

Public Service Commission - Monthly Meeting - 8-2-2017

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

MEETING OF THE PUBLIC SERVICE COMMISSION

Wednesday, August 2, 2017  
10:30 a.m.

Three Empire State Plaza  
Agency Building 3, 19th Floor  
Albany, New York

COMMISSIONERS

JOHN RHODES, Chair

GREGG C. SAYRE  
DIANE X. BURMAN  
JAMES ALESI

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2 (The meeting commenced at 10:30 a.m.)

3 CHAIR RHODES: Good morning. I'd like  
4 to call this session of the Public Service Commission  
5 to order.

6 Assistant Secretary Aissi, are there any  
7 changes to the final agenda?

8 ASSISTANT SECRETARY AISSI: Good  
9 morning, Chair and Commissioners. There are no  
10 changes to the agenda this morning.

11 CHAIR RHODES: Okay. Thank you.

12 Let's proceed to -- am I on? I'm not  
13 on. Am I on?

14 So there are no changes to the agenda.

15 So let's proceed to the first item for discussion.

16 Item 201, Cases 15-M-0127, et al, which is the  
17 Interlocutory Appeal by Constellation Energy Gas  
18 Choice, L.L.C., and Direct Energy Services, L.L.C.,  
19 presented by Julia Bielawski, Deputy General Counsel.

20 Julia, please begin.

21 MS. BIELAWSKI: Good morning, Chair,  
22 Commissioners. The proposed order before you today  
23 arises from the proceedings in which the Commission  
24 is evaluating the retail energy market in the state.  
25 In preparation for filing testimony in those

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2 proceedings, the parties have been engaged in  
3 discovery. And the Public Utility Law Project, or  
4 PULP, issued discovery requests on many of the ESCOs  
5 that are participating in this proceeding.

6 When several of those ESCOs objected,  
7 the Public Utility Law Project brought a motion  
8 before the A.L.J.s -- A.L.J.s presiding in the  
9 proceeding to compel production of the requested  
10 information. The A.L.J.s issued a ruling, granting  
11 that motion. It is that ruling that's the subject of  
12 the interlocutory appeal before you. The appeal is  
13 brought by Constellation Energy Gas Choice and Direct  
14 Energy Services.

15 Now for the Commission to entertain an  
16 interlocutory appeal, an appeal from a judge's ruling  
17 at this early stage in the evidentiary process of a  
18 proceeding, it's extraordinary. And it is up to  
19 Appellants to show extraordinary circumstances to  
20 warrant the Commission's intervention at this point.

21 Here -- typically, a discovery dispute  
22 would not rise to that level. Here, however, one of  
23 the arguments presented asserted by the Appellants  
24 meets that criteria. So the recommendation is for  
25 the Commission to entertain this appeal.

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2 Specifically, Appellants assert that the ruling  
3 improperly orders the ESCOs to release certain  
4 customer-specific data in response of two of PULP's  
5 information requests. This would be, according to  
6 the Appellants, in violation of the Uniform Business  
7 Practices, Commission policy, and existing customer  
8 contracts.

9 The Uniform Business Practices provide  
10 for such disclosure in very limited circumstances,  
11 only where it's necessary to facilitate or maintain  
12 service to a customer or the customer has consented  
13 to that disclosure. Because the ruling would require  
14 the immediate release of this information, the  
15 extraordinary circumstances threshold is met in this  
16 case.

17 So turning to the merits, the proposed  
18 order finds that PULP's assertion that it needs this  
19 information to support its analysis in this  
20 proceeding is insufficient to outweigh the  
21 countervailing interest protecting customer-specific,  
22 personally identifiable information. The information  
23 request would reveal individual names, addresses, and  
24 account numbers of residential customers. It is this  
25 type of information that it -- should it land in the

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2 wrong hands, could be used to enroll customers for  
3 ESCO service without the customer's consent, a  
4 practice that has been a problem in the past.

5 So despite the fact that PULP, itself,  
6 may have a valid reason for wanting to evaluate this  
7 information, the proposed order finds that the risk  
8 to customers of a more widespread dissemination of  
9 this information weighs against the disclosure.

10 Accordingly, the proposed order  
11 recommends reversing the ruling but only with respect  
12 to these two information requests such that no ESCOs  
13 would be required to disclose the requested customer-  
14 specific information. In all other respects, the  
15 proposed order recommends affirming the judge's  
16 determination. And I will briefly outline the other  
17 arguments raised by Appellants in that regard.

18 First, Appellants indicate that the  
19 judges should not have ruled because it was PULP's  
20 obligation to first take the issue back to the ESCOs  
21 and try to negotiate a resolution of a discovery  
22 dispute before bringing the motion to the judges. In  
23 their ruling, the judges acknowledge that that was  
24 appropriate for any party to try to resolve discovery  
25 disputes before bringing it to the judges' attention.

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2                   However, because the issue was briefed  
3 before the judges and, in their discretion, looking  
4 at it, and the distance between the parties on the  
5 issue, they decided, in the matter of efficiency, to  
6 go ahead and resolve the issue. The proposed order  
7 finds that it's appropriately within the judges'  
8 discretion to do.

9                   Appellants also challenged the relevance  
10 of some of the information requested. And the order  
11 before you evaluates the subject matter of each  
12 request and ultimately recommends affirming the  
13 judges' conclusion that the information requested is  
14 relevant to these proceedings.

15                   Likewise, Appellants' arguments that  
16 some of the terms used in the information request are  
17 vague and ambiguous were properly rejected by the  
18 judges because in the context read -- when you read  
19 the information requests, any ambiguity can be  
20 resolved to the extent that the ESCOs were able --  
21 should be able to respond to these requests.

22                   The Appellants' concerns that the  
23 requests were overbroad or unduly burdensome were  
24 also evaluated by the judges. And the judges  
25 properly found that they were reasonably tailored to

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2 these proceedings.

3 Appellants also argue that there were --  
4 they asserted several privileges that they assert  
5 should not have been -- are grounds for not  
6 disclosing information requested in the -- in these -  
7 - in the information requests. However, the judges'  
8 ruling did not finally resolve this issue. Instead,  
9 what the judges said was that there wasn't enough  
10 information to determine whether a privilege was  
11 warranted. So they rejected those claims without  
12 prejudice for the ESCOs to come back and reassert  
13 them. Accordingly, the proposed order finds no  
14 relief to Appellants on this issue is necessary at  
15 this juncture.

16 Finally, Appellants object to some of  
17 the requested information as outside the scope of  
18 this proceeding. Those arguments are identical to  
19 issues raised and resolved in the interlocutory  
20 appeal by the Retail Energy Supply Association and  
21 Direct Energy, which is the next item to be presented  
22 today. This order does not reach those issues.

23 I am happy to answer any questions you  
24 have.

25 CHAIR RHODES: Thank you, Julia. I

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2 welcome and thank you for the thoughtful explanation  
3 and the legal analysis and the analysis of the  
4 merits.

5 My own view is that we need to affirm  
6 and preserve a longstanding policy of the Commission  
7 and, of course, the principles in the Uniform  
8 Business Practices to ensure protection of customer-  
9 sensitive information. So certainly agree with the  
10 reversal of those relevant aspects of the May ruling  
11 and agree with the rejection of the remainder of the  
12 appeal.

13 Are there any comments or questions from  
14 my fellow commissioners?

15 COMMISSIONER SAYRE: Just to say that  
16 I'm fully in accord with the recommendation and with  
17 the chairman's remarks.

18 CHAIR RHODES: Commissioner Burman?

19 COMMISSIONER BURMAN: Thank you, Chair.

20 So I just want to make clear we have two  
21 items, 201 and 202. 202 is separate from that and  
22 we'll be voting on that separately. And that  
23 addresses other issues, including the thresholds of  
24 issue of jurisdiction; correct?

25 MS. BIELAWSKI: That's correct.



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2 COMMISSIONER BURMAN: Okay. Thanks.

3 So my perspective is that it is true  
4 that it's extra -- extraordinary circumstances to  
5 take up the interlocutory appeal. But this -- this  
6 proceeding, itself, is extraordinary and how we're  
7 handling things is extraordinary. So from a path-  
8 forward perspective, I am looking at ways that we can  
9 facilitate all parties working together in ways that  
10 we can facilitate the opportunity for helping to  
11 streamline some of the data processes and data  
12 overload that may be required.

13 I am concerned that some of the tenor of  
14 the administrative proceeding has gotten weighted  
15 down with back and forth animosity and a -- I think  
16 the threshold issue for me is that it is incumbent  
17 upon the parties to attempt to work together before  
18 they go to the administrative law judge.

19 Now, I do understand that in this case  
20 the first party who didn't go was PULP, felt that it  
21 was not going to be helpful and fruitful. That may  
22 have been the case. However, I do want to see that  
23 parties are trying, despite the odds, to come up with  
24 ways to work together and potentially resolve some of  
25 these issues so that we don't continue to get

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2 weighted down in -- and the administrative law judges  
3 don't get weighted down with a lot of back and forth  
4 discovery requests.

5 I do -- you know, we've been blessed at  
6 the Commission. When I was a staffer, as well as on  
7 the Commission, that despite great odds we have seen  
8 parties who have been in polar opposites, when they  
9 are challenged to, to come together and figure out  
10 solutions. I think that has been historically  
11 something that we can be very proud of.

12 In fact, until a few years ago, it used  
13 to be that the ESCO collaboratives and the ESCO  
14 process was seen as -- while, yes, tedious and  
15 difficult, it was seen as very worthwhile for those  
16 parties who were participating and actually seemed to  
17 result in resolution, even when people were, again,  
18 polar opposite. So I think that history is something  
19 that's important and we should look forward to trying  
20 to get there.

21 Now, to the extent that the first  
22 threshold -- threshold issue of the personally  
23 identifying customer information, that clearly rises  
24 to the level of needing to say that information is  
25 not appropriate and shouldn't be discoverable here

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2 under these circumstances. And therefore, under  
3 these circumstances, we are -- I think we are all in  
4 agreement that that is appropriate to grant that  
5 aspect of the rehearing.

6 As to the others, it falls into, for me,  
7 that grey area. And again, keeping in mind that the  
8 bulk of the issues are in the 202 order, not in the  
9 201 order and some of the 202 orders deal with the  
10 threshold jurisdictional issue so we only get to  
11 that. We only get to the 201 issues if we think that  
12 there is jurisdiction on a lot of the threshold  
13 issues. So I'll reserve my comments for the 202  
14 order as to the threshold issues there.

15 But here, one of the aspects is that the  
16 time period, the five-year time period and asking for  
17 data for five years. And, you know, whether it's one  
18 year, five years, ten years, fifteen years, I really  
19 don't know what the appropriate number is. And,  
20 again, I leave that to the administrative law judge  
21 to figure that out.

22 However, I am mindful of the fact that  
23 that may be onerous depending on the ESCO, the size  
24 of the ESCO, the number of customers, the amount of  
25 time that the ESCO has been operating, and what the

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2 rules are for having to keep that information.  
3 Whether it's an ESCO or a utility or some other  
4 entity, five years may be, in some fashion, overly  
5 burdensome and actually not get to the heart of the  
6 issues of what is trying to be dealt with to address  
7 to bring back to the Commission on the threshold  
8 issues.

9                   So I would look for the folks seeing if  
10 there maybe are alternative ways that they can get  
11 there. It also, I think, would be important to know,  
12 since the Commission and the Commission staff has had  
13 a robust enforcement process, what information over  
14 the years have we had for us to make determinations  
15 on enforcement. Because if there are opportunities  
16 to obtain some of the higher-level information  
17 without needing to go to the ESCO through this  
18 process, I would like to see that the staff and the  
19 ESCOs work on -- on the information that already may  
20 be housed with the staff, as well as the information  
21 that they've deemed, over the years, relevant looking  
22 at the enforcement process.

23                   However, again, I do understand the need  
24 for the administrative law judge to have some  
25 flexibility. But to the extent that they are hearing

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2 from this commissioner, the focus of trying to figure  
3 out collaboration and alternative pathways, I think  
4 that's important.

