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February 28, 2003

VIA OVERNIGHT MAIL AND FAX

Richard J. Grossi
Chairman
New York Independent System Operator
3890 Carman Road
Schenectady, NY 12303

c/o William J. Museler
President and Chief Executive Officer
New York Independent System Operator
3890 Carman Road
Schenectady, NY 12303

Re: Notice of Appeal of the Management Committee's Decision

Dear Chairman Grossi:

Pursuant to the Procedural Rules for Appeals to the ISO Board, Select Energy, Inc., on behalf of Select Energy New York, Inc. ("Select Energy"), respectfully submits three copies of an appeal of the Management Committee's decision at its February 13, 2003 meeting to disallow the votes of three members in determining whether to recommend that the New York Independent System Operator adopt installed capacity demand curves. A copy of this appeal has been electronically transmitted to NYISO Staff for purposes of service.

Sincerely,
/s/
David B. Raskin
Jeffrey S. Burk

Attorneys for Select Energy, Inc.
and Select Energy New York, Inc.

Appeal by Select Energy, Inc.
of Management Committee Decision

Select Energy, Inc., on behalf of Select Energy New York, Inc. ("Select Energy"), hereby appeals the February 13, 2003 decision of the Management Committee ("MC") to disallow the votes of MC members Mirabito, Econergy, and Agway ("Disenfranchised Members") in determining whether the MC should recommend that the New York Independent System Operator ("NYISO") adopt installed capacity demand curves.

I. SUMMARY

Were they allowed, the votes of the Disenfranchised Members would have changed the outcome of the MC vote at its February 13, 2002 meeting in favor of adopting installed capacity demand curves, a measure that had been rejected by the MC only one month earlier. Accordingly, disallowing the votes of approved members of the NYISO produced an MC decision that did not in fact have the required support of the members.

The MC disallowed the votes based on a protest by the Independent Power Producers of New York ("IPPNY") and an "on the spot" interpretation of the MC's By-Laws by NYISO Counsel. The votes were excluded because the new members purportedly had not provided adequate notice (seven days) of the designation of their alternative representatives. However, as should have been readily apparent, this notice requirement could not have been met because this MC meeting was held on very short notice without permitting an appeal of the Business Issues Committee's ("BIC") decision on this same issue in accordance with the rules. In order to rush the matter to a vote on

only five days' notice, the BIC appeal rules were circumvented based on the incorrect conclusion that no one's due process rights would be harmed. In permitting this MC meeting to take place on only five days' notice, NYISO Counsel stated that the "test should be whether the MC agenda gives parties reasonable notice." Obviously, when the Disenfranchised Members could not vote because of the seven-day notice period, this litmus test had failed. Had the MC meeting been scheduled in accordance with the rules following the BIC vote, there can be no doubt that the Disenfranchised Members' votes would have counted, and the demand curves resolution would have been rejected.

Moreover, this interpretation of the MC By-Laws regarding voting rights of new members was wrong and ignored the portion of the rules most on point. The By-Laws state that a member may designate its representative, or alternates, seven days in advance of an MC meeting. If this rule applied to a new member, it would mean that no member could vote for at least seven days after its application was accepted. However, as shown below, there is ample precedent for permitting members to vote within a day or two after becoming members. In this case, the persons designated to vote for the Disenfranchised Members were the persons named in their written applications for admission as members, which were accepted. Indeed, it was at the recommendation of NYISO Staff that alternates were designated, so that the Disenfranchised Members would not need to use proxies to vote at the MC meeting. The Disenfranchised Members met all the requirements for MC membership and acted on the advice of the NYISO Staff to ensure their votes would be counted. When their applications were accepted they should have been permitted to vote through their designated representatives or alternates.

In fact, another provision of the MC By-Laws makes clear that the intent of the By-Laws is to allow parties to vote whenever there is no question about the validity of their votes. Section 2.06 of the By-Laws directs the MC Chairperson to permit alternate forms of attendance at MC meetings "to the extent practicable" as long as the security of the voting is maintained. The unmistakable principle behind this rule is to permit members to vote unless there is a substantive reason to believe their votes are not valid. No question exists as to the validity of the votes at issue; these members unambiguously intended to vote in opposition to the motion, as was their right. Section 2.06 of the By-Laws was not followed here.

