

NYISO Liability & NERC Penalties

**Protecting NYISO and Market Participants from
Third Party Penalty Liability**

At Issue

- ◆ NYISO may be subject to incurred penalties from NERC/NPCC/NYSRC/NYPSC in two ways
 - *Through its own omission/commission*
 - *Through third party actions which cause NYISO to violate a standard, criterion or rule*
- ◆ NYISO status as a non-profit organization
 - *No shareholder equity with which to pay NERC penalty assessments*
 - *Market Participants may be subject to penalty costs which would be collected in Rate Schedule 1*

Purpose

- ◆ Establish clear legal processes to manage NERC penalty assessments
- ◆ Indemnify the NYISO as a non-profit organization against NERC penalties
- ◆ Protect Market Participants from the malfeasance of third parties
- ◆ Encourage all entities to meet regulatory compliance standards

FERC Order March 20, 2008

Providing Guidance on Recovery of Reliability Penalty Costs by RTOs and ISOs

- ◆ Rejects automatic recovery
- ◆ Declines policy of imposing only non-monetary penalties on ISOs/RTOs
- ◆ Takes into account not-for-profit status of ISOs/RTOs in assessing penalties
- ◆ Provides two possible methods for ISOs/RTOs to recover penalty assessments
 - *Considered only on a case by case basis*

Method One – Direct Assignment

- ◆ FERC will consider a section 205 filing if:
 - *ISO notifies NERC/NPCC during the course of the investigation that another entity is responsible for a violation (addresses due process concerns)*
 - *The entity is notified by NERC/NPCC during the investigation of its potential liability*
 - *The ISO has a mechanism to pass on the penalty cost through an applicable tariff or contract with the violating entity*

Method Two – Recovery from All Members

Factors FERC will consider in a section 205 filing:

Whether

- *NYISO has a Compliance Program in place*
 - Includes incentives for management/employees
- *Violations are deemed intentional/grossly negligent or just negligent*
- *Whether management was involved*
- *Ability to pay*
- *Fairness of the assessment mechanism proposed by the ISO*

FERC Order March 20, 2008

“It is therefore important for the RTOs and ISOs to include provisions regarding the appropriate responsibility for reliability-related monetary penalties in their contracts with their members and customers and/or in their tariffs, including provisions regarding the appropriate responsibility for such penalties on the ISOs and RTOs.”

NYISO Response to FERC Order

1. Identify entities that may put NYISO at risk of a violation
 - *May include entities that are not registered*
 - *Entities that are registered but not for the function for which the penalty is assessed*
2. Include provisions in contracts and tariffs to protect itself from liability
 - *Provide requisite notice and mechanisms to directly assign liability to entities that cause a NYISO violation*
3. Established compliance program is in place to prevent violations from occurring in accordance with FERC requirements

Identify Entities that may put NYISO at risk

- ◆ ISO – RTO Council's Standards Review Committee (SRC) has made a preliminary identification of violations of NERC Standards that may not be attributable to ISOs/RTOs
 - *SRC has identified registered entities associated with the above Standards*
- ◆ NYISO will also review NERC requirements to identify third parties upon which its compliance depends
 - *NYISO will determine whether agreements, contracts and tariff language cover obligation*

Establish provisions for notices and indemnification



NYISO proposes additions to its Tariffs

- ◆ Market Services Tariff
 - *Section 3.5 ISO Procedures*
 - *Section 5.1 Control Area Services*
 - *Section 12.4 Indemnification*
- ◆ Open Access Transmission Tariff
 - *Section 10.2 Indemnification*
 - *Section 10.3 Limitation of Liability*
 - *Section 10.6 Reliability Compliance and Penalty Cost Recovery*
 - *Rate Schedule 1*

Services Tariff - 3.5 Procedures

The ISO shall develop, and modify as appropriate, procedures for the efficient and non-discriminatory operation of the ISO Administered Markets and for the safe and reliable operation of the NYCA in accordance with the terms and conditions of the Tariff. All such procedures must be consistent with Good Utility Practice. In accordance with this Tariff and the ISO Procedures, all Customers shall conform to all applicable reliability criteria, policies, standards, rules, regulations and other requirements of NERC, NPCC, NYSRC, and any applicable regional council or their successors, the NYISO's specific reliability requirements and ISO Procedures, and operating guidelines and all applicable requirements of federal and state regulatory authorities. Failure to conform to these requirements may subject a Customer to direct assignment of penalties assessed against the NYISO by FERC, NERC, NPCC or any other federal or state regulatory authority as a result of such Customer's failure to conform.

Services Tariff – 5.1

Control Area Services



With respect to the NYISO's obligations to administer the mandatory NERC reliability compliance process in (l) above, in some instances the NYISO's ability to comply with mandatory reliability standards depends on timely, accurate and adequate information and/or actions on the part of Customers. Thus, in accordance with applicable requirements in this Tariff and the ISO Procedures, all Customers shall conform to all applicable reliability criteria, policies, standards, rules, regulations and other requirements of NERC, NPCC, NYSRC, and any applicable regional council or their successors, the NYISO's specific reliability requirements and ISO Procedures, and operating guidelines and all applicable requirements of federal and state regulatory authorities. Failure to conform to these requirements may subject a Customer to direct assignment of penalties assessed against the NYISO by FERC, NERC, NPCC or any other federal or state regulatory authority as a result of such Customer's failure to conform. If a particular Customer cannot be identified as the cause of a penalty assessment against the NYISO or if the NYISO is assessed a penalty because of its own action or inaction that resulted in a reliability standard violation, the NYISO may seek recovery such penalty costs in Rate Schedule 1 of the OATT. Any direct assignment of penalty costs or inclusion in Rate Schedule 1 must first be approved by FERC on a case-by-case basis, as provided in *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, Docket No. AD07-12-000, 122 FERC ¶ 61,247 (2008).

