February 20, 2002

<u>VIA AIRBORNE EXPRESS</u>
Richard J. Grossi
Chairman
New York Independent System Operator
3890 Carman Road
Schenectady, NY 12303

c/o William J. Museler
President and Chief Executive Officer
New York Independent System Operator
3890 Carman Road
Schenectady, NY 12303

Re: Notice of Appeal of Con Edison, The City of New York and consumer Power Associates of the Management Committee's Decision With <u>Respect to the Congestion Shortfall Reallocation Proposal</u>

Dear Chairman Grossi:

Pursuant to the "Procedural Rules for Appeals to the ISO Board," Consolidated Edison Company of New York, Inc. ("Con Edison"), The City of New York and Consumer Power Associates (collectively, "Appellants") respectfully submit three copies of their appeal of the Management Committee's decision at its February 7, 2002 meeting to approve the "Congestion Shortfall Reallocation Proposal" (the "Proposal"). This motion was listed on the agenda as Motion #10.

Appellants are appealing this decision because the Proposal: 1) is discriminatory in that it inherently favors the owners of transmission facilities that take planned rather than forced outages; (2) alters the method of allocating congestion rent shortfalls while leaving unchanged the manner in which congestion rent surpluses are allocated; (3) violates the terms of the ISO/TO Agreement; (4) has a chilling effect on the construction of new transmission lines; and (5) does not address the cause of congestion rent shortfalls and surpluses.

A copy of this appeal has been electronically transmitted to Kristen Kranz who has agreed to serve it on the members of the Management Committee. Thank you.

Sincerely,

Neil H. Butterklee
Attorney for Con Edison
(212) 460-1089

cc: Kristan Kranz
Ira Frielicher, Esq.
Jay Kooper, Esq.
Catherine Luthin

NOTICE OF APPEAL OF
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
THE CITY OF NEW YORK, AND CONSUMER POWER ASSOCIATES
OF THE MANAGEMENT COMMITTEE'S DECISION WITH RESPECT TO
THE CONGESTION SHORTFALL REALLOCATION PROPOSAL

I. SUMMARY OF ARGUMENT

In accordance with Article 5 of the ISO Agreement and Section 1.02 of the NYISO's "Procedural Rules for Appeals to the ISO Board," Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company"), the City of New York ("NYC") and Consumer Power Associates (collectively, the "Appellants") hereby file this notice of appeal of the Management Committee's decision at its February 7, 2002 meeting to approve the "Congestion Shortfall Reallocation Proposal" (the "Proposal"). The Proposal was listed on the agenda as item number 10.

Appellants have five concerns with the Proposal. First, the Proposal is discriminatory in that it inherently favors the owners of transmission facilities that incur planned outages more frequently than forced outages. Since outages of overhead facilities are more frequently planned while outages of underground facilities are more frequently forced, owners of overhead facilities receive preferential treatment under the Proposal. Second, prior to this modification, congestion rent shortfalls and surpluses were allocated in the same manner. The Proposal, however, alters the method of allocating congestion rent shortfalls while leaving unchanged the manner in which congestion rent surpluses are allocated. Third, the Proposal violates the terms of the ISO/TO Agreement. Fourth, the Proposal has a chilling effect on the construction of new downstate transmission lines. Finally, the Proposal does not address the cause of congestion rent shortfalls and surpluses and mitigate their occurrences. Accordingly, implementation of this Proposal will unfairly impose a substantial cost on downstate consumers.

II. BACKGROUND

The NYISO OATT provides that Transmission Congestion Contracts ("TCCs") sold at auction will be fully funded. TCCs were designed to be simultaneously feasible, meaning that the transmission system must be able to accommodate the flow of power corresponding to outstanding TCCs without violating reliability rules. As such, there should be sufficient potential congestion revenues generated from daily transactions to compensate the holders of the TCCs. In instances where there is not sufficient potential congestion revenue, the resulting shortfall is paid by the New York Transmission Owners ("TOs") under a formula developed by the TOs prior to the start-up of the NYISO. Likewise, if the amount of congestion revenues collected by the NYISO exceeds the amount that is due to TCC holders, then that surplus is allocated to the TOs according to the same formula. In the calendar year 2000, there was a net surplus of congestion revenues while in the calendar year 2001 there was a net shortfall of such revenues.

At the November 14, 2001 meeting of the Business Issues Committee ("BIC"), Niagara Mohawk Power Corporation ("NiMo") introduced its Proposal, which reallocates congestion rent shortfalls but not surpluses. The Proposal was approved by the BIC. The Proposal was then introduced and withdrawn from both the December 5, 2001 and the January 10, 2002 Management Committee meetings. Subsequently, the Proposal was discussed at various NYISO committees and approved at the January 23, 2002 meeting of the BIC. Throughout this process, Con Edison spent a considerable amount of time and effort trying to work with NiMo and its supporters to eliminate the discriminatory features of the Proposal. Notwithstanding Con Edison's efforts, the Management Committee approved the Proposal on February 7^{th}, which would unfairly impose a significant new cost on downstate consumers.

III. <u>ARGUMENT</u>

A. The Proposal Is Discriminatory In That It Unduly Discriminates <u>Against Owners Of Underground And Underwater Facilities</u>

The Federal Power Act ("FPA") sets forth the basic standard for prohibited discrimination in FERC jurisdictional cases. Specifically, the FPA states that "[n]o public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of customers." *16 USC § 824d*; *See Wisconsin Electric Power Co. v. Northern States Power Co. et al*, 86 FERC ¶ 61,121 at 61,415 (1999) ("the Commission's comparability policy prohibits [Northern States Power] Transmission from unduly discriminating against or providing preferential treatment to [Northern States Power] Merchant or any other customer.") In this case, the NYISO is the entity charged with providing non-discriminatory service.

