

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

Case 14-M-0101

**COMMENTS OF THE
NATIONAL ENERGY MARKETERS ASSOCIATION**

On April 25, 2014, the New York Public Service Commission (NYPSC) issued an Order¹ instituting an administrative proceeding entitled “Reforming the Energy Vision” (hereinafter referred to as “REV” and/or the “REV Docket”). Coincident with the Order, the Commission released a Staff Report and Proposal which outlined the “Vision” in greater detail. The Commission has opened this Docket to receive comments on a myriad of issues that could radically impact the design and operation of the New York electricity distribution systems.

The Order recites changed circumstances that support its decision to reform the existing distribution systems in the State of New York.ⁱ Important to an ultimate policy decision in this proceeding are the historic assumptions that electricity demand is or has been relatively inelastic, and that economies of scale may or may not be available to benefit all consumers. Additionally, the Commission observes that the demands of a digital economy have increased the real costs of outages, and that traditional distribution systems are an inherently inefficient means to meet increasingly high and unmanaged demand levels.

The Staff Report and Proposal describes an end state vision of the New York distribution system in which regulated utilities operate dynamic (two-way) distribution systems, and the concept of a Distributed System Platform Provider (DSPP) is explained in detail.ⁱⁱ Given the costs, impacts and complexity of the issues involved in this proceeding, parties have been given an opportunity

¹ Case 14-M-0101, Order Instituting Proceeding, issued April 25, 2014, [hereinafter “Order”].

to comment on the assumptions underlying this Order as well as the proper roles of both private and public capital investmentsⁱⁱⁱ as they relate to this REV Docket.²

The National Energy Marketers Association (NEM)³ has provided input and submitted recommendations and specific proposals through the Customer Engagement Working Group.^{iv} NEM appreciates this opportunity to offer its initial comments on the assumptions underlying the Commission Order and the Staff Report and Proposal issued on April 25, 2014.

Infrastructure Funding Should Leverage, not Limit, Private Investments

NEM supports two fundamental precepts which underlie this proceeding – 1) that consumers should be reasonably and actively engaged in energy consumption decisions; and 2) utilities should be focused on core competencies that include maintaining and improving the reliability, resiliency, and security of energy delivery systems. To the credit of this and past Commissions, utilities have historically offered a basically reliable electricity delivery product, and ESCOs have successfully migrated millions of consumers to competitively-offered energy and related products, services, information and technologies. NEM submits that this Commission should leverage, not limit, private capital to meet consumers increasing demand for electricity as well as the need for its increasingly reliable delivery.

The Order and Staff Report submit that the demands of a digital 21st century economy plus the increasingly severe weather events require a new slate of utility reliability products to serve the future needs of the State of New York. The Commission and Staff also submit that the historical

² Case 14-M-0101, Ruling Posing Questions on Selected Policy Issues and Potential Outcomes, Establishing Comment Process, and Revising Schedule, issued June 4, 2014, setting forth Questions on Track 1 Policy Issues.

³ The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies.

utility regulatory paradigm needs to be revised to permit added “reliability” to be better and more transparently priced as a commodity. NEM supports the fully transparent pricing of all current and future utility products and services.

It is possible that an upgraded, resilient and dynamic electricity distribution architecture may in fact be able to deliver an enhanced reliability product to future consumers.⁴ However, the Commission should not infringe, usurp or limit the growth of competitive energy-related investments as it examines and authorizes the public expenditures necessary to implement these major infrastructure investments. It is critical to note for the record that there is no evidence that would support a conclusion that the fundamental roles of a regulated distribution monopoly should somehow extend past its core energy delivery-related functions and infringe on or in anyway limit the growth of competitively-provided energy related products, services, and technologies.

Reforming the Energy Vision should enhance electricity distribution system reliability by refocusing utility resources into the development of a new generation of reliability technologies. The Commission should continue to permit and promote private investments to meet the demand for competitively-available energy and related products and services. In so doing, it will and should free up additional utility capital to transform the distribution system to meet the growing reliability needs of New York consumers. The more private capital is encouraged to meet future consumer demands, the more public capital should be available to upgrade distribution system reliability.

