, but the NYISO will determine whether a regulated backstop solution must be "triggered" to ensure that it can be implemented by the need date in order to maintain bulk power system reliability. The NYISO may also trigger a backstop solution outside of the CRP if, as a result of periodic monitoring of market-based projects, it is determined that such projects will no longer be available to meet the identified Reliability Need.

The NYISO establishes "trigger" dates for regulated backstop solutions after reviewing the Responsible TOs' estimated lead times for implementing the backstop solution. The trigger dates indicate the date by which the NYISO must decide whether a regulated backstop solution should proceed. If insufficient market-based solutions will be available by the need date, the NYISO will "trigger" the reliability backstop solution by requesting that the Responsible TO or TOs proceed with regulatory approval and development of their proposed regulated backstop solution. The Responsible TO(s) proceed to seek regulatory approval after the NYISO's Board of Directors (Board) approves the CRP.

The CRPP has a "halting" process that provides an orderly process for terminating the regulated reliability

project. This process is described in Section 10.0 of Attachment Y of the NYISO OATT, and Section 2.6 of the CRPP Manual.

The CRPP also contains provisions that will allow the NYISO Board to deal with the sudden appearance of a Reliability Need on an emergency basis, whether during or in-between the normal CRPP cycle. In the event the NYISO determines that neither market-based proposals nor regulated proposals can satisfy the Reliability Need in a timely manner, the NYISO will set forth its determination that a "Gap Solution" is necessary in the CRP.[9] If there is an immediate threat to reliability, the NYISO Board, after consultation with the New York Department of Public Service (NYDPS), may request the appropriate TO(s) to propose a Gap Solution outside of the normal planning cycle and to pursue its completion and alert the NYPSC. Any party may submit an alternative Gap Solution proposal to the NYISO and the NYDPS for their consideration.

The NYISO evaluates all Gap Solution proposals to determine whether they will meet the Reliability Need or imminent threat. A permanent regulated solution, if appropriate, may proceed in parallel with a Gap Solution. Given the regular cycle of and scope of reliability studies conducted by the NYISO, it is envisioned that a regulated reliability solution should be invoked by the NYISO only in rare instances, and a Gap Solution should be invoked even more rarely.

Because the NYISO lacks authority to license or construct projects to respond to Reliability Needs, the

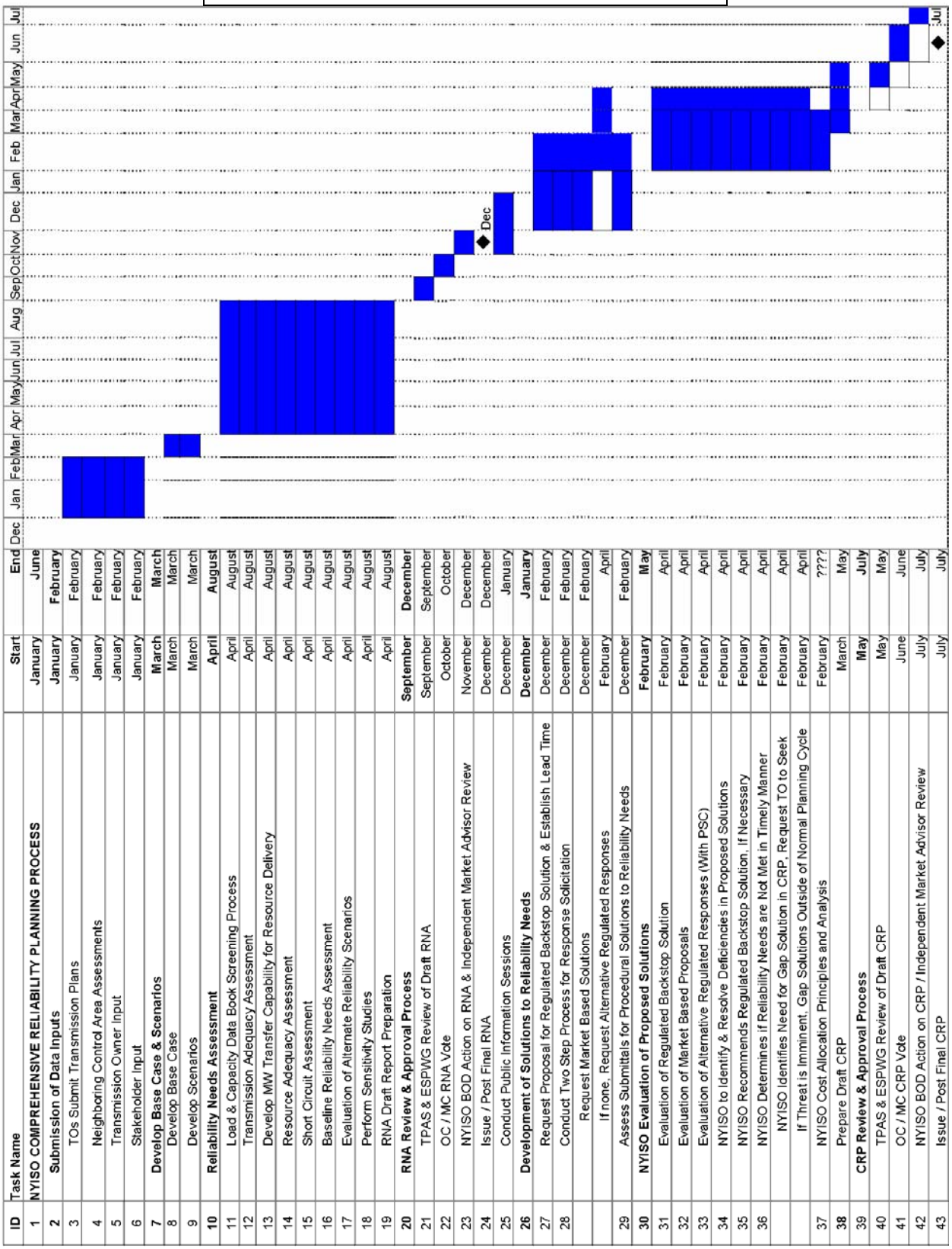
[9] Gap Solutions should be designed to be temporary and to strive to be compatible with permanent market-based proposals.

ultimate selection and approval of those projects lies with the appropriate regulatory agencies. These agencies may include the NYPSC, the Federal Energy Regulatory Commission (FERC), environmental permitting agencies, and local governments. The NYISO monitors the progress and continued viability of proposed market-based and regulated reliability projects to meet identified needs, and the trigger dates for reliability backstop solutions, on a quarterly basis.

Figure 2 contains a Gantt chart describing the detailed steps of the CRPP and the timing of those steps. Highlights with particular relevance to Initiative II of this proceeding include:

- Jan: Start development of RNA (Task 2)
- Nov/Dec: Reliability Loss of Load Expectation and compensatory MWs identified by year and zone (Task 23)
- Dec/Feb: Establish lead time for Reliability Need and issue request for market-based solutions (Tasks 27-28)
- Feb/Apr: Evaluate market-based, regulated backstop, and alternative regulated solutions and prepare cost allocation analysis (Tasks 30-37)
- July: Complete CRP and trigger recommended backstop resource, if necessary (Tasks 42-43)

Figure 2: Gantt chart of CRPP



| ID | Task Name | Start | End |
|---|---|---|---|
| 1 | **NYISO COMPREHENSIVE RELIABILITY PLANNING PROCESS** | January | June |
| 2 | **Submission of Data Inputs** | January | February |
| 3 | TOs Submit Transmission Plans | January | February |
| 4 | Neighboring Control Area Assessments | January | February |
| 5 | Transmission Owner Input | January | February |
| 6 | Stakeholder Input | January | February |
| 7 | **Develop Base Case & Scenarios** | March | March |
| 8 | Develop Base Case | March | March |
| 9 | Develop Scenarios | March | March |
| 10 | **Reliability Needs Assessment** | April | August |
| 11 | Load & Capacity Data Book Screening Process | April | August |
| 12 | Transmission Adequacy Assessment | April | August |
| 13 | Develop MW Transfer Capability for Resource Delivery | April | August |
| 14 | Resource Adequacy Assessment | April | August |
| 15 | Short Circuit Assessment | April | August |
| 16 | Baseline Reliability Needs Assessment | April | August |
| 17 | Evaluation of Alternate Reliability Scenarios | April | August |
| 18 | Perform Sensitivity Studies | April | August |
| 19 | RNA Draft Report Preparation | April | August |
| 20 | **RNA Review & Approval Process** | September | December |
| 21 | TPAS & ESPWG Review of Draft RNA | September | September |
| 22 | OC / MC RNA Vote | October | October |
| 23 | NYISO BOD Action on RNA & Independent Market Advisor Review | November | December |
| 24 | Issue / Post Final RNA | December | December |
| 25 | Conduct Public Information Sessions | December | January |
| 26 | **Development of Solutions to Reliability Needs** | December | January |
| 27 | Request Proposal for Regulated Backstop Solution & Establish Lead Time | December | February |
| 28 | Conduct Two Step Process for Response Solicitation | December | February |
| | Request Market Based Solutions | December | February |
| | If none, Request Alternative Regulated Responses | February | April |
| 29 | Assess Submittals for Procedural Solutions to Reliability Needs | December | February |
| 30 | **NYISO Evaluation of Proposed Solutions** | February | May |
| 31 | Evaluation of Regulated Backstop Solution | February | April |
| 32 | Evaluation of Market Based Proposals | February | April |
| 33 | Evaluation of Alternative Regulated Responses (With PSC) | February | April |
| 34 | NYISO to Identify & Resolve Deficiencies in Proposed Solutions | February | April |
| 35 | NYISO Recommends Regulated Backstop Solution, If Necessary | February | April |
| 36 | NYISO Determines if Reliability Needs are Not Met in Timely Manner | February | April |
| | NYISO Identifies Need for Gap Solution in CRP, Request TO to Seek | February | April |
| | If Threat is Imminent, Gap Solutions Outside of Normal Planning Cycle | February | April |
| 37 | NYISO Cost Allocation Principles and Analysis | February | ??? |
| 38 | Prepare Draft CRP | March | May |
| 39 | **CRP Review & Approval Process** | May | July |
| 40 | TPAS & ESPWG Review of Draft CRP | May | May |
| 41 | OC / MC CRP Vote | June | June |
| 42 | NYISO BOD Action on CRP / Independent Market Advisor Review | July | July |
| 43 | Issue / Post Final CRP | July | July |

