

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of
the New York Independent System Operator
for a Declaratory Ruling

DECLARATORY RULING
DEC #19-12

INTRODUCTION

The New York Independent System Operator (“the NYISO”) petitions, pursuant to §204 of the State Administrative Procedure Act and 6 NYCRR Part 619, for a declaratory ruling that the Department will not enforce against Generators violating NO_x RACT emission limits under 6 NYCRR §§ 227-2.4 and 227-2.5 or opacity requirements under 6 NYCRR § 227-1.3, when those violations occur as a result of supplying power to the New York State Power System (“NYS Power System”) in response to the NYISO’s instruction to go to maximum capability in an emergency on the NYS Power System.

STATEMENT OF FACTS

For purposes of this declaratory ruling only, the Department will assume that the facts alleged in the petition are true. The Department may take official notice of any fact not subject to reasonable dispute if it is either generally known or can be accurately and readily verified. 6 NYCRR §619.2(b). Hence, this declaratory ruling is based on the assumed facts provided by the NYISO and any other readily verifiable facts which are pertinent to this matter. The Department will engage in no fact finding for purposes of this declaratory ruling and the binding effect of the ruling is limited by the assumed fact predicate. See Power Authority v. N.Y. State Dept. of Environmental Conservation, 58 N.Y.2d 427, 434, 461 N.Y.S.2d 769, 772 (1983). The Department will not assume the truth of statements which are legal conclusions.

The NYISO is an independent and not-for-profit corporation organized under New York State law and created pursuant to the NYISO Agreement.¹ The NYISO’s purposes are stated in its certificate of incorporation as follows:

The corporation is formed for the purpose of acting as the independent system operator for the New York State Power System in order to: (1) maintain the safety and short-term reliability of the New York State Power System in conformance with Reliability Rules, promulgated by the North American Electric Reliability council, the Northeast Power Coordination [sic] Council, the New York State

¹ See Exhibit 2 to the Petition - NYISO Agreement.

Reliability Council and such regulatory agencies as may have appropriate jurisdiction, so as to maintain the integrity and reliability of the interconnected New York State Power System; (2) maintain the internal and external operation of the New York State Power System which may have an impact on the security of the interconnected New York State Power System in accordance with the Independent System Operator Agreement (“ISO Agreement”); (3) to comply with the Federal Energy Regulatory Commission’s ISO principles as stated in Order Nos. 888 et seq; (4) provide open access to the New York Transmission System; (5) provide non-discriminatory treatment for all market participants; and (6) provide meaningful involvement by parties to the ISO Agreement in the oversight of the New York State Transmission System in accordance with the provisions of the ISO Agreement.

Exhibit 1 to the Petition - Restated Certificate of Incorporation Of The New York Independent System Operator, Inc. at 3.

The NYISO does not generate electric power. It is an independently managed entity established in December 1999 which acts as the primary interface between the generators of electrical power (“the Generators”) the owners of transmission and distribution facilities (“Transmission Owners”) - the former vertically integrated electric utility companies, and other participants in New York’s wholesale electric marketplace. It does this by directing the operation of the NYS Power System² to supply electricity to customers while maintaining safety and reliability. In addition, the NYISO facilitates and administers a number of different electricity markets, thereby providing all market participants with the ability to sell and purchase various services on an unbundled basis. To this end, the NYISO administers centralized markets where buyers and sellers submit bids to purchase or offers to sell energy, or schedule bilateral transactions.

The execution of the NYISO Agreement and the founding of the NYISO were outgrowths of the process of deregulation and restructuring of the market for electrical power in New York State.³ Before December 1999, the responsibility for the management of the NYS Power System

² Some definitions should be recited for a more complete understanding of the facts. Pursuant to the NYISO agreement: “NYS Power System” means “[a]ll facilities of the NYS Transmission System, and all those Generators located within the NYCA [New York Control Area] or outside the NYCA, some of which may be from time-to-time subject to operational control by the ISO.” “NYS Transmission System” means “[t]he entire New York State electric transmission system, which includes: (1) the Transmission Facilities Under ISO Operational Control; (2) the Transmission Facilities Requiring ISO Notification; and (3) all remaining transmission facilities within the NYCA.”

Exhibit 2 to the Petition - ISO Agreement at 21.

