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February 27, 2003

Richard J. Grossi
Chairman of the Board
Care of William J. Museler, President
New York Independent System Operator
3890 Carman Road
Schenectady, New York 12303

Re: Notice of Appeal of Agway Energy Services, Inc., ECONnergy Energy Company, Inc., and Mirabito Gas & Electric, Inc.

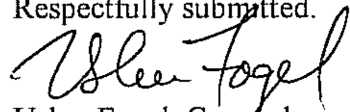
Dear Chairman Grossi:

In accordance with Article II of the Procedural Rules for Appeals to the ISO Board ('Rules"), enclosed for filing with the ISO Board, please find three (3) duly executed copies of the "Notice of Appeal of Agway Energy Services, Inc., ECONnergy Energy Company, Inc., and Mirabito Gas & Electric, Inc., on the Demand Curve Proposal". This appeal pertains to the decision of the Management Committee issued at its special meeting held on February 13, 2003.

The undersigned has been advised by ISO Staff that the ISO will post an electronic copy of this Notice of Appeal on the website of the ISO, and this will fulfill Appellants' service obligation to the Members of the Management Committee as codified in Section 2.03 of the Rules.

Appellants, through their counsel, hereby request the opportunity to present oral argument on this appeal to the Governance Committee at its scheduled meeting of March 11, 2003.

Respectfully submitted.



Usher Fogel, Counsel

Cc: Diane Egan (by e-mail)
By Airborne Express

BEFORE THE NEW YORK
INDEPENDENT SYSTEM OPERATOR

NOTICE OF APPEAL OF AGWAY ENERGY SERVICES, INC., ECONnergy ENERGY COMPANY, INC., AND MIRABITO GAS & ELECTRIC, INC., ON THE DEMAND CURVE PROPOSAL.

I. SUMMARY

In accordance with Article II Section 2.04 of the Procedural Rules for Appeals to the ISO Board, Agway Energy Services, Inc. ("Agway"), ECONnergy Energy Company, Inc. ("ECONnergy") and Mirabito Gas & Electric, Inc. ("Mirabito") (collectively "Appellants") hereby jointly submit to the Board of Directors ("Board") of the New York Independent System Operator ('ISO") this appeal of the decision of the Management Committee ("MC") issued at its special meeting held on February 13, 2003, precluding, prohibiting and excluding Appellants from voting or exercising any voting rights in connection with the MC's consideration of the Demand Curve proposal, and approving said proposal. This decision was violative of the ISO Agreement and the By-Laws of the MC, exceeded the authority of the MC, conflicted with the doctrine of equitable estoppel, and was arbitrary and capricious.

II. PRELIMINARY STATEMENT

The New York Independent System Operator ("ISO") has been considering the controversial and complex issue relating to the ICAP Demand Curve. The introduction of this new approach to pricing ICAP will significantly impact the cost of electric capacity, the economic viability of electric suppliers and ultimately the cost of electricity charged to retail consumers.

The consideration and approval of this matter was a primary subject at the special meeting of the MC held on February 13, 2003. Notwithstanding the significance and importance of this matter, at the meeting the Chairman of the MC, without prior notice or warning, ruled that Appellants were prohibited from voting on the issue of the Demand Curve proposal because their Membership was not in effect prior to the posting of the notice of the February 13, 2003 meeting. As will be demonstrated below, this decision was erroneous as a matter of fact and law, disenfranchised important sectors of the energy market, and violated the letter and spirit of the ISO's professed desire to encourage active participation by all sectors of the energy market in the ISO's deliberations and activities. Appellants respectfully urge the Board to reverse the erroneous ruling of the MC, allow Appellants to vote on all issues before the MC and accept their vote as presented at the meeting of February 13, 2003 with respect to the issue of the ICAP Demand Curve.

III. FACTUAL BACKGROUND

A. Description of Appellants and Their Interest in This Matter.

Appellants are each energy service companies (ESCO) authorized by the New York State Public Service Commission to supply electric commodity to retail customers throughout the State of New York. Both companies are currently actively providing electric supply service to residential, commercial and agricultural customers in both the downstate and upstate areas.

In their capacity as ESCO's, Appellants qualify for participation in the "Other Supplier" sector within the committees of ISO.[1] Further, they have a direct and substantial financial and business interest in the ISO proceedings, including specifically resolution of the

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[1] New York Independent System Operation Agreement ("ISO Agreement") Section 1.96, page 24; By-Laws of the Management Committee ("By-Laws"), Section 11.01.2.