Finally, NYISO Counsel apparently believed that the Disenfranchised Members' participation in the voting would violate the "spirit" of the NYISO's governance rules. Although Counsel's opinions about the "spirit" of the rules is irrelevant, one would think that the "spirit" of any voting rules would be to permit eligible members to have their votes counted. In this case, the Disenfranchised Members became members for the very reason that they would be adversely affected by the decision to adopt demand curves. They were exercising their rights as participants in the NYISO markets to express their disapproval of a motion before the MC. They had a right to have their votes counted no less than any other member, and any suggestion that allowing them to vote violated the "spirit" of the voting rules turns the basic principles of democratic due process on their head.

The NYISO Board should stand foursquare in favor of honest voting, regardless of its views on the merits of the issue. In this case, votes cast by interested members

were rejected, without any reason to believe they were invalid, in order to change the results. That is counter to the letter and the "spirit" of the rules, and the NYISO Board should not permit it.

II. RELEVANT HISTORY

Implementing installed capacity demand curves has been a contentious matter in the NYISO. Their implementation was voted down by the BIC on December 13, 2002, and that decision was sustained on appeal by the MC on January 9, 2003. The BIC was scheduled to reexamine the issue on February 11, 2003. Decisions by the BIC are subject to appeal to the MC within ten business days of a BIC meeting, in this case by February 26, 2003.

Nonetheless, on February 6, 2003, the MC Chairperson agreed to schedule a special MC meeting on demand curves on February 13, 2002, just two days after the BIC meeting was to occur. The MC By-Laws require that items be placed on the agenda at least five business days before the MC meeting. This effectively deprived parties of their right to appeal decisions arising out of the February 11, 2003 BIC meeting, since it would be a practical impossibility to prepare an appeal within two days and place it on an agenda that must be finalized five days prior to the MC meeting. In effect, the MC was going to render a decision that made the BIC meeting and decisions arising out of it moot.

The latest demand curve proposal passed at the February 11, 2003 BIC meeting with 59.12 percent of the vote. The required number to pass was 58 percent. Two parties that had just joined the BIC were permitted to vote at the meeting. One of those parties,

Agway, opposed the demand curves. The other new party, Fortistar/Lockport, supported it. Indeed, IPPNY had served as an alternate representative or held a proxy on behalf of Fortistar/Lockport.

The day between the BIC meeting and the MC meeting, Mirabito and Econergy joined the MC by supplying all necessary documentation and paying their membership fees. Mirabito designated Select Energy and Econergy designated Sempra as their alternate representatives. It was NYISO Staff that recommended that Select Energy and Sempra become alternative representatives on behalf of Mirabito and Econergy rather than having to obtain vote proxies for the February 13, 2003 MC meeting.

The MC meeting was held by telephone conference. When the Disenfranchised Members were introduced, IPPNY raised its protest. The MC Chairperson requested advice from NYISO Counsel, who advised that under the By-Laws the addition of a new alternate representative for a member requires seven days' advance notice to the MC Secretary and that the late addition of the Disenfranchised Members to the MC for the purposes of voting on demand curves violated the "spirit" of NYISO governance. The MC thus disregarded the Disenfranchised Members' votes, and the MC approved a resolution recommending that the NYISO adopt the controversial demand curves. The decision passed 59 percent, with 58 percent required to pass. Inclusion of the Disenfranchised Members' votes would have caused the resolution to fail with only 57.59 percent.

III. DISCUSSION

A. The MC Chairperson Should Have Permitted the Disallowed Votes

The MC By-Laws contain no provision requiring a waiting period before a party becomes a member of the MC or may vote at an MC meeting. Section 2.02.2 states, "A Member may designate up to seven alternate representative(s) by seven days advance written notice to the Secretary of the Management Committee." This provision was adopted for administrative purposes to ensure that NYISO Staff can process the designation of an alternative representative prior to an MC meeting. Section 2.02.2 does not require any advance notice to other parties. The lack of seven days' notice in this case had no administrative impact on NYISO Staff's ability to process the designation of the Disenfranchised Members' alternate representatives. Indeed, it was NYISO Staff that recommended using the designation of alternate representatives, rather than proxies, to permit the Disenfranchised Members' votes to count at the February 13, 2003 MC meeting.

Moreover, Section 2.06 states that the MC Chairperson "shall allow alternate forms of attendance . . . with reasonable safeguards, to the extent practicable, and consistent with the need to maintain order during meetings and security of voting." Thus, the By-Laws require that the Chairperson permit members to attend and vote as long as voting security is ensured. No facts exist that would support a finding that allowing the Disenfranchised Members vote to count would in any way violate the order of the meeting or security of voting. Accordingly, the Chairperson's disallowance of the Disenfranchised Members' votes was a violation of the By-Laws.

