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September 16, 2010

VIA HAND DELIVERY

Ms. Karen Antion
Chairwoman, NYISO Board of Directors
c/o Mr. Stephen G. Whitley
New York Independent System Operator, Inc.
10 Krey Boulevard
Rensselaer, New York 12144

Re: U.S. Power Generating Company's Motion in Support of IPPNY
Appeal and in Opposition to the Indicated TOs Appeal

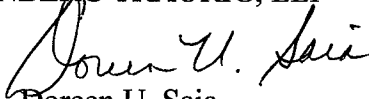
Dear Chairwoman Antion:

Our firm represents U.S. Power Generating Company. In accordance with Sections 1.03 and 4.01 of the NYISO Board of Directors Procedural Rules for Appeals, U.S. Power Generating Company, a member of the Management Committee, hereby submits three original copies of its Motion in Support of the Appeal of the Independent Power Producers of New York, Inc. and in Opposition to the Appeal of the Indicated TOs. IPPNY and the Indicated TOs had appealed Motion #5 and Motion #5b, respectively, from the August 25, 2010 Management Committee meeting.

A copy of this Motion has been delivered contemporaneously herewith to Ms. Deborah Eckels, Ms. Leigh Bullock and Mr. Peter Lemme via e-mail for dissemination to all members of the Management Committee via electronic mail. Should you have any questions, please call or e-mail me.

Very truly yours,

GREENBERG TRAURIG, LLP



Doreen U. Saia

Counsel to U.S. Power Generating Company

DUS/aaw
Enclosures

cc: Ms. Leigh Bullock (via e-mail; w/enc.)
Ms. Deborah Eckels (via e-mail; w/enc.)
Mr. Peter Lemme (via e-mail; w/enc.)

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**MOTION OF U.S. POWER GENERATING COMPANY IN
SUPPORT OF THE IPPNY APPEAL
AND IN OPPOSITION TO THE
INDICATED TOs APPEAL**

In accordance with Sections 1.03 and 4.01 of the NYISO Board of Directors Procedural Rules for Appeals, U.S. Power Generating Company, a member of the Management Committee (“USPG”), hereby submits its Motion in Support of the Appeal of the Independent Power Producers of New York, Inc. (“IPPNY”) and in Opposition to the Appeal of the Indicated TOs.¹ IPPNY has appealed the August 25, 2010 Management Committee meeting Motion #5 which proposes a number of substantial, unwarranted and unbalanced changes to the recently approved New York City capacity market load side mitigation rules without any analysis or substantiation to demonstrate that such changes are just and reasonable. In contrast, the Indicated TOs have appealed Management Committee meeting Motion #5b from the same date in which the Management Committee stopped short of endorsing an even further deterioration of the load side mitigation rules.²

For the reasons set forth herein, USPG respectfully requests that the NYISO Board of Directors decline to endorse the proposed load side mitigation rule changes set forth in Motion #5.³ If, arguendo, these unsupported concepts are nonetheless accepted, USPG respectfully

¹ The Indicated TOs are comprised of Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority and Niagara Mohawk Power Corporation d/b/a National Grid.

² All entities in the Generator Sector and the Other Supplier sector opposed Motion #5b which caused the motion to be blocked by a vote of 57% for, 43% against. However, three entries in the Other Supplier Sector changed their vote on the underlying Motion #5 which permitted the motion to pass with a vote of 64.17% in favor of it. Of these three Other Suppliers, two are demand response providers that have been taking a load posture of late. The third entity, Hess Corporation, has a vested interest in easing the uneconomic entry provisions that are applied to its new project so that it will either avoid mitigation entirely, or at a minimum, reduce the duration that such mitigation will apply to it, and thus, appears to have voted its pocketbook. All other entities in the Generator Sector and the Other Supplier Sector opposed this motion.

³ At the same meeting, Management Committee Motion #6 addressed the clarification that the mitigation exemption test would be applied on an average annual basis. This motion passed by a show of hands with abstentions. The results of this motion have not been appealed. As was first raised by Market Participants to the

requests that, at a minimum, the NYISO Board return the proposed draft tariff language to the stakeholder process for further review and modification.

