

## **11 Dispute Resolution Procedure**

## **11.1 Purpose and Applicability of Dispute Resolution Procedure**

### **11.1.1 Purpose and General Provisions**

A party, or parties, and the ISO, having a dispute involving service under the ISO Market Administration and Control Area Services Tariff (“Services Tariff”) or the Open Access Transmission Tariff (“OATT”), ISO Procedures, or any Agreement entered into under either Tariff, may utilize the provisions of this Section 11 for resolution. The purpose of the dispute resolution processes provided herein is to avoid litigation when possible, and to pursue resolution of the dispute in the most cost-effective and prompt method possible.

Nothing herein restricts the rights of any party or the ISO to file a complaint or seek any other remedy from the Commission under the relevant provisions of the Federal Power Act.

### **11.1.2 Exceptions**

This Article 11 shall not apply to the following disputes, which shall be resolved in accordance with the provisions of the ISO Tariffs, or otherwise, as indicated below:

- (i) disputes regarding the Standard Large Facility Interconnection Procedures or Standard Large Generator Interconnection Agreement, which disputes shall be governed by Attachment X to the ISO OATT, or disputes regarding the Small Generator Interconnection Procedures or Standard Small Generator Interconnection Agreement, which disputes shall be governed by Attachment Z to the ISO OATT;
- (ii) disputes regarding the Local Transmission Planning Procedures, which disputes shall be governed by Section 31.2.1.3 of Attachment Y to the ISO OATT;

- (iii) disputes over cost estimates provided in interconnection agreements as provided in Attachment S, which disputes shall be resolved under the interconnection agreement;
- (iv) disputes regarding a Customer's settlements that were not resolved in the ordinary settlement review, challenge, and correction process, which disputes shall be governed by Section 7.4 of this ISO Services Tariff or Sections 2.7.4.2 or 2.7.4.3 of the ISO OATT;
- (v) disputes regarding certain ICAP-related issues that Section 5 of the ISO Services Tariff expressly indicates shall be governed by other provisions of the ISO Services Tariff;
- (vi) disputes regarding Centralized TCC Auction or Reconfiguration Auction awards, which disputes shall be governed by Attachment M, Section 19 of the ISO OATT;
- (vii) disputes involving applications for changes in rates, changes in terms or conditions of service, or other changes to the ISO Tariffs, ISO Procedures, or agreements to which the ISO is a party and disputes that may result in an obligation to transmit electricity under circumstances where the Commission is precluded from ordering transmission service pursuant to FPA Section 212(h). Parties with these disputes have exclusively those rights provided for under the FPA or otherwise provided by law and have no right to invoke dispute resolution processes under this Section 11.

## **11.2 Initiation of Dispute Resolution Proceedings**

### **11.2.1 Notice of Dispute**

In the event of a dispute that the party or parties have been unable to resolve, any party or parties may initiate a dispute resolution proceeding pursuant to this Article 11 (“Dispute Resolution Proceeding”) by submitting a written notice to the ISO. The written notice shall describe the dispute in detail and set forth the factual and legal assertions underlying the dispute (including specific reference to applicable provisions of the ISO Tariffs, or ISO Procedures, or relevant Service Agreements), and shall designate one or more authorized representatives of each of the party or parties initiating the dispute to participate in the Dispute Resolution Proceeding on their behalf.

### **11.2.2 Parties to Dispute Resolution Proceeding**

The party or parties initiating the dispute pursuant to the provisions of Section 11.2.1 and the ISO shall be parties to the Dispute Resolution Proceeding (“Parties”).

### **11.3 Informal Discussions**

Within thirty (30) days of written notice of the dispute pursuant to Section 11.2.1, senior representative(s) of each Party shall attempt in good faith to fully and finally resolve the dispute through informal discussions.

#### **11.4 Available Formal Proceedings**

In the event the Parties are unable, through informal discussions in accordance with Section 11.3 to resolve the dispute within thirty (30) days after the NYISO receives written notice of the dispute, then:

##### **11.4.1**

Upon their express written agreement, the Parties may submit all or some portion of the dispute to non-binding mediation as specified in Section 11.5; or

##### **11.4.2**

The Parties, upon their express written agreement, may submit all or some portion of the dispute to arbitration as specified in Section 11.6, provided however, if the mediation procedures are used, the Parties may submit all or some portion of the dispute to arbitration only after the conclusion of mediation that does not resolve the dispute; or

##### **11.4.3**

The Parties may commence legal proceedings before the Commission, or a court of competent jurisdiction as to any matter not within the primary or exclusive jurisdiction of the Commission, for purposes of adjudicating all or some portion of the dispute; provided, however, that if the Parties agreed in writing to submit the dispute to non-binding mediation, termination of the mediation, as certified in writing by the mediator selected by the parties, is a condition precedent to the commencement of any legal proceeding, except to the extent necessary to preserve a claim subject to expiration under an applicable statute of limitations.

