

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System Operator, Inc.) Docket No. ER09-1142-005

**REQUEST FOR REHEARING AND CLARIFICATION OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2009), the New York Independent System Operator, Inc. (“NYISO”) hereby seeks rehearing and clarification of the Commission’s June 4, 2010 *Order on Compliance Filing* in this docket (“June 4 Order”).¹ The June 4 Order rejected a number of the NYISO’s proposed compliance tariff revisions identifying “traffic ticket” violations that should not require automatic referral to the Market Monitoring Unit (“MMU”). The Commission found that some of the proposed “traffic ticket” violations did not meet its three criteria for exclusion from the referral requirement. The NYISO respectfully submits that certain rejected traffic ticket violations in fact satisfy the criteria and should be exempt from the automatic referral requirement. Accordingly, the NYISO requests the Commission grant rehearing and allow the NYISO to reinstate certain proposed traffic ticket violations in the tariff, as specified below.

The NYISO also requests clarification to confirm that P 17 of the June 4 Order authorizes it to propose modified tariff language for one item rejected by the Commission because it lacked appropriate tariff references.

¹ *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,225 (2010).

I. Communications

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II. Background

In its November 20, 2009 Order,² the Commission directed the NYISO to remove tariff provisions that would have exempted certain categories of matters from automatic MMU referral but allowed the NYISO to propose new language identifying specific “traffic ticket” tariff violations that met three criteria.³ The Commission’s three criteria provided that actions would qualify for exemption from automatic MMU referral where:

(i) the activity [is] expressly set forth in the tariff, (ii) the activity ... involves 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.⁴

On February 18, 2010, the NYISO submitted its compliance filing containing revisions that included a list of sixteen activities that the NYISO asserted were traffic ticket violations meeting the three criteria for exemption from automatic MMU referral. On June 4, 2010, the

² *New York Independent System Operator, Inc.*, 129 FERC ¶ 61,164 (2009).

³ *Id.* at PP 98-99.

⁴ *Id.*

Commission issued an order accepting the NYISO's compliance filing, but directing that the NYISO remove various items from its list of "traffic ticket" violations.

In particular, the Commission rejected items: (9) Reserve Services penalties, because it found that the NYISO could exercise discretion regarding whether to reinstitute the penalties and the criteria it would use to impose such penalties; item (10) imposition of Persistent Undergeneration charges, on the ground that the tolerance range was not specified in the tariff, but instead would be "set pursuant to ISO procedures," and thus supposedly did not meet the second part of the Commission's test; and item (16) failures to comply with creditworthiness requirements because it found the NYISO did not provide tariff citations for the conduct or the sanction.⁵

III. Request for Rehearing

The NYISO seeks rehearing with respect to two items, because they are activities which meet the three exemption criteria and are therefore properly included in the list of traffic ticket violations.

A. Item (9) - Regulation Service Performance Penalties

The NYISO requests rehearing with respect to the Commission's directive to remove item (9), "Regulation Service performance resulting in the imposition of penalties under Section 8.0 of Rate Schedule 3 to the Services Tariff" from the list of traffic ticket violations. The Commission's concern was that the imposition of penalties would be at the NYISO's discretion and because the NYISO would allegedly make "judgment calls" based on "unspecified criteria" when it decides to reinstitute the penalties.⁶ Such concerns are misplaced. The tariff provisions

⁵ *Id.* at 22.

⁶ *Id.* at P 21.

allowing the NYISO to reinstate penalties for inadequate Regulation Service performance have not been invoked since the relevant tariff provisions were accepted by the Commission in 2001. Section 8.0 of Rate Schedule 3 requires the NYISO to provide notice to the Commission and to Market Participants at least seven days before it re-institutes the performance charges. If the NYISO were to determine that it is appropriate to reinstate the performance charges it would be unlikely that they would be lifted lightly. Thus, while the decision to re-activate the penalties might technically be at the NYISO's discretion it would hardly be a "discretionary action" in practice.

Further, the NYISO's "discretion" is limited to determining whether or not the penalty regime should apply. Once the penalty rules were re-instituted the NYISO would have absolutely no discretion regarding their implementation, including determinations as to when individual entities should be subject to penalties. Stated otherwise, if the penalty regime is restored, violations that result in penalties would have all of the attributes of traffic ticket violations. If it isn't restored, there won't be any tariff violations to report. Therefore, the NYISO asks that the Commission grant rehearing and find that item (9) was properly included in the list of traffic ticket violations.

B. Item (10) - Persistent Undergeneration Charges

The NYISO also requests rehearing of the Commission's rejection of item "(10) performance that results in the imposition of Persistent Undergeneration charges under Rate Schedule 3-A of the ISO Services Tariff." The Commission should not have rejected this item on the basis that the tolerance range should be specified in the tariff, more precisely defined, or that the reference to the ISO Procedures should be replaced with a reference to a particular

document.⁷ The NYISO tariffs contain numerous references to the “ISO Procedures,” a defined tariff term which encompasses all of the NYISO’s manuals, technical bulletins, and related documentation. The Commission has found that the omission of specific references to ISO Procedures from the tariff is not a violation of the filed rate doctrine, because certain details do not need to be included in an ISO’s tariff.⁸ The NYISO submits that the tolerance level at issue here is appropriately the kind of detail that should be contained in the NYISO’s manuals, as evidenced by the Commission’s acceptance of the tariff provisions that relegated the tolerance level for Persistent Undergeneration Charges to the ISO Procedures.