³ The NYISO was created to provide a mechanism to ensure open access to the interstate electricity transmission system in compliance with the April 24, 1996 Order No. 888 of the Federal Energy Regulation Commission (“the FERC”). See Exhibit 5 to the Petition - Order 888. The FERC issued Order No. 888 pursuant to its authority under §§ 205 and 206 of the Federal Power Act, 16 U.S.C. §§824d and 824e, which require that the FERC must ensure, with respect to any transmission in interstate commerce or any sale of electric energy for resale in interstate commerce by a public utility, no person is

rested with the New York Power Pool (“the NYPP”) - an assemblage of the then and previously existing eight vertically integrated electric utility companies which collectively owned all electricity transmission facilities in New York State.⁴ The NYISO replaced the NYPP in assuming operational control over all electricity transmission facilities in the State but, unlike the NYPP, the NYISO has no ownership interest in those facilities. Most saliently, the NYISO differs from the NYPP in that it has no ownership or operational control over the electricity generation assets in the State. For the most part, the former electric utility companies have divested themselves of their generation assets and now act primarily as transmission and distribution network owners. The electricity generation assets are now divided among scores of separate Generators.

While the NYISO remains obligated to maintain electric service reliability pursuant to the NYISO Agreement,⁵ it lacks the practical authority to command that adequate electricity be

subject to any undue prejudice or disadvantage. Order 888 at 98-100. The FERC determined that a successful transition to competitive wholesale electricity markets could not be achieved without the existence of non-discriminatory open access transmission services (including access to transmission information). Id. at 51. In considering likely mechanisms to achieve the goals of Order No. 888, the FERC wrote:

We believe that ISOs have the potential to provide significant benefits ... and will further our goal of achieving a workably competitive market.... [W]e see many benefits in ISOs, and encourage utilities to consider ISOs as a tool to meet the demands of the competitive marketplace.

Id. at 59-60. An ISO is a public utility subject to FERC jurisdiction and the ISO’s operating standards and procedures must be approved by the FERC. Id. at 279-80. In an effort to give industry guidance on how to proceed with ISO formation, the FERC provided a list of “ISO Principles” that the FERC would use in assessing ISO proposals that might be submitted to the FERC in the future. See id. at 279-286.

On May 20, 1996 the New York State Public Service Commission (“the PSC”) issued Opinion No. 96-12 - Opinion and Order Regarding Competitive Opportunities For Electric Service, Case 94-E-0952 et al., in which it expressed its support for the establishment of an ISO to provide open access to the electricity transmission system while coordinating the daily operation, and ensuring the reliability, of the NYS Power System. Exhibit 9 to the Petition - Opinion No. 96-12.

⁴ During 1997, the NYPP member systems filed their proposal to establish the NYISO with the FERC. The FERC conditionally approved the establishment of the NYISO by its order issued on June 30, 1998. Exhibit 13 to the Petition - 83 FERC 61,352.

⁵ In its Opinion No. 96-12 at 28 (Exhibit 9 to the Petition), the PSC enunciated its goal with regard to continuing reliability of electric service. The PSC wrote:

In order to protect all consumers, any new system involving competition in the generation sector must have reliability of the bulk power system as a top priority, including an independent system operator (ISO) that must have the authority and means to continue to provide this reliability.

Among the principles expressed in FERC Order 888 (Exhibit 5 to the Petition) is one expressing that:

An ISO should have the primary responsibility in ensuring short-term reliability of grid operations. Its role in this responsibility should be well-defined and comply with applicable standards set by [the North

supplied by the Generators to the NYS Power System. Prior to electricity market restructuring, the NYPP member systems were responsible for generating, transmitting, and delivering electricity to almost all consumers in New York State. These utilities were subject to the broad oversight of the FERC, and had a “duty to serve” all customers pursuant to Public Service Law (“PSL”) §65. Today, however, the former NYPP member systems have divested themselves of the great majority of their generation assets and have become the present Transmission Owners. The Transmission Owners are still subject to the duty to serve but own virtually no generating capacity to support it.⁶ The Generators now have the electricity generation capacity, but the duty to serve has not been formally extended to cover them because they operate in a competitive, open market where it is intended that they be essentially free to offer, or not to offer, power as their own interests dictate.