## B. Current Status of CRPP

### 1. The 2008 RNA

The 2008 RNA, which was issued on December 12, 2007, indicated that the forecasted system first showed a Reliability Need in the year 2012. The need in 2012 resulted from a statewide capacity deficiency as well as a zonal deficiency resulting from transmission constraints.[10] Therefore, the need could have been resolved by adding capacity resources downstream of the transmission constraints or by adding resources upstream of transmission constraints in conjunction with transmission reinforcements. Accordingly, the RNA designated all TOs, except for the New York Power Authority (NYPA),[11] as the Responsible TOs required to identify a regulated backstop solution to the Reliability Need, which may be called upon by the NYISO in the event a market-based solution is not available.

Based upon continuing load growth throughout the NYCA from 2013 to 2017, and assuming no additional resources in the second five years of the RNA study period,

[10] The 2008 RNA assumed no imports of external resources other than those that are tied to long-term contracts. Historically, up to 2,755 MWs of external resources have sold capacity into the New York market on a short-term basis.

[11] NYPA was not identified as a Responsible TO because it serves its government, authority and private sector customers by contractual agreement, rather than as the utility provider of last resort, which would be required to serve those customers should they refuse service from NYPA. Nevertheless, the NYISO stated that it expects NYPA to work cooperatively with the Responsible TOs to identify regulated backstop solutions to the reliability needs identified in the RNA.

the RNA determined that additional resources would be needed in these years as well. The RNA characterized the Reliability Needs for 2013-2017 as statewide resource adequacy needs, such that there are multiple combinations of generation, transmission and demand-side resources that could satisfy those needs during this period. Consequently, the RNA identified all of the TOs, except for NYPA, as Responsible TOs to identify regulated backstop solutions for the Reliability Needs in 2013 to 2017.

The RNA reported the results of two sensitivity analyses, with the following results:

- The Reliability Need in 2012 could be deferred to 2013 if the Neptune project was modeled as firm capacity in Zone K; and,
- Assuming unlimited transmission system capability would also defer the first year of a Reliability Need from 2012 to 2013.

The RNA also examined the Reliability Needs under a number of alternative scenarios that resulted in a change in the need date, with the following results for those scenarios:

- If the high load forecast were to occur, the Reliability Need in 2012 would advance to 2010, and local needs would emerge in western New York;
- If increasingly stringent environmental controls were to force the imminent retirement of all of the coal-based generation in New York, except for the two most modern units, the Reliability Needs in some zones in New York would advance to 2009 or 2010;
- If NYPA proceeds with one of its two proposals to purchase 500 MW of new capacity in Zone J by 2011 to serve its customers in New York City, the first year of need would be 2014; and,
- If energy savings consistent with those in the “15 x 15” initiative are achieved (through the

> NYPSC's Energy Efficiency Portfolio Standard proceeding), which would be equivalent to approximately 5,700 MW of peak demand reduction, the identified Reliability Needs over the ten year planning period would not occur.

On December 10, 2007, the NYISO Board approved the 2008 RNA. Because the NYISO's Open Access Transmission Tariff calls for the NYISO to encourage market-based solutions to identified Reliability Needs, the NYISO issued its initial request for those solutions on December 12, 2007. The NYISO requested that developers submit market-based solutions and that the Responsible TOs submit regulated backstop solutions to the identified Reliability Needs by March 1, 2008. The NYISO also stated that developers could submit alternative regulated solutions if they chose to. Due to uncertainty as to the viability of generation solutions as of April 4, the NYISO issued a letter that day soliciting any remaining alternative regulated solutions by April 21, 2008.

Two significant changes have occurred since the NYISO Board approved the 2008 RNA. The first was a reduced load forecast and the second was a change in status of a proposed market-based solution (i.e., the First Light Energy project in Rensselaer, New York, which commenced construction). In addition, the amount of demand response Special Case Resources (SCRs) most recently registered increased. Changes to these parameters will be incorporated in the next cycle of CRPP, starting with the 2009 RNA. Accordingly, in accordance with the NYISO's tariffs, the 2008 CRP evaluated solutions received in response to the NYISO's solicitations to determine if they

met the Reliability Needs that were identified in the 2008 RNA.

**2. The 2008 CRP**

The NYISO Operating Committee and Management Committee voted to recommend that the NYISO Board approve the 2008 Draft CRP on June 19, 2008, and June 27, 2008, respectively. The NYISO Board approved the 2008 CRP in mid-July, 2008.

In response to the NYISO's request for solutions to the Reliability Needs identified in the 2008 RNA, the NYISO received 3,380 MW of market-based solutions. Moreover, the NYISO received updated plans from the TOs, regulated backstop solutions from the Responsible TOs, and some alternative regulated solutions to the Reliability Needs.

The 2008 CRP indicates that the Reliability Need in 2012 is deferred until 2013 with the addition of the Neptune project connecting Long Island to PJM. However, because the NYISO received more market-based proposals than the minimum resources needed to meet resource adequacy criteria and transmission security criteria, the NYISO determined that the market-based projects that have been submitted, in conjunction with updated TO plans, met the Reliability Needs identified in the 2008 RNA. Accordingly, the NYISO determined that there is no need at this time for the NYISO to trigger the Responsible TOs to proceed with a regulated backstop solution to the Reliability Needs. The NYISO does not have authority to choose which of the submitted market-based projects will be built, and therefore, the NYISO's role going forward will be to monitor the market-based projects to ensure they will continue to meet the identified Reliability Needs. Rather,

it is up to the proponents to proceed with, and the relevant state and federal siting and permitting agencies to approve, the specific projects.

In accordance with the criteria adopted by the NYISO Operating Committee, the NYISO will continue to monitor and track, on a quarterly basis, the progress of market-based transmission, generation and demand response resource projects to determine their on-going viability, and to determine whether regulated backstop solutions need to be triggered, and will report on its evaluation on a regular basis.[12] Such determination may be made either within, or outside of, the CRP.

The next round of the CRPP should progress on schedule. The draft 2009 RNA Assessment was completed in October 2008, and will be presented to the NYISO Board in December 2008.

## III. Recommended Selection Process

### A. Overview of the Process

It is helpful to consider the recommended process in the context of the parties' expectation that regulated backstop projects are expected to be triggered by the NYISO in limited instances. Resource needs should normally be met by the market, and the process recommended herein should not inadvertently favor the use of this process in lieu of market-based approaches. It is also possible that the recommended process will have a limited impact on achieving public policy goals, other than ensuring reliability. The parties also recognize that it is

[12] See, NYISO Technical Bulletin 171, Subject: Monitoring Viability of Solutions to Meet Reliability Needs – NYISO Process.

particularly important for any necessary regulated reliability solutions to be selected and implemented in a timely manner, since limited time will be available between the NYISO triggering the need for a solution and the Reliability Need date.

The process recommended by the parties is designed to be compatible and consistent with the NYISO's CRPP.[13] The following is a brief description of this process, which is detailed more fully in the next section, where the specific procedural steps and the timing of those steps are discussed, including the roles and responsibilities of the various entities involved. A flowchart is included in Appendix A as Figure 3, at the end of this report, to illustrate the recommended process.

In sum, the Responsible TO(s) and NYDPS Staff would conduct a review of all alternative regulated solutions when it appears reasonably likely that a regulated backstop solution or an alternative regulated solution, if it were designated as the backstop solution, would need to be triggered to meet a NYISO-identified Reliability Need. The reasonable likelihood of a solution being triggered would be based on an informal determination by NYDPS Staff, after consulting with the NYISO, Responsible TOs, and other appropriate entities.

[13] The NYISO indicates that the consultation process should not and cannot delay the Responsible TO's obligation to timely submit a regulated backstop solution to the NYISO. Nor may the process delay the NYISO's preparation of the draft CRP for consideration by the stakeholders, governance committees and board of directors, in accordance with the requirements of Attachment Y of the NYISO Tariff.

As noted above, the NYISO monitors the progress and continued viability of proposed market-based and regulated reliability projects to meet identified needs, including the trigger dates for reliability backstop solutions, on a quarterly basis. NYDPS Staff would utilize this information gathered by the NYISO, taking into consideration the amount and status of market-based solutions, as well as any other relevant considerations, in determining the reasonable likelihood of a solution being triggered. Thus, NYDPS Staff would consider the reasonable likelihood of a solution being triggered during these four times per year at a minimum. However, it is anticipated that one of the quarterly reports would coincide with issuance of the RNA,[14] and in such situations NYDPS Staff would utilize the information regarding any identified Reliability Need(s) in the most current RNA, while consulting with the NYISO regarding the amount and status of market-based solutions and TO update plans in response to those needs, as updated in accordance with the NYISO's CRPP.[15]

In conducting a review of alternatives, the Responsible TO(s) together with NYDPS Staff and the NYISO will consult individually with each proponent of an alternative regulated project for which the NYISO has determined the extent to which it would meet the identified

[14] On October 16, 2008, FERC accepted the NYISO's proposal to move the CRPP, including the RNA, to a biennial planning cycle.