5 As to -- and just want to pull it up --  
6 sorry -- as to page 15 and 16 of the order, it speaks  
7 of the -- speaks of the court standard -- court  
8 standard, versus the Commission standard. And there  
9 is a focus that the court standard adopted a stricter  
10 definition for discovery. But under this case, we  
11 were looking at our discovery dispute, sharing of  
12 evidence under the Commission proceeding, which is --  
13 allows more evidence to be obtained than if they were  
14 under the court proceeding.

15 Under the court proceeding, my  
16 understanding is it has to really be much more direct  
17 evidence that is being collected. Do you want to  
18 just make sure I'm reading that right?

19 MR. AGRESTA: That's generally correct.  
20 The court rules of discovery now have a new test and  
21 it's -- I think most people would say it's not quite  
22 as broad as the old test, but that's not the test  
23 that's in the Commission rules and we apply the test  
24 that's in the Commission rules.

25 COMMISSIONER BURMAN: Right. No, and I

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2 understand that from a legal perspective that the  
3 Commission rules are broader. But to the extent  
4 that, again, going back to some of the basic tenets  
5 of trying to work together and be collaborative and  
6 actually try to get through some of the issues, to  
7 the extent that it may be appropriate to look and  
8 take a pause and say let's, at least, while we may  
9 disagree on the broader interpretation, to the extent  
10 that we all are in agreement on the stricter  
11 definition from the court perspective and the court  
12 standard, let's at least wrap our arms around that  
13 aspect and the -- that data overload.

14 And maybe that could be the first  
15 threshold issues that are dealt with from a discovery  
16 perspective, which may help to inform some future  
17 needs, as well, that -- that will go there from a  
18 discovery perspective.

19 So I'm just offering up some food for  
20 thought as ways to -- again, I do think that there  
21 may be pathways. And like we've dealt in many  
22 proceedings with different phases and looking at what  
23 we can wrap our arms around within the first onset,  
24 that may be an opportunity. That subset of  
25 information is at least more discreet and maybe we

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2 agree and do things in -- in a, you know, more  
3 systematic, smaller bite way to get there.

4 So then the other aspect is the vague  
5 and ambiguous wording. And essentially, the -- the -  
6 - the draft order says that the Commission's review  
7 of the terms indicates that the words have obvious  
8 and apparent meanings when read in the context of the  
9 full text of the discovery requests and the context  
10 of these proceedings, and had often been used by the  
11 ESCOs themselves in pleadings before the Commission.  
12 So it was denying the ESCOs' request that the --  
13 there's an understanding of the vagueness and the  
14 ambiguity of the discovery request.

15 I guess we all know what the words are.  
16 However, I do think that we, ourselves, on the  
17 Commission and back in the beginning of REV did have  
18 focus on what was a product, what was value added,  
19 you know, what -- you know, what is the definition of  
20 a -- a customer complaint, a consumer complaint. So  
21 you know, what's a sanction, what's a fee, what's a  
22 penalty?

23 So all of those things may, you know, to  
24 my understanding is trying to have, again, a  
25 conversation on what is it that we're actually trying

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2 to get, especially as it goes to information and data  
3 on customer complaints. What do we, ourselves, as  
4 the Commission on the Commission staff already have  
5 in our enforcement proceedings that could be done  
6 without -- without dragging down the process and the  
7 hearing process further? And maybe we could help in  
8 that regard.

9                   However, again, I do understand  
10 administrative law judge does have -- needs to have  
11 some flexibility in, in this case, her rulings, so  
12 maybe an opportunity, though, to revisit now that  
13 this Commission is going to be voting on this item  
14 and look at where are we at now, especially since  
15 those rulings there have been a lot of activity not  
16 only in the court but at the Commission itself on  
17 these issues.

18                   Then the other issue is internal audits.  
19 I am concerned that by handing over internal audits,  
20 without clearly defining what exactly is being looked  
21 at and how broad that is, that we may be actually  
22 chilling the ESCOs from doing their internal audits.

23                   I'm not sure what the parameters are and  
24 I'm not sure if there's a way to look at that, you  
25 know, and -- and make sure that we are consistent



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2 with what we do, not only with ESCOs, but with our  
3 own internal audits, as well as internal audits that  
4 other companies that come before the Commission are  
5 also subject to. So I just want to make sure that we  
6 are very clear and fair in the same rules applying.  
7 And so I think that's something that should be looked  
8 at.

9 And with that, I don't have any specific  
10 questions. I do want to see, you know, the pathway  
11 forward and I do want to figure out some solutions.  
12 And I do hope that there is an opportunity to take a  
13 pause and figure out a better collaborative way,  
14 especially with the history of -- past history, eons  
15 ago, of the collaboratives working well. So thank  
16 you.

17 CHAIR RHODES: Thank you, Commissioner  
18 Burman.

19 Commissioner Alesi.

20 Thank you.

21 So thank you for your comments and  
22 questions. We're now going to proceed to a vote.

23 My vote is in favor of the  
24 recommendation to reverse that portion of the May 25,  
25 2017, ruling that would have compelled production of

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2 responses to two of the discovery requests and to  
3 deny the other aspects of the appeal as described.

4 Commissioner Sayre, how do you vote?

5 COMMISSIONER SAYRE: Aye.

6 CHAIR RHODES: Commissioner Burman?

7 COMMISSIONER BURMAN: I vote in favor  
8 based on my comments at session.

9 CHAIR RHODES: Commissioner Alesi?

10 COMMISSIONER ALESI: Aye.

11 CHAIR RHODES: The item is approved and  
12 the recommendations are adopted. Thank you.

13 We now proceed to the second item for  
14 discussion, Item 202, Cases 15-M-0127 et al, which is  
15 the interlocutory appeal by the Retail Energy Supply  
16 Association and Direct Energy Services, L.L.C.,  
17 presented again by Julia Bielawski, Deputy General  
18 Counsel.

19 Julia, please begin.

20 MS. BIELAWSKI: Thank you.

21 I'd like to begin by clarifying my  
22 response to you, Commissioner Burman, with respect to  
23 you saying that this interlocutory appeal deals with  
24 the jurisdictional issues.

25 This appeal doesn't implicate the

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2 Commission's jurisdiction expect -- except with  
3 respect to a very narrow issue on the ESCO  
4 profitability and argument made. But it does deal  
5 with the process and the authorization for the  
6 evidentiary hearings going forward. So I just wanted  
7 to clarify that.

8 COMMISSIONER BURMAN: Yes. Excuse me,  
9 Chair, I just want to --

10 CHAIR RHODES: Please.

11 COMMISSIONER BURMAN: -- if it's okay?

12 Thank you. I appreciate that  
13 clarification. I saw Paul having a heart attack, so  
14 I'm glad that you clarified it.

15 I do -- I do agree that we have  
16 threshold issues discreet to the administrative law  
17 hearing and that's what we're dealing with. And that  
18 is, for me, of prime importance that takes precedent  
19 over the other issues that fall after it, depending  
20 on how you vote on this item. So thank you.

21 MS. BIELAWSKI: Understood.

22 So this proposed order also resolves an  
23 interlocutory appeal. Here, the Retail Energy Supply  
24 Association, or RESA, as well as Direct Energy  
25 Services, both ESCOs doing business in New York

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2 State, challenge two rulings issued by the  
3 administrative law judges in this proceeding.

4 The first ruling, issued May 15th, 2017,  
5 rejected procedural challenges to the evidentiary  
6 hearings that have been scheduled in this proceeding.  
7 The challenged May 23rd, 2017, ruling declined the  
8 limit to -- to limit the scope of discovery in these  
9 proceedings, specifically rejecting Appellants'  
10 contentions that data regarding large commercial and  
11 industrial customers and data with regard to ESCO  
12 profitability should be excluded from the discovery  
13 process.

14 So, as I mentioned with regard to the  
15 prior item, discovery disputes on appeal  
16 interlocutory relief is extraordinary. And here,  
17 although extraordinary circumstances have not been  
18 demonstrated given the procedural nature of the  
19 challenges, the recommendation here is for the  
20 Commission to, nevertheless, address the merits of  
21 this appeal to provide additional guidance to the  
22 parties given the importance of this proceeding and  
23 its complicated procedural history.

24 So turning to the first challenge, which  
25 is to the evidentiary process established here,

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2 Appellants contended that the secretary's notice,  
3 which was issued on December 2nd, 2016, was the  
4 vehicle that authorized proceedings -- authorized  
5 evidentiary hearings in this proceeding. And as  
6 such, they argue that it was issued in excess of the  
7 secretary's authority.

8 Pursuant to Section 11 of the Public  
9 Service Commission, evidentiary hearings may be held  
10 where authorized by law such as where we have  
11 expressed statutes regarding major rate changes and  
12 we always have evidentiary hearings or where the  
13 Commission otherwise authorizes these hearings. But  
14 under Section 8 of the Public Service Law, the  
15 specific individual or individuals can be authorized  
16 to conduct hearings on the Commission's behalf but a  
17 certification has to be filed in order to do that.

18 So here, because the secretary does not  
19 have such a certification under Section 8, the ESCOs  
20 are contending that these evidentiary hearings were  
21 not properly authorized.

22 The proposed order rejects these  
23 arguments. It acknowledges that the secretary is not  
24 empowered to authorize or conduct hearings, but it  
25 also recognizes that she may issue notices of a

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2 ministerial nature as was the December 2nd notice in  
3 this case. The notice that is required by law, going  
4 forward, is the notice issued under the State  
5 Administrative Procedure Act, which was issued in  
6 this proceeding by one of the administrative law  
7 judges who has been certified in compliance with  
8 Section 8 of the Public Service Law to conduct  
9 hearings.

10 But on a higher level, the proposed  
11 order also recognizes that, although evidentiary  
12 hearings were not mandated in this case, by  
13 scheduling evidentiary hearings, the Commission is  
14 affording ESCOs a greater opportunity to be heard  
15 before reaching any decision in this matter. And  
16 thus, it is surprising that the ESCOs are so  
17 vigorously challenging a process that is designed to  
18 give them more process than the typical notice and  
19 comment procedures would have.

20 Here, where there's been a significant  
21 disagreement between stakeholders, including previous  
22 failed collaborative efforts, a trial type  
23 evidentiary hearing is the best course to build a  
24 record upon which the Commission may ultimately make  
25 an informed decision regarding the workability of the

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2 retail energy market. Given this fact and to  
3 eliminate further litigation over the authorization  
4 of the proceedings up to this point, in the proposed  
5 order, the Commission today clearly authorizes a full  
6 evidentiary process for these proceedings.

7           With regard to the second rule --  
8 ruling, Appellants challenged the judges' ruling  
9 rejecting the ESCOs' attempt to limit the scope of  
10 discovery to exclude issues related to large  
11 commercial and industrial customers and ESCO  
12 profitability. Based on the language of that  
13 December 2nd secretary's notice which addresses the  
14 mass market, Appellants contend that the proceeding  
15 is limited to evaluating that mass residential  
16 market. They also argue that the investigation of  
17 ESCO profitability is beyond the scope of this  
18 proceeding and the Commission's jurisdiction.

19           The proposed order affirms the finding  
20 of the A.L.J.s on the scope issues. Again,  
21 interlocutory review of discovery issues should be  
22 exercised rarely and here the order finds that the  
23 A.L.J.s acted fully within their discretion in  
24 correctly applying the discovery rules.

25           Specifically, they appropriately held

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2 that although the purpose of these proceedings is  
3 limited to examining the mass market, evidence  
4 related to commercial and industrial products is  
5 relevant and helpful to determining whether products  
6 successful for large customers could be incorporated  
7 into the mass market.

8 They properly found that data regarding  
9 ESCO profitability may reveal information relevant to  
10 this proceeding such as overcharges. The order  
11 concludes that the question of whether ESCOs can  
12 profitability provide valuable service at reasonable  
13 -- at a reasonable value is crucial to the  
14 Commission's investigation into whether the market is  
15 properly functioning.

16 Lastly, the proposed order points out  
17 that Appellants' argument that the Commission lacks  
18 jurisdiction to investigate ESCO profitability has  
19 been foreclosed by the July 27th, 2017, decision of  
20 the Appellate Division Third Department. That -- in  
21 that decision the Court expressly held that the  
22 Commission has broad authority over the gas and  
23 electricity market, including the authority to impose  
24 limitation on ESCO rates.

