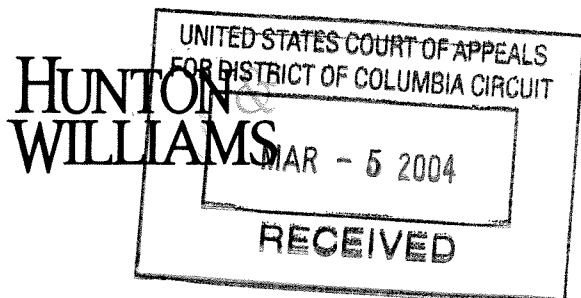


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March 5, 2004

BY HAND

Mark J. Langer, Clerk
United States Court of Appeals
District of Columbia Circuit
United States Court House
333 Constitution Avenue, NW
Room 5423
Washington, D.C. 20001

Re: Electricity Consumers Resource Council v. Federal Energy Regulatory Commission,
No. 03-1449

Dear Mr. Langer:

Enclosed for filing in the above-referenced proceeding are the original and four copies of the New York Independent System Operator, Inc.'s response to the Court's order, dated February 19, 2004, requiring intervenors to show cause why they should not be required to file one joint brief in support of Respondent, the Federal Energy Regulatory Commission.

Respectfully submitted,

Arnold H. Quint
Attorney for Intervenor
New York Independent System Operator, Inc.

Enclosures

cc: Solicitor, Federal Energy Regulatory Commission (w/enclosures)
Service Lists (w/enclosures)

MAR - 5 2004

RECEIVED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Electricity Consumers Resource Council,
Petitioner,

v.

Federal Energy Regulatory Commission,
Respondent.

No. 03-1449

**NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.'S
RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE AND REQUEST FOR AN
ORDER GRANTING LEAVE TO FILE A SEPARATE INTERVENOR BRIEF**

Intervenor, New York Independent System Operator, Inc. (the "NYISO"), hereby responds to the Court's February 19, 2004 order to show cause why intervenors should not be required to file one joint brief in support of the Respondent in this proceeding. The NYISO respectfully requests leave to file a separate intervenor brief in support of the Respondent because requiring the NYISO to file a joint brief with other intervenors could compromise the principles of independence that are the foundation of the Federal Energy Regulatory Commission's ("FERC's") policy governing independent system operators. Granting the NYISO a separate brief in this proceeding is, therefore, appropriate.

In support of this response, the NYISO states the following:

1. The NYISO respectfully requests that the Court grant the NYISO leave to file a separate intervenor brief in this proceeding. Circuit Rule 28(e)(4) requires intervenors on the

same side to “join in a single brief to the extent practicable.”¹ In this proceeding, joining in a brief with the intervenors could compromise the NYISO’s independence and the FERC policies regarding independent system operators (“ISOs”).

2. The NYISO is an independent, not-for-profit corporation organized under New York State law and established pursuant to FERC’s policies for ISOs.² The NYISO’s mission is to (i) provide for open, non-discriminatory access to interstate electric transmission facilities located in New York State, (ii) ensure the reliable, safe, and efficient operation of those facilities, and (iii) fairly and efficiently administer competitive wholesale electricity markets in New York State.

3. The NYISO does not generate electric power or own any electricity transmission or generation facilities. Rather, the NYISO acts as the independent interface among generators, transmission owners, and other participants in New York’s wholesale energy markets (the “Market Participants”).³ One of the markets administered by the NYISO is the Installed Capacity market, which is the subject of this proceeding.

4. FERC Order No. 888 requires, *inter alia*, that ISOs maintain independence from their market participants.⁴ FERC reiterated that mandate in Order 888-A:

¹ Circuit Rule 28(e)(4) states the following unacceptable grounds for filing a separate brief: that issues require greater length than the rules allow; that counsel cannot coordinate their efforts due to geographical dispersion, or that separate presentations were allowed in earlier proceedings. None of these grounds applies to the NYISO here.

² *E.g.*, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. and Regs. ¶ 31,036 (1996) [hereinafter “Order No. 888”]; on reh’g Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. and Regs. ¶ 31,048 (1997) [hereinafter “Order No. 888-A”].

