

March 24, 2004

Hand Delivered

Mr. John W. Boston
Chairman of the Board
c/o Mr. William Museler
President and CEO
New York Independent System Operator, Inc.
3890 Carman Road
Schenectady, N.Y. 12303

Re: IPPNY Appeal of Management Committee Decision on DG/DRP Voting

Dear Chairman Boston:

Pursuant to the "Procedural Rules for Appeals to the ISO Board," Consolidated Edison Company of New York, Inc., Central Hudson Gas & Electric Company, New York State Electric and Gas Corporation, and Niagara Mohawk, a National Grid Company (collectively, "Transmission Owners") hereby file this motion in opposition to the March 16, 2004 Appeal (the "Appeal") filed by the Independent Power Producers of New York, Inc. ("IPPNY"). IPPNY's Appeal relates to the Management Committee's decision to not approve IPPNY's proposal for a subsector for Demand Response Providers and Distributed Generators.

The Transmission Owners look forward to discussing both of IPPNY's appeals at the April 19th oral argument. The Transmission Owners would appreciate it if the NYISO could post this document on its website and serve a copy via e-mail to all members of the Management Committee. Thank you.

Very truly yours,

Paul L. Gioia, Esq.
Transmission Owners

Neil H. Butterklee, Esq.
Consolidated Edison Company
of New York, Inc.

MOTION IN OPPOSITION TO AN APPEAL

Pursuant to the “Procedural Rules for Appeals to the ISO Board,” Consolidated Edison Company of New York, Inc., Central Hudson Gas & Electric Company, New York State Electric and Gas Corporation, and Niagara Mohawk, a National Grid Company (collectively, “Transmission Owners”) hereby file this motion in opposition to the March 16, 2004 Appeal (the “Appeal”) filed by the Independent Power Producers of New York, Inc. (“IPPNY”). In its Appeal, IPPNY seeks to overturn the March 2, 2004 decision of the Management Committee (“MC”) decision to not approve IPPNY’s proposal for a subsector for Demand Response Providers (“DRP”) and Distributed Generators (“DG”). The new subsector would be created by reducing the existing voting shares of specified sectors and subsectors.

The IPPNY appeal should be denied on the grounds that the Management Committee acted reasonably in rejecting the IPPNY proposal, which is inconsistent with the proposal approved by the Management Committee on February 4, 2004, and that the IPPNY proposal is unreasonable and is not supported by the factual contentions on which it is based.

I. THE MANAGEMENT COMMITTEE ACTED REASONABLY IN REJECTING IPPNY’S PROPOSAL

In rejecting the proposal offered by IPPNY for the creation of a separate subsector for DGs and DRPs, the Management Committee clearly reaffirmed its preference for the proposal that it approved on February 4, 2004. That proposal was developed by the By-Laws Subcommittee after extensive consideration over the course of close to a year, with the active participation by all interested parties, including IPPNY and several of its

members. The proposal approved by the Management Committee was carefully crafted to assign DGs and DRPs to the sector in which their participation would be most appropriate based on the functions they would perform in the NYISO markets. Generally, that participation would be in the Other Supplier sector. However, under specified circumstances, DGs and DRPs would participate in the End Use Consumer sector or the Generator Owner sector.

The board should reject IPPNY's attempt to collaterally attack through this appeal the carefully considered and sound actions of the By-Laws Subcommittee and the Management Committee.

II. IPPNY'S PROPOSAL IS UNREASONABLE

As explained in our response to IPPNY's appeal of the Management Committee's decision on February 4, DGs and DRPs clearly fit the definition of members of the Other Supplier sector. As the Management Committee recognized, the Other Supplier sector was intentionally and clearly defined to include entities such as DGs and DRPs. The Other Supplier sector includes any party that is a "seller, buyer, broker, aggregator . . . or ESCO."¹ An ESCO is defined as a "Load Serving Entity (other than an entity supplying its own load), a retail load aggregator or a provider of comprehensive energy services."² Based on their functions in the NYISO markets, DGs and DRPs clearly are entities included in the broad definition of Other Supplier. Despite this obvious fact, IPPNY contends that DGs and DRPs should not participate in the Other Supplier sector because it can predict how these entities will vote in the future, on issues that do not yet exist, and that they will vote in favor of "Load" and against "Supply" interests.

¹ ISO Agreement, § 1.96.

