

**New York Independent System Operator  
Board of Directors**

**Comments of City of New York In Reply To NYISO Board Notice  
of July 17, 2008 Concerning the Proposed Treatment of a  
Recent Legislative Amendment to the New York City  
Industrial and Commercial Incentive Program**

**July 31, 2008**

## **I. Introduction**

The City of New York (“City”) hereby responds to the July 17 “Notice to Market Participants” issued by the NYISO Board of Directors concerning recent New York State legislation that addresses the applicability of tax abatements or other benefits for “utility property” under the City’s Industrial and Commercial Incentive Program (“ICIP”).

For the reasons explained below, the statutory change made to ICIP this year should itself create no additional barrier to the development of new generation. Moreover, the ICIP amendment will not necessarily have any appreciable effect on capacity market prices, or on the net cost of new entry (“CONE”) as defined by the NYISO in its demand curve formulation that is scheduled to remain in effect until early 2011.

Under no circumstances should the statutory modification made to ICIP effective July 1, 2008 be viewed as giving rise to “exigent circumstances” within the meaning of Section 5.6.7 of the NYISO ICAP Manual. There is no colorable claim upon which to invoke that provision of the Manual here, and no rational basis exists on which to undertake reopening the existing Demand Curve process.

## **II. Industrial and Commercial Incentive Program**

ICIP was created by New York City Local Law 71 in 1984, as authorized by the New York State Real Property Tax Law, Title 2-D of Article 4, § 489. The purpose of program was to encourage development of greater investment in industrial and commercial facilities in New York City. ICIP is managed by the New York City Department of Finance (“DOF”). DOF promulgates rules governing the administration

of ICIP, and provides two principal forms of benefit to qualified property owners: tax exemptions, which reduce the assessed value of a property, and/or property tax abatements, which provide credits against total taxes due. In general terms, the DOF rules provide that ICIP applicants must make a minimum required expenditure in carrying out eligible property improvements that will materially create or enhance the value of the affected property.

The former ICIP statute was by its own terms due to expire before July 1. In the face of this statutory deadline, the State Legislature reenacted ICIP, but amended its terms to, *inter alia*, exempt from its coverage “utility property” as that term was defined in the amendment proposal. The ICIP modification bill was passed by both legislative houses, and was signed into law by Governor Paterson. The new ICIP terms were made effective as of July 1, 2008.

Despite the claims made at the Board-Management Committee liaison meeting held on July 15, 2008, and in some other forums, this ICIP amendment does not give rise to any exigent circumstances that warrant NYISO action concerning the demand curve reset process, or recalculation of CONE numbers applicable to NYISO Zone J in New York City.

First, it is important to note that the statutory changes are of prospective application only; no current ICIP benefits recipients under the terms of the statute as it existed through June 30, 2008 will be affected by the amendment. This is true for both regulated utilities and for exempt wholesale generators.

And despite some hyperbolic contentions that the cost of new entry in Zone J as used in the demand curve reset process will be materially affected by the recent changes

made to ICIP, there are in existence alternative incentive programs that can provide benefits to developers of generation assets that are comparable to, or in some cases even more advantageous than, the benefits formerly conferred by ICIP.

Therefore, it is not a simple matter of removing the ICIP property tax benefits from the CONE calculation and recomputing the CONE, a process that results in a claimed cost impact of some 39%.<sup>1</sup> Such a mechanical approach to the issues posed by the amendment of the ICIP program is both simplistic and misleading, and should be rejected by the Board.

### **III. Industrial Development Agency Programs**

A key City incentive program is that operated by the New York City Industrial Development Agency (“NYCIDA”). The NYCIDA is the City’s primary mechanism for providing large-scale conduit financing and/or tax exemptions to businesses, including both commercial and industrial enterprises. NYCIDA transactions are subject to approval by the NYCIDA Board of Directors. The President of the New York City Economic Development Corporation (“NYCEDC”) is the Chairperson of the NYCIDA Board, and the City’s Deputy Mayor for Economic Development also has a Board seat. NYCIDA transactions are predicated on significant capital investment in New York City, party commitments of ten (10) years or more, and projects that are often of major scope and scale. NYCIDA can provide assistance packages that are generally similar to ICIP benefits, although some distinctions apply, as described below.

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<sup>1</sup> The City questions that percentage number from the loss of ICIP benefits in any case, given the numerous other potential variables at work. More importantly, it is simply a false premise to claim that only ICIP can provide the real estate tax benefits in question. Therefore, any claimed mathematical certitude in calculating the effects of the amendments made to ICIP is at best illusory.

Specific NYCIDA potential benefits may include availability of low-cost financing through tax exempt bonds, partial property tax exemptions and deferrals of mortgage recording taxes, and sales tax exemptions on construction materials.

While ICIP is an as-of-right program, and NYCIDA assistance is subject to the exercise of discretion, there is no current basis on which to conclude that such discretion will deny benefits to new market entrants,<sup>2</sup> and therefore no reason to prematurely revisit the demand curve reset process based solely on developments that relate to ICIP. The City has publicly expressed its desire for additional in-City generation resources,<sup>3</sup> and a principal mission of the New York City Industrial Development Agency is to advance City goals.

