

**Via Hand Delivery**

March 29, 2005

Hon. John W. Boston  
Chairman of the Board  
c/o Mr. Mark S. Lynch  
President and CEO  
New York Independent System Operator, Inc.  
3890 Carman Road  
Schenectady, NY 12303

Re: Motion of Independent Power Producers of New York, Inc. in Opposition to the Appeals to the NYISO Board Regarding the March 2, 2005 Decision of the Management Committee Approving Tariff Language with respect to the Gross Receipts Tax

Dear Chairman Boston:

Pursuant to the "Procedural Rules for Appeals to the ISO Board," please find enclosed three copies of the "Motion of Independent Power Producers of New York, Inc. in Opposition to the Appeals of Fluent Energy Corporation and Multiple Intervenors to the NYISO Board Regarding the March 2, 2005 Decision of the Management Committee Approving Tariff Language with respect to the Gross Receipts Tax." IPPNY requests an opportunity to present oral argument to the NYISO Board.

I have e-mailed a copy of the Application to Diane Egan, of the NYISO's staff, who has agreed to serve it on each member of the Management Committee today.

Very truly yours,

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David B. Johnson

Enclosures

cc: Diane Egan, via e-mail

MOTION OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC., IN  
OPPOSITION TO THE APPEALS OF FLUENT ENERGY CORPORATION AND  
MULTIPLE INTERVENORS TO THE NYISO BOARD REGARDING THE  
MARCH 2, 2005 DECISION OF THE MANAGEMENT COMMITTEE APPROVING  
TARIFF LANGUAGE WITH RESPECT TO THE GROSS RECEIPTS TAX

Independent Power Producers of New York, Inc. (“IPPNY”),<sup>1</sup> acting through its members on the New York Independent System Operator (“NYISO”) Management Committee (“MC”), hereby moves in opposition to Multiple Intervenors’ (“MI”) and Fluent Energy Corporation’s (“Fluent”) (collectively, the “Appellants”) appeals of the Management Committee’s March 2, 2005, decision to approve Motion # 2 that directs the NYISO to request that the Federal Energy Regulatory Commission (“FERC”) approve an amendment to the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”)(the “Amendment”).<sup>2</sup> The Amendment provides that certain customers seeking to purchase services under the Services Tariff for their own use, informally referred to as “Direct Customers,” must take steps to ensure that sellers into the NYISO-administered wholesale markets will not be deemed to be making retail sales that might be construed by a taxing authority to subject them to any New York State or local gross receipts tax (“GRT”) liability arising from the Direct Customers’ purchases.<sup>3</sup>

Direct Customers can make such demonstration by providing to the NYISO one of the following: (1) a current reseller’s certificate; (2) a certificate exempting the customer and its transactions from each applicable taxing authority’s GRT; or (3) a written agreement with each

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<sup>1</sup> IPPNY is a not-for-profit trade association representing more than 100 companies involved in the development, operation, marketing and sale of electric power in New York.

<sup>2</sup> The Governance Committee of the NYISO’s Board of Directors granted an extension of time to file responses to the appeals to March 29, 2005.

<sup>3</sup> The GRT is an income tax previously imposed by the State and currently levied by various local municipalities on utilities’ gross receipts received from sales of electric commodity rendered for ultimate consumption. N.Y. Tax Law § 186-a; N.Y. Gen. City Law § 20-b; N.Y. Village Law § 5-530.

applicable taxing authority pursuant to which the customer pays directly to the taxing authority GRTs arising from its purchases and the taxing authority waives any claims for GRT liability against all sellers into the NYISO-administered markets. In the alternative, Direct Customers may demonstrate to the NYISO that each jurisdiction in which such Direct Customer engages in purchases from the NYISO does not impose a GRT, or the receipts from the purchase by or sale to the Direct Customer are not subject to the GRT imposed by such jurisdiction. If the required demonstration is not made, the NYISO is required to terminate service to the Direct Customer.

Appellants contend, among other things, that the Amendment could eliminate the Direct Customer option and that any potential GRT liability imposed on wholesale suppliers is “highly speculative.” The Appellants’ arguments lack merit and should be rejected.

The Amendment is necessary to help ensure that wholesale suppliers cannot be deemed to be selling electricity at retail when Direct Customers purchase electricity from the NYISO for their own use. IPPNY and its members have consistently stated their position that suppliers into the NYISO markets are engaged solely in wholesale transactions and therefore are not subject to GRTs. Wholesale suppliers are especially sensitive to any potential claim that their sales are anything but wholesale, because of the significant harm they would suffer as a result of a finding that they were making retail sales. If such finding were made, not only could suppliers be subject to the GRT, they could be subject to greater regulation by the New York State Public Service Commission and exposed to burdensome regulation under the Public Utility Company Holding Act (“PUCHA”). This concern is heightened with respect to the GRT because Direct Customers are currently purchasing services directly from the NYISO for their own use, the New York State Tax Department has issued an advisory opinion stating that the NYISO is exempt from GRT liability, and GRT liability is imposed on sellers to end-use consumers, not purchasers.