SUMMARY OF POSITION

° After a long and contentious proceeding that continued for more than two years, the Federal Energy Regulatory Commission (“FERC”) approved a comprehensive set of supplier side and load side New York City capacity market mitigation rules in 2008 that were expressly designed to ensure the long term sustainability of the market by preventing artificially inflated and artificially suppressed prices. IPPNY’s appeal should be granted because neither the NYISO nor any other party has demonstrated that these rules have not worked as intended over the past two years. Nor has any party demonstrated that these rule changes are just and reasonable and will not otherwise upset the critical balance that the FERC expressly found was just and reasonable in 2008.

° Eliminating the minimum three year duration period from the proposed rule will only serve to further exacerbate the flaws inherent in this proposal, particularly with respect to the 50% provision,⁴ and thus, the Indicated TOs’ appeal should be denied.

° Even assuming arguendo that the Board elects to permit these concepts to be filed at the FERC under FPA Section 205 notwithstanding the fact that -- like the unsupported rule changes to arbitrarily reduce the price and bid cap in the New York City capacity market capacity that loads railroad through over supplier opposition three years ago and which were

NYISO Staff this past spring and has been addressed at length during the working group process, this clarification is required to bring the NYISO’s current tariff in conformance with the NYISO’s own comprehensive mitigation proposal, Dr. Patton’s recommendations and the FERC orders accepting both in this regard. Thus, USPG respectfully requests that the NYISO Board direct Staff to make this limited tariff filing with the FERC to clarify that the mitigation exemption test will be applied on an average annual basis without any further delay.

⁴ One of the proposed rule changes approved by the Management Committee as part of Motion #5 was to permit the Offer Floor mitigation to be lifted as soon as a cumulative amount of a unit’s capacity has been sold that is the equivalent of 12 months of the unit’s capacity provided that at least 50% of the capacity must have been sold in a month for the month to be counted.

soundly rejected by the FERC -- no analysis was produced to support these changes (which it clearly should not), the proposed tariff language is vague, ambiguous, unwieldy and, in some instances, does not even appear to effectuate the NYISO Staff's proposal as stated in its presentation. Thus, at a minimum, USPG respectfully requests that the NYISO Board direct its Staff to review the draft tariff language with Market Participants and make necessary revisions before it is submitted to the FERC.

A. The Board Should Not Support Material, One-Sided Market Rule Changes That Are Bereft of Any Underlying Analysis

In 2008, the FERC approved a comprehensive set of supplier side and load side mitigation measures, the vast majority of which were proposed by the NYISO itself and supported by its independent market monitor, Dr. David Patton. In its order, the FERC held that such rules "improve the mitigation that exists today and are otherwise just and reasonable because they prevent sellers with market power from artificially raising capacity prices and prevent net purchasers from artificially depressing capacity prices with uneconomic generation."⁵ Throughout both its March and September Orders, the Commission emphasized the need to balance the supplier side and load side measures to ensure that long term reliability was promoted.

Just two years later, NYISO Staff has come forward with substantial changes to the load side mitigation rules only. First, as more completely addressed in the IPPNY Appeal, the proposed rule changes will allow a new entrant to "class shop" for an exemption long after the time that it has made its investment decisions in direct contravention of the structure

⁵ See New York Independent System Operator, Inc., 122 FERC ¶ 61,211 (2008) ("March Order") at P 1. On rehearing, the FERC determined that the load side mitigation measures properly should be applied to all new entrants, not merely "net purchasers," holding, "We find that all uneconomic entry has the effect of depressing prices below the competitive level and this is the key element that mitigation of uneconomic entry should address." See New York Independent System Operator, Inc., 124 FERC ¶ 61,301 (2008) ("September Order") at P 29.

recommended by Dr. Patton and approved by the FERC.⁶ Second, the proposed rule changes will significantly undercut the duration that the Offer Floor is applied to new entrants rendering it likely that a resource will escape mitigation long before such resource is otherwise economic.⁷ Here, too, these rule changes undermine the Commission's clearly expressed intent in its March Order for the length of mitigation to match the roll off of the associated excess capacity produced by the new entrant.