² ISO Agreement § 1.33.

First, raw speculation as to how any party will vote in the future cannot provide a sufficient basis for the board's overturning a decision of the Management Committee and should be rejected out of hand. Furthermore, the sectors and subsectors in the NYISO's governance structure are based on the functions various segments of the industry perform in the NYISO markets, and are not based on a presumption as to how they will vote on various issues.

Finally, if one were to consider the economic interests of DGs and DRPs, given their functions, their economic interests would clearly be similar to those of other generators and suppliers, rather than those of the other market sectors. DGs economic interests will generally be in alignment to their larger brethren and supportive of higher energy prices so they can receive higher revenues for their output. Similarly, lower energy prices run counter to DRP's economic interests. Lower energy prices would obviate the need for the NYISO to call upon a DRP's resources. Thus, the creation of a new subsector for DGs and DRPs is unnecessary and unreasonable.

III. IPPNY'S CLAIM OF A SIMPLISTIC LOAD VERSUS SUPPLY DICHOTOMY OF VOTING INTERESTS IS UNSUPPORTED BY THE FACTS

IPPNY argues that the Management Committee should have approved its proposal because it is necessary to preserve the current dichotomy of Load/Supply voting interests in the NYISO's governance. IPPNY, however, provides no support for this contention. In fact, its contention is refuted by the arguments in its own appeal.

Based on IPPNY's rationale, the sectors identified as "Supply" have a distinct minority of voting shares and need the support of other sectors to gain Management Committee approval. Yet, a number of major initiatives supported by these "Supply"

sectors have gained Management Committee approval. In its appeal, IPPNY tries to explain away these compelling actions, including the removal of the bid cap on 30-minute non-synchronous reserves, the ICAP demand cure, and scarcity pricing. IPPNY contends that these measures were approved by the Management Committee only because they enjoyed strong support from the NYISO's Independent Market Advisor and because of "a number of other factors." That is precisely the point. IPPNY indirectly concedes that members of other sectors do consider factors other than their short-term financial interests when voting, and do consider the advice of knowledgeable parties, such as the NYISO's Independent Market Advisor. That doesn't mean, of course, that other sectors will support any proposal made by IPPNY. Proposals without merit, such as the instant proposal, will not gain the support of other sectors simply because they do not warrant their support. The Management Committee's rejection of the IPPNY proposal is not evidence of a "Load" versus "Supply" voting dichotomy. It demonstrates only that the Management Committee found the IPPNY proposal unworthy of support on its merits.

IV. THE HISTORY OF THE NYISO GOVERNANCE REFUTES IPPNY'S CONTENTION OF A SIMPLISTIC LOAD VERSUS SUPPLY DICHOTOMY

The NYISO's governance process has not been a pitched battle of "Load" versus "Supply" interests, as IPPNY suggests. If that were the case, the NYISO and its market participants could not have accomplished as much as they have over the past four years. While all market participants pay careful attention to their short-term economic interests, they also have a shared long-term interest in the success of the NYISO and its markets. IPPNY derisively refers to this as "the proposition that load often votes in an altruistic

manner with the sole aim of enhancing market equity and efficiency.”³ Whether or not market participants are “altruistic,” they do recognize their long-term self-interest in efficient markets, and the importance of treating all market sectors, including suppliers, fairly. This has clearly been demonstrated in Management Committee voting patterns.

In its motion in support of the Management Committee’s decision on February 4, the Transmission Owners presented an analysis of votes taken at the Management Committee from June 2002 through June 2003. That analysis showed that of 30 roll call votes taken, the Transmission Owner sector voted with the End Use Consumer sector 16 times, or 53%, while they voted with the Generator Owner sector 13 times, or 43%. When this analysis is updated through December 2003 (for a 19 month sample of 35 roll call votes), it can be seen that the Transmission Owner sector voted with the End Use Consumer sector 18 times, or 51%, while they voted with the Generator Owner sector 15 times, or 43%. Clearly, this is not evidence of a load versus supply dichotomy.

With respect to block voting by sector, IPPNY continues to overlook the facts. For the 19-month period from June 2002 through December 2003, the Transmission Owner sector voted as a block 21 out of 35 times, or 60%. For that same time period, the End Use Consumer sector voted as a block only 15 times, or 43%, while the Generator Owner sector voted as a block 21 out of 35 times, or 60%. While IPPNY advances an unsupported contention that “load” interests invariably vote as a block and in opposition to “supply” interests, the review of a large sample of votes proves otherwise.

