

131 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

New York Independent System Operator, Inc.

Docket No. ER09-1142-005

ORDER ON COMPLIANCE FILING

(Issued June 4, 2010)

1. On February 18, 2010, the New York Independent System Operator, Inc. (NYISO) filed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) intended to satisfy the Commission's directives in its November 20, 2009 Order¹ regarding market monitoring, pursuant to Order No. 719.² NYISO requests that its proposed tariff revisions be made effective January 1, 2010, consistent with the date that the other tariff provisions accepted by the November 2009 Order went into effect. In this order, we conditionally accept NYISO's compliance filing, subject to further compliance filing to be filed within 30 days of this order, as discussed below.

I. NYISO's Filing

A. Background

2. In Order No. 719, the Commission established reforms to improve the operation of organized wholesale electric power markets³ and amended its regulations under the

¹ *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,164 (2009) (November 2009 Order).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719 or Final Rule).

³ Organized market regions are areas of the country in which a regional transmission organization (RTO) or independent system operator (ISO) operates day-ahead and/or real-time energy markets. The following Commission-approved RTOs and ISOs have organized markets: PJM Interconnection, L.L.C. (PJM); New York Independent System Operator, Inc. (NYISO); Midwest Independent Transmission System

(continued...)

Federal Power Act (FPA) in the areas of: (1) demand response, including pricing during periods of operating reserve shortage; (2) long-term power contracting; (3) market-monitoring policies; and (4) the responsiveness of RTOs and ISOs to their customers and other stakeholders. The Commission stated that these reforms are intended to improve wholesale competition to protect consumers in several ways: by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, removing barriers to demand response, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.⁴

3. The NYISO submitted its compliance filing in response to Order No. 719 on May 15, 2009 ("May 2009 Filing"). The May 2009 Filing proposed several revisions to the NYISO Services Tariff and OATT in response to Order No. 719's market monitoring and bid disclosure directives. On November 20, 2009 the Commission accepted the NYISO's proposed tariff revisions, subject to a further compliance filing.

B. Proposed Tariff Revisions

4. NYISO first addressed the Commission's directive to remove tariff provisions that would have exempted certain categories of matters from automatic referral to the Market Monitoring Unit (MMU), while allowing the NYISO to propose new language identifying specific tariff provisions that would qualify for such an exemption. NYISO notes that the Commission agreed that certain "traffic ticket" violations may be sanctioned by NYISO without referral to the Commission if they meet the following criteria: (1) the activity must be expressly set forth in the tariff; (2) the activity must involve objectively identifiable behavior, and; (3) the activity does not subject the actor to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission.⁵

5. However, the Commission directed NYISO to remove from its tariff NYISO's proposed modification to the Core Functions in section 4.5.3.1 regarding exemptions of certain matters for referral to the Commission.⁶ Instead, the Commission gave NYISO the option of adding a new provision to its tariff in which it lists the specific existing

Operator, Inc. (Midwest ISO); ISO New England, Inc. (ISO New England); California Independent System Operator Corp. (CAISO); and Southwest Power Pool, Inc. (SPP).

⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 1.

⁵ Filing letter at 4.

⁶ *Id.* at 5.

provisions in its tariff that it believes meet the requirements for exclusion from the referral requirement.⁷

6. In response, NYISO has removed the language that it originally proposed to include in section 4.5.3.1 of the Market Monitoring Plan (Attachment O) and replaced it with a list of sixteen specific “traffic ticket” behaviors in proposed section 4.5.3.2. The list details how each type of market participant behavior is tied to a specific sanction or consequence set forth in a specific, previously accepted, provision of the NYISO tariff in order comply with the November 2009 Order’s directive to show “how any particular provision meets the necessary criteria.”⁸

7. NYISO states that the MMU will retain the discretion to refer to the Commission activities it is not required to refer, such as actions not constituting market violations even though the underlying behavior may be sub-optimal.⁹

8. Regarding potential market violations that constitute “Market Problems,”¹⁰ NYISO proposes to add language to section 4.5.3.2 to clarify that these are things that the NYISO already reports to the MMU and the Commission’s Office of Enforcement, so they need not also be referred by the MMU.¹¹ NYISO explains that the MMU will have the opportunity to submit an additional report to the extent the MMU determines that additional reporting is necessary.

9. Regarding the MMU’s monitoring responsibilities, the November 2009 Order directed NYISO to clarify that it would be responsible for performing daily monitoring

⁷ *Id.* at 5.

⁸ *Id.* at 7.

⁹ *Id.* at 13.

¹⁰A Market Problem is defined by section 2.103a of the NYISO’s Services Tariff as an issue that includes market design flaws, software implementation and modeling anomalies or errors, market data anomalies or errors, and economic inefficiencies that have a material effect on the ISO-administered markets or transmission service. Pursuant to section 3.5.1 of the Services Tariff, NYISO must notify the Commission, the MMU, and, unless otherwise directed, Market Participants of the discovery of a Market Problem.