[15] Nothing in this recommended process is intended to limit the NYPSC's existing authority to take action outside the procedures described herein, or to limit the ability of the NYISO to exercise its responsibilities under its tariffs.

Reliability Need. The consultation would be intended to consider and discuss the particulars of each alternative and whether the Responsible TO(s) should modify the regulated backstop proposal, either in whole or in part, to reflect the use of a regulated alternative solution. The NYISO will consider (and evaluate as appropriate) the potential ability of each alternative solution to address an identified Reliability Need, while the Responsible TO(s) and NYDPS Staff will consider the consistency of those solutions with public policy objectives and other relevant criteria, including but not limited to cost. Each proponent of an alternative solution may also share with the Responsible TO(s) and the NYDPS Staff its informal comments on its proposed solution. NYDPS Staff would share its informal comments with the proponent of each alternative regulated solution and with market participants, including representatives of end-use customers.[16]

While this process is intended to ensure that all alternative regulated solutions are considered, the Responsible TO(s) would make the ultimate decision regarding whether to modify their proposed regulated backstop solution, either in whole or in part, to reflect the use of a regulated alternative solution. The responsibility to determine the proposed regulated backstop solution rests with the Responsible TO(s), as does a determination as to whether to modify a proposed regulated backstop solution, in order to reflect the use of an alternative regulated solution.

[16] The public policy objectives and relevant criteria are discussed below in section IV.A.

Although this process is envisioned as informal and non-binding on the NYPSC and the Responsible TO(s), there may be a need for the Responsible TO(s) to conduct sufficient analysis of an alternative, at the request of NYDPS Staff, to determine whether to modify the regulated backstop proposal, either in whole or in part, to reflect the use of a regulated alternative solution. The proponent of an alternative regulated solution will be responsible for providing NYDPS Staff and the Responsible TO(s) with the information and analysis relevant to an informal review of the proposal. To the extent that NYDPS Staff or the Responsible TO(s) determine that additional information or analysis is required for the review, they will request the proponent of the proposed solution to provide such information or analysis. In the event the Responsible TO(s) modify their backstop proposal to include an alternative regulated solution, in whole or in part, the modified solution would be referred to the NYISO for a re-evaluation to ensure that it satisfies the Reliability Need.

An advantage of this approach is that it allows Responsible TO(s) and NYDPS Staff an opportunity to consider alternative solutions, which may have longer lead-times than a backstop solution, before that backstop solution is triggered by the NYISO. For example, and for illustrative purposes only, a backstop proposal may involve the construction of a generation project with a relatively shorter lead-time than a potential alternative solution that involves a transmission project. The recommended process would allow the transmission solution, as well as any other potential options, to be considered prior to the generation solution being triggered. As such, the

recommended process does not foreclose any potential solutions, which may occur under the existing process. It also allows either the NYDPS Staff or the sponsor of an alternative backstop solution to pursue a viable alternative solution before the NYPSC in a timely manner. If NYDPS Staff determines that an alternative solution should be pursued further, NYDPS Staff may recommend that the NYPSC initiate a proceeding under section 66 of the Public Service Law,[17] to investigate whether an alternative is in the public interest, so that a potential option is not foreclosed.[18]

An additional rationale for a NYDPS Staff review is to provide market participants with some indication of NYDPS Staff's assessment of the value of their projects in meeting the identified Reliability Need and other public policy objectives, and whether those projects should be pursued further. Furthermore, the NYDPS Staff's informal comments would not involve the type of comprehensive

[17] PSL §66(5) authorizes the NYPSC to conduct a hearing and "determine and prescribe the safe, efficient and adequate property, equipment and appliances…to be used, maintained and operated for the security and accommodation of the public." Moreover, under PSL §66(2), the Commission may "order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of…electric corporations." PSL §65(1) requires electric corporations to provide "such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable."

[18] In the event a proponent of an alternative project with a longer lead-time than the Responsible TO's proposed backstop solution wishes to pursue its project further, it may petition the NYPSC to review its project and seek a determination authorizing such project as a regulated reliability solution.

environmental review, and the time and costs associated with such review, which would otherwise be necessary for the NYPSC to select a regulated reliability solution. However, the NYPSC's ultimate selection of a project that ensures reliability and best promotes the public interest will likely require such a detailed environmental review under Article VII of the Public Service Law and/or the State Environmental Quality Review Act (SEQRA). Therefore, this approach would be just as protective of the environment as is currently required under the law.

In accordance with the CRPP, the NYISO will request that the Responsible TO(s) pursue the backstop solution when it becomes apparent that sufficient market-based solutions will not be available to meet the identified Reliability Need. Under the process recommended herein, the Responsible TO(s) would then seek necessary authorizations including regulatory approval from the NYPSC, while concurrently, proponents of alternative projects for which the NYISO has determined the extent to which it would meet the identified Reliability Need, that would like to be considered further would have the right to submit their alternatives to the NYPSC for such consideration. Proponents of alternative regulated solutions would have the monetary risk of going forward with a NYPSC proceeding that will review and select a regulated solution. In contrast, at present, the Responsible TO(s) are obligated to propose and, if directed, to implement regulated solutions and are guaranteed recovery of these costs through a rate recovery mechanism in the NYISO tariff.[19] The NYPSC would initiate a

[19] NYISO Open Access Transmission Tariff, Attachment Y, §16.

PSL §66 proceeding in order to review the backstop project and the alternatives in parallel (e.g., PSL Article VII, SEQRA), and make findings regarding the selection of an appropriate solution to the Reliability Need that best promotes the public interest and satisfies other applicable requirements. NYDPS Staff may also recommend, at any time, that the NYPSC initiate a PSL §66 proceeding in order to review the regulated backstop project and/or the alternatives.

In order to ensure a coordinated and timely review of a solution to an impending Reliability Need, the NYPSC would request lead agency status under SEQRA.[20] In the event that a developer already has commenced a SEQRA review under another lead agency, the developer may elect to continue its permitting process with that lead agency. The overall intent is that this process would involve a coordinated review by each "involved agency" with permitting or approval authority, as defined under SEQRA, and constitute the environmental review of the project(s) so that the NYPSC can select a preferred solution and the necessary approvals and permits can be issued contemporaneously with such selection.

**B. Procedural Steps**

As noted above, the recommended process would be applied in situations where it appears reasonably likely that either a regulated backstop solution or an alternative regulated solution, if it were designated as the backstop solution, would need to be triggered. The following is a description of the timing and procedural steps involved in

[20] Disputes regarding the selection of a lead agency are resolved by the Commissioner of the Department of Environmental Conservation. See, 6 NYCRR 617.6(b)(5).

such review. These steps should be interpreted to include the descriptions contained in the previous section (Overview of the Process), to the extent that additional or more specific details are provided therein.

| Timing | Procedural Steps |
|---|---|
| 1) Time 0 (after NYISO quarterly Reports) | 1) NYDPS Staff informally determines, after consultation with the NYISO, Responsible TO(s) and other appropriate entities, that a proposed solution with the earliest lead-time/trigger date (either a regulated backstop or alternative regulated solution if it were designated as the backstop solution), would likely need to be triggered to meet a NYISO-identified Reliability Need. NYDPS Staff will take into consideration the amount and status of market-based solutions, as well as any other relevant considerations. |
| 2) End of Step 1 → ~60 days prior to the proposed solutions' longest lead-time/trigger date | 2) If, based on NYDPS Staff's informal determination, it appears reasonably likely that a solution would need to be triggered, the proponents of alternative projects will consult with the Responsible TO(s), the NYISO and NYDPS Staff regarding modifying the regulated backstop proposal, either in whole or in part, to reflect the use of a regulated alternative solution. The proponent of an alternative would be responsible for providing NYDPS Staff and the Responsible TO(s) with relevant information and analyses. NYDPS Staff provides feedback to the Responsible TO(s) and alternative project proponents regarding its informal comments on the relative strengths and/or weaknesses of each alternative with regard to public policy objectives and other relevant criteria. The Responsible TO may request that the NYISO review a modification to its |

| | |
|---|---|
| | proposed backstop solution to ensure it meets the Reliability Need, on a "preliminary" basis. The review of alternative regulated solutions will generally begin no sooner than six months prior to the trigger date of the proposed solution with the longest lead-time and be completed no later than 60 days prior to such trigger date.[21] |
| 3) End of Step 2 | 3) The Responsible TO(s) request, if they have not already done so, that the NYISO review any modifications to their backstop solution(s) to ensure the modified solution(s) will meet the NYISO-identified Reliability Need. The Responsible TO(s) inform NYDPS Staff of such request. |
| 4) End of Step 3 → + 30 days | 4) The NYISO evaluates whether any modifications to the backstop solution(s) will meet the Reliability Need, and informs the Responsible TO(s) and NYSDPS Staff accordingly. |
| 5) End of Step 4 → + 30 days | 5) NYDPS Staff informs market participants of its review and the outcome of the review process at an Electric System Planning Working Group meeting.[22] The NYISO modifies the Responsible TO(s)' backstop proposal and trigger date, as appropriate. |

[21] In determining whether to undertake a review of alternative regulated solutions, NYDPS Staff will take into consideration that market-based solutions should be the first choice to meet an identified Reliability Need, while regulated solutions should only be implemented in instances where a market-based solution will not be available to meet the identified Reliability Need.

