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**Via Electronic Mail**

July 18, 2011

Hon. Jaclyn A. Brilling  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, NY 12223-1350

Re: Case No. 11-M-0294 - In the Matter of the Filing of Annual Reports Pursuant to Public Service Law §66(6) by Electric and Gas Corporations Subject to Lightened Ratemaking Regulation Case Under the Wallkill Ruling and Order.

Dear Secretary Brilling:

Attached for electronic filing in the above-referenced case, please find the Comments of Independent Power Producers of New York, Inc.

Thank you for your consideration in this matter.

Respectfully submitted

READ AND LANIADO, LLP  
Attorneys for Independent Power Producers of New  
York, Inc.

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

Attachment

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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In the Matter of the Filing of Annual Reports Pursuant to  
Public Service Law §66(6) by Electric and Gas  
Corporations Subject to Lightened Ratemaking Regulation  
Under the Wallkill Ruling and Order.

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Case 11-M-0294

**COMMENTS OF INDEPENDENT  
POWER PRODUCERS OF NEW YORK, INC.**

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Attorneys for Independent Power  
Producers of New York, Inc.

Dated: July 18, 2011  
Albany, New York

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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In the Matter of the Filing of Annual Reports Pursuant to  
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Case 11-M-0294

**COMMENTS OF INDEPENDENT  
POWER PRODUCERS OF NEW YORK, INC.**

**I. INTRODUCTION**

On June 3, 2011, the New York State Public Service Commission (“Commission”) issued a notice (the “Notice”) soliciting comments in the above-captioned case concerning the annual report filing requirements that it asserts are applicable under Section 66(6) of the New York State Public Service Law (“PSL”) to electric corporations whose business is the generation of electricity for sale into competitive wholesale markets under federal law (“Wholesale Generators”). The Notice states that in the Wallkill Ruling issued in 1991,<sup>1</sup> the Commission decided that it was not necessary to impose extensive recordkeeping obligations on Wholesale Generators and that, therefore, it permitted Wholesale Generators to fulfill the annual report filing requirements of PSL Section 66(6) through the submission of records and information that they file with the Federal Energy Regulatory Commission (“FERC”).<sup>2</sup>

PSL Section 66(6) provides that the annual report must show:

(a) the amount of its authorized capital stock and the amount thereof issued and outstanding; (b) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms

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<sup>1</sup> Case 91-E-0350, *Wallkill Generating Company, L.P.*, Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991)(“*Wallkill*”).

<sup>2</sup> Notice at 1.

of evidence of indebtedness issued and outstanding; (c) its receipts and expenditures during the preceding year; (d) the amount paid as dividends upon its stock and as interest upon its bonds; (e) the names of its officers and the aggregate amount paid as salaries to them and the amount paid as wages to its employees; (f) the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired; and (g) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission.

The Notice states:

At the time of the Wallkill Ruling in 1991, substantial compliance with these requirements could be achieved through FERC filings. In the intervening decades, however, FERC has repeatedly reduced the scope of the filing requirements it imposes on wholesale generators. It now appears that meeting the FERC filing requirements no longer also meets the disclosure requirements of PSL §66(6).<sup>3</sup>

The Notice concludes that a reexamination of the application of the annual report filing requirements that it asserts are applicable under PSL Section 66(6) to Wholesale Generators and to other electric and gas corporations granted lightened regulation needs to be conducted.

As discussed below, the Commission's premise that a reexamination of the application of the annual report filing requirement is needed because FERC has reduced the scope of the filing requirements on Wholesale Generators is factually incorrect. FERC has exempted Wholesale Generators that it has authorized to sell electricity at market-based rates from filing annual reports that include the type of information listed in PSL Section 66(6) since at least 1990, a year before *Wallkill*.<sup>4</sup> Indeed, Wallkill Generating Company, L.P. specifically provided this information to the Commission in its April 3, 1991 petition for lightened regulation. Thus when

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<sup>3</sup> Notice at 2.

