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PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of approximately 50 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits its Reply Comments on Phase II Issues in Case 06-M-1017.¹

On April 19, 2007, the New York State Public Service Commission (“Commission”) issued an Order Requiring Development of Utility-Specific Guidelines for Electric Commodity Supply Portfolios (“April 19th Order”) in this proceeding. Initial comments on “Phase II Issues” in response to the April 19th Order were due on June 5, 2007, and the filing deadline for reply comments is June 25, 2007. (See April 19th Order at 39.)

To date, Multiple Intervenors has received initial comments in response to the April 19th Order from the following parties: (a) AES Eastern Energy, L.P., Dynegy Power Corporation, Entergy Nuclear Power Marketing, L.L.C., the Mirant Parties and US Power Generating, LLC; (b) Central Hudson Gas & Electric Corporation; (c) the City of New York; (d) Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (“ConEd/O&R”); (e) Consolidated Edison Solutions, Inc. and Consolidated Edison Energy, Inc.; (f) Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; (g) Direct Energy Services, LLC; (h) FPL Energy LLC (“FPL”); (i) Hess Corporation; (j) the Independent Power Producers of New York, Inc. (“IPPNY”); (k) KeySpan Corporation; (l) Liberty Power; (m) the Long Island Power Authority; (n) the

¹ Case 06-M-1017, Proceeding on Motion of the Commission as to the Policies, Practices and Procedures For Utility Commodity Supply Service to Residential and Small Commercial and Industrial Customers.

Mirant Parties; (o) the New York Independent System Operator, Inc. (“NYISO”); (p) the New York Power Authority; (q) the New York State Consumer Protection Board; (r) New York State Department of Public Service Staff (“Staff”); (s) New York State Electric & Gas Corporation (“NYSEG”) and Rochester Gas and Electric Corporation; (t) the New York State Energy Research and Development Authority; (u) Niagara Mohawk Power Corporation d/b/a National Grid (“Niagara Mohawk”); (v) the NRG Companies (“NRG”); (w) Nucor Steel Auburn, Inc.; (x) the Retail Energy Supply Association and the Small Customer Marketer Coalition; and (y) SUEZ Energy North America, Inc.

In its Initial Comments, Multiple Intervenors advanced its positions on the Phase II Issues identified by the Commission in the April 19th Order. Those positions are incorporated by reference herein and will not be repeated. Rather, these Reply Comments are intended solely to address selected positions advanced by other parties that were not anticipated. Accordingly, Multiple Intervenors hereby responds to the following positions of other parties on Phase II Issues:

1. Multiple Intervenors supports ConEd/O&R’s proposal that if the Commission still is considering implementing substantial changes in energy policy following its evaluation of parties’ initial and reply comments, it first should conduct a thorough investigation and schedule further proceedings on the design of, and the goals for, any potential Integrated Resource Planning (“IRP”) process (Con Ed/O&R at 1-2);

2. Multiple Intervenors opposes Staff’s proposal that the Commission should establish a Dynamic Energy Planning Process (“DEPP”) in this proceeding (Staff at 2-8);

3. Multiple Intervenors supports the positions advanced by numerous parties that multiple barriers exist which discourage increased reliance on long-term contracts, and that no new incentives should be created to promote such contracts in the case of those barriers; and

4. Multiple Intervenors opposes the arguments of IPPNY, FPL and NRG that seek to condition the execution of long-term contracts upon the adoption of modifications to the NYISO's market rules intended to protect existing generators at the expense of consumers (IPPNY at 26; FPL at 6; NRG at 16-17).