At no stage has NYISO Staff or any other party identified flaws in the current structure. Nor did NYISO Staff at any point produce any analysis to demonstrate that the new provisions that it was proposing were just and reasonable. Indeed, notwithstanding repeated requests from members of the supplier community that the NYISO analyze the impact of such rule changes on the balance now in place in the New York City market to determine whether corollary rule changes were required on the supplier side, such requests went unanswered.

The development of these new rules -- right down to the stakeholder votes which were, once again on a core pocketbook issue, split along load and supplier lines⁸ -- is strikingly similar to the situation three years ago when the Management Committee passed a motion to reduce the New York City capacity market bid and price cap from \$105/kW-year to \$82/kW-year over supplier opposition. The one major difference now is that the NYISO's IMM unequivocally stated during the August 25th Management Committee meeting before the votes were cast, inter alia, that the NYISO Staff's proposed mitigation duration revisions were too lenient. Dr. Patton's recommendations, however, were to no avail. The motion passed anyway.

⁶ See IPPNY Appeal at 6-8.

⁷ See IPPNY Appeal at 4-6.

⁸ As noted supra, in the instant case, one traditional supplier did vote in favor of these rule changes. However, that supplier will be subject to the load side mitigation test, and thus, it appears that it was in its vested interest to attempt to relax the rules for its own benefit. Even if that supplier had cast its vote against the proposal, Motion #5 still would have passed.

Suppliers then -- as here -- correctly called foul. Expressly finding that the NYISO had wholly failed to offer cost support and sufficient economic justification to support their \$82 proposal, the FERC rejected the NYISO's \$82 filing outright.⁹ History need not repeat itself.

B. Eliminating the Three Year Minimum Duration for the Offer Floor Would Only Serve To Further Erode the Load Side Mitigation Rules

In their Appeal, the Indicated TOs assert that as long as capacity is economic for the "equivalent of 12 months," the Offer Floor should not apply to such capacity.¹⁰ According to the Indicated TOs, Con Edison and LIPA sponsored a motion to eliminate the three year minimum duration period to "rectify this situation." The Management Committee did not support this motion.¹¹ Given that such additional rule change would, in fact, further erode -- not foster -- the ongoing sustainability of the capacity market in New York City, the NYISO Board should not support this change.

The Indicated TOs have wholly failed to counter two critical facts. First, the three year minimum duration period is in place in the current tariffs. No market participant has demonstrated that it is not adequate to meet its intended purpose or that it is flawed. Second, the minimum duration rule was designed to be -- and, by its very nature, is -- self-correcting. If a resource is actually economic, its bid at 75% of Net CONE will allow it to clear the market and sell its capacity. If the resource cannot clear the market at that level, continued mitigation -- in the form of being unable to sell such capacity and artificially suppress the market clearing price - - remains both appropriate and necessary.

⁹ See New York Independent System Operator, Inc., 118 FERC ¶ 61,182 (2007) at PP 13, 17.

¹⁰ See Indicated TOs Appeal at 3-5. In an attempt to support this additional rule change, the Indicated TOs assert that the three year rule "creates a significant financial penalty" by requiring loads to: (i) pay higher prices; and (ii) pay twice for capacity. The FERC already addressed and rejected these very same arguments in the In City ICAP Proceeding. See, e.g., March Order at PP 89, 103.

¹¹ Id. at 3.

Indeed, in its presentations, NYISO Staff asserted that the entirely new (and entirely unsupported) “equivalent of 12 months” principle -- i.e., the ability to sell less than the full capacity of the unit but for longer than 12 months and still satisfy the mitigation test -- only withstood scrutiny when coupled with the 3 year minimum duration rule. Having voted to approve those provisions, the Indicated TOs’ current efforts to undermine these very same provisions by advancing this additional proposed rule change will further erode the load side mitigation provisions. Thus, it cannot be countenanced.