<sup>4</sup>See, e.g. *Enron Power Enterprises Corp.*, 52 FERC ¶ 61,193 (1990) ("*Enron*").

the Commission issued its *Wallkill* ruling, the Commission understood that Wholesale Generators were not filing annual reports with FERC.<sup>5</sup>

The Commission appropriately recognized in *Wallkill*, and in the dozens of lightened regulation orders issued subsequent to *Wallkill*, that it is unnecessary to impose the requirements of PSL Section 66(6) to Wholesale Generators because they operate in a competitive environment and do not sell electricity at retail. Even were jurisdictional issues able to be cast to the side, which, as addressed below, they cannot,<sup>6</sup> there is no reason for the Commission to change its long-standing policy to exempt Wholesale Generators from the annual reporting requirements in PSL Section 66(6). The imposition of PSL Section 66(6) reporting requirements on Wholesale Generators would be counterproductive. It would provide no benefit to New York's energy consumers, would needlessly burden Wholesale Generators, and undermine the Commission's policy of reducing regulatory oversight to promote competition in the electricity markets. Additionally, requiring Wholesale Generators to disclose confidential, proprietary information could destabilize the competitive wholesale marketplace.

The Commission also is preempted by the Federal Power Act from requiring Wholesale Generators to report the information that it is considering under Section 66(6). The specific data that Section 66(6) requires electric corporations to file is solely to assist the Commission in regulating a utility's rates. Wholesale Generators sell electricity at wholesale, not retail. FERC has exclusive jurisdiction over wholesale rates, a determination long upheld by federal courts.

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<sup>5</sup> Case 91-E-0350, *Wallkill Generating Company, L.P.*, Petition (April 3, 1991) at 22, note 13 and Attachment C. Attachment C of the Petition included the full text of *Enron*.

<sup>6</sup> IPPNY has long challenged the basis and scope of the Commission's jurisdiction over Wholesale Generators including the upstream owners of such entities.

Thus, the Commission therefore has no authority to regulate a Wholesale Generator's wholesale rates in any manner.

## II. COMMENTS

### **A. The Commission's Premise That Relaxed FERC Filing Requirements Necessitate the Reexamination of the Application of PSL Section 66(6) to Wholesale Generators Is Factually Incorrect.**

The Commission's assertion in the Notice that FERC has repeatedly reduced the scope of the filing requirements it imposes on Wholesale Generators is historically and factually inaccurate. FERC's reporting requirements for Wholesale Generators that existed in 1991, which the Commission determined in *Wallkill* satisfied the filing obligations of PSL Section 66(6), are substantially the same today. There has been no change in federal policy that would provide support for the Commission to change how it has applied PSL Section 66(6) for two decades to Wholesale Generators. To the contrary, subsequent events only reinforce the soundness of the current policy.

Just as the PSL requires utilities to file annual financial reports with the Commission, the Federal Power Act requires public utilities subject to FERC's jurisdiction to file annual financial reports with FERC to assist the agency and interested parties in evaluating the justness and reasonableness of a utility's rates.<sup>7</sup> Entities classified as major electric utilities are required to file FERC Form No. 1 ("Form 1") with FERC. Similar to the information the Commission is authorized to collect from utilities pursuant to PSL Section 66(6), Form 1 collects summary financial information and balance sheet and income information, as well as electric plant, sales, operating and statistical data.

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<sup>7</sup>16 U.S.C. 825a, 825f, 825h; 16 U.S.C. 825j; *see also* 18 C.F.R. Parts 41, 50 and 141 (FERC's regulations implementing these sections of the Federal Power Act).

As early as 1982, FERC granted waivers of the reporting requirements, including the requirement to file a Form 1, to public utilities that do not provide service at monopoly, cost-of-service rates.<sup>8</sup> In 1982, St. Joe Minerals Corporation, an operator of electric generating facilities that had contracted to sell the plants' electricity that exceeded the needs of its zinc smelter, requested that FERC waive the reporting requirements (including Parts 41, 50 and 141 of FERC's regulations) on the basis that the regulations were intended for public service monopolies and not for industrial companies selling surplus electricity to utilities.<sup>9</sup> FERC granted the waivers, stating that the requirements "may be unnecessarily burdensome and may complicate and impede the conduct of St. Joe's normal business."<sup>10</sup>