Indeed, the above discussion illustrates the central problem with the claim advanced by those who seek to reopen the existing demand curve and its constituent parts, including the net CONE. There is absolutely no justification for compelling a time-consuming immediate assessment of a program change that has been in effect only in the last month, and has had no demonstrable consequences.

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<sup>2</sup> There are a number of potential program application complexities that also militate in favor of waiting until the next NYISO demand curve reset process. Under the General Municipal Law, NYCIDA project assistance may be limited to merchant power providers, as opposed to closely regulated public utilities. On the other hand, the NYCIDA Uniform Tax Exemption Policy, which governs the form and amount of assistance the NYCIDA can provide, is subject to *ad hoc* adjustments via a deviation procedure to provide assistance to commercial facilities such as independent power plants.

<sup>3</sup> Most notably and recently in Mayor Bloomberg's *PlaNYC*, which identified as Energy Initiative No. 8 the City's facilitation of power plant repowering and construction of new power plants and dedicated transmission lines. *PlaNYC* at pp. 110-111, available at [www.nyc.gov](http://www.nyc.gov)

We currently have no data or experience with the practical consequences of the latest form of ICIP, or any experiential information on possible alternatives to ICIP for new NYISO market entrants. Thus, it is not only unknown, it is at this early juncture unknowable to what extent NYCIDA or other City incentive programs can become close substitutes for the previous form of ICIP.

If they do, no real basis exists to revisit the related CONE assumptions made in the NERA analysis used in the last NYISO demand curve reset process. If over time it can be demonstrated that they do not closely replicate the effects of the now repealed ICIP, there may be a valid argument to be advanced for closer examination of the CONE components, and recalculation thereof to take into account actual experience with NYCIDA or other programs. And to the extent that NYCIDA programs may offer benefits that actually exceed those conferred by ICIP, there may be a basis for concluding that net CONE will actually be reduced rather than increased for those parties that qualify for NYCIDA assistance.

In any case, the time for that sort of analysis is not here in view of the very recent changes made to ICIP, thus illustrating why reopening the demand curve setting process now would be ill-advised, and calculated to yield far more confusion than clarity.

#### **IV. Absence of Exigent Circumstances Justifying Reexamination of CONE and Demand Curve Reference Prices**

In the face of a present total lack of evidence to support the claims that the CONE will be dramatically affected by the consequences of the new law, the reopening proposal made at the Board-Management Committee liaison meeting should be denied.

The Board and all NYISO stakeholders recognize that any reset proceeding is inherently complex, lengthy, and highly contentious. To further complicate that effort with reliance on what can only be characterized as purely speculative views as to what the ICIP statutory changes have wrought would make a challenging process even more difficult, if not impossible, and would ill serve all parties.

In addition, as some of the proponents of the reopening proposal before the Board have themselves stated, the very point of a three-year demand curve reset cycle is to provide a reasonable measure of market predictability and certainty. In any three year period, there will be any number of statutory, regulatory and dynamic market changes that will arguably affect the CONE. Some of these changes will cut in favor of suppliers, while others may operate to benefit consumers.

As with regulation, legislation is not immutable. The risk of unanticipated changes over a three-year demand curve period is borne by all parties, just as it is in the case of changes made to NYISO policies or tariffs, whether in response to a FERC directive or otherwise. Market design changes are also made frequently, but they provide no necessary basis for reopening CONE calculations or the reference prices derived from same.

Here, the former ICIP law contained a sunset or expiration provision, as is true of a number of New York State statutes. The continuation of the exact terms of the ICIP authorization beyond June 30<sup>th</sup> of this year was therefore necessarily a matter of speculation. Some may have believed that the law would simply be recodified with extender language, as has occurred in the past. On the other hand, recent legislative

experience suggests that no such assumption is necessarily warranted.<sup>4</sup> And if automatic statutory repeal is a recognized possibility, then an amendment of the ICIP law obviously remains a possibility as well.

As the Board noted in its July 17<sup>th</sup> Notice herein, the regular demand curve reset process at the NYISO is slated to commence in 2009, with an expected effective date for a new curve and CONE figure in May of 2011. In view of that near term deadline to commence discussion of a demand curve reset applicable beyond 2011, there is all the more compelling reason to await the normal stakeholder proceedings next year. At that time, all parties will likely have more actual evidence concerning the interplay of NYCIDA, ICIP, and perhaps other City development incentive programs.<sup>5</sup>

It would clearly not be sound policy for the NYISO to lightly open matters that have already been completed and approved by the Federal Energy Regulatory Commission following a lengthy procedural process, and a full substantive debate. The mere expiration of one benefit program affecting generators does not give rise to a cognizable claim that applicable benefits contemplated in the CONE calculation have been materially affected. This is particularly true where, as here, a similar incentive program under NYCIDA remains in full effect. No exigent circumstances within the meaning of Section 5.6.7 of the ICAP Manual exist, and no Board action is warranted here.

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<sup>4</sup> *E.g.*, Public Service Law Article X expired at the end of 2002, and despite the efforts of numerous parties to encourage its return, to date it has not been reenacted in any form.

<sup>5</sup> Other incentives may conceivably have application to generation developers as well, such as the Payment in Lieu of Taxes (“PILOT”) program.



## V. Conclusion

For all the above reasons, the City urges the Board to reject any claims of purported exigency to revisit the current demand curve issues, including but not limited to the calculation of the cost of new entry.

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Respectfully submitted,

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