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October 23, 2006

**VIA HAND DELIVERY**

Ms. Karen Antion  
Chairman of the Board of Directors  
c/o Mr. Mark S. Lynch  
President and Chief Executive Officer  
New York Independent System Operator, Inc.  
10 Krey Boulevard  
Rensselaer, New York 12144

Re: Appeals of September 29, 2006 Management Committee Decision

Dear Chairman Antion:

Enclosed are three copies of the Motion of Multiple Intervenors and the New York State Consumer Protection Board in Opposition to Appeals. The enclosed Motion responds in opposition to the appeals of the September 29, 2006 Management Committee decision to approve certain installed capacity market monitoring and mitigation measures (Motion # 4).

Multiple Intervenors and the CPB request an opportunity to participate in oral argument on the appeals, if scheduled.

Respectfully submitted,

COUCH WHITE, LLP

Michael B. Mager

MBM/mdt

Enclosures

cc: Ms. Leigh Bullock (via E-Mail; w/enc.)  
Robert Fernandez, Esq. (via E-Mail; w/enc.)  
Mr. Ray Stalter (via E-Mail; w/enc.)  
Mr. Tariq N. Niazi (via E-Mail; w/enc.)

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**MOTION OF MULTIPLE INTERVENORS  
AND THE NEW YORK STATE CONSUMER PROTECTION BOARD  
IN OPPOSITION TO APPEALS**

**PRELIMINARY STATEMENT**

Multiple Intervenors<sup>1</sup> and the New York State Consumer Protection Board (“CPB”)<sup>2</sup> hereby submit this motion to the New York Independent System Operator, Inc. (“NYISO”) Board of Directors (“Board”) in opposition to the appeals filed by KeySpan-Ravenswood, LLC (“KeySpan”), certain members of the Independent Power Producers of New York, Inc. (“IPPNY”), NRG Energy, Inc., and Energy Curtailment Specialists, Inc. (collectively, “Appellants”). Appellants challenge the September 29, 2006 decision of the NYISO Management Committee (“MC”) approving Motion #4, which is a proposal to adopt certain In-City installed capacity (“ICAP”) market monitoring and mitigation measures (the “Proposal”) applicable to the divested generation owners (“DGOs”). For the reasons set forth herein, Multiple Intervenors and the CPB urge the Board to: (a) deny the appeals in their entirety; and (b) file tariff amendments with the Federal Energy Regulatory Commission (“FERC”) implementing the Proposal as expeditiously as practicable.

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<sup>1</sup> Multiple Intervenors is an unincorporated association of 54 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State. Through five of its members – Alcoa, Inc., IBM Corporation, Occidental Chemical Corp., Praxair, Inc., and Wegmans Food Markets, Inc. – Multiple Intervenors participates actively in the NYISO’s principal stakeholder committees, as well as selected subcommittees and working groups.

<sup>2</sup> The CPB is an agency in the Executive Department of New York State government charged with “... representing the interests of consumers of the state before federal, state and local administrative and regulatory agencies.” N.Y. Exec. Law § 553(2)(d). The CPB has been designated as the “State-Wide Consumer Advocate” at the NYISO, representing the interests of residential, small business and farm electricity users throughout the State.

In this motion, Multiple Intervenors and the CPB provide the Board with the consumer perspective on the issues raised on appeal, and respond in opposition to selected arguments advanced by Appellants. Specifically, Multiple Intervenors and the CPB explain that: (a) the Proposal is needed to address repeated acts of economic withholding by at least one DGO that are artificially increasing prices in the In-City and the Rest-of-State (“ROS”) ICAP markets; (b) the NYISO should act to implement the Proposal expeditiously; and (c) the Board should accord great deference to the MC’s approval of the Proposal, which enjoys broad-based stakeholder support. It is anticipated that a number of other stakeholders including, but not limited to, Consolidated Edison Company of New York, Inc. (“Con Edison”), New York City, and the New York State Department of Public Service (“NYS DPS”), also will oppose the appeals and provide additional justification in support of the Proposal.

### **ARGUMENT**

#### **A. The Proposal Is Needed to Address Economic Withholding Impacting ICAP Markets**

The relevant facts leading up to the present controversy are not in serious dispute. The DGOs possess market power and, consequently, certain market monitoring and mitigation measures, such as a price cap, have been in place for some time. More recently, the NYISO’s ICAP markets were modified to rely on Demand Curves to set prices. The Demand Curves were intended to, *inter alia*, lead to: (a) lower ICAP prices in periods of high supply (when prices are supposed to move down the “Curve”); and (b) higher ICAP prices in periods of low supply (when prices are supposed to move up the “Curve”). Additionally, the

Demand Curves were supposed to eliminate – or at least reduce significantly – incentives for generators to engage in economic withholding.