If the NYISO is not deemed to be the seller for purposes of collecting the GRT, it is not a stretch to imagine that some enterprising taxing jurisdiction will seek to impose the GRT on the NYISO's suppliers in the future. That none have done so to date is no comfort. The level of tax revenues resulting from the current amount of Direct Customer purchases may not justify enforcement expenditures, yet that could easily change as more customers, seeking to avoid the GRT, choose the Direct Customer option. Moreover, at least one of IPPNY's members has informed IPPNY that it currently is being subjected to an audit with respect to potential GRT liability, so IPPNY's concern is far from theoretical or speculative.

The Amendment is appropriate and reasonable because the current Services Tariff unfairly benefits Direct Customers at the expense of wholesale suppliers. It allows Direct Customers to avoid GRT liability while exposing wholesale suppliers to the risk that they may be required to assume a GRT liability.<sup>4</sup> While IPPNY agrees with Appellants that wholesale suppliers have strong arguments why their sales cannot be subject to the GRT, this fact would not justify the Board's rejection of the Amendment. Wholesale suppliers should not have to face *any* risk, and certainly not any associated litigation expenses, that their sales will be deemed to be retail, because they have never agreed to make retail sales and they have always assumed they were operating exclusively in a wholesale market pursuant to a wholesale tariff approved by FERC.

As the FERC-approved administrator of the wholesale electricity markets in New York, the NYISO has a duty to ensure that all transactions conducted pursuant to, and in compliance with, the Services Tariff are wholesale in nature. In fact, the Services Tariff provides that “[a]

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<sup>4</sup> While the GRT is not imposed directly on the purchaser, regulated utilities and other retail suppliers that are charged the GRT typically pass it through to their retail customers.

party who purchases Energy, Capacity or Ancillary Services in the Wholesale Market to serve its own Load is considered to be a participant in the Wholesale Market.”<sup>5</sup> The best and simplest way to preserve the wholesale nature of the Services Tariff with respect to Direct Customer purchases is to require Direct Customers to purchase services from the NYISO through an affiliate and to require the Direct Customer to provide a reseller’s certificate to the NYISO. Indeed, IPPNY has always been under the opinion that this is the only way to reconcile Section 2.196 of the Services Tariff, quoted above, with the definition of Load Serving Entity. IPPNY understands that at least one of its members was required by the NYISO to form such an arrangement to serve its own load with NYISO services.

As an accommodation to Direct Customers, IPPNY negotiated in good faith in the committee process four alternative methods that Direct Customers can choose to meet their obligations under the Services Tariff. The Appellants offer detailed arguments supporting their contention that the GRT cannot be imposed on wholesale suppliers yet offer nothing more than conclusory statements that Direct Customers will be unable to meet the requirements of the Amendment.<sup>6</sup> If Appellants are so confident their argument that the GRT cannot be imposed on wholesale suppliers will prevail, they should have no cause to argue that they will be unable to convince taxing jurisdictions to supply them with the exemptions as required by the Amendment. On the other hand, a taxing jurisdiction’s refusal to provide an exemption is evidence that wholesale suppliers’ concerns of being faced with inappropriate GRT liability are reasonable and must be addressed by the NYISO.

If Direct Customers are not satisfied with the alternative methods provided by the Amendment, the NYISO should consider requiring reseller certificates as the sole option for

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<sup>5</sup> Services Tariff § 2.196.

<sup>6</sup> MI states, without any supporting evidence “it is not realistic to expect Direct Customers to obtain the broad, explicit waivers from taxing authorities that are required by the Motion.” MI Motion at 6.

Direct Customers to self-supply NYISO services. That alternative provides the strongest protection for the wholesale market as there can be no doubt that all sales are truly wholesale. Such an approach also would appear to eliminate the need for the NYISO to register as a sales tax collection agent, as there would indisputably be no retail sales occurring from the NYISO under such an approach.

#### CONCLUSION

In light of the foregoing, IPPNY respectfully requests that the NYISO Board reject Appellants' appeals of Motion #2 and file the Amendment for FERC approval as soon as possible.

Respectfully submitted,

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By: \_\_\_\_\_  
David B. Johnson

Dated: March 29, 2005  
Albany, New York