25 Accordingly, the recommendation is to



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2 deny this interlocutory appeal in its entirety and,  
3 in doing so, sanction the continued efforts of the  
4 parties going forward with a full evidentiary  
5 process.

6 Thank you.

7 CHAIR RHODES: Thank you, Julia.

8 Again, I welcome the thoughtful  
9 explanation and I recognize the dual conclusions of  
10 the order, one, that the actions by the secretary in  
11 issuing them was appropriate and that the actions --  
12 as were the actions of the A.L.J. And two, that in  
13 order to put the issue to rest and avoid further  
14 delay, propose that the Commission authorize the  
15 evidentiary hearings as described and with the scope  
16 as described in the order.

17 Commissioner Sayre?

18 COMMISSIONER SAYRE: I've been observing  
19 the ESCOs using every legal and procedural move that  
20 I can imagine, and I'm a regulatory attorney of some  
21 years standing, to slow down and limit this  
22 proceeding. All I want to say at this time is that I  
23 look forward, with very great interest, to what the  
24 record now, and may I say finally, being developed in  
25 this case will say. Even more, I look forward to

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2 having an opportunity to make some decisions  
3 regarding what appears to be a troubled market.

4 Thank you.

5 CHAIR RHODES: Thank you, Commissioner  
6 Sayre.

7 Commissioner Burman?

8 COMMISSIONER BURMAN: Thank you. So I  
9 have been very focused from the very beginning that  
10 we need to be very careful with procedural missteps.  
11 Process is very important. And I have been very  
12 careful in focusing all of my concerns around that  
13 and around the need to look at this and the problems  
14 are -- are -- that may come or the precedent that may  
15 be set for failure to follow the -- the right  
16 procedural steps, whether it's FOIL notices, due  
17 process, et cetera.

18 This extends beyond the ESCOs. It's a  
19 threshold issue. And when I voted no on the ESCO  
20 order and was very clear that I was concerned that we  
21 were making some procedural missteps and that we were  
22 trying to, through creative logic, explain away what  
23 could have been done in a much more procedurally fair  
24 and right way, and also making sure that we were  
25 dotting every I and crossing every T so that we were

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2 not risking a court ruling that would go and say that  
3 we had done something wrong.

4 In fact, what happened was the Court did  
5 acknowledge that we had made some procedural  
6 missteps. I don't need to go into the detail of each  
7 and every. And basically, for some of that said, you  
8 know, go fix it. We are now doing what I think is  
9 strained and creative logic in taking the December  
10 2nd, 2016, notice from the secretary and saying that  
11 it was okay because the court told us to do this. So  
12 based on the court order saying go fix it, that is  
13 within the tenets of the Commission.

14 Now we can go back and forth on what's  
15 right legally or not. I come down on the side of --  
16 especially because there was common ground here  
17 between the ESCOs and counsel on a very limited  
18 matter. That was that there were no members on the  
19 Commission and there needed to be an opportunity for  
20 the Commission to speak as a whole.

21 That issue, to me, acknowledges that the  
22 Commission, as a body, is important to speak as a  
23 whole, which is why we're here today. I need to make  
24 sure that my words are heard for future matters in  
25 things, whether it's ESCOs or other matters that come

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2 before us. It is very important that we clearly  
3 understand the role of the secretary, and the role of  
4 the secretary as she acts on behalf of the  
5 Commission, and on the role of the secretary when she  
6 issues notices.

7 To the extent that we have had chaotic  
8 and confusing and, frankly, illogical processes for  
9 the last few years since I've been on the Commission  
10 as it deals with whether the secretary should issue a  
11 notice, whether the secretary should start a  
12 proceeding by -- via notice, whether the Commission  
13 itself should act to open up a proceeding, it has not  
14 been a clear pathway and there are no real rules of  
15 the road. And it seems like it changes.

16 I implore the Chair, as we move forward,  
17 and I have no doubt that he will be thoughtful in  
18 this. I implore the Chair to make it clear, not only  
19 to the commissioners, but to the staff and, frankly,  
20 to the secretary on the specific role and the general  
21 rules and when there may be and need to be exceptions  
22 to that.

23 There may be need for the secretary to  
24 act quickly, but there may also be an opportunity for  
25 the Commission, itself, to confirm that.

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2 And I want to make sure that we go  
3 through that process and have that discussion because  
4 it's important for not only the commissioners and the  
5 staff and the secretary, but it's important for the  
6 parties to know what the role of the secretary is.

7 I have spoken publicly about my concerns  
8 about the overreach by the secretary. It is no  
9 reflection on her. She's an excellent secretary. It  
10 is that she does need guidance from the Commission,  
11 itself, so that we are not in the position where we  
12 are only seeing notices after they've been published,  
13 or we've only seen notices an hour before it's  
14 published and it's not asking us for our blessing on  
15 it.

16 There are opportunities and way to get  
17 around that and we need to be clear. So here now, we  
18 have a notice by the secretary that was done on  
19 behalf of the Commission, without the Commission  
20 itself blessing it. We had an opportunity at the  
21 December 17th, 2016, session, before, even though the  
22 notice was issued December 2nd, 2016. There was no  
23 activity with the administrative law -- the  
24 administrative law judges hearing or proceeding until  
25 after the December 17th, 2016, session. Nothing had

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2 been done except for the notice, and then I think  
3 there were some requests for extension that were  
4 granted.

5 To the extent that we had an opportunity  
6 and we chose -- the Chair at that time chose not to  
7 use that to have the Commission itself take heed of  
8 the judge's order and issue this notice and issue the  
9 tenets in the four corners of it, I think that was a  
10 failure of process. I think that was a failure  
11 substantively and procedurally.

12 I think that -- and again I can only  
13 think it because we didn't have this opportunity. I  
14 think that if it had been brought before the  
15 Commission at that time and the question of the four  
16 corners of what the scope was going to be and whether  
17 or not we were going to be including C and I  
18 customers, we would have had an answer that said no,  
19 that that was too broad and that it should have been  
20 restricted.

21 How do I know that? I don't know a  
22 hundred percent because I didn't have that  
23 opportunity. But I know it from the comments that  
24 were said at each of the sessions by the Chair at  
25 that time, as well as comments that she said publicly

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2 to the ESCOs and to others in the community on her  
3 concern and how she was -- it was a targeted and very  
4 specific focus that was not meant to be overly broad.

5 So what I would like to see, on a going  
6 forward basis, is that we have that clear pathway and  
7 we understand. And to the extent that the Commission  
8 as a body needs to have the ability to weigh in on  
9 things, even if I am in the lone dissent, I want to  
10 be able to have that full discussion and opportunity.  
11 So that's the first thing.

12 When you look at the secretary's  
13 notice, it is not merely ministerial. It is setting  
14 forth in there a lot of policy and a lot of  
15 information that goes -- goes, not just to the  
16 factual issues, but rather is setting forth policy.  
17 That concerns me.

18 Staff said that the notice didn't limit  
19 the discovery and, therefore, it was broad. That's  
20 staff's interpretation. Again, if the notice had  
21 been presented to the Commission and the four corners  
22 of it had been presented to the Commission or if it  
23 had just been a Commission order, I do think we would  
24 have seen a very different document and a very  
25 different focus and a much narrower focus with a

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2 disclosure. But, again, that's just playing Monday  
3 night quarterback.

4 So the order on page six says that the  
5 Commission's investigation into the roles ESCO play  
6 in the state, this is discussing the -- whether or  
7 not the notice was broad, that the presiding  
8 administrative law judges considered the secretary's  
9 issuance to be a ministerial act that implements the  
10 court's order and advances the Commission's  
11 continuing investigation.

12 I think that is illogical and I think it  
13 also goes against what the focus is. The -- the  
14 secretary is supposed to be issuing notices based on  
15 the -- on behalf of the Commission, itself. To the  
16 extent that the court order was focused on the  
17 Commission itself and especially because there had  
18 been some procedural missteps, I think it was -- not  
19 only would have been wise, but I think it was  
20 incumbent upon folks to bring it to the Commission  
21 itself at the December 17th, 2016, session to  
22 actually make sure that we were acting on the court's  
23 order.

24 And, again, I do think that -- that it  
25 would have been different. I do think, most likely,



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2 that the Commission at that time would have, though,  
3 authorized the hearing in some fashion.

4 On page eight of the order, it says that  
5 the -- talking about the secretary's notice, that  
6 essentially the secretary's notice -- sorry. Excuse  
7 me. I was talking about the court order. I'm trying  
8 to find the part where we say that -- here there's --  
9 in this order, there's been a focus that the  
10 secretary is really giving a heads-up to the parties.

11 There was a SAPA issued and then there  
12 was a notice, and that notice was a heads-up. I  
13 don't think that --.

14 MS. BIELAWSKI: Page 12.

15 COMMISSIONER BURMAN: Oh, thank you.

16 So it says while the December 2nd, 2016,  
17 notice advises parties that there will be an  
18 evidentiary track in these proceedings, it is not a  
19 notice setting a hearing. Instead, it is an  
20 additional notice about process. The secretary never  
21 was or claimed to be empowered to conduct  
22 investigations or hearings. In that sense the  
23 secretary was performing a ministerial function by  
24 issuing the notice. The December 2nd, 2016, notice  
25 gave parties a head start in the proceeding as to

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2 what was to be required.

3           There is an implicit acknowledgement  
4 that the secretary notices are supposed to be purely  
5 ministerial. And here, if you read the December 2nd,  
6 2016, notice I don't think anyone can say it was  
7 purely ministerial. Well, some people can say it. I  
8 think this draft order does -- that the December 2nd,  
9 2016, notice was purely ministerial. It goes much  
10 deeper than that and really reads more like an order  
11 than it does a notice setting forth the parameters  
12 based on the order.

13           And to say that the notice was really  
14 just giving the parties a head start in the  
15 proceeding, I think takes away the importance of  
16 notices being issued on behalf of the Commission from  
17 Commission order or directives.

18           And while the notice is categorized as  
19 being fully responsive to the directive in Judge  
20 Zwack's (phonetic spelling) decision and order and  
21 while, in fact, the judge may say that it's okay to  
22 the extent that the focus was on the Commission  
23 itself, I think that's very important.

24           So that's the threshold issue as to the  
25 secretary's notice. I think we failed; therefore, I

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2 am not in favor of the -- of approving the draft  
3 order in its current form.

4 But then we get into the second --  
5 second piece, which is the scope. I do think that  
6 the scope is too broad. I do think that we do need  
7 to look at ways that we could make sure that we're  
8 not chilling C and I customers and that we do look at  
9 the -- somehow figuring out a way to make sure that  
10 we are addressing the court issue, which everyone is  
11 in agreement. The court issue is not about the C and  
12 I customers. The court issue is about the  
13 residential mass market.

14 And so to the extent that we are not  
15 opening the door so broad that everybody is involved  
16 that doesn't need to be, I think we need to really  
17 look at that.

18 There is -- there are some other  
19 threshold issues that I think needs to be focused on.  
20 There was a July 25th, 2017, letter that came from  
21 the ESCOs asking that it be shared with the  
22 commissioners. It wasn't expressly shared. I went  
23 into the file, looked at all of the documents, and  
24 then that's when I found the letter.

25 I do think it is important that items

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2 that come in after the draft orders are being looked  
3 at and circulated should flag those items that may be  
4 pertinent. May not be pertinent to the staff writer,  
5 but it is pertinent to the Commission that they have  
6 an opportunity, especially when there's a letter that  
7 directly asks that it be shared with the  
8 commissioners.

9 I do believe that we need to find a  
10 better way. I do want to implore the Chair, as well  
11 as the administrative law judges, that we look at  
12 opportunities and we try to figure out a way to move  
13 forward.

14 Since we've been focused on this, what  
15 seems to have fallen off from our radar is laser  
16 focus on information and updates on what's happening  
17 on the enforcement end, as well as how customers are  
18 doing. There's been no real discussion on some of  
19 the rollout with the court orders, as well as if  
20 we're hearing from -- at least this commissioner  
21 hasn't heard on if there's been any questions or  
22 concerns not only from the ESCOs, but my primary  
23 importance is the customers, as well as the utilities  
24 and the implementation from it.

