



Independent Power Producers of New York, Inc.

Gavin J. Donohue
President and CEO

Hand Delivered

February 19, 2004

Hon. John W. Boston
Chairman of the Board
C/o
Mr. William J. Museler
President and CEO
New York Independent System Operator
3890 Carman Road
Schenectady, NY 12303

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

Dear Chairman Boston:

Pursuant to the "Procedural Rules for Appeals to the ISO Board," please find enclosed an original and three copies of the Independent Power Producers of New York, Inc.'s (IPPNY) Appeal, on behalf of its members identified on Attachment 1 to the Appeal, of the Management Committee's February 4, 2004 decision with respect to voting rights and procedures for demand response providers and distributed generators. IPPNY also would like to request that it be given the opportunity to present oral argument to the Board with respect to the Appeal.

Please do not hesitate to contact me, if you have any questions or I may be of assistance to you.

Very truly yours,

Glenn D. Haake
General Counsel

Powerfully Competitive

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NOTICE OF APPEAL

The Independent Power Producers of New York, Inc. (“IPPNY”), on behalf of its members identified on Attachment 1 (the “Appellants”) that are also members of the New York Independent System Operator’s (“NYISO”) Management Committee (“MC”), hereby appeals to the NYISO Board of Directors (“Board”) to reject the MC’s February 4, 2004 decision requesting the Board to authorize the NYISO to file under Federal Power Act sections 205 and 206 amendments to Article s 2 and 7 of the ISO Agreement and Article XI of the MC By-Laws that would establish voting rights and procedures (“Voting Procedures”) for Demand Response Providers (“DRPs”) and Distributed Generators (“DGs”).¹ On behalf of the Appellants, IPPNY respectfully requests that the Board issue a decision rejecting the MC proposal to effectuate the Voting Procedures and declining to join in a filing with the Commission, because the Voting Procedures would (1) eviscerate the already precarious balance of shared governance that currently exists between supply-oriented market participants (“Suppliers”) and load-oriented market participants (“Load”), (2) discriminate against Suppliers, because the voting percentages afforded to DGs and DRPs come primarily from Suppliers, rather than from all market participant sectors, notwithstanding the fact that demand response and distributed generation brings benefits to all aspects of the market, and (3) alternative procedures can and should be developed that would more appropriately and equitably account for DGs and DRPs within the NYISO voting structure without undermining the precarious balance between Suppliers and Load.

I. THE VOTING PROCEDURES

The Voting Procedures provide that DRPs shall vote in the Other Suppliers sector, and DGs shall vote in that sector as well, subject to two caveats. If the DG is owned by an End-Use

¹ The Voting Procedures were affected in motion 3 of the February 4, 2004, MC meeting. IPPNY is not appealing motion 3 to the extent it approved amendments to Article 1 of the ISO Agreement and supports the request to file those changes at FERC, once the effort to develop appropriate voting procedures for DGs and DRPs, as described in this Appeal, have been completed. In addition, IPPNY also is not appealing motion 4, which established reduced NYISO membership fees (“Reduced Fees”) for certain of these entities.

Consumer or an Affiliate thereof, and the primary purpose of the DG is to supply energy and capacity to that End-Use Consumer, it shall vote in the End-Use Consumer sector. Conversely, if the DG is owned by an entity that is not an Affiliate of an End-Use Consumer, and the primary purpose of the DG is to supply energy and capacity into the grid, it shall vote in the Generator Owners sector. The proposed amendments also provide criteria to guide the NYISO in determining the “primary purpose” of the DG. In addition, the Voting Procedures clarify that if the DG owner or the DRP is an Affiliate of a Generator Owner or an End-Use Consumer, the NYISO shall determine which Affiliate shall be permitted to vote and in what sector.

II. ARGUMENT

At the outset, IPPNY must note that it and the Appellants recognize the importance of securing reasonable voting rights for DGs and DRPs and stand ready to work diligently with all market participants to develop fair and equitable voting procedures for these entities in an expeditious manner. As the Federal Energy Regulatory Commission (“FERC”) recognized in its Standard Market Design NOPR, DGs and DRPs are an important and necessary component of efficient, competitive markets. These entities can provide benefits to the market in a number of ways; they can reduce or eliminate the need for certain transmission upgrades, impose downward pressure on wholesale prices, particularly during peak demand periods, and improve demand elasticity, thereby eliminating the rationale for artificial restraints on the competitive markets such as bid caps and other mitigation procedures.