The ability to maintain electric service reliability is inextricably tied to the ability to ensure that a sufficient amount of electricity may be supplied when and where necessary.⁷ The NYISO’s methods of ensuring the reliability of the NYS Power System are recorded in the various agreements establishing the duties and responsibilities of the NYISO - the NYISO Agreement, the NYISO/Transmission Owner Agreement⁸, the New York State Reliability Council Agreement⁹, and the NYISO/New York State Reliability Council Agreement¹⁰. These agreements expressly provide that the NYISO shall maintain the security and adequacy of the NYS Power System. The NYISO must also comply with reliability standards developed by the North American Electric Reliability Council (“NERC”) and by the Northeast Power Coordinating Council (“NPCC”).¹¹

American Electric Reliability Council] and the regional reliability council.

Id. at 282.

⁶ In its Opinion No. 96-12 at 99 (Exhibit 9 to the Petition), the PSC expressed that the duty to serve customers remains only with the Transmission Owners and not with the Generators. The PSC wrote:

Obligation to Serve/Customer Protections - The development of a robust market for energy services is encouraged. However, in order to protect all customers, transmission and distribution companies will need to remain obligated to serve all customers, at least in the short term. ... The relationship of the energy service function to the [transmission and distribution] company should be addressed in individual utility filings.

⁷ The NYISO defines “reliability” as “the ability of an electrical network to supply sufficient power at any given time to meet consumer demand within the constraints imposed on the bulk power transmission system and within applicable reliability criteria.” Petition at 6-7.

⁸ Exhibit 14 to the Petition.

⁹ Exhibit 15 to the Petition.

¹⁰ Exhibit 4 to the Petition.

¹¹ The NERC and NPCC are two voluntary organizations developed to create and promote reliability standards within the electric industry. The reliability rules adopted by the New York State Reliability Council generally complement the NERC and NPCC standards, although in some cases they are even more stringent.

The NYISO also has the obligation to support interconnected neighboring bulk power systems, which are synchronously interconnected to the NYS Power System, to maintain reliability of the electric network of eastern North America. Mutual support is key to reliability, and the NYISO can count on other interconnected systems to supply power when the NYS Power System experiences emergency conditions. This also implies, however, that the NYISO will attempt to provide power to neighboring systems if requested to do so when those neighboring systems experience emergency conditions.

Day-to-day planning of the electric supply in New York starts with the NYISO's Day Ahead Market where capacity, energy, and ancillary services are scheduled, bought and sold for the following day. Reliability is ensured because the scheduled capacity in the Day Ahead Market always provides for an operating reserve, which is sufficient to respond to credible contingencies.¹² Securing an operating reserve is mandated by NERC and gives the NYISO flexibility to address unforeseen events.

When the operating reserve cannot be obtained in an amount sufficient to meet NERC requirements, the NYISO implements its Emergency Procedures.¹³ These procedures involve a cascade of measures that are aimed at increasing the amount of power available in an effort to forestall the collapse of the NYS Power System. In the Petition at 10-11, the NYISO writes that the procedures are carried out in the following order:

1. Curtail all interruptible (i.e., non-firm) sales of electricity to entities outside New York State;
2. Issue maximum generator alerts when there is insufficient reserve capacity (i) a day ahead, (ii) in day using a three-hour look ahead and (iii) in day for the next hour;
3. Issue NERC emergency alerts when there is insufficient reserve capacity (i) a day ahead (Level 1), (ii) in day using a three-hour look ahead (Level 2) and (iii) in day for the next hour (Level 3);
4. Follow NPCC Notification requirements C-19¹⁴ when there is insufficient reserve capacity (i) a day ahead , (ii) in day using a three-hour look ahead and (iii) in day for the next hour;

¹² "Operating Reserves" means "Generating Capacity that is available to supply Energy, or Interruptible Load Resources that are available to Curtail Energy usage, in the event of contingency conditions which meet the requirements of the ISO. Operating Reserves include spinning reserves, ten-minute non-synchronized reserves, and thirty-minute reserves." Exhibit 2 to the Petition - ISO Agreement at 22.

¹³ See generally Exhibit 16 to the Petition - NYISO Technical Bulletin XX-X, Operating During System Emergencies and Compliance with Air Emissions Regulations (May 23, 2000).

¹⁴ See generally Exhibit 16 to the Petition - Northeast Power Coordinating Council Document C-19, Procedures During Shortages of Operating Reserve (January 18, 2000).