25 I do want to track that. I do want to

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2 make sure that we are looking at it to the extent  
3 that a lot of the issues in this hearing are actually  
4 being looked at in other proceedings like the VDR,  
5 like the low-income collaborative, like some of the  
6 working groups. I do think it's important that to  
7 the extent that we look at that list --  
8 administrative law judges can do that, and those  
9 items that are already going to be flushed out for  
10 discussion purposes in other pending actions where  
11 there is a lot of robust discussion.

12                   There are more players or parties in --  
13 in that. I think that may be appropriate to move  
14 some of those items over there if folks are in  
15 agreement, especially if the same folks are -- are  
16 involved in it. It may be an opportunity for folks  
17 to come to agreement outside of the very -- what I  
18 would call the siloed evidentiary hearing.

19                   I am -- I am about to conclude. I do  
20 want to just note that what we are not addressing now  
21 is some other threshold issues. There may be other  
22 things that come, attorney-client privilege, as well  
23 as other privilege documents, or other privilege  
24 requests that come that will go to the front lines  
25 with the administrative law judge. And so those may

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2 wind up coming before the administrative law judge  
3 needing to rule on it or somehow coming back to us.

4 And so what I don't want to see happen  
5 is that if parties, and in particular ESCOs, choose  
6 to make sure that they let folks know that they have  
7 concerns about this, formally and informally, and  
8 make their appropriate motions or take their actions,  
9 that they're not seen as somehow trying to chill the  
10 -- the next steps.

11 That may be in some case. And to the  
12 extent that the administrative law judge should  
13 clearly try to ferret out those folks who were just  
14 looking to delay, but there may be an opportunity  
15 where they need to say we're preserving our right,  
16 and these are our reasons why, and try to work  
17 through the process. And that's what I'd like to  
18 see, where folks are not having to give up their  
19 right to work through that.

20 I am very, very concerned. And this  
21 isn't before us now -- I am very, very concerned with  
22 subpoenas getting issued without having the  
23 Commission have voted on that. I -- I am not sure --  
24 at least in my history, I am not sure that I've ever  
25 seen a subpoena get issued before. It may be, but to

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2 the extent that that is an extraordinary act, I think  
3 we need to be very careful especially when there are  
4 subpoenas going to nonparties and what that means,  
5 and especially when the scope is so broad.

6                   It may be today that we're subpoenaing  
7 ESCOs. It may be tomorrow we're subpoenaing  
8 individual customers. And I don't -- I don't believe  
9 that we're going to do that. I would think -- and  
10 just let me make myself clear, no one has any intent  
11 of that. My -- my issue is we need to make sure that  
12 we're very clear in the appropriateness of when  
13 someone is issuing a subpoena and what the four  
14 corners are.

15                   I would like to see, if that's going to  
16 happen, that there's a general discussion by the  
17 Commission and a working through what that process  
18 would be so that we're not having staff making that  
19 decision without the full weight of the Commission.  
20 I think that's important from a staff perspective, as  
21 well as for parties to know that there is that  
22 opportunity.

23                   So with that, I thank you. I think that  
24 you've done a -- an incredible job of trying to work  
25 through these issues. I do believe that there is a

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2 pathway there, especially with our wonderful Chair.  
3 And I hope that we can work towards a better process  
4 and keep in mind that we need to not forego the  
5 proper process, especially when it comes to the  
6 Commission as a body speaking. And it's not just in  
7 the ESCO world. It's in all of our matters. And we  
8 need to take that very seriously and not sidestep the  
9 Commission.

10 Thank you.

11 CHAIR RHODES: Thank you, Commissioner -  
12 - thank you, Commissioner Burman. And certainly want  
13 to note that we've heard your thoughtful request to  
14 us as a Commission and personally to me as Chair.

15 Commissioner Alesi?

16 COMMISSIONER ALESI: Nothing more, Mr.  
17 Chairman. Thank you.

18 CHAIR RHODES: Okay. Thank you.

19 With that, let's proceed to call for a  
20 vote. My vote is in favor of the recommendations to  
21 deny the appeal and affirm that the pending  
22 evidentiary hearings conducted by the presiding  
23 administrative law judges are authorized by the  
24 Commission as described.

25 Commissioner Sayre, how do you vote?



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2 COMMISSIONER SAYRE: Aye.

3 CHAIR RHODES: Commissioner Burman?

4 COMMISSIONER BURMAN: No.

5 CHAIR RHODES: Commissioner Alesi?

6 COMMISSIONER ALESI: Aye.

7 CHAIR RHODES: The Item is approved and  
8 the recommendations are adopted.

9 MR. AGRESTA: Mr. Chairman, before we  
10 allow Deputy General Counsel Bielawski to leave, I'd  
11 just like to point out that this is her last  
12 appearance before the Commission, that she'll be  
13 leaving our department shortly. And we all wish her  
14 well on her new endeavors.

15 And I'm not going to announce where it  
16 is because I don't know if that's public or not. But  
17 we -- we all loved working with Julia and greatly  
18 appreciate her efforts. And we're all -- and I, in  
19 particular, am going to miss her greatly.

20 CHAIR RHODES: So -- so thank you, Paul,  
21 for that entirely appropriate interruption and for  
22 the sentiment you expressed.

23 And are there other commissioners who  
24 would like to --?

25 COMMISSIONER BURMAN: Thank you.

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2 CHAIR RHODES: Commissioner Burman,  
3 thank you.

4 COMMISSIONER BURMAN: It has been a real  
5 pleasure working with you. I have found you very  
6 thoughtful, very professional, very diligent, and  
7 very, very smart. And I have enjoyed getting to know  
8 you on a personal level, as well as professional  
9 level. You will be sorely missed.

10 You're going to a good place. You and I  
11 both used to work there, so I am very excited for  
12 your opportunity and look forward to seeing the good  
13 things that will come from that.

14 Don't be a stranger and just know that  
15 you have made a difference and -- a significant  
16 difference. And you've touched many people, and I  
17 appreciate all that you've done. So thank you.

18 COMMISSIONER SAYRE: From the very  
19 beginning, you found your way through difficult,  
20 thorny, legal thickets. Even in the area my -- my  
21 home turf of telecommunications, you've come up with  
22 some brilliant solutions that I never thought of.  
23 I've been enormously impressed with your ability and  
24 -- and your ability to work with people. And oh I  
25 wish we could hang on to you.

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2 MS. BIELAWSKI: I just want to say thank  
3 you. And I am -- it's been a privilege and a  
4 blessing to work here. I've learned so much. I'm so  
5 glad that I -- I got this opportunity. And -- and  
6 I'm going to miss you all.

7 Thank you.

8 CHAIR RHODES: That was -- that was well  
9 done. Thank you, Paul.

10 Let's move to the third item for  
11 discussion. Item 301-B, Case 14-M-0101, which is the  
12 Petition for Rehearing and/or Clarification Regarding  
13 Opportunities for Participating in the REV Proceeding  
14 and Utility Ownership of Distributed Energy Resources  
15 for Low- and Moderate-Income Customers, presented by  
16 Ted Kelly, Assistant Counsel.

17 Ted, please begin.

18 MR. KELLY: Good morning, Chair Rhodes  
19 and Commissioners. Item 301-B is a proposed order,  
20 denying a petition for rehearing or reconsideration  
21 of the order adopting regulatory policy framework and  
22 implementation plan in the Reforming the Energy  
23 Vision case, also commonly known as the Track One  
24 order or the REV Framework order.

25 The Track One order established a

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2 framework for the development of a customer-centric  
3 electric -- electric industry where distributed  
4 energy resources are deployed by market participants  
5 to benefit customers, the electric grid, and society.  
6 The Track One order applied the general presumption  
7 against utility ownership of generation to these  
8 distributed energy resources, but identified several  
9 limited exceptions to that rule.

10 In particular, one exception provided  
11 for utility ownership of distributed energy resources  
12 to enable low- and moderate-income residential  
13 customers to benefit from those -- from those  
14 resources where opportunities had not otherwise been  
15 provided.

16 Petitioner and several nonprofits  
17 requested Commission grant rehearing or  
18 reconsideration and eliminate that exception or limit  
19 it to utility funding of, rather than ownership of  
20 distributed energy resources. They argue that the  
21 decision prematurely assumed that markets would not  
22 sufficiently serve low-and moderate-income customers.

23 The draft -- the draft item clarifies  
24 that the exception does permit utility ownership of  
25 DER to benefit low- and moderate-income customers

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2 subject to Commission approval and oversight, and  
3 denies the petition for rehearing. The Petitioners  
4 do not present any legal factual -- legal or factual  
5 errors that would demonstrate -- that would warrant  
6 rehearing of the order.

7 Furthermore, they do not present any  
8 evidence that low- and moderate-income customers have  
9 currently been provided with sufficient access to the  
10 benefits of DER through market mechanisms.  
11 Therefore, all options should continue to be  
12 considered in ensuring that those customers are able  
13 to fully participate in the REV energy future,  
14 including utility ownership.

15 As stated in the Track One order, the  
16 Commission will consider each proposal for utility  
17 ownership on its own merits and will determine  
18 whether utility ownership in any particular case is  
19 in the public interest and is necessary to provide  
20 the greatest benefits to low- and moderate-income  
21 customers and to further the goals of REV.

22 This careful oversight will ensure the  
23 allowance for utility ownership does not provide --  
24 prove a barrier to market developments that enable  
25 those customers to be served low -- low -- including

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2 low- and moderate-income customers to be served  
3 through market mechanisms and DER markets.

4 Thank you.

5 CHAIR RHODES: Thank you very much, Ted.  
6 Thank you for the -- for the -- welcome the -- the  
7 clear explanation. And I recognize that in the Track  
8 One order, as you say, the Commission had noted that  
9 there might be --.

10 UNIDENTIFIED SPEAKER: Mic's not on.

11 CHAIR RHODES: Sorry.

12 Thank you, Ted, for the clear  
13 explanation.

14 I recognize that in the Track One order,  
15 the Commission had indeed noted that there might be  
16 exceptional circumstances where utilities could  
17 usefully and appropriately own DER, especially to the  
18 benefit of low- or moderate-income customers and  
19 recognize the importance of clarifying in this point  
20 and in this order that ensuring service to LMI  
21 customers and ensuring these customers' participation  
22 in REV is -- is important.

23 So thank you.

24 Are there any comments or questions from  
25 my fellow commissioners?

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2 Commissioner Sayre?

3 COMMISSIONER SAYRE: Utility ownership  
4 of DER was one of the most controversial issues in  
5 our Track One Rev order. And we made a compromise  
6 between always allowing utilities to own and -- and -  
7 - and put DERs into rate base or never. I think we  
8 made a good compromise. I -- this order continues to  
9 uphold that compromise. And I think, as Mr. Kelly  
10 explained, we will very carefully look at -- at each  
11 proposed exception involving LMI customers to see if  
12 the proposal for utility ownership is in the public  
13 interest. I think that's plenty of protection and  
14 the right result.

15 CHAIR RHODES: Commissioner Burman?

16 COMMISSIONER BURMAN: Thank -- thank you  
17 very much.

18 So I think this is a unique situation in  
19 that there are some issues that we agree with.  
20 Ultimately, we don't agree on the most relevant  
21 portions. So we all agree, I believe, that we should  
22 be clarifying the Track One order. What that  
23 clarification is is somewhat different. I have a  
24 different viewpoint.

25 This item, we're treating as a

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2 rehearing, slash, clarification petition of the Track  
3 One REV order, which was issued February 26, 2015. I  
4 actually was here, but did not vote for it as I was  
5 excused from the Commission session for medical  
6 reasons.

7 I do believe that if we -- if -- if it  
8 had been before us at that time and I was there, I  
9 think it may have looked somewhat differently or at  
10 least there may have been an opportunity for me to  
11 clarify some points to it.

12 But this petition was brought in the  
13 relevant timeframe for petitions for rehearing and  
14 was SAPA'd on April 29th, 2015, and comments were due  
15 June 15th, 2015. That was over two and a half years  
16 ago from the original order and a little over two  
17 years from the formal comment period ending. Since  
18 that time, there have been many other REV-related  
19 orders and building upon this Track One order and  
20 these have been issued. There're ongoing, numerous  
21 proceedings that have been initiated. And many of  
22 these issues are being further fleshed out in those  
23 proceedings.