## **11.5 Non-Binding Mediation**

If the Parties agree to submit all or some portion of the dispute to non-binding mediation, as specified in Section 11.4.1, they shall do so either (i) pursuant to a written agreement setting forth or adopting all necessary terms, conditions and rules of procedure governing the mediation as agreed by the Parties, or (ii) pursuant to a written agreement adopting the procedures of 11.5.1 through 11.5.3:

### **11.5.1 Selection of a Mediator**

Within ten (10) days of the Parties' written agreement to mediate, the Parties shall exchange lists of proposed mediators, and the Parties shall seek to agree on a mediator.

Any individual designated as the mediator shall make known to the Parties whether he or she is a past or present officer, employee or consultant to any of the Parties, or of any entity related to or Affiliated with any of the Parties or is otherwise interested in the matter to be mediated. Any person with such a relationship shall not be eligible to serve as the mediator, absent the express written consent of all Parties.

If the Parties are unable to agree on a mediator, they shall invoke the assistance of the Commission's Dispute Resolution Service to select a mediator.

### **11.5.2 Scope of Mediator's Duties**

The disputing parties shall attempt in good faith to resolve their dispute in accordance with the schedule established by the mediator but in no event, may the schedule extend beyond ninety (90) days from the date of appointment of the mediator.

The mediator may require the disputing parties to:

1. submit additional written statements of issue(s) and position(s), along with supporting documents or affidavits;
2. meet for discussions; and/or
3. comply with additional mediation procedures designated by the mediator.

If the Parties have not resolved the dispute within ninety (90) days after the date the mediator was appointed, then the mediator shall promptly provide the Parties with a written, confidential, non-binding recommendation to resolve the dispute. The recommendation shall include an assessment by the mediator of the merits of the principal positions being advanced by each of the Parties . The Parties shall then meet in a good faith attempt to resolve the dispute in light of the mediator's recommendation. This recommendation shall be limited to resolving the specific issues presented for mediation.

The recommendation of the mediator, and any other statements made by any Party during the mediation process, shall not be admissible for any purpose, in any subsequent proceeding.

### **11.5.3 Costs**

Each Party will bear an equal share of the costs associated with the time, expenses and other charges of the mediator. Each Party shall bear its own costs, including attorney and expert fees.



## **11.6 Arbitration**

If the Parties agree in writing to submit all or some portion of the dispute to arbitration as specified in Section 11.4.2, they shall do so either (i) pursuant to a written agreement invoking the assistance of the Commission Dispute Resolution Service in reaching an agreement on the selection of a neutral arbitrator or arbitrators, and the adoption of all necessary terms, conditions and rules of procedure to govern an arbitration or other resolution of the dispute, or (ii) pursuant to a written agreement adopting the procedures of 11.6.1. Only if all Parties include in their agreement, submitting all or a portion of their dispute to arbitration, that the decision of the arbitrator shall be final and binding on the Parties, shall such decision be final and binding on the Parties whether they choose to pursue the arbitration pursuant to 11.6(i) or 11.6(ii).

### **11.6.1 Procedural Provisions**

#### **11.6.1.1 Selection of an Arbitrator**

Within ten (10) days of the date the Parties submit a written agreement to invoke the arbitration provisions of this Section 11.6, and unless such written agreement has invoked the Commission's Dispute Resolution Service pursuant to Section 11.6, the Parties shall exchange lists of qualified arbitrators. No person shall be eligible for selection as an arbitrator who is a past or present officer, employee of or consultant to any of the Parties, or of an entity related to or affiliated with any of the Parties, or is otherwise interested in the matter to be arbitrated, except upon the express written consent of the Parties. Any individual designated as an arbitrator shall make known to the Parties any such disqualifying relationship or interest and a new arbitrator shall be designated, unless express written consent is provided by each Party.

If the Parties cannot agree upon an arbitrator, the Parties shall invoke the services of the Commission's Dispute Resolution Service in the selection of an arbitrator.

#### **11.6.1.2 Scope of Arbitrator's Duties**

The arbitrator shall have no power to modify or change any agreement, tariff or rule or otherwise create any additional rights or obligations for any Party. The scope of the arbitrator's decision shall be limited to the issues presented for arbitration. The arbitrator shall determine discovery procedures, intervention rights, how evidence shall be taken, what written submittals may be made, and other such procedural matters, taking into account the complexity of the issues involved, the extent to which factual matters are disputed, and the extent to which the credibility of witnesses is relevant to a resolution. Each Party shall produce all evidence determined by the arbitrator to be relevant to the issues presented. To the extent such evidence involves proprietary or Confidential Information, the arbitrator may issue an appropriate protective order which shall be complied with by all Parties. The arbitrator may elect to resolve the arbitration matter solely on the basis of written evidence and arguments.