5. Notify regulators when there is insufficient reserve capacity (i) a day ahead , (ii) in day using a three-hour look ahead and (iii) in day for the next hour;
6. Notify the DEC, Division of Air Resources, when there is insufficient reserve capacity (i) a day ahead, (ii) in day using a three-hour look ahead and (iii) in day for the next hour;
7. Issue a Supplemental Resource Evaluation whereby NYISO solicits additional bids from Generators to compensate for the shortage in the reserve deficiency;
8. Direct all market participants to curtail non-essential company loads;
9. Issue manual voltage reduction for the next day;
10. Direct all market participants to curtail interruptible customer load in accordance with contractual agreements;
11. Direct the market participants to contact large industrial and commercial customers to request voluntary curtailment;
12. Direct market participants to make general radio and TV appeals to the public to request voluntary curtailment of electric power usage;
13. Curtail special use customers;
14. Purchase emergency capability and energy from the neighboring control areas in sufficient quantity to eliminate deficiency;
15. Count load relief that can be implemented within 10 minutes as reserve (automatic voltage reduction);
16. Direct Generators to go to maximum capability; and
17. Direct load shedding steps.

The last of these measures involves “load shedding.” Load shedding (sometimes called “rolling blackouts”) is the ultimate emergency step implemented by electric network administrators, such as the NYISO, and involves disconnecting consumers from the power grid on a pre-determined geographic basis and for a fixed period of time. The network administrator then “rotates” the disconnection to other geographic areas. This essentially allows an electrical network to reestablish a balance between demand and supply. If demand exceeds supply before load is shed, the physical properties of electricity may cause the entire interconnected electrical system to collapse, thereby creating a widespread blackout similar to the one that occurred in 1965.

The NYISO's directive to go to maximum capability is the last emergency instruction before load shedding. The NYISO's maximum capability directive is issued only after the NYISO has stopped selling electricity out of state and to industrial consumers who have agreed in advance by contract, or on that day as a result of a public request, to curtail electric use; after public appeals to voluntarily curtail electric use; and after available electricity has been purchased from neighboring control areas outside New York State. The NYISO claims that the possibility that it would ever issue the maximum capability directive "is remote because, in most circumstances, the previous emergency instructions should secure sufficient power to compensate for any deficiency." Petition at 12.

DISCUSSION

The relief requested by the NYISO is for the Department to declare in advance that it will not enforce against any Generators for violating their NO_x RACT emission limits under 6 NYCRR §§227-2.4 and 227-2.5 and opacity requirements under 6 NYCRR 227-1.3 when those violations occur as a result of supplying electricity to the NYS Power System in response to an instruction from the NYISO to go to maximum capability in an emergency on the NYS Power System.

In essence, the Petition requests that the Department analyze how applicable law and policy weigh the competing public interests in maintaining a reliable supply of electricity and preserving and enhancing air quality.

In undertaking this analysis, the Department notes there are few public health and safety concerns that are more significant than the provision of an uninterrupted supply of electricity. Electricity is indispensable to today's society and is an integral part of the daily life of New Yorkers. Hospitals and health care emergency facilities depend on electric power to provide their services. The flow of traffic in urban areas also is supported by electric power. Most importantly, electric power ensures the health and safety of the public by providing air conditioning during summer periods of great heat and humidity, and by providing heat in periods of extreme cold.

New York State law formally recognizes the paramount importance of a safe and reliable electricity supply. Energy Law §3-101 provides as follows:

It shall be the energy policy of this state:

1. to obtain and maintain an adequate and continuous supply of safe, dependable and economical energy for the people of the state

Similarly, PSL §30 provides, in pertinent part, as follows:

It is hereby declared to be the policy of this state that the continued provision of gas, electric and steam service to residential customers without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest.

The need for ensuring an adequate supply of electricity for the NYS Power System is particularly acute at present. Demand for electrical power continues to increase while available generation assets that can supply the NYS Power System remains stagnant.¹⁵ In an editorial entitled “New York Needs More Power” published in the June 29, 2000 edition of the *New York Daily News*, Maureen O. Helmer, Chairman of the New York Public Service Commission, in the context of discussing the need for new power plants in the State, emphasized how the present strain on the NYS Power System to supply adequate and reliable power may affect the public health and safety.¹⁶ This tight electricity supply situation in New York State was also recently recognized by the NERC.¹⁷ At the federal level, U.S. Secretary of Energy Bill Richardson emphasized these same concerns which exist in many areas of the nation.¹⁸

¹⁵ See May 17, 2000 NYISO press release, “New York State’s Summer Power Forecast Issued,” <http://www.nyiso.com/topics/articles/index.html>, in which William Museler, NYISO’s President and CEO, stated “The peak demand is growing with New York’s robust economy, while the building of new generation has remained stagnant.”