NEM submits that there is no overriding or valid public policy rationale to expand regulated utility monopolies into otherwise competitive markets. Historic utility electricity distribution and delivery monopolies should not be permitted or encouraged to mutate into consumer

⁴ Significant additional quantitative information and analysis is required to make this determination.

information, in-premises information, and/or demand-side monopolies.⁵ Indeed, the distortions that have arisen from permitting regulated monopolies to remain in competitive electricity supply markets support an opposite result.^v NEM submits that there are substantial opportunities and public necessities for both utility investments and competitive investments to be deployed in order for a more reliable, resilient, secure, and possibly a dynamic distribution system to be implemented in the most cost effective manner possible.

The Role of A DSPP in Reforming the Energy Vision

A Distributed System Platform Provider (DSPP) as described in the Staff Report,⁶ is intended to be a new dynamic distribution architecture designed to coordinate and deliver increasingly distributed energy resources (DER), presumably in real time. The Staff Report describes a new business model in which distributed energy resources (DER) become a primary tool in the planning and operation of electricity distribution and delivery systems. Under this model, either the utility or another entity is intended to function as a DSPP.⁷

As a matter of public policy, DER, as described, can and should be competitively provided energy supply-related products and services, while Distributed System Platforms, as described, are major infrastructure investments designed to provide a more reliable means of delivering DER. Whether a DSPP is necessary, who should fill the role of DSPP, how much a dynamic

⁵ See infra note 9.

⁶ The Distributed System Platform Provider (DSPP) will actively coordinate consumer activities so that any given utility service area as a whole places more efficient demands on the bulk system. Ideally, it would reduce the need for expensive investments in the distribution system as well. The function of the DSPP can and should be complemented by competitive energy service providers; both generators of electricity and retailers of commodity can and will expand their business models to participate in Distributed Energy Resources (DER) markets both now and when coordinated by the DSPP. The NEM proposal on the Retail Demand Response Load Profiles submitted to the Customer Engagement Working Group : http://www.energymarketers.com/documents/NEMA_Mass_Market_Retail_DR_Policy.pdf is designed to initiate this process before significant investments in smart grid or smart metering technology occurs.

⁷ The issue of who should control the Distributed System Platform should be addressed again after the revised Staff Report is issued and sufficient quantitative data is submitted to permit informed public comment.

distribution platform will cost and who should pay for it over what period of time are issues best left for another round of comments.

NEM submits that this record needs to be more fully informed on the quantitative costs and benefits associated with a utility-based DSPP versus some other means of supplying reliability and related products and services. Currently, added reliability has become an increasingly competitive product offering.⁸ Socializing added reliability as a new series of infrastructure investments or DSPP products presents serious policy and financial considerations given the increasing costs of distribution rates. The Rocky Mountain Institute projects grid neutrality, and ultimately grid defection, based on current solar and battery technology and projected retail prices within a reasonable DSPP planning horizon.⁹ NEM does not object to incremental, enhanced, or added utility-provided reliability. Indeed, it may be long overdue. However, it should not be used as a means of expanding the natural monopoly functions of a utility into otherwise competitive markets.

Additionally, there appears to be significant and potentially harmful ambiguity¹⁰ on whether the intended role of a DSPP is that of a market facilitator of DER, a market maker of DER or a market participant that actually creates and sells DER-related products and services. The latter role would be highly objectionable and, in fact, both limits and becomes an unnecessary barrier to increasing private investments in the new markets for distributed energy resources and

⁸ It should be noted that added reliability increasingly comes in the form of distributed roof top solar, building controls and efficiency projects, and behind-the-fence generation projects. Hence server farms in Silicon Valley and elsewhere have already made strategic reliability decisions to add self-generation to their costs of manufacturing. As such, self generation becomes the marginal price for nine 9s reliability. While hospitals and certain consumers may need nine 9s reliability, other consumers may not. Indeed, forcing a one size fits all reliability requirement on all future consumers may not withstand a sophisticated quantitative cost benefit analysis. Hence moving forward herein with speed may yield a major public policy mistake with significant financial consequences. See note 15 infra.

⁹ Rocky Mountain Institute, *The Economics of Grid Defections: When and Where Distributed Solar Generation Plus Storage Competes with Traditional Utility Service* (2014).