ICAP Demand Curve issue. The pricing of electric capacity determines the cost these companies must pay for electricity and, in turn, affects the price they will offer to consumers in the competitive energy retail market. This, of course, directly impacts upon their ability to compete in an effective manner and ultimately whether they can sustain themselves as viable competitive entities.

In sum, Appellants are integral players in the competitive retail market and will be directly and substantially affected by the implementation of the ICAP Demand Curve proposal.

B. The February 13, 2003 Meeting of the Management Committee.

Appellants were recently apprised that the Demand Curve proposal was placed on the agenda for a special meeting of the MC scheduled for February 13, 2003. The Appellants concluded that if adopted as proposed, this proposal would significantly harm their financial and business interests. In order to participate in the deliberations with respect to this important matter, these companies took appropriate and legitimate steps to become approved Members of the ISO.

The membership application of Agway with its payment of Five Thousand Dollars was accepted and approved by the ISO on February 7, 2003. In approving Agway's Membership, the ISO did not in any way intimate, state, or advise that its ability to vote at any meeting of the Board or its committees would be circumscribed, precluded or prohibited. Agway designated Russ Miller as its representative and James Scheiderich as its alternate representative at meetings of the ISO committees. Agway, through its alternate representative, was allowed to vote on the Demand Curve proposal at the meeting of the Business Issues Committee ("BIC") on February 11, 2003.

The application and Five Thousand Dollar payment of ECONnergy was accepted and approved by ISO on February 12, 2003. ECONnergy designated Tom Hallerin to act as its

alternate representative at committee meetings. The ISO never advised, intimated or in any way indicated to ECONnergy that it would be precluded or prohibited from voting upon matters before the MC. Similarly, the application of Mirabito was accepted by the ISO on February 12, 2003, without any reservation as to Mirabito's voting rights. Mirabito designated Russell Southard as its representative and James Scheiderich as its alternate representative.

Without question or dispute, Appellants were duly approved Members of the ISO and designated their representatives prior to the February 13, 2003 meeting of the MC.

Appellants through their alternate representatives attended and participated in the special MC meeting conducted on February 13, 2003. When the meeting opened, a Member challenged the eligibility of Appellants to vote on the vague ground of fairness, emphasizing that their Membership had only recently been approved. After much heated discussion, the Chair of the MC after consultation with outside counsel, declared that the right to vote at the meeting was limited to those Members whose membership was approved prior to the posting of the notice of the February 13th meeting. This decision eliminated the ability of Appellants and other parties to vote on the Demand Curve proposal because their membership became effective after the meeting notice was posted. [2]The Chair then directed that two votes be taken, the first with Appellants excluded which resulted in the Proposal being approved, and a second with the Appellants included, which resulted in rejection of the Proposal.[3] The Chair unilaterally ruled that the first vote--excluding Appellants and approving the Demand Curve proposal--would be declared the "official" vote tally.

In summary, had the votes of Appellants not been excluded on alleged "fairness" grounds, the MC would have rejected the Demand Curve proposal. On this appeal, Appellants respectfully urge the Board to reinstate the vote of all companies that were Members of the ISO at the time of the February 13, 2003 MC meeting. With such votes reinstated, the Board should

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[2] This voting qualification resulted in the voter disenfranchisement of four Members.
[3] The second vote inclusive of all Members resulted in a tally of 57.59% in favor and 42.41% against.

confirm as demonstrated by the second vote, that the Demand Curve proposal did not receive the requisite approval from the MC.

IV. THE DECISION OF THE MC WAS ERRONEOUS AS A MATTER OF FACT AND LAW AND SHOULD BE REVERSED

At the meeting, the Chair of the MC took the extraordinary action of prohibiting duly approved Members from voting on the Demand Curve proposal--a matter of extreme importance to these Members and all segments of the electric energy market. It was acknowledged at the meeting that Appellants were legitimate ESCOs who properly belonged in the "Other Supplier" sector, the Appellants were admitted as ISO Members prior to the meeting, and that each Appellant had a direct and substantial interest in the outcome of the vote. Nonetheless, the Chair determined that it would not be "fair" to allow them to vote on this matter and only those entities that were ISO Members prior to the meeting notice being posted would be allowed to vote. This decision was ill conceived and should be reversed.[4]

