

**New York Independent System Operator**

**Board of Directors**

**Reply Comments of City of New York  
Concerning the Proposed Treatment of  
Recent Legislative Amendment to the New York City  
Industrial and Commercial Incentive Program**

**August 8, 2008**

The City of New York (“City”) hereby replies to statements received by the NYISO Board concerning the purported “exigent circumstances” associated with recent New York State legislation that repeals the former applicability of tax abatements or other benefits for “utility property” under the City’s Industrial and Commercial Incentive Program (“ICIP”).

As The City observed in its Comments submitted on July 31, 2008 in this matter, no plausible claims of a true exigency or need for emergency reevaluation of the demand curve and CONE have been made here. Rather, certain parties (*e.g.*, July 31 Comments of IPPNY at pp. 11-12, 21; Affidavit of Mark D. Younger at pp. 4-5; PSEG at p.1; TransCanada at 4<sup>1</sup>) have simply advanced a flawed syllogism, *i.e.*, the study undertaken by NERA Economic Consulting assumed the continuation of the former ICIP program and placed a significant value on the financial benefits associated with that program, a legislative change resulted in the repeal of ICIP benefits for generation assets, and hence an exigency exists within the meaning of NYISO Manual Section 5.6.7.

In fact, the claim of an emergency situation that calls for an immediate reset of the demand curve parameters is wholly unsupported. There are other significant City economic incentive programs that can potentially provide similar benefits – and possibly superior ones, as reflected in the City’s earlier submission (City Comments, discussion of NYCIDA program at pp. 4-6). It is of course true, as the City freely acknowledged on

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<sup>1</sup> Illustrative of exaggerated claims is the TransCanada declaration in its Comments at p. 4 that “the legislators in New York have decided to eliminate the property tax exemption for generation assets in New York.” This statement pointedly fails to note that it is true only under one, non-exclusive statutory scheme that permits such tax exemptions – ICIP.

July 31, that ICIP is an as-of-right program, while NYCIDA benefits are discretionary in nature.

But importantly, the burden of making a showing of an exigency rests squarely on those making a claim of its existence. And aside from the submission of wholly conclusory statements and contentions that lack any factual support, no credible evidence has been produced here. There are, for example, no claims of denial of NYCIDA benefits, and indeed, no showing to date of any efforts to gain such benefits during the period after ICIP was amended. As a practical matter, of course, we have had little experience with NYCIDA grants to generators, or even applications for same, in large part because before July 1st of this year, new market entrants and generation developers tended to rely on what was understandably viewed as the more certain ICIP program.

In any case, no party has even attempted to make a case that NYCIDA incentives are unlikely to be awarded to generation developers – a circumstance that clearly argues for not reopening the demand curve reset process prematurely. Once actual experience is gained over the period since the ICIP amendment was made effective, there will be ample opportunity to take the matter up during the next demand curve reset process in 2009.

We do have at least some relatively recent evidence that there is no inherent bar to the receipt of substantial NYCIDA benefits by a merchant generator. In 1995, and again in 1997, Brooklyn Navy Yard Congeneration Partners, L.P. (“BNYCP”) received NYCIDA grants including the use of tax exempt bonds. The following facts were set forth in a Public Service Commission Order authorizing the issuance of \$540,000,000 in bonds by BNYCP, and in a Department of Public Service Staff Recommendation supporting the BNYCP Petition to issue those bonds:

BNYCP operates as an independent power producer.

Development of BNYCP's Facility was financed by bonds issued in 1995 by the New York City Industrial Development Agency ("IDA") under a lease-leaseback arrangement between IDA and BNYCP, and by loans to BNYCP...through a combination of new bonds issued by IDA and privately placed debt....