ARGUMENT

POINT I

A THOROUGH INVESTIGATION AND FURTHER PROCEEDINGS SHOULD BE CONDUCTED BEFORE IMPLEMENTING SUBSTANTIAL CHANGES IN ENERGY POLICY

In its response to Question No. 1 in the April 19th Order, Multiple Intervenors asserted that the Commission should refrain from: (a) establishing an IRP process that is duplicative of, or conflicts with, existing planning efforts; and (b) implementing an IRP process unless its primary purpose is to reduce electricity prices paid by New York consumers while maintaining reliable service. (MI at 2-4).² In its initial comments, ConEd/O&R similarly express caution about the possible establishment of a new IRP process, and advocates that: "if the Commission desires to proceed with this inquiry and consider making a substantial change in State policy, it should order a thorough investigation

² See also MI at 8-9 (detailing how electricity prices in New York are not competitive with prices in the rest of the nation).

to first determine whether there are specific State public policy goals that are not currently being achieved and whether there is a need for changes in the policy concerning long-term contracts in order to achieve those goals.” (ConEd/O&R at 1-2.) Multiple Intervenors concurs with ConEd/O&R.

While compelling reasons have been advanced by many parties as to why the Commission should proceed very cautiously, if at all, with respect to an increased reliance on long-term contracts, further proceedings should be instituted before a substantial change in energy policy is adopted at this time. As numerous parties have recognized, the New York Independent System Operator, Inc. (“NYISO”) already engages in substantial planning efforts for reliability reasons, and soon may be engaging in increased economic planning activities. Moreover, there is substantial evidence that the Commission has been able to pursue public policy goals without the need for a new IRP process or increased reliance on long-term contracts; to wit: the Commission’s adoption of a System Benefits Charge, a Renewable Portfolio Standard, and, more recently, an Energy Efficiency Portfolio Standard.

As the State learned – or should have learned – following its disastrous experience with the Six-Cent Law, reliance on long-term electricity contracts has substantial, long-term financial risks to consumers.³ While there may be a limited, future role for such

³ See e.g. Cases 94-E-0098 and 94-E-0099, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric and Street Lighting Service, Opinion No. 98-8, Opinion and Order Adopting Terms of Settlement Agreement Subject to Modifications and Conditions (issued March 20, 1998) at 2 (detailing how the single largest contributor to Niagara Mohawk’s 25-35% rate increases was the utility’s long-term power purchase agreements, pursuant to which the utility paid over \$1 billion in 1995 alone), and 7 (summarizing how Niagara Mohawk, in an effort to obtain relief from some of its long-term power purchase agreements, agreed to pay, inter alia, approximately \$3.6 billion in cash and 46 million shares of its common stock). Any Commissioner or party not familiar with the enormous financial risks associated with long-

contracts if pursued cautiously, and only for purposes of reducing prices and/or maintaining reliability, the Commission, and consumers, would benefit greatly from further proceedings before energy policy is modified dramatically in this proceeding. In other words, if, after its evaluation of initial and reply comments herein, the Commission still desires to establish an IRP process reliant on long-term contracts, further proceedings should be implemented to examine, in greater detail, the following issues: (a) how an IRP process can avoid duplicating, and conflicting with, existing planning efforts; (b) the goals of the IRP (e.g., making electricity prices in New York more competitive); (c) under what circumstances should long-term contracts be pursued; (d) how long-term contracts can be achieved at the least cost and the lowest risk to consumers; and (e) how the cost of long-term contracts should be allocated to, and recovered from, customers.

POINT II

STAFF'S PROPOSED DYNAMIC ENERGY PLANNING PROCESS SHOULD BE REJECTED

In its initial comments, Staff advocates that the Commission adopt its proposed DEPP in this proceeding. For the reasons set forth below, Multiple Intervenors respectfully disagrees and recommends that the proposed DEPP be rejected. To the extent any IRP process is established, it should be (in contrast to the DEPP): (a) far narrower in scope; (b) implemented cautiously, not in an expedited manner; and (c) focused solely on reducing electricity prices to consumers while maintaining reliability.

term contracts should review, for example, the rate structures and prior Commission orders involving Niagara Mohawk and NYSEG – those utilities' customers already have paid, and continue to pay, billions of dollars in stranded costs related to above-market, long-term contracts.