¹⁶ Chairman Helmer stated, in pertinent part, as follows:

If our existing plants and transmission lines work as designed, we have an adequate supply for this summer. But if two or more plants break down on a hot day, we may not have the reserve generation to provide power in parts of the state.

Make no mistake, this situation threatens the reliability of our system as well as electric prices.

Without prejudging any future proposals, the fact is that power plants are an integral part of our life. We have a choice. Do we ignore increasing demand and stake our future on our older, less efficient plants? Or do we act to site the cleaner, more efficient plants that eventually must displace them?

To those who suggest we don’t need more power, I ask this: Are you willing to live with the consequences of a less reliable electric system and the prospect of more frequent outages?

Failure to make the difficult decisions and take action will cost New Yorkers money, undermine our economy and jeopardize the reliability of a system that is absolutely vital to our health and well-being.

¹⁷ See May 23, 2000 press release, “Generation and Transmission Resources Expected to be Adequate in Most Areas This Summer,” <http://www.nerc.com/pressrelease/>, in which NERC wrote, in pertinent part, as follows:

[E]ven though generating capacity margins appear adequate, higher than projected demand due to hot weather or unexpected generating unit or transmission outages may put a strain on electric supplies.

Areas of concern for this summer are New England, New York

Electricity suppliers in New England and New York say they may not be able to meet their capacity reserve obligations during peak demand. Although some new generation was added in New England since last summer, key transmission outages in the Northeast may limit imports into the area at peak demand conditions. New England and New York are prepared for the summer and have emergency procedures in place to deal with capacity shortages.

¹⁸ Secretary Richardson stated, during a June 19, 2000 speech at the Virginia Reliability Summit:

The State's overall policy in regard to air pollution prevention and control is articulated at ECL §19-0103, which provides, in pertinent part, as follows:

It is declared to be the policy of the state of New York to maintain a reasonable degree of purity of the air resources of the state, which shall be consistent with the public health and welfare and the public enjoyment thereof, the industrial development of the state, the propagation of flora and fauna, and the protection of physical property and other resources, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution in the state of New York. [Emphasis added.]

Of course, in virtually every case, the Department's enforcement of air pollution control requirements constitutes an act in furtherance of the public health and welfare. The present Petition, however, describes a unique scenario in which anticipated Department enforcement of such requirements could, on balance, be detrimental to the public health and welfare.

The NYISO's direct control over the NYS Power System is primarily limited to the matter of distribution of electricity. The NYISO can be reasonably assured that, due to the legal duty to serve incumbent on the Transmission Owners and implementation of the terms of the ISO Agreement and the NYISO/Transmission Owner Agreement, the Transmission Owners will dispatch all available electricity in accordance with its directives.

The NYISO has no correspondingly safe assurance that the supply of electricity that it would need to distribute would be forthcoming in the remote eventuality that actual electricity demand was about to outstrip supply. Since electricity cannot be stored, the operating reserve of electricity that is maintained by the NYISO for the NYS Power System is essentially composed of contractual arrangements by which supplies are promised by the Generators. If a combination of certain unforeseen events occur to the NYS Power System, the actual amount of electricity that can be supplied may be less than the planned reserve. If the NYISO finds that it must get to Step 16 in the above list of emergency measures, it needs to exercise its last opportunity to seek additional power by requesting the Generators to go to maximum capability. At this point, the reliability of the NYS Power System could be seriously compromised and the System may be subject to

Nothing less than the reliability of our electric grid is at stake. Summer has already fired its first salvo, and it has gotten our attention. Without electricity, business and industry grinds to a halt.

....

For the sick, or the elderly, reliable electricity can be a matter of life and death. We have a booming 21st century economy running on a power system that's lost in the past. With summer bearing down, we have to assure the public that we will do everything we can to make sure their lights will stay on, and that their air conditioners will keep cool, when temperatures break 90.

See <http://www.doe.gov/news/newsss.htm>.

imminent collapse.

