

February 27, 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 February 19, 2003 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 clarify the voting rights of Demand Response Providers and Distributed Generators.

The Transmission Owners would also like an opportunity to present oral argument to the Board's Governance Committee with respect to their pleading. The Transmission Owners further respectfully request that they be allowed to allocate their allotted time to two speakers, Mr. Paul L. Gioia and Mr. Neil H. Butterklee.

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,

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Paul L. Gioia, Esq.  
Transmission Owners

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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 February 19, 2003 Appeal (the “Appeal”) filed by the Independent Power Producers of New York, Inc. (“IPPNY”). In its Appeal, IPPNY seeks to overturn the February 4, 2004 decision of the Management Committee (“MC”), which provided that Demand Response Providers (“DRP”) and Distributed Generators (“DG”) would generally vote and participate in the Other Suppliers sector of the NYISO governance.

The MC’s decision should be upheld because it is the result of an extensive process in which representatives of all sectors actively participated and is reasonable in that it places DRPs and DGs in the sectors where they logically belong based on their functions and the nature of their participation in the NYISO markets. DRP and DGs clearly fit the existing definition of an Other Supplier, even without the clarifications approved by the MC on February 4<sup>th</sup>. Furthermore, IPPNY’s appeal is based on contentions concerning the intent and functioning of the NYISO’s governance that are simply incorrect and unsupported by the voting history of the MC. IPPNY’s Appeal incorrectly assumes that the NYISO’s governance is based upon a delicate voting balance between load and supply that must be preserved.

Accordingly, the Transmission Owners respectfully request that the Board uphold the decision of the MC and file the approved revisions to the ISO Agreement with the Federal Energy Regulatory Commission (“FERC”).

## **I. BACKGROUND**

Both FERC and the NYISO Board have recognized the need to encourage participation in the NYISO governance process by DGs and DRPs. With that in mind, the By-Laws and Governance Subcommittee (“By-Laws Committee”) began a process in May 2003 to clearly define the sectors in the NYISO voting structure in which DGs and DRPs would participate and to establish an appropriate fee structure for such entities. This process started with a May 29, 2003 e-mail from Aaron Breidenbaugh to the By-Laws Committee, which indicated that these resources should participate in governance as members of the Other Suppliers sector. This view was reaffirmed by Keith O’Neill in a July 15, 2003 memo.

This issue was carefully considered and extensively discussed by the By-Laws Committee throughout the rest of 2003 and the early part of 2004. IPPNY members actively participated in the Committee meetings and in the development of the proposal submitted to the MC.<sup>1</sup> The proposal that was ultimately approved by the MC, with 65.27% of the vote, was, in large part, drafted and shaped by IPPNY representatives.

## **II. THE DECISION OF THE MC WAS REASONABLE**

### **A. DGs and DRPs Participate in the Market as Other Suppliers**

IPPNY argues that DGs and DRPs do not fit into any sector and placing them in the Other Suppliers sector is unfair to suppliers.<sup>2</sup> By assigning DGs and DRPs to the Other Suppliers sector, the MC decision places DGs and DRPs in the sector that is best

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<sup>1</sup> IPPNY’s offer to “meet at any time” to discuss this matter is disingenuous as the By-Laws Committee has been meeting on this, with IPPNY’s participation, since May 2003. *See* IPPNY Appeal, page 6.

<sup>2</sup> IPPNY Appeal, pages 2-5.

aligned with their fundamental functions and interests.<sup>3</sup> The ISO Agreement defines an Other Supplier as a “Party that is seller, buyer, broker, aggregator, Power Exchange, ESCO or transmitter of capacity or energy in, from or through the New York Control Area, provided, however, that for the purposes of ISO governance a Municipal Electric System, a cooperatively owned electric System and a governmental agency that acts as a retail Load aggregator shall not qualify as an Other Supplier.”<sup>4</sup> 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, serving customers in New York State.”<sup>5</sup> As can be seen, the current definitions of an Other Supplier is quite broad and clearly was intended to include various types of entities that buy and sell energy and capacity, and aggregate retail load.