³ The NYISO administers markets in energy, Installed Capacity, various “ancillary services,” and transmission congestion contracts.

⁴ Order No. 888, *supra* note 3, at 21,596.

We reaffirm our view that ISO Principles 1 (independence with respect to governance) and 2 (independence with respect to financial interests) are fundamental to ensuring that an ISO is truly independent and would not favor any class of transmission users The principle of independence is the bedrock upon which the ISO must be built if stakeholders are to have confidence that it will function in a manner consistent with this Commission's pro-competitive goals.⁵

5. Independence is essential to the fair and efficient administration of the energy markets. Thus, the NYISO has no financial interest in any transactions for the generation or sale of electricity, Installed Capacity, or any other transaction handled in a NYISO-administered market. The NYISO has no economic interests in its Market Participants, and the NYISO's governance is structured so that no Market Participant or group of Market Participants is favored.

6. The Installed Capacity market design approved by FERC, and challenged in this proceeding by Petitioner, was developed through the NYISO's governance process and is intended to ensure greater transmission system reliability and resource adequacy in New York State. In defending FERC's decision to approve that market design, the NYISO is following its mandate to ensure a reliable electric system in New York State, and is not representing the individual interests of any Market Participant. In contrast, the Market Participant intervenors represent their individual economic interests.⁶

7. The NYISO is responsible for administering the Installed Capacity market rules established in its FERC-approved tariffs. These tariffs require the NYISO to enforce those rules among Market Participants on a fair and non-discriminatory basis. The NYISO's participation in

⁵ Order No. 888-A, *supra* note 3, at 12,317-18.

⁶ The Court's Order, dated February 11, 2004, granted intervenor status to 21 entities, including the NYISO. Other than the NYISO and the New York State Public Service Commission (the "PSC"), all of those intervenors are participants in NYISO-administered markets. The PSC, as a governmental entity, is not required to participate in a joint intervenor brief. *See* Circuit Rule 28(e)(4).

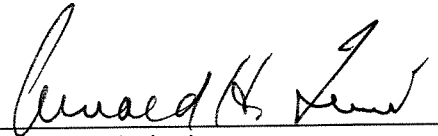
a brief with some Market Participants in a dispute against other Market Participants concerning the Installed Capacity market could create an inappropriate appearance that the NYISO is somehow favoring the interests of one group of Market Participants over others. Allowing the NYISO to file its own brief avoids this potential appearance.

8. This Court has previously granted an ISO's request to file a separate intervenor brief in similar circumstances. See, e.g., Sithe New England Holding, LLC v. Federal Energy Regulatory Commission, No. 02-11113, 2002 WL 1796766, at *1 (D.C. Cir. July 24, 2002). There this Court allowed ISO New England, Inc., to file a separate brief in support of the respondent FERC, while the remaining intervenors for respondent were required to file a joint brief.

9. The NYISO is mindful of the Court's rules and the February 19, 2004 Order in this proceeding regarding the limitations on the length of briefs and does not wish to burden the Court with extraneous or repetitive papers. The NYISO respectfully requests that, should the Court grant the NYISO leave to file a separate intervenor brief in support of Respondent, the Court designate that the NYISO's brief contain no more than 2,915 words separate and apart from the 8,750 words that intervenors in support of Respondent may be entitled to jointly file under the rules of this Court or as the Court may order. The limited separate submission the NYISO requests here will permit the NYISO to address briefly, from its unique perspective as the system operator, the issues likely to be raised by Petitioner.

For the foregoing reasons, the NYISO respectfully requests that the Court grant the NYISO leave to file a separate intervenor brief in support of Respondent of no more than 2,915 words or of another length acceptable to this Court.

Respectfully submitted,

By: 

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Dated: March 5, 2004

*Member of the Bar of this Court

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PROOF OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that I have this 5th day of March, 2004, served the foregoing document by first class mail, postage prepaid, upon all of the parties to this proceeding. Those parties are set forth on the attached list of parties served.

Respectfully submitted,

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