The NYISO will notify the applicable Regional Entity, NERC or other federal or state regulatory authority and the applicable Customer when the NYISO determines that the applicable Customer should be considered by the Regional Entity, NERC or other federal or state regulatory authority as a root cause of a potential violation.

Penalties that are assessed against the NYISO on or after the effective date of this Section shall be recoverable as provided in this Section regardless of the date of the violation(s) for which the penalty is assessed.

Services Tariff – 12.4

Indemnification



Subject to the ISO's obligations to the Transmission Owners under the ISO/TO Agreement and the ISO Agreement, each Customer and Market Participant shall indemnify, save harmless and defend the ISO, the Transmission Owners and the NYSRC including their directors, members, managers, officers, employees, trustees, committee members and agents, or each of them (individually the "Indemnitee" or collectively the "Indemnitees") from and against all claims, demands, losses, liabilities, judgments, damages, penalties, and related costs and expenses (including, without limitation, reasonable attorney and expert fees, and disbursements incurred by the Indemnitees in any actions or proceedings between the Indemnitees and a third party, the Customer or Market Participant or any other party) arising out of or related to the Indemnitee's or the Customer's acts or omissions related in any way to performance under the ISO Services Tariff, a Service Agreement, or an ISO Related Agreement, or ISO Procedure, except to the extent that the Indemnitees are found liable for gross negligence or intentional misconduct.

OATT – 10.2 Indemnification

The Transmission Customer shall at all times indemnify, defend, and save the ISO and each Transmission Owner harmless from, any and all penalties, damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the ISO's or the Transmission Owner's performance of its obligations under this Tariff on behalf of the Transmission Customer, except in cases of gross negligence or intentional wrongdoing by the ISO and except in the case of gross negligence or negligence consistent with the limitation of liability standards in Section 10.3(a), or intentional wrongdoing by the Transmission Owner.

OATT – 10.3 Liability

- (b) The ISO shall not be liable, whether based on contract, indemnification, warranty, equity, tort, strict liability or otherwise, to any Transmission Customer, Market Participant, User, Interconnection Customer, Interconnecting Transmission Owner or any third party or other person for any penalties or damages whatsoever, including, without limitation, direct, incidental, consequential (including, without limitation, attorneys' fees and litigation costs), punitive, special, multiple, exemplary or indirect damages arising or resulting from any act or omission in any way associated with service provided under this Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, except to the extent that the ISO is found liable for gross negligence or intentional misconduct, in which case the ISO will only be liable for direct damages.

OATT – 10.6 Reliability Compliance and Penalty Cost Recovery (new section)

In accordance with FPA Section 215 and FERC's Order No. 693, et seq., the NYISO has certain obligations to comply with mandatory NERC Reliability Standards. In some instances the NYISO's ability to comply with mandatory reliability standards depends on timely, accurate and adequate information and/or actions on the part of Customers. Thus, in accordance with applicable requirements in this Tariff and the ISO Procedures, all Customers shall conform to all applicable reliability criteria, policies, standards, rules, regulations and other requirements of NERC, NPCC, NYSRC, or and any other federal or state regulatory authority or their successors, the NYISO's specific reliability requirements and ISO Procedures, and operating guidelines and all applicable requirements of federal and state regulatory authorities.

OATT – 10.6 Reliability Compliance and Penalty Cost Recovery (new section)

Failure to conform to these requirements may subject a Customer to direct assignment of penalties that are assessed against the NYISO by FERC, NERC, NPCC or any other federal or state regulatory authority as a result of such Customer's failure to conform. If a particular Customer cannot be identified as the cause of a penalty assessment against the NYISO or if the NYISO is assessed a penalty because of its own action or inaction that resulted in a reliability standard violation, the NYISO may seek recovery such penalty costs in Rate Schedule 1 of this OATT. Any direct assignment of penalty costs or inclusion in Rate Schedule 1 must first be approved by FERC on a case-by-case basis, as provided in *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, Docket No. AD07-12-000, 122 FERC ¶ 61,247 (2008).

The NYISO will notify the applicable Regional Entity, NERC or other federal or state regulatory authority and the applicable Customer when the NYISO determines that the applicable Customer should be considered by the Regional Entity, NERC or other federal or state regulatory authority as a root cause of a potential violation.

Penalties that are assessed against the NYISO on or after the effective date of this Section shall be recoverable as provided in this Section regardless of the date of the violation(s) for which the penalty is assessed.

OATT – Rate Schedule 1

Section 3 ISO Costs

Any recovery of penalty costs imposed by NERC, a Regional Entity, or any other federal or state regulatory authority, as approved by the Commission in accordance with Section 10.6 of this Tariff.

Next Steps

- ◆ NYISO will present its proposed changes to the Operating Committee, the Business Issues Committee and the Management Committee
- ◆ NYISO will seek approval at each committee in support of the proposed tariff changes
- ◆ Approved changes will be brought to the Board
- ◆ NYISO will make the necessary tariff filings with FERC