



David A. Paterson  
Governor

STATE OF NEW YORK  
EXECUTIVE DEPARTMENT  
CONSUMER PROTECTION BOARD

Mindy A. Bockstein  
Chairperson and Executive Director

April 22, 2009

SENT VIA ELECTRONIC FILING

Honorable 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 Motion to Intervene and Protest of the New York State Consumer Protection Board in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 474-5016.

Very truly yours,

Saul A. Rigberg  
Intervenor Attorney

Attachment  
SAR/jf



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

NEW YORK INDEPENDENT SYSTEM ) Docket No. ER09-945-000  
OPERATOR, INC. )

**MOTION TO INTERVENE AND PROTEST  
OF THE  
NEW YORK STATE CONSUMER PROTECTION BOARD**

Pursuant to Rules 211, 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.211, 385.212 and 385.214, and the Commission's Combined Notice of Filings #1, dated April 6, 2009, the New York State Consumer Protection Board ("NYSCPBoard") files this Motion to Intervene and Protest in response to the April 1, 2009 filing of the New York Independent System Operator ("NYISO"). The NYISO proposes to establish a mechanism for it to seek Commission approval to allocate costs of penalties incurred by the NYISO for violations of North American Electric Corporation ("NERC") Reliability Standards and other applicable regulatory requirements.<sup>1</sup>

Copies of all documents and correspondence should be sent to:

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<sup>1</sup> *New York Independent System Operator, Inc., Proposed Tariff Revisions for Recovery of Penalty Assessments, Docket No. ER09-945-000 ("NYISO Filing").*

## NYSCPБ MOTION TO INTERVENE AND PROTEST

### **MOTION TO INTERVENE AND STATEMENT OF INTEREST**

The NYSCPБ is an agency in the Executive Department of New York State government statutorily charged, in relevant part, with "... representing the interests of consumers of the state before federal, state and local administrative and regulatory agencies."<sup>2</sup> No other party in this proceeding is statutorily charged with the responsibility of advocating on behalf of New York State consumers. Further, pursuant to Executive Order No. 45<sup>3</sup>, the NYSCPБ is authorized to:

Act as an advocate before other state and federal entities by:

- (a) representing the interests of consumers in proceedings of federal, state and local administrative and regulatory agencies where the State Director deems the proceeding to affect the interest of consumers.

The NYSCPБ has also been designated by the NYISO as the "Statewide Consumer Advocate," representing the interests of the State's residential, small business and farm electricity users in the NYISO governance process. The Agency has fully participated in the NYISO's stakeholder process since the inception of the NYISO in the late 1990's and has made many filings with the Commission.

In contravention of FERC's preference regarding penalty recovery mechanisms designed to act as a deterrent, the NYISO's April 1, 2009, filing proposes to place the penalty burden of any failure to conform to reliability rules for which it may be responsible upon market participants, and ultimately retail ratepayers. This proposal, if approved by the Commission, would affect electricity prices in the NYISO-administrated markets and thereby affect the interest of consumers. Consumers

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<sup>2</sup> New York Executive Law § 553(2)(d).

<sup>3</sup> New York State Executive Order No. 45, issued November 13, 1996.

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represented by the NYSCPb, have a direct interest in ensuring that prices in the NYISO's markets are just and reasonable. Further, no party other than the NYSCPb is authorized by State law to represent the interests of New York consumers before federal regulatory agencies such as the Commission, or has been designated as the "Statewide Consumer Advocate" at the NYISO. For these reasons, the NYSCPb's intervention would serve the public interest in this proceeding.

The NYSCPb respectfully requests Intervener status in this proceeding and urges the Commission to reject the NYISO's filing or approve it with the modification discussed herein.

### **PROTEST**

#### **BACKGROUND**

On March 20, 2008, the Commission issued guidance to Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) concerning cost recovery for penalties that may be assessed against them pursuant to Section 215 of the Federal Power Act (FPA)<sup>4</sup> for noncompliance with mandatory and enforceable Reliability Standards.<sup>5</sup> In the Guidance Order, the Commission acknowledged that RTOs and ISOs, to the extent they operate as not-for-profit organizations funded by their customers, may have insufficient reserves to pay penalties. "Nonetheless," the Guidance Order continued, "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

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<sup>4</sup> 16 U.S.C. § 824o (Supp. V 2005).

<sup>5</sup> *Order Providing Guidance On Recovery Of Reliability Penalty Costs By Regional Transmission Organizations And Independent System Operators*, 122 FERC ¶ 61,247 (2008) ("Guidance Order").

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incentive for RTOs and ISOs and their employees to comply with applicable Reliability Standards."<sup>6</sup>

The Commission explained, however, that it has concerns about *automatically* passing on the costs of reliability-related monetary penalties assessed against an RTO or an ISO, when the organization itself is found to be at fault for the violation, to market participants and, ultimately, to end-use customers. "Penalties are designed to encourage compliance with the Reliability Standards. *If an RTO or ISO knows it could simply pass through the costs of those penalties, the incentive to comply with the Reliability Standards would be reduced.*"<sup>7</sup> The FERC 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,<sup>8</sup> which may include or be entirely non-monetary penalties.<sup>9</sup>

The Guidance Order offered several suggestions for aligning penalties with responsibility:

There are also mechanisms which the RTOs and ISOs may employ on a proactive basis to prevent the incurrence of penalties. For instance, RTO/ISO boards of directors and management may incorporate policies for planning and operation of the bulk power system in compliance with Reliability Standards as a significant part of the RTO/ISO staff and management performance evaluations and compensation programs, as part of an effective internal compliance program. *Bonuses and other incentives received by senior management could also be made contingent on penalty-free operations.* Such practices could substantially lessen the likelihood of employee and/or management behavior that results in violations. Another mechanism is the inclusion of indemnification provisions in

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<sup>6</sup> Guidance Order at P 1.