The cornerstone of the Proposal is that it assigns "Counter Flow TCCs" to TOs for each significant outage they have on a transmission facility. Counter Flow TCCs result in the TO paying for the congestion rent shortfalls associated with the facility that is experiencing an outage for the period of the outage. Under the Proposal this payment obligation would be mitigated for owners of overhead facilities, but not for the owners of underground and underwater facilities, because the TCCs sold would be adjusted for planned outages only. A TO would therefore be responsible for only those outages that exceed the forecasted period of the outage. However, the Proposal offers no such mitigation with respect to forced outages on underground and underwater facilities.

Throughout the negotiation process, Con Edison offered a method that would allow mitigation of the exposure of underground and underwater facilities to Counter Flow TCCs by reducing transmission line capability in the auction by an historic outage level. This remedy was rejected, imposing an unfair cost burden on downstate LSEs and consumers, who have only a small portion of the Management Committee vote.[1]

B. The Proposal Unfairly Allows Upstate Transmission Owners To Keep Extraordinary Surpluses While Reducing Their Exposure to Shortfalls at the Expense of Downstate Consumers

The most glaring discriminatory element of the Proposal is the fact that it would allocate shortfalls and surpluses differently. While the Proposal radically changes the way shortfalls are covered, it leaves in place the current method of allocating congestion rent surpluses, which amounted to $17.1 million in 2000. Thus, downstate TOs and consumers will pay the majority of congestion rent shortfalls, while NiMo and upstate TOs will receive the majority of congestion rent surpluses. Clearly, the Commission's anti-discrimination requirements do not support a tariff that provides preferential treatment to one class of customers. Con Edison tried to rectify this situation by proposing an amendment at the February 7, 2002 Management Committee meeting which stated that "[t]he NYISO shall appropriately modify the methodology to allocate excess transmission congestion revenues to make it consistent with the methodology for assignment of Counter Flow TCCs." This amendment failed.

[1] The Board should take note that the State Consumer Protection Board abstained on this Proposal.

One of the arguments sure to be advanced by the proponents of the Proposal is that the requisite number of members of the BIC and the Management Committee voted in favor of the Proposal. Management Committee approval, however, cannot immunize a discriminatory tariff. As the Commission recognized in *Bangor-Hydro Electric Company*, 95 FERC ¶ 61,149 at 61,479 (2001), "the fact that the provision was 'widely supported' does not, in and of itself, make it reasonable or require its acceptance." The Board should see the Proposal for what it is, a vote by 70% of the market participants to impose cost burdens on the other 30%.

C. The Proposal Violates The Terms Of The ISO/TO Agreement

Section 3.04 of the ISO/Transmission Owners Agreement ("Agreement") grants the NYISO the authority to administer and operate the bulk power system provided that "[t]he ISO does not materially and adversely affect the right of any Transmission Owner concerning transitional arrangements set forth in the ISO Tariffs, pertaining or relating to Existing Transmission Agreements which are in effect at the commencement of ISO Operations." *See* Section 3.04(c) of the Agreement. Specifically, the costs associated with Counter Flow TCCs will "materially and adversely affect" Con Edison's rights under an "Existing Transmission Agreement" by eviscerating the benefits associated with its grandfathered "Y-50 Agreement" with LIPA (*See* Attachment L of the NYISO OATT). As such, the Proposal violates the terms of the Agreement. Furthermore, implementation of the Proposal would constitute an unauthorized attempt by the NYISO to improperly modify the Agreement.

D. The Proposal Will Have A Chilling Effect On The Construction Of New Transmission Downstate

New transmission built in and around New York City and Long Island will have to be located underground or underwater. By not addressing the underlying problem, but instead unfairly adding additional costs to the owners of underground and underwater transmission facilities, the Management Committee has erected a significant roadblock to every new transmission project that would serve to benefit the consumers of New York City and Long Island. Rather than establishing programs to encourage the development of new transmission, the Management Committee has put forth a Proposal that will have a chilling effect on the construction of new transmission in the downstate area.

E. The Proposal Fails To Address The Cause of Congestion Shortfalls

A major defect of the Proposal is that it reallocates rather than eliminates congestion rent shortfalls. Congestion rent shortfalls (and surpluses) occur when scheduled transmission in the day-ahead market does not equal the amount of TCCs sold at auction. Currently, the NYISO does not account for historic outages in determining the amount of TCCS to be sold at auction. Instead, the NYISO auctions off TCCs equal to 100% of the transmission capacity, which is tantamount to saying that transmission is always 100% available, which is obviously not the case. The Proposal modifies this treatment by requiring the NYISO to make provisions for planned transmission outages. To solve this problem in a non-discriminatory manner, the NYISO should immediately adjust the amount of TCCs sold at auction to account for historic transmission outage levels and known planned transmission outages.

Adjusting the level of TCCs sold at auction to reflect historic outage levels is analogous to the movement from installed capacity (“ICAP”) to unforced capacity

("UCAP"). Both scenarios recognize the fact that capacity (whether it is generating or transmission capacity) is not available 100% of the time. This is both a more realistic and a more equitable way of auctioning these resources.

IV. CONCLUSION

Appellants respectfully request that the NYISO Board reject the decision of the Management Committee to adopt the Proposal.

Dated: February 20, 2002
New York, N.Y.

Respectfully submitted,

Consolidated Edison Company
of New York, Inc.

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