

132 FERC ¶ 61,270  
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. ER10-2062-000

ORDER ACCEPTING AND SUSPENDING TARIFF REVISIONS  
SUBJECT TO CONDITIONS

(Issued September 29, 2010)

1. On July 30, 2010, the New York Independent System Operator, Inc. (NYISO) submitted, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> proposed amendments to the market power mitigation measures set forth in Attachment H to NYISO's Market Administration and Control Area Services Tariff (Services Tariff) to permit implementation of new reference level software functionality that will enable market parties to submit fuel price and fuel type information for their generators. NYISO proposes a September 30, 2010 effective date for the proposed provisions. In this order, the Commission accepts and suspends NYISO's proposed revisions for a nominal period to become effective September 30, 2010, as proposed, subject to refund and the conditions of this order as discussed below.

**I. Background**

2. NYISO's market power mitigation measures are set forth in Attachment H to its Services Tariff. Dollar denominated reference levels, such as start-up, minimum generation and incremental energy reference levels, serve as NYISO's estimate of the marginal cost of providing a service. NYISO states that several of the rules addressing the development of reference levels expressly require NYISO to adjust reference levels to reflect changes in the price of the fuel that a generator must consume, and even beyond these requirements, NYISO incorporates fuel costs where appropriate to more accurately reflect generators' marginal costs. NYISO states that it has developed improved reference level software that will permit it to implement a number of upgrades to the determination of generator reference levels. In the real-time market, market parties will have the ability to submit both fuel price and fuel type information to update the information which has been submitted in the day-ahead market, and which NYISO has

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<sup>1</sup> 16 U.S.C. § 824d (2006).

used to calculate reference levels. In this filing, NYISO proposes rules that will allow it to use this up-to-date fuel price and fuel type information submitted by market parties to more accurately fuel index their generators' reference levels.

**A. NYISO's Filing**

3. NYISO proposes to amend its market power mitigation measures, set forth in Attachment H to implement its new reference level software. Incorporating more accurate cost information into generator reference levels would improve the accuracy of NYISO's conduct and impact testing of generator bids for possible mitigation. NYISO states that improving the accuracy of the cost signal that generators are able to provide in their bids should improve the accuracy of NYISO's dispatch and increase market efficiency.

4. NYISO states that in addition to adding specificity to the rules for fuel indexing generator reference levels and supporting enhanced software functionality, the proposed tariff revisions: (1) clarify market parties' obligation to accurately report fuel type and fuel price information, and to accurately report significant changes to the cost components used to develop generator reference levels; (2) propose a penalty/sanction that will apply to market parties that submit inaccurate fuel price and/or fuel type information, where the inaccurate information is used by NYISO to develop a reference level, and it increases guarantee payments or market clearing prices paid to the market party above the payments that the market party would have received had it submitted accurate fuel price/type information; (3) clarify that it is not necessary for NYISO to calculate real-time reference levels for operating reserve ancillary services because generators' real-time Availability Bid must be \$0; and (4) propose corresponding / reciprocal revisions to the NYISO's Market Monitoring Plan<sup>2</sup> where the Market Monitoring Unit's duties are affected by the proposed changes to the market mitigation measures.<sup>3</sup>

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<sup>2</sup> The Market Monitoring Plan is set forth in Attachment O to the Services Tariff.

<sup>3</sup> Concurrently with the instant filing, NYISO has proposed in two other dockets, amendments to its Open Access Transmission Tariff (OATT) and Services Tariff associated with the new reference level software. In Docket No. ER10-1866-000, et al., NYISO addresses the impact of the new software on generators that start late in the dispatch day and that need to run on the following dispatch day to complete their minimum run time (Late Day Start generators) and revises bid production cost guarantees and day ahead margin assurance payments to account for the new software. In Docket No. ER10-1977-000, et al., NYISO proposes to permit generators to increase the price of energy already scheduled in the day-ahead market to reflect a change of cost following the day-ahead commitment. It also proposes associated penalty calculations and authority to revoke the opportunity to increase bids in real-time. The filing in the instant docket, Docket No. ER10-2062-000, contains certain tariff revisions proposed in the

5. NYISO states that the proposed tariff revisions are applicable to both the day-ahead and the real-time markets. In the day-ahead market, NYISO proposes to permit market parties to submit information identifying the type of fuel that their generator will burn if it is committed. According to NYISO, this information is relevant to fuel-indexing the reference levels of generators that are capable of burning more than one fuel type, that burn different fuel blends, or that are connected to multiple fuel sources that have distinct prices.<sup>4</sup> NYISO states that the proposed tariff revisions are designed to permit NYISO to implement a fuel type screening process that will require NYISO's approval to change a generator's fuel type to a new fuel type. NYISO states that the automated screening process will not permit a market party to select a fuel type that has not been pre-approved. NYISO further states that the proposed screening thresholds will identify which proposed fuel price changes need to be manually reviewed by NYISO's staff before they are permitted to take effect. NYISO proposes to publicly post the thresholds it will use to screen changes in fuel type or fuel price in advance.