¹⁰ This ambiguity increases the costs and risks of private investments into this market. NEM maintains that the REV Vision relies as much on private capital as it does on ratepayer capital.

demand reduction (DR). As a matter of public policy, NEM strongly urges the Commission not to expand traditional utility monopoly functions to include these competitively available products, services, information and technologies.

I. Potential REV Outcomes

One issue raised for comment is whether the anticipated outcomes identified in the matrix are the appropriate results that the Commission should be striving for in this effort. NEM fundamentally supports the Commission's goal of enhancing distribution system reliability, resiliency, and security.¹¹ NEM submits that instituting an advanced technology-enabled utility business model that enhances the reliability, resiliency, and security of current distribution systems could animate the development of distributed and other value-added, consumer-focused products and services.¹² DSPP as an advanced reliability technology platform could be effective if quantitative data supports same, and it is implemented on time and within budget.

However, if the Commission abandons its legislative mandate to protect the public against vertical monopoly market power abuses,¹³ the resulting DSPP market structure as well as its

¹¹ The potential REV outcomes identified in the matrix are grouped into the categories of: advancement of clean energy; customer engagement; safe, reliable, and resilient systems; and operational efficiency. The Staff Proposal asserts that instituting the utility, as a DSPP, will engender increased DER participation on the system, resulting in a decrease in the overall investments that will be needed for system maintenance and upgrades. This is clearly a desirable result, however, absent quantitative evidence supporting this conclusion it is difficult to comment.

¹² Prior to the identification of the DSPP structure as an outcome of this proceeding, the stakeholders should engage in the fundamental dialogue of:

- what functions are necessary to achieved enhanced customer engagement in DER;
- whether those functions can be performed under the current market paradigm;
- whether those functions can be performed under the current market paradigm with modifications;
- whether those functions need to be performed by a new entity;
- whether that new entity is a DSPP or something else; and
- finally, after all of that analysis is undertaken, if a DSPP is determined to be needed, who should properly perform the role of the DSPP.

¹³ The NYPSC was established in 1907 to oversee the utility monopolies. The NYPSC has the, "paramount purpose of protecting and enforcing the rights of the public." *People v. Pub. Serv. Comm'n*, 141 N.Y.S. 1018 (1913). The NYPSC ensures that regulated entities under its jurisdiction perform their, "public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values, and the conservation of natural resources." PSL § 5(2). The Commission is charged with ensuring that the utilities provide safe and adequate service at just and reasonable rates. PSL § 65(1).

ability to serve the public interest will be compromised as will its efficiency and cost effectiveness. If a utility DSPP is ultimately permitted to both make the markets for DER and to enter the DER markets as a market participant, such an expansion in the utility's natural monopoly functions and business model could undermine the private investments needed to fulfill the Reformed Vision as proposed. NEM submits that such a breach of the vertical market power protections relied upon in the competitive New York energy markets for decades would unnecessarily inhibit the significant resources currently arrayed to fully develop this new market in a manner that best suits consumer demand.

If, the DSPP is both a system coordinator and a DER market participant, it could create a new information and/or demand-side monopoly for entities that already enjoy a dominant role in the marketplace as a merchant commodity provider.¹⁴ Not only will utilities enjoy instant economies of scope and scale in offering DER products, but they will have access to system data (inside information) that competitive market participants will not, thereby providing the utilities with significant competitive advantages, the effects of which will be compounded by the competitive advantages they currently enjoy as the incumbent monopoly commodity supplier. NEM urges the Commission not to incorporate this inherent conflict of interest as part of its Reformed Energy Vision.