Notwithstanding the foregoing, earlier this year at least one DGO began engaging in a pattern of economic withholding. One effect of such withholding activities was to increase, artificially, In-City ICAP prices, which undoubtedly also was the motivation behind the activities. This increase in ICAP prices occurred even though approximately 1,000 MW of new capacity recently was added to the In-City ICAP market. Thus, at a time when the In-City ICAP Demand Curve should have led to reduced prices due to an increase in supply, prices did not decline but, rather, increased. Also, the expectation that the Demand Curves would eliminate incentives for generators to engage in economic withholding proved, regrettably, to be unfounded.

Moreover, because the DGO's capacity was withheld, by operation of the Demand Curves there was less capacity available for the ROS ICAP market, leading to substantial price increases in that market. Importantly, no such relationship existed between the In-City and the ROS ICAP markets prior to implementation of the Demand Curves.<sup>3</sup> Thus, consumers throughout New York State have been paying – and continue to pay – higher In-City and ROS ICAP prices than would be the case if there was no economic withholding. Attached to this motion are two charts reflecting the In-City and the ROS ICAP prices over the past 18 months. These charts illustrate the impact of the economic

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<sup>3</sup> Thus, regardless of what may have been anticipated by some parties at the time of Con Edison's divestiture of generation, there never was any expectation that economic withholding by a DGO would increase ROS ICAP prices.

withholding activities, which commenced earlier this year, on ICAP prices paid by consumers.

Throughout the country, competitive electricity markets are facing increasing public scrutiny and criticism. In an October 15, 2006 article in The New York Times entitled, “Competitive Era Fails to Shrink Electric Bills,” it was reported that the disappointing results to date “stem in good part from the fact that a genuinely competitive market for electricity production has not developed.” The article continues that:

... critics say that, as in California five years ago in a scandal that enveloped Enron, the auction system can be manipulated to drive up prices, with the increases passed on to customers. What is more, companies that produce electricity can withhold it or limit production even when demand is at its highest, lifting prices. This happened in California, and the federal commission has found that it occurred in a few more instances since then. Critics say that more subtle techniques to reduce the supply of power are common and that the commission shows little interest in investigating.

Against this backdrop, the NYISO has been presented with a confirmed case of economic withholding. The primary issue before the Board on appeal is whether instances of economic withholding by a DGO possessing market power should be condoned or addressed expeditiously. Although it would have been the strong preference of the CPB and Multiple Intervenors that the NYISO respond proactively to cases of economic withholding when discovered – as both parties requested in letters dated July 14 and 19, 2006, respectively – the Board now has before it for approval market monitoring and mitigation measures, supported by a large and broad-based majority within the MC, that are designed to address cases of economic withholding by a DGO. Multiple Intervenors and the CPB believe

the NYISO possesses a duty to foster the competitiveness of the markets that it administers, and this responsibility includes the protection of consumers from the impacts of inappropriate bidding behavior by generators possessing market power.

Electricity is an essential commodity. Pursuant to the Demand Curves, consumers generally have to pay for all capacity made available in the NYISO's ICAP markets, even amounts well above the minimum thresholds required to maintain reliability. The exercise of market power by a DGO engaging in economic withholding has increased – and if left unabated, will continue to increase – prices in the In-City and the ROS ICAP markets. Upon information and belief, the artificially-high level of ICAP prices caused by economic withholding activities already have cost consumers at least tens of millions of dollars in 2006 alone.

The Proposal approved by the MC would implement a conduct-and-impact test (similar to that employed by the NYISO in other markets) to mitigate bids impacted by a DGO's decision to engage in economic withholding. A DGO's bid only would be mitigated to a reference bid if both the conduct and the impact criteria are violated. Absent economic withholding or other type of inappropriate bidding behavior, the Proposal should not impact ICAP prices. Additionally, based on feedback from stakeholders and NYISO staff, prior drafts of the Proposal were modified to make it easier for the NYISO to implement.

