

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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April 22, 2009

SENT VIA ELECTRONIC FILING  
Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. ER09-945-000 - New York Independent  
System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Notice of Intervention and Comments of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler  
Assistant Counsel

Attachment

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System                    )     Docket No. ER09-945-000  
Operator, Inc.                                    )

NOTICE OF INTERVENTION AND COMMENTS OF  
THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NEW YORK

Pursuant the Federal Energy Regulatory Commission's (FERC or Commission) Combined Notice of Filings #1, issued April 6, 2009, and Rule 214 of the Commission's Rules of Practice and Procedure, the New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention and Comments on the proposed revisions to the Market Administration and Control Area Services Tariff and Open Access Transmission Tariff (OATT) filed by the New York Independent System Operator, Inc. (NYISO) on April 1, 2009 (Filing).

Copies of all correspondence and pleadings should be addressed to:

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## INTRODUCTION AND SUMMARY

The NYISO's Filing seeks to establish a mechanism for allocating the costs of penalties that it may incur for violations of reliability standards adopted by the North American Electric Reliability Council, the FERC, the NYPSC, and the New York State Reliability Council (NYSRC). This mechanism would allow the NYISO to file a petition under Section 205 of the Federal Power Act (FPA) to assign the penalty costs to a customer or market participant that caused the penalty to be incurred. To the extent the NYISO caused the penalty to be incurred, or the penalties cannot be directly assigned to another entity, the mechanism would allow the NYISO to allocate such costs equally to energy injections (e.g., suppliers) and energy withdrawals (e.g., consumers), subject to the Commission's approval on a case-by-case basis. The NYISO indicates that this approach is necessary since it is a not-for-profit corporation and "does not have retained earnings from which to pay penalties."<sup>1</sup>

The NYPSC is concerned that penalty costs, which the Commission may authorize recovery of, could be automatically passed through to end-use consumers by Investor-Owned Utilities. While penalties are designed to encourage compliance with

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<sup>1</sup> NYISO Filing at p.2.

reliability standards, allowing the pass through of these costs associated with a penalty would not further this purpose. Moreover, it would unnecessarily raise prices, and result in unjust and unreasonable charges. Accordingly, the Commission should clarify that Investor-Owned Utilities which the Commission authorizes the recovery of penalties from are not authorized to pass through the associated costs to end-use consumers, unless authorized by the NYPSC.

We are also concerned that the NYISO's proposal to recover, through its OATT, penalties that may be imposed for reliability standards adopted by the NYPSC would usurp our authority. Because the Commission is only authorized to impose penalties for violations of reliability standards that FERC has approved, the NYISO's Filing would impermissibly expand the Commission's authority under the FPA. Therefore, the Commission should reject this provision within the NYISO's Filing.

#### **BACKGROUND**

On March 20, 2008, the Commission issued an Order Providing Guidance on Recovery of Reliability Penalty Costs by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) (Guidance Order).<sup>2</sup> The Guidance Order

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<sup>2</sup> Guidance Order, 122 FERC ¶61,247 (2008).

acknowledged that ISOs, such as the NYISO, which operate as not-for-profit organizations funded by their customers, "may have insufficient reserves to pay penalties."<sup>3</sup> Notwithstanding, the Commission indicated that, "a blanket exemption from the payment of reliability-related monetary penalties could have adverse consequences for the Bulk-Power System, as it would reduce the incentive for...ISOs and their employees to comply with applicable Reliability Standards."<sup>4</sup>

In situations where an ISO cannot directly assign the monetary penalty costs to an entity deemed responsible for the violation, the Commission indicated that it will entertain filings by the ISO to recover those costs assessed against the ISO by spreading the costs among all the members or customers of the organization.<sup>5</sup> However, the Commission expressed its concern with this approach that "ISOs will not have the appropriate incentives to proactively comply with Reliability Standards if they have blanket authority to automatically pass through monetary penalties to their customers."<sup>6</sup> Accordingly, the FERC

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<sup>3</sup> Guidance Order at ¶1.

<sup>4</sup> Id.

<sup>5</sup> Guidance Order at ¶26.

