

137 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Green Mountain Energy Company

Docket No. ER12-307-000

ORDER GRANTING REQUEST FOR RELIEF FROM PENALTY

(Issued December 28, 2011)

1. On November 1, 2011, Green Mountain Energy Company (Green Mountain) filed a request for waiver of section 23.4.5.4 of the New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Area Services Tariff (Market Services Tariff) Attachment H and the penalty provisions contained therein associated with the withholding of capacity. For the reasons discussed below, we will grant Green Mountain's request for relief from the penalty assessed by NYISO associated with the withholding of capacity.

Green Mountain's Request for Waiver

2. Green Mountain states that in May and June of 2011, it inadvertently withheld a small amount of capacity (a total of less than 20 MW) from the NYISO New York City (NYC) Installed Capacity (ICAP) spot market auctions in May and June of 2011. It states that, as a result, NYISO imposed a penalty of \$387,456 pursuant to the filed penalty provisions of section 23.4.5.4.2 of the Market Services Tariff. Green Mountain asserts that the error was inadvertent and the result of a "perfect storm" of events, including personnel changes, failures to communicate, and a new "must offer" requirement.

3. Green Mountain contends neither Green Mountain nor its parent company, NRG Energy Inc. (NRG), profited from the mistake. Green Mountain asserts it acted in good faith and it took steps to notify the appropriate entities after discovering its mistake. Green Mountain states that its request is limited in scope because of the small amount of capacity withheld in the May and June 2011 ICAP spot market auctions. Moreover, Green Mountain states it immediately fixed the problem going-forward and instituted new controls to ensure that the type of error does not happen again. In addition, Green Mountain maintains that the request addresses a concrete problem that is focused

on a specific bidding requirement, which it intends should not establish a precedent with respect to future transactions.

4. Finally, Green Mountain asserts its request for waiver is appropriate because NYISO's rules governing the imposition of penalties are in flux.¹ Green Mountain asserts that, at the time of the May and June 2011 ICAP spot market auctions, the Market Services Tariff provided a bandwidth under which no penalty would be assessed and that Green Mountain was within that bandwidth.² Green Mountain contends that, although NYISO subsequently proposed revised tariff sheets that would eliminate the bandwidth, the Commission should take notice of the tariff sheets in effect at the time of Green Mountain's failure to offer capacity.

5. Accordingly, Green Mountain requests a limited, one-time waiver of section 23.4.5.4.2, so as to be relieved of the obligation to pay the penalty.

Interventions and Comments

6. Notice of the November 1, 2011 waiver request was published in the *Federal Register*, 76 Fed. Reg. 69,716 (2011) with interventions and protests due on or before November 22, 2011.

7. On November 18, 2011, NYISO filed a timely motion to intervene and comments on the request. NYISO states that Green Mountain's failure to offer capacity in the May and June 2011 ICAP spot market auctions (11.6 MW in the May auction and 9.7 MW in the June auction) resulted in the May auction clearing \$0.12/kW-M higher and the June auction clearing \$0.10/kW-M higher than they would have cleared had Green Mountain's capacity been offered in the respective months. NYISO asserts that, although Green Mountain's failure to offer its capacity had a *de minimus* market impact, section 23.4.5.4.2 of the Services Tariff does not afford NYISO the discretion to consider any extenuating circumstances surrounding the failure of Green Mountain to offer this capacity and requires NYISO to assess the penalty in the manner described.³ Therefore,

¹ Since we are granting the requested relief, the Commission need not address this issue.

² Green Mountain states that on October 30, 2008, in Docket No. EL07-39-005, NYISO filed tariff provisions that instituted a minimum percentage impact and \$/kilowatt-month threshold for either a failure to offer mitigated unforced capacity (UCAP) or the sale of external UCAP. Green Mountain states that the Commission accepted these tariff sheets to be effective November 1, 2008. *See New York Independent System Operator, Inc.*, 131 FERC ¶ 61,170 (2010) (May 20, 2010 Order).

³ NYISO November 18, 2011 Comments at 2.

NYISO states it assessed a total penalty in the amount of \$387,456 against Green Mountain on September 2, 2011. However, NYISO agrees that the mistake was inadvertent and that the parties have instituted controls to prevent a future occurrence. Further, NYISO maintains that the mistake was not intended to manipulate the NYISO market for the financial benefit of Green Mountain, its affiliates, or the NRG family of companies. In addition, NYISO maintains that after consulting with its independent market monitoring unit, it accepts that the error was not an intentional attempt to withhold capacity. Accordingly, NYISO states that it does not oppose the relief requested in Green Mountain's request for waiver.

Commission Determination

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motion to intervene serves to make NYISO a party to this proceeding.

9. The Commission will grant Green Mountain Energy's request for relief from the penalty assessed by NYISO associated with the withholding of capacity.⁴ Green Mountain explains that the error was inadvertent and a good faith mistake. We concur, finding that numerous factors contributed to the company's inadvertent attainment of a long capacity position, and note the loss of key strategic personnel, the recent acquisition by NRG, and the complexity of new rules applying to Green Mountain.

10. Green Mountain also explains that its request is limited because it seeks a limited, one-time waiver of the penalty provision in section 23.4.5.4.2 of Attachment H of the Services Tariff and it has taken steps to prevent this from occurring again. Green Mountain has worked with NRG and NRG Power Marketing to develop and install controls limiting Green Mountain's purchase of physical capacity. Green Mountain has put into place additional checks on its physical position and has made changes to risk policies and procedures related to its NYISO capacity positions. We find that Green Mountain and its affiliates have trained trading personnel on the need to maintain a physical short position, on the necessity of compliance with NYISO's "must-offer" obligation, and, in conjunction with NYISO, completed a process of "decertifying" future sales that would have put Green Mountain in a similar position for July 2011. Moreover, Green Mountain contends its request addresses a concrete problem in that it is focused on a specific bidding requirement and it does not intend to establish a precedent.

11. Accordingly, we accept that Green Mountain made the underlying error in good faith, that the request is of limited scope, and that a concrete problem needs to be

⁴ *Cf. supra* note 1 (noting that since we are granting the requested relief, we need not address Green Mountain's alternative claim).

remedied. Coupled with NYISO's support and the lack of opposition, we grant the requested relief from the penalty assessed by NYISO associated with the withholding of capacity.

The Commission orders:

The relief from the penalty assessed by NYISO associated with the withholding of capacity is hereby granted, as requested.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.