Initially, Staff claims that its proposed DEPP is needed “to ensure that electric infrastructure needs are met on a cost-effective basis consistent with adequate protections for the environment and achievement of public policy goals.” (Staff at 4.) Multiple Intervenors is very concerned about how those goals actually would be achieved in practice. For instance, how is a “cost-effective basis” to be defined? What “adequate protections for the environment” are needed given the plethora of increasingly-stringent environmental laws and regulations already in existence governing the construction of energy infrastructure projects? What “public policy goals” would be pursued, and how would competing goals be prioritized? For the reasons detailed in its Initial Comments, Multiple Intervenors submits that the Commission would be best served focusing the resources that would be needed to implement the DEPP on lowering electricity costs to consumers; the State’s competitive disadvantage in terms of prices is substantial, growing, and a significant detriment to important economic development goals.

Staff’s proposed DEPP would involve enormous expenditures of resources, which could outweigh any benefits achievable by the process. Staff recognizes that the NYISO currently implements a comprehensive reliability planning process. (Staff at 5.) Nevertheless, Staff proposes a multi-track DEPP that would be conducted in addition to the NYISO’s process. What Staff refers to as “Track I” would be conducted every three years, and “evaluate long-term policy directions and strategies over a 15 to 20 year term.” (Id.)⁴ Staff’s “Track II” would be conducted annually, focusing on “a planning horizon of five years and would address the selection of resources needed to meet the goals established” in

⁴ About the only thing that is near certain with respect to the “energy world” of 15-20 years into the future is that predictions and projections made about it today are little more than guesses that will be inaccurate.

Track I. Although not denominated as a “Track,” Staff’s DEPP also contains an initial phase, involving the expedited establishment of an interim plan – to be developed by Staff – for all electric utilities four months after an order is issued herein. (Id. at 6.) This phase would “ensure that higher priority procurement efforts are commenced promptly” (id.), but Staff does not explain how various goals would be prioritized prior to the completion of Tracks I and II.

Thus, in addition to the NYISO’s current reliability planning and likely future economic planning efforts, Staff’s DEPP would require: (a) an expedited, interim planning process; (b) an annual planning process; and (c) a triennial planning process (which presumably would be conducted simultaneously with the annual planning process occurring every third year). The resources that would have to be devoted toward the DEPP by the Commission, Staff, the State’s electric utilities and interested stakeholders would be enormous and, Multiple Intervenors submits, could be better spent elsewhere (e.g., focusing on efforts to reduce the State’s noncompetitive electricity prices).

It also is unclear what impact Staff’s DEPP, if established, would have on the State’s wholesale electricity markets administered by the NYISO. As detailed in Multiple Intervenors’ Initial Comments, those markets can accommodate bilateral contracts and, therefore, a cautious approach to pursuing increased reliance on long-term contracts on a limited basis (i.e., to reduce prices and/or maintain reliability) should not interfere unduly with competitive markets, particularly if market forces continue to be accorded the first opportunity to address identified economic and reliability needs. (See generally MI at 5-11, 20-22.) However, the centralized approach seemingly endorsed by Staff’s DEPP, depending

on how it would be implemented, could reduce the likelihood of future market-based infrastructure development in the State.⁵

For the foregoing reasons, Staff's proposed DEPP should be rejected. To the extent the Commission concludes that some form of IRP should be established, further proceedings should be conducted to ensure that the process: (a) is not duplicative of, or in conflict with, existing planning efforts; and (b) is focused on reducing electricity costs to consumers while maintaining reliability.