As a result, these entities clearly should have a voice in the NYISO’s governance. However, sector designation for these parties simply was not contemplated when the NYISO governance structure was developed. It is for this very reason that these entities do not fit into any of the existing categories. It is crucial to the fair and balanced functioning of the NYISO’s shared governance structure that the provision of voting rights to these entities must be considered anew; these entities should not be “force-fit” into one of the existing categories. Moreover, the allocation of voting rights to these entities must be done in a manner that does not

skew the balance that was intended to exist between Suppliers and Load when the NYISO governance structure was developed and that must exist if shared governance is to remain viable. The Appellants contend that the Voting Procedures endorsed by the MC fail to satisfy that requirement.

A. THE VOTING PROCEDURES WOULD UPSET THE ALREADY PRECARIOUS BALANCE BETWEEN SUPPLIERS AND LOAD IN THE NYISO'S SHARED GOVERNANCE PROCESS

Stakeholder committees, both generally and in the NYISO, understandably are characterized by parties on both the supply and load sides of the market “voting their pocketbooks.” As currently constituted, the End-Use Consumers, Public Power and Transmission Owners sectors, as well as the retail load serving entities (“LSEs”) within the Other Suppliers sector, primarily vote as Load. The first three sectors identified in the preceding sentence carry 57% of the vote; the amount of each Other Suppliers sector vote carried by the LSEs depends upon how many parties within that sector are present at a particular meeting. The Generation Owners sector and the wholesale suppliers and marketers within the Other Suppliers sector primarily vote as Suppliers. The Generation Owners sector carries 21.5% of the vote. The wholesale suppliers and marketers carry the portion of the 21.5% allocated to the Other Suppliers sector that is not allotted to the LSE members of that sector.

With a 58% voting threshold, the current balance is tenuous at best.² Indeed, the vote on the motion to endorse the Voting Procedures broke down purely along load and supply lines. Appellants contend the Voting Procedures are likely to improperly increase

² Even in the case of the ICAP Demand Curve proposal, which had the support of the New York Public Service Commission and the NYISO -- both of which characterized it as a critically needed corrective measure for a deeply flawed capacity market design -- the proposal barely passed at the MC. This was the case, notwithstanding the fact that some of the Loads were persuaded to “break ranks” and vote in favor of the proposal. Had last minute efforts to enroll in the Other Suppliers sector additional new load-oriented members succeeded, the Demand Curve proposal would have been voted down.

the Load percentage within the Other Suppliers sector and thereby enable Load to effectively override Suppliers in future MC votes, rendering shared governance a sham.

DRPs do not own any demand or generation resources. Instead, they act as aggregators for entities which, if they were members of the NYISO, would be participants in the End-Use Consumers sector. In essence, DRPs owe their livelihood to the willingness of End-Use Consumers to cooperate with them to reduce load so that DRPs are able to provide aggregate demand reductions. Thus, it is the End-Use Consumer that owns or controls the “product”; the DRP serves only an administrative role. Appellants contend that the situation is much the same for the vast majority of DGs.

In the past, particularly with matters that have the potential to significantly affect wholesale rates, Loads have used their ability to grant or withdraw contracts or extensions thereof to influence the voting behavior of those with whom they are doing or may in the future do business. Thus, Appellants contend that the addition of even a relatively small number of DGs and/or DRPs to the Other Suppliers sector would shift the balance of voting interests of NYISO market participants and render the existing shared governance process unworkable. For this reason, the Board should refrain from joining in a joint filing of the Voting Procedures.

B. THE VOTING PROCEDURES WOULD DISCRIMINATE AGAINST SUPPLIERS, BECAUSE THE VOTING PERCENTAGES GIVEN TO THE DG AND DRP ENTITIES WOULD COME ALMOST EXCLUSIVELY FROM SUPPLIERS

As mentioned, under the Voting Procedures, all DRPs would be eligible to participate in NYISO governance via the Other Suppliers sector. During the negotiations within the By-Laws Subcommittee that led to its presentation of the Voting Procedures, the representative of DG and DRP entities stated that he expects the vast majority of, if

not all, DGs also would qualify under this rule to join the Other Suppliers sector. Thus, it is likely that virtually all of the voting percentage exercised by DGs and DRPs will come at the expense of the existing members of the Other Suppliers sector.

