

108 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

New York Independent System Operator, Inc.

Docket No. ER04-1024-000

ORDER ACCEPTING PROPOSED REVISIONS TO
INDEPENDENT SYSTEM OPERATOR AGREEMENT

(Issued September 13, 2004)

1. In this order, we accept revisions filed by the New York Independent System Operator, Inc. (NYISO) to the Independent System Operator Agreement (ISO Agreement) to allow demand response providers and distributed generators to become voting members in stakeholder governance. All parties agree that demand response providers and distributed generators should be given a voice in NYISO's governance. Giving these market participants a voice in NYISO policy development will encourage the implementation of new demand management technologies and services in New York's electricity market, to the benefit of electricity suppliers and buyers. This order resolves a disagreement among the parties as to the appropriate sector in which to place these market participants.

Background

2. NYISO's governance structure provides its members with a voice in the design, development and operation of New York's electricity market. Policy decisions are decided by NYISO's Board of Directors (NYISO Board) based on recommendations from NYISO's Management Committee. Before the Management Committee can propose tariff amendments or other actions to the NYISO Board for consideration, those proposals first must meet the threshold of a 58 percent favorable vote among the five sectors comprising NYISO's total membership. Voting shares are currently allocated among the following five sectors: (1) generation owners; (2) other suppliers; (3) transmission owners; (4) end use consumers; and (5) the public power/environmental sector.

3. NYISO states that demand response providers and distributed generators are an important and rapidly growing sector of market participants. NYISO further states that these market participants were inadvertently excluded from participating in NYISO's governance structure when the categories and voting thresholds were developed in 1999.

NYISO'S Proposal

4. NYISO proposes to amend the ISO Agreement to place demand response providers and certain distributed generators in the "other suppliers" sector. NYISO believes that these market players are similar in their function to "other suppliers," because they supply energy or capacity to load. NYISO contends that they meet the ISO Agreement's definition of "other supplier" as a party that "is a seller, buyer, broker, aggregator, power exchange, energy service company or transmitter of capacity or energy in, from or through the New York control area." NYISO proposes to place all demand response providers in the "other suppliers" sector. While NYISO proposes that certain distributed generators be placed in the "other suppliers" sector, it also proposes that some individual distributed generators may fit better within the "end use consumer" or "generation owners" sectors, depending on their economic interests.

5. NYISO proposes a four-part test to determine a distributed generator's primary purpose and, based on this, to determine the voting sector to which a particular distributed generator should be assigned. This test considers: (1) the size of the distributed generator relative to its host load; (2) the intended use for which the distributed generator was constructed; (3) the historical use of the distributed generator; and (4) the location of the distributed generator. If the distributed generator is owned by an end-use consumer or an affiliate of such and NYISO determines that the primary purpose of the distributed generator is to supply electrical energy and capacity to that end-use consumer, then NYISO proposes that the distributed generator owner would participate in NYISO's governance as a member of the end-use consumer sector. If the distributed generator is owned by an entity that is not an affiliate of an end-use consumer and NYISO determines that the primary purpose of the distributed generator is to sell electrical energy and capacity into the grid, then NYISO proposes that the distributed generator owner would participate in NYISO's governance as a member of the generator owners sector. Otherwise, NYISO proposes that the distributed generator would participate in the "other suppliers" sector.

6. NYISO also proposes to offer reduced membership fees to smaller demand response providers and distributed generators (below the regular membership fee of \$5,000 per annum) for the first three years of their membership. NYISO states this will ensure that the fee does not act as a financial barrier to participation. NYISO proposes that demand response providers with 40 MW or less of resources and distributed generators with 2 MW or less of resources would pay a fee of \$1,000 for 2004, \$2,000 for

2005, and \$3,000 for 2006. Starting with 2007, NYISO proposes that these demand response providers and distributed generators would pay the regular membership fee of \$5,000.

7. NYISO states that the proposed amendments were appealed by the Independent Power Producers of New York (IPPNY), but that these appeals were denied by NYISO's Board. NYISO's Management Committee also considered and rejected an alternative proposal. This alternative proposal would have required an equal reduction among all voting sectors to create a new sub-sector housed within the public power and environment sector that would give demand response providers and distributed generators a combined 2 percent voting share.