24 It concerns me that we have taken this  
25 up so late. And it's really, in some ways, very



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2 dated. And we've only taken it up -- I mean, I'd  
3 like to clarify a lot of the aspects, but a lot of  
4 the clarification is being done in other proceedings.  
5 And some clarifications mean that things stay the  
6 same and others they're getting changed. So it does  
7 concern me that we're looking at this in isolation.

8           However, at the core of this petition  
9 are two issues. The first issue is the issue of what  
10 is the appropriate, if at all, mechanism to allow  
11 utility ownership of DER for LMI customers. And the  
12 second issue is the appropriate amount of public  
13 participation and involvement.

14           I was originally going to do the first  
15 issue before the second, but I think that I'll take -  
16 - I'll take the second issue first.

17           The petition seeks to say we need to do  
18 a better job with public engagement. I do believe  
19 they're correct. I think that the draft order seeks  
20 to point to several avenues of public engagement that  
21 was done. They were done. Some of them were done  
22 well, some of them were done great, and some of them  
23 were not necessarily done the best, and maybe we'd do  
24 it a little differently.

25           I think that really what, for me, is at

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2 the core is that we should take heed that public  
3 engagement may need to be better. I do believe that  
4 the criticism is valid in some respects. I am  
5 mindful that it's not just about having public  
6 engagement for public engagement's sake. And  
7 regulatory processes need to proceed with certainty  
8 and, when necessary, with regulatory action.

9           And people will differ on what the right  
10 amount of public engagement and processes and venues  
11 will be. Different people will have different ideas,  
12 but we need to be open to the criticism that exists  
13 even if, in some cases, that criticism may be seen as  
14 unfair. In this case the Track One order is now  
15 over, but to the extent that we may be able to have  
16 better processes, I think that we should look to  
17 that.

18           I will say one of the things that I  
19 think may be very appropriate to do is to go through  
20 the very tedious exercise -- not me but others -- go  
21 through the very tedious exercise of all of the items  
22 in the generic proceeding and try to capture the ones  
23 that are still open and where the buckets are. It's  
24 very hard to find your way through that if you're  
25 looking for a particular REV demo or you're looking

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2 for a particular filing that's coming.

3 In some cases, we have done that. We've  
4 opened up new proceedings and reflected it in that.  
5 I do think that, really, while it might be tedious, I  
6 think it really would be a great exercise and would  
7 show that we are trying to work through that and put  
8 the right things in the right place. So I offer that  
9 just as constructive criticism and, you know, would  
10 even -- would even offer up walking through that with  
11 people if they want it. So for what that's worth,  
12 that's the second prong of the two issues.

13 So now going back to the first issue,  
14 which is what is the appropriate, if at all  
15 mechanism, to allow utility ownership of DER for LMI  
16 customers. Looking at the first issue of utility  
17 ownership, the Track One order did address it.  
18 However, candidly, it was unartfully addressed and  
19 seemed to some to weigh on the side of not allowing  
20 utility ownership, except if there was market  
21 failure. Here, the seemingly pertinent language  
22 focused on not allowing utility ownership of DER,  
23 unless markets have an opportunity to provide a  
24 service and fail to do so in a cost-effective manner.

25 However, the order was more nuanced than

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2 that, and even more nuanced if one was dealing with  
3 LMI customers. The LMI exception to the no utility  
4 ownership rule focused on no utility ownership of DER  
5 for LMI customers, unless there does not appear to be  
6 a developing market for DER and the public interest  
7 warrants utility investment that will support such  
8 development.

9 So I've gone through the full file, as  
10 well as focused on other areas where we have dealt  
11 with low income, and there have been numerous areas.  
12 In fact, there was a -- several different reports  
13 that were issued, several different working groups  
14 that have detailed minutes. And I did find it  
15 actually very helpful to see the breadth of  
16 discussion, not necessarily agreement, but the  
17 breadth of discussion.

18 Even in the Value DER proceeding, I  
19 looked again going forward. And the path forward, I  
20 see that there is a working group that is going to be  
21 looking at LMI and actually LMI and utility ownership  
22 and whether it's appropriate. That kind of confused  
23 me because we were dealing with that here, we dealt  
24 with it in Track One, and now there's another  
25 process.

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2 So I really want to make sure that we  
3 are making our information available, we're not  
4 necessarily spending inordinate amount of times  
5 starting from scratch, and that we're having some  
6 basic tenets of issues resolved.

7 To the extent that initially the low-  
8 income collaborative was supposed to issue a report  
9 for the Commission, itself, to weigh in on, while  
10 there was a report issued, there was also a White  
11 Paper that was not done and that is being now looked  
12 at in the VDR.

13 To the extent that it be may be  
14 appropriate for the Commission to make some initial  
15 determinations on that and find the pathway, it is  
16 all over the place. It's very, very confusing. And  
17 I do recognize, again, the scope of the issues are  
18 difficult, but at the end of the day, our job is to  
19 help make a real difference for all customers and  
20 especially those vulnerable and low income.

21 And I really -- to the extent that we  
22 are doing our due diligence doing our evaluation and  
23 our metrics ourselves, we ask, you know, the  
24 companies that come before us to do that. We should  
25 be, ourselves, evaluating and measuring and making

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2 sure that we are doing things to make a difference  
3 from that.

4 So I see it as four buckets. The  
5 confusion lies in the order. And the first is what  
6 is deemed not appearing to be the necessary  
7 developing market. The second is what is utility  
8 investment. The third is what is an LMI customer.  
9 And the fourth, and probably the most important, is  
10 what is in the public interest?

11 Now some groups, mostly environmental  
12 and IPNY (phonetic spelling), would like to bar such  
13 utility ownership of DER. Both groups may have  
14 different reasons for doing so, but on the face of it  
15 they're in agreement that at this time there should  
16 not be allowed utility ownership of DER. Those groups  
17 are not necessarily seen as together on many issues,  
18 so I do take note that two -- two large groups that  
19 may traditionally have opposing views on this point  
20 were very clear.

21 Interesting, the city disagrees. And,  
22 again, I went through every single filing and looked  
23 at every -- at everything to make sure that I was  
24 fully understanding and capturing exactly what the  
25 parties' positions were, not just the summary from

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2 staff.

3 So the interesting part is the city's  
4 disagreement is on focusing on wanting the LMI  
5 customers not to be barred for failure of private  
6 entities being unwilling to serve LMI customers, and  
7 they should have the same opportunities as the non-  
8 LMI customers. So ironically -- first as a  
9 threshold, ironically that issue is at the heart of  
10 some of the separate ESCO issues. So I just found  
11 that instructive.

12 But also the joint utilities oppose the  
13 petition because in -- the petitions -- because, in  
14 essence, they want the utilities to have an  
15 opportunity to serve these customers as well, and  
16 they believe that the Track One order protects the  
17 development of the DER markets since there's built-in  
18 flexibility in the Track One order which would allow  
19 a non-utility ownership DER market to LMI customers,  
20 as well as utility investment framework.

21 So their focus is on we can do it, as  
22 well as have a utility investment framework. So in a  
23 nutshell, except for the utilities look -- except for  
24 utilities, almost all of the parties' rationale it's  
25 clear that at first blush almost all of them would,

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2 including the city, implicitly find that it would be  
3 best if private entities would be willing to serve  
4 LMI customers -- would be willing to serve. So the  
5 issue is are they willing to serve and are there  
6 barriers to that?

7 The city doesn't want to preclude such  
8 customers from utility ownership DER if there's no  
9 willing market participants. And the utilities see  
10 that both can, in certain circumstances, exist.

11 So the language then becomes the focus  
12 on this utility investment language. Now the  
13 Commission order and sort of the language utility  
14 investment in the order and the question is was it  
15 meant to mean more specifically utility ownership.  
16 Frankly, I think it's unclear and, you know, I -- I  
17 do think that the wording utility investment was  
18 focused on having -- and the section on that was  
19 focused on having our consumer advocate working with  
20 stakeholders, including low-income advocates,  
21 utilities, and others to develop these utility  
22 investments projects in the DSIPs and other ongoing  
23 REV developments.

24 So I do think it was not intended to  
25 lock in the Commission or the staff and stakeholders



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2 on exactly what was meant, until later. Obviously,  
3 therein lies the confusion. And for our purposes,  
4 the later is now being called upon for clarification.  
5 And the super majority of the Commission that voted  
6 for that punt to later are no longer here with us.

7 Truthfully, if all -- all of this only  
8 comes into play if there's no market. But even that  
9 is complicated on what that actually means. However,  
10 since the order also, elsewhere, focused on utility  
11 ownership being banned, except for a few exceptions,  
12 including if a DER project would benefit an LMI  
13 residential customer, where markets are not likely to  
14 satisfy the need.

15 So the order focused on utility  
16 ownership being banned, except for a few exceptions,  
17 which included if the DER project would benefit and  
18 LMI residential customers where markets are not  
19 likely to satisfy the need. So this exception to the  
20 LMI residential customer implicitly understood that  
21 the markets were -- were favored. And where the  
22 markets are not likely to satisfy the need, the LMI  
23 customer -- residential customer should be able to  
24 look to, in some fashion, utility ownership. And  
25 then it goes on to define ownership as owning,

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2 leasing, contracting, or other forms of direct  
3 sponsorship.

4 So I am persuaded that the basic  
5 underlining premise of the Track One order is that  
6 utility ownership of DER for LMI customers should be  
7 generally disallowed except in very limited  
8 circumstances. And the limited circumstances are no  
9 utility ownership of DER for LMI customers, unless  
10 there does not appear to be a developing market for  
11 DER and the public interest warrants utility  
12 investment that will support such development.  
13 Again, it comes back to the four prongs.

14 Since the order makes clear there will  
15 be Commission review of that, one will need to ensure  
16 that we're very careful and cautious when we seek to  
17 ignore the general rule of no utility ownership of  
18 DER

19 So again, we come back to what I call  
20 the confusion elements or the basic tenet elements  
21 which is, one, what is deemed not appearing to be  
22 necessary developing market. Two, what is utility  
23 investment, and we looked at that. And, three, what  
24 is an LMI customer? And, four, what is in the public  
25 interest?

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2 So this is how I would clarify because,  
3 again, I think we're all in agreement that there's a  
4 need for clarification. But there's need for  
5 clarification not in a vacuum because that Track One  
6 order, again, is dated. Now it doesn't mean that  
7 it's dated and everything goes away. What it means  
8 is that we now have the benefit of information, other  
9 proceedings as well as if we were to write that now,  
10 how would we have written it. So it's not meant to  
11 wipe out the Track One order, but it is meant to  
12 clarify what it means for as we are dealing with it  
13 now.

14 So what is deemed not appearing to be  
15 the necessary developing market? We need to be very  
16 careful to not give up on the developing market and  
17 work with the market participants, low-income  
18 advocates, and all stakeholders to define what  
19 barriers exist to some such markets. As we see in  
20 Item 301-A that we'll be addressing later, there is a  
21 robust dialogue and -- and folks not only the parties  
22 here who sought to have no utility ownership of DER,  
23 but others including SEIA and Vote Solar, who were  
24 also not willing to give up on the developing market,  
25 as well as the city. But I will address that aspects

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2 of whether it appears to be the necessary developing  
3 market in 301-A.

4 The second prong is the what is utility  
5 investment. Here that's a broad definition that was  
6 meant in the order to be decided for another time.  
7 To extent it can incorporate utility ownership, I  
8 understand that. I do not think it was meant to help  
9 with focused on not giving up on the market. So to  
10 extent, I think this is the key. I think that that  
11 section that dealt with utility investment and looked  
12 to the consumer advocate working through it in other  
13 REV avenues, including DSIPs, was meant that to the  
14 extent something less than utility ownership should  
15 be tried first or incorporated with that, that that  
16 was what the focus was.

17 It was allowing, if necessary, utility  
18 ownership, but it was really looking at it from a  
19 very targeted and limited perspective and utility  
20 investment was meant broader and there might be other  
21 opportunities. And, you know, the one that comes to  
22 mind to me is the financing aspects with the New York  
23 Green Bank, et cetera, because it's about if you look  
24 at the low-income collaborative report, not the White  
25 Paper because that hadn't been -- that hasn't been

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2 done yet, but the report identifies different  
3 barriers, including financing. And that also is  
4 dealing with some aspects in the credit risk and  
5 other things.