Under the proposed refinancing, the IDA will issue tax-exempt Series 1997 bonds.....<sup>2</sup>

At least one party, IPPNY, has suggested it is somehow incumbent on the City to provide information on the nature and extent of support that may be expected under the NYCIDA process, and cites an alleged lack of evidence that NYCIDA can "equal or even approach" the previously available ICIP benefits (IPPNY Comments at p. 9, fn. 27).

This contention actually turns the obligation of the respective parties on its head. It is IPPNY and other moving parties here that contend that the former ICIP program is unique and irreplaceable. It is incumbent on those that bear the burden of claiming exigency to make a compelling showing that their claim is accurate. They have failed to do so in any form other than continual repetition of bald assertions to that effect.

As the City stated in its own initial Comments, while NYCIDA is a discretionary program, it offers potential benefits that can meet and in some cases exceed those associated with the former ICIP regime. More importantly, in the absence of any demonstration that the exercise of discretion by the NYCIDA Board has operated in the past, or is likely to operate in the future, to the detriment of new market entrants or power

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<sup>2</sup> See Petition of BNYCP for Authority to Issue Long-Term Debt in an Amount Not to Exceed \$540,000,000, Public Service Commission Case 97-E-1935, Order Approving Petition (issued and effective December 3, 1997), and underlying Recommendation of Office of Accounting & Finance at pp.1-3 (dated November 12, 1997). N. B. The particular tax-exempt bonding authority that was utilized by NYCIDA for the BNYCP arrangements in 1995-97 has now expired. This example is therefore intended to be illustrative only.

plant developers, the exaggerated claims of exigency that have been made here fall of their own weight.

This is not to say that the City is presently prepared to state that a particular NYCIDA grant application outcome can be absolutely assured. It is obviously the nature of a discretionary program that the results of any individual decision will be driven by a myriad of policy factors and factual circumstances that will almost certainly be unique, and limited to the case under consideration. However, as of this time, with just five weeks of actual experience without the formerly applicable ICIP benefits, there is no basis on which to conclude that any dire effects on power plant financing will likely follow from the legislative change being reviewed by the Board here.

Moreover, as was observed by NRG affiant Lee Davis, “New York City is looking to replace existing generation with cleaner and more efficient generation projects including repowering at existing sites” (Davis Affidavit at p. 7, ¶ 19). This actually constitutes an argument for City policies that enhance the likelihood of such new market entrants – and as the City previously noted at p. 5 in its July 31 Comments, a principal part of the mission of NYCIDA is to advance such City goals.

At this juncture, we can only explain the suite of potential NYCIDA benefits that will likely apply to generators that can make a showing that a demonstrably beneficial generation project will not happen without the provision of City incentives. The City already addressed this subject at some length in its initial Comments, and will not reiterate that discussion here.

Beyond that, the City has now cited at least two decisions made by NYCIDA in 1995 and 1997 to grant very substantial financial assistance to an independent power

producer and exempt wholesale generator, BNYCP. No party alleging a form of financial disaster with the demise of ICIP tax advantages for generators has made a showing that NYCIDA grants (or other forms of City benefits) are not likely to be available in the future as a close substitute for ICIP.

Finally, as was pointed out by DPS Staff in its initial filing (DPS Comments at p. 2 ), any simple recalculation of the CONE and other demand curve values based solely on the ICIP amendment would be completely unjustified as that change, whatever its claimed financial effects, will have absolutely no impact on current recipients of the multi-year ICIP tax benefits, who are unaffected by the recent amendment.

This much is clear: absolutely no basis exists to allow current recipients of very generous ICIP property tax advantages for years to come to also get the benefit of a recalculation of demand curve values based solely on a statutory modification that has had no effect on them. Any consideration of such a course by the Board would, as DPS suggests, actually call into question the unitary NYISO-operated capacity market pricing system that is currently applicable to incumbents and new entrants alike.

In sum, the City urges the Board to reject all the unsupported claims of exigency made in this proceeding, and deny any immediate reassessment of the demand curve or its constituent elements.

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Respectfully submitted,

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