In 1990, one year before *Wallkill*, FERC began routinely granting waivers of the reporting requirements under Parts 41, 101 and 141 of its regulations to wholesale suppliers that sell electricity at market-based rates.<sup>11</sup> FERC expressly found that because the seller's rate is not cost-based, the cost data requirements are inapplicable.<sup>12</sup> The Commission was well aware in *Wallkill* that Wholesale Generators were not filing annual reports with FERC because Wallkill Generating Company, L.P. provided this specific information to the Commission in its April 3, 1991 petition for lightened regulation.<sup>13</sup>

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<sup>8</sup>*St. Joe Minerals Corporation*, 21 FERC ¶ 61323 (1982) ("*St. Joe*").

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Enron*, *supra* note 3..

<sup>12</sup>*Id.*

<sup>13</sup> Case 91-E-0350, *Wallkill Generating Company, L.P.*, Petition (April 3, 1991) at 22, note 13 and Attachment C.

The only information that FERC requires Wholesale Generators with market-based rate authority to report to it on a routine basis are summaries of the utilities' service agreements for all of their market-based power sales. The reports must be filed on a quarterly basis with FERC electronically and must include information on all quarterly transactions, including "seller, the buyer, and the type and magnitude of the service provided" as well as "the price (or exchange ratio) of the service provided."<sup>14</sup> Wholesale Generators have been required to file these reports with FERC since as early as 1991, and the reports have been, and continue to be, available to the public on FERC's website.

In sum, FERC has granted waivers of the Form 1 filing requirement to Wholesale Generators since before *Wallkill*, and Wholesale Generators have only been subject to certain quarterly reporting requirements since 1991. Since the Commission's contention in the Notice that FERC has reduced the scope of its reporting requirements for Wholesale Generators is inaccurate, it cannot form the basis to reexamine the application of PSL Section 66(6) to Wholesale Generators.

**B. PSL Section 66(6) Is Unnecessary and Extraneous to Any Commission Limited Role in the Regulation of Wholesale Generators.**

When the Legislature enacted PSL Section 66(6) in 1910, Wholesale Generators and competitive markets did not exist. Only monopoly utilities existed. Like much of the PSL, the purpose of Section 66(6) is to assist the Commission in ensuring just and reasonable cost-based rates for monopoly utilities selling service at retail. As the Commission must consider a utility's debt, revenues and costs to establish cost-based rates, Section 66(6) seeks material inputs for determining rates such as the amount of a utility's dividends, stock and debt issued and

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<sup>14</sup>*Western Systems Power Pool*, 55 FERC P 61495 (June 27, 1991).

outstanding, and a utility's costs and revenues. With respect to Wholesale Generators that must secure their revenues from competitive markets and whose investors alone are at risk, these cost-of-service inputs are overly burdensome, potentially anti-competitive, and provide no information useful to the Commission.

As the Commission recognized in *Wallkill* and its subsequent orders granting lightened regulation to Wholesale Generators, the Commission does not and cannot set wholesale rates. As discussed in greater detail in Point C, the Commission appropriately found that Article 2 and numerous other provisions of the PSL should not be applied to Wholesale Generators because they apply to monopoly, retail providers of electricity that have cost-of-service rates. Indeed, the central purpose of the Commission's lightened regulation orders is to reduce the regulatory burdens on Wholesale Generators because "a competitive provider of electric services does not require the same degree of regulatory scrutiny as is applied to monopoly suppliers."<sup>15</sup>

In determining the scope of its regulation over Wholesale Generators, the Commission stated that "[a] realistic appraisal is needed to ascertain the Public Service Law requirements that should be imposed on new forms of electric service providers that differ in character from traditional electric utility monopoly providers."<sup>16</sup> Under this approach, the Commission first looks at whether a particular section of the PSL is inapplicable on its face; then, if it is not, determines whether an entity can comply with its requirements; and finally "[e]ven if an entity could theoretically comply with a statutory provision, a realistic appraisal requires an analysis of

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<sup>15</sup> Wallkill Order at 3.

