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FILE NO: 55430.000042

December 19, 2001

By Hand

Mark J. Langer, Clerk  
United States Court of Appeals  
District of Columbia Circuit  
United States Court House  
333 Constitution Avenue, NW  
Room 5423  
Washington, D.C. 20001

Re: *New York Independent System Operator, Inc. v. Federal Energy Regulatory  
Commission*, Case No. 01-1496

Dear Mr. Langer:

Enclosed for filing by the New York Independent System Operator, Inc. ("NYISO") are the original and two copies of: (1) Docketing Statement; (2) Statement of Issues to be Raised; (3) NYISO's Certificate as to Parties, Rulings and Related Cases; and (4) Use of Deferred Appendix and an original and four copies of the Motion to Defer Briefing Schedule.

Respectfully submitted,

Arnold H. Quint

Enclosures

cc (w enc.): Solicitor, Federal Energy Regulatory Commission  
Service Lists

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK INDEPENDENT SYSTEM	)	
OPERATOR, INC.,	)	
	)	
Petitioner,	)	Case No. 01-1496
v.	)	
	)	
FEDERAL ENERGY REGULATORY	)	
COMMISSION,	)	
	)	
Respondent,	)	

**PETITIONER'S  
STATEMENT OF ISSUES TO BE RAISED**

1. Having found that rates for non-spinning reserves could be raised to unduly high levels through an abuse of market power, did the Federal Energy Regulatory Commission (FERC) arbitrarily and capriciously conclude that the Federal Power Act (FPA) precluded a determination of just and reasonable rates during a period affected by such market power when the New York Independent System Operator, Inc. (NYISO) requested such a determination pursuant to Section 205 of the FPA in accordance with a FERC-approved market monitoring plan?

2. Did FERC erroneously hold that the NYISO had raised a new issue on rehearing by proposing a methodology for substituting just and reasonable rates for certain rates set at unduly high levels through an abuse of market power, when in its initial order FERC expressly

declined to undertake a re-determination of such rates on the grounds that doing so would be unreasonably difficult?

Respectfully submitted,

By: \_\_\_\_\_

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Attorneys for Petitioner  
New York Independent System Operator, Inc.

Dated: December 19, 2001

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	)	
Respondent,	)	

**CERTIFICATE AS TO PARTIES,  
RULINGS AND RELATED CASES**

**A. Parties and *Amici***

The parties before the Federal Energy Regulatory Commission are those listed below.

AES NY, L.L.C.  
California Electricity Oversight Board  
Central Hudson Gas & Electric Corporation  
Coral Power, L.L.C. and  
Merchant Energy Group of the Americas  
Dynegy Power Marketing, Inc.  
Electric Power Supply Association  
EME Homer City Generation, L.P. and  
Edison Mission Marketing & Trading, Inc.  
Energetix, Inc.  
Enron Power Marketing, Inc.  
1st Rochdale Cooperative Group, Inc.  
Indeck Energy Services, Inc.  
Independent Power Producers of New York, Inc.  
KeySpan-Ravenswood, Inc.  
LSE Intervenors  
Long Island Power Authority and LIPA  
Multiple Intervenors  
Municipal Electric Utilities Association  
New York State Electric & Gas Corporation  
Niagara Mohawk Energy Marketing, Inc.  
NRG Power Marketing, Inc.  
Orion Power New York GP, Inc.

PG&E National Group, PG&E Generating, and  
PG&E Energy Trading-Power, L.P.  
Public Service Commission of the State of New York  
Public Service Electric & Gas Company  
Sithe Power Marketing, L.P.  
Southern Energy NY Gen, L.L.C., Southern Energy  
Bowline, L.L.C. and Southern Energy Lovett, L.L.C.  
Strategic Power Management, Inc.  
TransCanada Power Marketing Ltd.

The Petitioner in this court is the New York Independent System Operator, Inc. (“NYISO”). The NYISO is a New York not-for-profit corporation formed under New York law. Although it does not own or control any electric power generation facilities, it possesses operational control over the transmission facilities in the state of New York. The NYISO is the independent body responsible for providing open access transmission service, maintaining reliability, and administering competitive wholesale electricity markets in New York State. The NYISO is not a publicly-held company. Nor does it have any parent company or publicly held company that has a 10% or greater ownership in it.