8. NYISO also states that it has committed to filing annual reports on an informational basis on the effectiveness and fairness of the shared governance structure and to propose changes as necessary. NYISO states that, if it appears that changes are necessary, the NYISO Board and market participants will: (1) consult; (2) propose further action as necessary to the governance process; and (3) make appropriate filings with the Commission.

Notice of Filing and Pleadings

9. Notice of NYISO's filing was published in the *Federal Register*, 69 Fed. Reg. 44,526 (2004), with protests and interventions due on or before August 5, 2004. Timely motions to intervene were filed by the Constellation Power Source, Inc. and Constellation NewEnergy, Inc. (collectively, Constellation), Multiple Intervenors,¹ and, jointly, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York Power Authority, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Orange and Rockland Utilities, Inc., and Niagara Mohawk Power Corporation (collectively, New York Transmission Owners).

10. Timely motions to intervene and protest were filed by Calpine Corporation (Calpine), Keyspan-Ravenswood, LLC (Ravenswood), IPPNY, AES Eastern Energy, L.P. and Sithe Energy Marketing, L.P. (AES/Sithe), NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC (collectively, NRG Companies), and Dynegy Power Marketing, Inc. and Dynegy Northeast Generation, Inc. (collectively, Dynegy).

11. Multiple Intervenors and New York Transmission Owners support NYISO's filing because they believe that it will enfranchise demand response providers and distributed generators. Multiple Intervenors state that the proposed voting sector designations for demand response providers and distributed generators are appropriate. According to

¹ An association of 55 large commercial and industrial energy consumers.

Multiple Intervenors, assignment of demand response providers, certain distributed generators and other suppliers in one sector will maintain an equitable balance among voting sectors. Multiple Intervenors also state that the process that preceded NYISO's filing was fair, since it resulted from extensive analysis and deliberations by the By-Laws Subcommittee and Management Committee, including a vote of over 65 percent in favor of the instant proposal and an orderly appeal process. New York Transmission Owners state that the proposed changes will ensure that demand response providers and distributed generators will have voting rights within NYISO's governance process and will allow them to participate in the sector best related to their functions and interests.

12. IPPNY requests that the Commission reject NYISO's filing. IPPNY argues that the proposed amendments to the governance structure will undermine the balance between suppliers and load in NYISO's shared governance structure.² IPPNY instead suggests that we adopt the alternative procedure that was rejected by the Management Committee that would have granted demand response providers and distributed generators a 2 percent voting share as part of the public power and environmental sector.

13. IPPNY recommends that, if the Commission accepts NYISO's application, NYISO should be required to file semiannual reports on the state of the governance process. Such reports would have to provide details regarding whether demand response providers and distributed generators have voted with load or with suppliers, and analyze the impact such votes have had on the outcomes of issues and whether this process produces a balanced result.

14. Ravenswood and AES/Sithe suggest that, if the Commission accepts the proposed changes to the governance structure, NYISO should be directed to submit bi-annual status reports assessing the effectiveness of the shared governance process in New York and, if warranted, proposing changes to that structure.

15. Ravenswood, AES/Sithe, Calpine, Dynegy, and NRG also support IPPNY's proposal and express concern that demand response providers and distributed generators are likely to vote with load and that this will shift voting outcomes. Protestors explain that such a shift is likely because the interests of demand response providers and distributed generators are closely linked to those of their customers – *i.e.*, the load serving entities. These protestors ask the Commission to reject NYISO's application.

² Voting in the Management Committee is conducted by sector, with “generation owners” allocated 21.5 percent of the voting shares, “other suppliers” – 21.5 percent, “transmission owners” – 20 percent, “end use consumers” – 20 percent, and public power – 17 percent.