<sup>16</sup> Case 98-E-1670, *Carr Street Generating Station, L.P.*, Order Providing For Lightened Regulation (April 23, 1999) ("*Carr Street*"), at 4.

whether imposing the requirement is necessary to protect the public interest, or would instead adversely affect the public.”<sup>17</sup> The Commission stated that:

Inasmuch as the legislative purpose in enacting the Public Service Law was to ensure that the monopoly electric service providers charged only ‘just and reasonable ‘rates for electric services, and we have determined that those rates are now best achieved through market competition, it is no longer necessary or appropriate to apply some of the provisions of the Public Service Law to merchant plants . . . that operate exclusively in the wholesale market.<sup>18</sup>

Courts have affirmed the Commission’s interpretation that various provisions of the PSL do not apply to competitive entities that did not exist when the PSL was enacted. For example, in 1999, the Commission determined that the Home Energy Fair Practices Act (“HEFPA”) set forth in Article 2 of the PSL should not be applied to newly emerged non-utility gas marketers. In upholding the Commission’s decision, the Supreme Court reasoned that:

The simple and inescapable truth is that HEFPA was enacted by the Legislature in 1981 as a consumer protection measure . . . at a time when residential gas, electricity and steam service were provided by regulated monopolies and competition had not yet been introduced for these utility services. Gas marketers, unbundling and utility competition are not even mentioned or in any respect provided for in any of the provisions of HEFPA.<sup>19</sup>

The Court recognized that a statute clearly designed prior to the introduction of competition should not be applied “to an industry that was not in place or envisioned by the Legislature when [the statute] was enacted.”<sup>20</sup> The Court further held that the intent of the statute did not mandate

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<sup>17</sup>*Id.* at 5.

<sup>18</sup>*Id.* at 5-6.

<sup>19</sup>*Public Utility Law Project of New York, Inc., et. al. v. The New York State Public Service Commission, et. al.*, Index #4509-96, (Sup. Court Albany County, April 29, 1997) at 27.

<sup>20</sup>*Id.* at 26.

its application to newly created competitive entities, especially in a way that would inhibit competition.

Like HEFPA, PSL Section 66(6) was enacted prior to the introduction of competition into the markets, and its purpose is not advanced by its robotic application to entities that did not exist, and had not yet been envisioned by the Legislature at the time of its enactment. To the contrary, the mechanical application of PSL Section 66(6) to Wholesale Generators would unduly burden them and be anti-competitive, while providing no benefits to the ratepayers the statute was designed to protect.

The cost-of-service information required by PSL Service 66(6) serves no useful purpose with respect to the Commission's lightened regulation of Wholesale Generators. It provides the Commission no greater ability "to protect that market from suppliers that might attempt to acquire or exercise market power."<sup>21</sup> The Commission has spent the last 20 years routinely exempting Wholesale Generators from PSL sections solely designed for retail, monopoly service providers. It should continue to do so now.

Nothing has changed in the New York markets to justify such an unprecedented Commission encroachment into the business affairs of lightly regulated Wholesale Generators. If anything, the maturation of competitive electricity markets that are protected by comprehensive anti-market manipulation rules has made it even less important for the Commission to regulate Wholesale Generators than it was when the Commission issued *Wallkill*.

Any requirement that Wholesale Generators submit annual reports containing the information specified on PSL Section 66(6) would undermine the goal of promoting competition

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<sup>21</sup> *Carr Street* at 1.

in the wholesale generation market. For most if not all of the market participants (a number of which are not publicly traded), much of the information specified in Section 66(6) clearly could include proprietary, trade secret and confidential commercial information. While the Commission's rules provide a procedure allowing for the possibility that such information might be protected from disclosure,<sup>22</sup> a company required to submit this sensitive information has no guarantee that it will not ultimately be disseminated to its competitors. The disclosure of this type of sensitive information (or even the prospect of disclosure) could result in market distortions and inhibit competition, the very consequences the Commission wishes to avoid.