[22] NYDPS Staff will await the outcome of the NYISO's evaluation within Step 4 before informing market participants, except that it will inform them at the end of Step 3 if the Responsible TO(s) do not propose any modifications to their backstop solution(s).

| | |
|---|---|
| 6a) Proposed Solutions' Lead-Time Date | 6a) Any proponent of an alternative solution, which was not included as part of the backstop proposal, but has a proposed lead-time date earlier than the backstop solution, and wishes to pursue its project further, notifies the Responsible TO(s) and files a petition with the NYPSC for approval of regulated cost recovery for its project. |
| 6b) Trigger Date | 6b) NYISO triggers a regulated reliability backstop solution. Responsible TO(s) file their backstop solution with the NYPSC. Any proponent of an alternative solution, which was not included as part of the backstop proposal, but has a proposed lead-time date later than the backstop solution, and wishes to pursue its project further, notifies the Responsible TO(s) and files a petition with the NYPSC for review and approval of regulated cost recovery for its project. |
| 7) End of Step 6a or 6b → + 60 days | 7) If the NYPSC receives a petition, as described in either Steps 6a and 6b, the NYPSC determines whether to initiate a proceeding under PSL §66 to review available options and select a preferred solution(s) to the identified Reliability Need. |
| 8) End of Step 7 → + 15 days | 8) The Responsible TO(s), alternative project developers, the NYISO and interested parties intervene in the NYPSC proceeding. An Administrative Law Judge (ALJ) is assigned. |
| 9) End of Step 8 → + 15 days | 9) The ALJ holds a Procedural Conference to establish the schedule and deadlines for conducting a coordinated review of applications subject to SEQRA and/or Article VII. |
| 10) End of Step 7 | 10) In parallel with environmental |

| | | |
|---|---|---|
| | → End of Proceeding | reviews, as appropriate, the parties conduct discovery, NYDPS Staff works with consultants to assist with the analysis (This could include, for example, requests to the NYISO to confirm claimed economic and additional system benefits of the project), and the ALJ holds evidentiary hearings and requests briefings by the parties to the extent necessary. |
| 11) | End of Proceeding | 11) NYPSC issues Order, bringing together NYDPS Staff's analysis and the findings from the SEQRA and Article VII reviews, and determining which project(s) will best promote the public interest and will be eligible for ratepayer funding. Contemporaneously, the selected project(s) are granted necessary approvals and permits in order to be implemented. |

**C. Objections to Recommended Process**

Regarding Review and Implementation of Regulated Reliability Solutions, Reliant Energy, Inc. ("Reliant") is concerned that the quarterly NYDPS Staff review of NYISO data proposed under the Recommended Process will negatively impact the competitive energy and capacity markets, by inadvertently emphasizing regulated investments as opposed to market-based investments. According to Reliant, the fact that NYDPS Staff's conclusions will be based on partial data, *i.e.*, analyses prior to completion of the CRP and that NYDPS Staff can undertake a review at any time, is especially troubling, creating substantial regulatory uncertainty regarding New York State's commitment to competitive markets.

In addition, Reliant urges the Commission to clarify the report to clearly indicate that the review of alternatives will be limited to projects that have been

found by the NYISO to meet the identified reliability need. This can be accomplished by revising the sentence on page 19 that begins "The NYISO will consider ... ", to read as follows: "The review process will be limited to alternative regulated solutions found by the NYISO to address, in whole or in part, the identified Reliability Need."

Finally, Reliant notes that in the December 24, 2007 Order initiating this process, the Commission specified that this process should address reliability needs for the 2012-2013 delivery year:

> The process should be designed first to provide us recommendations regarding the implementation of NYISO's regulatory backstop process for near-term (2012-2013) reliability needs, including the filings and processes that may be required under the schedule allowed by the NYISO CRPP to complete backstop projects.[23]
>
> By a companion order in this proceeding, the Commission is instituting a proceeding in part to develop a process that will be used to choose among competing regulatory backstop proposals should a regulated backstop project be needed to ensure system reliability in the near term (2012-2013).[24]

Reliant indicates that the December 2007 Order in this proceeding envisions that a subsequent phase of this case would address long-term planning requirements and policy. Further, given the complexity of the negotiations involved in developing the All Parties Report, Reliant indicates

---

[23] Case 07-E-1507, 06-M-1017 Long-Range Electric Resource Plan and Infrastructure Planning Process Order Initiating Electricity Reliability and Infrastructure Planning (issued Dec. 24, 2007) at 18.

[24] Case 07-E-1507, 06-M-1017, Long-Range Electric Resource Plan and Infrastructure Planning Process, Order Making Determination of Significance Regarding Development of Near-Term Backstop Process, (issued Dec. 24, 2007) at 1.

that it is not surprising that Parties failed to discuss the limited time frame within which the Commission intended this process to be effective. Nonetheless, in light of the Commission's directive and the ongoing work of the Energy Planning Board, which was subsequently convened by Governor David Paterson to define long-term energy policy for New York State, Reliant requests that the Recommended Selection Process only be utilized to address a Reliability Need identified for the 2012-2013 delivery year.

In conclusion, Reliant requests that these comments be considered in reviewing the All Parties' report and the proper procedures to ensure reliability in New York. In addition, Reliant asks that the Commission make the following findings: 1) that the Recommended Selection Process, limited to the 2012-2013 delivery year as requested above, complies with the Commission's December 24 Order; and, 2) given the NYISO's assertions that the region's reliability needs during the critical period highlighted in the December 24 Order will be met, no further analysis by NYDPS Staff beyond the 2012-2013 delivery year, as requested by Reliant, is warranted at this time.

**1. Responses to Objections**

NYDPS Staff responds to Reliant's objection that the Recommended Process will adversely affect the competitive markets. NYDPS Staff emphasizes that the Recommended Process is merely designed to identify the solution(s) to a Reliability Need that should be implemented if, and only if, the NYISO triggers a regulated backstop solution to meet such a need. NYDPS Staff maintains that since the NYISO's tariff already allows the NYISO to trigger a backstop solution, the establishment of

a process to determine which of the available solutions should be implemented, in the event the NYISO triggers a solution, should not interfere with the competitive markets.

In addition, contrary to Reliant's suggestion, NYDPS Staff indicates that the Recommended Process will take into consideration the most recent CRP and analyses performed by the NYISO in determining whether to undertake a review of available alternatives. As noted above, the Recommended Process involves NYDPS Staff reviewing the NYISO's quarterly reports, which identify the status of market-based projects and regulated reliability projects to meet Reliability Needs, as identified in the CRP. In situations where the quarterly reporting coincides with the issuance of a new RNA, and an updated CRP has not yet been issued, NYDPS Staff will utilize the information regarding any identified Reliability Need(s) in the most current RNA, while consulting with the NYISO regarding the amount and status of market-based solutions and TO update plans in response to those needs. Moreover, the Recommended Process would be limited to the review of alternative regulated projects for which the NYISO has determined the extent to which it would meet the identified Reliability Need. These measures, according to NYDPS Staff, ensure that the most current CRP and analyses performed by the NYISO will be utilized. As such, NYDPS Staff has no objection to the Commission making the clarification suggested by Reliant that the review of alternatives will be limited to those projects that the NYISO has found to meet the Reliability Need, in whole or in part.

Finally, NYDPS Staff responds to Reliant's request that the Commission limit the application of the

Recommended Process to Reliability Needs identified for the 2012-2013 delivery year. While the December 24 Order noted the Commission's initial concern was with regard to regulated backstop projects that may be needed in the near-term,[25] NYDPS Staff asserts that the Commission did not intend to limit the application of a selection process to only Reliability Needs identified in 2012-2013. Instead, the December 24 Order focused on near-term Reliability Needs in order to establish a workable schedule for Initiative II of this proceeding in the event that the NYISO needed to trigger a backstop solution. According to NYDPS Staff, the Commission's purpose for establishing a process that could be used for choosing among competing regulatory solutions in the near-term, is equally valid for needs identified beyond 2013.

The New York Transmission Owners, LIPA and NYPA (collectively the NYTOs) also respond to Reliant's objections. The NYTOs share Reliant's concern that the process for the review of alternative regulated solutions not negatively impact the development of market-based projects. For that reason, the NYTOs have consistently urged that the decision to conduct a review of alternative regulated solutions not be based solely on an RNA or any interim needs assessment, but also should consider TO updates and market based solutions provided in response to the identified needs. The TOs believe that this issue is adequately addressed in the report.[26]

---

[25] December 24 Order at p.3 (citing the NYISO's 2008 RNA, which indicated the first need date in 2013).

[26] See, All Parties Report at pp 17 and 23 (Step 1), and Footnote 21.

The NYTOs also note that Reliant specifically expresses concern with respect to the reference in the report to NYDPS Staff's utilization of the NYISO's quarterly monitoring of the continued viability of proposed market-based solutions and regulated reliability projects to meet identified needs in determining the reasonable likelihood of a regulated solution being triggered. Those quarterly updates, however, are limited to the continued viability of solutions proposed to meet reliability needs previously identified in the NYISO's planning process, and would not provide a basis for the identification of new needs. In response to Reliant's concerns, the NYTOs indicate that this point should be clarified in the Commission's order. Similarly, there is a reference in the report to the consideration by NYDPS Staff of a new RNA that coincides with a quarterly update. The NYTOs believe that the current language in the report clearly provides that a new RNA would not be considered in isolation, but in conjunction with market-based solutions and TO updates submitted in response to that RNA.[27] To address Reliant's concerns, the NYTOs suggest that this point should be confirmed by the Commission in its order.