Instead, NEM strongly urges the Commission to reaffirm its long-standing policies that permit and encourage private capital, not utility ratepayers, to bear the risk of creating and funding new DER products and services. Over the course of nearly two decades, the Commission has carved

¹⁴ The Commission has, “acknowledge[d] NEM’s concerns regarding the creation of an information monopoly through the deployment of AMI that is proprietary and closed to outside providers. “We do not support the creation of an information monopoly through our approval of these smart grid projects, and thus, require utilities to take all steps appropriate, including adherence to the AMI minimum functional requirements, to prevent such monopoly from being created. Consequently utilities, unless otherwise waived, shall adhere to the AMI minimum functional requirement that customers or their competitive providers will be able to access meter data in an open, standard, non-proprietary format, as both NEM and EnerNOC suggest.” (Emphasis added). Cases 09–E–0310 and 09–M–0074, Order Authorizing Recovery of Costs Associated with Stimulus Projects, issued July 27, 2009, at 39-40 (emphasis added).

a path under which utilities have progressively limited their role as competitive energy market participants. It would be inconsistent with this long-standing Commission policy if the utilities were to be relied upon to be DER product innovators or risk managers, roles that are and should remain competitively-provided. DSPP in the role of DER supplier would be wholly inconsistent with the natural utility monopoly model that private risk capital has relied upon since the inception of restructuring in the State of New York.

NEM is also concerned with the potential REV outcome identified in the matrix as, “customer aggregation – remove barriers to aggregation of customer to the extent practical.” Through participation in the REV working groups, NEM understands that this concept is intended to refer more specifically to community aggregation programs. This model, while interesting and novel in some isolated experiments, may be less sustainable than originally anticipated. New York was wise not to rely on this mechanism to initiate competitive restructuring. The farther the consumption decision resides away from the consumer, the less consumer-focused and/or responsive the products, services and technologies can be.

II. Optimal Ownership Structures for Distributed Energy Resources (DER)

The Staff Proposal explains that a corollary issue to the DSPP model is the extent of utility engagement in DER activities beyond the traditionally accepted roles of planning and operations. (Staff Proposal at 26). The Proposal identified utility engagement in the form of DER ownership, financing, operation, contracting or some combination. This language is very broad in scope and far reaching in impact on private investments before informed analysis and comment on a cost-effective DSPP is possible. At this stage of this proceeding, it is unwise to limit or inhibit private DER investments.

Additionally, the focus of this round of comments is to identify near term solutions that could fulfill the Demand Response (DR) and DER objectives of the REV Docket before substantial

smart meter and smart grid investments are made or committed. NEM believes that the issues surrounding a potential end state business model of a future regulated monopoly requires additional cost/benefit analysis before informed comment and policy decisions can be made.

The Staff Proposal noted the Commission's longstanding Vertical Market Power Policy. Despite this longstanding policy as well as the Commission's original jurisdictional mandate to protect the public against vertical market power abuses, the Staff Proposal minimizes its importance to a properly structured competitive retail market. Nothing could be farther from the truth.

The Staff Proposal opines that, "where a utility has imminent operational and planning needs and/or can provide resources that are not available in the competitive market, a pragmatic approach may be preferable to a theoretical approach to the optimal operation of markets in an as-yet-unrealized system." (Staff Proposal at 27). This statement sounds rational. However, experience with the pragmatic use of utility monopolies to provide default megawatt supplies in otherwise competitive megawatt markets surely informs the pragmatic use of utility monopolies in the new and emerging negawatt market. Particularly, in light of the ESPA v. FERC decision.

During the resolution of FERC jurisdiction over negawatts, this Commission could not be more empowered (even with its limited inherent legislative authority) to seize this opportunity, and to continue and indeed accelerate its wildly successful regulatory restructuring of the New York electricity markets, and to further limit (not expand) the use, scope and functions of regulated monopolies.¹⁵ A new default utility negawatt supplier is and should be a totally unacceptable

¹⁵ The NYISO operates in a single state as a neutral, independent wholesale electric commodity market operator that is also engaged in system planning and ensuring reliability. While the NYISO has experience establishing the wholesale value of DR to the NY capacity markets, NEM submits that given NYPSC jurisdiction after the EPSA case and its current policy priorities, it should not be difficult to implement a regulatory determination as to the added value that DR provides to distribution systems and retail mass market consumers. Such a determination added to existing wholesale market valuations of DR plus the implementation of retail DR load profiles could help small consumers to monetize DR behavior and simultaneously inform negawatt pricing in the retail consumer markets.

outcome. After all the years of competitive distortions arising from default utility megawatt supplies, this policy option should not even be a consideration, nonetheless a serious proposal.