Tellingly, the Notice does not articulate any need for the information or any useful end to which the information could be put by the Commission. In fact, Chairman Garry Brown acknowledged that the Commission has access to much more useful information collected by the NYISO to monitor "important" issues such as "assessing the performance of the restructured, competitive marketplace, the competitiveness and efficiency of energy markets, and the likelihood of market manipulation and collusion."<sup>23</sup> Chairman Brown wrote:

I agree with you that these are important issues that must be regularly evaluated. However, because of the importance of these issues, we rely on much more comprehensive information than that described in Section 66 to provide data as an input to our analysis. In particular, I would call your attention to (a) the NYISO's Market Monitor Reports, both the annual State of the Market Report, and the Quarterly Report on the New York ISO Electricity Markets, available on the NYISO's website; and (b) the annual Load and Capacity Data report (i.e. the "Gold Book"), also on the

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<sup>22</sup> 16 NYCRR 6-1.3.

<sup>23</sup> Letter from Garry A. Brown, Chairman of the Public Service Commission to the Honorable James F. Brennan, Chair of the Assembly Committee on Corporations, Authorities & Commissions, dated May 12, 2011 at 2. Attached hereto as Exhibit 1.

NYISO's website which reports, by owner and facility, capacity and annual energy produced.<sup>24</sup>

Chairman Brown stated that the information available from the NYISO is “much more comprehensive . . . than that described in Section 66.”<sup>25</sup> Chairman Brown's statement illustrates that the Commission has ample and superior information publicly available to it to achieve any regulatory duty it believes it must apply to Wholesale Generators. PSL Section 66(6) would not provide any information that the Commission needs or currently does not have access to.

As discussed in Point A, FERC, the long-recognized entity with exclusive jurisdiction over Wholesale generators, has imposed minimal reporting requirements on Wholesale Generators, and such reports are available on FERC's website. There is no need to burden Wholesale Generators with more extensive requirements than those imposed by FERC. Imposing unnecessary reporting requirements on Wholesale Generators would signal a major step backwards to the competitive market that the Commission has been so careful to encourage and sustain. Regulation always has a cost. In a situation, as here, where regulation serves no public purpose and therefore only has a cost, those costs ultimately will filter down to consumers without any countervailing benefit to justify it. There is simply no reason for the Commission to overturn 20 years of precedent in return for no discernible benefit to anyone.

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<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

**C. The Commission's Proposed Requirement that Wholesale Generators File the Cost-of-Service Information Listed in PSL Section 66(6) Would Be Inconsistent With Its Application of Other Sections of the PSL to Lightly Regulated Entities.**

The Commission has been waiving other reporting requirements for Wholesale Generators for 20 years, and should treat PSL Section 66(6) similarly. Beginning with *Wallkill*, the Commission has routinely exempted Wholesale Generators from PSL Sections 66(12), 72-a, and 66(4). PSL Section 66(12) provides for rate regulation. PSL Section 72-a provides for the filing of monthly fuel cost statements. PSL Section 66(4) provides for a uniform system of accounts. The Commission has correctly declined to apply these sections to Wholesale Generators because the rates they charge are regulated by FERC.

Like these PSL sections, PSL Section 66(6) is only useful for the setting of rates and no other purpose. Because the Commission has no authority to set rates for Wholesale Generators, it has no legitimate purpose to seek to require the filing of information contemplated by PSL Section 66(6) for monopoly utilities. There is no functional distinction to be made between monthly fuel cost statements required by PSL Section 72-a and the "receipts and expenditures during the preceding year" required by PSL Section 66(6).

In fact, the Commission has not even required strict adherence to PSL § 66(6) counterparts for lightly regulated steam corporations which do make retail sales and which are clearly Commission-jurisdictional sales. PSL Section 80(5) imposes the same reporting requirements on steam corporations that PSL Section 66(6) imposes on electric corporations. Yet the Commission ruled that lightly regulated steam corporations could satisfy the full panoply of PSL Section 80(5) requirements by reporting annually "the total volume of steam sold to, and revenue received from, its steam customer for the prior calendar year, broken down by each

month of that year.”<sup>26</sup> Importantly, this information is already required by PSL Section 18-a, which means that the Commission imposed **no** extra filing requirements on an entity making retail sales to satisfy PSL § 80(5). The same has been true of lightly regulated electric corporations making retail sales. In discussing these reduced requirements, the Commission stated:

As to PSL § 66 recordkeeping, Independence requests waiver of those requirements entirely. It notes that, in the Wallkill Ruling, the developer was required only to file materials it submitted to other governmental entities, such as the Federal Energy Regulatory Commission (FERC). If information filings are required, Independence proposes to limit them to materials it files with the Securities Exchange Commission (SEC) and New York's Department of Environmental Conservation (DEC). As discussed in the Wallkill Ruling, PSL § 66 recordkeeping requirements may be substantially reduced. To satisfy the statute in this instance, Independence is directed to file a copy of all filings made with the Securities and Exchange Commission (SEC). Moreover, it must report annually, by January 31 of each year, information concerning electric sales to each of its retail customers, and the payments received from those customers, for each month during the prior calendar year. These recordkeeping requirements are appropriate for this competitive entity.<sup>27</sup>

The Commission also allowed another lightly regulated company selling electricity at retail, Brooklyn Navy Yard Cogeneration Partners, L.P., to satisfy PSL § 66(6) by submitting “annual reports concerning electric sales to BNYDC for each month of the preceding calendar year, as well as copies of any filings made with the SEC.”<sup>28</sup>

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<sup>26</sup>Case 08-M-1301, *Lockport Energy Associates, L.P.*, Order Granting a Certificate of Public Convenience and Necessity Pursuant to Public Service Law §81 and Providing For Lightened Regulation, (January 20, 2009) at 8; *See also*, Case 01-S-1750, *Rochester Technology Park, LLC*, Order Issuing Certificate of Public Convenience and Necessity, And Providing for Lightened Regulation, (January 23, 2002).

<sup>27</sup>Case 93-E-0272, *Niagara Mohawk Power Corporation*, Order Adopting a Regulatory Framework to Govern Retail Electric Sales By the Independence Generating Station, (April 19, 1994).

<sup>28</sup>Case 96-M-1108, *Brooklyn Navy Yard Cogeneration Partners, L.P.*, Order Granting a Certificate of Public Convenience and Necessity and Denying Declaratory Ruling, (March 19, 1997).

Similarly, in an order granting lightened regulation to Connecticut Municipal Electric Energy Cooperative (“CMEEC”), the Commission acknowledged that CMEEC was not required to file reports under federal law.<sup>29</sup> Yet, instead of enforcing the full panoply of PSL § 66(6) requirements, the Commission allowed CMEEC to fulfill its filing requirement by filing “annually, by March 1 of each year, a report with us showing, by month and cumulatively, the total number of hours that the Fisher's Island generation facility operated in the prior year, and the number of such hours that it operated in Island Mode.”<sup>30</sup>

Therefore, assuming *arguendo* that the Commission has jurisdiction in the first instance, it is clear that the Commission has broad discretion in applying PSL reporting requirements to lightly regulated entities, even ones making Commission-jurisdictional retail sales. Applying more stringent requirements to Wholesale Generators, which make no Commission-jurisdictional retail sales, is illogical. The Commission, therefore, should reaffirm its long standing precedent and find that Wholesale Generators meet the requirements of PSL Section 66(6) through the reports Wholesale Generators are required to file at FERC.

**D. The Commission Is Preempted From Requiring Wholesale Generators To File the Cost-of-Service Information Listed in PSL Section 66(6).**

Preemption exists under the Supremacy Clause of the United States Constitution where (1) Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law; (2) where the state law at issue conflicts with federal law because it is impossible to comply with both; or (3) where the state law conflicts with federal law because the state law stands as an obstacle to the accomplishment and execution of

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<sup>29</sup>Case 10-E-0281, *Connecticut Municipal Electric Energy Cooperative*, Order Providing For Lightened Regulation and Approving Financing, (October 14, 2010) at 4.