Furthermore, the NYTOs note that the NYISO and other parties have indicated their support for Reliant's position that the review of alternative regulated solutions be limited to solutions that have previously been found by the NYISO to meet, in part or in whole, the reliability need for which they have been proposed. The NYTOs believe that there are several places in the report that provide

[27] See, All Parties Report at p 17.

this clarification,[28] and in response to Reliant's concern, the NYTOs suggest that the Commission confirm this point in its order.

The NYTOs disagree with Reliant's suggestion that the process developed in this proceeding be limited to reliability needs identified in the 2012-2013 timeframe. The NYTOs believe that the Commission's directive that the parties first provide recommendations with respect to near-term reliability needs was based on a concern that the Commission would be called upon to address alternative regulated proposals in the near future and that there would not be sufficient time to develop a generic process for the consideration of those alternatives. In fact, however, the NYISO's most recent RNA does not indicate any near-term reliability needs, and the parties to this proceeding have been able to develop a generic process that can be used to address any future reliability needs. According to the NYTOs, there appears to be no justification to limit the application of the process that has been developed through this collaborative effort to near term reliability needs, that do not currently exist, or to establish a subsequent proceeding to address issues already addressed in this proceeding.

Independent Power Producers of New York, Inc. (IPPNY) disagrees with the objections raised by Reliant Energy, Inc. and contends that the language in the *All-Parties' Report on Recommendations Regarding Review and Implementation of Regulated Reliability Solutions* should remain as written. Specifically, although IPPNY shares Reliant's underlying view that the competitive wholesale

[28] See, All Parties Report at pp 17-18 and 21.

energy markets should be advanced and its goal of minimizing distortion to the state's competitive wholesale energy markets wherever possible, IPPNY respectfully disagree with their contention that the report's recommended quarterly review process would inadvertently lead to an over-emphasis on regulated projects and create uncertainty regarding New York's commitment to competitive markets. Indeed, the report emphasizes the intent to rely upon market based solutions in the first instance whenever possible and further expressly states that regulated backstop solutions are expected to be used rarely (if ever). Additionally, as the report accurately demonstrates, the proposed consultation process between the DPS Staff, NYISO, Responsible TOs and sponsors of alternative regulated backstop solutions is an informal process that will require little more effort than that required by the NYISO tariff. NYISO review and report to the NYDPS already takes place on a quarterly basis, and the procedure set forth broadens the options available beyond the Responsible TOs' regulated backstop solution that would otherwise be considered in any event. The result is not to make a non-market solution more or less likely, but to allow all regulated reliability solutions to participate on an equal footing.

Furthermore, IPPNY states that the NYDPS Staff's informal review and comment on these proposals is not likely to have any impact on whether a developer will proceed with a market-based project. According to IPPNY, properly functioning competitive markets will drive the development of needed resources to meet reliability needs in a timely manner. As has been discussed at length throughout this process, developers that delay their

projects in hopes that their projects will be selected as a regulated reliability solution could very well be foreclosed from development by one or more market-based projects. Thus, "holding out" to see if a regulated reliability project is called upon is a very risky premise. The timing of what would initiate the informal review of backstop projects was an oft-debated subject. In early discussions, parties debated the merits of tethering the informal review to either the NYISO's CRP or RNA. IPPNY and NYDPS Staff had argued that linking such a review to the NYISO's CRP brought on the risk of arbitrarily eliminating alternative regulated projects that had longer lead times than the Responsible TOs' regulated backstop solution from consideration. The TOs argued that linking such a review to the NYISO's RNA would result in the review potentially being triggered every year and require unnecessary work. The compromise language included in the report – an informal Staff review will be performed if there is a reasonable likelihood of a solution being triggered – is a model that both allows for DPS discretion regarding whether such a review is necessary, and provides sufficient time for consideration of the greatest number of regulated reliability projects. Frequent review of market solutions is prudent, and the recommended process allows for the greatest flexibility to react to changing circumstances.

On Reliant's point regarding limiting review of alternatives to those found to meet the reliability need, IPPNY points out that such language is already found earlier in the text of the same paragraph and need not be repeated. The NYISO has proposed clarifying language to

further support this premise and IPPNY agrees with the NYISO's proposed language in this regard.

Finally, IPPNY states that the backstop solution selection criteria developed in this phase of the proceeding were intended to be applied pending completion of the Initiative III phase, related to long-range planning, within this proceeding. The long-range planning process, now suspended pending the issuance of the State Energy Plan (SEP), was intended to provide the Commission guidance on the criteria it should apply in choosing backstop solutions and projects to meet public policy goals. The informal Staff review process, to which Reliant objects, does not address the criteria NYDPS Staff will use in determining which project(s) should proceed as the backstop solution. It simply sets forth the procedures to be used to get to the point where the public policy criteria are applied and a final determination is made as to the appropriate regulated reliability project. Section IV of the report directly addresses selection criteria. There is no dispute that this section is subject to change pending the SEP. Further, last summer, when the judge loosened the July deadline to finalize the report for the Commission, it was with the understanding that there would not be a need for this process this year, and therefore it was being developed in case it is needed in subsequent years. IPPNY notes that no party raised an objection that development of the process was rendered moot.

## IV. Policy Matters

### A. Public Policy Objectives

In its December 24 Order, the NYPSC indicated that it was interested in "recommendations regarding the

process and standards necessary to approve and have constructed in a timely manner any regulated backstop project needed to maintain system reliability."[29] The NYPSC requested an interim report from the parties addressing the "decisional standards to be used to approve and construct a regulated backstop project in the near-term," and identified various public policy concerns that may need to be considered in choosing among potential regulated projects.[30] The parties here, except where noted below,[31] recommend the manner in which public policies and other decisional standards should be evaluated as part of the NYPSC's process to review and select regulated reliability projects.

To help ensure transparency in the process and better inform the Responsible TOs and developers of alternative regulated solutions in the development of their proposed projects, the State's energy policies should be clearly defined. It is anticipated that Responsible TOs and other developers will be guided in the development of their proposals by energy policies to be established by the Commission and/or the State Energy Plan.[32]

---

[29] December 24 Order at p. 3.

[30] Id. at pp.3, 5-6, 19, Appendix C.

[31] Parties raising objections to the recommended manner in which the public policy objectives and other decisional standards are evaluated by the NYPSC include Multiple Intervenors. These objections are indicated in section IV.A.1. below.

[32] On April 9, 2008, Governor Paterson signed Executive Order No. 2, which established a State Energy Planning Board tasked with developing a State Energy Plan. See, http://www.state.ny.us/governor/executive_orders/exeorders/eo_2.html.

It is recommended that two screens be used by the NYPSC to select a regulated reliability project. The first screen would assess the ability of the project to address the Reliability Need in a timely manner. The second screen would compare the relative merits of the projects that have passed the first screen with regard to various other criteria and public policy objectives.

*First Screen*

The primary considerations of the Commission in selecting among regulated reliability projects should be the ability of a project to address the identified Reliability Need effectively and efficiently within the time frame established by the NYISO. Factors to be considered by the Commission may include, but are not limited to, the NYISO's analysis of the project's contributions toward meeting the Reliability Need, the expertise, experience and financial strength of the project proponent, as well as indicators of the success of the respective project (e.g., status of the project, relative risk, past indicators of a proponents ability to bring facilities on-line, technical, legal, regulatory, and financial issues that may impact whether the proposed project will timely address the Reliability Need).

*Second Screen*

Projects that would adequately address the identified Reliability Need in a timely manner, taking into consideration the criteria set forth for the First Screen, would then be reviewed for consistency with State energy policies and relevant decisional criteria.

Although a number of policy issues may be taken into account under the second screen, the screening should be capable of being performed in a timely manner and take

into account the need of the project to proceed with the regulatory process in order to implement the solution in time to meet the Reliability Need. It is anticipated that the second screen would depend on the development of state energy policies over time, and would change as public policies changes. For example, the public policy goals in the State Energy Plan, which is scheduled to be finalized by June 2009, should be considered for incorporation into the second screen. The public policy concerns and decisional standards the Commission might consider in its second screen, in no particular order of significance, could include, but are not limited to:

a. System reliability benefits beyond applicable reliability criteria;
b. Fuel diversity, sustainability, and security;
c. Transmission versus generation versus demand side and energy efficiency projects;
d. Generation diversity (base-load, intermediate, peaking, distributed, etc.);
e. Achieving state goals for renewable generation, energy efficiency, greenhouse gases, etc.;
f. Environmental impacts and externalities, such as generator emissions;
g. Environmental justice issues;
h. Economic development impacts and opportunities;
i. Impacts on the affordability and reasonableness of rates;
j. Overall benefits to New York ratepayers;
k. Market power concerns;
l. Cost certainty (e.g., limitations on cost recovery);
m. Cost impacts unrelated to project costs (e.g., impacts to zonal or other market prices);
n. Ancillary impacts on the system (e.g., Installed Reserve Margin);
o. Relative cost-effectiveness of projects; and,
p. The relative potential impact of the project on the competitive markets, positive and negative.