POINT III

NUMEROUS BARRIERS EXIST TO INCREASED RELIANCE ON LONG-TERM CONTRACTING

In its April 19th Order, the Commission inquired as to: (a) what barriers, if any, exist that discourage increased reliance on long-term contracts for the development of new electricity resources; and (b) whether new incentives should be created to encourage entry into long-term contracts. (April 19th Order at 36-37; Question No. 5.) In its Initial Comments, Multiple Intervenors identified a number of barriers that discourage long-term contracts for the development of new electricity resources, and asserted that the Commission should refrain from creating any new incentives for utilities to enter into long-term contracts. (MI at 13-14.) Before adopting new policies reliant on long-term contracting, the Commission should evaluate carefully the numerous barriers that exist today. In light of those barriers, the Commission should proceed cautiously, and pursue long-term contracts on

⁵ If the Commission and/or Staff already has concluded that New York's wholesale electricity markets are broken irreparably, it should so state that conclusion. It is imperative that current problems and future goals be identified candidly if appropriate solutions are to be designed and implemented.

a limited basis and only in furtherance of a few critical goals; to wit: reducing electricity prices for consumers and maintaining reliability.

Initially, the sheer number of barriers to long-term contracting identified by the parties in this proceeding is staggering, and warrants the Commission proceeding very cautiously before establishing a new IRP that is heavily reliant on such contracts. The barriers identified include, but are not limited to: (a) the significant expense of long-term contracts; (b) the significant risks associated with long-term contracts; (c) cost recovery concerns; (d) the limited number of parties with sufficient loads and financial strength to enter into long-term contracts sufficient to cause the development of new generation; (e) the lack of a developed, forward market for electricity; (f) the absence of the former Article X electric generation siting process or a successor thereto; (g) governmental, legislative and regulatory uncertainties; (h) increasingly-stringent environmental requirements and related uncertainties; (i) the immaturity of restructured electric markets; (j) lack of confidence in estimates of future retail load; (k) debt equivalents are imputed to utilities entering into long-term contracts; (l) scarcity of land resources available for new generation in certain regions; and (m) the risk of losing load to other suppliers.

As asserted previously by Multiple Intervenors, notwithstanding the above-mentioned barriers, there may be a limited role for increased reliance on long-term contracts, if and when used to reduce prices and/or maintain reliability, preferably after according market forces an adequate opportunity to address such needs. However, because of the numerous barriers that exist, including the substantial financial risk to consumers and New York's poor track record with respect to long-term electricity contracts, the Commission should act very cautiously. The Commission should not, based solely on two rounds of

comments from interested parties (most of which oppose or express reservations about long-term contracting), establish a new, resource-intensive IRP process heavily reliant on pervasive long-term contracting.

Furthermore, the Commission should not attempt to create new incentives to overcome barriers to long-term contracting. The State's electric utilities already are obligated to advance regulated solutions – including but not limited to long-term contracts – in response to reliability needs identified by the NYISO where adequate, market-based solutions are not forthcoming. The utilities also will be obligated to comply with general policies adopted in this proceeding. Thus, no new incentives to promote long-term contracts are needed. Moreover, Multiple Intervenors is very concerned that any “new incentives” identified by parties – particularly utilities – would cause the costs and/or risks of resulting long-term contracts to consumers to increase, thereby exacerbating New York's overriding problem of exorbitant electricity prices.

POINT IV

LONG-TERM CONTRACTS SHOULD NOT BE CONDITIONED UPON THE ADOPTION OF MARKET RULE CHANGES INTENDED TO PROTECT GENERATORS AT THE EXPENSE OF CONSUMERS

In its Initial Comments, Multiple Intervenors asserted that long-term contracts (to the extent pursued) can be accommodated under the existing market structure and need not be “harmonized” in any particular manner. (MI at 20-22.) Many parties agree with this position, including Staff. (See, e.g., Staff at 21-26.) However, several parties, such as IPPNY, FPL and NRG, while agreeing that the existing market structure can – and already

does – accommodate long-term contracts, attempt to condition the pursuit of such contracts on the adoption of market rule changes intended to protect generators. Those arguments should be rejected.