<sup>30</sup>*Id.*

congressional objectives.<sup>31</sup> Wholesale electric rate setting is a field subject to FERC's exclusive jurisdiction under the Federal Power Act. Section 824 of the Federal Power Act, the applicability section, states that "[FERC] shall have jurisdiction over all facilities for [wholesale] transmission or sale of electric energy,"<sup>32</sup> including the setting of "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the [FERC]."<sup>33</sup>

Because Wholesale Generators' rates and service are regulated by FERC, the Supremacy Clause of the United States Constitution preempts the Commission from regulating the wholesale rates of Wholesale Generators. The U.S. Supreme Court has reaffirmed FERC's preemptive authority over wholesale power sales on numerous occasions.<sup>34</sup>

The New York Court of Appeals has likewise recognized the inapplicability of the PSL to wholesale rate transactions. The court held that the Commission could not require a utility to purchase power from a qualifying facility under New York law because such a facility is subject to FERC's exclusive jurisdiction.<sup>35</sup> In so holding, the Court stated:

There is no dispute that if transactions between petitioner and purely State qualifying facilities for the purchase of electricity are sales at wholesale at interstate commerce, the FPA preempts any state regulation in the area.<sup>36</sup>

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<sup>31</sup>*Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 368, 106 S.Ct. 1890, 1898 (1986).

<sup>32</sup> 16 U.S.C. § 824 (2006).

<sup>33</sup> 16 U.S.C. § 824d (2006).

<sup>34</sup> See, e.g., *New York v. FERC*, 535 U.S. 1 (2002); *Mississippi Power & Light Company v. Mississippi*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

<sup>35</sup>*Con Edison v. Pub Serv. Comm'n*, 63 N.Y.2d 424 (1984).

<sup>36</sup>*Id.* at 439.

Similarly, Wholesale Generators selling electricity exclusively at wholesale are not subject to State rate regulation. Because the purpose of PSL § 66(6) is to protect against unreasonable rates, its application to Wholesale Generators is foreclosed by FERC's jurisdiction over wholesale rates.

### **III. CONCLUSION**

For the foregoing reasons, IPPNY respectfully requests that the Commission reaffirm its long-standing precedent and rule that Wholesale Generators already satisfy the requirements of PSL Section 66(6) through the reports they file at FERC.

Respectfully submitted,

READ AND LANIADO, LLP

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Dated: July 18, 2011  
Albany, New York

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE  
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350  
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## PUBLIC SERVICE COMMISSION

GARRY A. BROWN  
*Chairman*  
PATRICIA L. ACAMPORA  
MAUREEN F. HARRIS  
ROBERT E. CURRY JR.  
JAMES L. LAROCCA  
*Commissioners*

MAY 16 2011



PETER MCGOWAN  
*General Counsel*

JACLYN A. BRILLING  
*Secretary*

May 12 2011

Honorable James F. Brennan  
Chair, Assembly Committee on  
Corporations, Authorities & Commissions  
Room 422, Legislative Office Building  
Albany, New York 12248

Dear Assemblyman Brennan,

We have received your letters of April 19 and May 6, 2011. These letters have prompted a close reexamination of the way in which wholesale electric generating companies subject to the Commission's Lightened Regulation regime comply with the annual report requirement found in Public Service Law § 66(6). As explained below, it appears that the mechanism set forth in the Lightened Regulation orders is not sufficient and that the manner in which wholesale generators comply with Section 66 (6) will have to be revisited and restated. We will begin an administrative proceeding shortly for this purpose.

Your recent letters assert that the Commission has "unilaterally exempted" certain wholesale electric generation companies from meeting the requirements of PSL § 66(6) to file an annual report. It is not accurate to assert that the Commission has provided such an exemption to any of these companies. We have previously explained to your staff that companies subject to our Lightened Regulation orders were not "exempted" from compliance with the PSL § 66 annual report requirements. The orders used to implement the Lightened Regulation regime clearly state that these generators, as electric corporations, are required to comply with this portion of Section 66.<sup>1</sup> There was no "circumvention" of State law for wholesale generators through the Commission's Lightened Regulation orders.

<sup>1</sup> In each of the Lightened Regulation orders, it was recognized that each generator was an electric corporation under the Public Service Law and that, for this reason, was subject to the annual reporting requirements described in Section 66(6). For example, in the Wallkill Declaratory Ruling which your May 6 letter references, the Commission plainly stated that Wallkill "cannot escape the fact that it intends to operate electric plant, as that term is defined in PSL § 2(12), and so meets the definition of electric corporation under PSL § 2(13)." Case 91-E-0350, Wallkill Generating Company, L.P., Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991) at 12. At the same time and in the same ruling, the Commission concluded that Wallkill's filings at FERC would "be considered as fulfilling Annual Report filing requirements ... " under § 66(6). Id. at 16.