**1. Objections to Recommendations**

Multiple Intervenors advocates strongly that the cost-effectiveness of projects be considered as part of the first screen. Multiple Intervenors indicates that, as set forth above in its December 24, 2007 Order, the NYPSC initiated this collaborative process to develop "recommendations regarding the implementation of NYISO's regulatory backstop process for near-term (2012-2013) reliability needs, including the filings and processes that may be required under the schedule allowed by the NYISO CRPP to complete backstop projects."[33] In particular, the Commission requested suggestions on a process and "decisional standards" that it could use in selecting a preferred project among various potential solutions to a Reliability Need identified by the NYISO.[34] Importantly, the Commission directed the parties to identify how public policy concerns should be addressed in selecting potential regulated projects.[35] It is Multiple Intervenors' position that Section IV.A. Public Policy Objectives, fails to meet the Commission's directives.

According to Multiple Intervenors, by merely listing the public policy concerns set forth in the December 24 Order as a potential second screen -- without any useful prioritization of potentially-competing public policy goals -- the Report fails to make any concrete or useful recommendations as to how such concerns should be addressed, nor does it provide the Commission with the

[33] December 24 Order at p. 18.

[34] December 24 Order at p. 3.

[35] December 24 Order at p. 19.

requested "decisional standards" by which it may select a regulated project in a manner consistent with public policy. As set forth below, it is Multiple Intervenors' position that the primary consideration of the Commission in selecting among regulated reliability projects should be the ability of a project to address the identified reliability need effectively, efficiently, within the time frame established by the NYISO, and in a cost effective manner. Cost and price impacts must be accorded the highest priority in evaluating competing projects.

Multiple Intervenors notes that New York consumers currently pay the third highest electricity prices in the continental U.S.[36] In fact, in 2007, New York consumers paid nearly 69 percent more for electricity than the national average.[37] This growing price disparity places an undue burden on all State's consumers. Significantly, the State's high energy prices, together with other factors, place New York businesses at a significant competitive disadvantage with respect to businesses in other regions and nations. The failure of the Report to identify cost-related factors as the primary consideration in selecting a backstop solution will only exacerbate electricity costs facing the State's consumers. As the Commission recognized in the December 24 Order, "the CRPP is not designed to promote infrastructure additions that

[36] Energy Information Administration ("EIA"), *Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State*, available at http:// www.eia.doe.gov/cneaf/electricity/epm/table5_6_a.html (Report released June 10, 2008).

[37] EIA, *Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State* (Report released March 13, 2008).

may otherwise be cost effective."[38] As such, in addition to the expertise, experience and financial strength of the project proponent, the cost of the project must be a primary factor in selecting a project. The cost analysis should include, *inter alia*, impacts on the affordability and reasonableness of rates, economic development impacts and opportunities, cost certainty (*i.e.*, limitations on cost recovery and protections from cost overruns), cost impacts unrelated to project cost (impacts to zonal or other market prices); and ancillary impacts on system (e.g., impact on the State's IRM). Where competing projects are similarly cost-effective, Multiple Intervenors suggests that the Commission should only then further analyze other benefits of a proposed project (*i.e.*, fuel diversity, etc.) in a manner consistent with established State policies.

To merely identify possible factors for use in evaluating regulated backstop projects, according to Multiple Intervenors, without providing the Commission with any guidance whatsoever as to how those factors should be prioritized or weighted, does absolutely nothing to further the goal of this phase of the proceeding. At a minimum, cost and price impacts should be accorded the highest possible priority. Where competing projects present comparable cost and price impacts, other factors should be considered.

**2. Responses to Objections**

In response to Multiple Intervenors, the NYTOs contend that the Report does provide the Commission with a useful decisional standard, by proposing a two screen

[38] December 24 Order at p. 9.

process, with a First Screen that focuses on the factors that are relevant to a determination of whether a proposal and its sponsor have the financial strength, technical expertise, and experience to justify the Commission's confidence that it will meet the reliability need effectively and in time to avoid a degradation in reliability. Further, while cost is an important factor, the NYTOs argue that the cost of a project cannot reasonably be considered in isolation, but rather, must be considered in the context of all of the factors the Commission considers relevant. For example, a project that is more expensive than an alternative in terms of nominal direct dollars may be more cost-effective than the alternative when considering the total benefits it would provide (e.g., fuel diversity).

DPS Staff disagrees with Multiple Intervenors' contention that section IV.A. of this Report, entitled Public Policy Objectives, fails to meet the Commission's directives. In its December 24 Order, the NYPSC indicated that "[t]o the extent time permits, the issues discussed below on near-term reliability needs [(e.g., how public policy concerns should be addressed in choosing among potential regulated projects)] should be addressed in a report to the Commission."[39] Therefore, there was no directive in the December 24 Order to address the issue of how to deal with public policy concerns. Notwithstanding, the recommended approach in the report provides the NYPSC with useful guidance on how to address public policy concerns, by identifying various policy objectives and decisional standards that should be balanced by the NYPSC

[39] December 24 Order at pp.18-19.

is selecting an appropriate solution that best promotes the public interest.

DPS Staff objects to Multiple Intervenors' suggestion that cost should be used as a predominant factor in selecting a regulated reliability solution. DPS Staff argues that such approach could favor projects that are, in fact, contrary to public policy concerns, and frustrate the NYPSC's "primary interest [in this proceeding] to address those public policy concerns and issues that are not considered by, planned for, or internalized in the wholesale market as it exists today."[40] For example, a coal-fired base-load unit may be the cheapest available alternative, but generally inconsistent with State objectives in promoting renewable generation and reducing greenhouse gas emissions. As such, DPS Staff suggests that cost should be a factor to be considered along with all the other relevant criteria in selecting among available alternatives to a Reliability Need.[41] Finally, DPS Staff notes that each of the factors Multiple Intervenors suggests for inclusion as part of a cost analysis is listed in the second screen.

In response to Multiple Intervenors, the NYISO expresses its agreement with the Commission's December 24 Order, which recognizes that the selection process must be

[40] December 24 Order at p. 8.

[41] It also appears that placing a priority on certain criteria and according different weight to those criteria may constitute an "action" under SEQRA, and therefore require an appropriate environmental review before they may be adopted. See, 6 NYCRR §617.2(b)(defining agency "actions" to include "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions."

consistent with the NYISO's CRPP process. When the NYISO determines that it is necessary to trigger a regulated backstop project to ensure reliability, it is because market-based solutions have not come forward to meet a Reliability Need. At that time, it is essential that the selection process operate in an expedited manner - both to ensure reliability as well as to minimize interference with other market-based solutions. As noted in the Report, it is anticipated that the occasion for the NYISO to trigger a regulated backstop solution will be infrequent, and on such occasion, the principal "public policy" objective must be to ensure reliability.

**B. Long-Term Contracts**

In the December 24 Order, the NYPSC concluded that "utility long-term contracts may be required to support new construction to maintain reliability, if adequate reliability is not provided by the wholesale market or to be judiciously used to achieve other policy goals (e.g., RPS)."[42] Because of concerns about the potential negative impacts of long-term contracts on consumers, the NYPSC also indicated that "[t]o the extent required, mandatory long-term contracts can be used as a last resort to facilitate new investment for reliability or other policy reasons, if the market fails to provide such capacity."[43]

[42] December 24 Order at p. 21. It should be noted that the RPS program does not use *utility* long-term contracts to support construction of new renewable facilities. Instead, the New York State Energy Research and Development Authority issues Requests for Proposals and enters into contracts with developers.

[43] Id. at 23.

To address concerns that had been raised concerning prudence determinations, the NYPSC delineated the steps to be taken to secure a prompt prudence finding for a utility procurement process.[44] As explained by a number of parties and recognized by the Commission in the December Order, financial markets may be unwilling to provide the capital necessary for the construction of certain types of new facilities on a purely merchant basis.[45] Thus, to ensure that all project types -- transmission, generation and demand response -- have the opportunity to compete effectively to meet the identified Reliability Needs, as the Commission indicated in the December 24 Order, the use of long-term contracts should be an option available for consideration in implementing a regulated reliability solution.

The NYPSC should indicate that long-term contracts will be considered on a case-by-case basis, including factors such as whether they are necessary in view of market conditions, the relevant benefits and/or negative impacts of specific proposals, the consistency with applicable NYISO markets, minimization of the risks and costs to consumers, conformance with applicable public policies, and the degree to which the proposed structure of the contract impacts the competitive markets.

**1. Objections to Recommendations**

According to IPPNY, contractual arrangements between transmission owners and alternative regulated generation projects are necessary to ensure such projects obtain payment from retail ratepayers. IPPNY maintains

[44] Id. at 26.

[45] Id. at 22.

that the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over the rates of, and matters affecting the rates of, generators selling exclusively at wholesale. Pursuant to FERC's rules implementing Section 205 of the Federal Power Act, FERC accepts rates for a generator's wholesale sales based on market prices or the generator's cost of service. IPPNY contends that the NYPSC does not have authority to require or accept the filing of tariffs by generators that provide for the payment of rates for the generator's wholesale sales. Further, IPPNY maintains that the NYPSC can only approve rate recovery for utilities that make retail sales, such as the regulated transmission owners. Therefore, the only mechanism available to the Commission, according to IPPNY, is to provide for retail ratepayer payments to wholesale generators through a contractual arrangement between the generator and the transmission owner.

**2. Responses to Objections**

Although Multiple Intervenors does not oppose the possible use of long-term contracts as a means for addressing reliability needs in the event of market failure, it is Multiple Intervenors' position that – contrary to IPPNY's position – there should be no presumption in favor of long-term contracts. The NYPSC is reminded that New York's history with long-term contracts is extremely unfavorable to consumers, and the mistakes of the past should not be repeated in the future.