In effect, the Chair unilaterally imposed a new restriction on the voting rights of duly approved Members of the ISO and the MC. The decision of the Chair now established, for the first time, a time constraint on voting rights of MC Members, restricting the pool of eligible voting Members to those entities that were Members prior to the posting of a meeting notice. However, such a restriction finds no support in the ISO Agreement. Section 7.11(c) and (d) thereof, which address the meting notice requirements of the MC, merely direct when notices are to be issued (at least five business days before the meeting) and codify what information is to be included in the notice. There is no provision therein, which, in any way, limits voter eligibility to those entities whose Membership is approved prior to the notice being issued. [5]

[4] This creates a five business day waiting period for new Members as the notice of the meeting must be provided at least five days before the scheduled meeting.
[5] The same holds true for the By-Laws. See, By-Laws, Section 4.07

In connection with voting rights, the ISO Agreement provides that voting in the MC "shall be by sector", requires the Member to advise the ISO of the sector in which it is qualified to participate, and further states that a party"...may vote in one sector and may cast only one (1) vote".[6]The By-Laws echo these standards by reiterating that each Member participating in a sector "shall be entitled to cast one vote".[7]There is no provision that limits voting only to those Members whose application was approved be the issuance of the meeting notice.

The decision of the MC to exclude the votes of Appellants thus constituted an *ultra vires* act with no foundation in law or equity. The MC is authorized to engage only in such activities and exercise those powers specifically enumerated in its By-Laws or the ISO Agreement[8] Neither of these source documents empower the MC to exclude the vote of a duly admitted Member solely because membership became effective after the meeting notice was issued or other vague assertions of fairness. In fact, pursuant to these binding sources of authority, once Membership is granted there are no restrictions on a Member's ability to vote within the relevant sector on a matter that is properly before the MC. In these circumstances, the Chair's decision was in excess of its lawful authority and should be reversed.

Further, the actions of the MC as actualized under the By-Laws, must at all times "be consistent with the ISO Agreement, as the ISO Agreement is amended from time to time."[9] In connection with the ability of a Member to act and participate at meetings of the MC (including voting) the ISO Agreement provides that a "Party may designate any person to represent the Party on the Management Committee. Such representative will serve until replaced by the Party by written notice or until the Party ceases to be a Party".[10] Similarly, the ISO Agreement further states that a Party thereto "may participate in the governance of the ISO", and

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[6] ISO Agreement, Section 7.04, page 52, Section 7.05, page 54.
[7] By-Laws Section 12.03.
[8] ISO Agreement Section 7.01, *et. seq,* By-Laws, Section 1.01-1.04.
[9] By-Laws, Section 1.01.
[10] ISO Agreement, Section 7.03, page 51.

that the MC shall be comprised "of each Party to the ISO Agreement".[11]The Appellants designated their appropriate representative on the day their membership was accepted by the ISO. The ISO Agreement places no restriction on the ability of the representative to vote on behalf of a Member and neither does it impose a waiting period or in any other manner impinge upon the voting rights of duly approved Members of the ISO. Obviously, the voting restriction imposed by the Chair at the February 13, 2003 meeting, is inconsistent with the ISO Agreement and thus void as a matter of law.

The decision of the Chair of the MC should also be rejected on the ground of equitable estoppel. Appellants duly submitted the requisite application forms and related payment to the ISO. The ISO accepted the applications and granted membership status to these entities. Neither the application forms nor the acceptance of the ISO advised the Appellants that their ability to vote on a matter considered by the MC would be restricted in any manner whatsoever. These Members reasonably believed they were now full Members of the ISO, with redolent authority to exercise the most prized right of a Member-- to exercise the right to vote on matters considered by the MC, especially such a crucial and controversial issue as the Demand Curve proposal. Under these circumstances, the MC should be deemed estopped from its effort to impose an after-the-fact limitation on Appellants' voting rights.