6 So to the extent that I think there was  
7 a -- there was a recognition from the Track One  
8 order, as well as -- and the low-income  
9 collaborative, that opportunities for financing and  
10 other things may be appropriate. I think that's what  
11 it was trying to get at, that utility investment that  
12 might need to be there. And, again, working with the  
13 market to the extent that you can.

14 So the next -- the third thing is what  
15 is an LMI customer? I agree with the parties that  
16 say that the LMI customer is not clearly defined in  
17 this context and is too broad, that it virtually  
18 makes it meaningless. I do think the Commission  
19 captured the -- that broad definition for this  
20 without much thought behind it and was intended to  
21 make it more palatable to a broader set of folks and  
22 to deal with it later.

23 However, to the extent that we should be  
24 looking at this in phases and whether or not we need  
25 to limit it to low-income folks, we can look at that

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2 in the 301-A matter.

3 The fourth aspect is what is the public  
4 interest. And I'm mindful that we need to be very  
5 careful that any allowance for an exception to the  
6 general rule that no utility ownership of DER needs  
7 to be in the public interest. And that does include  
8 trying to ensure that there's a vibrant and cost-  
9 effective market, and, again, to the extent that  
10 we'll look at that in 301-A, whether or not there is  
11 a market.

12 In conclusion, as to the LMI exception  
13 issue I would grant rehearing and reaffirm that  
14 generally utility ownership for DER should not be  
15 allowed. There are aspects of the order that dealt  
16 with the LMI part that were unartful and inadequately  
17 captured the intent and left things for later, I  
18 would not seek to neatly address now in a Track One  
19 order clarifying and saying it's okay.

20 And rather, I would say that since here  
21 the Track One order clarification is being  
22 inexplicably looked at over two and a half years  
23 later to clarify, I don't think, frankly, that this  
24 is the proper venue for the Commission now to speak.  
25 Rather, I would look to the Value of DER proceeding

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2 that has the LMI working group and will be looking at  
3 the White Paper, and it's also considering some of  
4 these very issues. And I would look to other  
5 opportunities. And, again, the 301-A is one that  
6 comes to mind.

7 And finally, the remaining aspect of the  
8 petition -- oh, okay, that's -- that was the second  
9 issue. So we dealt with that.

10 So overall, I would grant the rehearing.  
11 I do not see that we're locked in forever to the  
12 Track One order, in and of itself. We need to learn  
13 from that and that's part of what has been the  
14 different phased approach in looking at things and  
15 making sure that we're on track and, if there needs  
16 to be adjustments, that they are made appropriately,  
17 but also trying to do things in a very constructive  
18 and forward-thinking way I think is appropriate.

19 We do -- we are in agreement that the  
20 Track One order needs clarification. We're just in  
21 disagreement on what that clarification should be.  
22 And as the clarification order is now before us, to  
23 the extent that I'll look at the 301-A order, moving  
24 forward on what is appropriate, rather than just  
25 solely the rationale that the generic Track One order

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2 allowed this exception.

3 So I'll be voting against the draft  
4 order that's presented. But I do thank folks for  
5 their thoughtfulness in this. And I do know that we  
6 will be revisiting a lot of these issues in a way to  
7 make sure that they make sense.

8 So thank you.

9 CHAIR RHODES: Thank you, Commissioner  
10 Burman. Thank you, Commissioner Burman.

11 Commissioner Alesi?

12 COMMISSIONER ALESI: Nothing more at  
13 this point. Thank you, Mr. Chairman.

14 CHAIR RHODES: Thank you.

15 With that, I call for a vote. My vote  
16 is in favor of the recommendations to deny rehearing  
17 and provide for clarification and to provide for  
18 clarification as described.

19 Commissioner Sayre, how do you vote?

20 COMMISSIONER SAYRE: Aye.

21 CHAIR RHODES: Commissioner Burman?

22 COMMISSIONER BURMAN: No.

23 CHAIR RHODES: Commissioner Alesi?

24 COMMISSIONER ALESI: Aye.

25 CHAIR RHODES: The item is approved and



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2 recommendations are adopted.

3 Move now to the fourth item for  
4 discussion, Item 301-A, Case 16-E-0622, which is the  
5 Petition of Consolidated Edison Company of New York,  
6 Inc., for Approval of a Pilot Program for Providing  
7 Shared Solar to Low-Income Customers, presented by  
8 Marco Padula, Deputy Director for Market Structure.

9 Ted Kelly is available for questions.  
10 Marco, please begin.

11 MR. PADULA: Thank you. Good morning,  
12 Chair Rhodes and Commissioners.

13 Item 301-A is a draft order, addressing  
14 a filing by Consolidated Edison Company of New York,  
15 Inc., seeking approval of a pilot program for  
16 providing shared solar to low-income customers. In  
17 its petition, filed on October 31st, 2016, Con Edison  
18 seeks approval of a shared solar pilot program to  
19 provide community distributed generation to customers  
20 participating in the company's established electric  
21 low-income affordability program.

22 The shared solar pilot would provide  
23 low-income households with opportunities to  
24 participate in clean and renewable energy offerings.

25 The company proposed that the shared

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2 solar pilot would consist of two phases, an initial  
3 phase to test the pilot program and a second phase  
4 expanding the pilot if it proves to be successful.

5 The draft order before you, if adopted,  
6 would approve only the first phase of Con Edison's  
7 proposed pilot, allowing Con Edison to competitively  
8 procure the design, siting, permitting, construction,  
9 and commissioning of three megawatts of solar  
10 generation.

11 The solar panels will be installed on  
12 company-owned rooftops and other company-owned  
13 locations. Con Edison plans to prioritize the  
14 installation of the solar generation in areas where  
15 additional distributed resource penetration may  
16 benefit the system and, therefore, benefit other  
17 customers through a reduced need for traditional  
18 infrastructure investments. Any program expansion  
19 beyond the first phase will require future approval  
20 by the Commission.

21 The three-megawatt project size will  
22 enable the company to provide an average \$5-per-month  
23 monetary credit, to up to 1,600 participating low-  
24 income customers.

25 The draft order finds that Con Edison's

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2 ownership of the three-megawatt solar generation  
3 project is warranted under the exceptions to the  
4 general rule against utility ownership described in  
5 the REV Track One order, specifically the exception  
6 which states that a project will enable low- or  
7 moderate-income residential customers to benefit from  
8 DERs where markets are not likely to satisfy the  
9 need.

10 In this case, the draft order grants Con  
11 Edison ownership in response to the current lack of  
12 opportunity for low-income participation in projects  
13 like this, and, as such, will provide experience with  
14 a model for low-income participation in DER programs.  
15 I would note that the draft order also expressly  
16 states that this decision is not a precedent.

17 Specifically, the shared solar pilot  
18 would provide an opportunity for participation in  
19 DERs for low-income customers which, to date, has not  
20 been provided by markets in Con Edison's territory.

21 The shared solar pilot will enable the  
22 company to understand how low-income customers  
23 respond to various program design features and allow  
24 the company to explore and report the most effective  
25 roles for the utility, third parties, and community

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2 organizations in providing these customers access to  
3 DERs.

4 Lastly, in addition to various reporting  
5 requirements, the draft order requires Con Edison to  
6 develop an implementation plan in consultation with  
7 staff, which will be submitted back to the Commission  
8 for Commission approval.

9 This concludes my presentation. I'm  
10 available for any questions.

11 CHAIR RHODES: Thank you, Marco. Thank  
12 you for the very clear discussion.

13 I would like to note several things  
14 here. Obviously, I note the concordance of this  
15 proposed project with the item we just discussed, the  
16 -- around the LMI exception. I note the cautious  
17 approach here, the scale, the limited nature inherent  
18 to a pilot, the phasing, the filing of an  
19 implementation plan subject to Commission approval,  
20 all in response to an absence to date of market or  
21 other solutions.

22 And I also note the attention in Con  
23 Ed's project planning that will be given to assist in  
24 benefits resulting from appropriate deployment of the  
25 resource.

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2 Those conclude my -- my observations.

3 Commissioner Sayre?

4 COMMISSIONER SAYRE: I fully concur with  
5 the Chair's comments. I think Con Ed made the case  
6 that this pilot is in the public interest. And I  
7 have the same view of the program as Chairman Rhodes.  
8 It's limited. It's cautious. It involves steps --  
9 further steps for Commission approval of the  
10 implementation plan. I think this is a good news  
11 story.

12 CHAIR RHODES: Commissioner Burman?

13 COMMISSIONER BURMAN: Thank you.

14 I do recognize that 301-B was voted on  
15 and so that now has to be factored in into the 301-A  
16 order that's before us. I do want to note that it  
17 wasn't just about the Track One order. It also looks  
18 to the community net metering. And in July 2015, the  
19 Commission issued a order that established a  
20 community net metering in the state. And the  
21 community net metering allows multiple customers to  
22 subscribe and receive credits to the electricity  
23 produced from onsite renewable generation facility.

24 And the policy was done to make it  
25 possible for, primarily, renters and low-income

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2 residents and homeowners to receive credits for  
3 renewable energy who previously could not install  
4 renewable generation facility in their home. And in  
5 general, the community energy project was deemed, in  
6 July 2015, to require a minimum of 10 members.

7 In March of 2017, the Commission in  
8 recognition -- again, in recognition of the work that  
9 had been done through the community net metering low-  
10 income collaborative, in -- in there it listed out  
11 several different barriers to community net metering.  
12 There was a concern from folks that we were not  
13 moving forward fast enough with community net  
14 metering and that one of several barriers dealt with  
15 the 10-member requirement.

16 So the Commission, in limited fashion,  
17 myself included, waived the minimum 10-member  
18 requirement in -- in some areas. And so the  
19 community net metering was divided also into two  
20 phases, the phase one, which was until April 30th,  
21 2016, which was supposed to be an introductory phase.  
22 And then during this period the projects were limited  
23 to siting distribution -- distributed generation in  
24 areas where provide greatest locational benefits to  
25 the larger grid and in areas that promote low-income

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2 customer participation.

3 And then the second phase, which was to  
4 begin in May 1st, 2016, when the community net  
5 metering projects will fully be implemented or going  
6 to be implemented throughout the other utility  
7 service territories. There have been some  
8 applications. In the Con Ed territory, I believe  
9 that there were 10 CDG projects. I don't believe  
10 that any have gotten off the ground.

11 Is that correct?

12 MR. KELLY: I believe -- I believe it's  
13 correct that none of them are in operation yet and I  
14 --

15 COMMISSIONER BURMAN: Right. Okay.

16 MR. KELLY: -- and 10 sounds as either  
17 correct --

18 COMMISSIONER BURMAN: Okay.

19 MR. KELLY: -- or close to correct, yes.

20 COMMISSIONER BURMAN: And -- and none  
21 of them deal with the low-income community. Is that  
22 correct?

23 MR. KELLY: That's right. To our  
24 knowledge, none of them are focused on low- or  
25 moderate-income customers.

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2 COMMISSIONER BURMAN: Okay. So here,  
3 the -- the focus really is in has there been a -- a  
4 failure. And again, the -- the focus is on the low-  
5 income DER customers and whether or not there's a  
6 sufficient market that is existing. And if not, then  
7 the Commission, based on 301-B, believes that utility  
8 ownership of DER for low-income -- low -- LMI  
9 customers may be appropriate.

10 And so that is now before us in what is  
11 the market. Is it not sufficient enough? And part  
12 of the concern that I have is that, again, we have  
13 multiple -- multiple parties who might normally be  
14 not on the same page, and here are very afraid that  
15 we are foregoing the market without giving it a  
16 sufficient chance. And most of their focus has been  
17 on that it's premature, that there are other areas  
18 that were looking at that, the low-income  
19 collaborative, as well as the VDR, and that the --  
20 there has been -- and frankly, also the ESCO  
21 proceedings were making it hard for folks to commit.

22 And so there was concern that we would  
23 rush into utility ownership of DER and then there  
24 would never be an opportunity for the market to  
25 develop because the utility has taken over. I think



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2 that's primarily, you know, the -- the bulk of the  
3 concern is that we're, you know, rushing into this.