It is Multiple Intervenors' position that if a long-term contract is pursued, all types of contracts should be pursued and examined, including cost of service agreements with bidding requirements and limitations. The possible use of long-term contracts must be examined on

a case-by-case basis relative to the specific facts and circumstances of each proposed project. The structure and content of any such contracts must be developed in a manner that minimizes the risks and costs to consumers. Significantly, as all parties, including IPPNY, seem to agree, it is far preferable for identified reliability needs to be addressed through market-based projects, as opposed to reliance on regulated backstop solutions. Consequently, Multiple Intervenors maintains that it is critically important that the process ultimately adopted in this proceeding not create an incentive for developers to seek regulated projects in lieu of market-based projects. Undue reliance on long-term contracts that are not cost-based, according to Multiple Intervenors, may have the unintended effect of discouraging market-based projects if backstop solutions appear more attractive to developers.

The NYISO believes that minimization of the impact on competitive markets should be a critical factor in the NYPSC's consideration of the use of long-term contracts for regulated reliability projects.

The NYTOs object to IPPNY's suggestion that "contractual arrangements between transmission owners and alternative regulated generation projects are necessary to ensure such projects obtain payment from retail customers." According to the NYTOs, in fact, it is not clear that a contract between the alternative project proponent and the transmission owners would be necessary. For example, there may be a contract between a project developer and an entity other then the TOs. In its Policy Statement on Backstop Project Cost Allocation and Recovery, issued April 24, 2008 in this proceeding (April 24 Policy Statement, p. 10), the Commission expressly stated that it wants to maintain

flexibility with respect to cost recovery mechanisms and to consider them in the context of specific factual circumstances, and does not want to eliminate any options with respect to how cost recovery will be accomplished. Consequently, IPPNY's attempt to promote a specific cost recovery mechanism for regulated projects (i.e., a fixed KWh payment contract that also allows the project to retain all market revenues) is inappropriate.

### C. Potential Impacts on Competitive Markets

While the Commission should consider the relative potential impacts of regulated reliability solutions on the competitive markets, both positive and negative, a proposal's potential impacts on the competitive markets will depend on a number of factors. Therefore, it cannot be assumed that a particular solution will have a greater or lesser impact on the competitive markets. For example, impacts on competitive markets may depend on how a proposal is structured. The NYPSC should recognize that the specifics of any cost recovery structures established for regulated reliability solutions could affect, either positively or negatively, the long-term incentives for merchants to invest in market-based solutions in lieu of regulated reliability solutions.

#### 1. Objections to Recommendations

Certain parties, including the Independent Power Producers of New York, Inc. (IPPNY) and the NYISO recommend that the NYPSC take into account the impacts on competitive markets by adopting a particular approach. According to IPPNY, in the first instance, market mechanisms, such as the implementation of a forward capacity construct in New York, should be used to more effectively align New York's planning process with its capacity markets and to avoid the

need to default to regulated reliability solutions. If a regulated reliability solution ultimately is required, potential impacts of long-term contracts on competitive markets could be minimized by utilizing cost recovery mechanisms for regulated reliability resource solutions that provide resources with appropriate incentives to respond to market prices and bid their costs into the energy, ancillary services, and installed capacity markets. IPPNY maintains that cost recovery structures where resources do not have the incentive to bid their costs may skew market clearing prices and hinder efficient operation. For example, cost recovery structures where resources are bid into the market at less than their true costs, because their costs are otherwise recovered through other mechanisms, may skew dispatch, artificially depress clearing prices, or otherwise threaten needed existing and the potential entry of new market-based resources.

IPPNY points to the NYPSC's Renewable Portfolio Standards (RPS) proceeding, wherein the NYPSC determined, for public policy reasons, to support the development of renewable generation. There, the Commission adopted an incentive fee approach, which, IPPNY contends, limited the potential harmful impacts on the competitive market. Under this approach, developers are paid a fixed kWh payment to go forward with what would otherwise be uneconomic renewable energy projects. However, the developers are required to rely on the market revenues to pay their remaining costs for their projects. Accordingly, IPPNY believes that developers are provided with appropriate incentives to respond to market prices and bid their costs into the market. Consistent with the NYPSC's approach in its RPS proceeding, IPPNY recommends that a similar type

approach should be considered by the NYPSC in this proceeding.

The NYISO reiterates its belief that minimization of the impact on competitive markets should be a critical factor in the NYPSC's consideration of the use of long-term contracts for regulated reliability projects. The NYISO agrees that consideration of market-compatible mechanisms should include the type of structure utilized for the RPS.

**2. Responses to Objections**

According to RESA, and supported by SCMC, reference to the purported benefits and costing approaches cited by IPPNY overlook certain important countervailing considerations which include:

- The use of long-term contracts and any cost recovery mechanism will need to be examined on an individualized case-by-case basis that reflects the particular facts and circumstances of the particular contract and related project. Until such contract specific factors are known it is at best speculative to argue that any particular comparative benefit may accrue or that any particular cost recover mechanism is appropriate.
- Regulated long-term contracts are likely to lead to higher prices;
- Long-term contracts harm consumers because they are inflexible and prevent market adjustments that may lower prices;
- Long-term contracts lock-in current forecasts (including forecast errors) of fuel prices, interest rates, inflation, volumes and regulatory environment;
- Regulated long-term contracts eliminate appropriate incentives. They provide the wrong price signals that otherwise are needed for energy efficiency and demand response;
- Regulated long-term contracts will undermine the competitive generation market and drive investment and competitive efficiencies out of the market, ultimately leading to higher prices;

- Regulated long-term contracts are not necessary to encourage construction of needed facilities; and,
- The RPS program does not use utility long-term contracts to support construction of new renewable facilities, and does not involve the limited stop gap solution under consideration in this proceeding.

In response to IPPNY's recommendations, it is Multiple Intervenors' position that if a long-term contract is pursued, all types of contracts should be pursued and examined, including cost of service agreements with bidding requirements and limitations. As discussed above, the structure and content of those agreements should be developed in a manner that minimizes the risks and costs to consumers.

Multiple Intervenors objects to IPPNY's call above for forward capacity markets (FCMs). The possible implementation of FCMs in New York is a highly controversial issue that currently is being discussed as part of the NYISO stakeholder process. Multiple Intervenors, for instance, does not favor the adoption of FCMs at this time for numerous reasons. In any event, FCMs are not before the NYPSC in this proceeding and, thus, IPPNY's reliance thereon is irrelevant for present purposes.

Multiple Intervenors also takes issue with IPPNY's reliance on the RPS proceeding as support for an incentive-based fee arrangement for backstop solutions. The RPS, which is narrow in scope, is intended to encourage the development of otherwise uneconomic renewable energy projects through the payment of a fixed per kWh financial subsidy. Unlike the RPS, however, which is intended to

promote renewable energy, regulated backstop solutions may include various and contrasting resources, such as transmission, demand response and multiple forms of generation projects. While a long-term contract including a volumetric payment mechanism may be considered as a means of responding to identified reliability needs, the NYPSC should refrain from adopting any preferred contract approach and, instead, retain maximum flexibility to address proposed regulated backstop solutions on a case-by-case basis. According to Multiple Intervenors, the Commission's primary focus, as articulated above, should be on satisfying the identified reliability need at the lowest overall financial cost and risk to consumers.

The NYTOs contend that the cost recovery structure advocated by IPPNY is not the only, or necessarily the best approach to minimizing the impact of regulated projects on the competitive market. The NYTOs maintain that the best way to limit their impact on the competitive market is to ensure that regulated projects are not encouraged and are kept to an absolute minimum. Furthermore, the NYTOs submit that the Initiative II portion of this proceeding should not attempt to bias the selection process for or against any particular approach to cost recovery for a regulated solution.

The NYTOs note that the Commission clearly stated in its April 24 Policy Statement that it would not be appropriate at this point to adopt any one cost recovery mechanism or exclude others from consideration. As the Commission explained in its order, "mechanisms can and will be developed, often necessarily depending on the specific factual circumstances to allow regulated reliability project costs to be collected in accordance with the Public

Service Law in a fair, equitable, and non-discriminatory manner, and with due consideration of existing competitive markets."[46]

According to the NYTOs, regulated projects that would employ long-term contracts should stand or fall on their own merits, and not be supported by a presumption in their favor. If such a proposal provides greater benefits to the public, including minimizing impacts on the competitive market, it should be demonstrated to the Commission. Depending on the circumstances, however, the Commission may determine that the public interest is best served by a cost-of-service approach, especially when the primary public policy concern in the selection of a regulated project is ensuring that electric system reliability is maintained. For example, cost-of-service reliability agreements entered into between ISO-NE and market participants with resources retained for reliability are based on pro-forma cost-of-service agreements which require all market revenues received in excess of stipulated bid costs to be credited back to ratepayers against the fixed cost charges necessary to fully support reliability resources. Under these agreements the owner is required to bid stipulated variable costs, with self-adjusting formula rates that are updated daily. The stipulated variable cost formula includes fuel costs, variable O&M, environmental adders, start-up costs, and no-load costs, and results in bids comparable to those expected from a resource operating in a competitive market. Thus, such cost-of-service arrangements, which are also possible with a utility-build project, would not

[46] April 24 Policy Statement, p. 10.

necessarily have a negative impact on the competitive market. The NYTOs assert that, in fact, there may be more concern with the market impact of a contractual arrangement that guarantees a fixed payment to the provider while also allowing it to retain profits from high market prices in times of scarcity. At a minimum, such cost-of-service arrangements for regulated reliability solutions should be available for the Commission's consideration.

In addition, the NYTOs maintain that encouraging the use of long-term regulated contracts could cause developers to hold off on investments in market-based projects, which by definition would be more risky. This could result in the implementation of more regulated projects than would otherwise be necessary, and thereby undermine the competitive market.