A DG is a small generation facility that sells energy and capacity. A DRP is generally an aggregator and seller of demand side resources. A DRP, as a provider of capacity or an ESCO, and a DG, as a supplier of energy and capacity, clearly qualify as members of the Other Suppliers sector even without the clarifications approved by the MC on February 4<sup>th</sup>.

The measure approved by the MC, however, provides that under certain circumstances DGs and DRPs are better suited to participate in the End Use Consumer sector or the Generation Owners sector. Correctly defining those exceptions constituted

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<sup>3</sup> There are two exceptions to this rule. First, DGs that are owned by a customer are placed in the Consumer sector; and, second, DGs that primarily sell into the grid are placed in the Generation Owners sector. It is generally believed that most DRPs and DGs will fit into the Other Supplier sector.

<sup>4</sup> ISO Agreement, page 23.

<sup>5</sup> ISO Agreement, page 10.

the bulk of the work in the development of this proposal.<sup>6</sup> Early on in the process, it was proposed that all DGs be placed in the Generation Owners sector; since DGs are small generators, and benefit from high prices just as their larger brethren. IPPNY's argument that DGs will vote and behave like load completely ignores the physical and economic reality of small generators,<sup>7</sup> and IPPNY offers no support for this contention. Yet, in deference to Generation Owner representatives on the By-Laws Committee, the placement of DGs in the Generation Owners sector was limited to those DGs that primarily sell into the wholesale market.

Accordingly, as entities that can sell and purchase energy and capacity, provide hedging services to load, and aggregate retail loads, DGs and DRPs clearly fit the description and functions of an Other Supplier.

**B. The Issue At Hand Is Not The Restructuring Of the Entire NYISO Governance Structure**

The assignment given to the By-Laws Committee was to clarify the sector representation of DGs and DRPs, not to reshuffle the votes in the MC and other standing committees. The governance of the NYISO, including voting rights at the committees, the structure of the NYISO and the filing rights under the Federal Power Act, was part of a comprehensive package, which was supported by the NYISO and the great majority of market participants. The counter proposal presented by IPPNY would alter the current governance structure by taking votes away from various sectors and creating a new sub-sector.<sup>8</sup> The existing definition of Other Suppliers accommodates these entities.

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<sup>6</sup> The other area that constituted a great deal of work was in the development of the reduced fee structure, which IPPNY is not officially contesting, but, with which IPPNY has expressed reservations. See IPPNY Appeal, page 5.

<sup>7</sup> IPPNY Appeal, page 4.

<sup>8</sup> IPPNY Appeal, page 6.

IPPNY's assertion that these types of entities were "overlooked" at the formation of the NYISO is inconsistent with the plain wording of the ISO Agreement, which clearly intended that entities such as these would participate in the Other Suppliers sector.<sup>9</sup> What was needed, and what the By-Laws Committee proposed and the MC approved, was a definition of the circumstances in which DGs should participate in the End Use Consumer sector or the Generation Owners sector, and an appropriate fee schedule for these entities. The By-laws Committee was not asked, and did not undertake, to revise the NYISO's voting allocations for the various sectors.

### **III. IPPNY'S APPEAL IS UNSUPPORTED BY THE FACTS**

IPPNY contends that the MC's decision "would upset the already precarious balance between suppliers and load in the NYISO's shared governance process."<sup>10</sup> IPPNY further contends that the NYISO committee and voting process is reduced to a mindless contest between supply and load,<sup>11</sup> arguing that transmission owners, end-use consumers, public power and retail load serving entities invariably vote as a load block and against the interests of suppliers.<sup>12</sup> Based on these faulty assumptions, IPPNY argues that adding DRPs and DGs to the Other Suppliers sector would "thereby enable Load to effectively override Suppliers in future MC votes."<sup>13</sup>

An examination of actual votes taken at the MC proves that voting does not, as IPPNY contends, break down into a simple and consistent load versus supply contest. While parties certainly consider their particular interest when voting, their interests do not always fall into a simple division of load versus supply.

