

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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March 16, 2011

HAND DELIVERED

Ms. Karen Antion

Chairwoman, NYISO Board of Directors

c/o: Mr. Stephen G. Whitley

President and CEO

New York Independent System Operator, Inc.

10 Krey Boulevard

Rensselaer, New York 12144

Re: Appeal of the Management Committee's decision at its February 24, 2011 meeting rejecting a motion to amend the NYISO's tariffs to provide a structure and funding mechanism for an end use consumer sector consultant

Dear Chairwoman Antion:

Attached please find the Motion in Support by the Staff of the New York State Department of Public Service to the Notice of Appeal filed by the New York State Consumer Protection Board regarding the above-referenced matter. Should you have any questions, please do not hesitate to contact me at (518) 474-1585.

Very truly yours,

A handwritten signature in black ink that reads 'Alan T. Michaels'. The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Alan T. Michaels
Assistant Counsel

**MOTION IN OPPOSITION
OF THE STAFF OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE**

INTRODUCTION

The Staff of the New York State Department of Public Service ("NYDPS") hereby respectfully submits this motion in support of the New York State Consumer Protection Board's ("CPB") Appeal of the Management Committee's Rejection of Tariff Amendments Authorizing Funding of an End Use Consumer Sector Consultant, filed on March 10, 2011. The CPB's appeal seeks further consideration to the funding of a Consumer Sector Consultant. The NYDPS supports the CPB's appeal.

BACKGROUND

The concept of having a Consumer Sector Consultant has gained significant support in recent history. Experts in the electricity field have discussed the need for enhanced participation by end-users. State and federal regulators have also recognized this need, and have articulated support for additional representation of consumers at Independent System Operators and Regional Transmission Organizations ("ISOs/RTOs"). The New York market is no exception; experts and regulators have pointed to a need for additional participation from end-users in the market.

Chairman Jon Wellinghoff of the Federal Energy Regulatory Commission ("FERC") has publicly advocated for this addition to market system operators' deliberative processes; FERC stated more directly in Order 719 that market operators would have to take meaningful steps to address the lack of consumer representation.¹ At the state level, the New York State legislature proposed a bill last year to provide for consumer representation at the NYISO.² A similar bill has again been proposed in the Senate and Assembly this year.³ Members of the Public Service Commission ("NYPSC") have also strongly advocated for better consumer representation, particularly at sessions during the summer of 2010.

On July 15, 2010, during a formal session, Commissioner Robert E. Curry explained the recognized need for additional participation and his support for an end-user representative. He referred to a study prepared by the United States Government Accountability Office which made a number of conclusions demonstrating a need for additional input from consumers. The study indicates that stakeholders representing consumers expressed concern that ISOs/RTOs failed to adequately take into account the affect of their decisions on consumer prices.⁴ The

¹ See, Order No. 719, 18 C.F.R. Part 35 at P.481 (2008).

² 2010 NY Assembly Bill A11500; sponsored by Members of Assembly Brodsky and Cahill.

³ 2011 NY Senate-Assembly Bill S3307, A5307; sponsored by Senator Maziarz and Assembly Member Cahill.

⁴ See, Case No. 10-E-0160, *The New York Independent System Operator's Petition under Public Service Law §69 for Authority to Incur Indebtedness for a*

study further showed that ISO/RTOs have numerous and simultaneous issues under consideration, and stakeholders state they are unable to attend all meetings they would like due to resource constraints.⁵ Stakeholders believe their level of participation determines their influence on ISO/RTO decisions.⁶

In addition to citing to the GAO study, Commissioner Curry quoted a New York Independent System Operator ("NYISO") study prepared by Sue Tierney providing a Ten-Year Review of the NYISO. Commissioner Curry quoted,

"it is also true that a high degree of frustration still colors public attitudes about high electricity prices in New York State. This frustration is often directed at the NYISO due to a sense among many observers that 'markets' - rather than consumers - see the benefits of power production efficiency gains. Although economists will tend to say that a more efficient market will produce savings for consumers, relative to a less efficient market, many of New York's market participants and external observers raise concerns about whether consumers (rather than owners of generators) are seeing an adequate share of the savings."⁷

From these studies, Commissioner Curry concluded, "what each of these reports indicates is that the expectation not yet met of the ratepayer is that the money that he or she shells out for

Term in Excess of 12 Months, at p.23 li. 3-6 (July 15, 2010). See also, United States Government Accountability Office, *Report to the Committee on Homeland Security and Governmental Affairs, U.S. Senate, Electricity Restructuring*, at 6, 34 (Sept. 2008). (Hereinafter, "GAO Study").

