

133 FERC ¶ 61,123
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System
Operator, Inc.

Docket No. ER09-1142-008

ORDER DENYING REHEARING
AND GRANTING CLARIFICATION

(Issued November 5, 2010)

1. On July 6, 2010, the New York Independent System Operator, Inc. (NYISO) filed a request for rehearing and clarification of an order issued on June 4, 2010.¹ In that order, the Commission conditionally accepted NYISO's February 18, 2010 filing revising its Market Administration and Control Area Services Tariff (Services Tariff). NYISO's proposed revisions were intended to satisfy the Commission's directives in its November 20, 2009 order² regarding market monitoring, pursuant to Order No. 719. In this order, we deny NYISO's request for rehearing and grant clarification, as discussed below.

I. Background

2. In the November 20, 2009 Order, the Commission stated that NYISO may sanction certain "traffic ticket" violations without referral to the Commission if they met the following criteria: (i) the activity must be expressly set forth in the tariff; (ii) the activity must involve objectively identifiable behavior; and (iii) 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 a right of appeal to the Commission.³ In the June 4, 2010 Order, the Commission rejected several of NYISO's proposed revisions for

¹ *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,225 (2010) (June 4, 2010 Order).

² *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,164 (2009) (November 20, 2009 Order).

³ *Id.* P 98.

its traffic ticket violations, numbers: (1), (3 – 10), (12 – 14), and (16), finding that they did not meet these three requirements.⁴

II. Request for Rehearing

3. NYISO seeks rehearing of two of its proposed traffic ticket violation proposals: “(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);” and “(10) performance that results in the imposition of Persistent Undergeneration charges under Rate Schedule 3-A to the ISO Services Tariff.”

4. The Commission found in the June 4, 2010 Order that item (9) did not meet the three-part test because NYISO has the discretion 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.”⁵ Furthermore, according to the June 4, 2010 Order, imposition of the performance charge is discretionary as the provision uses the word “may,” and therefore, is not objective.⁶

5. NYISO argues that the Commission’s concerns with respect to item (9) are misplaced because the tariff provisions allowing NYISO to reinstate the penalties for inadequate regulation service performance have not been used since they were accepted by the Commission in 2001.⁷ Furthermore, NYISO argues that, before it could re-institute the performance charges, it is required to provide seven-day notice to the Commission and market participants. NYISO asserts that once the penalty rules are re-instituted, NYISO would have no discretion regarding their implementation.

6. The Commission found in the June 4, 2010 Order that item (10) it did not meet the objectivity test for traffic ticket violations because the tolerance range for undergeneration is not specified in the tariff. The June 4, 2010 Order stated that 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.⁸

⁴ June 4, 2010 Order, 131 FERC ¶ 61,225 at P 18.

⁵ *Id.* P 21.

⁶ *Id.* P 22.

⁷ NYISO Request for Rehearing at 4.

⁸ June 4, 2010 Order, 131 FERC ¶ 61,225 at P 22.

7. NYISO argues that the Commission should grant rehearing and allow NYISO to treat item (10) as a traffic ticket violation since the tolerance level is precisely defined in the relevant ISO Procedure and few of the ISO Procedures specify the manual or technical bulletin to which they refer.⁹ NYISO argues that any changes to the ISO Procedures are subject to stakeholder review and that the tolerance level at issue here is the kind of detail that should be contained in such manuals consistent with Commission precedent. NYISO asserts that the Commission has approved the omission of specific details from the tariff in accordance with the filed rate doctrine.¹⁰

III. Commission Determination

8. First, we will address proposed traffic ticket violation “(9) Regulation 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).” As background, Section 8.0 provides that NYISO will constantly monitor its compliance with various reliability standards, area control error, disturbance control standards, reserve pickup performance, and system security.¹¹ Section 8.0 further states that, if it appears to NYISO that degradation in suppliers’ performance threatens compliance with reliability standards or compromises reliability, and that reinstating the performance charges that were originally part of the NYISO’s market design would assist in improving compliance, or would assist in re-establishing reliability, NYISO may require suppliers of regulation services to pay a performance charge (penalty). If reinstated, the performance charge is to apply to suppliers of regulation service any time that there is a difference between the actual energy supplied by a supplier and the energy required by base point signals.¹²

9. NYISO does not dispute that the language of Section 8.0 provides it with the discretion to reinstate penalties. Rather, it argues simply that it is obligated to provide prior notice to the Commission of its decision to reinstate the penalties and that, once they are reinstated, NYISO would have no discretion regarding their implementation. While such prior notice allows interested parties to protest NYISO’s decision, it does not eliminate discretion accorded to NYISO. On that basis alone it was appropriate to reject NYISO’s proposed traffic ticket violation (9). However, we find that a more

⁹ NYISO Request for Rehearing at 5-6 (citing section 4.11 NYISO’s Ancillary Services Manual).

