

**Comments of
Consolidated Edison Company of New York, Inc.
And Orange and Rockland Utilities, Inc.
On the New York System Operator's Proposal
For a Balanced Sanctions Program**

The following are the comments of Consolidated Edison Company of New York, Inc. ("Con Edison") and Orange and Rockland Utilities, Inc. ("O&R," collectively, the "Companies") with respect to the New York Independent System Operator's ("NYISO") Strawman Proposal for a Balanced Sanctions Program (the "Strawman"). For the reasons set forth herein, the Companies strongly oppose the financial penalties set forth in sections (a), (c) and (d) of the Strawman and urge the NYISO to delete those provisions from the Strawman.

I. Background

Reacting to an increasing need to deter deliberate behavior on the part of certain generation suppliers that distort market prices, the Management Committee ("MC") of the NYISO passed a series of penalties in lieu of a retroactive price correction mechanism. This series of penalties was meant to serve as an incentive to generators to not exercise market power. The MC proposal was rejected by the NYISO Board ("Board") as not being "balanced."

At the May 15th meeting between the Board and the MC Liason Committee, the Board indicated that its staff would produce a more balanced penalty document. In response, the NYISO staff developed the Strawman, which presents a series of penalties whose scope extends beyond market power

issues, and would apply to all market participants, including transmission owners (“TOs”)

The NYISO set May 25, 2001 as the comment date on its Strawman proposal.

II. Comments

The Companies believe that the NYISO Staff has completely misconstrued the intent of the Board’s direction to produce a more balanced penalty plan and has neglected to consider the underlying basis and intent of the penalties proposed by the MC. It is the Companies’ understanding that the balance that the NYISO staff was to achieve was in the retroactive nature of the penalties as it related to generators exercising market power. It was not intended to expand the scope of the penalties to include the TOs’ performance of their operational duties, which are not the subject of market power and do not have any relevance in this effort.

Accordingly, the Companies oppose any effort on the part of the NYISO to put the Strawman into effect as it is currently written.

A. The Strawman Violates the Terms of the ISO/TO Agreement

The proposed penalties on TOs contained in parts (a), (c) and (d) of the Strawman violate the terms of the ISO/TO Agreement (the “Agreement”) pursuant to which the NYISO was given Operational Control over certain parts of the New York State bulk power system. The Agreement sets forth, among other things, the relationship between, and operating obligations of, the TOs and the NYISO. The staff’s proposed penalties are a bald attempt to change the nature

of the Agreement. Furthermore, it is a collateral attack on the FERC order approving the Agreement. For these reasons, the financial penalties set forth in sections (a), (c) and (d) of the Strawman must be rejected.

Specifically, the \$100,000 penalty for not following the instructions of an NYISO operator during an emergency is inconsistent with the terms of the Agreement. Article 3.01 of the Agreement grants the NYISO Operational Control over "certain facilities of the NYS Power System under normal operating conditions and system Emergencies." The Strawman fails to differentiate between the facilities that the NYISO has Operational Control over and those that it does not.

Furthermore, although the Agreement says that the TOs must follow the instructions of the NYISO with respect to "certain" transmission facilities under NYISO Operational Control in an emergency, Article 2.04 of the Agreement states that "notwithstanding any other provision of this Agreement, a Transmission Owner may take such action with respect to the operations of its facilities as it deems necessary to maintain Safe Operations." Similarly, Article 3.10 of the Agreement allows the TOs "to take whatever actions it deems necessary to fulfill its obligations under local, state or federal law" or "to protect its electric facilities from physical damage or to prevent injury or damage to persons or property." However, under the Strawman, the TO could be penalized for taking an action that it is contractually permitted and/or legally obligated to take, if such action is not in accord with an instruction given by the NYISO. For example, actions taken to prevent a major system shutdown could, under the

Strawman, result in the NYISO's penalizing a TO for acting to prevent harm to persons or property. The Strawman's penalty provisions may also enable the NYISO to penalize Con Edison for not following an NYISO order that would harm the tax-exempt status of Con Edison's Local Furnishing Bonds. In that regard the Strawman would be inconsistent with the terms of the NYISO OATT, the Agreement and Order 888-A, all of which allow Con Edison to refuse certain transactions if those transactions would violate the tax-exempt status of Con Edison's Local Furnishing Bonds.

