

September 16, 2010

VIA HAND DELIVERY

Ms. Karen Antion
Chairwoman of the Board of Directors
c/o Mr. Stephen G. Whitley
President and CEO
New York Independent System Operator
10 Krey Boulevard
Rensselaer, NY 12144

Re: Appeals of the Management Committee's Decision Regarding The Buyer-Side Mitigation Measures Approved at its August 25, 2010 Meeting.

Dear Chairwoman Antion:

On September 9, 2010, Consolidated Edison Company of New York, Inc. ("Con Edison"), Orange and Rockland Utilities, Inc., Niagara Mohawk Power Corporation d/b/a National Grid, Long Island Power Authority, and New York Power Authority ("NYPA"; collectively, "Indicated NYTOs") and the Independent Power Producers of New York, Inc. ("IPPNY") filed separate appeals of the Management Committee's August 25th vote on amendments to Section 23.4.5.7 of Attachment H of the New York Independent System Operator, Inc.'s ("NYISO") Market Administration and Control Area Services Tariff.

Pursuant to the Procedural Rules for Appeals to the ISO Board, the City of New York ("City") submits this Motion in support of the Indicated NYTOs' appeal and in opposition to IPPNY's appeal. The City respectfully requests that the NYISO's Board of Directors consider the arguments presented in the attached Motion in its consideration of the appeals.

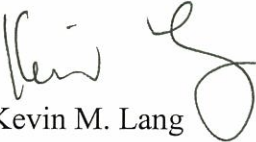
This Motion is being provided electronically to NYISO's Committee Liaisons. The City requests that they distribute this document to the members of the Management Committee and NYISO Staff.

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Thank you for your consideration of this Motion.

Sincerely,

COUCH WHITE, LLP


Kevin M. Lang

KML/glm

cc: Richard Barlette (via e-mail)
Debbie Eckels (via e-mail)
Michael Delaney (via e-mail)

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**MOTION OF THE CITY OF NEW YORK
IN SUPPORT OF THE APPEAL FILED BY THE
INDICATED NEW YORK TRANSMISSION OWNERS AND
IN OPPOSITION TO THE APPEAL FILED BY THE
INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.**

On September 9, 2010, Consolidated Edison Company of New York, Inc. (“Con Edison”), Orange and Rockland Utilities, Inc., Niagara Mohawk Power Corporation d/b/a National Grid, Long Island Power Authority, and New York Power Authority (“NYPA”; collectively, “Indicated NYTOs”) and the Independent Power Producers of New York, Inc. (“IPPNY”) filed separate appeals of the Management Committee’s August 25th vote on amendments to Section 23.4.5.7 of Attachment H of the New York Independent System Operator, Inc.’s (“NYISO”) Market Administration and Control Area Services Tariff. The City of New York (“City”) files this motion in support of the Indicated NYTOs’ appeal and in opposition to IPPNY’s appeal.¹

Indicated NYTOs’ Appeal

The Indicated NYTOs appeal the decision of the Management Committee to reject the proposal to eliminate the six capability period minimum duration for buyer-side mitigation in the New York City capacity market. The Federal Energy Regulatory Commission (“FERC”) explained the purpose of buyer-side mitigation as preventing “uneconomic entry that would

¹ The City has significant concerns with buyer-side mitigation in general, and the NYISO’s Board of Directors should not consider the City’s support of the Indicated NYTOs’ appeal as meaning that the City believes that such mitigation is appropriate or warranted if that appeal is granted. Rather, the City’s support indicates only that the Indicated NYTOs’ proposal is superior to the provision now in place. Similarly, the City’s opposition to IPPNY’s appeal indicates only that the proposal approved by the Management Committee is better than the approach advocated by IPPNY.

reduce prices in the NYC capacity market below just and reasonable levels.”² In his affidavit in support of the NYISO’s October 4, 2007 filing that led to this pronouncement by the FERC, Dr. Patton explained that “[t]he purpose of market power mitigation measures is to deter efforts to exercise market power and help ensure that auction outcomes are protected against the influence of market power. However, *mitigation measures must be designed so as not to impede competitive behavior.* [emphasis added].”³

These statements make clear that mitigation is unnecessary and should not apply where new entry is economic. Nevertheless, the NYISO proposed continuation of, and the Management Committee wrongly approved, a tariff requirement in which new entry that is not deemed to be exempt from mitigation based on the NYISO’s forecast of future conditions will be mitigated for a period of at least three years (*i.e.*, six capability periods) even if actual conditions that exist years later when the new entrant commences commercial operations demonstrate that the entry is economic.