IPPNY also claims “that the balance between load and supply in the NYISO governance tips heavily in favor of load interests.”⁴ This claim, however, is at odds with

³ IPPNY Appeal, page 5.

⁴ IPPNY Appeal, page 6.

the fact that for the 19 month period ending December 2003, the outcome of the Management Committee vote agreed with the vote of the Generator Owner sector 23 out of 35 times, or 66%, while the outcome of the Management Committee vote agreed with the vote of the Transmission Owner sector 22 out of 35 times, or 63%. With respect to the End Use Consumer sector, the outcome of the Management Committee vote agreed with their vote 21 out of 35 times, or 60%.

V. IPPNY’S CONTENTION THAT ENTITIES SUCH AS DGs AND DRPs WERE NOT CONTEMPLATED WHEN THE NYISO WAS FORMED IS UNSUPPORTED

IPPNY contends that DGs do not belong in the Other Supplier sector because they were never contemplated by the drafters of the ISO Agreement. Yet, the definition of an Other Supplier clearly includes sellers and, given that DGs are nothing more than small generators, it is apparent that the term seller includes DGs. In fact, IPPNY members have insisted that generator owners meet the definition of both the Generator Owner sector and Other Supplier sector and can move between these two sectors at will. The proposal approved by the Management Committee, however, strictly limits the ability of DGs to participate in the Generator Owner sector, at the insistence of IPPNY representatives on the By-Laws Subcommittee.

In its first appeal, IPPNY argued that DRPs do not belong in the Other Supplier sector because they are “aggregators for entities which, if they were members of the NYISO, would be participants in the End-Use Consumer sector.”⁵ Since the ISO Agreement defines an Other Supplier as including “[a] Party that is a seller, buyer, broker, aggregator,”⁶ IPPNY’s statement is an admission that the drafters did, in fact,

⁵ IPPNY’s February 19, 2004 Appeal, page 4.

⁶ ISO Agreement, Section 1.96.

include entities like DRPs in the NYISO governance structure. This is in contrast to IPPNY's assertion in their March 16th appeal, where IPPNY argues that DRP and DG parties were "never discussed or even contemplated as a concept during the negotiations that led to the formulation of the NYISO's governance framework."⁷

Furthermore, there is no justification, as IPPNY suggests, for the board to consider the "intent" of the parties to the ISO Agreement. First, it is black letter law that the intent of the parties to an agreement cannot be considered unless the agreement has been proven to be ambiguous.⁸ It is patently clear that IPPNY has not met that burden. Second, unsubstantiated and self-serving general statements by interested parties as to what they did or did not intend can not provide sufficient evidence of the intent of all of the parties to an agreement. For example, many of the supporters of the Management Committee's actions were actively involved in the drafting of the ISO Agreement and disagree with IPPNY's contention that participation by entities such as DGs and DRPs was not contemplated, as is clearly evidenced by the language in the ISO Agreement.

VI. CONCLUSION

For the reasons stated above, the NYISO Board of Directors should reject both of IPPNY's appeals and uphold the decisions of the MC.

⁷ IPPNY Appeal, page 2.

⁸ New York State law provides that "[a]ccording to the parol evidence rule, [plaintiff] is precluded from introducing extrinsic evidence of the contract's purpose in order to vary the plain meaning of the writing." *Investors Insurance Company v. Dorinco Reinsurance Company*, 917 F.2d 100, 104 (2nd cir. 1990); *see also Fidelity and Guranty Insurance v. West Point Reality*, 2002 WL 1933780 (S.D.N.Y. 2002). In other words, IPPNY can only introduce intent of the parties during the negotiation of the ISO Agreement "when the terms of the writing itself are ambiguous." *Id.* Otherwise, "the parties' intentions as to the terms of a contract is inadmissible when the contract is unambiguous." Further, the obligation to prove that the ISO Agreement is ambiguous rests with IPPNY, which it has not done. *See The Millgard Corporation v. E.E. Cruz/NAB/Fronier-Kemper and Liberty Mutual*, 2003 WL 22741664 (S.D.N.Y. 2003). Finally, "under New York law, the omission of terms in a contract does not create ambiguity." *Id.*

Dated: March 24, 2004

Respectfully submitted,

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