⁵ GAO Study at 31.

⁶ GAO Study at 34.

⁷ Case No. 10-E-0160 at 23, *quoting*, Susan F. Tierney, Ph.D, *The New York Independent System Operator: A Ten-Year Review*, at 30 (April 12, 2010).

electricity is prudently and appropriately expended."⁸

Commissioner Curry continued stating this is significant because there is no direct ratepayer participation in the market process.⁹ Based on the studies and observations, Commissioner Curry concluded that there are numerous NYISO committees and hundreds of meetings, and "the ratepayer does not have a seat at the table."¹⁰

Commissioner Patricia L. Acampora publicly shared her support for a consumer representative at the NYISO during the same July 2010 Session. "[W]e're asking the ISO to also take their responsibility seriously in balancing the benefits of the people who do make money and the ratepayers who put out a lot of money," she said. "And I think it's not asking too much to again make sure that ratepayers are represented, so that there is that equality of the balancing act that we experience every day here and that they should also be doing at the ISO."¹¹

Chairman Brown also commented stating that ratepayers do not have the resources to match those of other market participants.¹² The NYPSC recognized the need for additional consumer representation at the NYISO.

⁸ Case No. 10-E-0160 at 23.

⁹ *Id.*

¹⁰ *Id.* at 24.

¹¹ *Id.* at 29.

¹² Case No. 10-E-0160 at 27.

On December 6, 2010, CPB gave a presentation to the Market Issues Working Group at the NYISO, providing an initial review of funding a Consumer Sector Consultant, the position, and its role at the NYISO. When finished with the presentation, the CPB held an open discussion, and accepted questions and comments about the proposal. The CPB incorporated comments made, and gave a second presentation further in pursuit of a consumer consultant position at the NYISO. The proposal failed in a vote at the Business Issues Committee, and it was raised to the NYISO Management Committee. On February 24, 2011, the Management Committee held a meeting, and voted to hold a secret ballot on the proposal for a consumer consultant. Subsequently, a secret vote was held on the proposal itself, which failed. The CPB received a vote of 28% in favor of the proposal.

ARGUMENT

The NYDPS supports the CPB's appeal for the reasons stated within the CPB's submission, and further supports the CPB's presentation to the NYISO of the consumer consultant proposal. In addition, the NYDPS emphasizes the benefits of establishing the consumer consultant position. Lastly, arguments made against the position must be addressed.

I: Providing for an End-Use Consumer Consultant in the NYISO Tariff Will Benefit All Participants

Each participant in the market must recognize the benefit of hiring a consumer consultant. The end-user receives access

to expertise and a voice in the market. At a minimum, the consumer may be better informed, and therefore more confident in the operations and decisions of the electricity market.

Those potentially in opposition to the perspective of the end-user will also gain a benefit from a consumer consultant. An additional voice leads to a more robust discussion; it provides additional knowledge and perspective in a marketplace of ideas. Positive communications at the market forum may resolve issues and may avoid future litigation. To vet discussions at NYISO Committee meetings and negotiate within the market can be far more cost-effective than litigation.

The NYISO itself will also benefit. Establishing a consumer consultant will raise the public awareness and trust for the NYISO. This boost in credibility would come during a time when the NYISO has been scrutinized by state legislators and the media.

II: The Adverse Vote on February 24, 2011 Undermines the Legitimacy of the NYISO Decision-Making Process

The recent secret vote disapproving the funding and creation of an End Use Consumer Consultant has harmed the credibility of the NYISO and its participants. Since participants chose to hold the vote in secret, there lies an implication that the majority who voted against the proposal understood that their vote had negative implications.

III. Objections Raised

During the CPB's presentation on December 6, 2010, some issues of concern were raised in objection to the consumer consultant. Below are offered responses to these concerns.

A. Some Participants Pay, but Have no Access

During the CPB presentation, participants questioned whether it was appropriate to charge Energy Service Companies ("ESCOs"), transmission companies ("TOs") and municipalities for a consultant for the end-use sector. These three groups may at times have an opposing view to the position of the consumer consultant, and they will not have access to the consultant's expertise.

