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February 27, 2004

VIA HAND DELIVERY

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

Re: Appeal of Management Committee Decision

Dear Chairman Boston:

Multiple Intervenors, an unincorporated association of approximately 55 large commercial and industrial energy consumers with manufacturing and other facilities located throughout New York State, hereby submits the original and three copies of its Motion in Opposition to the appeal by the Independent Power Producers of New York, Inc. of the February 4, 2004 decision by the Management Committee to approve modifications to the ISO Agreement and Management Committee By-Laws providing voting rights to Demand Response Providers and Distributed Generators.

If you have any questions concerning this filing, please call me at (518) 320-3409.

Very truly yours,

COUCH WHITE, LLP

Michael B. Mager

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Enclosures
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MOTION OF MULTIPLE INTERVENORS
IN OPPOSITION TO THE APPEAL OF
THE INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.

Multiple Intervenors, an unincorporated association of approximately 55 large commercial and industrial energy consumers with manufacturing and other facilities located throughout New York State, hereby submits to the New York Independent System Operator, Inc. (“NYISO”) Board of Directors (“Board”) its Motion in Opposition to the appeal filed by the Independent Power Producers of New York, Inc. (“IPPNY”) on February 19, 2004 (“Appeal”). The Appeal challenges the decision of the Management Committee (“MC”), at its February 4, 2004 meeting, to approve the proposal advanced by the By-Laws & Governance Subcommittee (“Subcommittee”) modifying the ISO Agreement and the MC By-Laws to define Demand Response Providers (“DRPs”) and Distributed Generators (“DGs”) and establish rules governing the voting sector designations applicable to those entities (“Proposal”).¹ For the reasons set forth below, the Board should deny the Appeal.

This Motion in Opposition is organized into three sections. In Section I, Multiple Intervenors supplements IPPNY’s cursory description of the Proposal and highlights briefly the substantial efforts undertaken by the Subcommittee with respect thereto. In Section II, Multiple Intervenors demonstrates why the Proposal is reasonable and should be affirmed by the Board. In Section III, Multiple Intervenors demonstrates that the arguments advanced by IPPNY in the Appeal are without merit and should be rejected.

¹ Five members of Multiple Intervenors – Alcoa Incorporated, IBM Corporation, Occidental Chemical Corporation, Praxair Inc. and Xerox Corporation – are active members of the MC.

I. The Proposal Approved by the MC

In the Appeal, IPPNY summarized the Proposal and its specific objections thereto in a cursory manner, choosing instead to argue that the purportedly “precarious balance” of the NYISO’s existing governance structure has been placed in jeopardy by the MC’s actions. Before demonstrating the lack of merit of IPPNY’s arguments, the Board should understand exactly how the Proposal works, as well as the considerable amount of work that went into formulating the Proposal and achieving broad consensus for it.

The Proposal defines and establishes sector designations for DRPs and DGs. There is no known opposition to the proposition that DRPs and DGs should be permitted to participate in the NYISO’s governance process. Although Multiple Intervenors disagrees with IPPNY’s assertion that DRPs and DGs currently are precluded from participating in the existing governance process (Appeal at 2), it does share with the NYISO and other parties the general belief that the voting rights of these entities should be made explicit.

The Proposal defines a DRP as: “An entity that does not own Demand Side Resources but is qualified pursuant to ISO Procedures to submit aggregated bids for Demand Side Resources into ISO demand response programs”² Importantly, DRPs, as defined, are not the actual owners of Demand Side Resources. Thus, End-Use Consumers that own Demand Side Resources would not qualify as DRPs. Rather, DRPs are aggregators or suppliers of Demand Side Resources, and in this respect are comparable (if not identical for

² The term “Demand Side Resources” is defined in the Proposal as: “Resources located in the NYCA that are capable of reducing demand in a responsive, measurable and verifiable manner within time limits, and that are qualified to participate in competitive Energy markets pursuant to ISO Tariffs and the ISO Procedures.”

all relevant purposes) to aggregators or suppliers of “Supply Side Resources.” Accordingly, the Proposal assigns DRPs to the Other Suppliers sector for voting purposes.