6. NYISO states that all of the changes described above for the day-ahead market will also apply to the real-time market, but in the real-time market, NYISO proposes to give market parties the ability to submit real-time fuel price information in addition to fuel type information. NYISO explains that this is because the day-ahead fuel prices that it uses to fuel index generator reference levels may not accurately reflect the fuel costs that a generator committed in the real-time market must pay.

7. NYISO states that changes in fuel price and/or type that are timely submitted and that accurately reflect the cost of the fuel that a generator needs to burn will be eligible for recovery, even when NYISO is unable to timely review and approve a change to a more (or less) expensive fuel type. NYISO states that the proposed revisions clarify that market parties are responsible for ensuring that fuel cost information they submit to NYISO (including fuel price and fuel type) is accurate. In addition, according to NYISO, market parties are required to report to NYISO significant changes (upward or downward) to the cost components used to develop their generators' reference levels.<sup>5</sup>

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other two foregoing dockets, which will be addressed in those dockets.

<sup>4</sup> For example, if a generator has indicated that it usually buys gas at either the "Transco Zone Six New York" spot price or at the "Algonquin City Gates" spot price, and both fuels are included by the NYISO on the generator's pre-approved list of available fuels, a change by the generator from one pipeline to the other would constitute a change in fuel "type."

<sup>5</sup> NYISO adds that where it uses a published fuel price index to fuel-adjust reference levels, market parties are not required to report when their fuel cost is less than the index price. See section 23.3.3.1 of the market mitigation measures.

8. According to NYISO, fuel type or fuel price information that is used to determine a generator's reference levels can directly impact market clearing prices or a particular generator's guarantee payment compensation. NYISO states that, because reference levels are calculated based on the generator's reported fuel costs, applying mitigation (which is based on reference levels) will not prevent a generator that submits inaccurate fuel price or fuel type information from receiving a financial benefit. For this reason, NYISO proposes the following two methods of addressing cases where market parties submit inaccurate fuel type or fuel price information for their generators.

9. First, proposed section 23.3.1.4.7.8 states that if NYISO determines, following automated and/or manual screening, and following consultation with the market party and review by the Market Monitoring Unit, that a market party submitted inaccurate fuel type or fuel price information (measured over a period of at least one week) that was biased in the market party's favor, NYISO may cease using the submitted fuel price or fuel type information for a period of up to six months following the first identified occurrence, and for a period of up to one year following each subsequent occurrence.

10. Second, NYISO proposes to apply a penalty when (1) a market party submits inaccurate fuel price and/or fuel type information for one or more generators, and (2) the inaccurate information is used by NYISO to develop reference levels for the generators, and (3) the resulting inaccurately developed reference levels permit the market party to bid the generator(s) in a manner that increases the guarantee payments to one or more of the market party's generators, or the market clearing prices at the market party's generator locations, or the market party's Day-Ahead Transmission Congestion Contract revenues, above the payment that the market party would have received had it submitted accurate fuel price/type information. NYISO states that, in order for a penalty to apply, the guarantee payment or market clearing price must increase by more than NYISO's proposed conduct and impact thresholds for at least one of the market party's generators.<sup>6</sup>

11. NYISO states that the proposed penalty is calculated based on the difference between the compensation the market party received based on the inaccurate fuel type and/or fuel price information it submitted and the compensation the market party would have received if it had submitted accurate information. NYISO proposes to apply a multiplier of between 1 and 1.5 to the results of the penalty calculation, based on NYISO's consideration of the facts and circumstance presented by the market party in the

<sup>6</sup> Proposed section 23.4.3.3.3 of the market mitigation measures requires consultation with the market party regarding the appropriate fuel price or fuel type and requires NYISO to apply a penalty unless the market party shows to NYISO's satisfaction, that its behavior was consistent with competitive conduct or if the penalty NYISO calculates is less than \$10,000. NYISO states that the purpose of the \$10,000

exception is to permit NYISO to set aside relatively minor, likely unintended, impacts of submitting fuel type or fuel price information that is almost, but not quite, accurate.

consultation process. NYISO states that its discretion in applying the penalty is constrained because the lowest permissible penalty multiplier is 1, which effectively requires NYISO to take back any gains that the market party received due to its submission of inaccurate information, without regard for culpability. NYISO adds that its Market Monitoring Unit will have the opportunity to review and comment on NYISO's proposed penalty before it is applied.