The City respectfully submits that if the output of a new generating facility clears the market, the facility must be deemed economic. In such a case, there can be no legitimate concerns that the facility is exercising market power, inappropriately depressing prices, or acting inconsistently with competitive behavior. As cautioned by Dr. Patton, the NYISO must therefore ensure that it is not impeding competition by improperly and unjustly imposing mitigation on that facility.

² *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 (2008) at P 100.

³ *New York Independent System Operator, Inc.*, Docket No. EL07-39-000, Compliance Filing of the New York Independent System Operator, Inc. Regarding the New York City ICAP Market Structure, dated October 4, 2007, Attachment 1 – Affidavit of Dr. David B. Patton, sworn to on October 4, 2007, ¶ 43.

More importantly, as the FERC observed, and as Section 205 of the Federal Power Act requires, the paramount consideration is that the rates charged to consumers in connection with the sale of electricity must be just and reasonable. The NYISO must also ensure that capacity prices do not become unjust and unreasonable by virtue of being inflated because of unnecessary and unwarranted imposition of mitigation on new entrants. Here, the mandatory imposition of mitigation on a new entrant for at least three years based on future predictions and assumptions, without any consideration or recognition of whether that entrant's facility is actually economic results in unjust, unreasonable, and indefensible rates. That broad and inflexible rule is also wholly at odds with the concept of competition and the underpinnings of the NYISO's competition-based market structure.

The City, through NYPA, is a large individual purchaser of electricity in the State. The city purchases electricity to run schools, police stations, water pollution control plants, and other public buildings, provide street and traffic lights, and perform other government operations. In its role as a duly-constituted governmental body, the City also protects and advances the interests of its residents and businesses. It is in both roles that the City opposes this requirement and supports the Indicated NYTOs' appeal. By requiring new entry that becomes economic within three years of its commercial operation date to nevertheless be mitigated for a minimum of three years, the NYISO is ensuring only that an improper wealth transfer occurs between consumers and suppliers via an artificially and unjustly inflated capacity price. To the extent that the new entry has a relationship to Con Edison or NYPA related to serve the respective loads of the people of New York City or the City and other governmental customers (*e.g.*, New York City Housing Authority, Metropolitan Transportation Authority), the NYISO is also unreasonably requiring such consumers to pay

twice for capacity – once to the new entrant for its capacity and once to some other provider of duplicate capacity.

The cost of this unwarranted burden on consumers can be readily quantified. For every 100 MW of economic entry that the NYISO wrongly mitigates, the City and its residents will be forced to pay approximately \$13 million annually to existing generators (based on current capacity prices; under the proposed new demand curves for Zone J, that cost will increase).

As the NYISO's Chief Executive Officer has acknowledged at Management Committee meetings and elsewhere, the fundamental purpose of the competitive markets is to benefit consumers. Competitive market design, and the concept of market efficiency, are intended to provide greater value and lower prices to consumers than the rates charged under the former vertically-integrated, heavily regulated paradigm. Therefore, a requirement that creates market inefficiency and raises prices to consumers is antithetical to the competitive construct, and should not be allowed to continue.

For the foregoing reasons, the NYISO's Board of Directors should grant the Indicated NYTOs' appeal and direct the NYISO to modify Section 23.4.5.7 of Attachment H to eliminate the six capability period minimum duration for buyer-side mitigation. The remainder of the provisions of that Section will continue to adequately protect against the alleged concerns over buyer-side market power and prevent the elimination of mitigation of a new entrant that does not clear the market during that period of time.