¹⁰ *Id.* at 5 (citing *330 Fund I LP v. New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,151, at P 34 (2009)).

¹¹ *See* NYISO Market Services eTariff, Rate Schedule 3, section 15.3.8 (according to the new eTariff version of section numbering).

¹² *Id.*

fundamental, threshold problem with including the Section 8.0 penalties in NYISO's tariff list of traffic ticket violations is that the penalties are not currently effective. The list of traffic ticket violations should only include currently effective penalties. Therefore, we deny rehearing.

10. However, we agree with NYISO that, if the Section 8.0 performance penalties were to be reinstated, the penalties themselves would meet the requirements for traffic ticket violations, as they will be applied whenever there is a difference between the actual energy supplied by a supplier and the energy required by the base point signals. Therefore, if NYISO reinstates the Section 8.0 performance penalties, at that time it may file to include these performance penalties among the traffic ticket violations.

11. For proposed traffic ticket item "(10) performance that results in the imposition of Persistent Undergeneration charges under Rate Schedule 3-A to the ISO Services Tariff,"¹³ the Commission stated in the June 4, 2010 Order that the provision could be corrected with a more precise definition of the tolerance range or with a reference to another document which contains a description of the range, or the manner in which the range is calculated.

12. NYISO requests rehearing, arguing that "ISO Procedures" is a defined term that encompasses all of the NYISO's manuals, technical bulletins, and related documentation. NYISO also argues that the Commission has found that it is not a violation of the filed rate doctrine for it to omit certain details from a tariff that are included in the ISO's procedures.¹⁴ We find that NYISO's arguments are misplaced. Here, the question is simply whether the conduct meets the three-part test for traffic ticket violations. Two of those requirements are that the conduct must be specified in the ISO's tariff and must be objectively identifiable. That is not the case here.

13. NYISO defines "ISO Procedures" in its tariff as: "The procedures adopted by the ISO in order to fulfill its responsibilities under the ISO OATT, the ISO Services Tariff and the ISO Related Agreements."¹⁵ This broad definition does not adequately indicate to either the Commission or NYISO market participants how the tolerance level is set, and therefore what tolerance level NYISO deems appropriate. Equally important, market participants are not given adequate prior notice whether their conduct falls within the

¹³ Rate Schedule 3-A imposes a persistent undergeneration charge on a non-regulation service supplier that persistently operates at a level below its schedule unless its operation is within a tolerance set pursuant to ISO Procedures.

¹⁴ *330 Fund I, L.P. v. New York Independent System Operator, Inc.*, 126 FERC ¶ 61,151 (2009).

¹⁵ See NYISO Open Access Transmission Tariff, definitions list at p. 29 of 223.

desired tolerance range, and thus are left without any guidance as to what manual, bulletin, “related documentation” or procedure they should consult for this purpose. In sum, NYISO’s reference to a vast body of documents does not satisfy the requirement of the conduct being specified in the tariff. Nor does it allow a determination as to whether the conduct is objectively identifiable, since the Commission has no way to determine what specific procedures NYISO has in mind. For these reasons, rehearing on traffic ticket item (10) is denied.

IV. Request for Clarification

14. NYISO seeks clarification regarding the Commission’s rejection of proposed traffic ticket item (16) “failure of a Market Party to comply with the ISO’s creditworthiness requirements....” The June 4, 2010 Order rejected item (16) because it found that the NYISO did not provide specific tariff references for either the conduct to be sanctioned or the sanction provisions.¹⁶ NYISO requests that the Commission clarify that NYISO can propose alternative tariff language for item (16) and that the June 4, 2010 Order did not bar NYISO from proposing such language.

15. We clarify that NYISO may propose modified language for item (16).

The Commission orders:

NYISO’s request for rehearing is hereby denied and its request for clarification is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁶ June 4, 2010 Order, 131 FERC ¶ 61,225 at P 26.