Protecting the public and competitive markets from vertical monopoly market power is and should remain the primary mission of the New York Public Service Commission. Its enabling legislation and the basic function and purpose of utility regulation itself is to protect the consuming public as well as competing private investments from monopoly market power.

Indeed, this is why utilities are called a regulated monopoly and is the *raison d'être* of the Commission's existence. A light-handed and measured approach is required as past efforts by the legislature and NYPSC to force investments in new technology turned out to be extremely costly for New York State's electric customers. The much heralded 6 Cent Law that New York State implemented under PURPA plagued New York utilities and ratepayers for nearly 20 years.¹⁶ Given current reliability concerns and the costs this Commission will be called upon to implement a universal "smart" meter deployment and a dynamic smart grid infrastructure, establishing realistic prices for retail negawatts to encourage private consumers ("prosumers") and private DER investments could potentially solve or delay the current megawatt reliability problem accentuated by this winter's wholesale market dysfunction.

¹⁶ In 1978, in response to skyrocketing fuel costs, interest rates and large plant construction, Congress passed the Public Utility Regulatory Policy Act (PURPA). The purpose of PURPA was to encourage electric energy conservation, increased energy efficiency, and equitable retail rates, many of the same goals enunciated by this Commission in instituting the REV proceeding. PURPA required the electric utilities to purchase energy and capacity from "qualifying facilities," co-generators and independent power producers (IPPs). At the state level, New York enacted PSL Section 66-c in 1980, which required the state electric utilities to purchase electricity from alternate energy production facilities, co-generation facilities and small hydro facilities under rates and at terms and conditions deemed just and reasonable by the Commission. The following year, Section 66-c was amended to institute a six cent per kilowatt hour floor on the purchase price paid by the electric utilities.

One of the many factors contributing to high electric prices in New York in the 1980s-90s was the cost of purchased power from IPPs. Many of the long-term contracts entered into in the late 1980s were based on energy price forecasts that were too high. This was due to reductions in demand for electricity caused by the economic slowdown and a lower-than-forecasted price of oil. Utilities ended up paying more for independent power than if they had generated the energy themselves or purchased the power on the spot market. The failure of this legislative mandate to predict and accurately forecast economically rational rates for competitive generation caused significant harm to New York energy consumers and utilities, for example, leading to the near bankruptcy of NIMO. The six cent floor purchase price for the electric utilities was repealed in 1992 by then Governor Cuomo.

Now is the time for the Commission to implement the low-cost, immediately available “short term wins” such as the NEM Retail Demand Response Load Profile¹⁷ and to signal the private capital markets that they can rely on the decades old vertical market power protections that have been the cornerstone for competitive restructuring. NEM urges the NYPSC to ensure this fundamental consumer and marketplace protection.^{vi}

III. DSPP Identity - Ownership and Operational Structures for DSPPs

The Staff Proposal recites the merits of instituting an independent entity as the DSPP, but then without any significant discussion or cost/benefit analysis, the Proposal concludes that the utilities are “uniquely situated” to perform this function.¹⁸ NEM urges the Commission to more thoroughly consider the costs/benefits of an independent DSPP versus a utility DSPP. Particularly, if there is any chance that the utility will be permitted to become an actual DER market participant rather than an infrastructure technology facilitator. Until additional quantitative data informs this administrative record, it would be premature for NEM to comment or for the NYPSC to decide such significant public policies and public capital commitments.

V. Transition for Clean Energy Programs

Under the Staff Proposal the DSPP will be charged with integration of DER resources into system planning and NYSERDA’s role will shift to market intervention strategies to facilitate greater penetration of clean generation and efficiency technologies.¹⁹ At this time it is unclear how the Commission can ensure the transition from current renewable and energy efficiency programs. Competitive forces are already working to bring clean energy into the network, especially if certain barriers are removed.

¹⁷ See: http://www.energymarketers.com/documents/NEMA_Mass_Market_Retail_DR_Policy.pdf. This proposal also responds to the Chair’s comments at the July 10, 2014, Hearing in which “algorithmic settlements” could alleviate the immediate need for universal smart meter installations.

¹⁸ Staff Report and Proposal at 24-26.

¹⁹ Staff Proposal at 21.