The Proposal defines a DG as: “A facility, existing or under construction, for the generation of electricity that is or will be connected at the distribution level, typically located on the End-Use Consumer’s side of the consumption meter, and usually located at or near the intended place of use for at least some of the facility’s output.” DGs also are designated as Other Suppliers for voting purposes, subject to two important exceptions. First, if the DG is owned by an End-Use Consumer or its Affiliate, and the primary purpose of the DG is to supply energy or capacity to that End-Use Consumer, then the DG shall vote in the End-Use Consumers sector. Second, if the DG is owned by an entity that is not an Affiliate of an End-Use Consumer, and its primary purpose is to sell energy or capacity into the grid, then the DG shall vote in the Generator Owners sector.³

The Proposal advanced by the Subcommittee essentially places DRPs and DGs in the same voting sectors that the NYISO most likely would assign them had the Proposal not been approved by the MC. In recognition that limited factual circumstances may arise where the specified voting designations are subject to question, the Proposal also is subject to the NYISO’s existing challenge procedures governing sector designations. Thus, if a party such as IPPNY contends that application of the Proposal would result in a DRP or DG being assigned to an inappropriate sector, that party possesses the right to challenge the sector designation.

³ Thus, where a DG is more akin to an End-Use Consumer or a Generator Owner, it will be assigned to that sector and not the Other Suppliers sector. Importantly, however, where a DG is not affiliated with the End-Use Consumer and its primary purpose is to sell energy and/or capacity to the End-Use Consumer and/or third parties, the DG appropriately is assigned to the Other Suppliers sector.

The Board also should be aware that the Proposal advanced by the Subcommittee and approved by the MC (with over 65% of the vote) was the product of extensive deliberations and negotiations by interested parties, including IPPNY and some of its members. The Subcommittee worked on the subject matter of the Proposal for over eight months prior to the February 4th MC meeting. Numerous parties, including Multiple Intervenors, compromised their positions on many issues in an effort to achieve the consensus Proposal. For several months, there appeared to be very broad support within the Subcommittee that (i) DRPs should be designated as Other Suppliers, and (ii) most DGs should be designated as Other Suppliers, but that provisions were needed to address the possibility that certain DGs may be more akin to End-Use Consumers or Generator Owners. Indeed, following the January 23, 2004 meeting of the Subcommittee, it was the understanding of Multiple Intervenors and others in attendance that IPPNY supported the Proposal, which it had a significant role in drafting.⁴ In sum, the Proposal is the result of an open and extensive collaborative process.

II. The Proposal Is Reasonable and Should Be Affirmed

The Proposal approved by the MC is reasonable. As detailed above, DRPs are aggregators and suppliers (but not owners) of Demand Side Resources. As suppliers of energy products, DRPs are precisely the type of entity that was intended to populate the broadly-defined Other Suppliers sector. The ISO Agreement defines Other Supplier as: “A Party that is a seller, buyer, broker, aggregator, ... ESCO or transmitter of capacity or energy

⁴ In fact, many compromises requested by IPPNY and its members were reflected in the Proposal, including, but not limited to, (i) narrowing the circumstances pursuant to which a DG could be designated as a Generator Owner and (ii) expanding the circumstances pursuant to which a DG could be designated as an End-Use Consumer.

in, from or through the New York Control Area” (ISO Agreement at § 1.96.) DRPs satisfy this definition. DRPs are sellers, brokers and aggregators of capacity and energy provided by owners of Demand Side Resources, and also qualify as ESCOs.⁵ DRPs currently sell capacity and energy supplied by Demand Side Resources, often in the form of curtailed demand and energy, through the NYISO’s demand response programs. Thus, they already satisfy the definition of an Other Supplier.

Moreover, because DRPs market and sell Demand Side Resources, their interests generally are akin to Generator Owners and Other Suppliers in that they can be expected to benefit from higher energy and capacity prices. Indeed, representatives of DRPs have confirmed in meetings of the Subcommittee that the financial interests of the entities they represent are best served by higher energy and capacity prices.