¹¹ On December 11, 2009, the Commission conditionally accepted NYISO’s tariff revisions that provide that NYISO will immediately inform both the MMU and the Commission’s Office of Enforcement upon discovery of any potential Market Problems. *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,217 (2009).

and analyzing market outcomes.¹² The November 2009 Order also directed NYISO to clarify whether the MMU is responsible for monitoring virtual bidding.¹³ In the instant filing NYISO proposes to add a new section 4.5.2.1 to the Market Monitoring Plan that provides that the MMU will perform daily monitoring and analyze market outcomes and will also be responsible for monitoring virtual bidding.

10. Regarding the responsibility for purely administrative matters, the November 2009 Order directed the NYISO to clarify that it would handle activities that were remote from the Core Functions to be performed by the MMU.¹⁴ The NYISO proposes to modify section 4.4 of its Market Monitoring Plan to clarify that the MMU will not be involved in purely administrative matters that are remote from its Core Functions.

11. The November 2009 Order also directed the NYISO to clarify to whom reports on market design flaws and market violations must be made.¹⁵ NYISO proposes to amend section 4.1 to specify that such reports will be provided to Commission staff in accordance with sections 4.5.3 and 4.5.4.

12. Regarding enhanced information dissemination, the November 2009 Order directed the NYISO to include a requirement that the MMU be available for regular conference calls with the Commission and state commission staff, ISO/RTO representatives and market participants.¹⁶ NYISO proposes a new section 10.4 in compliance with the November 2009 Order. This section provides that the MMU will participate in regular conference calls.

13. The November 2009 Order also directed the NYISO to modify its proposed tariff revisions to provide that the MMU, not the NYISO, is responsible for responding to tailored requests for information from state commissions.¹⁷ The November 2009 Order also directed that the NYISO revise its tariff to specify that the MMU would be the entity

¹² Filing letter at 14.

¹³ *Id.* at 14.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 15.

¹⁷ *Id.* at 16.

to respond to information and data requests it receives from the Commission.¹⁸ NYISO is revising section 6.5 to comply with these directives.

14. The November 2009 Order also directed the NYISO to modify its tariff provisions addressing the MMU's responses to tailored requests for information to allow market participants to provide context to Confidential Information related to them which has been released in response to a "tailored" request, as long as no undue delay results. NYISO proposes to add a new section 6.5.5.2 in compliance with the November 2009 Order.¹⁹

II. Notice of Filing and Responsive Pleadings

15. Notice of NYISO's February 18, 2010 filing was published in the *Federal Register*, 75 Fed. Reg. 9889 (2010) with comments, interventions, and protests due on or before March 11, 2010. There were no interventions, protests or adverse comments.

III. Discussion

16. We accept all of NYISO's proposed revisions except certain traffic ticket type violations in Attachment O, section 4.5.3.2 that would not require referral to the Commission. Specifically, we accept item numbers "(2) Failure to meet a Contract or non-Contract CRIS MW Commitment pursuant to Sections VII.K.1.a and VII.K.1.b of Attachment S to the ISO OATT that results in a charge or other sanction under Section VII.K.1c of Attachment S of the ISO OATT"; "(11) Black Start performance that results in reduction or forfeitures of payments under Rate Schedule 5 to the ISO Services Tariff"; and "(15) any failure by the ISO to meet the deadlines for completing System Impact Studies, or any failure by a Transmission Owner to meet the deadlines for completing Facilities Studies, under Sections 19 and 32 of the ISO OATT that results in the filing of a notice and/or the imposition of sanctions under these provisions."²⁰ These types of violations meet the Commission's requirements that: (1) the activity must be expressly set forth in the tariff; (2) the activity must involve objectively identifiable behavior, and; (3) the activity does not subject the actor to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission.²¹

¹⁸ *Id.* at 16.

¹⁹ *Id.* at 17.

²⁰ We note that we rejected NYISO's proposal to delete section 32 of the OATT. *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,074 (2010).

²¹ November 2009 Order at P 98.

17. However, we reject NYISO's traffic ticket violations for numbers: (1), (3 – 10), (12 – 14), and (16), because as we explain below, they do not meet the three requirements. NYISO is therefore directed to remove or revise these violations from the listing of those that do not require referral to the Commission in accordance with the guidance provided herein.

18. We reject proposed traffic ticket number “(1) failure to meet a deadline, or to take any other action, required of Developers under Attachments S, X, or Z of the ISO OATT that subjects a Developer to a possible loss of queue position” because NYISO has not listed the specific provisions within these attachments to which it refers. NYISO's ability to remove the developer from its queue position is discretionary, not mandatory, and the grounds for NYISO's exercise of discretion are not provided. However, in this case no traffic ticket offense is involved (nor is it a tariff violation referable to Commission staff). The developer's failure to meet a deadline or provide information simply means NYISO cannot complete the processing of the developer's interconnection application. Dropping the developer from its queue position or considering its request as withdrawn is therefore not a sanction, but simply a matter of ordinary tariff administration. While the provision should be removed from the list of traffic-ticket type offenses, NYISO is free to remove a developer from the queue position or consider its request as withdrawn if NYISO has not received the necessary information or the developer has not taken the other actions needed for NYISO to process its application.