4 This -- this shared solar pilot and the  
5 draft order has tried to make it very -- take the  
6 very cautious approach and to not -- you know, we are  
7 not saying that there is market failure. What we are  
8 saying is that we are making this a pilot that should  
9 be instructive in working with the different folks to  
10 give information that may be helpful not only to the  
11 utility, but to the customers and to those market  
12 participants so that if there are barriers that are  
13 making folks unable to come and have active projects,  
14 that we should try to identify that.

15 So I do think that one of the things  
16 that's helpful here is that we are not, after today,  
17 allowing the utility, in this case Con Ed, to rush  
18 ahead and do a very broad program. We are limiting  
19 it and we are telling them that they must come back  
20 to the Commission, as a whole, with their  
21 implementation plan. And that implementation plan  
22 must be very clear in some of the goals that are  
23 going to be done and some of the actual details in  
24 fleshing that out.

25 So it is trying to have an opportunity

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2 for folks, frankly, like was done with BQDM in many  
3 respects, to be able to offer their thoughts on the  
4 implementation plan, to be able to offer some  
5 constructive criticisms, and to also again look to  
6 ways to enhance the market in a way that may then be  
7 able to have the utility get out of the way later, or  
8 be able to understand some of those developments.

9 This is one small tool in the toolkit.  
10 There are many other aspects that are out there. I  
11 think this order -- draft order makes very clear that  
12 the market is important, that this is not now a  
13 signal to all utilities to go rushing ahead, that  
14 instead, it is really looking for some clear guidance  
15 through this pilot to try to actually entice folks to  
16 this.

17 We do have an issue that we have wanted  
18 to have CDG as a whole and also then for low-income  
19 customers. And we need to help unbottle the issues,  
20 but in a way that is not forgetting about the market  
21 but rather is trying to embrace that.

22 So I can be in agreement with this item,  
23 first, the threshold issue is the 301-B decided the  
24 threshold issue, but then second because it is very  
25 narrow and when -- when folks see the draft order,

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2 they will see, I think, the careful and cautious  
3 approach that's being taken. But for me, also what's  
4 most important is that the Commission, as a whole, is  
5 trying to work through this and that the  
6 implementation plan will come back to the Commission  
7 in this case.

8 It doesn't mean that in other cases, in  
9 all cases, that that will be done, but for right now,  
10 it's very important that the Commission weighs in on  
11 this. And I think, just like the 301-B, as well as  
12 the initial Track One order, there was a very clear  
13 recognition that the Commission itself needs to  
14 review the exceptions to the utility ownership of DER  
15 and this is following those basic elements.

16 And I give credit to the staff willing  
17 to work through this. I know you've had many  
18 internal challenges with me on, you know, making it  
19 as -- as carefully and narrowly focused and again,  
20 making sure that we are clearly trying to help not  
21 say goodbye to the market, but actually to embrace  
22 them and look at the other barriers which may need to  
23 be taken up in other proceedings.

24 So thank you very much.

25 CHAIR RHODES: Thank you, Commissioner

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2 Burman.

3 Commissioner Alesi?

4 COMMISSIONER ALESI: Thank you.

5 CHAIR RHODES: Thank you.

6 With that, I now call for a vote. My  
7 vote is in favor of the recommendations to approve  
8 the first phase of Con Edison's shared solar pilot  
9 and direct the filing of an implementation plan  
10 subject to Commission approval as described.

11 Commissioner Sayre, how do you vote?

12 COMMISSIONER SAYRE: Aye.

13 CHAIR RHODES: Commissioner Burman?

14 COMMISSIONER BURMAN: Aye.

15 CHAIR RHODES: Commissioner Alesi?

16 COMMISSIONER ALESI: Aye.

17 CHAIR RHODES: The item is approved and  
18 recommendations are adopted.

19 We now move to the fifth item for  
20 discussion. Item 302, Case 17-E-0428, which is the  
21 Investigation into the April 21, 2017, Metropolitan  
22 Transportation Authority's Subway Power Outage and  
23 Consolidated Edison Company of New York Inc.'s  
24 Restoration Efforts, presented by Mike Worden,  
25 Director, Office of Electric, Gas and Water, and Paul

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2 Agresta, General Counsel.

3 Mike, please begin.

4 MR. WORDEN: Good afternoon, Chair  
5 Rhodes and Commissioners.

6 Item 302 is a draft emergency order in  
7 which the Commission would direct certain steps be  
8 taken to safeguard and maintain the New York City  
9 subway system. As you know, in recent months,  
10 increasingly frequent power outages have led to  
11 failures of infrastructure throughout the  
12 Metropolitan Transportation Authority's rail and  
13 subway systems. Staff's investigation into the  
14 quality of Consolidated Edison's power supply to the  
15 MTA system began as a result of an April 21, 2017,  
16 power failure that led to significant delays across  
17 MTA's subway system.

18 The April 21st outage resulted from a  
19 failure of Con Edison's electricity supply to the 7th  
20 Avenue subway station. This, in turn, led to a loss  
21 of subway signals. It was also determined that one  
22 of the secondary services to that MTA facility had  
23 been previously rerouted and Con Edison's failure to  
24 document the change in its records significantly  
25 delayed repair of the electrical systems after the

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2 outage occurred.

3 The initial results of our investigation  
4 indicate that there are significant actions that Con  
5 Edison should be taking now to improve resiliency and  
6 prevent future service failures.

7 First, Con Edison needs to dedicate  
8 additional personnel and perform comprehensive  
9 inspections of all electrical equipment that serves  
10 the MTA system, including equipment in its own  
11 manholes, MTA's interlocking station equipment, and  
12 area substation equipment serving MTA's high voltage  
13 substations.

14 Second, MTA needs to install new sensors  
15 and monitoring equipment throughout its system,  
16 including advanced metering infrastructure and  
17 associated communications networks.

18 Third, Con Edison needs to replace all  
19 aluminum conductors that supply MTA's signaling  
20 services with copper cable. It needs to install  
21 redundant electric supply options for MTA's signaling  
22 services and it needs to design, install or modernize  
23 automatic transfer panels and related equipment.

24 Fourth, Con Edison needs to establish a  
25 stockpile of emergency generators that can be used to

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2 respond quickly on demand across all MTA stations and  
3 support the establishment of quick connects and other  
4 equipment needed to deploy the generators.

5 Fifth, Con Edison needs to form a  
6 complete detailed failure analysis of all power  
7 supply and power quality events affecting MTA  
8 signaling services.

9 Sixth, Con Edison needs to establish a  
10 dedicated operations response team and participate in  
11 activities of MTA's crisis response team in joint  
12 emergency drills.

13 Second -- Seventh, Con Edison needs to  
14 assist in the performance of a detailed power quality  
15 assessment.

16 And finally, Con Edison needs to prepare  
17 a project management plan to coordinate all of its  
18 activities related to the MTA system and track its  
19 performance and expenditures in this remedial effort  
20 and provide monthly reports on its activities to the  
21 Commission.

22 This is just a summary of some of the  
23 activities that need to be done. I would report that  
24 DPS, MTA, and Con Edison technical staffs have been  
25 communicating extensively on the details of the scope

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2 of the remediation measures that are necessary. Our  
3 expectation is that Con Edison will provide the  
4 necessary resources and its full cooperation to the  
5 Commission, the staff of the Department of Public  
6 Service, and the staff of the MTA in ensuring the  
7 remediation, maintenance, and repair of electricity  
8 service provided to the MTA

9 That completes my part of the  
10 presentation. Paul will now address the procedural  
11 aspects.

12 MR. AGRESTA: Okay. I have just two  
13 points that I want to mention. The first is that the  
14 draft order notes that Con Edison has consented to  
15 the ordering clauses. I just want to explain that  
16 that does not mean that this is a joint proposal or a  
17 settlement agreement. It means that Con Edison is  
18 working with staff and has indicated that it is  
19 trying to fully cooperate with the attempts to do  
20 what this order is attempting to do.

21 The proposal, as before you, is not a  
22 joint proposal; it's the chairman's proposal with the  
23 assistance of staff.

24 The other thing I -- before I go on to  
25 the second one, I'd like to also say that we have



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2 been working very hard with Con Edison and at least  
3 my experience in working with them on this effort has  
4 been that they've been very responsive and  
5 cooperative and I want to thank them for that.

6 The second thing I want to point out is  
7 that the proposal on an emergency basis. What that  
8 means is that there isn't enough -- this really needs  
9 to get done now and there really isn't enough time to  
10 put it out for comment and wait for the comments  
11 before you act.

12 When you adopt something on an emergency  
13 basis, you then will follow it up with a notice  
14 published in the State Register, a consideration of  
15 comments, and then this order will expire on its own  
16 within 90 days. And once the comments come in and  
17 you've considered them, you will have to again  
18 consider whether you want to further adopt the rules  
19 that are proposed here. So we expect that we'll be  
20 back in a couple of months to do that process.

21 And that's all I have for -- unless  
22 there's any questions.

23 CHAIR RHODES: Thank you, Mike. Thank  
24 you, Paul, for the summary of where we are, what  
25 we're doing, and the process involved.

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2 I certainly appreciate the importance of  
3 the investigation described by Mike. I also  
4 appreciate, deeply, the fact that we face a crisis  
5 and, indeed, a declared state of emergency. It's  
6 clear that electric power issues on the combined  
7 MTA/Con Ed systems are part of the problem and that  
8 they can result in costly and dangerous disruptions  
9 to service, which means we really have to take swift  
10 and effective action and help all partners also take  
11 swift and effective action.

12 And I note with appreciation Con Ed's  
13 consent to the work described -- summarized by Mike  
14 to its cooperation, and to its initiation already of  
15 good parts of the work that are described in Mike's  
16 summary.

17 Commissioner Sayre?

18 COMMISSIONER SAYRE: I just want to say  
19 that I'm fully in accord with the item and with the  
20 Chair's comments.

21 CHAIR RHODES: Commissioner Burman?

22 COMMISSIONER BURMAN: Thank you, Chair.

23 Because of the extent of the problem,  
24 depth of public concern, including the issuance of an  
25 executive order from Governor Cuomo, Chair Rhodes

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2 directed staff to initially investigate the matter as  
3 it concerned both Con Edison's power quality and  
4 power supply to the MTA system.

5 Staff, under the direction of Chair  
6 Rhodes, worked with both the MTA and Con Ed to try  
7 and determine not only the issues which led to the  
8 relevant outages, but to determine what needs  
9 attention to protect the safety and general welfare  
10 of the public as it concerns the reliability and  
11 resiliency of the power connected to the MTA subway  
12 system.

13 We, at the Commission, have very limited  
14 information at this time. We're now being asked,  
15 based on staff reporting and initial careful review  
16 from Chair Rhodes and as a chair proposal as  
17 evidenced by his letters to Con Ed, to allow a  
18 further 90-day review. This review is in looking at  
19 the past and in looking forward and clearly  
20 identifying, making sure that we are focused on  
21 making sure that we have the information to try to  
22 prevent any future events.

23 The focus is on Con Ed, MTA, and DPS  
24 staff continuing to work cooperatively to identify  
25 what needs to be done to safeguard and maintain

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2 adequate utility service to the subway system  
3 operated by the MTA

4 Roles of the Commission are not here in  
5 this order and at this time determining fault or  
6 assessing the proper cost allocations. Rather, we  
7 are authorizing this continued investigation, as well  
8 as giving the specific framework with targeted  
9 activities and short timeline deliverables necessary  
10 to properly undertake this endeavor. This includes  
11 ensuring relevant experts such as EPRI and personnel  
12 are at hand to help with this important matter.

13 This matter may come back to the  
14 Commission within 90 days of the issuance of this  
15 order. And at that time, if there are any issues in  
16 dispute or needing further clarification or detailed  
17 next steps, we can address them at that time.

18 What is most important is that the  
19 technical, on-the-ground engineering and power  
20 resiliency folks are actively engaged in identifying  
21 root causes and solutions to power quality and supply  
22 events to avoid or minimize future events. To that  
23 end, the upcoming joint response drill activities are  
24 imperative. I would ask that such response drill  
25 activities involve, as appropriate, emergency

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2 responders including the FDNY.