12. NYISO proposes to clarify that it is not necessary to calculate real-time reference levels for spinning reserves, 10-minute non-synchronized reserves, or 30-minute reserves because generators that are capable of providing these products are assigned real-time availability bids of zero for the amount of operating reserves they are capable of providing. NYISO also proposes to clarify the methods it will use to develop reference levels for operating reserves in the day-ahead market.<sup>7</sup>

13. NYISO proposes corresponding/reciprocal revisions to its Market Monitoring Plan where the market monitoring unit's duties are affected by NYISO's proposed changes to the market power mitigation measures.

14. NYISO states that the proposed tariff revisions were unanimously approved by its management committee. However, according to NYISO, some market participants that own generators indicated that, although they voted in favor of the measure or abstained, they do not support section 23.3.1.4.7.8, which grants NYISO the authority to preclude generators that have submitted inaccurate fuel price or fuel type information to NYISO on two or more occasions, from submitting fuel price and fuel type information for a period of up to one year.

## **II. Notice of Filing and Responsive Pleadings**

15. Notice of NYISO's July 30, 2010 filing was published in the *Federal Register*, 75 Fed. Reg. 45,617 (2010) with comments due on or before August 20, 2010. Dynegy Power Marketing, Inc., the New York Transmission Owners, AES Eastern Energy, L.P., and Shell Energy North America (US), L.P. filed motions to intervene. The New York State Public Service Commission filed a notice of intervention. No comments were filed.

## **III. Commission Determination**

### **A. Procedural Matters**

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>7</sup>See section 23.1.4.6 of the market mitigation measures.

**B. Substantive Matters**

17. We accept NYISO's filing, suspend it, and permit it to become effective September 30, 2010, as proposed, subject to refund and to the conditions of this order as discussed below. We recognize that day-ahead fuel prices that NYISO currently uses to fuel index generator reference levels may not accurately reflect the fuel costs that a generator committed in the real-time market must pay. The proposed amendments, in general, provide increased accuracy in the development of reference levels, and thereby contribute to market efficiency. However, we find that the penalty and mitigation provisions lack specificity in their application or leave assessment of penalties up to NYISO's discretion and, therefore, we direct NYISO to refile to modify these provisions as discussed below. We also condition acceptance of the tariff filing in this docket on the outcome of the proceedings in Docket Nos. ER10-1977-000, et al. and ER10-1866-000, et al.

**1. Sections 23.3.1.4.7.8 and 30.4.6.2.3 of the Market Services Tariff**

18. Proposed section 23.3.1.4.7.8 provides:

If (i) [NYISO] determines, after consultation with the Market Party and the Market Monitoring Unit, that the market party or its representative, has, over a period of at least one week, submitted inaccurate fuel type or fuel price information that was, taken as a whole, biased in the Market Party's favor, or (ii) if a Market Party is subject to a penalty or sanction under Section 23.4.3.3.3 . . . then [NYISO] may cease using the fuel type and fuel price information submitted to [NYISO's] Market Information System along with the Generator's Bid(s) to develop reference levels for the affected Generator(s) for a period of up to six months for a first instance and up to one year for subsequent occurrences.

19. The proposed provision states only that NYISO "may" cease using the fuel type and fuel price information in the calculation of its reference level if certain criteria are met, but does not specify the criteria or information to be relied upon by NYISO to make this determination. In addition, the proposed provision does not provide criteria for the determination of the specific length of the mitigation. Under the proposed section, market parties and market observers have no notice of the criteria or types of information that NYISO will rely upon for its determination, or the duration of mitigation that will occur if NYISO decides to cease using the information. For these reasons, we find that the proposed revision is not just and reasonable.

20. To apply mitigation, NYISO must file within 45 days of this order to amend the proposed provision to provide either the criteria or the types of information NYISO will use for determining when it will cease using a generator's fuel type and fuel price

information in the calculation of the generator's reference level and for determining the specific duration of such mitigation. The criteria or information types listed in the revised provision need not be exhaustive or exclusive.

21. We note that section 30.4.6.2.3 repeats the foregoing ambiguous language found in section 23.3.1.4.7.8. Thus, for the reasons discussed above, NYISO must file within 45 days of this order to amend it in the same manner directed above.