19. We reject proposed traffic ticket numbers “(3) failure to provide wind forecasting information that results in a sanction under Section 5.8a of the ISO Services Tariff”; “(4) failure to provide Installed Capacity related information or operating data under Articles 5.12.1, 5.12.3, or 5.12.5 of the ISO Services Tariff that triggers sanctions under Article 5.12.12 of the ISO Services Tariff”; “(5) failure to comply with the scheduling, bidding, and notification requirements under Article 5.12.1 or 5.12.7 of the ISO Services Tariff that trigger sanctions under Article 5.12.12 of the ISO Services Tariff”; “(6) other actions or failures to act that trigger sanctions under Article 5.12.12 of the ISO Services Tariff...”; and “(7) shortfalls by Installed Capacity Suppliers and External Installed Capacity Suppliers that trigger sanctions under Article 5.14.2 of the ISO Services Tariff” because NYISO retains discretion to apply the sanction as these sections use the word “may.” Therefore, we find that these traffic tickets do not meet the requirement of objectivity. NYISO could correct this either by making imposition of the sanction mandatory, or by specifying the criteria in each section under which NYISO would or would not impose the sanction.

20. We also reject proposed traffic ticket number “(8) Voltage Support Service performance that results in the imposition of charges under Rate Schedule 2 to the ISO Services Tariff,” but we note that the subparts of this schedule, with one exception on Tariff Sheet No. 267, which uses the word “may,” meet the three-part test, and therefore, are appropriately listed as a traffic-ticket type offense for which NYISO can impose the

specified sanctions. In the one exception on Tariff Sheet No. 267, NYISO's application of a continued sanction is discretionary, and therefore, does not meet the requirement of objectivity. This could be corrected either by replacing "may" with "shall," or by specifying the criteria whereby NYISO will determine to reinstate payments.

21. Proposed traffic ticket number "(9) Regulation Service performance that results in the imposition of penalties under Section 8.0 of Rate Schedule 3 to the ISO Services Tariff (in the event that such penalties are re-instituted by the ISO)" also does not meet the three-part standard. This provision leaves it up to NYISO to determine whether performance "threatens compliance" and whether reinstating performance charges "would assist in improving compliance with established standards...or would assist in re-establishing reliability." These tests rely on a judgment call by NYISO based on unspecified criteria, and therefore, do not meet the three-part test for traffic ticket type offenses. Furthermore, imposition of the performance charge is discretionary, as the provision uses the word "may," and therefore, is not objective.

22. Proposed traffic ticket number "(10) performance that results in the imposition of Persistent Undergeneration charges under Rate Schedule 3-A to the ISO Services Tariff" is rejected because the tolerance range is not specified in the tariff, other than to characterize it as "set pursuant to ISO procedures."²² Therefore, it does not meet the objectivity test for traffic ticket-type offenses. This provision could be corrected with a more precise definition of the tolerance range or with a reference to another document containing a description of the range, or the manner in which the range is calculated.

23. We reject proposed traffic ticket number "(12) conduct that results in a sanction under Section 4.3 of the Market Mitigation Measures..." NYISO clearly intends that these behaviors, which are regarded by NYISO as implicating market power concerns, are to trigger mitigation. Market power mitigation is a market design mechanism to ensure competitive offers even when competitive conditions are not present; it is not intended to function as "punishment" for a tariff violation, but instead to protect and promote competition. Therefore, it should not be included in the list of traffic ticket offenses.²³

²² See NYISO Services Tariff Third Revised Sheet No. 280.01.

²³ For the same reason, NYISO-proposed mitigation is not generally subject to referral under section 4.6.2.1.

24. Traffic ticket number “(13) conduct that results in the ISO’s use of the “Load Bid Measure” set forth in Section 4.4 of the Market Mitigation Measures” is also rejected for the reasons given for traffic ticket number (12) as discussed above.

25. Traffic ticket number “(14) actions or failures to act by Installed Capacity Suppliers and Responsible Interface Parties that trigger sanctions under Section 4.5(d), (f), or (g) of the Market Mitigation Measures” is also rejected for the reasons given for traffic ticket number (12) as discussed above.

26. Finally, we must also reject proposed traffic ticket number “(16) failure of a Market Party to comply with the ISO’s creditworthiness requirements for customers...” because NYISO has not provided a citation for the conduct it wishes to sanction or for the sanction provision itself, and therefore, the conduct in question does not meet the three-part test.

The Commission orders:

(A) NYISO’s compliance filing is conditionally accepted in part, as discussed in the body of this order.

(B) NYISO must file revised tariff provisions as discussed in the body of this order, within 30 days of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.