The arbitrator shall consider all issues underlying the dispute, and the arbitrator shall take evidence submitted by the Parties in accordance with procedures established by the arbitrator and may request additional information including the opinion of recognized technical bodies or experts. The Parties shall be afforded a reasonable opportunity to rebut any such additional information.

Absent agreement to the contrary by all Parties, no person or entity that is not among the Party or Parties initiating the dispute pursuant to Section 11.2.1 of this Tariff shall be permitted to intervene, but see Section 11.7 concerning consolidation of separate disputes.

### **11.6.2 The Arbitration Decision**

Within ninety (90) days of the appointment of the arbitrator, and after providing the parties with an opportunity to be heard, the arbitrator shall render a written decision, including findings of fact and the legal basis for the decision. The arbitrator will follow the Commercial Arbitration Rules of the American Arbitration Association.

If the arbitrator concludes that no proposed award is consistent with the ISO Services Tariff, the ISO OATT, the FPA and Commission's then-applicable standards and policies, or would address all issues in dispute, the arbitrator may determine no award is available or the arbitrator may develop a compromise solution consistent with the terms of the ISO Services Tariff, the ISO OATT or the FPA. In all cases, the arbitrator shall provide to the Parties a written decision including findings of fact and explaining the basis for the award, the basis for the compromise award or, if no award is available, the basis for the decision that no award is available. No award shall be deemed to be precedential in any other arbitration related to a different dispute.

### **11.6.3 Costs**

All costs associated with the time, expenses and other charges of the arbitrators shall be borne by the unsuccessful Party. Each Party shall bear its own costs, including attorney and expert fees.

### **11.6.4 Filing and Finality.**

All arbitration decisions that affect matters subject to the jurisdiction of the Commission shall be filed with the Commission. Any arbitration decision that affects matters subject to the jurisdiction of the PSC under the PSL may be filed with the PSC. The judgment of the arbitrator,

agreed to be final and binding by written agreement of the Parties, pursuant to Section 11.6, may be entered on the award by any court in New York having jurisdiction.

Within one (1) year of the arbitration decision, a Party may request that the Commission or any other federal, state, regulatory or judicial authority (in the State of New York) having jurisdiction over such matter vacate, modify or take such other action as may be appropriate with respect to any arbitration decision that is:

1. based upon an error of law;
2. contrary to the statutes, rules or regulations administered by such authority;
3. violative of the Federal Arbitration Act or Administrative Dispute Resolution Act;
- or
4. based on conduct by an arbitrator that is violative of the Federal Arbitration Act or Administrative Dispute Resolution Act.

## **11.7 Consolidation of Related Arbitration Proceedings**

Upon the written consent of all Parties who have agreed to arbitration of a dispute pursuant to Sections 11.4.2 and 11.6, and with the consent of all Parties to pending arbitration proceedings commenced pursuant to the same provision, such arbitration proceedings may be consolidated if the disputes in each proceeding (i) arise out of or relate to essentially the same set of facts or fact pattern, series or type of transactions or legal issues, and (ii) are governed by the same provisions of the ISO Tariffs and applicable law, provided however, arbitration proceedings which the Parties have agreed, pursuant to Section 11.6, shall result in a final and binding decision shall be consolidated, to the extent otherwise permitted by this section, only with other arbitration proceedings which the Parties have agreed, pursuant to Section 11.6, shall result in a final and binding decision. Any Party to an arbitration proceeding who agrees to consolidation as provided herein may not, and forever waives any right to, challenge a final award, in whole or in part, whether on appeal or otherwise, on the ground that it was prejudiced or deprived of any right by virtue of the consolidation.

## **11.8 Ongoing Duty to Perform**

The pendency of a Dispute Resolution Proceeding under this Article 11 shall not relieve the Parties of any duty to perform their respective obligations under the ISO Tariffs, ISO Procedures, or relevant agreement.

## **11.9 Rights Under the Federal Power Act**

Nothing in Section 11 of this Tariff shall restrict the rights of any Party to file a complaint, rate or tariff or other contract change with the Commission under the relevant provisions of the Federal Power Act. No arbitrator shall select an award which requires the transmission of electricity under circumstances where the Commission is precluded from ordering Transmission Services pursuant to FPA Section 212(h).