In addition to being justified based on the circumstances at issue, the Proposal is consistent with the NYISO's Market Services tariff, which provides, in pertinent part, that:

If and to the extent that sufficient installed capability is not under a contractual obligation to be available to serve load in New York and if physical or economic withholding of installed

capability would be likely to result in a material change in the price for installed capability in all or some portion of New York, the ISO, in consideration of the comments of the Market Parties and other interested parties, shall amend this Addendum, in accordance with the procedures and requirements for amending the Plan, to implement appropriate mitigation measures for installed capability markets.

(NYISO Market Services Tariff at Attachment H, § 4.5(a).) As evidenced by the attached charts, economic withholding clearly is impacting ICAP prices, particularly in the ROS region.

For the foregoing reasons, implementation of the Proposal is needed to address confirmed economic withholding by a DGO possessing market power.

**B. The NYISO Should Act to Implement the Proposal  
Expediently**

In their appeals, Appellants advance arguments advocating that the Board not implement the Proposal and, instead, refer the Proposal, and numerous other ICAP-related issues, back to the governance process. (See, e.g., KeySpan at 13-14; IPPNY at 6-7.) The Board should reject all such arguments. Clearly, there are a multitude of issues relating to the NYISO's ICAP markets that could be subjected to further analysis, including some of the issues raised by Appellants. Importantly, however, the existence of one or more issues worthy of future consideration does not mean that implementation of the Proposal should be delayed. The Proposal addresses an identified, confirmed economic withholding problem that is believed to be costing consumers tens of millions of dollars monthly; it needs to be implemented as expeditiously as practicable.

Initially, there can be little doubt that Appellants possess a strong financial incentive to prevent – or, alternatively, delay – implementation of the Proposal. As detailed above, absent the Proposal one or more DGOs possessing market power can engage in economic withholding without ramification and to the financial benefit of other generators. Such withholding has led to artificially-higher prices in the In-City and the ROS ICAP markets. The longer implementation of the Proposal is delayed, the longer all generators benefit from the economic withholding at the expense of consumers.

Concerns regarding the economic withholding activities of a DGO were raised to the NYISO many months ago. Issues were discussed and debated at several stakeholder meetings before proposals were advanced for consideration by the Business Issues Committee (“BIC”) and the MC. Indeed, following approval of a slightly-different proposal by the BIC, a vote at the MC was delayed by the proponents of the Proposal in an effort to expand stakeholder support for the Proposal and make the Proposal easier for the NYISO to implement expeditiously. As the pleadings submitted on appeal no doubt demonstrate, further deliberation of the Proposal within the stakeholder process is not likely to result in any broader consensus, and certainly would perpetuate the period of time during which Statewide ICAP prices are inflated artificially due to economic withholding.

It may be that a number of the other ICAP-related issues raised by Appellants will receive further examination and possible action by the NYISO.<sup>4</sup> Such further examination of these issues, however, should not delay implementation of the Proposal.

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<sup>4</sup> Some of these issues already are under consideration in the ICAP Working Group and Multiple Intervenors and the CPB are participating in that process.



Importantly, a serious problem exists today because ICAP prices are being inflated, artificially, by the economic withholding activities of at least one DGO possessing market power. It would be inappropriate for the NYISO to delay implementation of the Proposal simply because there are other ICAP-related issues that may warrant consideration. There always are other issues to be considered – some issues require more immediate action. The NYISO should implement the Proposal expeditiously, and be willing to consider other proposals involving its ICAP markets as they work their way through the stakeholder process.

**C. The Board Should Accord Great Deference to the MC's Approval of the Proposal**

The Proposal enjoys broad-based support within the MC. For the reasons set forth below, the Board should accord great deference to the MC's approval of the Proposal.

The MC approved the Proposal overwhelmingly at its September 29, 2006 meeting. The Proposal garnered nearly 70% of the vote, considerably more than the 58% support required to pass a motion at the MC. Notably, the Proposal was supported by representatives of all five sectors, including the Generation Owners and Other Suppliers sectors (and was supported without opposition by the Transmission Owners, Public Power/Environmental and End-Use Consumers sectors). On a non-weighted basis, there were 33 votes cast in support of the Proposal, compared to only nine votes in opposition. Although not a voting member of the MC, the Proposal also was supported – and, in fact, co-sponsored – by the NYS DPS, one of the original proponents of the Demand Curves now in

effect in the NYISO's ICAP markets. Thus, support for the Proposal within the MC is substantial and broad-based.