While there currently are some retail LSEs in the Other Suppliers sector that generally have voted along Load lines, the balance of their vote in the Other Suppliers sector has been smaller than that accorded to entities that represent primarily the supply side of the market. Maintaining the Supplier orientation in the Other Suppliers sector is crucial if the NYISO is to retain a fair balance between Load and Suppliers in the NYISO governance. The addition of just a few Load entities to the Other Suppliers sector would tip the balance of power untenably in favor of Load, leaving Suppliers in a position where they could neither reject a Load-based proposal nor pass a more reasonable counter-proposal. In this regard, it is noteworthy that the Reduced Fees program also approved by the MC would facilitate access for potentially large numbers of new DRPs and DGs into the Other Suppliers sector.

Moreover, allocating voting rights to DRPs and DGs in the manner contemplated in the Voting Procedures ignores two other critical factors. First, these entities -- and their likely impact for purposes of establishing voting thresholds -- inadvertently were overlooked when the categories and voting thresholds were developed for the NYISO. Second, as mentioned at the outset, DRPs and DGs provide benefits to all sectors of the market, not just the Suppliers' side. In fact, it could be argued that Load entities are the primary beneficiaries of the positive impacts that will accrue from increased participation in the NYISO markets by DRPs and DGs, and they certainly are in the best position to affect the voting practices of these entities. Under these circumstances it is inappropriate

to discriminate against Suppliers by providing DRPs and DGs with voting rights that are taken solely from the Suppliers side of the market. Rather, all sectors should be required to contribute an equal voting percentage to develop a sub-sector for the DRPs and DGs. Accordingly, the Board should reject the MC's proposal and should decline to endorse a joint filing of the Voting Procedures at FERC.

C. ALTERNATIVE PROCEDURES CAN AND SHOULD BE DEVELOPED THAT WOULD MAINTAIN AN APPROPRIATE BALANCE IN NYISO GOVERNANCE BETWEEN SUPPLIERS AND LOAD

During the February 4, 2004 MC meeting, a member of the Other Suppliers' sector requested, and the MC chairman consented, to have placed on the agenda of the March 2, 2004 MC meeting an agenda item concerning creation of a new DG/DRP sub sector the voting percentage of which would be established through a reduction in existing voting percentage from each of the existing sectors. The By-Laws Subcommittee has scheduled a meeting for February 24, 2004, prior to the March MC meeting, to address this proposal.³

As some on the Load side have opined, it may not ultimately prove possible to complete the negotiations that would lead to development of a DG/DRP sub-sector in one meeting. However, IPPNY and the Appellants stand ready to meet at any time and are committed to working through these issues promptly in order to provide DGs and DRPs with reasonable voting rights that are equitably redistributed on an equal percentage basis from all market participant sectors. The Board should direct NYISO staff to facilitate and support this effort and should encourage all market participants to work together to fashion a voting rights proposal for DGs and DRPs that does not undermine the NYISO's

³ The meeting was not scheduled prior to February 24, 2004 due to scheduling conflicts. IPPNY and the Appellants will use their best efforts to resolve these issues at that meeting.

shared governance structure. Because there is a means of affording DGs and DRPs participation in the NYISO governance that is more balanced and equitable than the Voting Procedures, the NYISO should reject the MC's proposal and should decline to join in a filing at FERC in support of the Voting Procedures.

CONCLUSION

For the foregoing reasons, the Board should reject the Voting Procedures and direct NYISO staff to work with market participants to develop a voting rights process that allocates a voting percentage to DRPs and DGs on a fair and equitable basis without eroding the balance of market participant interests necessary for workable shared governance.

Respectfully submitted,

Glenn D. Haake
General Counsel
Independent Power Producers
of New York Inc., on behalf
of the Appellants

ATTACHMENT 1

LIST OF APPELLANTS

1. AES NY
2. American National Power, Inc.
3. Calpine
4. Constellation Power Source
5. Coral Power, LLC
6. Dominion Energy Marketing, Inc.
7. Dynegy
8. Edison Mission Marketing & Trading
9. Entergy Nuclear Northeast
10. Fortistar/Lockport Energy Associates, L.P
11. HQ Energy Services
12. Indeck Energy Services
13. KeySpan Ravenswood, LLC
14. Mirant New York, Inc.
15. NRG Power Marketing
16. PSEG Energy Resources & Trade
17. Reliant Energy Services, Inc.
18. SCS Energy LLC/Astoria Energy LLC
19. Sithe Energies, Inc.