The MC and the ISO, as administrative bodies are obligated to act in a reasonable manner and are prohibited from making determinations that are arbitrary and capricious or issuing penalties which are abusive in nature. In the instant matter, the Chair's decision to exclude the votes of Appellants is most arbitrary and capricious and highly abusive in light of the absence of any authority to bar the vote of certain Members, and the more temperate measure that could have been used.[12] If the Chair was truly concerned with Appellants' voting status, he could have merely adjourned the meeting for a short interval and then taken a new vote. The one

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[11] *Id.*, Section 2.02, page 32, Section 7.01, page 50.
[12] See, New York Civil Practice Laws and Rules Section 7803 (3).

week change in schedule would not have prejudiced any party's rights or expectations, or affected the viability of the Demand Curve proposal as there was no deadline that had to be met. By ignoring this obvious solution and instead opting to disenfranchise Appellants-- a truly draconian measure-- it is apparent that the Chair acted in an arbitrary and capricious manner.[13]The arbitrary nature of the Chair's decision is further underscored by the fact that Agway and Fortistar/Lockport Energy Associates, L.P., two companies whose votes were excluded by the MC, were allowed to vote on the same issue without objection or opposition before the BIC at its meeting of February 11, 2003.

The Chair also made passing reference to the alleged inability of Appellants to comply with Article II of the By-Laws of the MC, which provides, in relevant part in Sections 2.02 and 2.02.2 thereof:

> "2.02 A Member of the Management Committee may designate any person to represent the Member at meetings of the Management Committee by seven days advance written Notice to the Secretary of the Management Committee...
>
> 2.02.2 A Member may designate up to seven alternate representative(s) by seven days advance written notice to the Secretary of the Management Committee."

Apparently in the view of the Chair, these provisions mandate that a Member of the Committee can only participate at a meeting through a representative, or alternate, if such representative is designated by seven days advanced written notice to the Secretary of the MC. As Appellants did not provide seven days advance written notice of their designation of a representative, the MC erroneously concluded that they were ineligible to vote at the meeting. This reading of the By-Laws is entirely erroneous.

Section 2.02 and 2.02.2 merely explicate that a Member *may* designate a representative or alternate by seven days advance notice, it does not state that such a procedure *must* be used in order for a Member to participate through a representative at a MC meeting. In

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other words, the language cited is merely permissive--identifying one potential means of participation- - not mandatory or limiting and thus precluding any other approach to participating at a meeting through a representative capacity. Thus, a Member may designate a representative or alternate on seven days advance notice, or a Member may employ a shorter period if necessary or desired under the circumstances.

The Chair's professed interpretation of the By-Laws not only supplants permissive language with a mandatory preclusion, but also creates a bar to voting that is no where envisioned in the By-Laws or other relevant ISO document. Section 2.02 further provides that a Member that is not a natural person (i.e. a corporation) must "be represented by a representative". Following the Chair's reasoning, such representative of a corporation must be designated by at least seven days advance written notice. Therefore, according to the MC a corporate Member must go through a seven day waiting period before it is eligible to vote at an MC meeting. But such a "waiting period" for corporate Members is a fiction created by MC and finds no support in the By-Laws or the ISO Agreement. There is no provision of the ISO Agreement or By-Laws that forces a Member to be a Member for a specified period of time before the right to vote comes to full fruition.

In a similar fashion, the Chair's forced reading of the By-Laws also creates an irrational voting distinction between a Member that is a natural person and a Member that is not a natural person. In the case of the former, Section 2.02 provides that a Member "who is a natural person may appear in person at any time", but in the case of the latter (and the more ubiquitous form of Member) the MC has established a seven day waiting period before voting rights are available. There is no rational theory that supports such discriminatory treatment where a Member that is an individual can appear and vote at meetings without restriction, while a corporate Member must wait seven days.

Failure to reverse the decision will also engender significant cynicism among players in the energy market, especially the Appellants whose votes were disallowed by the

Chair. From their perspective, which is most reasonable under the circumstances, their only sin was not *when* they became a Member, but their opposition to the Demand Curve proposal. To assure passage of the motion on the proposal, the Appellants are now of the belief, that the Chair went to extraordinary and unprecedented lengths to create a new voting restriction out of whole cloth. Unless corrected by the Board, such a state of affairs will cast the ISO in an unenviable light and markedly reduce the incentive for parties to participate in ISO proceedings and activities.

V. CONCLUSION

In view of the foregoing, it is evident that the MC erred in excluding Appellants from voting on the Demand Curve proposal at the February 13, 2003 meeting. Accordingly, the Board should reinstate the votes of all companies that were Members of ISO at the time of the meeting and upon such reinstatement confirm that the Demand Curve proposal failed to achieve the necessary approval as required under the procedures of ISO.

Respectfully submitted,

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Dated: February 27, 2003
Cedarhurst, New York