Furthermore, the NYTOs argue that because generation projects are usually financed on a non-recourse basis and given that the project is needed to maintain reliability, the risk that consumers may have to fund higher construction or operating costs than was agreed to under the contract cannot be completely eliminated. This is true even though consumers would not benefit if the developer earns a return substantially higher than would be permitted on a cost-of-service basis.

Finally, the NYTOs indicate that while a developer with a long-term contract may assume some risk, it also will have the benefit of the potential for significantly higher profits than would flow to the developer of a cost-of-service project. It stands to reason that the developer would structure the contract to ensure that its recovery will, at least, cover all of its costs, including the required returns to equity investors,

which are generally higher than equity returns for regulated companies. Given that the alternative regulated projects will be undertaken to ensure reliability, the Commission may determine that under certain circumstances a cost-of-service approach is in the public interest. The relative merits of competing regulated projects, according to the NYTOs, should be determined by the Commission in light of all of the relevant facts and circumstances. The proposed solutions presented to the Commission should be judged on their merits and there should not be a presumption for or against any specific approach to cost recovery.

**3. Answers to Responses**

In response to RESA and the TOs, IPPNY argues that their objections to long-term contracts are, in fact, objections to the use of alternative regulated backstop solutions to meet reliability needs. Assuming the market is unable to incent generation needed to meet a reliability need, construction of new generation will not likely begin until financing is received, and financing may not occur until a long-term contract is executed. Moreover, separate and apart from the financing concern, the only way for generators to receive regulated payments from retail ratepayers is through a contract with the investor-owned utility for that service territory. Under such circumstances, IPPNY asserts the Commission has two choices in meeting the reliability need. It can approve a TO project that recovers its costs through traditional cost-of-service rates, with a guaranteed rate-of-return for the life of the project. Alternatively, the Commission can approve a non-TO project that recovers its cost through a

long-term contract. Importantly, in either case, a long-term obligation is incurred.

With respect to a TO project, IPPNY points out that the TO's ratepayers face the very real risk that they will be required to bear significant cost overruns if the TO's project is selected. IPPNY maintains that there is a long history of TOs seeking and receiving recovery of cost overruns from the Commission for their construction of generation and transmission projects.[47]

IPPNY disagrees that ratepayers cannot be fully protected from the risk of cost overruns with respect to a project with a long-term contract. The TOs' concerns that a developer with cost overruns will seek additional cost recovery can readily be addressed in an evaluation of the developer's financial and technical capability and in contractual milestones and performance guarantees. IPPNY argues that the TOs' argument that a developer with a long-term contract will have a higher profit potential than a

[47] According to IPPNY, Con Edison's East River Repowering Project had an estimated cost of $406 million. However, final costs were capped at $788.3 million, almost a 100% overrun of original cost estimates. Case 05-S-1376, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of the Consolidated Edison Company of New York, Inc. for Steam Service*, Order Determining Revenue Requirement and Rate Design (September 22, 2006), p. 6. In addition, at the time the Commission authorized RG&E's construction of its Rochester Transmission Project, RG&E's projected capital cost was approximately $75.4 million. Case 03-T-1385, Rochester Gas and Electric Corporation, Order Granting Certificate of Environmental Compatibility and Public Need (December 16, 2004) at page 6. Its latest estimate is $125 million, a 60% increase over its earlier estimate.

developer of a cost-of-service project is at odds with the Commission's policy rejecting the cost-of-service approach in favor of competition. IPPNY maintains that developers of alternative projects will compete against each other to be selected by the Commission as the regulated solution, thus ensuring that the reliability need can be met in a least-cost manner.

IPPNY also disagrees with the TOs' argument that long-term contracts should be avoided because it will cause developers to hold off on investing in market-based projects. The TOs' argument ignores the very underpinnings of the competitive market. Assuming they are properly functioning, competitive markets should drive the development of needed resources to meet reliability needs in a timely manner. According to IPPNY, developers that delay their projects in hopes of being designated a regulated reliability solution could very well be foreclosed from development by one or more market-based projects.

IPPNY also responds to the TOs' proposed use of cost-of-service contracts, like the reliability agreements used in ISO-NE. As IPPNY points out, the TOs ignore that, when FERC considered these so-called "reliability must run" contracts, FERC ordered ISO-NE to correct its market design because such contracts harm competitive markets.[48] IPPNY further responds that, even if cost-of-service approaches to cost recovery for generation projects are pursued, such approaches must still be pursued through long-term contracts between generators and transmission owners who

[48] See, e.g. Devon Power, LLC, et al., 103 FERC 61,082 (2003).

sell to retail customers. While IPPNY believes that RPS-type of contract arrangements best limit risk to consumers and are least disruptive to the wholesale power markets, if cost-of-service type contracts of the type used in New England are adopted, such contracts, unlike RPS-type contracts, would be wholesale power contracts under FERC jurisdiction. IPPNY argues that such contracts, including the return, would be subject to the just and reasonable standard and would not result in excess recoveries from utility ratepayers.

## V. Other Matters

### A. Permitting/Siting Issues

If the selected regulated reliability project is unable to obtain siting or permit approval, or for any other reason is unable to be implemented, and there is insufficient time to consider options under the CRPP, the parties recommend that the provisions in the NYISO tariff be utilized for implementing a Gap Solution.[49] Section 7.4(b) of the NYISO OATT provides that if there is an imminent threat to the reliability of the New York power system, the NYISO Board, after consultation with the NYDPS, may request the appropriate TO(s) to propose a Gap Solution outside the normal planning cycle.

Section 7.4(c) of the OATT provides that the Responsible TO(s) will propose a Gap Solution as soon as reasonably possible for consideration by the NYISO and the NYDPS. Section 7.4(d) provides that any party may submit an alternative Gap Solution proposal to the NYISO and the NYDPS for their consideration. The NYISO will evaluate the

[49] See, §7.4(a) of Attachment Y of the NYISO's OATT.

Gap Solutions proposals to determine whether they meet the Reliability Need or imminent threat, and report the results of its evaluation to the party making the proposal, the NYDPS and other appropriate regulatory agencies for consideration in their review of the proposals.

Section 7.4(e) provides that Gap Solutions will be designed to be temporary solutions and strive to be compatible with permanent market-based proposals. Section 7.4(f) provides that a permanent regulated reliability solution, if appropriate, may proceed in parallel with a Gap Solution.

### B. Ensuring Construction of Regulated Reliability Projects

The potential for proposed regulated reliability solutions to not be constructed can be minimized by carefully selecting projects and by imposing milestones on them. In addition, security payments can be applied to alternative regulated projects that are selected as regulated reliability projects.[50] The milestones that are selected should be consistent with those set forth in the NYISO's CRPP Manual and Technical Bulletin 171, which contain detailed monitoring procedures and criteria for the NYISO to track project development.[51]

The cost/performance risks associated with any regulated reliability proposal that may lead to failure to

[50] The same approach could be used for regulated backstop solutions if the Responsible TO(s) agree to forego seeking recovery of cost overruns.

[51] CRPP Manual §2.2, pp. 2-2 – 2-3; Technical Bulletin 171 – Monitoring Viability of Solutions to Meet Reliability Needs – NYISO Process (December 3, 2007).

timely meet the Reliability Need may include, but are not limited to:

- Management, engineering, procurement, construction or other technical and cost control failures;
- Failure to secure necessary site control, permits and regulatory approvals;
- Insufficient financial assurance and oversight to manage and cover delays, changes in cost of equipment and services, adverse power market conditions, and cost overruns;[52]
- Failure to meet NYISO interconnection requirements.

Selection Process Applied to Regulated Reliability Projects

The following should be favored in the selection process:

- Developers demonstrating competence and experience in managing similar types of projects;
- Submission of complete and well-documented applications addressing all elements necessary for successful and timely project completion;
- Projects demonstrating significant progress, at the time of submittal, toward obtaining necessary permits and interconnection, authorizations, or evidence that such permits, interconnection and authorizations will be timely secured or have already been obtained;
- Projects with significant progress, at the time of submittal, toward selection and award of Engineering, Procurement and Construction agreements;
- Projects with significant progress, at the time of submittal, toward fabrication and

[52] This risk would also apply to a regulated backstop proposal if a TO agreed to forego seeking to recover cost overruns.

procurement of equipment requiring significant lead times, or demonstration that such activities can be timely completed;

- Projects with demonstrated firm costs of development and interconnection; and,
- Projects with demonstrable financial resources to timely complete the project.

Security Requirements

To the extent not already completed, the following milestones and security requirements should be considered:

- Permit/SEQRA/Article VII filing by date certain together with milestone payment or Letter of Credit (LOC) posted promising in-service date attainment. Additional security being posted within a specified period, such as 30 days of selection of project. Failure to file or post disqualifies project immediately. Payment is refunded once facility enters commercial operation.
- Receipt of permits by date certain, together with posting of additional payment/LOC, once permits received. Developer can purchase extension of date with additional LOC/payments of up to 6 months if consistent with date of need. Payments forfeited and developer disqualified if dates are missed. Dates are of the essence.
- Commencement of construction by date certain. Limited extensions of time can be purchased.
- Once construction begins, posting additional payment/LOC for commencement of operation by date certain. Ability to purchase extension as above. Total amount of extensions up to 12 months, if consistent with date of need.
- Payment could be determined on a dollars per kW basis, increasing as development proceeds, reflecting the increasing risk and cost of replacement capacity.

Case 07-E-1507

Appendix A - Figure 3:  Procedural Steps Flow Chart