At least since the Wallkill Declaratory Ruling, these wholesale generating companies have been permitted to comply with the Section 66(6) annual report requirement through filings made and required to be made at FERC.<sup>2</sup> We understand now, however, that, since the advent of Lightened Regulation, FERC's filing requirements have been relaxed substantially for wholesale generators such as those subject to the Commission's Lightened Regulation regime. Today, FERC filing requirements for wholesale generators have either been abandoned entirely, or, if they continue to exist, they provide only a portion of the information required by Section 66(6). Consequently, it is currently my view that reliance on the filing requirements at FERC appears no longer to be unjustified. Accordingly, we will begin in the near future an administrative process to implement new procedures so that the wholesale generating companies under our Lightened Regulation regime will come into compliance with the requirements of Section 66(6).

Your April 19 letter also refers to the importance of assessing the performance of the restructured, competitive marketplace, the competitiveness and efficiency of energy markets, and the likelihood of market manipulation and collusion. I agree with you that these are important issues that must be regularly evaluated. However, because of the importance of these issues, we rely on much more comprehensive information than that described in Section 66 to provide data as an input to our analysis. In particular, I would call your attention to (a) the NYISO's Market Monitor Reports, both the annual State of the Market Report, and the Quarterly Report on the New York ISO Electricity Markets, available on the NYISO's website; and (b) the annual Load and Capacity Data report (i.e. the "Gold Book"), also on the NYISO's website which reports, by owner and facility, capacity and annual energy produced.

I hope this response clarifies the Commission's PSL § 66(5) practice and the steps we intend to take to realign this practice with the fact that FERC filings do not now and cannot be expected in the future to supply the information required by Section 66(6).

Thank you again for your letter and your continuing interest in ratepayer access to reliable and low cost power. For clarity and in conclusion, let me restate that the Commission has not "exempted" and is not in the future expected to "exempt" wholesale electric generators or any other electric corporations from the Section 66 requirement to file an annual report.<sup>3</sup>

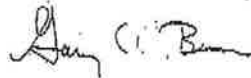
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<sup>2</sup> Each of the Lightened Regulation orders since 1991 has used a formulation very similar to that employed in the Wallkill Declaratory Ruling. If you wish to review these rulings, this is most easily accomplished through the Department's Document and Matter Management system which is available to the public. Conducting an Advanced Search on the word "Lightened" in case titles will provide a list from which the wholesale electric generators subject to the Lightened Regulation regime can be identified, and the case numbers and the specific Lightened Regulation order applicable to each generator can be obtained.

<sup>3</sup> Your May 6 letter seeks the most recent annual report for each "electric corporation" in the State. By its terms, this request seeks the annual report for each of the State's investor owned utilities or municipal utilities. These reports are voluminous and a literal response to your inquiry would be more than a thousand pages of materials. There are electronic copies of these reports, although we do not presently have them available through our internet website. To obtain electronic (or paper) copies of the specific reports in which you are interested or, if necessary, to obtain all of these reports, please contact Alan Michaels of our staff for assistance.

We expect the manner in which these generators will comply with the statute's requirements to change in the near future, and we hope that you or your staff will participate in that process as it moves forward.

Sincerely,



Garry A. Brown  
Chairman

cc: Patricia L. Acampora, Commissioner  
Robert E. Curry, Jr., Commissioner  
Maureen F. Harris, Esq., Commissioner  
James L. Larocca, Commissioner  
Andrew Cuomo, Governor  
Eric Schneiderman, Attorney General  
Sheldon Silver, Speaker of the Assembly  
Dean Skelos, Majority Leader of the Senate  
Brian Kolb, Minority Leader of the Assembly  
John Sampson, Minority Leader of the Senate  
Kevin Cahill, Assemblymember  
George Maziarz, Senator

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