C. The Proposed Draft Tariff Language Requires Additional Review and Clarification

As noted in the IPPNY Appeal, after NYISO Staff was unable to clearly respond to the concerns raised by Dr. Patton with respect to how the retesting rules would apply to partial CRIS rights, the MC motion on this topic was modified by friendly amendment to eliminate partial CRIS rights consideration.¹² However, it is unclear what, if any, proposed tariff language was correspondingly eliminated or what, if any, provisions regarding retesting remain. In addition, as further noted in the IPPNY Appeal, given the lack of adequate review of the tariff provisions, it is quite likely that these provisions will not actually implement the concepts that were approved.¹³

During the MC meeting itself, at least one supplier proposed to limit the motion to a vote on the concepts only but NYISO Staff was opposed to this approach.¹⁴ If the Board ultimately elects to support these concepts notwithstanding their inherent flaws identified by the IMM as well as the IPPNY Appeal (which it should not), the Board must step in to ensure that the

¹² See IPPNY Appeal at 3-4.

¹³ Id. at n. 2.

¹⁴ Voting on the concepts alone and establishing that the proposed tariff language to effectuate such concepts will be reviewed and approved by the Management Committee and Business Issues Committee Chairs and Vice Chairs is a longstanding approach that has been used for countless MC motions over the past ten years.

proposed tariff provisions that are filed at the FERC, in fact, effectuate these concepts. Thus, the Board should remand the proposed tariff language back to the stakeholder process for further review and much needed clarification.

We illustrate deficiencies in the proposed tariff language by way of an example.¹⁵ Proposed section 23.4.5.7.3 provides that entities in the then current Class Year qualify as “Examined Facilities.” However, proposed section 23.4.5.7.3 also provides that an entity that is an “expected recipient” of transferred CRIS Rights qualifies as an “Examined Facility.” Proposed section 23.4.5.7.3.2 provides that the NYISO will compute the reasonably anticipated ICAP Spot Market Auction forecast price by, inter alia, including all Examined Facilities. Given these provisions, what happens if an entity is not yet under consideration as part of a Class Year but secures transferred CRIS Rights? Does that entity leap frog ahead, i.e., can it be considered for an exemption even though it has not yet made its way through the Class Year process? Or does its presence simply count when establishing the auction forecast price for those who are currently in the Class Year process? The answer is anything but clear. In fact, the entire process -- if it can even be characterized as such -- is confusing. What is abundantly clear, however, is that the answer -- whatever it is -- is likely to have major ramifications on exemption determinations in the future.¹⁶

These shortcomings in the tariff language are likely due, in large part, to the inadequate review of these provisions to date. For example, the “Examined Facilities” concept addressed above was not even mentioned in the initial BIC presentation disseminated to Market

¹⁵ Other examples abound. However, in the interests of brevity, USPG proffers this example to highlight the insufficiency of the proposed tariff language.

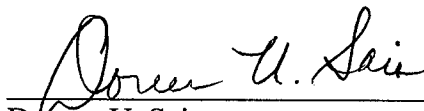
¹⁶ With the Management Committee discussion of this agenda item sounding much more like a preliminary Working Group discussion with many questions left unanswered by NYISO Staff, it can be no wonder that the proposed tariff language does not hold together.

Participants for the August 4 BIC meeting.¹⁷ In fact, it did not become a defined term until the NYISO issued a revised presentation on August 1st. Moreover, while the August 1st BIC presentation addressing these issues stated that NYISO Staff would review the proposed tariff language with Market Participants in advance of the Management Committee,¹⁸ it never did so.¹⁹

CONCLUSION

For the reasons set forth herein and, in more detail, in the IPPNY Appeal, USPG respectfully requests that the NYISO Board: (i) decline to endorse the load side mitigation changes set forth in Motion #5; and (ii) at a minimum, return the draft tariff language to the stakeholder process for further review and clarification.

Respectfully submitted,



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¹⁷ http://www.nyiso.com/public/webdocs/committees/bic/meeting_materials/2010-08-04/Agenda_10_Exemption_Determination_and_Duration_of_Offer_Floor.pdf

¹⁸ http://www.nyiso.com/public/webdocs/committees/bic/meeting_materials/2010-08-04/Agenda_08_09_Revised_In-City_Buyer-Side_Mitigation_Measure.pdf

¹⁹ The only review of proposed draft tariff language took place at the July 27, 2010 ICAP Working Group meeting. However, the NYISO proposal changed substantially between that meeting and the August 25 MC meeting, making such tariff review outdated and insufficient.