16. Calpine also requests that the Commission reject elements of NYISO's proposal, *i.e.*, the manner in which the vote of demand response providers and distributed generators is taken from the voting share of other stakeholders, and require NYISO to give further consideration to an alternative proposal that better preserves existing voting shares among sectors. It also argues that it is unjust and unreasonable to alter NYISO's voting structure to diminish the influence of existing generation owners, the entities that have the most capital at risk in power markets. Calpine explains that the influence of generators will be diminished under NYISO's plan because demand response providers and distributed generators are likely to vote with load, thus skewing the existing voting balance. Calpine argues that, since amendments to the ISO Agreement regarding voting weights must be filed under section 206 of the Federal Power Act, NYISO has a heightened burden to prove that the proposed modifications are just and reasonable. Calpine argues that NYISO did not meet this burden.

17. New York Transmission Owners filed an answer to IPPNY's protest. Along with its arguments opposing IPPNY's protest, New York Transmission Owners also present voting statistics showing that NYISO's voting sectors do not vote as blocks. NYISO also filed an answer to the protests.

Discussion

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by New York Transmission Owners and NYISO because they provide information that assists us in our decision-making process.

19. We will accept NYISO's proposed amendments to the ISO Agreement as just and reasonable. We reject the unsupported argument of IPPNY and its members that the proposed changes in the governance structure will confer an unfair advantage on load or unreasonably skew future governance votes. As NYISO explained in its decision to deny IPPNY's appeal, seemingly similarly-situated market participants may, in fact, view their economic interests differently.

20. As to IPPNY's claim that members of the Management Committee vote as blocks of either load or supply, NYISO maintains it is impossible to determine whether the interests of demand response providers and distributed generators would likely cause them to vote as load or as supply. This viewpoint is supported by the New York Transmission Owners' explanation that municipal systems, retail load serving entities, environmental groups, large consumers, state agencies and state power authorities, do not all vote in lock step with their load. In fact, the New York Transmission Owners assert

that IPPNY was incorrect in referring to these entities as a “load block” because (as shown by statistics they have gathered from voting records³) these groups have not voted as a block. In this same regard, NYISO states that demand response providers that participate directly in the NYISO-administered Day-Ahead energy market are compensated by NYISO as if they were generators. NYISO also adds that, in the future, demand response providers and distributed generators will have expanded opportunities to participate as suppliers in the NYISO’s ancillary services markets.

21. NYISO stresses that, in selecting the proper sector to house demand response providers and distributed generators, we must ensure that a fair and balanced structure is maintained. We agree. We also agree with NYISO as to the appropriate sectors to place the demand response providers and distributed generators within the revised NYISO membership structure. We believe that NYISO’s proposal, placing demand response providers within the “other suppliers” sector and placing distributed generators within one of three sectors, depending on the factors described above, is appropriate. We agree with NYISO’s placement of the distributed generators because it allows distributed generators that may have an economic interest that is more closely aligned with end users or generation owners than with “other suppliers” to be appropriately identified and grouped. We find, therefore, that it is appropriate to place certain distributed generators in the end use consumers or generation owners sectors, and others in the “other suppliers” sector as proposed by NYISO. We find that this proposal is consistent with the existing governance structure and does not treat any market segment in an arbitrary or discriminatory manner. This proposal allows all market participants to continue to participate effectively in NYISO’s decision-making process.

22. We agree with the request of IPPNY, Ravenswood and AES/Sithe that NYISO should report on the effect of proposed changes on voting and we will order NYISO to monitor voting and include such analysis in the informational annual reports required by section 10.1 of the NYISO Market Monitoring Plan.⁴ If warranted, changes can be worked out through the existing governance process and filed with the Commission.

The Commission orders:

(A) NYISO’s proposed revisions to the ISO Agreement are hereby accepted for filing, as discussed in the body of this order.

³ The New York Transmission Owners’ analysis is based on votes made between June 2002 and December 2003.

⁴ Although various protestors recommended that these reports be required semi-annually or bi-annually, we believe that these matters can adequately be monitored in annual reports.

(B) NYISO is hereby directed to include an analysis of and report on the effects of its revised membership voting plan in its informational annual reports required under section 10.1 of the NYISO Market Monitoring Plan, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.