Similarly, DGs that do not qualify as End-Use Consumers under the Proposal can be expected to possess interests extremely similar to Generator Owners and Other Suppliers. Such entities would not be affiliated with the End-Use Consumer at the site, but would sell energy and/or capacity to that End-Use Consumer and/or third parties (e.g., other End-Use Consumers, Transmission Owners). Such a DG indisputably satisfies the definition of Other Supplier in that it is a “seller ... or transmitter of capacity or energy in, from or through the New York Control Area.” (ISO Agreement at § 1.96.) Many DGs also could be expected to satisfy the definition of a Generator, which is a facility that: “(a) is located in the NYCA, or (b) is supplying capacity to the NYCA, or (c) ... has filed an application for siting approval pursuant to Article X of the New York State Public Service Law, or other

⁵ An ESCO is defined in pertinent part as: “a retail load aggregator or provider of comprehensive energy services, serving customers in New York State.” (Id. at § 1.33.)

applicable law, which is deemed complete by the Article X Board of other such agency”
(Id. at § 1.38; emphasis added.)⁶

Moreover, with the exception of DGs that would be designated as End-Use Consumers under the Proposal, all other DGs can be expected to favor higher energy and capacity prices. Indeed, representatives of DGs confirmed in Subcommittee meetings that the financial interests of the entities they represent are best served by higher energy and capacity prices.

The MC’s decision to approve the Proposal should be affirmed by the Board for many reasons. First, the Proposal satisfies a goal shared by the NYISO and most market participants; to wit: the adoption of provisions expressly reflecting the rights of DRPs and DGs to participate in the NYISO as voting members. Second, as detailed above, the Proposal is reasonable, and succeeds in assigning DRPs and DGs to the most appropriate sectors for voting purposes. Third, the Proposal maintains the equitable balance inherent in the existing NYISO’s governance process because DRPs and DGs will be assigned to sectors that are consistent with their role in the market and likely voting interests. Fourth, the process that was employed in this instance is above reproach and should instill confidence in the outcome – the Subcommittee spent over eight months striving to resolve an issue in a manner that the MC found overwhelmingly to be both balanced and reasonable.

⁶ In contemplation of IPPNY supporting the Proposal, other members of the Subcommittee agreed as part of the Proposal to exclude DGs from the current definition of Generator. This section of the Proposal was, like many others, drafted by IPPNY and reflected a compromise made in response to IPPNY’s stated desire of limiting the ability of DGs to populate the Generator Owners sector.

III. IPPNY's Arguments on Appeal Are Without Merit

IPPNY's arguments on appeal consist primarily of unfounded assertions regarding the alleged "precarious balance" inherent in the NYISO's existing governance process and how the Proposal approved by the MC allegedly would upset that balance in an inequitable manner. At no time does IPPNY proffer any detailed analysis of the Proposal, or explain why its adoption would not be reasonable. For the reasons set forth below, the arguments advanced in the Appeal are without merit and should be rejected by the Board.

Initially, with a broad brush IPPNY characterizes all entities in the End-Use Consumers, Public Power/Environmental Parties, and Transmission Owners sectors as "Load" and asserts that those entities routinely vote as a block to thwart the interests of Generator Owners. This claim cannot withstand scrutiny. First of all, it does a disservice to all market participants to lump different sectors together and impugn their voting records. And, more importantly, the facts do not support the claim. The "Load" sectors, as characterized by IPPNY, routinely vote in different directions. In fact, on many votes there is a lack of uniform voting even within those individual sectors. For example, the public power entities in the Public Power/Environmental Parties sector own or control substantial generation assets and often side with Generator Owners and Other Suppliers. Similarly, the Transmission Owners often possess interests different from Load, and the voting patterns reflect those differences. Even on the controversial demand curve vote, which IPPNY cites to as proof-positive of a Load cabal (Appeal at 3), the "Load sectors" did not vote in unison, and there were dramatic splits within each of the sectors. The bottom line is that sector voting cannot be pigeon-holed in the manner that IPPNY suggests.