<sup>7</sup> *Id.* at P 25, 26. Emphasis added.

<sup>8</sup> NERC Sanction Guidelines, sec. 4.4.1. The Sanction Guidelines were approved, subject to a compliance filing, by the Commission in *North American Electric Reliability Corp.*, 121 FERC ¶ 61,033 (2007).

<sup>9</sup> *Id.* at P 26.

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membership or formation agreements of the RTOs and ISOs, obligating the members to cover the costs of any reliability penalties which may be assessed against the RTO or ISO. Such agreements could, through their negotiation in exchange for indemnification, include measures to ensure that adequate internal compliance incentives are put in place by the RTO or ISO.<sup>10</sup>

Significantly, in the next sentence following the quoted material, the Commission stated that while it "*favours the foregoing*, the Commission will, as with section 205 filings providing for direct assignment, entertain section 205 filings by the RTOs and ISOs requesting recovery of penalty costs by spreading those costs among their members and/or customers."<sup>11</sup> It explained, however, that "[b]ecause the enforcement scheme involving Reliability Standards is so new, and because no party has experience with the actual assessment of a penalty, any such filing must be addressed on a case-by-case basis."<sup>12</sup>

### DISCUSSION

The NYISO Filing addressed three (3) situations in which penalties would be assessed. "First, for reliability penalties the NYISO incurs due to the action or inaction of a Customer or a Market Participant, the NYISO may seek Commission approval to directly assign and bill those penalty costs to the offending entity after providing the entity with the appropriate notice and opportunity to participate in the underlying root cause proceeding."<sup>13</sup> Second, for penalties not incurred due to the behavior of an identified entity or that the NYISO "cannot otherwise directly assign to another entity, the NYISO may seek Commission approval to recover penalty costs from all Customers and Market Participants."<sup>14</sup> Third, for

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<sup>10</sup> Id.

<sup>11</sup> Id. Emphasis added.

<sup>12</sup> Id. Emphasis added.

<sup>13</sup> NYISO Filing at 2. Footnote omitted.

<sup>14</sup> Id.

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*penalties the NYISO incurs due to its own actions or inactions....*, the NYISO may seek Commission approval to recover penalty costs from all Customers and Market Participants."<sup>15</sup> The NYISO states that shared penalty costs will be allocated and billed 50% to energy injections and 50% to withdrawals.<sup>16</sup> It is this third situation to which the NYSCPb strongly objects.<sup>17</sup>

The Guidance Order states unequivocally that the purpose of an incentive mechanism is to affect behavior. This is a commonsense truism that is widely applied to all segments of human behavior. Accordingly, the first situation described by the NYISO, in which the Market Participant or Customer that violated the Reliability Rule pays the penalty, is not controversial. Similarly, the second situation, which calls for allocation of the penalty to all Customers and Market Participants when it cannot be readily determined which entity caused the violation, invokes principles of fair play and sharing of "common" costs among members of the community.

In the third situation, the NYISO is culpable but escapes any consequence. This result is contrary to normal expectations. The NYISO's Filing offers no justification for this approach other than noting it was offered as a second choice in the Guidance Order. The NYISO does not explain why it rejected the good governance approach suggested by the Commission. In lieu of imposing penalties on RTOs and ISOs, which are often not-for-profit corporations without cash reserves, the Guidance Order expresses preference for encouraging senior management to take

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<sup>15</sup> *Id.* Emphasis added.

<sup>16</sup> *Id.*

<sup>17</sup> The NYSCPb, admittedly, came late to this conclusion. It was not until we read the Guidance Order more carefully did we realize our error in not opposing this penalty recovery paradigm during the NYISO stakeholder process.

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the Reliability Rules seriously by including compliance with the Reliability Rules in their performance appraisals and incentive compensation plans.

The NYSCPb urges FERC to require that the NYISO file a penalty payment plan that more closely aligns causation and consequences. The NYISO's incentive compensation plans for senior management are sufficiently robust to accommodate this addition.<sup>18</sup> As the Guidance Order states, putting incentive compensation at risk "could substantially lessen the likelihood of employee and/or management behavior that results in violations."<sup>19</sup>

The NYSCPb also objects to this aspect of the NYISO Filing for two (2) other reasons. FERC is statutorily required to ensure that rates are just and reasonable. By definition, a process that increases rates by consciously assigning penalties incurred due to NYISO behavior is unjust and unreasonable. This method is especially without justification when the purpose of imposing penalties cannot be realized by shifting those penalty costs to the blameless consumers. Further, putting off just how, in a specific situation, the penalties would be allocated until FERC considers a NYISO § 205 filing describing that situation, leaves this matter unsettled and burdens parties with the need to vigilantly participate in every such filing.

### CONCLUSION

Failure should not be rewarded. NYISO management personnel that are responsible for a violation of the Reliability Rules should suffer a decrease in their incentive compensation. It is patently unfair to saddle others with the consequences of those failures. It also does not

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<sup>18</sup> Discussing specific details of these plans would unnecessarily intrude upon the privacy of these individuals.

<sup>19</sup> Id. at P 26.



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encourage compliance with the Reliability Rules and accountability in businesses. Assigning penalties, incurred by the NYISO due to its own actions or inactions, to market participants and customers will lead to unjust and unreasonable rates. The NYISO's Filing should be rejected or modified as discussed above.

Respectfully submitted,



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Dated: April 22, 2009  
Albany, New York