<sup>6</sup> Guidance Order at ¶16.

indicated that "proposals to recover any such penalties be filed case-by-case."<sup>7</sup>

## DISCUSSION

I. The FERC Should Clarify That The Costs Associated With Penalties For Violations of Reliability Standards May Not Be Passed Through To End-Use Consumers By Investor-Owned Utilities Unless Authorized By The NYPSC

We share the Commission's goal of establishing appropriate incentives to achieve full compliance with the reliability standards that FERC has approved. As the Commission notes, "[p]enalties are designed to encourage compliance with the Reliability Standards."<sup>8</sup> However, allowing an entity to merely pass through the costs it incurs for violating applicable reliability standards to end-use consumers would not create any additional incentive for that entity to comply with such standards. In other words, penalizing end-use consumers, which do not have an ability to control or influence compliance, would not serve any legitimate purpose.

Moreover, in the event these penalty costs are allowed to be passed through to end-use consumers that were not

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<sup>7</sup> Id. The Guidance Order notes that an organization's ability to pay a penalty is already a factor in the determination by the North American Electric Reliability Corporation (NERC) of the appropriate penalty, which may include non-monetary penalties.

<sup>8</sup> Guidance Order at ¶26.

responsible for the violation, it would unnecessarily raise prices, and result in unjust and unreasonable charges. In addition, end-use consumers would be deprived of the Commission's due process requirements to ensure a "targeted entity has been notified during the course of the investigation" into a potential violation.<sup>9</sup>

Because the recovery of penalty costs would be recovered under a new rate schedule, it is unclear whether Investor-Owned Utilities paying penalty costs would be authorized to pass through those costs to end-use consumers. Therefore, similar to how the NYPSC may prohibit Investor-Owned Utilities from passing along the costs of penalties through retail rates, the Commission should clarify that its authorization to recover penalties for violations of reliability standards does not authorize them to pass through the associated costs to end-use consumers, unless authorized by the NYPSC.<sup>10</sup>

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<sup>9</sup> Guidance Order at ¶23.

<sup>10</sup> It is our understanding that generation suppliers subject to monetary penalties would bear a significant risk that such penalties could not be recovered in the competitive market. Likewise, competitive Load-Serving Entities (LSEs), such as Energy Service Companies, would bear a significant risk in terms of cost recovery. Thus, LSEs serving native load (i.e., Investor-Owned Utilities) should not be given more favorable treatment by being allowed to automatically pass along such penalties to captive ratepayers.

**II. The Commission Should Reject The NYISO's Proposal To Seek Recovery, Through The OATT, Of Penalties Unrelated To FERC-Approved Reliability Standards**

In addition to seeking recovery for violations of FERC-approved reliability standards, the NYISO would also pursue the Commission's approval to recover penalties incurred in connection with reliability rules approved by the NYPSC and the NYSRC. However, the Commission's authority to impose penalties for violations of these rules is limited under the FPA.

The FPA provides the Commission with authority to impose penalties in connection with a violation of a "reliability standard," which is defined as "a requirement, approved by the Commission..."<sup>11</sup> Accordingly, the Commission's penalty authority is limited to where the Commission has approved the reliability standard that was violated.<sup>12</sup> We therefore request that the Commission reject this provision of the NYISO's Filing because it would go beyond the Commission's authority.

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<sup>11</sup> 16 U.S.C. 824o(e) (3) (emphasis added).

<sup>12</sup> 16 U.S.C. 824o(a) (3).

CONCLUSION

The Commission should make the requested clarification and modification to the NYISO's Filing in accordance with the above discussion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter McGowan". The signature is written in a cursive style with a large initial "P".

Peter McGowan  
General Counsel  
Public Service Commission  
of the State of New York

By: David G. Drexler  
Assistant Counsel  
3 Empire State Plaza  
Albany, NY 12223-1305  
(518) 473-8178

Dated: April 22, 2009  
Albany, New York

CERTIFICATE OF SERVICE

I, David Drexler, do hereby certify that I will serve the foregoing Notice of Intervention and Comments of the New York State Public Service Commission, upon each of the parties of record indicated on the official service list compiled by the Secretary in this proceeding.

Dated: April 22, 2009  
Albany, New York

  
David Drexler