In practice, there is considerable interaction between NYISO and TO operators in maintaining a safe and reliable operation of the New York Control Area. This interaction is based on frank technical assessments of conditions and events as they develop and involves the physics of the power system under normal and emergency conditions. This relationship is technical in nature, it involves the physics of how power flows and how reliability is preserved under normal and emergency conditions.

Bottom line, the Agreement represents a negotiated transfer of control of certain transmission facilities, subject to certain specified rights and obligations. The proposed penalties unfairly and illegally override the TO's protections and rights set forth in the Agreement.

B. The Strawman Is Neither Balanced Nor Appropriate

The experience of the NYISO markets since their inception provides extensive documentation of the acts of various generation suppliers and the impact of those acts on the New York electric markets and the State's electricity

consumers. As the NYISO readily admits, it has seen fit to intervene in the electric markets on numerous occasions in order to mitigate the price of electricity. These mitigation actions have been solely due to the exercise of market power by various generation suppliers. Nothing in this extensive record demonstrates any market power action by TOs. In fact, the NYISO has not had the need to step in and correct the actions of a TO for any reason. Accordingly, there is no support whatsoever for penalties on TOs since there is no record of any actions that need to be addressed.

The TOs are regulated by FERC and the PSC with respect to the actions for which the NYISO seeks to create penalties. The TOs are also subject to the terms of the Agreement (as is the NYISO). Conversely, the generators are not subject to the same type or degree of regulatory oversight. Accordingly, the MC sought to create incentives for generators to not exercise market power and thereby fill an existing void that is not applicable to TOs.¹

Furthermore, the Strawman fails to state the disposition of the penalty dollars collected by the NYISO.

¹ Con Edison and O&R are also concerned that the penalties on a TO for failure to follow an ISO order fail to account for the fact that the NYISO operator could issue an incorrect, illegal or unclear order. For example, many operator instructions are very technical in nature and subject to a great deal of interpretation and ongoing discussion between the NYISO and TO control center operators. The penalties could be applied to situations where there is a good faith on the part of a TO to work with an NYISO operator in order to effectuate an order that is subject to more than one legitimate interpretation. A situation could arise where it was not clear as to whether a NYISO instruction pertained to an "A-1" or an "A-2" facility. A TO operator would have to first discuss the instruction with the NYISO operator before taking any action.

C. The Strawman Penalizes the TOs For the NYISO's Failure To Perform its own Billing Functions

The Strawman seeks to penalize TOs for failures to maintain or timely provide billing and settlement information. To begin with, it is not clear what “timely provide” means. Does it mean provide information as soon as an NYISO employee asks for it? It is also unclear how often the penalty will be applied. If an NYISO employee separately asks for five different billing determinants for five different hours and the TO provides it in an “untimely” manner, will the TO be subject to a \$125,000 penalty (5 requests x 5 billing determinants x \$5000)?

Currently, the TOs provide the NYISO with free billing and metering help consistent with the terms of the Agreement, since the collection of the NYISO's real-time data is mainly through the SCADA systems of the TO control centers. As written, the Strawman would penalize the TOs for failing to perform the NYISO's billing function in a manner that the NYISO deems timely. There has been a collaborative on-going effort between the NYISO and all TOs to improve the timeliness and accuracy of the general billing and reconciliation process. This effort has made considerable progress. Imposition of penalties would create barriers to this collaborative progress in an area where close and open discussions have been very effective in producing clear and positive improvements.

III. Conclusion

Based on the foregoing, Con Edison and O&R respectfully request that the NYISO delete financial penalties (a), (c) and (d), or, in the alternative, reject the Strawman in its entirety.

Dated: New York
May 25, 2001

Respectfully submitted,
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