Excluding new members' votes based on the notice provisions of the By-Laws has the effect of requiring a seven-day waiting period for membership and voting in the MC. There is clearly nothing in the By-Laws, nor in the NYISO Agreement or governance application to join the MC, that evinces an intention to require such a waiting period. Indeed, there is precedent for permitting new members to vote within seven days of a meeting. New parties were permitted to vote through their alternate representatives at the February 11, 2003 BIC meeting although they had not given seven days' notice. Indeed, Agway and Fortistar/Lockport's votes were allowed at the February 11, 2003 BIC meeting but were later denied at the February 13, 2003 MC meeting. At an MC meeting on July 11, 2002, Coral Power was permitted to vote on an issue despite the fact that it had joined on July 10, 2002, and thus had not designated a representative more than seven days prior to the MC meeting. Disallowance of the Disenfranchised Members' votes were in clear violation of the established practice at the BIC and the MC.

B. The MC's Own Schedule Was The Cause of the Votes Being Disallowed

Furthermore, had the MC meeting been scheduled at least ten days after the BIC meeting, as the ten-day appeal rights after a BIC meeting suggest should be the case, the Disenfranchised Members' designation of alternate representatives would have had seven days' advance notice, and their votes would have counted. The MC Chairperson's decision to take up such a controversial issue at an MC meeting just two days after the lower body, the BIC, was to vote on the exact same issue ensured that any decision of the BIC would be moot. NYISO Counsel conceded as much when he stated in a February

10, 2003 e-mail to MC and BIC members that "appeal of the BIC decision itself would thus be superfluous, redundant and moot" because "there will be an MC vote on the 'demand curve' regardless of whether or not the BIC decision is appealed." NYISO Counsel contends, "Neither the By-Laws nor the ISO Agreement contain provisions circumscribing the proximity of the meetings of the two committees to one another. The timing of the MC meeting is thus up to the Chairman of the MC." If there is no relationship between the timing of the meetings, then there is no point to a bifurcated process.

NYISO Counsel in fact maintains that "[a] dissenter from the BIC decision would not be deprived of any 'due process' since he or she will be free to make all the same arguments to exactly the same people, for or against the proposal, at the MC." Yet this is obviously not the case for new MC members when (1) a special meeting of the MC is scheduled with only five business days' notice; (2) that special meeting follows the BIC decision by only two days; and (3) new members are disenfranchised because their designation of representatives or alternates was without seven days' notice. The timing of the MC meeting did deprive the Disenfranchised Members of due process. Had the MC meeting been held at least ten days after the BIC meeting, the Disenfranchised Members would have had seven days to give notice. It was the schedule adopted by the MC that ensured that they were unable to vote.

While NYISO Counsel argued that permitting the Disenfranchised Members' votes would be contrary to the spirit of NYISO governance, it is in fact contrary to the spirit of that governance, as well as sound public policy, to permit the MC to short-circuit

the BIC, the appeal process, and the voting rights of new members. The spirit of NYISO governance should be to permit members to cast votes on issues, so long as such voting is administratively practical and secure, and to ensure that decisions of the BIC and/or the MC represent the views of 58 percent of the members, not less than 58 percent but with some votes excluded on a technicality.

IV. REQUEST FOR RELIEF

Select Energy believes that the MC erroneously excluded the votes of four MC members that would have resulted in an opposite decision on demand curves. While there are valid procedural and security reasons for ensuring that alternate representatives are designated in an orderly, timely fashion, no threats to process or secure voting would have been threatened by permitting the Disenfranchised Members' votes to count here. Votes have been counted within seven days of a member's joining in both BIC and MC meetings. It is particularly troublesome that the votes at the MC meeting were disallowed upon the protest of a party, IPPNY, that had previously used precisely the same procedures to cast a vote as an alternative representative at the February 11, 2003 BIC meeting. Especially since the seven-day-notice provision is to ensure NYISO Staff's ability to carry out its administrative duties, and not to provide notice to or to protect other parties such as IPPNY, the protest should have been denied. Select Energy thus prays for relief in the form of the reversal of the MC's decision to exclude the Disenfranchised Members' votes and a finding that such reversal results in the failure

with only 57.59 percent of the vote of the MC resolution to recommend the implementation of installed capacity demand curves in the NYISO.

Respectfully submitted,

/s/

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