## **2. Proposed Section 23.4.3.3.3 of the Market Services Tariff**

22. Proposed sections 23.4.3.3.3 explains the circumstances under which NYISO will impose a penalty on market parties that submit incorrect fuel price information. Subsections 23.4.3.3.3.3 and 23.4.3.3.3.4 provide, in relevant part, that, even if other criteria for a penalty are met, a day-ahead or real-time penalty will not be imposed on a market party if "the Market Party shows, to the satisfaction of [NYISO], with review and comment by the Market Monitoring Unit, that its actions were consistent with competitive conduct." Further, the section states that NYISO "may elect to apply" a penalty if the total penalty calculation is less than \$10,000. The provision does not indicate what information or criteria NYISO will rely upon to determine whether a market party's behavior is "consistent with competitive behavior" or the criteria NYISO will use in determining whether to apply a penalty under \$10,000. Accordingly, for these reasons, we find the foregoing subsections of proposed section 23.4.3.3.3 to be unjust and unreasonable. To apply this section, NYISO must file within 45 days of this order to amend these provisions to provide the criteria or information it will rely upon to determine whether a market party's behavior is "consistent with competitive behavior" and the criteria NYISO will use in determining whether to apply a penalty under \$10,000.

The criteria must be consistent with the Commission's ruling on "traffic ticket" offenses, which are exempt from referral to the Commission provided they meet certain specific criteria.<sup>8</sup>

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<sup>8</sup> The Commission identified so-called "traffic ticket" offenses, which are exempt from referral to the Commission, as those which meet 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 the right of appeal to the Commission.

The Commission stated that examples of such activities would include late payments, failure to notify NYISO of an outage, failure to respond to an operational directive, and the like. *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,164, at P 98 (2010). See also *New York Indep. Sys. Operator*, 131 FERC ¶ 61,225, at P 19 (2010).

23. In addition, proposed subsections 23.4.3.3.3.3 and 23.4.3.3.3.4 are ambiguous as to how NYISO will calculate the applicable penalty for the day-ahead and real-time markets, respectively. The subsections state that NYISO will multiply a calculated penalty by a factor between 1.0 and 1.5, requiring NYISO to “consider the facts and circumstances presented by the Market Party when determining the appropriate multiplier to use.” The provisions do not identify the “facts and circumstances” that are relevant to this consideration and, therefore, do not specify an objective method to establish penalties.

24. We find subsections 23.4.3.3.3.3, and 23.4.3.3.3.4 are not just and reasonable and are not consistent with Commission precedent. The Commission has previously stated that penalties imposed by regional transmission organizations and independent system operators must be based entirely on objective criteria.<sup>9</sup> To apply a penalty under these provisions, NYISO must file within 45 days of this order to amend these provisions either to provide a list of criteria, consistent with the “traffic ticket” criteria discussed above, by which it will determine the appropriate multiplier or to eliminate the multiplier,

25. If proposed subsections 23.3.3.3.3, and 23.3.3.3.4 are revised as directed above, it is permissible to treat the penalty thereby imposed as a “traffic ticket” penalty. Accordingly, in addition to filing the foregoing revisions, NYISO should also file within 45 days of this order to revise section 30.4.5.3.2 to include a reference to these provisions in the list of its “traffic ticket” penalties.

26. Finally, several of NYISO’s proposed tariff sections submitted via the Commission’s eTariff program in this docket contain implementation priority designations that duplicate those contained in NYISO’s related filings in Docket Nos. ER10-1866-000, *et al.*, and/or ER10-1977-000, *et al.* Because the eTariff program will use the tariff record with the highest Record Effective Priority Order<sup>10</sup> to supersede any other tariff records with the same effective date, the implementation priority designation must be unique across tariff records with the same tariff record identifier and proposed effective date. At such time that NYISO files revisions in response to this order, NYISO shall refile unique, chronologically correct implementation priority designations for all those tariff sections that had the same proposed effective date and implementation priority designations that were duplicative of those filed in Docket Nos. ER10-1866-000 *et al.*, and/or ER10-1977-000, *et al.*

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<sup>9</sup> *Id.*

<sup>10</sup> The eTariff documentation (*available at* <http://www.ferc.gov/docs-filing/etariff/implementation-guide.pdf>, *see* pages 10-11, 22) refers to Record Effective Priority Order identifiers, which are the means that the eTariff program uses to determine the implementation order of tariff sections or sheets that have been submitted to the eTariff program.



27. Based upon a review of the filing, the Commission finds that the proposed tariff sheets have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission shall accept such tariff sheets for filing and suspend their effectiveness for a nominal period to become effective September 30, 2010, subject to the conditions set forth in this order.

The Commission orders:

(A) NYISO's proposed tariff revisions are accepted and suspended for a nominal period to become effective September 30, 2010, subject to refund and the conditions of this order, as discussed in the body of this order.

(B) NYISO is directed to file the tariff revisions, as discussed in the body of this order, within 45 days of the date of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.