IPPNY's Appeal

By its appeal, IPPNY seeks to protect an unwarranted advantage for existing generators in New York City, create a barrier to competition, and maintain inflated capacity

prices for many years into the future. The NYISO's Board of Directors should not be swayed or misguided by the manner in which IPPNY cloaks its arguments; rather, the Board should recognize the true purpose and goal of IPPNY's appeal and reject it.

Capacity prices in Zone J for the 2009-2010 winter capability period through January 2010 were in the range of approximately \$1/kW-month to \$3/kW-month; for the 2009 summer capability period, they were in the range of \$8/kW-month to \$9/kW-month. After the Charles Poletti Plant ("Poletti") closed at the end of January 2010, capacity prices rose to about \$7.50/kW-month for the remainder of the 2009-2010 winter capability period and about \$13.00/kW-month for the 2010 summer capability period. The generators located in New York City essentially want to maintain those high capacity prices for as long as possible to maximize their profits, and they are attempting to manipulate the buyer-side mitigation measures to do so.

The City is not aware of any claim by any existing generator located in New York City that its revenues under the former capacity prices were insufficient to allow it to keep operating, and none of those generators announced any plans to close any of their facilities due to inadequate revenues. Therefore, the prior level of capacity prices, in combination with energy revenues, presumably covered all of the generators' costs and provided some profit. As a result, the difference between the former and present capacity prices must largely, if not totally, constitute additional profits to those generators. Put another way, because of the closure of Poletti, consumers are now paying almost double or more for the same capacity.

This information demonstrates that the alleged "carefully erected balance between supplier-side and load side mitigation measures that is critical to ensure that prices are

neither artificially suppressed nor inflated”⁴ already has been eviscerated. The City recognizes that the higher prices are a function of the demand curve and the relative amount of supply and demand. However, the overarching purpose of the demand curve was to provide appropriate price signals to attract new entry; it was not to maximize profits for existing generators. Indeed, some new entry is projected to enter the market within the next few years, and the existing generators are doing whatever they can to prevent competition from that new entry and to continue to receive windfall profits.

In an attempt to partially ameliorate the unintended and unjust result of the initial iteration of the buyer-side mitigation rules, and to reflect the substantial change in economic conditions confronting New York City and its residents, the NYISO Staff correctly sought to limit the duration of the application of the buyer-side mitigation measures.⁵ One aspect of the NYISO Staff’s proposal, which was approved by a majority vote of the Management Committee, was to exempt a new entrant once the equivalent of its total generating capacity clears the market for 12 months. Another aspect was to place a hard cap on the mitigation of 15 years. These measures constitute an improvement over the existing rules.

Moreover, the proposed measures will assist in achieving the public policy goals of the City (PlaNYC), the State, and the federal government to replace old, inefficient, heavily polluting generation with modern, state-of-the-art, low emitting, and more efficient equipment. That is, a developer may not make an investment in new technology and new

⁴ IPPNY Appeal, p. 1.

⁵ Under the existing rules and current forecasts, a new entrant could be mitigated for decades. That result creates a barrier to entry and stifles competition within New York City. It also would keep capacity prices artificially inflated and prevent them from going down.

facilities if it is not allowed to fully participate in the NYISO's markets and have the opportunity to fairly compete with existing generators. Indeed, one of the motivations of the existing generators to prevent new entry is presumably the fact that modern facilities have lower heat rates and fewer emissions and, consequently, the ability to produce electricity at lower costs. If new entrants are allowed to fairly and fully compete with the existing generators (which is, after all, the purpose of competitive markets), the new entrants would likely supplant some or all of the existing facilities. Thus, at its core, the generators' opposition is really about preserving market share (*i.e.*, market dominance) and obstructing reasonable competition.

IPPNY argues that the proposed modifications would allow new entrants to "prematurely escape mitigation,"⁶ and, citing to the previous FERC Orders on this matter, that the NYISO must prevent prices from being "depressed". As discussed above, IPPNY completely ignores, and hopes the NYISO Board will as well, the other half of the rationale behind the package of mitigation measures adopted by the FERC – prevention of prices becoming and remaining artificially inflated. IPPNY would have the Board believe that the actions and motivations of Con Edison, NYPA, and the City are to be feared and must be closely monitored to prevent abuse. The reality, though, is that an existing generator improperly manipulated the capacity markets to boost its profits,⁷ and the demonstrable need for more substantial market mitigation measures emanated directly from that conduct, not the conduct of any load serving entity.