The NYISO explains that it will give the instruction to go to maximum capability only when there is an actual energy shortage within the hour. This leaves Generators very little time to respond to increase their supply to the interconnected grid. As the NYISO reasonably argues, in the face of the possibility of the imposition of stringent penalties for violating applicable NO_x RACT emission limits and opacity requirements, Generators that might otherwise marginally increase their power supply to the NYS Power System while even remaining in compliance with these requirements may refuse to do so as a precaution. By obtaining the relief requested in its Petition, the NYISO believes that if this emergency situation arises, it is more likely that the Generators will follow the NYISO's instructions to go to maximum capability without fear that the Department will enforce against those generators which temporarily exceed their NO_x RACT emission limits and opacity requirements in responding to the emergency.

There are a number of provisions which recognize that the regulatory response to air pollution control violations should be flexible in emergency situations. With the exception of one provision (discussed in the next paragraph), these provisions involve some kind of malfunction or emergency arising from the operations of the regulated entity. In the facts presented in the Petition, the emergency does not spring from the particular operations of the Generators who would potentially violate their NO_x RACT emission limits and opacity requirements. Rather, the emergency arises from the imminent collapse of the NYS Power System of which they all are important components.

Under Clean Air Act ("CAA") §110(f), 42 U.S.C. §7410(f), the owner or operator of a fuel burning stationary source may put in motion a process by which the Governor of the state in which the source resides petitions the President to determine whether a national or regional energy emergency exists of such a severity that (a) a temporary suspension of any part to the applicable state implementation plan ("SIP") may be necessary, and (b) other means of responding to the energy emergency may be inadequate. If the President determines that such an energy emergency exists, the Governor may adopt a temporary emergency suspension of the relevant SIP provisions. The suspension shall be issued to a source only if the Governor finds that (a) there exists in the vicinity of the sources an emergency involving high unemployment or loss of necessary energy supplies for residential dwellings, and (b) such unemployment or loss can be totally or partially alleviated by such emergency suspension. Any such suspension may last no more than four months.

CAA §110(f) addresses a situation far less dire than the possibility posed in the Petition. It was meant to address situations where energy feedstocks (coal, oil, natural gas, etc.) were in short supply.¹⁹ While the statute addresses an emergency situation deemed by Congress to warrant

¹⁹ See, e.g., *Florida Power & Light v. Costle*, 650 F.2d 579 (petition based on decrease in availability of low sulfur fuel); June 19, 1979 EPA memorandum from David G. Hawkins and Marvin B. During, "Supplemental Guidance Regarding Implementation of Section 110(f) of the Clean Air Act," (requires provision of details of fuel shortage); January 10, 1980 EPA memorandum from Jeffrey G. Miller and David G. Hawkins, "Alternative Procedure for Section 110(f) Relief in Localized, Short Term Energy Emergencies," (limits use of expedited procedures to situation of localized problem due to unavailability of

suspension of SIP provisions, it requires a multistep federal/state procedure which includes the requirement of public notice and opportunity for public hearing. The circumstances that CAA §110(f) contemplates are ones that can be dealt with in a relatively leisurely way. The Petition presents a scenario where fuel feedstocks are not an issue; rather, the physical capability of the NYS Power System to cope with demand is severely impaired. This situation demands action to be taken within one hour. Despite the inapplicability to the situation posed by the Petition, CAA §110(f) demonstrates the overarching Congressional intent that flexibility should be accorded to State authorities in responding to emergencies relating to power supplies.

Congressional concern that a reliable supply of electricity not be needlessly imperilled by air pollution control requirements on power plants is evident in CAA §403(d)(2), 42 U.S.C. §7651b(d)(2), wherein the U.S. Environmental Protection Agency (“EPA”) is directed to make sure that regulations establishing the sulfur dioxide allowance tracking system will not interfere with electric reliability.²⁰

The CAA provides for flexibility in responding to violations of air pollution control requirements that may result from events entirely beyond the control of the violator. CAA §120(a)(2)(B)(iv), 42 U.S.C. §7420(a)(2)(B)(iv), provides that the owner or operator of any source shall be exempted from the duty to pay a noncompliance penalty if the owner or operator shows that the failure to comply was due solely to an inability to comply with the relevant requirement “which inability results from reasons entirely beyond the control of the owner or operator of such source....”