The Respondent is the Federal Energy Regulatory Commission (“FERC”).

The parties who have moved to intervene in this proceeding are:

Independent Power Producers of New York, Inc.  
KeySpan-Ravenswood, Inc.  
Long Island Power Authority and LIPA  
The Municipal Utilities Association of New York State  
NRG Power Marketing, Inc.  
Orion Power New York GP, Inc.

## **B. Rulings under Review**

The FERC rulings under review are:

*New York Independent System Operator, Inc., et al.*, Order on Tariff Filing and Complaints, 91 FERC (CCH) ¶ 61, 218 (May 31, 2000); and

*New York Independent System Operator, Inc., et al.*, Order on Rehearing, 97 FERC (CCH) ¶ 61, 155 (November 8, 2001).

**C. Related Cases**

The case on review has not previously been before the court. Consolidated Edison Company of New York, Inc. has sought review of the same two orders in *Consolidated Edison Company of New York, Inc. v. Federal Energy Regulatory Commission*, D.C. Circuit No. 01-1503, filed on December 3, 2001.

Respectfully submitted,

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FEDERAL ENERGY REGULATORY	)	
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	)	
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**USE OF DEFERRED APPENDIX**

The parties request the use of a deferred appendix.

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	)	
FEDERAL ENERGY REGULATORY	)	
COMMISSION,	)	
Respondent,	)	

**CERTIFICATE OF SERVICE**

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 19<sup>th</sup> day of December, 2001, served the (1) Docketing Statement; (2) Statement of Issues to be Raised; (3) NYISO's Certificate as to Parties, Rulings and Related Cases; (4) Use of Deferred Appendix; and (5) Motion to Defer Briefing Schedule by first class mail, postage prepaid, upon all of the parties admitted to the proceedings below in accordance with the official service lists maintained by the Federal Energy Regulatory Commission in Docket Nos. ER00-1969, EL00-57, EL00-60, EL00-63 and EL00-64. Those parties are set forth on the attached list of parties served. I have also served the foregoing document by hand delivery to the Solicitor at the Federal Energy Regulatory Commission.

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**MOTION TO DEFER BRIEFING SCHEDULE**

The New York Independent System Operator, Inc. (“NYISO”), the Petitioner herein, moves to defer the briefing schedule until the Federal Energy Regulatory Commission (FERC) rules on the NYISO’s pending Request for Rehearing. In support of this motion, the NYISO states as follows:

1. The Petition for Review in Case No. 01-1496 involves orders of FERC issued on May 31, 2000 and November 8, 2001 in *New York Independent System Operator, Inc.*, Order on Tariff Filing and Complaints, 91 FERC (CCH) ¶61,218 (2000), and Order on Rehearing, 97 FERC (CCH) ¶ 61,155 (2001).

2. On December 10, 2001, the NYISO filed a Request for Rehearing on the November 8, 2001 Order on Rehearing because the Order on Rehearing appears to be based on new grounds that are not specified in the Commission’s original May 31, 2000 Order on Tariff Filing and Complaints and that do not support the Commission’s holdings, and because the Commission erroneously concluded that the NYISO had raised a new issue in its original request for limited rehearing.

3. Section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(6), provides that “[n]o objection to the order of the Commission shall be considered by the court unless such an objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.” The NYISO filed its second Request for Rehearing because it recognizes that courts have strictly construed the rehearing requirement. *Town of Norwood v. FERC*, 906 F.2d 272, 774 (D.C. Cir. 1990).

4. Because the pending Request for Rehearing relates to the issues pending before the Court, issuance of a briefing schedule should be deferred until FERC acts on the Request for Rehearing.

5. Counsel for the NYISO has contacted counsel for FERC. Counsel for FERC has advised the undersigned that FERC has not yet formulated its response.

WHEREFORE, an order establishing a briefing schedule should be deferred pending FERC action on the Request for Rehearing.

Respectfully submitted,

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