However, the cost of the position is expected to be paid by the end-use consumer. It is a pass-through cost, one to be charged directly to the consumer. Moreover, if the consumer consultant assists in the representation of the end-user in the New York market, his/her voice is likely to save the consumer more money than it costs. This cost-effective charge to the consumer, spread over the end-use sector, will cost each individual a minimal amount per year,¹³ and will add representation and expertise to the market forum.

¹³ According to the CPB presentation of December 6, 2010, authority to spend \$350,000 for the consumer consultant would equate to \$0.002 per KWh withdrawn.

B. Overlap with Liaison

Another argument raised was that the proposal is redundant, for a consumer liaison has already been created at the NYISO. Opponents suggested the NYISO should wait, determine whether the liaison is effective, and whether there is a need for additional support for the end-user.

The argument fails to appreciate the significant differences between the positions of liaison and consultant. While the liaison keeps the end-user sector informed of important events, s/he will not represent or provide needed expertise to benefit the consumer. The liaison is substantially clerical in nature, assisting with the administration of a calendar of events. The consumer consultant represents more; s/he will appear at meetings and speak on behalf of consumers. The consumer consultant will further assist in market issues, and using his/her expertise, will provide guidance in the complex electricity market. Though coordination will assist both the liaison and the consumer consultant, the two positions are very different.

C. Legislative Prerogative

Another argument is that the NYISO is an improper forum to create a consumer consultant, and the legislature should act instead. However, it is the NYISO who was established to know the market best and its needs. There is no better forum to

establish a well-thought, defined, and crafted position of consumer consultant. Having the position legislated from outside the NYISO may cause the creation of multiple positions that are different from what has been proposed by market participants. The legislature may have something very different in mind, like multiple advocates, rather than one consultant, to provide even more support and a stronger voice to the end-use sector. Legislation may even, and has, called for the appointment of multiple consumer representatives to the Board. The most appropriate forum for the creation of the position of a market consultant at this juncture is from the market and its stakeholders themselves.

D. Slippery Slope

Opponents of a consumer consultant argued that once this position is created, other participant groups will ask for their own consultants.

The "slippery slope" argument defies logic. The present proposal has the end-user paying for its own consultant. Therefore, for another group to use this proposal as precedent, they would need to pool their resources and hire a consultant, and it seems unlikely that they would do so through the NYISO. Lastly, if a proposal is brought before the NYISO to provide additional assistance to another market participant, it is expected the proposal will be thoroughly reviewed in turn.

Without a proposal before the NYISO, it is impossible to argue against its merits. If an additional proposal is submitted, it is hoped to receive as much attention and scrutiny as the present proposal for a consumer consultant.

CONCLUSION

Based upon the foregoing, the NYDPS respectfully requests that the CPB's Appeal of the Management Committee's Rejection of Tariff Amendments Authorizing Funding of an End Use Consumer Sector Consultant, should be granted. Further consideration should be given to the position of a Consumer Sector Consultant. The need has been voiced by state and federal regulators, legislators, and market participants.

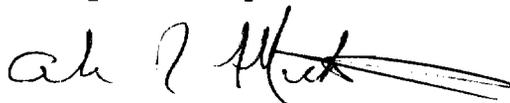
A consumer consultant would add to the voice of the end-user, providing a more robust discussion at the NYISO. The proposal's cost is minimal to the end-user, and may be more cost-effective than the charge. There is no position at the NYISO that provides this type of expertise, voice, and assistance to the consumer. The proposal is proper to come from the NYISO; it is an internal issue, one that may have a remedy from inside the market, rather than forced upon the NYISO by outside politicians. The proposal represents a pass-through cost; since the position is paid for by the consumer, there is no logical argument that others will ask for similar representation. If another group of market participants also

wants additional support, they may entertain paying for it themselves, as this proposal entails.

Therefore, the NYDPS respectfully supports the CPB appeal, and requests additional consideration be given to the position of a consumer consultant.

Lastly, it must be recognized that the NYISO Board has the authority to request FERC's approval of the position of a consumer consultant under § 206 of the Federal Power Act. Pursuant to the need for additional assistance for the consumer described by FERC and its Chairman, the NYISO Board should independently entertain creating an end-user consultant. It would be just and reasonable to pursue the establishment of a consumer consultant to ensure adequate representation of market participants, and it would be responsive to the comments of the New York State Commission, FERC and its Chairman.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alan T. Michaels", with a long horizontal flourish extending to the right.

Alan T. Michaels
Assistant Counsel
(518) 474-1585