The Department recognizes, under 6 NYCRR §§ 201-1.5 and 201-6.6(c), an affirmative defense against enforcement of air pollution control requirements due to violations caused by an emergency.²¹ Among other things, these provisions require the source to provide a detailed notice to the Department within two working days of the occurrence of the emergency. The notice must

conforming fuel).

²⁰ CAA §403(d)(2) provides, in pertinent part, as follows:

In order to insure electric reliability, such regulations shall not prohibit or affect temporary increases and decreases in emissions within utility systems, power pools, or utilities entering into allowance pool agreements, that result from their operations, including emergencies and central dispatch, and such temporary emissions increases and decreases shall not require transfer of allowances among units nor shall it require recordation.

²¹ “Emergency” is defined at 6 NYCRR §201-2.1(b)(12) as follows:

Any situation arising from sudden and reasonably unforeseeable events beyond the control of the owner and/or operator of a facility, including acts of God, which situation requires immediate corrective action to restore normal operation and which causes the emission source to exceed a technology-based requirement under the permit or State-established emission limitations, due to unavoidable increased in emissions attributable to the situation. An emergency shall not include situations caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.

contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

The Department determines that, should the NYISO need to issue an instruction to go to maximum capability, an “emergency” within the meaning of 6 NYCRR §201-2.1(12) exists for any Generator which complies with that instruction. As such, any violations of NO_x RACT emission limits imposed pursuant to 6 NYCRR §§227-2.4 and 227-2.5 and opacity requirements imposed pursuant to 6 NYCRR §227-1.3 committed by the subject Generators qualify for the affirmative defense for emergencies under 6 NYCRR §§ 201-1.5, and 201-6.6(c).

This defense is only available where the “maximum capability” requested by the NYISO is limited to generation of the highest level of electrical power achievable by the subject Generators with the continued use of properly maintained and operating pollution control equipment required by all applicable air pollution control requirements.

Due to the fact that NO_x RACT emission limits are based on rolling thirty day averages outside the May 1 through September 30 ozone season and any increased emissions during the non-ozone season period should be sufficiently accommodated by the averaging period, this Declaratory Ruling applies only to violations of NO_x RACT emission limits that occur during the ozone season as the result of the issuance of a NYISO maximum capability instruction. This Declaratory Ruling applies to violations of opacity requirements that occur at any time during the year as the result of a NYISO maximum capability instruction.

Within 30 calendar days following the issuance of an instruction by the NYISO to any Generator to go to maximum capability, the NYISO must submit to the Department a report, along with all supporting materials, which details the following:

1. a description of the emergency which instigated the instruction to go to maximum capability, including, without limitation, (a) the cause of the emergency, (b) the location of the emergency, (c) the reason(s) why the emergency was unavoidable, (d) the exact times (to the minute) that the emergency began and ended;
2. the identity of the units of the Generators which were subject to the instruction; and
3. the actions taken by the NYISO in responding to the emergency;

The report must be signed by the President of the NYISO.

The Department is not requiring any additional reporting by the Generators who may wish to be covered by this Declaratory Ruling. The Department notes that any violations of a Generator’s NO_x RACT emission limits must be reported in the normal course of regulatory compliance pursuant to 6 NYCRR §227-2.6(b). Likewise, any violations of opacity requirements must be reported by a Generator pursuant to 6 NYCRR §227-1.4(b). In the interests of convenience and efficiency, the Department recommends that any Generator which seeks to avail itself of the affirmative defense recognized by this Declaratory Ruling should note in reporting its

emissions data that portion of the data attributable to emissions made during the time the relevant units were subject to a NYISO instruction to go to maximum capability.

CONCLUSION

The Department determines that, under the scenario described in this Declaratory Ruling wherein the NYISO issued an instruction to a Generator to go to maximum capability, any violations of NO_x RACT emission limits imposed under 6 NYCRR §§227-2.4 and 2.5 or opacity requirements imposed under 6 NYCRR §227-1.3 will be subject to the affirmative defense for emergency conditions under 6 NYCRR §§201-1.5 and 201-6.6(c). This determination is limited to circumstances where the maximum capability requested by the NYISO would involve the generation of the highest level of electrical power achievable by the subject Generators with the continued use of properly maintained and operating pollution control equipment required by all applicable air pollution control requirements.

Dated: July 7, 2000.

Albany, New York

Frank V. Bifera

Frank V. Bifera
General Counsel