VI. Enhanced Services

The discussion in the Staff Proposal of rate design issues applicable to enhanced utility services inappropriately assumes that the utility should be performing such services. As noted throughout these comments, the fundamental determination that “basic services” can and should be offered by a utility should only be those associated with its core reliability functions as a regulated utility monopoly. These would include the maintenance of, improvements to and support of a reliable, resilient, and secure delivery infrastructure.

Enhanced services which the Proposal describes as “non-essential value-added services” should not be offered or performed by a utility. Enhanced services are competitive services, and the utility should not be permitted to offer these services, particularly in view of its superior access to system data (the equivalent of “insider information”), which represents an unfair and improper competitive advantage over other market participants.

The Staff Proposal suggests that: “revenues derived from such [enhanced] services should accrue primarily to the benefit of ratepayers, with some portion allocated to utility earnings to provide an incentive.”²⁰ This appears to be a proposal that effectively strips all the risks out of a DER product offering and subsidizes its upfront capital costs with captive ratepayer funding then guarantees a monopoly a free share of the no-risk DER investment returns. It is hard to conceive of a more unfair, anti-competitive business model in the middle of twenty years of progressively more competitive retail market restructuring.²¹ Under no circumstances would NEM or its members endorse such an anticompetitive intrusion into the new growth markets of DER.

²⁰ Staff Proposal at 61.

²¹ The Proposal says that the costs of providing basic utility service would continue to be allocated to all customers, and utility payments for DER products that are used to manage load and optimize system operation belong to the class of costs that are recoverable as part of the utility’s revenue requirement. Id.

To date, a host of regulatory and market barriers have impeded ESCOs from providing consumers with energy-related value-added services.²² Despite these barriers, ESCOs have been able to offer consumers with innovative products, and continue to try to find new ways to meet consumer needs. Many of the regulatory and market barriers that inhibit more wide-scale ESCO value-added services offerings could require significant time and expense to rectify, including for example, utility billing and metering infrastructure changes.

In order to facilitate achievement of the Commission's vision of increased consumer engagement in the marketplace, NEM suggests that one near-term solution that the Commission can implement in short order to achieve increased mass market consumer participation in demand response is to require the creation and use of Retail Demand Response Load Profiles using existing utility usage data and load profiles with algorithmic settlements, potentially augmented by additional load research data as the programs evolve. Prior to adopting an expensive untested DSPP infrastructure and regulatory paradigm, we urge the Commission to explore solutions such as this that permit the competitive retail marketplace to meet consumer needs for demand responsive products.

VII. Access to Data

Although access to data is identified here as a Track 1 issue, it is noted that Case 12-M-0476 on Retail Access Issues is simultaneously considering these issues, and therefore Staff will review the comments submitted in the Retail Access case before deciding whether it is necessary to solicit further comment. In view of this recognition of the interrelated data access issues in both the instant REV proceeding and the Retail Access proceeding, NEM wishes to incorporate by reference its comments filed in Case 12-M-0476.

²² See e.g., Case 12-M-0476, Comments of NEM.

Conclusion

NEM appreciates this initial opportunity to offer its views on the appropriateness of the assumptions underlying the REV and Staff Report as well as the outcomes proposed for the record in this proceeding. We look forward to continued participation in the REV proceeding and the Staff Straw Proposal on these significant issues.

Sincerely,



Craig G. Goodman, Esq.
President
Stacey L. Rantala
Director, Regulatory Services
National Energy Marketers Association
3333 K Street, NW, Suite 110
Washington, DC 20007
Tel: (202) 333-3288
Email: cgoodman@energymarketers.com;
srantala@energymarketers.com
Website-www.energymarketers.com

Dated: July 18, 2014.

ENDNOTES

ⁱ The changed circumstances cited by the Commission are: the increased real economic cost of outages associated with the demands of a digital economy; increased consumer installation of local power sources to supplement grid power; increasingly severe weather events that exceed the capabilities of traditional distribution systems; and technological developments in demand-side technologies. The Commission posits that these factors, in combination, warrant a reevaluation of the historic assumptions of demand elasticity and bulk economies of scale. Order at 3-4.