For instance, IPPNY asserts that all long-term contracts should be entered into following solicitations that are open to new potential resources and existing generators. (IPPNY at 26.) IPPNY further asserts that if such “solicitations are not open to all existing resources, NYISO market rules should ameliorate the impact of the discriminatory long-term contracts on NYISO ICAP prices paid to existing and new merchant generators.” (Id.) IPPNY also seeks market mechanisms to protect existing resources from depressed clearing prices if generation is not procured pursuant to solicitations that it characterizes as “non-discriminatory.” (Id.) Both FPL and NRG also seek to limit long-term contract procurements to those encompassing new and existing resources. (FPL at 6; NRG at 16.) Similar to IPPNY, NRG asserts that “market rules must be developed to prevent new capacity that is constructed with an out-of-market mechanism (*i.e.*, utility rate-base or bilateral contract) from artificially depressing prices in the NYISO capacity market.” (NRG at 16.) For the reasons set forth below, the positions of IPPNY, FPL and NRG on this issue should be rejected.

The wholesale electric markets administered by the NYISO already are designed to accommodate bilateral contracts, and a large percentage of electricity (*i.e.*, approximately 50%) currently is procured through contracts. Therefore, to the extent the Commission elects to require or encourage utilities to enter into long-term contracts as a means of facilitating new generation projects, no modifications to NYISO market rules are needed. The Commission should not base its policies with respect to long-term contracts on

existing NYISO market rules, nor should those rules necessarily be modified to respond to – or somehow contravene – Commission policies.

As detailed, supra, Multiple Intervenors contends that the only justification for the Commission to increase reliance on long-term contracts is to reduce electricity prices to consumers and/or maintain reliability. To the extent a long-term electricity contract is pursued to facilitate new generation, it should be bid competitively in order to minimize costs and risks for consumers. Multiple Intervenors disagrees with IPPNY, FPL and NRG, however, that all contract solicitations must be open to existing resources. Those resources, because they exist today, already have the ability to enter into bilateral contracts at any time. Moreover, if the goal of the solicitation is to increase generation capacity in New York, there is no reason to include existing resources (although the owners of existing resources generally should be included unless it would exacerbate market power concerns).⁶

The Commission should not endorse market rule modifications that would increase electricity costs to consumers. Future long-term contracts entered into by utilities should be treated in the same manner as other contracts for purposes of the NYISO's energy and capacity markets. Market mechanisms designed to increase energy or capacity prices in order to counteract Commission policies should be discouraged. To the extent some consumers are forced to pay for long-term contracts that they may not desire, the situation should not be made worse by also requiring consumers to somehow hold existing generators

⁶ With the exception of this distinction between new and existing resources, Multiple Intervenors generally agrees with IPPNY and other parties that contract solicitations should not be constrained unduly – limitations on potential bidders due to fuel type, environmental impacts, location or other characteristics serve merely to reduce the body of potential bidders and increase the ultimate cost of the contract to consumers.

harmless from the Commission's policies. Generators operating in New York either constructed or purchased their facilities assuming a certain level of regulatory and business risk that includes, among other things, the adoption of new policies by the Commission and the construction of additional generation or transmission projects in their load zone.⁷

New York's electricity prices are among the highest in the nation, and the discrepancy between the State and the national average is staggering and growing. (See MI at 8-9.) To the extent the Commission adopts policies that increase reliance on long-term contracts, its primary goal should be to reduce prices to consumers, thereby lessening the competitive disadvantage that exists today. Generators should not be shielded – at the expense of consumers – from the impacts, if any, of regulatory policies designed to ensure that adequate generation is developed in New York.

⁷ As noted in Multiple Intervenors' Initial Comments (at 22, n.19), generators sometimes have benefited from changes in policy (e.g., the Commission's championing of installed capacity Demand Curves, which have led to higher capacity prices than were in effect previously; the Legislature's repeated failures to extend or replace the former Article X siting process, which has discouraged the construction of projects that would compete with existing projects).

CONCLUSION

For all the foregoing reasons, Multiple Intervenors urges the Commission to resolve the issues identified in the April 19th Order in accordance with Multiple Intervenors' Initial Comments and Reply Comments on Phase II Issues.

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Respectfully submitted,

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