⁶ IPPNY Appeal, p. 5.

⁷ See *United States v. KeySpan Corporation*, Department of Justice Complaint, filed February 22, 2010, and DOJ Press Release, dated February 22, 2010, found at <http://www.justice.gov/opa/pr/2010/February/10-at-176.html>.

While the generators routinely argue that load serving entities will sponsor uneconomic entry for the sole or primary purpose of depressing capacity prices, they cannot point to any evidence that proves their allegations. While it is true that Con Edison and NYPA have entered into contracts with new suppliers, they both have customers to serve and obligations to meet.⁸ There is no rule prohibiting them from exercising free choice in the manner in which they will serve their respective loads, and as explained above, the selection of modern, efficient, low emitting resources is wholly consistent with public policy. Indeed, the ability to choose suppliers is a core tenet of competition and should be embraced and defended.

For these reasons, allowing a new entrant to extricate itself from unwarranted mitigation, and to lift the mitigation once an extended, and in the City's view, excessive, period has lapsed, is an improved measure to try to restore the balance between supplier and consumer interests. Certainly, allowing mitigation to lapse after a period of 15 years – which is longer than the NYISO has been in existence and could be equivalent to half the useful life of some new equipment – cannot reasonably be considered “premature”. Likewise, lifting the mitigation once the equivalent of the total capacity of the new entrant has cleared the market also cannot reasonably be considered a premature act.

IPPNY also appeals from the aspect of the proposed tariff amendments that relate to the application of the mitigation test. IPPNY's objections also largely relate to its attempt to stifle or obstruct competition and create unwarranted and unjustifiable barriers for new

⁸ For example, NYPA entered into a contract with the owners of the Astoria Energy II project to replace the energy and capacity formerly provided by Poletti and serve the needs of the City and its other governmental customers. It did not do so for the purpose of depressing market prices.

entrants. As part of the development of deliverability requirements (which have become another means by which competition from new entry is inhibited), the decision was made by the NYISO and a majority of market participants, and approved by the FERC, to allow new entrants to choose between being energy-only providers and providers of energy and capacity. Within New York City, the generators now want to restrict the ability of new entrants to exercise such choice.

That is, the generators want to prevent developers from having the freedom to assess the markets and choose how they will participate in those markets. If a developer determines that the price signals conveyed by the energy market justify a new project that would be able to compete in that market, it should be able to do so. If the developer later determines that the price signals conveyed by the capacity market indicate that its project should also participate in that market, it has the right and should have the unfettered ability to enter that market (subject, of course, to satisfying all pertinent requirements including passing the market power mitigation screen). As the experience of the past few years demonstrates, market conditions change over time. Competition is intended to allow market participants to respond and react to those changes in a superior manner than the former vertical integration model.

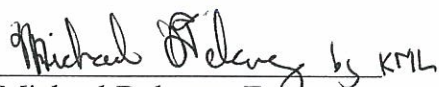
In this case, though, the generators want to prevent or restrict the ability of new entrants to respond to changes in market conditions and force them to make decisions regarding participation in the capacity markets according to a schedule set by the existing generators, not the developers or independent market forces. In fact, the City wonders whether the generators would advance the same arguments if current market conditions were different and indicated that new entry would clear immediately or within a couple of years.

In other words, the City submits that the generators' position is not premised on market-based principles or the best interests of the markets in general; rather, it is result-oriented position based on their present view of the likelihood of a new entrant being exempted from mitigation if the test is performed over the next few years.

As explained by NYISO Staff during the working group and committee meetings, the new rules have been designed to prevent a developer from manipulating the exemption test to achieve an unintended result. That design ameliorates any legitimate concerns that the generators may have, and no further changes are warranted.


CONCLUSION

For the reasons set forth above and in the Indicated NYTOs' appeal, the NYISO's Board of Directors should eliminate the minimum three-year or six capability period imposition of buyer-side mitigation measures. For the reasons set forth above, the Board should also reject IPPNY's appeal.



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Respectfully submitted,



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