The NYISO's existing governance structure has worked well for some period of time; in fact, the structure has helped forge a market design that is held up as a model for other regions of the country. Importantly, the Proposal does nothing to shift the existing balance of power in any direction. Instead, consistent within the existing model, it assigns DRPs and DG to the sectors that are most appropriate.

IPPNY then alleges that because DRPs and DGs often serve End-Use Consumers, those entities will be pressured to vote in a manner consistent with the wishes of End-Use Consumers. (Appeal at 4.) This argument lacks any factual support. It is likely that many DRPs and DGs will have contractual relationships with End-Use Consumers. However, it does not follow that, due to those relationships, DRPs and DGs will be coerced to vote against their own business and financial interests. The Board need only examine the financial interests of DRPs and DGs to realize the fallacy of IPPNY's arguments. With the limited exception of DGs who would be assigned to the End-Use Consumers sector under the Proposal, DRPs and DGs have a strong financial interest in higher prices, as attested to by their representatives at Subcommittee meetings.

IPPNY further argues that DRPs and DGs "inadvertently were overlooked when the categories and voting thresholds were developed for the NYISO." (Appeal at 5.) IPPNY's argument has no relevance to the Proposal. While DRPs may not have been envisioned specifically prior to formation of the NYISO, as detailed above the eligibility criteria for the Other Suppliers sector were defined broadly to accommodate entities such as DRPs (e.g., sellers, aggregators, ESCOs). Moreover, there is no evidence that DGs were not contemplated at the time of NYISO formation, and it is indisputable that DGs that would be assigned to the Other Suppliers and Generator Owners sectors under the Proposal would

qualify as such under the existing eligibility criteria for those sectors. (See ISO Agreement at §§ 1.38, 1.96.) The Proposal approved by the MC properly assigns DRPs and DGs to the sectors most consistent with their role in the market and likely business interests.

IPPNY also argues that because “Load entities are the primary beneficiaries of the positive impacts that will accrue from increased participation in NYISO markets by DRPs and DGs” (Appeal at 5), the Proposal should be rejected in favor of a requirement that all sectors contribute voting shares to develop a sub-sector for DRPs and DGs. (Id. at 5-6.) This argument should be rejected. As demonstrated above, the financial interests of DRPs and most DGs (i.e., DGs that would not be assigned to the End-Use Consumers sector under the Proposal) are in higher – not lower – prices. While End-Use Consumers may benefit from increased competition if DRPs and DGs enter the market, the exact same thing occurs when a new Generator enters the market. End-Use Consumers and Public Power/Environmental Parties and Transmission Owners should not have to sacrifice voting shares to entities that are the same as or akin to Other Suppliers and Generator Owners (which already possess the largest voting shares under the existing structure).

Finally, in its Appeal, IPPNY references continuing discussions on the issues addressed herein. (Appeal at 6-7.) The Board should not refrain from ruling on the Appeal to accommodate such discussions. IPPNY presented an alternative to the Proposal at the February 24, 2004 meeting of the Subcommittee, but there was no evidence of additional support for it. It is likely that IPPNY’s alternative or some variation thereof will be considered at the March 2, 2004 MC meeting. Given the MC’s approval of the Proposal and the lack of additional support for IPPNY’s alternative within the Subcommittee, Multiple

Intervenors does not expect the MC's prior action to be modified. Thus, after the MC meeting, the Board will be in a position to act on the Appeal.

Over 65% of the MC approved the Proposal, which was the product of numerous compromises and over eight months of deliberations in the Subcommittee. Every reasonable effort was undertaken to reach a broad consensus that included IPPNY. However, as demonstrated herein, the decision by IPPNY and its members to oppose the Proposal does not detract from its merits. The governance process worked well here, and the Proposal approved by the MC is balanced and reasonable. The Board should affirm the MC's decision.

Dated: February 27, 2004
Albany, New York

Respectfully submitted,

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