Few or none of the multiple references to the ISO Procedures in the tariffs specifically identify the referenced manual, technical bulletin, or related documentation to which they refer. The Commission has never required that they do, with good reason. Having to continually update the tariffs to track changes in the ISO Procedures would be a major administrative burden for any public utility. This would be especially true for the NYISO, because unlike most other public utilities, the NYISO normally cannot make Section 205 filings without the consent of its stakeholder Management Committee.

Under the Commission’s established “rule of reason” test, protocols or operating procedures involving “general operating procedures,” and which do not “significantly affect transmission service,” do not have to be included in the tariffs.⁹ The Commission has acknowledged that requiring the kind of information contained in the ISO Procedures to be

⁷ *Id.* at P 22.

⁸ *See, e.g., 330 Fund I LP v. New York Independent System Operator, Inc.*, 126 FERC ¶ 61,151 at P 34 (2009).

⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats & Regs. ¶ 31,241, at PP 1650-1651 (2007), *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, 129 FERC ¶ 61,126 (2009).

specified in the tariff “would be impractical and potentially administratively burdensome.”¹⁰ Finally, stakeholder interests are protected when detailed information is included in the ISO Procedures, because changes are only made after stakeholder review and require an affirmative vote of the NYISO’s Business Issues Committee which ensures that stakeholder interests are protected.

Consequently, because the tolerance level is precisely defined in the relevant ISO Procedure, (*i.e.*, the NYISO’s *Ancillary Services Manual*),¹¹ changes to the ISO Procedures are subject to stakeholder review, and the Commission accepted the NYISO’s decision to specify that detail in its ISO Procedures instead of the tariff, item (10) meets the Commission three criteria, as the activity is set forth in the tariff, involves objectively identifiable behavior and does not subject the actor to sanctions that have not been approved by the Commission. Consequently, the Commission should grant rehearing and allow the NYISO to treat item (10) as a traffic ticket, notwithstanding its general reference to the ISO Procedures.

IV. Request for Clarification

The NYISO respectfully requests clarification to confirm its understanding that, pursuant to P 17 of the June 4 Order, the NYISO is authorized to propose modified tariff language for traffic ticket item (16) failure of a Market Party to comply with the ISO’s creditworthiness requirements. Paragraph 27 of the June 4 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, but did not specifically state that the NYISO could propose modified tariff language. The NYISO believes, however, that P 17 of the June 4 Order, which listed the traffic

¹⁰ *Id.*

¹¹ See Section 4.11 of the Ancillary Services Manual, *available at* <<http://www.nyiso.com/public/webdocs/documents/manuals/operations/ancserv.pdf>>.

ticket violations that the Commission was rejecting, allows the NYISO to either remove the rejected items, or “revise the violations” in a manner that would make them compliant with the three exemption criteria. Therefore, the NYISO requests that the Commission clarify that, pursuant to P 17, the NYISO can propose alternative tariff language for item (16) and that P 26 does not bar the NYISO from proposing such alternative tariff language.¹²

V. Specification of Errors/Statement of Issues

In accordance with Rule 713(c), 18 C.F.R. § 385.713(c), the NYISO submits the following specifications of error and statement of issues:

- The Commission failed to engage in reasoned decision-making because the NYISO’s assessment of Regulation Service performance penalties would not be discretionary. The Commission’s concerns with respect to the NYISO’s criteria for reinstituting Regulation Service performance penalties under Section 8.0 of Rate Schedule 3 are unfounded, as a decision by the NYISO to invoke those tariff provisions is unlikely and will not be made lightly. Further, in the event that such penalties are reinstituted, the NYISO will not have discretion as to which entities the penalties will be applied. Therefore item (9) meets the Commission’s three criteria and is properly included in the list of traffic ticket violations.
- The Commission failed to engage in reasoned decision-making when it rejected item (10) “performance that results in the imposition of Persistent Undergeneration charges under Rate Schedule 3-A of the ISO Services Tariff,” because referencing the ISO procedures with respect to the relevant tolerance level is consistent with Commission precedent regarding information that is to be included in manuals and procedures, which provides that general operating procedures that do not significantly affect transmission service do not have to be included in the tariff. Requiring tariff references to ISO Procedures to be specific would be administratively burdensome, especially for the NYISO because unlike most other public utilities it normally cannot make Section 205 filings without the consent of its stakeholder Management Committee. Therefore item (10) meets the Commission’s three criteria and is properly included in the list of traffic ticket violations.

¹² The NYISO notes that it is filing modified tariff language providing specific tariff citations for item (16) in its compliance filing, which is being filed contemporaneously.

VI. Conclusion

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc. respectfully requests that the Commission grant rehearing and clarification of the June 4 Order.

Respectfully Submitted,

/s/Ted J. Murphy

Ted J. Murphy
Counsel to the
New York Independent System Operator, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 6th day of July, 2010.

/s/Vanessa A. Colón

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