In these circumstances, the NYISO should accord great deference to the collective judgment of the MC. The Proposal reflects a reasoned response by stakeholders to address a serious problem affecting ICAP markets statewide. Moreover, due to the significant and ever-increasing pricing impacts of the economic withholding problem necessitating the Proposal, it is imperative that the Proposal be implemented by the NYISO expeditiously, without the harmful delay that would be caused by any remand to the stakeholder process.

**CONCLUSION**

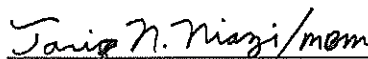
For the foregoing reasons, Multiple Intervenors and the CPB urge the NYISO Board to: (a) deny Appellants' appeals in their entirety; and (b) file tariff amendments with FERC seeking to implement the Proposal as expeditiously as practicable.

Dated:           October 23, 2006  
                    Albany, New York

Respectfully submitted,

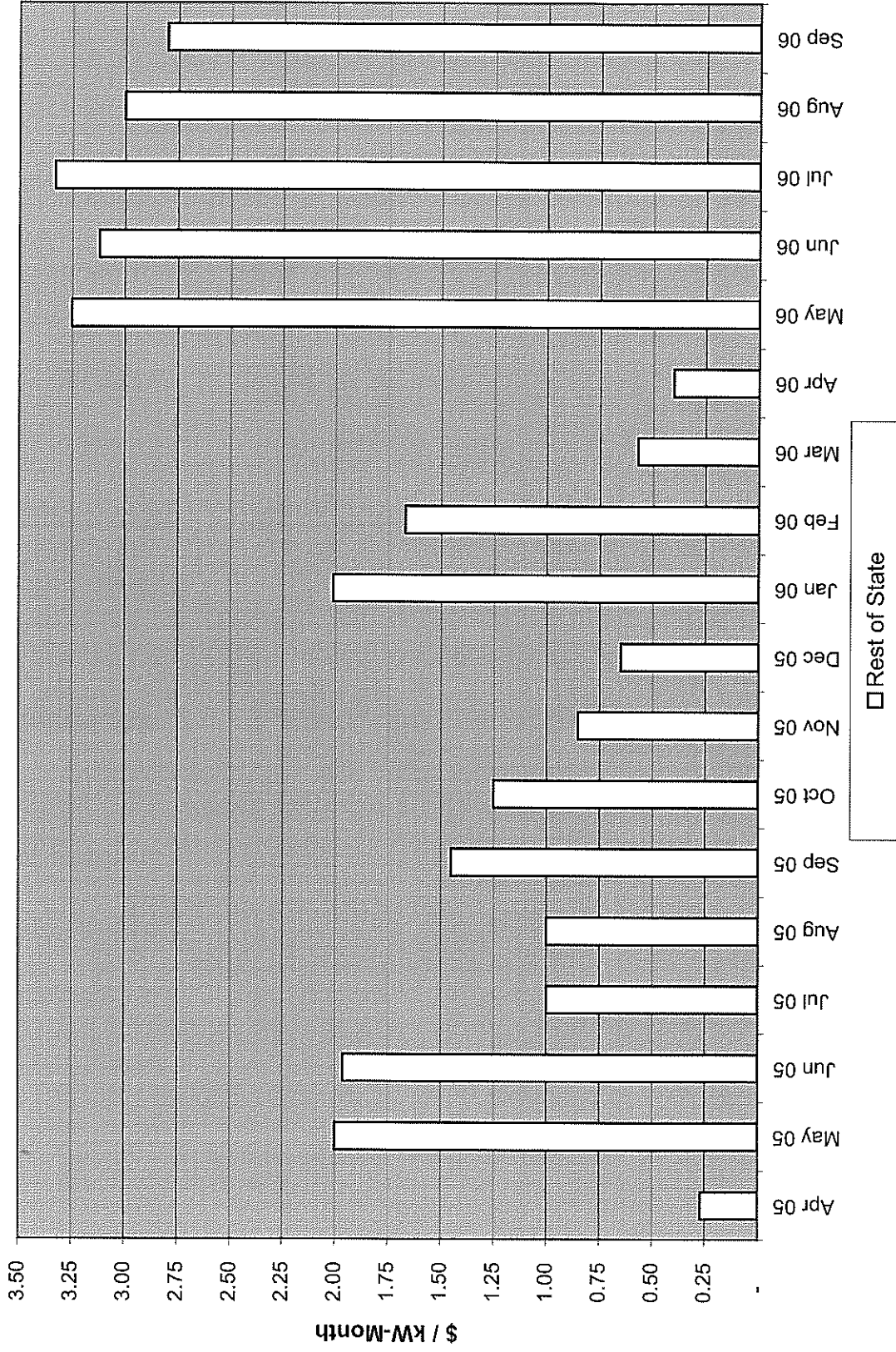


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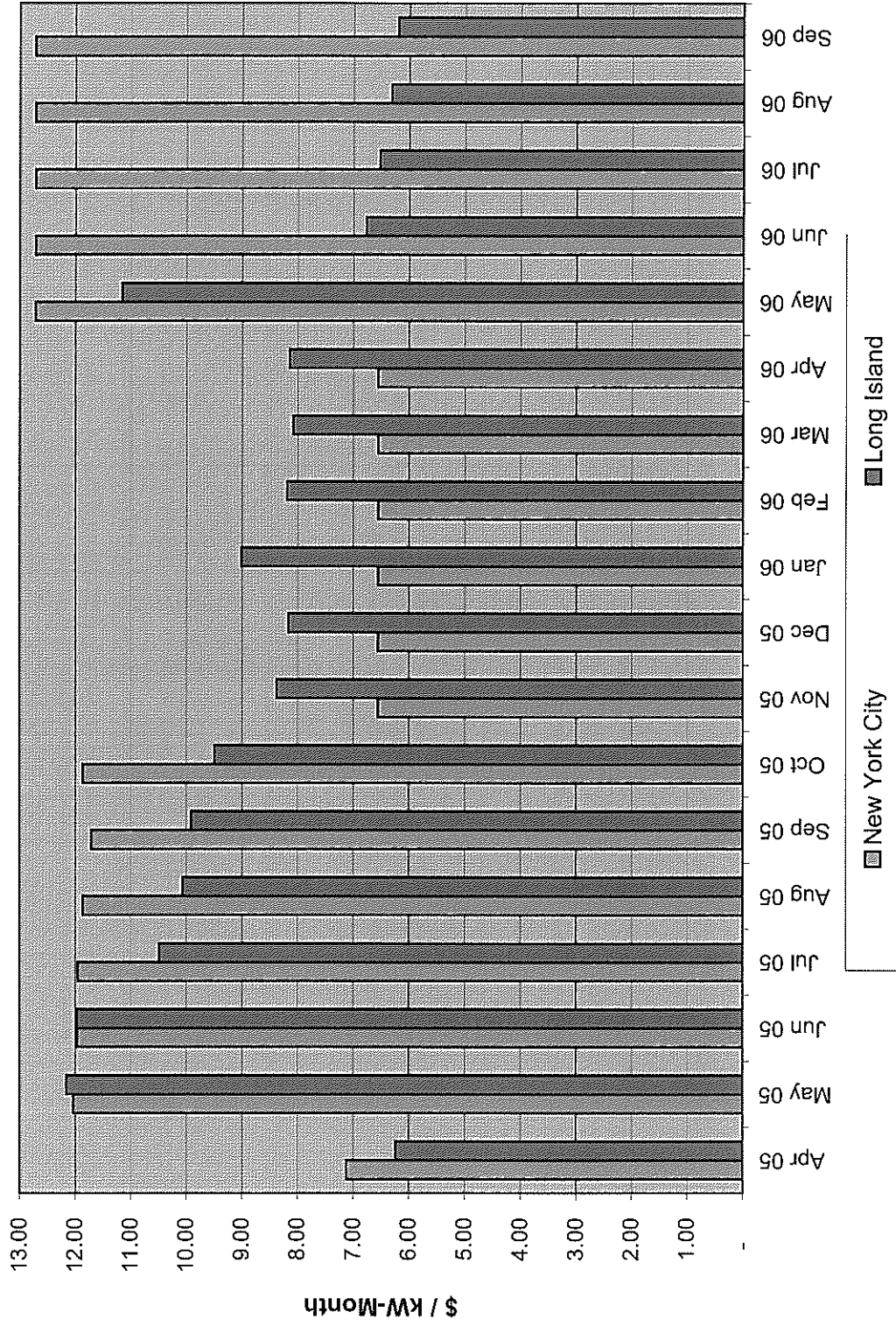
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# NYISO ICAP Monthly Auction Prices Rest of State



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**NYISO ICAP Monthly Auction Prices  
New York City and Long Island**



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