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<sup>9</sup> IPPNY Appeal, page 5.

<sup>10</sup> IPPNY Appeal, page 3.

<sup>11</sup> *Id.*

<sup>12</sup> *See e.g.*, IPPNY Appeal, pages 3-5.

<sup>13</sup> IPPNY Appeal, page 4.

Furthermore, IPPNY's contentions are inconsistent with the underlying intent of the NYISO governance structure and the actual behavior of the NYISO market participants. To begin with, the NYISO governance structure is not designed to set up a contest of load versus supply. Rather, as the ISO Agreement specifies, the governance structure is divided into five sectors, with each sector representing a major segment of the energy industry within New York State. The interests of these sectors cannot be reduced to a simplistic "load" or "supply" split. While transmission owners, for example, have a substantial investment in transmission and distribution facilities, they also are the largest purchasers of energy in the state and may also own some generation. As a consequence, the interests of Transmission Owners cannot be reduced to a simple "load" interest. Other sectors also have complex interests in various aspects of the NYISO markets.

More fundamentally, IPPNY fails to acknowledge the basic reality that all market participants have a common interest in an efficient, competitive market, which requires that the NYISO's procedures and market rules fairly treat all sectors. The market participants who IPPNY characterizes as "load," understand that if the legitimate interests of suppliers are not accommodated, the NYISO markets will not operate efficiently, and all sectors will suffer. Market participants not only recognize this basic reality, it clearly affects how they vote on issues.

An examination of the votes taken for the period June 2002 through June 2003, shows that there were 30 role call votes at the MC.<sup>14</sup> Of those 30 votes, the Transmission Owners sector voted with the End Use Consumer sector 16 times, or 53%. For that same time period, the Transmission Owners sector voted with the Generation Owners sector 13 times, or 43%. Voting with the End Use Consumer sector only 3 times more (out of 30

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<sup>14</sup> See the attached chart summarizing the votes of the sectors during this period.

votes) than they voted with the Generation Owners does not, as IPPNY asserts, prove that Transmission Owners and End Use Consumers vote as a load block.

The voting history at the MC also shows that consumers (or load) get their way even less than the Generation Owners. For the 2002 through June 2003 time period, the outcome of the MC vote agreed with the vote of the Generation Owners sector 19 times, or 63%, which is exactly the same number of times that the outcome agreed with the vote of the Transmission Owners sector. The End Use Consumers sector did not fare as well, as the outcome of the MC vote agreed with their vote only 17 times, or 57%.

With respect to block voting by sector, IPPNY once again misses the mark. The Transmission Owners sector voted as a block 17 out of 30 times, or 56%, during the June 2002 through June 2003 period. The End Use Consumers sector voted as a block only 13 times, or 43%. For that same time period, the Generation Owners voted as a block 16 out of 30 times, or 53%.

IPPNY makes reference to the February 13, 2003 Demand Curve vote. Yet in that vote, parts of the alleged “load” block, including parts of the End Use Consumer sector, voted with the Generation Owners and the Demand Curve was approved. Similarly, the March 20, 2003 vote to remove the price cap on non-spinning reserves was supported by three out of four Transmission Owners and significant parts of the End Use Consumer, Other Suppliers and Public Power sectors. Another example is the January 9, 2003 vote to approve the scarcity pricing proposal where the Generation Owners sector was joined by the Transmission Owners, Public Power and Other Suppliers sectors. These three critical votes, which adopted measures advocated by the Generation Owners sector, further demonstrate that MC voting does not break down on a load versus supply



basis. In fact, if IPPNY's block voting contention were correct, no measure supported by suppliers would be able to achieve Management Committee approval under the current voting structure, which clearly is not the case.

Accordingly, given the MC's voting history, the plain meaning of the ISO Agreement and the differences in interests among the sectors, there is no supply versus load voting balance that needs to be maintained.

**IV. CONCLUSION**

For the reasons stated above, the Board should reject IPPNY's appeal, uphold the decision of the MC and file the new voting structure with FERC.

Dated: February 27, 2004

Respectfully submitted,

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