ⁱⁱ In the February 2014 Order in the Retail Access proceeding, the Commission noted its intention to initiate the REV docket for the purpose of, “enabl[ing] market-based deployment of distributed energy resources and load management on a greater scale.” (Order at 47). The Commission suggested that, “This strong emphasis on demand-side resources and market animation will in all likelihood result in greatly increased opportunities for ESCOs to offer value-added services to residential customers. Our goal is to transition to competitive retail energy markets in which ESCOs and other vendors offer a wide range of innovative products and services to enable mass market customers to more effectively manage and control their energy bills.” Id.

However, in the February 2014 Retail Access Order, the Commission found that while workable competition exists for large non-residential customers, “as currently structured, the retail energy commodity markets for residential and small non-residential customers cannot be considered to be workably competitive.” The factors cited in favor of workable competition for mass market customers

included: large number of suppliers participating in the market and ease of supplier market entry and exit. The factors cited as impeding workable competition: lack of information on market conditions, especially pricing, and lack of energy-related value-added service offerings. This finding was reiterated in the Staff Proposal in this REV docket. (Staff Proposal at 38-42). The Commission identified and stakeholders recently filed extensive comments on market and regulatory barriers that have inhibited ESCOs from being able to provide energy-related value-added services to mass market consumers on a more widespread basis.

As noted in the Commission's determination regarding attainment of workable competition for mass market consumers, there are over two hundred ESCOs competing to provide service, indicating not only ease of competitive entry and exit, but significant competitive pricing pressures. Moreover, according to the latest migration reports compiled by the Commission, over 1.7 million electric and over 1 million natural gas customer accounts receive service from a competitive supplier. Contrary to the Commission's finding, millions of mass market consumers have elected to participate in workable competition. The Commission cannot fault ESCOs for lack of information on market conditions, when the underlying utility pricing paradigm is the principle reason that consumers cannot understand or make rational comparisons to ESCO products. So long as utilities operate in the default merchant commodity provider role, this pricing distortion will persist. Then, for purposes of this REV docket, it is being proposed that utilities potentially assume the additional role of default DER provider. All of the market distortions that have plagued the competitive retail commodity market will be compounded if the utility is also instituted in a new demand response monopoly provider role.

ⁱⁱⁱ As used herein, the term "public capital" refers to capital investments made by regulated utility monopolies, and for which captive ratepayers in the State of New York shall be responsible for the return of and the return on such investments. The New York Public Service Commission is the State governmental entity that determines the nonbypassable distribution rates that shall be charged to captive ratepayers to recover the public investments that will be required to be made as a result of this and future proceedings related hereto. Private capital refers to all private investments that are made by entities that comprise the competitive marketplace. Such investments carry a risk of loss associated with them as there are no regulated rates which guarantee the private investor a return of or a return on such investments.

^{iv} See NEM Proposal for implementation of Retail Demand Response Load Profiles, available at: http://www.energymarketers.com/documents/NEMA_Mass_Market_Retail_DR_Policy.pdf and [http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/fffb7bb0a0b4d2be85257cda005a1907/\\$FILE/NE/MA%20Retail%20DR%20Load%20Profiles%20Proposal6-5%2014.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/fffb7bb0a0b4d2be85257cda005a1907/$FILE/NE/MA%20Retail%20DR%20Load%20Profiles%20Proposal6-5%2014.pdf) (secure link).

^v The continued presence of supply side monopolies in emerging competitive markets has limited the growth of competitive markets, distorted retail pricing signals (PTC) and misallocated utility resources that could be better allocated to the maintenance, upgrades, resiliency, and security needs.

^{vi} The Commission's Vertical Market Power Policy is the bedrock on which private investments have relied to invest in providing competitive products and serving New York consumers. The importance of this Policy in facilitating the availability of competitive DER resources and preventing discriminatory utility practices cannot be overstated. For the very reasons cited by Staff related to the utility's superior knowledge and planning and operation of the distribution system, it would confer the utility with a significant competitive advantage to also directly engage in DER ownership. Unfair and discriminatory practices and preferences for utility-owned versus competitively-owned resources would be difficult to monitor, detect and prevent. NEM urges against any departure from the Commission's Vertical Market Power Policy. Market power and anticompetitive behavior is not a theory. It is precisely why the Commission incorrectly believes that the New York mass market is not workably competitive.