3 I am comfortable voting in favor of this  
4 item and ask that staff at DPS and Con Ed to continue  
5 to keep at the forefront that safety is everyone's  
6 business and we must work together to find solutions.  
7 Thank you. I am in favor of this.

8 CHAIR RHODES: Thank you, Commissioner  
9 Burman.

10 Commissioner Alesi?

11 COMMISSIONER ALESI: Thank you, Mr.  
12 Chairman. This is very encouraging to me. I find  
13 this whole situation intriguing.

14 UNIDENTIFIED SPEAKER: Your microphone?

15 COMMISSIONER ALESI: But I think this  
16 might be an opportunity for us to see a leap forward  
17 to improve the --.

18 ASSISTANT SECRETARY AISSI: Commissioner  
19 Alesi, I'm sorry to interrupt you, but can you turn  
20 on your microphone? The green button. Thank you.

21 COMMISSIONER ALESI: How's that?

22 CHAIR RHODES: There you go.

23 COMMISSIONER ALESI: Okay?

24 Well, I am encouraged by this to say the  
25 least. I think for the average citizen to pay

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2 attention to this from somewhere outside of the  
3 metropolitan area, it's intriguing to me. And I'm  
4 encouraged by the actions that are here before us as  
5 an opportunity to improve the quality of life in the  
6 metropolitan area, to improve the safety of those  
7 people that use the MTA, and of course, for the  
8 economic health of the city itself, as well as the  
9 state. And I look forward to whatever public input  
10 comes in the future as a result of this. And I'll be  
11 supporting this issue.

12 CHAIR RHODES: Thank you, Commissioner  
13 Alesi.

14 So now I call for a vote. My vote is in  
15 favor of the recommendations as described.

16 Commissioner Sayre?

17 COMMISSIONER SAYRE: Aye.

18 CHAIR RHODES: Commissioner Burman?

19 COMMISSIONER BURMAN: Aye.

20 CHAIR RHODES: Commissioner Alesi?

21 COMMISSIONER ALESI: Aye.

22 CHAIR RHODES: The item is adopted and  
23 the recommendations are approved.

24 We move now to the sixth item for  
25 discussion, the final item for discussion. Item 303,

1 Public Service Commission - Monthly Meeting - 8-2-2017  
2 Cases 15-E-0250 et al, which is the Petitions of  
3 Pareto Energy Limited, presented by Bridget Woebbe,  
4 Assistant Counsel.

5 Bridget, please begin.

6 MS. WOEBBE: Thank you, Chair.

7 Good afternoon, Commissioners.

8 Item 303 is a draft order that responds  
9 to two related petitions filed by Pareto Energy  
10 Limited. The first was a petition to implement a  
11 microgrid business model as a least cost resource to  
12 meet reliability contingencies and demand management  
13 objectives at Consolidated Edison Company of New  
14 York. It was filed on April 10th, 2015.

15 The second, a petition for rehearing,  
16 was filed on April 10th, 2017, repeats Pareto's 2015  
17 request, but is styled as a petition for rehearing of  
18 the Commission's March 9th, 2017, order on  
19 Distributed System Implementation Plan filings, or  
20 DSIP filings.

21 The petition for rehearing alleges that  
22 the Commission committed errors of law and fact per  
23 Public Service Law Section 22 and the regulations  
24 implementing that statute. The 2015 petition seeks  
25 relief from the Commission, including establishing

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2 Pareto's proposed microgrid business model as  
3 eligible for funding as a least cost resource for  
4 meeting reliability contingencies and demand  
5 management objectives under three separate funding  
6 opportunities. And it also requests that the  
7 Commission direct Consolidated Edison to interconnect  
8 to microgrids using the Petitioner's non-synchronous  
9 interconnection technology which it markets as  
10 GridLink.

11 Pareto intends to implement this  
12 GridLink technology at the King's Plaza combined heat  
13 and power project, located in Brooklyn, and at the  
14 Kennedy International Airport cogeneration facility  
15 located in Queens.

16 The petition for rehearing alleges that  
17 the Commission's order on DSIP filings erred  
18 factually and legally by not considering certain  
19 technologies, namely its GridLink technology, and  
20 that the utilities violated the law by not adopting  
21 these technologies.

22 By this order, the Commission denies  
23 Pareto's petition and denies Pareto's petition for  
24 rehearing. The order makes clear that Pareto is  
25 encouraged to continue to pursue viable funding



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2 streams to develop its GridLink technology to  
3 maturity, and to continue to engage in the New York  
4 market, but the relief requested by these petitions  
5 is an inappropriate attempt to bypass available  
6 utility programs and obtain funding.

7 Staff and I are available if there are  
8 any questions.

9 CHAIR RHODES: Thank you, Bridget. I  
10 welcomed the summary. I appreciate the -- the legal  
11 analysis. And I also note the well-made point that  
12 the Commission should refrain from interfering in  
13 appropriate effective selection processes, in this  
14 case by NYSERDA and/or by Con Ed, in determining  
15 which specific projects to select in part -- as part  
16 of a broader program. I think that's an entirely  
17 appropriate restraint.

18 Commissioner Sayre, any comments from  
19 you?

20 COMMISSIONER SAYRE: Although it's  
21 fairly clear in the order, I guess I want to make it  
22 additionally clear that in this decision, we're not  
23 rejecting the use of the company's proposed  
24 technology. And, in fact, I hope sometime in the  
25 future it will get a trial. All we're doing here is

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2 saying that the company has not made the case for us  
3 to require the use, ultimately at ratepayer expense,  
4 of this technology. It's as simple as that.

5 So I urge the company not to abandon its  
6 efforts and continue to work with utilities and other  
7 potential partners.

8 CHAIR RHODES: Commissioner Burman?

9 COMMISSIONER BURMAN: Thank you, Chair.

10 Here, Petitioner essentially, among  
11 other things, seeks for the Commission to mandate Con  
12 Ed to interconnect its GridLink technology. This  
13 situation is complicated because the matter overlaps  
14 with numerous economic opportunities for Petitioner  
15 to be a part of. This includes New York stand-alone  
16 microgrid projects, REV demos, non-wire alternatives,  
17 DG interconnection opportunities, and dynamic load  
18 management programs.

19 I am truly sympathetic to Petitioner  
20 here. A few years ago, they were awarded, with much  
21 excitement, a state grant related to the King's Plaza  
22 Brooklyn Microgrid's Project and it appeared to  
23 Petitioner that all systems were likely to be a go.

24 Petitioner spent considerable time  
25 working with numerous folks, including Con Ed, DPS,

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2 NYSERDA, and, near the end, the ISO. It is  
3 disappointing to Petitioner to date that it does not  
4 have a viable active project and feels that NYSERDA  
5 and other state energy processes have been a barrier  
6 to competition.

7 We do need to take seriously allegations  
8 and concerns that our energy processes are barriers  
9 to success. However, this petition is not the right  
10 venue. We should not be in the business of picking  
11 the winners and losers. And thus, we can't direct  
12 Con Ed to select Petitioner for its REV projects.  
13 However, it is something we need to review globally  
14 in the future to work with all parties to ensure we  
15 are getting rid of any perceived unfair regulatory  
16 barriers.

17 I support denying this petition, not  
18 necessarily for all the reasons outlined in the draft  
19 order, but rather, for the limited reasons that the  
20 petition is denied without prejudice for Petitioner  
21 to seek and obtain funding in the future and to  
22 encourage Petitioner to work, if it still desires,  
23 with Con Ed to move the interconnection process  
24 forward for the King's Plaza Project.

25 Thank you.

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2 CHAIR RHODES: Thank you, Commissioner

3 Burman.

4 Commissioner Alesi?

5 COMMISSIONER ALESI: Nothing. Thank

6 you.

7 CHAIR RHODES: With that, I move to call

8 for a vote. My vote is in favor of the

9 recommendation to deny the petitions, as described.

10 Commissioner Sayre, how do you vote?

11 COMMISSIONER SAYRE: Aye.

12 CHAIR RHODES: Commissioner Burman?

13 COMMISSIONER BURMAN: Aye, with -- based

14 on my comments at session.

15 CHAIR RHODES: Thank you.

16 Commissioner Alesi?

17 COMMISSIONER ALESI: Aye.

18 CHAIR RHODES: The item is approved and

19 recommendations are adopted.

20 We will now move to the consent agenda.

21 Do any of my fellow Commissioners wish to recuse from

22 voting on any items on the consent agenda?

23 Seeing none, I call for a vote. My vote

24 is in favor of the recommendations on the consent

25 agenda.

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2 Commissioner Sayre?

3 COMMISSIONER SAYRE: Aye.

4 CHAIR RHODES: Commissioner Burman?

5 COMMISSIONER BURMAN: Aye.

6 CHAIR RHODES: Commissioner Alesi?

7 COMMISSIONER ALESI: Aye.

8 CHAIR RHODES: The items are approved

9 and the recommendations are adopted.

10 If I may have your indulgence for one  
11 more moment, Commissioner Burman, can I turn that  
12 over to you?

13 COMMISSIONER BURMAN: Sure. I had the  
14 pleasure yesterday of spending time with the gas  
15 safety staff at the Commission, as well as about 130  
16 people ranging from folks from FEMSA, fire  
17 departments, fire chiefs, state fire department,  
18 utilities, other companies dealing with gas safety,  
19 as well as some miscellaneous folks involved in the  
20 gas safety space.

21 I had that pleasure, with the support of  
22 Chair Rhodes, to be a part of working on an all-day  
23 focus on what we need to do to continue to work  
24 through gas safety issues and improve gas safety.  
25 Coming up on August 11th is Call 811 Day. It's very

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2 important that we focus on that, but also focus on  
3 our first responders and how we can work with them as  
4 partners in embracing all that we do so that we can  
5 try to reduce and have zero incidents, but also to  
6 help in the planning of it and work through that.

7 We were really blessed that the Georgia  
8 Public Service Commission sent to us someone who is  
9 nationally recognized who is in the audience.

10 Michelle, if you'll just stand up?

11 She is really, you know, a mover and a  
12 shaker not only in Georgia, but nationally, and has  
13 been recognized in Georgia itself in a groundbreaking  
14 program called the Georgia Pipeline Emergency  
15 Response Initiative Project. So she came from  
16 Georgia, not at the expense of New York, to share  
17 with us, you know, their stakeholder involvement and  
18 things that are working and to give us an opportunity  
19 to, in this group -- this small group of 130 where we  
20 moved to a larger room, to talk about these issues  
21 and make sure that we are continually engaged. And  
22 we were blessed to have many folks there.

23 And a lot of the issues on mutual aid  
24 and planning and, frankly, really, for me, it  
25 actually informed me on why, especially with the

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2 Joint Response Initiative with the MTA, why it's  
3 important to make sure that we have at the table  
4 those first responders like the FDNY, which is why I  
5 pointed it out here, as well.

6 So I thank you. We're doing a lot of  
7 amazing things in New York on gas safety. We're  
8 working hand in hand and it helps us to make sure  
9 that we continue to do that. So I'd ask everyone to  
10 do their part and help us continue to have a  
11 wonderful energy system with natural gas that is  
12 safe, adequate, and reliable, and that starts with  
13 safety. So thank you so much.

14 CHAIR RHODES: Thank you, Commissioner  
15 Burman.

16 And thank you, Michelle, for coming --  
17 for joining us.

18 Assistant Secretary Aissi, is there  
19 anything further to come before us today?

20 ASSISTANT SECRETARY AISSI: There are no  
21 further items today, and the next session of the  
22 Commission will be held in Albany on September 14th.

23 CHAIR RHODES: Thank you.

24 And with that, I adjourn.

25 (The meeting adjourned at 12:33 p.m.)

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2 STATE OF NEW YORK

3 I, LESLIE TOMPSON, do hereby certify that the  
4 foregoing was reported by me, in the cause, at the  
5 time and place, as stated in the caption hereto, at  
6 Page 1 hereof; that the foregoing typewritten  
7 transcription consisting of pages 1 through 95, is a  
8 true record of all proceedings had at the hearing.

9 IN WITNESS WHEREOF, I have hereunto  
10 subscribed my name, this the 9th day of August, 2017.

11

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13 LESLIE TOMPSON, Reporter

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